

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

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<b>ZENA ASSOCIATES, LLC</b>	:	<b>March Term, 2008</b>
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<b><i>Plaintiff</i></b>	:	<b>No. 05874</b>
	:	
<b>v.</b>	:	<b>Commerce Program Court</b>
	:	
<b>ANDREW C. ABRAMS ET AL.</b>	:	
	:	<b>Control Nos. 09092851, 09091804</b>
<b><i>Defendants</i></b>	:	

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**MEMORANDUM OPINION**

Before the court are a motion for partial summary judgment filed by Defendants, and a motion for summary judgment filed by Additional Defendants. For the reasons below, the motion for partial summary judgment filed by Defendants is granted in part and denied in part, and the motion for summary judgment filed by Additional Defendants is denied.

**Background**

Plaintiff, Zena Associates, LLC (“Plaintiff,”) owns the patent and manufacturing rights to a hosing system designed to prevent the spillage of toxic, harmful, or flammable liquids. Defendant, Joseph Abrams, invented the hosing system, owned the patent rights thereto, and manufactured and sold the hoses through a number of companies collectively known as “Smart Hose.” Joseph Abrams and his son Andrew (the “Abrams Defendants,”) were guarantors of a loan obtained by Smart Hose from the Pennsylvania Business Bank (the “Bank”). Charles McMurtrie and Albert Michell, were

creditors of Smart Hose and are members of Zena. Andrea Guevara is a member of Zena. McMurtrie, Michell and Guevara are “Additional Defendants” in this action.

Smart Hose defaulted on its loan in 2003. In 2004, the Bank secured judgment against Smart Hose and its guarantors for an amount exceeding \$1.5 million. Subsequently, the Bank assigned its interest in the judgment to First Southwestern Financial Services (“FSFS.”) FSFS began proceedings to auction off the assets of Smart Hose.<sup>1</sup>

On 30 June 2005, the Abrams Defendants, and Additional Defendants McMurtrie and Michell, formed Zena to acquire the assets of Smart Hose at the auction. On the same day, the Abrams Defendants, Additional Defendants, Smart Hose, Zena, and FSFS, entered into a separate, fully-integrated agreement, whereby Zena agreed to bid for the assets of Smart Hose. Under this contract, Zena agreed to bid \$1.5 million, plus interest, fees and costs, and to acquire the assets “as is, where is,” if the Zena bid prevailed.<sup>2</sup> Smart Hose and the Abrams Defendants “jointly and severally” represented to Zena that all the assets to be purchased by Zena, constituted “all the assets which have been used in connection with, and which are necessary for the operation of, the business.”<sup>3</sup> The Abrams Defendants reasserted this representation while Zena prepared to bid.<sup>4</sup>

On 9 August 2005, Zena won the bid. Zena raised the money to complete the acquisition by borrowing \$725,000 from the Abrams Defendants. Zena agreed to repay

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<sup>1</sup> Undisputed facts, Answer to the Amended Complaint, ¶¶, 14-15.

<sup>2</sup> Agreement, ¶¶ 4, 6(b), 7(c), attached as Exhibit A to the amended complaint.

<sup>3</sup> Agreement, ¶ 7(c), attached as Exhibit A to the amended complaint.

<sup>4</sup> Amended Complaint, ¶ 22.

this loan by executing a promissory note in favor of the Abrams Defendants.<sup>5</sup>

On 12 August 2005, the Abrams Defendants and Zena entered into an Indemnification Agreement which was subsequently modified and executed. Under the final version of the Indemnification Agreement, the Abrams Defendants represented that one of the “material assets used by the Smart Hose Entities” was a patent held by a third party. The Abrams Defendants promised to cause that third party “to assign and transfer the patent to Zena.”<sup>6</sup> The Abrams Defendants also promised to indemnify Zena against any loss arising from any breach of the “covenants, warranties or representations” contained in the Indemnification Agreement.<sup>7</sup> On the same day, 12 August 2005, Joseph Abrams and Additional Defendants McMurtrie and Michell entered into an operating agreement detailing the roles and duties for the members of Zena. Joseph Abrams, a trained engineer, was hired to certify the safety of all hoses available for sale.

