IN THE TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

Lee Monte-Brewer,

Plaintiff,

vs. Court File No. 829-16

Ratzlaff Homes, Inc. and Bear Tracks, Inc.

Defendants.

and Ratzlaff Homes, Inc.,

Third-Party Plaintiff,

vs.

Kopp Concrete, Inc. and Hoefs, Construction, Inc.

Third-Party Defendants.

MEMORANDUM OPINION AND ORDER

I. Summary.

In this litigation, the Plaintiff, Lee Monte-Brewer ("Monte-Brewer") seeks damages against two entities, Ratzlaff Homes, Inc. ("Ratzlaff"), a residential contractor, and Bear Tracks, Inc. ("Bear Tracks"), a corporate entity with whom Monte-Brewer contracted in 2012 for alleged construction defects in connection with the building of his new home on the Reservation of the Shakopee Mdewakanton Sioux Community ("Community"). In turn, Ratzlaff seeks third-party damages against two entities, Kopp Concrete, Inc. ("Kopp"), a concrete contractor (who has not

responded), and Hoefs Construction, Inc. ("Hoefs"), a carpentry contractor who handled the framing and rough carpentry, including the installation of the subfloor, with whom Ratzlaff subcontracted for portions of that construction work. The primary issue is the significant cracking of the floor tile throughout the home.

Pending before the Court are several motions. Ratzlaff has moved for partial summary judgment against Monte-Brewer, contending that any claims relating to the installation of floor tile in the home are excluded from the scope of its contract, because Monte-Brewer both directly contracted with the tile installer and himself selected and purchased the tile. Bear Tracks has moved for summary judgment on all aspects of Monte-Brewer's complaint against it, contending that it had no responsibility for construction and therefore no responsibility for any defects. Hoefs has moved for summary judgment on Ratzlaff's third-party complaint against it, arguing that Hoefs had no obligations beyond installing the subfloor with materials Ratzlaff supplied, and that there is no defect alleged regarding that installation. Monte-Brewer has moved for leave to amend his complaint against Bear Tracks to add a claim to pierce the corporate veil and hold Bear Tracks' owners personally liable for damages; and Monte-Brewer also has filed a motion to compel discovery from Bear Tracks, specifically seeking an order that the company must produce its co-owner Lance Crooks ("Crooks") for an additional corporate-designee deposition, and also must produce further, responsive documents.

For the reasons set forth below, the Court denies Ratzlaff's motion for partial summary judgment; denies Bear Tracks' motion for summary judgment; grants Hoefs' motion for summary judgment in full; reserves judgment on Monte-Brewer's motion to pierce the corporate veil until after a determination of the merits; and partially grants and partially denies Monte-Brewer's motion to compel discovery.

II. Factual Background.

A. Contracts and Related Documents.

A number of the facts underlying this litigation are not disputed. In particular, there is no dispute with respect to the authenticity of seven documents, though the parties deeply dispute the intended and actual effect of several of those documents, which are --

1. Monte-Brewer's Agreement to pay Bear Tracks[1].

A one-page document, on Bear Tracks letterhead, dated December 3, 2012, was signed by Monte-Brewer and by Mary Simon ("Simon"), an officer and co-owner of Bear Tracks with Crooks. In its entirety, that document says:

> For: Lee Monte[2]
> 3098 Little Crow Drive
> Shakopee, MN 55379
>
> Lee Monte agrees to pay Bear Tracks, Inc [sic] their fee of $45,706.00 per the contract dated December 3, 2012 for construction of the single family dwelling and indoor pool located at the above address. By signing this agreement Lee Monte agrees to pay $45,706.00 on or before July 1st, 2012.

