

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

ORIANNA ASSOCIATES, LLC,	:	AUGUST TERM, 2003
Plaintiff,	:	No. 02250
v.	:	COMMERCE PROGRAM
TRANSAMERICA OCCIDENTAL LIFE	:	Control Nos. 091886, 091928
LIFE COMPANIES, TRANSAMERICA	:	
ASSURANCE COMPANY, TRANSAMERICA	:	
LIFE INSURANCE & ANNUITY COMPANY,	:	
EQUITY BANK, RUTH MOST and JOHN/JANE	:	
DOE, Executor/Executrix of the Estate of Ralph	:	
Most, Deceased,	:	
Defendants.	:	
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RUTH MOST and SUSAN TOBER, in her	:	DECEMBER TERM, 2004
capacity as Executrix of the ESTATE OF RALPH	:	
MOST,	:	No. 03147
Plaintiffs,	:	COMMERCE PROGRAM
v.	:	Control Nos. 091887, 091922,
JEAN MADELINE, INC, in its own capacity	:	091926, 091927
and/or as successor in interest to, or owner of,	:	
businesses operating as ADOLPH BIECKER,	:	
INC., METRO-HAIR, INC., JAMAR BEAUTY	:	
SUPPLY CO., JEAN MADELINE AVEDA	:	
INSTITUTE AND 210 SPA CORPORATION;	:	
JEAN MADELINE EDUCATION CENTER OF	:	
COSMETOLOGY, INC., in its own capacity	:	
and/or as successor in interest to, or owner of,	:	
businesses operating as JEAN MADELINE	:	
INSTITUTE; SAMUEL LEHMAN, and DAVID	:	
ALTMAN,	:	
Defendants.	:	

ORDER

AND NOW, this 29TH day of May, 2007, upon consideration of the Motion for Partial Summary Judgment of Ruth Most and Susan Tober as Executrix of the Estate of Ralph Most (collectively, the “Mosts”) Against Samuel Lehman and the Corporate Defendants, the Motion for Partial Summary Judgment of Jean Madeline Inc., Jean Madeline Education Center of Cosmetology, Inc., and Samuel Lehman, the responses thereto, the briefs in support and opposition, and all other matters of record, and in accordance with the court’s Opinion issued contemporaneously herewith, it is hereby **ORDERED** that both Motions are **DENIED**.

Upon consideration of the Motion for Partial Summary Judgment of the Mosts Against David Altman, the Motion for Partial Summary Judgment of David Altman, the responses thereto, the briefs in support and opposition, and all other matters of record, and in accordance with the court’s Opinion issued contemporaneously herewith, it is hereby **ORDERED** as follows:

1. The Mosts’ Motion Against Altman is **DENIED**.
2. Altman’s Motion is **GRANTED in part** and the claims against him for declaratory judgment and civil conspiracy are **DISMISSED**. The remainder of his Motion is **DENIED**.

Upon consideration of the Motion for Partial Summary Judgment of the Mosts Against Orianna Associates, LLC (“Orianna”), the Motion for Partial Summary Judgment of Orianna, the responses thereto, the briefs in support and opposition, and all other matters of record, and in accordance with the court’s Opinion issued contemporaneously herewith, it is hereby **ORDERED** that both Motions are **DENIED**.

BY THE COURT,

ALBERT SHEPPARD, JR., J.

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ASSURANCE COMPANY, TRANSAMERICA	:	
LIFE INSURANCE & ANNUITY COMPANY,	:	
EQUITY BANK, RUTH MOST and JOHN/JANE	:	
DOE, Executor/Executrix of the Estate of Ralph	:	
Most, Deceased,	:	
Defendants.	:	
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RUTH MOST and SUSAN TOBER, in her	:	DECEMBER TERM, 2004
capacity as Executrix of the ESTATE OF RALPH	:	
MOST,	:	No. 03147
Plaintiffs,	:	COMMERCE PROGRAM
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businesses operating as ADOLPH BIECKER,	:	
INC., METRO-HAIR, INC., JAMAR BEAUTY	:	
SUPPLY CO., JEAN MADELINE AVEDA	:	
INSTITUTE AND 210 SPA CORPORATION;	:	
JEAN MADELINE EDUCATION CENTER OF	:	
COSMETOLOGY, INC., in its own capacity	:	
and/or as successor in interest to, or owner of,	:	
businesses operating as JEAN MADELINE	:	
INSTITUTE; SAMUEL LEHMAN, and DAVID	:	
ALTMAN,	:	
Defendants.	:	