According to the amended complaint, Zena discovered in April 2007 that the assets acquired at the auction were mostly “obsolete and un-saleable.”<sup>8</sup> Zena took the position that the Abrams Defendants had induced Zena’s bid by making material misrepresentations about the value of the Smart Hose assets. In February 2008, Zena defaulted on the promissory note and terminated the employment of Joseph Abrams. Zena continued to operate the business and certified the safety of its hoses by using an existing signature of Joseph Abrams.

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<sup>5</sup> Promissory note dated 16 August 2005, exhibit B to the amended complaint.

<sup>6</sup> Indemnification Agreement, attached as Exhibit R to the motion for partial summary judgment of the Abram Defendants.

<sup>7</sup> Indemnification Agreement, attached as Exhibit R to the motion for partial summary judgment of the Abram Defendants.

<sup>8</sup> Amended complaint, ¶ 35.

On 3 April 2008, Zena filed an initial complaint against the Abrams Defendants. On 20 May, 2008, the Abrams Defendants filed an answer with counterclaims to the initial complaint, and filed an Additional Defendants Complaint against McMurtrie, Michell, and Guevara. The complaint filed against the Additional Defendants asserts the claims of breach of fiduciary duty, misappropriation and misuse of the Abrams name, civil conspiracy, aiding and abetting the civil conspiracy, and waste of assets. On 22 July 2009, the Additional Defendants filed an amended answer with counterclaim to the Additional Defendants Complaint. In the counterclaim, McMurtrie and Michell assert the claims of fraud and breach of a duty of loyalty against the Abrams Defendants, and ask the Court to declare that the promissory note was invalid from the onset.

On 10 November 2008, Zena filed an Amended Complaint. The amended Complaint asserts the claims of fraud, breach of express warranties, breach of contract and breach of fiduciary duty against the Abrams Defendants. On 4 December 2008, the Abrams Defendants filed an answer with new matter and counterclaims to the Amended Complaint. The counterclaims to the Amended Complaint assert the claims of breach of promissory note and misappropriation and misuse of the Abrams name.

On 14 September 2009, the Abrams Defendants filed a motion for partial summary judgment against Zena and the Additional Defendants (motion No. 09091804). This motion asserts that the Abrams Defendants are entitled to judgment against Zena for breach of the promissory note, and on the claims of indemnity and breach of express warranty. The motion also asserts that the Abrams Defendants are entitled to summary judgment on the fraud claims asserted by Zena in the Amended Complaint, and by the Additional Defendants in their counterclaim.

On 18 September 2009, Additional Defendants McMurtrie, Michell and Guevara filed their motion for summary judgment against the Abrams Defendants (motion No. 09092851.) This motion asserts that the Additional Defendants are entitled to judgment in their favor because the Abrams Defendants have failed to come forward with sufficient evidence to establish a material issue in any of their claims.

### **Discussion**

Under the Pennsylvania Rules of Civil Procedure, “the court shall enter judgment whenever there is no genuine issue of material fact as to a necessary element of the cause of action or defense that could be established by additional discovery.”<sup>9</sup> “Under the rules, a motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. For purposes of summary judgment, the record includes any pleadings, interrogatory answers, depositions, admissions, and affidavits.”<sup>10</sup>

#### **I. Additional Defendants McMurtrie and Michell lack standing to assert claims against the Abrams Defendants.**

The Abrams Defendants seek summary judgment on the claims of fraud, breach of fiduciary duty and for declaratory judgment, asserted by Additional Defendants in the counterclaim to the Additional Complaint. To support their argument, the Abrams Defendants rely on Pennsylvania case law holding that stockholders lack standing to directly assert claims which stem from injuries suffered by the corporation.<sup>11</sup> These cases do not address whether members of a limited liability company lack standing to

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<sup>9</sup> Fine v. Checcio, 870 A.2d 850, 857 (Pa. 2005).

