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

NEW HOPE BOOKS, INC., and FREDERICK SCHOFIELD,	:	July Term, 2001
Plaintiff,	:	No. 01741
v.	:	Commerce Program
DATAVISION PROLOGIX, INC.	:	Control Nos. 020101
Defendant.	:	

ORDER and MEMORANDUM

AND NOW, this 24TH day of June, 2003, upon consideration of the Motion for Summary Judgment (the "Motion") of Datavision Prologix, Inc., all responses in opposition thereto, all matters of record and in accord with the contemporaneous Opinion in further support of this Order, it is hereby

ORDERED and **DECREED**, that the Motion is **GRANTED** in part and **DENIED** in part, it is further

ORDERED and **DECREED** that all claims of Plaintiff Frederick Schofield are hereby **DISMISSED**, it is further

ORDERED and **DECREED** that counts I, II and IV of the complaint are **DISMISSED**, it is further

ORDERED and **DECREED** that New Hope Publishing Corporation, Inc.'s claims for punitive damages and future damages are **DISMISSED**, it is further

ORDERED and **DECREED** that the remainder of the Motion is **DENIED** and the case will proceed to trial on Count III, Breach of Warranties.

BY ORDER OF THE COURT:

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GENE D. COHEN, J.

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DATAVISION PROLOGIX, INC.	:	Control Nos. 020101
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MEMORANDUM OPINION

GENE D. COHEN, J.

Before the Court is the motion for summary judgment (the "Motion") of Defendant Datavision Prologix, Inc. ("Datavision"). For the reasons set forth more fully below, the Motion is **granted** in part and **denied** in part.

I. BACKGROUND

A. The Plaintiffs

The Plaintiffs in this action are New Hope Publishing, Inc. ("New Hope") and Frederick Schofield ("Schofield")(jointly referred to as the "Plaintiffs"). Schofield is the author of three fictional novels, *Boardwalkers, A Run to Hell* and *Megasino: the 13th Casino*. He began writing in or around 1995 having had no prior experience as an author or in publishing. Two of his novels, *A Run to Hell* and *Megasino: the 13th Casino* (jointly the "Novels"), were self-published through New Hope, which was incorporated by Schofield for the sole purpose of publishing his novels. He is the sole shareholder, director and officer of the company.

As a self-published author, Schofield feared that he and/or New Hope would not be taken seriously by the book industry. To address this concern, Schofield decided to give New Hope the appearance of a fully staffed publishing house by creating a roster of various fictional employees. When needed, Schofield would use different aliases to assume the positions of New Hope's publisher, bookkeeper, shipper and chief of marketing. New Hope never had any payrolled employees.

B. The UPC Labels and Datavision.

In order to sell the Novels through certain retailers, Plaintiffs were told by a distributor that the Novels needed UPC bar codes. With a UPC bar code, retailers such as supermarkets, grocery stores and news stands are able to scan the price of the Novels at the register. Because the Novels already contained ISBN bar codes on the back cover, the Plaintiffs decided to affix self-sticking UPC bar code labels over the ISBN bar codes. Plaintiffs researched several companies that produced such labels and chose Datavision, after viewing its website and talking to a sales representative.

In keeping with the facade of a fully staffed company, Schofield used the name of New Hope's fictitious chief of marketing, Tom Butler, during his negotiations with Datavision.[1] During all negotiations and when placing orders, Schofield acted under the "Tom Butler" persona. In fact, Schofield admits that during this period he *never* (1) identified himself as Frederick Schofield or (2) informed Datavision he was acting in the interest of Frederick Schofield.[2] Maintaining character,

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[1] Plaintiffs' Memorandum of Law In Opposition to Defendant's Motion Seeking Summary Judgment, Exhibit 9, Deposition of Frederick Schofield, pp. 56, 155-157.

[2] Id.

Schofield signed correspondence to Datavision as Tom Butler.[3]

Between August and January 2001, New Hope placed several orders with Datavision for self-sticking UPC bar code labels (the "Labels"). The only documents evidencing these transactions are correspondence between the parties and invoices issued by Datavision. During discovery, Datavision produced invoices containing written disclaimers on the reverse side.[4] Plaintiffs deny receiving copies of those invoices; however, Plaintiffs do assert that they received several statements from Datavision indicating that its payments were received.