OPINION

These consolidated cases arose upon the death of Ralph Most, who was an active member/shareholder of the following defendant entities: Orianna Associates, LLC (“Orianna”), Jean Madeline, Inc., Jamar Beauty Supply Co., and Jean Madeline Education Center of Cosmetology, Inc. (collectively the “JM Entities”). Defendant Samuel Lehman was also a member/shareholder of Orianna and the JM Entities. In addition, Most, Lehman, and defendant David Altman held interests in Lenola Road Associates, LLC, a non-party. Altman was also a creditor of the JM Entities.

Mr. Most’s widow, Ruth Most, and his Estate, represented by his daughter, Susan Tober, are the plaintiffs in the primary action, in which they seek to have the JM Entities repurchase Ralph Most’s shares, repay loans made by Most to the JM Entities, release collateral and guaranties given by Most on behalf of the JM Entities, and return certain personal possessions of Most’s. The Estate has also asserted claims against Altman for attempting to enforce a guaranty given to him by Most on behalf of the JM Entities, and Altman has counterclaimed for the amount of the loan.

The other action was brought by Orianna against, inter alia, the Estate and Mrs. Most and concerns the repurchase price to be paid for Most’s shares of Orianna, as well as whether a certain insurance policy was to be used to fund that repurchase. All the above listed parties have moved for summary judgment, which motions are presently before the court.

I. Both The Motion For Partial Summary Judgment Of Ruth Most And The Estate Against Samuel Lehman And The JM Entities And The Motion For Partial Summary Judgment Of The JM Entities And Lehman Must Be Granted In Part And Denied In Part.

The cross motions filed by Mrs. Most and the Estate and the JM Entities and Lehman are primarily concerned with the JM Entities’ responsibilities to Most’s widow and the Estate upon

his death. The following is a description of what should have happened with respect to Ralph Most's interests in the JM Entities following his death on April 7, 2003. Within five days after he died, his personal representative was supposed to deliver written notice of his death to the JM Entities whereupon the JM Entities were to purchase from Most's Estate, and Most's Estate was to sell to the JM Entities, all of Most's shares in the JM Entities.¹ The purchase price for the shares was to be the "Agreed Value."² The original Agreed Value, as of December 31, 1993, of the shares of each shareholder was \$50,000.³ However, the Shareholder's Agreement also provided that

The parties may, from time to time and at any time unanimously redetermine in writing the Agreed Value, and each such written redetermination shall then be the Agreed Value until a subsequent redetermination. In the event that the Agreed Value remains without redetermination for more than 12 months, the most recent Agreed Value shall be increased or decreased, as the case may be, by the change in Book Value . . . from the end of the Corporations' fiscal year immediately preceding the fiscal year in which such Shares are purchased hereunder.

* * *

Any redetermination of, or adjustment to, Agreed Value for purposes of this Agreement shall be determined by the Corporations' regularly engaged accountant in accordance with accounting principles and practices applied on a basis consistent with prior years. Such determination shall be final, binding and conclusive upon all parties and notice thereof shall be given to all parties as promptly as practicable.⁴

Since Ralph Most died in 2003, December 31, 2002 was the date as of which Ralph Most's shares were to be valued.

¹ See JM Entities' Shareholder's Agreement, ¶¶ 3.1- 3.2.

² *Id.* ¶ 4.1.2.

³ *Id.* ¶ 4.2.1.

⁴ *Id.* ¶¶ 4.2.2, 4.2.4. The Orianna LLC Agreement contains similar provisions. The original Agreed Value was \$600,000 per interest. "In the event that Agreed Value has not been redetermined [by agreement of the members], Agreed Value per interest shall be determined by the Company's regularly engaged independent public accountant. Such determination shall be on a basis consistent with prior years and absent manifest error, such determination shall be final, binding and conclusive . . ." Orianna LLC Agreement, ¶ 10.19.

