November 20, 2014

VIA FACSIMILE 201-795-6886
Hudson County Superior Court
595 Newark Avenue
Jersey City, N.J. 07306
Attn: Hon. Parick J. Arre, J.S.C.

Re: Dashi Slatina v. D. Construction Corp., *et al*
Docket No.: HUD-L-1182-08
Our File No.: 10-09

Plaintiff's Reply Brief in support of Cross-Motion for Partial Summary Judgment on the Issue of Breach

Motion Returnable: November 21, 2014

Dear Judge Arre:

In 1616 the Catholic Church ordered Galileo Galilei:

> to abandon completely... the opinion that the sun stands still at the center of the world and the earth moves, and henceforth not to hold, teach, or defend it in any way whatever, either orally or in writing.

— The Inquisition's injunction against Galileo, 1616.

That pretty much sums up LeFrak Organization's reality denying presentation to this Court.

LeFrak Organization's response to the cross motion is strikingly underwhelming. It consists entirely of rambling mis-summaries of case law and then jumps to conclusory statements far removed from reality. Its presentation is devoid of any real factual analysis. In fact, not only does defendant not provide any facts nor any real factual discussion whatsoever, but LeFrak Organization admits Plaintiff's statement of material facts in support of the cross-motion for partial summary judgment, having provided no response to it. *R.* 4:46-2(b).

In its brief LeFrak Organization makes numerous "pot calling the kettle black" assertions which simply have no connection to reality. For example, LeFrak Organization makes the baffling assertion that plaintiff has not provided proper citations in its Response to Defendant's Statement of Material Facts and therefore defendant's facts should be deemed admitted. (Db1) A plain reading of that Response shows that assertion has no connection to reality. Plaintiff provided a detailed response admitting or denying those assertions with numerous pin cites to the record. (Pb20-28) The reality is that it is defendant that has not, and can not, dispute the clearly set forth facts contained in Plaintiff's Cross-Motion.

Interestingly enough, this kind of "just ignore it" tactic to avoid summary judgment mirrors LeFrak Organization's baffling attitude toward its unmistakable responsibility to follow basic work safety rules under state and federal law and industry standards. That is, LeFrak Organization is not a husband and wife abandoned by their professional general contractor midway through and had to assume that role in building their dream home. LeFrak Organization is a multi-billion dollar commercial developer. Both its project manager (*Exhibit R at 45, 48-50, 53-56*) and its own expert (*Exhibit J at 5-11*) admit it has the responsibility to manage safety on its projects for the protection of workers and the public. But for whatever reason, cost savings or otherwise, it admits its just ignored it:

> Q. To your knowledge, did the LeFrak Organization do anything to manage safety with respect to its subcontractors on the North Tower project?
> A. No.

(*Exhibit K, Deposition of David Jenkins at 38-40*) (underline added) This baffling way of doing business endangers not only workers, but anyone else who comes near the project. Here the unbraced wall collapsed on the workers. Had the wall collapsed in another section closer to the open side of the building, cinder blocks just as easily could have fallen 8 stories onto pedestrians.

It is axiomatic that when a motion for summary judgment is made and adequately supported with briefs, affidavits, pleadings, depositions, answers to interrogatories and/or admissions on file, an adverse party can no more rest upon outdated law from the 1960s than it can on upon its own factual admissions and unsupported conclusions. If the adverse party does not respond with competent, relevant evidence properly presented, then summary judgment shall be entered against it. *R.* 4:46-5(a); *Brae Asset Fund*, 327 N.J. Super. 129. LeFrak Organization's unsupported concusions are not sufficient to overcome summary judgment. *Rule* 4:46-5(a) (party against whom summary judgment motion is made may not rest upon the mere denials, but his response by affidavits or otherwise "must set forth specific facts showing that there is a genuine issue for trial." *Brae Asset Fund, L.P. v. Newman*, 327 N.J. Super. 129 (App. Div. 1999) (bare conclusions in answering papers are insufficient to defeat a meritorious application for summary judgment).

LeFrak Organization's unsupported conclusions are without merit and much be disregarded.