2. Bear Tracks' Agreement "to manage this construction project".

Also on December 3, 2012, Monte-Brewer and Simon signed another one-page document which, in its entirety, said:

> | | |
> |---|---|
> | New Home Proposal: | $742,500.00 |
> | Pool Proposal: | $137,500.00 |
> | Total: | $880.000.00 |
>
> *This proposal price based on attached specifications dated December 3rd, 2012 & Plans dated September 7th 2012.
>
> By signing this agreement you are committing to work with Bear Tracks, Inc [sic] to manage this construction project. All Communications will be directed to the Contractors through a Bear Tracks representative. Bear Tracks, Inc. represents you and will keep you informed of all the pertinent information throughout the construction process and assist with any warranty issues. Bear Tracks Inc. will keep on file all documents regarding this project. By signing this agreement you are agreeing to these terms and to move forward with the project. This agreement is effective the date signed by all parties listed below.

[1] Throughout, this Memorandum will refer to each of the documents by the descriptive name given it in this section.
[2] The Plaintiff, at the time the various pertinent contracts were signed, called himself Lee Monte. Thereafter, he has changed his name to Lee Monte-Brewer, and that is how he will be named here.

3. Two "Proposal" documents.

The "specifications" that were referred to in Bear Tracks' agreement "to manage this construction project" apparently were contained in a fifteen-page "Proposal for New Home", and a seven-page "Proposal for Pool", each dated December 3, 2012, and each evidently prepared by Ratzlaff. The "Proposal for New Home", on its first page, in a section captioned "ALLOWANCES INCLUDED IN PRICE", set forth projected cost for various aspects of the construction work, and contained this provision relating to tile:

Ceramic tile (materials) By Homeowner

In sections outlining in detail the types of materials that would being installed in the home, the "Proposal for New Home", said this:

> Tile: By Homeowner – All prep work, tile material, setting material, cement board, grout & labor for the following areas [including the main level floor, the kitchen, the master bath, the master shower, the master tub, dog wash walls, and fireplace face].

Monte-Brewer signed both the "Proposal for New Home" and the "Proposal for Pool", as did Simon, above a signature line listing her as "Bear Tracks Representative". On each of the two documents, the signature line for "Contractor" bears no signature, though directly underneath Simon's signature on each document there is a printed block with Ratzlaff's address and telephone number, and on the bottom of each page of both proposal documents there is a line which says:

Lee & Kelsie Monte Ratzlaff Homes Inc. Page __ of __

4. Printed Ratzlaff construction contract.

A five-page printed document, bearing the heading "Ratzlaff Homes, Inc., Construction Contract – Shakopee Mdewakanton Sioux Reservation", and dated December 3, 2012, identifies Ratzlaff as "Builder" and Monte-Brewer as "Owner". It was signed by Monte-Brewer, and by Coleen Ratzlaff LaBeau (LaBeau), the President of Ratzlaff. In it, the following two sections appear, the effect of which is vigorously disputed by the parties:

> 15. Builder controls Construction. Owner agrees that direction and supervision of the working forces, including but not limited to subcontractors, rests exclusively with Builder. Owner agrees not to interfere with, issue any

instructions to, or contract for additional work with any of Builder's subcontractors, except with Builder's written consent, and then only in such manner as will not interfere with Builder's completion of construction. Owner acknowledges that the construction site posses [sic] hazards which may not be apparent and which could result in injury or death. Owner is advised not to enter the construction site. Owner agrees to supervise and take due care in protecting all visitors to whom [sic] Owner brings to the site. Owner agrees to hold the Builder harmless for any injuries to the Owner or visitors who visit the site, except to the extent injuries are caused by any gross negligence or willful conduct of the Builder.

16. Owner's Work/Materials. Owner agrees not to hire any subcontractors or suppliers to perform any work or supply any materials, without Builder's written consent. Owner agrees that any work performed or materials or equipment supplied by any of Owner's subcontractors or suppliers are not covered by the statutory warranties described in this Contract and are not the responsibility of the Builder. Owner waives any and all claims against Builder arising out of or relating to work performed or materials supplied by Owner's subcontractors or suppliers. Owner agrees to look only to those subcontractors or suppliers hired by Owner for any warranty or warranty work. Owner will supply to Builder certificates of insurance, in amounts and containing such coverages as is [sic] acceptable to Builder, before any of Owner's subcontractors or suppliers commence any work. Owner's subcontractors and suppliers must work within the hours of operation and schedule established by Builder. The Substantial Completion Date will be extended in the event of any delay caused by Owner's subcontractors or suppliers.