Thirty days after notice of Ralph Most's death was given to the JM Entities, the parties should have had a settlement at which the Estate's shares were returned to the JM Entities and the JM Entities gave the Estate Note(s) representing the purchase price(s) for the shares (the "Settlement").⁵ Prior to the Settlement, the JM Entities were supposed to

use reasonable efforts to (i) obtain the removal of [Most] as a guarantor from any and all loans from any bank or other lender to the Corporations, and (ii) obtain the release of any and all assets of [Most's] used as collateral for any and all loans from any bank or other lender to the Corporations, and shall deliver at [Settlement] any executed release or releases obtained, evidencing such removal and release.⁶

Once Settlement occurred, the JM Entities had three separate obligations to the Estate. Firstly, they were to begin paying the purchase price for the Estate's shares "in 120 equal monthly installments of principal together with interest" beginning one month after Settlement.⁷ Secondly, the JM Entities were to begin paying the Estate "all amounts due and owing pursuant to any loans made by [Most] to any of the Corporations, plus all charges, penalties and accrued interest thereon, if any, as listed on the Corporations' books."⁸ Such loan amounts were to be payable "in 120 equal monthly installments of interest only on the unpaid principal balance in arrears" beginning one month after Settlement.⁹ Once the 120 interest only payments were made, the JM Entities were to repay the loan amounts "in 120 equal monthly installments of principal together with interest on the unpaid principal balance in arrears."¹⁰ Thirdly, if the JM

⁵ JM Entities Shareholders' Agreement, ¶¶ 7.1.3, 7.2.

⁶ *Id.* ¶ 7.5.

⁷ *Id.* ¶ 6.1.

⁸ *Id.* ¶ 5.1.

⁹ *Id.* ¶ 6.2.

¹⁰ *Id.*

Entities were unable, through their “reasonable efforts,” to obtain the release of Most’s personal guaranties of, or his personal property used as collateral for, their loans, the JM Entities were required, following Settlement, to indemnify the Estate

for any and all claims, losses, liabilities, damages, costs and expenses (including reasonable attorneys fees) associated with, related to or arising from [Most’s] personal guaranties of, or pledge of collateral for, such loans to the Corporations.¹¹

The parties do not say when the JM Entities were notified of Ralph Most’s death, but presumably it occurred shortly after his death. Therefore, Settlement should have occurred sometime in May or June of 2003, and the JM Entities’ duty to indemnify the Estate for the loss of its collateral and for claims based on Most’s guaranties would then have arisen. Furthermore, one month later, the JM Entities should have started making payments to the Estate of principal and interest on the purchase price and of interest only on the loan amounts. The JM Entities would then have had until approximately June, 2013 to repay the purchase price and to pay interest only on the loans, and they would have had until approximately June, 2023 to repay the loan principal with interest.

Unfortunately, the Settlement and the events which were to follow never occurred because the parties disputed (and continue to dispute) the amount due for the purchase price and the meaning of the loan repayment and indemnification provisions. Some of the issues raised by the parties may be resolved at summary judgment by referencing the terms of the Shareholders’ Agreement; other disputed factual issues will have to await resolution at trial.

¹¹ *Id.* ¶ 7.5.

A. The Purchase Price for Most's Shares in the JM Entities.

As set forth above, the purchase price for Ralph Most's shares was to be determined by the JM Entities' "regularly engaged accountant in accordance with accounting principles and practices applied on a basis consistent with prior years."¹² Lehman and the JM Entities had Michael Jacobs, who had previously done accounting work for the Corporations, perform the valuation. He initially valued Most's shares at \$253,165, but ultimately valued them at \$34,249. Lehman and the JM Entities now take the position that, under the terms of the Shareholders' Agreement, the Estate is compelled to accept Jacobs' final valuation as the purchase price.

The Estate, through its expert, takes the position that Jacobs' valuation is flawed because it was not done "in accordance with accounting principles and practices applied on a basis consistent with prior years" as required under the Shareholders' Agreement. The Estate's expert claims that the book value of the shares is \$489,000.

