IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

CAROL E. ALBERT, and COLLEEN WARD	: JUNE TERM, 2001
Plaintiffs,	: No. 0914
v.	
	: Commerce Program
LUCY'S HAT SHOP LLC, and AVRAM HORNIK	*:* Control No. 072092
Defendants.	

O R D E R

AND NOW, this 31st day of December 2002, upon consideration of plaintiffs' Motion for Summary Judgment as to defendants' Counterclaim, the defendants' response in opposition, the respective memoranda, all other matters of record, and in accord with the Opinion being contemporaneously filed with this Order, it is hereby **ORDERED** that the Motion is **Granted** and defendants' counterclaims against plaintiffs are **Dismissed**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... December 31, 2002

Presently before the court is plaintiffs, Carol Albert and Colleen Ward's ("plaintiffs"), Motion for Summary Judgment ("Motion") as to the Counterclaim of defendants, Lucy's Hat Shop, LLC ("Lucy's" or the "Company"), and Avram Hornik ("Hornik") (collectively, the "defendants"). For the reasons discussed, this court **Grants** the Motion.

BACKGROUND

I. The Complaint

Lucy's Hat Shop is a Bar/Restaurant in Old City, Philadelphia, where it is good to be seen, with or without a hat. The plaintiffs, Carol Albert and Colleen Ward, are non-managing shareholders of Lucy's, a limited liability company.[1] Amended Complaint, ¶¶ 1, 2, 6. Defendant, Hornik, is the manager of the company and a shareholder. Id., ¶ 6; Id., Exhibit A. Sometime ago it was anticipated that Lucy's was going to be sold. Disagreements among the shareholders arose over the management of Lucy's finances and its proposed sale.

On July 23, 2001, plaintiff filed the Amended Complaint ("Complaint") in equity. The Complaint requested that this court direct: 1) that any proceeds of the sale of Lucy's be placed into an escrow account until approved either by the court or the parties to the suit, 2) that any costs or expenses relating to the sale which will cause the gross sale price to fall below $700,000 be approved either by this court or the parties, and, 3) that the defendants make the books, records and financial statements available for inspection. Id.

Plaintiffs based their claims on two agreements, the Operating Agreement and the Unanimous Consent Agreement (collectively, the "Agreements"), which they allege defendants breached. Complaint, Exhibits A and B. After the Complaint was filed, the parties engaged in busy motion practice, including preliminary objections, a preliminary injunction, and motions to compel discovery. On November 6, 2001, defendants filed an Answer, New Matter, and Counterclaim.

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[1] The record reflects that on December 14, 2001, the parties stipulated to the dismissal of Senuj Ravindran as a plaintiff.

The anticipated sale of Lucy's never took place and thus, the first two claims in the Complaint relating to the sale of Lucy's were marked moot. Plaintiffs' third claim was superseded by plaintiffs filing an action requesting the same relief in the Eastern District of Pennsylvania.[2] Defendants' Counterclaim, however, remained active in this court. See this court's Order dated April 18, 2002.

II. The Agreements Between the Parties

The Operating Agreement

The parties, along with other individuals, executed the Operating Agreement in late 1997, when the Company was formed. Complaint, Exhibit A. The Operating Agreement, discusses member meetings, classes of membership, voting procedure, and the discretion and limitations on actions of the managing member. Id. According to the Operating Agreement, defendant Hornik is the managing member, and plaintiffs are voting members. Id. The managing member may unilaterally manage and control the business of the Company, and bind the Company to various obligations, except as specifically limited in Section 8.8 of the Operating Agreement. Id., Section 8.3-8.4. Section 8.8 specifies that the managing partner must "obtain the consent of a two-third majority of [v]oting [m]embers," before: (a) incurring capital expenses above $10,000.00, and (e) liquidating the Company. Id., Section 8.8. Furthermore, under the Operating Agreement, all members have the right to inspect the Company's financial books and records. Id., Section 6.2.

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[2] That case, Ward, et al, on behalf of Lucy's Hat Shop, LLC v. Hornik, et al., 02-CV-944 (E.D. Pa. 2002), was dismissed by the Judge Ludwig on June 3, 2002, because it lacked the proper shareholder representation for a derivative suit.