(Emphasis supplied.)

The document also contains, in its first numbered section, the following provision (the dates, in italics, were inserted by someone in handwriting):

1. Contract Documents. This Contract, and the below listed documents which are made a part hereof, constitute the entire Contract between the parties:
   a. Construction Plans dated *9-29-12*, which are hereby approved by the parties ("Plans");
   b. Specifications dated *12-2-12*, which are hereby approved by the parties ("Specifications"); and
   c. Other (None unless specified) _____.

5. Ratzlaff/Bear Tracks Construction Contract.

Notwithstanding the apparently clear effect of the just-quoted "Contract Documents" provision in the Ratzlaff construction contract, yet another document, styled simply

"CONSTRUCTION CONTRACT", also was signed on December 3, 2012. It identifies, as "Contractor", by handwritten insertion above and below a blank at its beginning, both Ratzlaff and Bear Tracks. In what appears to be an inadvertence, a handwritten notation in the document's third numbered paragraph says the "Contract Sum and Payments" will total "880,00.00". The document also contains, *inter alia*, provisions relating to warranties, insurance, indemnification. It was signed by Simon, on behalf of Bear Tracks, as "Contractor", and by Monte-Brewer as "Owner", and by no-one else.

6. Hoefs Subcontract.

A printed document, captioned "Subcontractor Agreement", dated January 1, 2013, bearing the signatures of LaBeau for Ratzlaff and Dale Hoefs for Hoefs Construction, Inc. ("Hoefs"), says, in its first numbered section, that under the agreement the "scope of the Subcontractor's work shall be defined by written addendum to this Agreement". There is a printed one-page document, also signed by Labeau and by Dale Hoefs, captioned "ADDENDUM TO ANNUAL SUBCONTRACTOR AGREEMENT", attached to the principal document. But the "Scope of Work" section of that attached addendum piece is blank.

B. <u>Undisputed facts</u>.

In addition to the parties' agreement that each of the seven documents described above is genuine—that none is a forgery, that none has been surreptitiously altered, and that the signatures on each are what they purport to be—it is clear from the parties' pleadings and briefs, from affidavits and the transcripts of several depositions, and from various exhibits (including competing expert reports) that there also is general agreement as to a number of other salient points.

There is, for example, apparently no dispute that Ratzlaff operated as the general contractor for the construction of Monte-Brewer's home. And there is agreement that Monte-Brewer paid Ratzlaff $880,000, that Bear Tracks received no part of that amount, and that Monte-Brewer separately paid Bear Tracks $45,706.00.

There also is agreement that, after the home was complete, very significant cracking occurred in its floor tiles—cracking that, to repair, will require at least the removal and replacement of extensive areas of the floors, with other attendant work, at considerable cost.

There is no dispute that Monte-Brewer himself selected and purchased the tile, and that he alone contracted for the tile installation. Neither Ratzlaff nor Bear Tracks was a party to any contract relating to the tile selection or installation. It is agreed that the tile chosen by Monte-Brewer is porcelain. It is agreed that the tile was installed directly on top of the subfloor, with no "decoupler" in between the materials. There also is no dispute that Hoefs installed the subfloor which, after it was installed, at least in certain areas was exposed to rain and snow during a period of weeks before the tile was installed.

Notably, however, no party contends that Hoefs did anything improper in its work on the subfloor. No-one contends that it was Hoefs who selected the type of subflooring to be used—that selection was done by Ratzlaff. Nor did Hoefs have responsibility for the design or construction of the trusses on which the subfloor was placed – that work was done by the company that made the trusses. Hoefs' job was simply to install the trusses and the subfloor when the materials arrived and at the time directed. In deposition testimony, Dale Hoefs said, in his deposition, that when the flooring material arrived at the jobsite it came in plastic wrapping, that the material was unwrapped only when it was installed, and that once the material was installed, Hoefs' responsibility was done and Hoefs left the jobsite. In deposition testimony, Jerry Ratzlaff, an employee of Ratzlaff who was on the jobsite daily, verified Dale Hoefs' assertions, and the Court sees no evidence whatever in the record that contradicts these statements.