C. The Alleged Defects

In January of 2001 or shortly thereafter, Plaintiffs allegedly began receiving reports the Labels were not working properly. After conducting an investigation, Plaintiffs claim to have discovered evidence that the Labels did not scan at the point of sale. Plaintiffs also allege to have personally witnessed this failure to scan. Because of the scanning failures, Plaintiffs argue that the sales records of the Novels were rendered wholly inaccurate and, as a result, distributors were returning books and choosing not to place reorders. At this time, Schofield unmasked himself and revealed his true identity to Datavision. Plaintiffs advised Datavision of the alleged problems and sought compensation for their damages. Datavision refused Plaintiffs' demand for compensation, believing there was no problem with the Labels.

Subsequently, Plaintiffs commenced this action by filing a civil action complaint asserting four counts of liability against Datavision. Plaintiffs allege they suffered a litany of damages, the majority of which concern future lost revenue. Datavision filed an answer with new matter and a

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[3] Motion for Summary Judgment of Datavision, Exhibit 7.

[4] In the Motion, Datavision does not raise the issue of the disclaimers.

counterclaim.[5] After extensive discovery, Datavision filed the present Motion.

II. SUMMARY JUDGMENT

In accordance with Rule 1035.2 of the Pennsylvania Rules of Civil Procedure, this Court may grant Summary Judgment where the evidentiary record shows either that the material facts are undisputed, or the facts are insufficient to make out a *prima facie* cause of action or defense. McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938, 940 (Pa. Super. Ct. 1998). To succeed, a defendant moving for summary judgment must make a showing that the plaintiff is unable to satisfy an element in his cause of action. Basile v. H&R Block, 777 A.2d 95, 100 (Pa. Super. Ct. 2001).

To avoid summary judgment, the plaintiff, as the non-moving party, must adduce sufficient evidence on the issues essential to its case and on which it bears the burden of proof such that a reasonable jury could find in favor of the Plaintiff. McCarthy, 724 A.2d at 940. In addressing the issue, this Court is bound to review the facts in a 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. Manzetti v. Mercy Hospital of Pittsburgh, 565 Pa. 471, 776 A.2d 938, 945 (2001). The plaintiff, must be given the benefit of all reasonable inferences. Samarin v. GAF Corp., 391 Pa. Super. 340, 350, 571 A.2d 398, 403 (1989).

IV. DISCUSSION

Plaintiffs assert four counts of liability against Datavision: (1) negligence, (2) strict liability, (3) breach of warranties and (4) fraudulent misrepresentation. Datavision denies all liability and seeks the dismissal of the Complaint. In the alternative, if the case is to proceed on some or all of

[5] Datavision's counterclaim was withdrawn by stipulation.

the counts, Datavision seeks the dismissal of the claims alleged by Schofield arguing he lacks standing to sue.

For the reasons set forth more fully below, the Court finds that Schofield lacks the requisite standing to sue and, therefore, all counts as to Schofield are dismissed. The Court also finds in favor of Datavision on the negligence, strict liability and fraudulent misrepresentation counts. Lastly, New Hope's claims for punitive damages and future damages are dismissed. The remainder of the Motion is denied and the case will proceed to trial on Count III, breach of warranties.[6]

A. Schofield Does Not Have The Requisite Standing To Sue.

Plaintiffs' assertions that both New Hope and Schofield are in direct contractual privity with Datavision are without merit. Schofield's misrepresentations as to his identity and his failure to timely disclose his true identity bars him from being a direct party to the transactions. Furthermore, under Pennsylvania law, Schofield fails to satisfy the necessary criteria to be considered an intended third party beneficiary. Therefore, Schofield does not have standing to maintain claims against Datavision.

1. Schofield is not a direct party to the contract.

New Hope is arguably the only party that has direct contractual privity with Datavision. Plaintiffs rest their argument on the fact he was the "person" who dealt with Datavision. In other words, because his body and voice were used during the transactions, he is a party to the contract.

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[6] The Court finds that there is a genuine dispute as to an issue of material fact concerning Count III, breach of warranties. "In passing upon motion for summary judgment, trial court must not decide issues of fact; only whether there are issues of fact to be tried." Mylett v. Adamsky, 139 Pa.Cmwlth. 637, 642, 591 A.2d 341, 344 (1991). The "quantum of evidentiary facts which must be adduced to preclude summary judgment is not the same as that required at trial." Watkins v. Hospital of the University of Pennsylvania, 737 A.2d 263, 268 (Pa.Super.Ct. 1999)(citing 6 Standard Pennsylvania Practice § 32.99).

Plaintiffs argument is superficial and made without regard to the fact that Schofield admittedly was acting as an employee and representative of New Hope. Under the circumstances of this case, holding in favor of the Plaintiffs would sanction a type of contract by ambush.