If, as the Estate claims, Jacobs' valuation does not conform to the requirements set forth in the Shareholders' Agreement, then the Estate cannot be compelled to accept such an incorrect number. The court is unable, at this stage in the proceedings, to resolve the parties' dispute over the book value of Ralph Most's shares as of December 31, 2002 and therefore of the purchase price to be paid at Settlement for those shares.¹³

B. The Loans Made By Most to the JM Entities.

As set forth above, once the Settlement occurred, the JM Entities were to begin paying back the loans that Ralph Most made to them. Lehman and the JM Entities claim that the principle amount due on the loans as of June 30, 2004, was \$314,154. They also claim that they

¹² *Id.* ¶ 4.2.4

¹³ For similar reasons, the court is unable to determine whether Jacob's valuation of Ralph Most's shares in Orianna is proper under the Orianna LLC Agreement. Therefore, Orianna's Motion for Summary Judgment on this issue must be denied.

have been making monthly interest only payments of \$1,089.30 to the Estate. The Estate claims that the loan amount due as of Ralph Most's death in April, 2003, was \$379,971, plus an additional amount of accrued, and presumably unpaid, interest of \$81,000. Due to the fact that the parties have offered different totals for different time frames, the court cannot presently resolve the issue of exactly how much is owed, and that issue must await trial, if the parties cannot sort it out for themselves. However, the court can resolve the issue of how the loans, specifically the portion that reflects refinancing monies obtained by Ralph Most on his home, is to be repaid under the Shareholders' Agreement.

The Estate claims that, because Ralph Most used his home as collateral for a mortgage loan and then loaned the proceeds to the JM Entities, his home must be treated as collateral pledged for a loan to the Corporations and the mortgage amount must be immediately repaid under Section 7.5 of the Agreement. However, there is no evidence that Most's home was used as collateral for a loan directly from a third party to the JM Entities. Instead, the mortgage loan was apparently made by a bank to the Mosts, and Ralph Most opted to lend the money he received to the JM Entities. As a result, this loan of mortgage proceeds is covered by Section 5.1. of the Shareholders' Agreement, governing shareholder loans, not Section 7.5 regarding collateral provided by shareholders. Since the proceeds qualify as a shareholder loan, under the Shareholders' Agreement, the JM Entities have twenty years to pay such loan back, and the first 10 years they need pay interest only, as they claim they are currently doing.¹⁴

C. The Collateral Used for Loans From Third Parties To The JM Entities.

The Estate and Ruth Most claim that Ralph Most pledged several of his own assets as collateral for loans given by third parties to the JM Entities. The Estate demands the return of

¹⁴ See JM Entities' Shareholders' Agreement, ¶ 6.2.

such assets, or immediate payment of their value, by the JM Entities under the indemnification provisions of the Shareholders' Agreement.¹⁵ Lehman and the JM Entities claim that they did the best they could to get the collateral returned, but the lenders refused. The JM Entities also argue that they have no present duty to pay the Estate and Mrs. Most the value of their assets because their indemnification obligations do not arise until they default on their loans or otherwise cause the collateral to be permanently lost.

The indemnification provisions of the Shareholders' Agreement do not permit the JM Entities to hold the Estate's and Mrs. Most's assets hostage for years in this manner. Instead, the JM Entities are supposed to use "reasonable efforts" to get the third party lenders to release the collateral, but if such efforts fail, the JM Entities are then required to indemnify, or reimburse, the Estate for loss of, or damage to, the collateral.¹⁶ The court cannot determine at this juncture whether Lehman's efforts to get the collateral released were reasonable and sufficient; that determination will have to await trial. However, the court does find as a matter of law, that, to the extent that the lenders refused to release the collateral, those assets are now lost to the Estate and Mrs. Most, and they have been damaged by that loss. As a result, once Settlement occurs, the Estate and Mrs. Most are entitled to be reimbursed by the JM Entities in full for the loss of their assets. Such assets include a \$20,000 CD and a number of shares of Connoco-Philips stock¹⁷ that Ralph Most pledged as security for a loan or loans from PIDC/Commerce Bank to the JM Entities.

¹⁵ *Id.* ¶ 7.5.

¹⁶ *Id.*

¹⁷ The Estate claims that 2,000 shares were pledged. Lehman and the JM Entities dispute that number. Whatever the number of shares held by PIDC or Commerce Bank, the JM Entities will have to reimburse the Estate for their loss.