C. <u>Facts that are, or may be, at issue</u>.

The record presently before the Court also clearly establishes that a number of facts, some of which may well be central to the resolution of this litigation, are either unknown or may be disputed.

Among the unknown facts are many concerning the circumstances surrounding the installation of the home's tile. The tile installation contractor that Monte-Brewer chose was Greg Demarce ("Demarce"), who was a friend of Monte-Brewer's and who is the father of the

woman to whom Monte-Brewer briefly was married. Monte-Brewer and Demarce's daughter were living with Demarce during the time that Monte-Brewer's home was being constructed. Demarce is not a party to these proceedings, and at the time the Court heard argument on the motions that are being decided today, his deposition had not been taken by any party. The Court therefore has nothing before it describing the timing of the tile installation or the reasoning underlying decisions that were made before and during the installation. Nor is there anything in the record indicating what Demarce's view may be relating to the reasons that the floor tiles cracked, or to precautions that could have been taken to avoid the cracking.

There also are significant disputes between the parties as to whether the subflooring that was installed in the home was the appropriate material, and whether it was appropriately protected from the elements after it was installed and before the floor tile was installed. Both Jerry Ratzlaff and Dale Hoefs testified in depositions that they believed the oriented strand board ("OSB") subflooring installed was a product called Durastrand, when in fact it has proved to be a different product made by a different manufacturer. Whether that difference was, or might have been, a significant cause of the tile cracking is still unknown.

There is a significant dispute with respect to the role that Bear Tracks was to play, or did play, during the construction of the home. The Monte-Brewer Agreement to pay Bear Tracks $45,706.00 says the payment was made "per the contract dated December 3, 2012 for construction of the single family dwelling and indoor pool located at the above address". The Ratzlaff/Bear Tracks Construction Contract, which identified both Ratzlaff and Bear Tracks as "Contractor", and which was signed only by Simon from Bear Tracks and by no-one from Ratzlaff, said "Contractor shall provide all labor, equipment and Materials required to Build home w/ Pool". And in Bear Tracks' Agreement "to manage this construction project", Monte-Brewer agreed that he was "committing to work with Bear Tracks, Inc [sic] to manage this construction project". But in her deposition, Simon, a co-owner of Bear Tracks, who signed those documents and who is the only Bear Tracks representative whose testimony is presently before the Court, said that it was not her intent have Bear Tracks be a contractor, and that Bear Tracks in fact never served as a contractor, for the project. Perhaps adding to the uncertainty surrounding Bear Tracks' role and responsibility, Monte-Brewer, during his deposition of Monte-Brewer, testified as follows:

Q How does Bear Tracks fit into this? What is your understanding of Bear Tracks' involvement in this construction?

A They're my advisor or kind of there to do what I ask them to, in a sense. Best understanding to it, I guess.

Q So any – I think we talked about this before: Are they your primary point of contact for the construction of the home for any questions you may have?

A Yes.

III. Summary Judgment Standard.

Rule 28 of this Court's Rules of Civil Procedure, which governs motions for summary judgment, incorporates Rule 56 of the Federal Rules of Civil Procedure. Therefore, under our Rules summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law". In considering materials pertinent to a summary judgment motion, it is the Court's duty to view the evidence in the light most favorable to the non-moving party, and to give that party the benefit of all reasonable inferences drawn from the evidence. Florez v. Jordan Construction Co., 4 Shak. T.C. 124 (Jan 15, 2002); Barrientez v. SMS(D)C, 1 Shak 55 (Sept. 7, 1990)[3].