Furthermore, LeFrak Organization's inability to contest plaintiff's strongly supported facts is important. Plaintiff's cross motion should be granted because, "[a] non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute," but rather must come forward with evidence that creates a genuine issue as to a "material fact." *Sagendorf v. Selective Ins.*, 293 N.J.Super. 81, 94 (App. Div. 1996) (*citing Brill*, 142 N.J. at 523 (1995)). As LeFrak Organization has not and can no so respond, plaintiff's cross motion for partial summary judgment should be granted.

LeFrak Organization continues to misstate plain New Jersey law when it wrongly asserts that a general contractor is not liable for injuries to employees of subcontractors unless it interferes in the manner and means of the work. That was the old *Wolzak* rule which has not been the law in New Jersey since at least 1975. *Meder v. Resorts International*, 240 N.J.Super. at 476 (App. Div. 1989) (characterizing the lower court's application of *Wolczak* to a general contractor as "flawed analysis"); *Kane v. Hartz Mountain*, 278 N.J.Super. 129, 140-143 (App. Div. 1994) (reiterating the *Wolczak* rule has been replaced with the general contractor's non-delegable duty to enforce safety regulations and industry standards); *Izzo v. Linpro Company*, 278 N.J.Super. 550, 555-556 (App.Div. 1995) (same). To support its twisted position, LeFrak Organization says that since *Wolczak* was cited in *Muhammad v. New Jersey Transit*, 176 N.J. 185 (2003), it is still "good law." But as has been made clear, *Muhammad* was <u>not</u> a general contractor case. It was a property owner public entity case and the "manner and means" law still generally applies to property owners, as we made clear in our prior brief. (Pb35-44).

Plaintiff set forth in painstaking detail why these arguments about "manner and means" are without merit. Plaintiff's brief walked the reader through the last five decades of New Jersey construction accident law in explaining why LeFrak Organization's reliance upon the *Wolczak* non-liability for the general contractor rule is wholly outdated. Plaintiff's brief explained why LeFrak Organization had significant responsibility to manage safety on its projects. With nowhere else to go in response to that, LeFrak Organization (an apparently ever-moving target), changed its position in its reply brief. This is improper. *A.D. v. Morris County Bd. of Social Services*, 353 N.J.Super. 26, 30 (App. Div. 2002) ("It is improper to raise an argument for the first time in a reply brief. Typically, such an argument will not be recognized.") (citations omitted); *Pressler, Current N.J. Court Rules*, *Official Comment on R.* 2:6-5 (2002).

In this regard, for the first time in its reply brief LeFrak Organization cites to *Slack v. Whelan* to avoid summary judgment. In its opening brief LeFrak Organization says that as a builder/general contractor it is immune from liability for failing to manage safety among its subcontractors based upon the 1960s non-liability rule of *Wolczak.* In reply it attempts to justify its failure to appraise the

Court of the 4 decades hence evolution of the law by pointing to *Slack v. Whelan*. It is difficult to determine which is more incredible- denying facts akin to denying the Sun is hot and Pluto is cold, relying upon a non-liability rule that has not been the law of this State since 1977, or relying upon *Slack v. Whelan* to avoid the correct result in this matter.

LeFrak Organization (and/or its affiliates) was the general contractor on this project. Nevertheless it cites *Slack v. Whalen*, 327 N.J. Super. 186 (App. Div. 2000) to argue it is somehow not liable. *Slack v. Whalen* did not overturn some 30 years of construction site OSHA negligence law, and it certainly did not overturn *Alloway*. Instead, *Slack* addressed a very narrow set of facts whereby a husband and wife who were abandoned by the general contractor they hired to build the home they intended to live in and as such were thrust into having to complete the construction job on their own. *Slack* did not involve the more common situation presented here where a general contractor engaged in the business of real estate development consciously and voluntarily decides from the outset to serve as his own general contractor on an construction project.

In *Slack v. Whelan*, 327 N.J.Super. 186 (App. Div. 2000), defendants Tom and Margaret Whelan owned a modest residential lot in Warren County on which, one can infer, they endeavored to build their "dream home." They retained Trident Builders, a professional general contracting firm, to serve as the general contractor on the job and build their home. The cost was to be $80,000. At some point during the project Trident failed to perform and the Whelans, who had no experience in building a home, were forced to complete the project on their own. *Id.* at 188 (emphasis added). The Court found based on the specific facts of the case that the homeowners had no legal duty to exercise reasonable care for the employee's safety at the worksite since defendants had no opportunity or capacity to exercise control over the manner or means by which plaintiff chose to perform the spackling work. *Id.* at 194.