The Unanimous Consent Agreement

On April 25, 2001, the shareholders entered into the Unanimous Consent Agreement ("UC Agreement"")[3] to approve the sale of Lucy's to Peter Dissin. The UC Agreement limited the voting members' approval of the sales contract by providing that any changes to the sales contract would be subject to review and approval. The UC Agreement designated plaintiff Colleen Ward to consent to any changes to the sales contract. UC, ¶ 1.

The UC Agreement provided the following conditions for the approval of the sale:

(1) Members may submit questions to Hornik concerning the Company's 1999 or 2000 finances, questions which Hornik is to respond to within ten days. Id., ¶ 3.

(2) The Company's 2000 financial records are to be reviewed by an independent Certified Public Accountant ("CPA") selected according to a particular process. Id., ¶ 4. Specifically, the members are to identify their respective choices for a CPA by May 3, 2001; they are to agree on one or select one by majority vote by May 7, 2001; the CPA's review is to be completed by June 1, 2001. Id.

(3) The CPA's review is to be conducted by a process specified in the UC, "taking into account customary industry standards and practice," to determine that there were no material misrepresentations of the 2000 financial information presented by Hornik to the other members. Id., ¶ 4. The determination of what constitutes a material misrepresentation was to be made by the CPA. Id.

(4) If the CPA finds a material misrepresentation, then an audit of the Company's finances for the years 1999 and 2000 is to be carried out. The proceeds of the sale of Lucy's would be held in escrow until the result of the audit to determine distribution of the proceeds.

(5) The costs of the initial CPA's review and any further audit required by the finding of a material misrepresentation are to be borne by the Company. Id., ¶¶ 4, 6.

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[3] Although it purports to be unanimous, the UC Agreement, or the copy of it that was attached to the Complaint, is executed by only seven of the ten members of the Company. As such, it nonetheless meets the required majority to make the dissolution of the Company valid under the Operating Agreement.

III. The Counterclaim

In their Counterclaim, defendants deny that they breached either the Operating Agreement or the UC Agreement. Specifically, defendants state that a CPA was selected pursuant to the procedure dictated by the UC Agreement, and the CPA never found a material misrepresentation in the company's financial records. Counterclaim, ¶¶ 42-43. Defendants claim that plaintiffs' suit itself violated both Agreements. Id., ¶¶ 44-46. The damages demanded in the Counterclaim are those expenses allegedly incurred as a consequence of plaintiffs violating those Agreements and include "accounting and other professional fees and the cost of this action." Id., ¶ 47.

IV. The Summary Judgment Motion

Plaintiffs argue that defendants have no legal claim, even if the court were to consider as true the facts defendants allege. Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment ("Memorandum"), p. 2. Attorney fees and other costs incurred in litigation are, according to plaintiffs, not recoverable in a breach of contract action. Memorandum, pp. 3-4. As for the accounting fees, plaintiffs argue that they were not caused by any breach of contract by plaintiffs. Id., p. 5.

In their Response, defendants reiterate that plaintiffs breached the UC Agreement. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment ("Opposition Memorandum"), p. 5. Purportedly, plaintiffs should have accepted the CPA's report. Opposition Memorandum, pp. 9-10. Defendants assert that instead of accepting the CPA's report regarding the company's financial records, plaintiffs initiated litigation for an audit and the establishment of an escrow account which, under the UC Agreement, they could only do had the CPA reported a material misrepresentation in the Company's financial records. Id., pp. 10-11. Defendants urge that plaintiffs' suit

itself was a breach of the Agreements. Thus, defendants assert that the costs they incurred in the ensuing litigation resulted directly from plaintiffs' breach. Id.

Defendants argue further that they are entitled to attorney fees by virtue of 42 Pa. C.S. §2503 in that plaintiffs sued them "to harass and annoy" them in vexatious litigation. Opposition Memorandum, pp. 14-15. Defendants bolster that argument by stating that plaintiffs "fraudulently induced" them to enter into the UC Agreement. Defendants' Response to Plaintiffs' Motion, ¶¶ 12-13. Defendants also argue that they contracted with the CPA and incurred his fees because plaintiffs had agreed to accept his results. Id. Finally, defendants claim that plaintiffs fraudulently represented that they would accept the CPA's report. Id.