IV. Summary Judgment Analysis.

Given the facts recited above, it is clear to the Court that both Ratzlaff's motion for partial summary judgment and Bear Tracks' motion for summary judgment must be denied, but that Hoefs' motion for summary judgment should be granted.

A. Ratzlaff's Motion for Summary Judgment.

Ratzlaff's motion for partial summary judgment pertains only to Monte-Brewer's claims relating to tile damage. The motion is based on the undisputed facts that Monte-Brewer elected to separately purchase the home's tile and to separately contract for the tile's installation.

[3] Although this Court has published opinions dating back to the Court's creation in 1988, and although those opinions have discussed the procedures and standards applicable to motions for summary judgment under our Rules since at least 1990, no party has cited to any of those opinions in their arguments here. Nonetheless, it is this Court's decisions, under its Rule 28, that must control the decisions here.

Section 16 of the printed Ratzlaff construction contract provides that "Owner waives any and all claims against Builder arising out of or relating to work performed or materials supplied by Owner's subcontractors or suppliers", and on that basis Ratzlaff contends that there is no conceivable claim Monte-Brewer now can make against it with respect to tile problems.

There is some logic to Ratzlaff's argument. But viewing all the evidence now in the record in the light most favorable to Monte-Brewer, and giving him the benefit of all reasonable inferences from that evidence, as we must in considering a motion for summary judgment, Ratzlaff's motion cannot be granted. Three factors, in particular, require this result.

First, under section 15 of the printed Ratzlaff construction contract the "direction and supervision of the working forces, including but not limited to subcontractors, rests exclusively with [Ratzlaff]"; and in his deposition Jerry Ratzlaff testified that it was Ratzlaff's duty to maintain the calendar that was used to schedule construction events. So, Ratzlaff may have had both the authority and the responsibility to schedule the installation of the home's floor tile, regardless of the fact that the installer was under contract directly to Monte-Brewer. And given the possibility that the tile was installed when the subfloor was excessively wet, and that the floor's subsequent drying caused or contributed to the tile's cracking, it cannot be said at this point that there are no circumstances under which Ratzlaff could bear some responsibility for that damage. If prudence would have called for delay in tile installation, to allow the installed subfloor to dry, and if Ratzlaff could have, but did not, exercise that prudence, then contractual liability for Ratzlaff for that failure would appear to at least be a possibility.

Second, Ratzlaff selected the OSB material for the subfloor,. The record at this point is simply insufficient to rule out the possibility that, had a different material been selected, the tile damage would have been avoided or reduced.

Third, it is unclear at this point whether matters would or could have evolved differently had the subfloor in some fashion been protected from moisture after it was installed, which again seems at least to be a possibility, from the evidence adduced to this point in the proceedings.

It may well be that, should this matter go to trial, all three of these questions will be resolved overwhelmingly in Ratzlaff's favor. The facts that the tile selection and the manner of its installation, directly onto the subfloor rather than a "decoupler" layer, were outside Ratzlaff's

control, suggest that that may be the case. But under our Rule 28, an award of summary judgment to that effect cannot be made at this point.

B. Bear Tracks' motion for summary judgment.

Bear Tracks contends that, as a matter of law, it cannot be held liable for any construction defects in Monte-Brewer's home because, it maintains, it had absolutely no responsibility for the physical work done on the home, it retained none of the subcontractors, and it neither selected nor supplied any materials for the home. Its role, Bear Tracks asserts, was strictly to monitor Monte-Brewer's budget and to keep him informed of the progress of construction. Bear Tracks also points out the glaring difference in its payment of $45,706 for services rendered on the project versus the payment to Ratzlaff of $880,000, which covered basically all costs associated with the construction of the home.

But there are enormous differences between those contentions and the duties that could be reasonably inferred from at least two of the documents that Bear Tracks agrees it executed. First, there is Bear Tracks' agreement "to manage this construction project", wherein Monte-Brewer was told that Bear Tracks "represents you and will keep you informed of all the pertinent information throughout the construction process and assist with any warranty issues". And then there is the Ratzlaff/Bear Tracks Construction Contract, which identifies Bear Tracks, along with Ratzlaff, as "Contractor", and which contains covenants requiring the Contractor to provide certain particular warranties, insurance, and indemnification to Monte-Brewer.