Mrs. Most also claims that she is entitled to be reimbursed \$150,000 in proceeds from a \$400,000 life insurance policy (the “Policy”) that Ralph Most purchased on his own life with funds from either the JM Entities or Orianna.¹⁸ Ruth Most was named as beneficiary on the Policy, and she received \$250,000 of the proceeds paid on it. The remaining proceeds were seized by Equity Bank, the lender to which the policy had been pledged as collateral for a debt owed by one of the JM Entities.

Mrs. Most claims that, because she was listed as beneficiary under the Policy, the entire Policy proceeds are hers alone. She also claims that, under the indemnification provisions of the Shareholders’ Agreement, she is entitled to reimbursement from the JM Entities for the amount seized by Equity Bank. Lehman and the JM Entities (and Orianna) all claim that the Policy was intended to fund the redemption of Ralph Most’s shares under the terms of the Orianna LLC Agreement. If so, then the entire \$400,000 belongs to the Estate.

Under either party’s scenario, it appears that the \$150,000 seized by Equity Bank must be repaid: either by Orianna to the Estate as part of the Orianna redemption, or by the JM Entities to Mrs. Most as damages for loss of collateral. The court cannot resolve this issue at summary judgment because there are disputed issues of material fact as to which entity purchased the Policy and why.¹⁹

D. The Guaranty Given By Most to Altman.

Not only were the JM Entities supposed to use “reasonable efforts” to have collateral released, they were likewise supposed get Ralph Most’s personal guaranties of the JM Entities’

¹⁸ The parties dispute which entities’ funds were used to purchase the Policy and, as a result, what the purpose of the Policy was to be.

¹⁹ For this reason, the Estate’s and Orianna’s cross-Motions for Summary Judgment regarding the ownership and use of the Policy must both be denied.

debts released.²⁰ If they did not get the guaranties released, then the indemnification provisions were to apply. One such guaranty was given by Most for a loan from Altman to one of the JM Entities (the “Guaranty”). In addition to the Guaranty, Ralph Most pledged as collateral for the loan his 25.02% interest in Lenola Road Associates, LLC, whose sole asset was real property located at 468 Lenola Road, Burlington, New Jersey. That property has since been sold and Ralph Most’s share of the proceeds from the sale are currently being held in escrow. Altman claims an interest in those proceeds since they represent collateral for the loan. The JM Entities are apparently currently making payments on the loan from Altman.

Under the Shareholders’ Agreement, this factual scenario would normally trigger the JM Entities’ obligations to the Estate under the indemnification provisions. Once Settlement occurred, the JM Entities would have to reimburse the Estate for the loss of its interest in Lenola Road Associates, LLC.²¹ However, the Guaranty that Ralph Most executed in connection with Altman’s loan to the JM Entities provides as follows:

[Ralph Most] hereby waives any and all claims, rights or remedies which [he] may now have or hereafter acquire against [the JM Entities] which arise hereunder and/or from the performance by [Ralph Most] hereunder including without limitation any claim, remedy or right of subrogation, reimbursement, exoneration, contribution, indemnification, or participation in any claim, right or remedy of Altman against [the JM Entities] or against any security which Altman now has or hereafter acquires, whether or not such claim, right or remedy arises in equity, under contract, by statute, under common law or otherwise.²²

Under this provision, Ralph Most apparently waived the Estate’s right to seek indemnification from the JM Entities with respect to the Guaranty of the Altman loan and the pledge of the Lenola Road interest as collateral. However, the Estate objects that this waiver is not

²⁰ JM. Entities’ Shareholders’ Agreement, ¶ 7.5.

²¹ *Id.*

²² Guaranty, ¶ 4(b).

enforceable by the JM Entities because the JM Entities are not parties to the Guaranty and Ralph Most did not receive consideration for his waiver of the indemnification provisions in the Shareholders' Agreement. Both arguments raise questions of fact that must await determination at trial.