DISCUSSION

I. Legal Standards on a Summary Judgment Motion

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure allows a court to enter summary judgment "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action." Pa. R. Civ. P. 1035.2 (1). The record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." Pennsylvania State University v. County of Centre, 532 Pa. 142, 145, 615 A.2d 303, 304 (1992)(citations omitted). The court may accept as true only those facts specifically admitted by the non-movant and neither party will be deemed to have admitted conclusions of law. Mellon Bank v. National Union Ins. Company of Pittsburgh, 768 A.2d 865, 868 (Pa. Super. 2001)(citations omitted). Only where it is clear that the moving party is entitled to judgment as a matter of law will summary judgment be entered. Skipworth v. Lead Industries Ass'n., Inc., 547 Pa. 224, 230, 690 A.2d 169, 171 (1997).

The Rule also provides that summary judgment may be entered where "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense." Pa. R. Civ. P. 1035.2. Indeed, a court must grant a motion for summary judgment when a non-moving party fails to "adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor." Ertel v. Patriot-News Co., 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996) (citation omitted).

II. Defendants' Claims To Attorney Fees

A. Attorney Fees Under 42 Pa. C.S. § 2503

In their Response to plaintiffs' Motion, defendants argue that, under 42 Pa. C.S. § 2503, they are entitled to attorney fees because plaintiffs induced them to contract, plaintiffs intended to harass them, and plaintiffs engaged in fruitless, arbitrary, and vexatious litigation which has no basis in law or fact. See Opposition Memorandum, pp. 14-15. Defendants then cite law which supports the proposition that in such circumstances, the law permits recovery which includes the costs of defending bad faith litigation. Id., pp. 14-16.

No bad faith claim, fraud claim, or vexatious litigation claim, whether specifically based on a statute or not, was set forth in defendants' Counterclaim. Furthermore, while defendants state in the Counterclaim that plaintiffs "brought and continued this action . . . in bad faith," no facts supporting that particular claim, or the other claims defendants make in their Opposition Memorandum were pled. Defendants' Answer to Amended Complaint, New Matter and Counterclaim, ¶ 44.

The Counterclaim is a pleading. Pa. R. Civ. P. 1017. Rule 1020 (d) (1) states:

> If a transaction or occurrence gives rise to more than one cause of action against the same person, including causes of action in the alternative, they shall be joined in separate counts in the action against such person.

Pa. R. Civ. P. 1020 (d). Subsection (4) further provides:

> Failure to join a cause of action as required by subdivision (d)(1) of this Rule shall be deemed a waiver of that cause of action as against all parties to the action.

Id. Thus, under Pennsylvania law, defendants waived any cause of action not pled in the Counterclaim.

In their brief, defendants nevertheless attempt to document plaintiffs' alleged bad faith and vexatious conduct. "However, [b]riefs are not part of the record, and the court may not consider facts not established by the record." Erie Indemnity Co. v. Coal operators Casualty Co., 441 Pa. 261, 265, 272 A.2d 465, 467 (1971). Indeed, motion briefs are neither "pleadings, depositions, answers to interrogatories, admissions on file, [nor] affidavits," and thus will not supplement the evidentiary record. See Horne v. Haladay, 728 A.2d 954 (Pa. Super. 1999). Therefore, the record lacks facts upon which defendants may base claims to attorney fees under 42 Pa. C.S. § 2503.

B. Attorney Fees for Violation of the Agreements Between The Parties

The Counterclaim pleads breaches of both of the Agreements.[4] Counterclaim, ¶¶ 45-46. Specifically, defendants allege that plaintiffs proceeded on a course of conduct which they had agreed to pursue only if defendant Hornik had not performed his end of the agreement. Indeed, plaintiffs purportedly

[4] Defendants also claim a violation of the Limited Liability Law of 1994 without any factual allegations to support that claim. Counterclaim, ¶ 46. The court cannot entertain this claim as stated. "The material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa. R. Civ. P. 1019.

rejected a properly selected CPA's findings of no material misrepresentations, and sued defendants. Id., ¶¶ 41-44.