<sup>10</sup> Scalice v. Pa. Emples. Benefit Trust Fund, 883 A.2d 429, 435 (Pa. 2005).

<sup>11</sup> Burdon v. Erskine, 401 A.2d 369, 370 (Pa. Super. 1979).

directly assert such claims, and this court sought guidance from case law developed in another jurisdiction.

“[D]irect Claims are available only where the member has suffered damage that is independent of any damage suffered by the limited liability company.” Kuroda v. SPJS Holdings, LLC, 971 A.2d 872 (Del. Ch. 2009). In Kuroda, plaintiff was founder and manager of a limited liability company named Fugen, and was a non-managing member of another limited liability company named SPJS. Plaintiff sued the managing members of SPJS alleging that they had disparaged his business reputation and had caused him to lose business opportunities flowing through Fugen. Defendants moved to dismiss for failure to state a claim upon which relief could be granted, and the Court of Chancery of Delaware granted the motion. The Court reasoned: “[b]ecause the complaint does not properly allege that [plaintiff] was harmed individually, apart from his interest in Fugen, the claim for tortious interference with economic advantage must be dismissed... [Plaintiff] has failed to allege any harm to himself individually because all of [plaintiff’s] alleged harms flow through his involvement with Fugen.”<sup>12</sup>

This reasoning is persuasive. In this case, Zena is a limited liability company, and Additional Defendants are its members. Zena sued the Abrams Defendants who counterclaimed and filed an Additional Complaint against the Additional Defendants. The Additional Defendants counterclaimed for financial losses incurred through Zena, and assert that their losses stemmed from the misrepresentations of the Abrams Defendants.<sup>13</sup> This counterclaim does not allege that the Additional Defendants suffered

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<sup>12</sup> Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872, 886-887 (Del. Ch. 2009).

<sup>13</sup> Counterclaim, ¶¶ 91-97.

financial injury flowing separately from their involvement with Zena.<sup>14</sup> Additional Defendants have failed to rebut the argument that they lack standing to assert their claims. The motion for summary judgment of the Abrams Defendants is granted. Additional Defendants lack standing to assert claims contained in their counterclaim to the Additional Complaint.

**II. Zena may not assert the claim of breach of express warranties.**

In Count II of the amended complaint, Zena asserts the claim of breach of express written warranties. According to Zena, the Abrams Defendants represented in a written contract that the assets and patent to be acquired by Zena constituted all of the assets “necessary” for the operation of the safety hose business.<sup>15</sup> Zena contends that such assets were “obsolete and un-saleable,” and incapable of constituting assets necessary to operate the business.<sup>16</sup> The Abrams Defendants move to dismiss this claim. They argue that the claim of breach of express warranty can be asserted by a buyer against the seller. The Abrams Defendants note that the assets of Smart Hose were sold to Zena by FSFS through a public auction. They conclude that Zena may not assert this claim because the Abrams Defendants did not sell the assets. In the answer in opposition and memorandum of law, Zena fails to dispute whether the Abrams Defendants were non-sellers of the Smart Hose assets, and fails to dispute the validity of their legal argument.

Express warranties are created by “any affirmation of fact or promise made by the seller to the buyer.... [T]he whole purpose of the law of warranty is to determine what ...

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<sup>14</sup> Counterclaim, ¶¶ 95, 101-102.

<sup>15</sup> Amended complaint, ¶ 46.

<sup>16</sup> Amended complaint, ¶ 35.

the seller has in essence agreed to sell.”<sup>17</sup> In this case Zena has failed to dispute that the Abrams Defendants were non-sellers, and failed to oppose the legal merits of their argument. The motion for partial summary judgment of the Abrams Defendants is granted as to Count II of the amended complaint. Zena may not maintain the claim of breach of express written warranties asserted against the Abrams Defendants.

**BY THE COURT,**

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***ARNOLD. L. NEW, J.***

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<sup>17</sup> Goodman v. PPG Industries, Inc., 849 A.2d 1239, 1243 (Pa. Super. 2004).