In order to enforce the waiver in the Guaranty, the JM Entities must show that they are intended third party beneficiaries of the Guaranty. In order to determine if the JM Entities are third party beneficiaries of the Guaranty between Most and Altman, the court must apply the standards set forth in the Restatement (Second) of Contracts.²³ Under the Restatement, “[a] promise in [the Guaranty] creates a duty in [Ralph Most] to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.”²⁴

Unless otherwise agreed between [Most] and [Altman], [JM] is an intended beneficiary if recognition of a right to performance in [JM] is appropriate to effectuate the intention of the parties and either

- (a) the performance of the promise will satisfy an obligation of [Altman] to pay money to [JM]; or
- (b) the circumstances indicate that [Altman] intends to give [JM] the benefit of the promised performance.²⁵

In order to satisfy this test, the JM Entities must prove that “recognition of a right to performance in [them] is appropriate to effectuate the intention of [Altman and Most] and either that Altman owed the JM Entities money, which does not appear to be the case, or that the circumstances indicate that Altman intended to give the JM Entities the benefit of Most’s waiver

²³ See Scarpitti v. Weborg, 530 Pa. 366, 371, 609 A.2d 147, 149 (1992).

²⁴ Restatement (Second) of Contracts, § 304 (1981).

²⁵ *Id.*, § 302.

of the indemnification provisions.²⁶ The court has not been apprised of the circumstances under which the waiver was inserted in the Guaranty, nor of Altman's and Most's intentions with respect to the JM Entities' right to enforce it, so the court cannot presently determine whether the JM Entities were intended third party beneficiaries of the Guaranty and whether they are entitled to enforce the waiver against Most's Estate. The court does note, however, that as part of the loan transaction in which Most executed the Guaranty, Altman received a right to purchase Most's shares of the JM Entities upon his death. This right to purchase is arguably a motivation for Altman to obtain from Most the waiver intended to benefit the JM Entities (and his own interests as a potential shareholder in them). Similarly, if Altman bargained for the waiver as part of the loan, then the consideration requirement may be satisfied.²⁷ Alternatively, if he or the JM Entities somehow relied upon the waiver, then the Estate may be estopped from denying it even in the absence of consideration.²⁸

The court cannot determine at this point whether the waiver of the Shareholders' Agreement's indemnification provisions is valid and enforceable. Therefore, the court also cannot determine if the JM Entities are required to indemnify the Estate for Most's Guaranty and his pledge of his interest in Lenola Road as collateral for Altman's loan.

E. Most's Personal Property In The JM Entities' Possession.

The Estate and Mrs. Most claim that certain artwork and other personal possessions of Ralph Most's are still held by the JM Entities. The JM Entities say they are willing to return the

²⁶ See Scarpitti, 530 Pa. at 371, 609 A.2d at 149 ("The first part of the [Restatement's] test sets forth a standing requirement which leaves discretion with the court to determine whether recognition of third party beneficiary status would be appropriate. The second part defines the two types of claimants who may be intended as third party beneficiaries. If a party satisfies both parts of the test, a claim may be asserted under the contract.")

²⁷ Restatement (Second) Contracts, § 71 (1981).

²⁸ See Kreutzer v. Monterey County Herald Co., 560 Pa. 600, 606, 747 A.2d 358, 361 (2000), citing Restatement (Second) Contracts § 90 (1981); Novelty Knitting Mills v. Siskind, 500 Pa. 432, 457 A.2d 502, 503 (1983).

items requested, upon condition that the Estate execute a release of all such claims. It appears to the court that the parties should be able to resolve these issues themselves. If not, proof of the Estate's ownership of the items may be presented at trial.

II. The Motion For Partial Summary Judgment Of Ruth Most And The Estate Against Altman Must Be Denied And The Motion For Partial Summary Judgment Of Altman Must Be Granted In Part and Denied in Part.

Altman moved to dismiss the Estate's and Mrs. Most's claims against him for breach of contract, an accounting, declaratory judgment, and civil conspiracy.²⁹ In support of such claims against Altman, the Estate and Mrs. Most allege that Altman and Lehman conspired 1) to make the Estate pay off Altman's loans to the JM Entities under the Guaranty, so as to increase the assets of the JM Entities, and 2) to lower the purchase price for Most's shares of the JM Entities, so that the JM Entities can buy them back from the Estate and then re-sell them to Altman or his designee at less than their true value.