In their Motion, plaintiffs argue that, as a matter of law, even if plaintiffs were the ones who breached the UC Agreement, attorney fees are not recognized as an element of damages in Pennsylvania. Motion, pp. 3-4. Plaintiffs are correct. Our Supreme Court has stated that Pennsylvania consistently follows the American rule "that there can be no recovery of attorneys' fees from an adverse party, absent an express statutory authorization, a clear agreement by the parties or some other established condition." Merlino v. Delaware County, 556 Pa. 422, 425, 728 A.2d 949, 950 (1999). Therefore, even were defendants to succeed on the merits of a breach of the Agreements, "attorney's fees incurred in litigation cannot be recovered from the losing party." Sheriff v. Sheriff, 802 A.2d 644, 645 (Pa. Super. 2002).

Apparently, defendants read the UC Agreement as a "clear agreement" not to sue. Opposition Memorandum, p.10; See Merlino, 556 Pa. At 425, 728 A.2d at 950. They claim the UC Agreement was entered into "in order to avoid litigation expenses and costs." Opposition Memorandum, p. 3. They further claim that when the members agreed to accept the CPA's report and not to request a further audit or an escrow account, the members also "clearly [agreed to] no litigation." Id., p. 5. Accordingly, defendants claim the litigation expenses incurred by defendants are a direct result of plaintiffs' violation of an agreement not to litigate. Id., p. 10.

However, there simply is no clear agreement not to litigate in the UC Agreement, as required by Merlino. See, UC Agreement (Complaint, Exh. B.). The only language relating to legal costs refers to reimbursing the members for previously incurred legal fees or fees incurred in preparing the agreement between the parties. UC Agreement (Complaint, Exh. B), § 5. Agreements not to sue must meet strict

standards and spell out the intent of the parties with the utmost particularity. See Zimmer v. Mitchell and Ness, 253 Pa. Super. 474, 478, 385 A.2d 437, 439 (1978).

Defendants not only erroneously find an agreement not to litigate, they elevate such agreement to the status of a court adjudicated settlement agreement. Opposition Memorandum, p. 11. Defendants cite to a case where this court, affirmed on appeal, awarded plaintiff damages which included counsel fees. Id., citing Bata v. Central Penn National Bank, 57 Pa. D. & C. 2d 219 (C. P. Phila. 1971). At a minimum, the agreement in Bata clearly included a commitment not to sue by that party who ultimately sued and was consequently ordered to compensate the other party for litigation costs. Bata, at 225, 229. Indeed, the agreement between the parties in Bata stated: "Recognizing the importance of harmonious operations of Bata-Best, Jan A. Bata undertakes that he will not commence or take part as a party in any lawsuit concerning any affairs of Bata-Best." Bata v. Central-Penn National Bank of Philadelphia, 448 Pa. 355, 361, 293 A.2d 343, 347 (1973)(citing the settlement agreement between the parties). In addition, in Bata, the underlying agreement between the parties had been found to be valid and binding. Here, there is no settlement agreement, let alone an agreement to justify litigation cost damages.

Finally, defendants cite to Reichard v. Dunwoody, in which the Eastern District, applying Pennsylvania law, permitted plaintiff's recovery of litigation costs. Reichard v. Dunwoody, 45 F.Supp. 153 (E.D. Pa. 1942). Reichard is not inconsistent and may be distinguished. In Reichard, plaintiff was attempting to recover those costs which plaintiff had incurred in defending a case brought by a third party, which defendant declined to litigate despite his being ultimately the liable party. Reichard, 45 F. Supp. at 157. These costs were not those incurred by the winning party in a typical situation. "Litigants must bear the expense of counsel as an incident of establishing their legal rights." Id. Reichard, citing to Carleton v.