Bear Tracks maintains that Monte-Brewer clearly understood that Bear Tracks in fact was not a contractor, whatever the signed documents might say to the contrary. And Bear Tracks urges the Court to hold that the documents' provisions clearly were modified or defined by the parties' subsequent conduct. But to do so now would be singularly inappropriate in the context of a motion for summary judgment where the law requires that all ambiguities and all inferences be resolved in favor of the non-moving party. The Court has before it documents that could have given Bear Tracks broad authority over supervision or coordinating the schedule for the construction Monte-Brewer's home, and perhaps over such details as the protection of the subfloor once it was installed. Perhaps all parties understood that there was not such authority. And perhaps, if there is a trial, that will become completely clear; but it is not completely clear

from the record as it stands now, and the same considerations that require the Court to deny Ratzlaff's motion also require the denial of Bear Tracks' motion.

C. Hoefs' Summary Judgment Motion.

Matters stand differently with respect to Hoefs. As noted above, nothing in the record suggests that Hoefs had any responsibility for selecting the OSB subfloor material or for the timing of the tile installation. Hoefs installed the trusses and the subfloor, and its job was done. No-one has suggested that the truss or subfloor installation was faulty, or that Hoefs had any responsibility after the installation to cover the flooring. Jerry Ratzlaff, speaking for Ratzlaff, the sole party that has sought relief against Hoefs, testified during his deposition that all of Hoefs' work was appropriate and proper. None of the various expert reports call out any problems with Hoefs' work.

At the summary-judgment phase, where no party has even alleged, much less provided, any evidence suggesting that a contractor or supplier is liable, dismissal of that party is required. See Anderson v. Performance Constr., LLC., 6 Shak. T.C. 32 (Aug. 9, 2013) (granting dismissal at summary judgment of window supplier in construction-defect case where no party or expert cited any evidence suggesting supplier's liability). Accordingly, because there is simply no evidence before the Court that would suggest Hoefs could have liability to Ratzlaff if this matter went to trial, summary judgment in Hoefs favor therefore is appropriate now.

V. Monte-Brewer's Nondispositive Motions.

A. Monte-Brewer's Motion to Amend Complaint.

Monte-Brewer also seeks leave of the Court to amend his Complaint to add a claim for piercing the corporate veil against Bear Tracks. Bear Tracks opposes the motion due to the alleged lateness of the proposed amendment. And indeed, the deadline for filing non-dispositive motions was December 1, 2016, while the motion was made on December 12. Monte-Brewer has offered some reasons for the timing of his motion, but none explain why he waited many months between the time he received the discovery, including bank statements, which he cites as its primary justification for seeking to pierce the veil, and the filing of the motion.

The Court has authority to allow a complaint to be amended at any stage of the proceedings, if amendment is justified. Notwithstanding the deadline in the Court's scheduling order, Rule 15(a) of our Rules of Civil Procedure permits amendment of a pleading after the filing of an answer "by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires". Our Rule 15(b) also allows for amendments to conform to the evidence.

But we conclude no such amendment is necessary here for Monte-Brewer to preserve this claim, and because allowing it now would unnecessarily delay resolution of the merits, we will deny the motion. Following today's decision, the fact issues remaining for trial include whether Bear Tracks has any liability for the alleged defects, and if it does, the extent of that liability. There is, as yet, no showing that Bear Tracks' potential liability could extend beyond the $45,706.00 the corporation received for its work on the project. Nor is there any showing that, if held liable, Bear Tracks would not satisfy an award, necessitating post-judgment relief—like piercing the corporate veil.