However, the facts and issue presented in *Slack* are quite unlike those faced in the instant matter. Most notably, *Slack* hired a professional general contracting firm to oversee and manage the project. It was only after the firm reneged on its contract, that the Whelan's were thrust into the position of having to finish the construction of their home on their own while not having any prior experience in construction. The Court ultimately found in fairness, under the specific facts of that case, that the liability duties imposed on general contractors should not be imposed on them as the unwitting homeowners who got involved in finishing the construction project only after their professional general contractor abandoned them.

Here LeFrak Organization is a mega real estate developer. This is not even remotely close

to a situation where a private homeowner has been abandoned by a general contractor and was forced to complete the project on his own. Instead LeFrak Organization's business is to develop multi-million dollar properties. *Slack v. Whelan* is simply completely inapplicable to the facts of this case.

Furthermore, the case of *Slack v. Whalen* has been largely nullified by *Costa v. Gaccione,* 408 N.J.Super. 362 (App. Div. 2009). As is typical of its presentation to this Court, LeFrak Organization mis-states reality when its says the "next case [after *Slack*] to address this issue was Tarabokia..." (Db10). This is totally incorrect. The "next case" was *Costa v. Gaccione* which involved a construction accident case where the plaintiff too suffered injuries when he fell from unsafe, OSHA non-compliant scaffolding. *Id*. The Law Division dismissed all claims against the homeowner who was also serving as his own general contractor, on the basis that he had no duty to manage safety or enforce the OSHA regulations on the project. The Court reasoned that under the case *Slack v. Whalen*, 327 N.J. Super. 186 (App. Div. 2000), as a residential landowner Gaccione had no duty to enforce OSHA or mange safety.

The *Costa* decision highlights the "quite limited" nature of the *Slack* decision and further shows why *Slack* has no precedential value to the issues before this Court. *See also, Gerald H. Clark, "Loosening the Slack on Slack*", 198 N.J. Law Journal 274 (2009)(discussing the import of the *Costa* decision on *Slack*). The Appellate Division in *Costa v. Gaccione* distinguished *Slack* which did not involve the more common situation presented in *Costa* (and presented here) where a person makes an affirmative choice from the outset to serve as his own general contractor on a residential construction project. The Court stated:

> Slack represents an exceptional situation where this Court held that the property owners could not be held liable as general contractors due to the specific factual circumstances.

Costa v. Gaccione,408 N.J.Super at 365. Taking into account the volitional act of Gaccione in *Costa* to serve as his own general contractor, the obligations imposed under the OSHA federal workplace regulations, and the particular facts of the case, the Court found under a fairness analysis that the defendant should be held accountable and the summary judgment decision of the trial court was reversed.

Accordingly, it is clear that *Slack v. Whelan* is a very limited decision. It deals only with the rather uncommon situation where a private homeowner is thrust into the role of serving as their own general contractor midway through a project after being abandoned by their commercial general

contractor. The case *sub judice* does not deal with a homeowner serving as its own general contractor, much less one being thrust into that role. The *Slack* decision simply has no bearing on this case. Plaintiff's cross motion for partial summary judgment on breach should be granted.

In LeFrak Organization's world, multiple pin cites to the record are not cites, general contractors are not liable unless they interfere in the manner and means because *Wolczak* from 1961 is the law, Pluto is hot, the Sun is cold and both revolve around the Earth. Along these same lines, LeFrak Organization cites to an unpublished opinion to support its wild, geocentrism-esq assertion that OSHA standards are, "irrelevant to the determination of whether there was a duty of care." (Db11) This should be rejected. There is simply no reason to look to unpublished decisions of a factually dissimilar nature when New Jersey law on the issue is well-settled. In fact, the Supreme Court in *Alloway* could not have been any more clear:

> In determining the scope of the duty owed by Pat Pavers to plaintiff and the possible breach of such a duty, the applicability of federal safety regulations, specifically OSHA regulations, is **highly relevant**.