Lombard, establishes the right only to consequential damages as stated by our Supreme Court in Wolstenholme, Inc. v. Jos. Randall & Bro., Inc. Id., (citing Carleton v. Lombard, Ayres & Co., 19 App. Div. 297, 46 N.Y.S. 120 (N.Y.App. Div. 1897); Wolstenholme, Inc. v. Jos. Randall & Bro., Inc., 295 Pa. 131, 136, 144 A. 909, 911 (1929). Defendants cannot rely on Reichard in that they are not seeking consequential damages resulting from their having had to defend a suit filed by a third party against them because of any act of plaintiffs. Id.

Thus, plaintiffs' summary judgment as to defendants' claims for attorney fees is granted.

IV. Defendants' Claims to Accounting Fees

Defendants claim accounting fees as damages resulting from plaintiffs' breach of the Agreements. Counterclaim, ¶¶ 45-47. Defendants reiterate that an appropriately selected CPA reported that he found no material misrepresentations in the Company's financial records. Counterclaim, Attachment 1. Thus, when plaintiffs sued for an audit, they violated the UC Agreement.[5] Indeed, according to defendants, plaintiffs could only resort to the above actions if the CPA was not selected according to the procedures proscribed in the UC Agreement and/or if he found that the managing member had made material misrepresentations to the voting members. Defendants argue that their damages were incurred in reliance of plaintiffs' promise. Defendants' Sur-Reply, pp. 11-12.

[5] Alternatively, defendants argue that "plaintiffs fraudulently induced defendants to enter into the UC Agreement and arrange to retain Hui (the CPA) and incur the cost of his examination of Lucy's records." Response to Motion, ¶¶ 12-13. Had defendants timely and sufficiently pled fraud, they may have been able to recover the cost of the CPA's fees. However, as discussed above, defendants may not claim a new cause of action at this stage.

Plaintiffs assert that even assuming they breached the UC Agreement, that breach did not result in the accounting fees because the parties had initially agreed that the cost of the CPA's review would be borne by the Company. Memorandum, p. 5. Be that as it may, if plaintiffs breached the UC Agreement, defendants would be excused from performing their end of the bargain, that is, to bear the cost of the allegedly improperly rejected CPA review. Indeed, defendants may be entitled to damages if they followed the procedures set forth in the UC Agreement to incur the costs for the CPA in reliance on plaintiffs' commitment to abide by the CPA's review.[6] "The law makes clear that reliance damages may be available, following the breach of a contract, in order to put a party back in the position in which he would have been had the contract not been made." Shovel Transfer & Storage, Inc. v. Pennsylvania Liquor Control Board, 559 Pa. 56, 70, 739 A.2d 133, 140 (1999).

In reviewing the UC Agreement to determine whether plaintiffs breached that agreement, the following facts are noted:

- The UC states that the parties should agree on a CPA by May 7, 2001, and if they do not, they are to conduct a simple majority vote, that includes the managing member, to elect one of the accountants submitted.
- The accountant's review must be completed by June 1, 2001.
- The CPA's review should be based on generally accepted accounting principles ("GAAP").
- There is no "time of the essence clause" regarding the actions described in the UC Agreement. That condition is explicitly stated regarding the agreement of the sale of Lucy's to Peter Dissin.[7]

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[6] The CPA selected by defendants submitted three invoices to the Company, as follows: July 7, 2001, $ 1,575; September 14, 2001, $ 175; September 24, 2001, $ 225. Motion, Exh. B.

[7] Defendants erroneously state that the UC Agreement limits the "time of the essence" provision to the execution of the UC Agreement by the members. Sur-Reply Memorandum in Opposition to Motion, p. 10. In fact, a plain reading of the document demonstrates that the "time of the essence" provision refers to the agreement of sale for Lucy's. See Complaint, Exhibit B., ¶ 1.

- Nothing in the UC Agreement is to be construed to constitute a waiver of the terms of the Operating Agreement.

Also, it is undisputed, as reflected in plaintiffs' Motion, that the CPA hired by the Company submitted a report on August 6, 2001, which report gave a 'clean' review with no material misrepresentations, and represents that it followed the procedures dictated in the UC Agreement.

Thus, the CPA review was not available to the members until two months past the deadline agreed upon in the UC Agreement.[8] Unless defendants had a legitimate excuse for the delay, the facts support plaintiffs' position that defendants breached the UC Agreement and, thus, plaintiffs were not bound to accept the report.