A claim for piercing the corporate veil is a matter of first impression before the Court, and the question of when and how a party must make such a claim is far simpler to resolve here than in federal jurisdictions, where questions of underlying state law, diversity of parties, jury requirements, and conflict of laws can complicate the analysis. When this Court has subject-matter jurisdiction over an underlying, substantive claim, and personal jurisdiction over the parties, the Court also retains jurisdiction for purposes of hearing any disputes that may arise regarding post-judgment relief. Therefore, our existing post-judgment relief rules provide an appropriate framework for any veil-piercing claim. See SMSC R. Civ. P. 30 (incorporating the provisions of Fed. R. Civ. P. 69(a) relating to the enforcement of judgments). Federal Rule of Civil Procedure 69(a)(1) allows for enforcement via writ of execution "unless the court directs otherwise," among other provisions, and subsection (2) allows for appropriate post-judgment discovery. See also Shakopee Mdewakanton Sioux (Dakota) Community Gaming Ent. v. Prescott, 6 Shak. T.C. 105 (Nov. 23, 2010) (applying Fed. R. Civ. P.69(a)).

We recognize that the Community's law is not explicit on this point, and that other jurisdictions require preservation of veil-piercing claims at an earlier stage of the case. Therefore, the Court now expressly recognizes that a veil-piercing claim is cognizable as post-

judgment relief in this jurisdiction. Parties may raise such claims in their initial pleadings and conduct discovery thereon, although hearing on any such claims will typically be reserved until after judgment, as necessary for satisfaction of a judgment. Parties may also raise such claims solely as a matter of post-judgment relief, where warranted, and provided the Court has and will continue to have personal jurisdiction over all parties involved. The doctrines of claim preclusion or res judicata will not automatically operate to bar a post-judgment claim for veil piercing.

The Court at this time only reaches the question of when Monte-Brewer's claim must be brought and how it should be handled. It is clear here that the Court will continue to retain jurisdiction over all parties for purposes of any post-judgment relief that may be needed. Hence, the motion to amend is denied as moot. If Bear Tracks' is found liable at trial, and if there is a need for further post-judgment action to satisfy any award, Monte-Brewer may renew the claim and proceed as provided in SMSC Rule of Civil Procedure 30.

B. <u>Monte-Brewer's Motion to Compel Discovery</u>.

For practical reasons, the Court also will overlook the lateness of Monte-Brewer's motion to compel, despite his failure to show excusable neglect, and will grant partial relief. Although the nondispositive motion filing deadline has passed, under the parties' agreed-upon schedule, the discovery deadline was January 31, 2017, and the filing of the motion to compel came well before that—and the parties confirmed at the hearing on their motions that other depositions are still ongoing.

The motion to compel cites two issues: (1) Bear Tracks' alleged failure to turn over all documents relating to corporate formation and functions; and (2) Bear Tracks' alleged failure to produce a proper 30(b)(6) corporate deponent. The Court addresses these in turn.

1. Claim that Bear Tracks improperly withheld documents.

Regarding the first issue, Monte-Brewer alleges Bear Tracks refused to produce records that relate to "Plaintiff's potential additional claim that [] Mary Simon and Lance Crooks fail to operate Bear Tracks in a manner sufficient to maintain a corporate shield." Motion to Compel at 7. But the fact that Bear Tracks objected to discovery that was admittedly aimed at developing a

veil-piercing claim which Monte-Brewer had not yet even alleged is not surprising. And, for the reasons stated above, it is not necessary to reach this issue at this time, hence the motion is denied.

2. Claim that Bear Tracks failed to provide a proper corporate designee for the 30(b)(6) deposition.

Shakopee Rule of Civil Procedure 21 fully incorporates the provisions of Federal Rules of Civil Procedure 27-32.[4] Federal Rule of Civil Procedure 30(b)(6) provides that "[a] party may, by oral questions, depose any person, including a party, without leave of court" unless there have already been ten depositions taken by the party noticing the deposition—which limit has not been not reached here. There is detailed federal authority regarding a party's 30(b)(6) obligations:

> "Corporations, partnerships, and joint ventures have a duty to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unevasively answer questions about the designated subject matter." *Starlight Intern, Inc. v. Herlihy,* 186 F.R.D. 626, 639 (D.Kan.1999), citing *Dravo Corp. v. Liberty Mut. Ins. Co.,* 164 F.R.D. 70, 75 (D.Neb.1995). "[I]f it becomes obvious during the course of a deposition that the designee is deficient, the [organization] is obligated to provide a substitute." *Dravo Corp. v. Liberty Mut. Ins. Co.,* supra at 75.
>
> Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 638 (unpubl.) (D. Minn. 2000)

Where a deponent is not prepared to answer the relevant inquiries, and is without substantial justification for such failure, courts may order reconvention of the deposition, award of attorney's fees, or other appropriate sanctions. Id. (requiring reconvention of 30(b)(6) deposition where deponent "was not prepared to answer the full gamut of relevant inquiries, and he was abjectly uninformed as to numerous areas of proper inquiry" disclosed on the deposition notice); see also Fed.R.Civ.P. 37(d)(3).

Monte-Brewer complains of Simon's lack of preparedness to answer questions that go to Monte-Brewer's potential veil-piercing claim, but in the Court's view there is no basis for that complaint for the reasons stated above—and the Court does not see where Monte-Brewer's

[4] The Court cites here directly to the Federal Rules of Civil Procedure, which are incorporated into this jurisdictions under our Rules 21 (Depositions...) and 23 (Discovery and Production of Documents...).

notice of deposition plainly set forth an intent to ask those questions. The Court has also reviewed the arguments, as well as Simon's deposition transcript. Regarding the items actually were listed in the notice of deposition, all of which go to Bear Tracks' work and obligations and to the alleged construction defects, in fact Simon *did* answer all or nearly all questions. Ultimately, Simon testified for about three hours. It is just that her responses regarding Bear Tracks' daily activities on-site—just one of the fourteen items listed on Monte-Brewer's notice—were somewhat general. Those answers simply underscored the possibility that Crooks has more detailed, personal knowledge of Bear Tracks' day-to-day work on the project, because he evidently was present on the jobsite more often.

Therefore, the Court concludes that Bear Tracks neither "refused" to comply with the corporate-designee subpoena, nor that Simon was an improper deponent. Hence, Bear Tracks' refusal to produce Crooks as a second corporate designee is not unreasonable, much less sanctionable, because Bear Tracks complied with the subpoena it received.

The Court understands the desire for the efficiency that can come with conducting a single, 30(b)(6) deposition. But it is not a tool that stands in for all possible fact depositions—the necessity of which may only become clear upon conducting the 30(b)(6) deposition. A simple solution, that would not have required Court intervention here, would have been for Monte-Brewer simply to notice the fact deposition of Crooks, inasmuch as there was no limitation either in the schedule or in our Rules on Monte-Brewer's ability to do so.

The Court does agree that Crooks may have information relevant to the material issues in the case. Therefore, the Court now grants Monte-Brewer seven days from the issuance of this Order to notice the deposition of Crooks, which deposition will be scheduled promptly at a mutually convenient time for the parties. If Monte-Brewer fails to issue a notice within seven days, his ability to do so will have been waived.

FOR THE FOREGOING REASONS, IT IS ORDERED THAT:

1. Ratzlaff's motion for partial summary judgment is denied;
2. Bear Tracks' motion for summary judgment is denied;
3. Hoefs' motion for summary judgment is granted;
4. Monte-Brewer's motion for leave to amend his complaint is denied;

5. Monte-Brewer's motions to compel the production of additional documents and to produce an additional corporate designee for deposition are denied; and
6. Monte-Brewer may, within seven days of the date of this Order, notice the deposition of Lance Crooks, which deposition shall be scheduled promptly, at a time mutually convenient for the parties, provided that if Monte-Brewer fails to issue such a notice within seven days he will have waived the ability to do so.

Dated: February 7, 2017

John E. Jacobson
Chief Judge, Tribal Court of the Shakopee Mdewakanton Community