The Estate may assert a claim for breach of contract against Altman based on the Guaranty. Altman previously attempted to collect on the Guaranty by confessing judgment against the Estate. He subsequently filed a counterclaim in this action for breach of contract, in which Altman claims that "the loans have not been repaid and the Most Estate refuses to honor the Guaranty Agreement. There is currently due and owing . . . \$541, 985.87."³⁰ However, Altman nowhere describes the event of default that permits him to enforce the Guaranty against the Estate.³¹ Instead, the evidence shows that Altman waived payment on the loan at the time of Ralph Most's death and that Altman also acquiesced in the sale of the collateral securing the

²⁹ These claims were asserted against Altman, Lehman, and/or the JM Entities jointly. The remaining claims for conversion, unjust enrichment, constructive trust, breach of fiduciary duty, direct participant liability, and piercing the corporate veil were asserted against Lehman and the JM Entities only.

³⁰ Answer with New Matter and Counterclaim of Defendant David Altman, ¶¶ 133-4.

³¹ Guaranty, ¶ 1.

loan. If all such potential defaults were waived, then Altman's attempts to enforce the Guaranty could constitute a breach of the Guaranty. Furthermore, given that the Estate and Altman dispute how much is currently due under Note, the claim for an accounting regarding the outstanding amount of the loan is also valid.

The claims for conspiracy and declaratory judgment do not fare as well. Although Altman clearly has an interest in having Most's shares valued low, the Estate has offered no evidence that Altman did anything to deflate their value or to assist the JM Entities in valuing the shares lower than they should be. At most, the JM Entities have breached the Shareholders' Agreement and/or Lehman has breached his fiduciary duty to the Estate by having Jacobs value the shares too low. However, such possibly wrongful acts by Lehman and the JM Entities cannot, without more, be imputed to Altman in order to establish that he was a party to a conspiracy to defraud the Estate.

"In order to state a cause of action for civil conspiracy, a plaintiff must show that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice, i.e., an intent to injure, is essential in proof of a conspiracy."³² Likewise, under the related claim for aiding and abetting tortious conduct, Altman can be held liable only if the Estate can show that he

- (a) [did] a tortious act in concert with [Lehman] or pursuant to a common design with him, or
- (b) [knew] that [Lehman's] conduct constitutes a breach of duty and [gave] substantial assistance or encouragement to [Lehman] so to conduct himself, or
- (c) [gave] substantial assistance to [Lehman] in accomplishing a tortious result and [Altman's] own conduct, separately considered, constitutes a breach of duty to the [Estate].³³

³² Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 211, 412 A.2d 466, 472 (1979).

³³ Restatement (Second) Torts, § 876 (1979). At least one Pennsylvania court has recognized the tort of aiding and abetting breach of fiduciary duty as a viable cause of action. See Koken v. Steinberg, 825 A.2d 723, 731-2 (Pa. Commw. 2003).

Although the Estate may be able to show that Lehman breached his fiduciary duty to the Estate and that Altman concurrently breached the terms of the Guaranty, such separate wrongs do not constitute a conspiracy without proof of collusion, which the Estate has not provided. Therefore, the Estate's claims for conspiracy and declaratory judgment against Altman must be dismissed.

The Estate cross-moved to dismiss Altman's claim to enforce the Guaranty on the grounds that Altman is required under the Shareholders' Agreement to release the Guaranty that Most gave him. Although the Shareholders' Agreement is referenced in the loan documents, that does not make Altman a party to it, so its indemnification provisions cannot be enforced against him. Until such time as he purchases the Estates' share of the JM Entities, he is a creditor of, not a shareholder in, the JM Entities

CONCLUSION

For all the foregoing reasons, the Motion for Partial Summary Judgment of Ruth Most and the Estate against Lehman and the JM Entities and the Motion For Partial Summary Judgment of the JM Entities and Lehman are granted in part and denied in part, the Motion for Partial Summary Judgment of Ruth Most and the Estate against Altman is denied, Altman's Motion for Summary Judgment is granted in part, and the Motion for Partial Summary Judgment of Ruth Most and the Estate against Orianna and Orianna's Motion for Summary Judgment are denied.

BY THE COURT,

ALBERT SHEPPARD, JR., J.

May 29, 2007