Defendants advance two arguments in response. First, they claim that time was not of the essence in performing the UC Agreement. The court disagrees. That provision may be implied, where not explicitly stated in a contract, when the parties intended time to be of the essence. "It is firmly settled that the intent of the parties to a written contract is contained in the writing itself." PNC Bank v. Kerr, 802 A.2d 634, 641 (Pa. Super. 2002)(finding that time was of the essence even in the absence of such clause where parties were rewarded when performing by a deadline); Shumaker v. Lear, 235 Pa. Super. 509, 515, 345 A.2d 249, 252 (1975)(stating that time may be necessarily implied to be of the essence). In the UC Agreement the parties set a specific deadline for every step related to the CPA's review. There was a deadline for the submission of an accountant's name, a deadline for the selection, and a deadline for the report. The deadlines were then to trigger further action. The parties were working to facilitate another

[8] Plaintiffs also argue that the CPA's report did not follow the standards agreed upon in the UC Agreement. Plaintiffs have submitted a report by another CPA they selected, Mr. Carroll, whose report takes issue with the initial CPA's work. See Motion, Exh. L.

agreement, that for the sale of Lucy's, where time was of the essence. "The Members acknowledge that time is of the essence in executing this [Asset Purchase] Agreement." UC, ¶ 1. See also, Id., ¶ 5 ("If the Accountant determines that there has been no material misrepresentation in the accuracy of the 2000 financial information ..., then the Managing Member shall effect the dissolution of the Company as soon as possible after the sale transaction has been completed."). Furthermore, the parties were clearly contemplating ordering an audit and escrow account, acts which indicate an urgent concern over the Company's finances, and "rewarding" the managing member by refraining if he delivered by the deadline. The court finds that the submission of the CPA's report was not accomplished in accord with the UC Agreement and would constitute, if unexcused, a breach of that agreement, which would justify plaintiffs' subsequent actions.

Defendants next argue that they could not submit the report on time because plaintiffs delayed the selection process. Sur-Reply Memorandum in Opposition to Motion, p. 10. Defendants claim that plaintiffs did not supply defendants with any information regarding their candidate by the time prescribed for the selection of the CPA. Id. The record indeed reflects a dispute among the parties over the choice of CPA. See Motion, ¶¶ H & I. It is not clear how the Company ultimately chose Hui, but it is clear that the voting members wanted someone else. Thus, it is arguable that, in fact, they delayed defendants. Crucial to this assessment is whether defendants' rejection of the voting members' candidate, which was submitted by the deadline, was valid under the Agreements.

Plaintiffs' candidate was selected by a simple majority vote, which they claim was the method prescribed by the UC Agreement, where every member has a fixed percentage of votes, as represented in a table attached to that agreement. Defendants represented to plaintiffs that Carroll was not selected

properly pursuant to the Operating Agreement, which supersedes the UC Agreement. The resolution of that dispute is not necessary for the court's determination of defendants' entitlement to reliance damages.

In light of the fact that plaintiffs opted for another CPA before the deadline set in the UC Agreement, communicated that to defendant Hornik, and reiterated it to him when he called for a meeting to vote for a CPA (past the deadline set in the UC Agreement), defendant Hornik was not justified in unilaterally pursuing a different CPA. See Reply Memorandum in Support of Plaintiffs' Motion, Exhs. H, I, and J. His purported reliance on a contract that was clearly breached, regardless of which party breached first, was unreasonable. Reliance damages are permitted where a party has incurred the damages because the other party's conduct reasonably led him to believe he would be compensated for the damages. See Kreutzer v. Monterey County Herald Company, 560 Pa. 600, 747 A.2d 358 (2000); Jenkins v. County of Schuykill, 441 Pa. Super. 642, 658 A.2d 380 (1995). Therefore, the court grants plaintiffs' summary judgment as to defendants' claims for accounting fees.

CONCLUSION

For the reasons stated, this court grants plaintiffs' Motion for Summary Judgment on defendants' Counterclaim. A contemporaneous Order consistent with this Opinion will be entered of record.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.