Alloway, 157 N.J. at 233-234 (emphasis added). LeFrak Organization denies reality when it asserts that the non-compliance with OSHA standards are not relevant in an OSHA workplace safety case. *See also Constantino v. Ventriglia*, 324 N.J.Super. 437 (App.Div. 1999) (OSHA standards are pertinent in determining negligence in construction injury case)

Other reality denying unsupported conclusions of the LeFrak Organization defendants include that it had no control over the project, had no knowledge OSHA rules were not followed including that its walls were never braced, could do nothing to require the walls be braced and could do nothing to manage safety or prevent injuries on its projects. LeFrak Organization just says these absurd things in its brief. It provides absolutely no support for them. But the reality of the matter- as set forth in painstaking detail with pin cites to the record in our brief (Pb1-19)- with no dispute or responding statement from defendants- is that LeFrak Organization had substantial control over the project, made a conscious decision to disregard safety rules, specifically testified none of these walls were ever braced on the project as it did not require that, and clearly was in a position to require the opposite and prevent the kind of collapse that occurred here. (Pb1-19)

Beyond these wild assertions, LeFrak Organization even goes so far as to claim it had "nothing to do with" the project at issue. (Db15-16) It ignores that every single one of its witnesses who were the driving force behind the project- including the project's general superintendent, all

testified they were employed by the LeFrak Organization. Scott Rushkin specifically testified:

> Q. So LeFrak Organization, you guys were essentially managing this project, correct?
> A. Correct.

(Exhibit R at 48) The numerous assertions by the LeFrak Organization as to its corporate shell games contradict each other in numerous ways, including the various affidavits and deposition testimony of Paul Bozza, which seemingly change depending upon the perceived need of the day. (Exhibit A) In fact, the Appellate Division previously recognized this shell game and the potential fraud involved in sending the matter back down. *Slatina v. D. Const. Corp.*, 2012 WL 3140233 (App.Div. August 03, 2012) ("The record is also insufficient to address whether the initial admission of ownership, and subsequent denial, satisfies *Rule* 4:50–1(c), which authorizes relief from a judgment on the basis of 'fraud ... misrepresentation, or other misconduct of an adverse party.'")

Finally, LeFrak Organization asserts that it can not be held liable for hiring a safety incompetent contractor because it had no reason to know D Construction made it standard practice to disregard basic safety rules applicable to its work. This should be rejected. LeFrak Organization admits it has worked with D Construction many times in the past. It was well aware of its dangerous work practices. The same is true with the LeFrak Organization as owner hiring LeFrak Organization entities as general contractor. New Jersey law discourages this kind of conduct by allowing for liability for the hiring of safety incompetent contractors like this that needlessly place the public at risk.

Indeed, the whole point of liability for hiring safety incompetent contractors is to encourage safe conduct and prevent needless public danger. *Restatement (2nd) of Torts §411* (1965) *and Official Comment* (setting forth duty to hire "careful" contractor that does its work "without creating unreasonable risk of injury to others."); *Puckrein v. ATI Transport, Inc.*, 186 N.J. 563, 578-79 (2006) (incompetent contractor rule applied to "insur[e] the safety of vehicles that place the public at risk...") (underline added); Reuben I. Friedman, *When is Employer Chargeable with Negligence in Hiring Careless, Reckless, or Incompetent Independent Contractor,* 78 *A.L.R.*3d 910, 920 (1977) (same). LeFrak Organization however pushes for a new rule that says no matter how incompetently dangerous a contractor like LeFrak Organization or D Construction operate, so long as the final product looks good, there can be no liability. (Db16-18). This is no different than saying, for example, in *Puckrein v. ATI Transport*, 186 N.J. 563 (2005), so long as the delivery ultimately got to the final destination as contracted for, regardless of how many people were killed in the process,

there can be no liability. This is simply not the law and this new untenably dangerous rule should be rejected.

We could explain in far greater detail why defendant's position is without merit. Given the time constraints involved we are limited to what has been presented. Regardless, it should be clear that LeFrak Organization's motion for summary judgment should be denied and Plaintiffs' cross-motion for partial summary judgment on the issue of breach should be granted.

Respectfully submitted,

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GHC:od
Enclosures

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