The question is not so much who was dealing with Datavision but in what capacity said person was acting. This is not a case where Schofield was conducting business on his own behalf under a fictitious name. For example, Schofield did not represent to Datavision he was an author named "Tom Butler" looking to purchase labels for his books. Instead, Schofield represented himself to be the chief of marketing of an existing corporation, New Hope. Schofield never identified himself or intimated that Schofield, the author, was in involved when the orders were placed. Therefore, Schofield was not acting as an individual but on New Hope's behalf.

There is also a fundamental question of fairness raised by Schofield's actions. Schofield was fully aware that he was inducing Datavision to enter into a contract with New Hope based upon his representations that he was New Hope's chief of marketing. He admittedly withheld his true identity from Datavision in order to perpetuate the illusion that New Hope was a fully staffed company. Now, Schofield seeks to impose his personal damages as the author on Datavision in addition to the liability for New Hope's alleged damages. This additional liability is to a party that Datavision had no idea was involved in the transaction, until it was too late.[7]

2. <u>Schofield is not a third party beneficiary under Pennsylvania law.</u>

Schofield's argument that he is an intended third party beneficiary is also without merit. In order to be considered a third party beneficiary under Pennsylvania law, a party must satisfy a strict

[7] The difference in liability is clearly demonstrated by Schofield seeking damages over a million dollars in excess of New Hope's damages claim.

two part test. Cardenas v. Schober, 783 A.2d 317 (Pa. Super. Ct. 2001). This test, as articulated by the Pennsylvania Superior Court, is as follows:

> (1) [T]he recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and (2) . . . the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

Id. at 322 (citing Guy v. Liederbach, 501 Pa. 47, 459 A.2d. 744 (1983)). The Superior Court also clearly stated that "the fact that the obligor knows that his services will benefit a third person is not alone sufficient to vest in such third person the rights of a third person beneficiary. Id.

Plaintiffs allege that Schofield was an intended third party beneficiary because (1) he was present at all times when dealing with Datavision and (2) he is the author of the Novels. The Court fails to see how Schofield's presence when negotiating and ordering the Labels evidences he was an intended third party beneficiary. If he failed to reveal his true identity, and never discussed his or New Hope's connection to Schofield, how could Datavision possibly divine Schofield was an intended beneficiary by his presence as Tom Butler? Nevertheless, the Court will address the issue in the context of the test articulated in Cardenas.

It is clear Schofield fails the first prong. The recognition of Schofield's right is not appropriate to effectuate the intention of the parties. The underlying contract is between New Hope and Datavision, not Schofield. Nowhere is Schofield in his individual capacity made a part of transaction or conferred any rights therefrom. It is New Hope, the direct party to the contract, that has the right to sue to enforce the contract and/or seek damages for a breach. Therefore, the recognition of Schofield's right is not appropriate to effectuate the intention of New Hope.

It is equally clear that Schofield fails the second prong of the Cardenas test. First, the

performance of the contract in this case does not satisfy an obligation of New Hope to pay Schofield. Performance of the contract required Datavision to produce Labels for New Hope's use, nothing more. The record does not reveal any agreement with Datavision that its delivery of the Labels satisfied a debt owed to Schofield by New Hope.

Second, the circumstances of the transactions do not indicate that New Hope intended to give Schofield any benefit. Schofield admits that as Tom Butler he *never* discussed or talked about Schofield during the time the orders were placed. The fact that Schofield's name was printed on the sample Novels given to Datavision is not sufficient evidence to put Datavision on notice he was an intended third party beneficiary. At most, assuming that Datavision even took notice of Schofield's name on the Novels, Datavision may have deduced that Schofield could benefit from its services. Under Pennsylvania law, the fact that a party may know his services could benefit another is not enough to confer the status of an intended third party beneficiary.

Therefore, summary judgment is grated in favor of Datavision on all counts as they pertain to Frederick Schofield.

B. The Negligence and Strict Liability Counts Are Barred By Pennsylvania's Gist of the Action and Economic Loss Doctrines

Pennsylvania's doctrines of gist of the action and economic loss bar Plaintiffs' counts of negligence and strict liability. The gist if the action doctrine bars tort claims that: (1) arise solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; and (4) where the tort essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of the contract. Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 19 (Pa. Super.

2002). The economic loss doctrine bars the recovery of economic damages for torts when the only harm is to the product itself and not to other property. See Werwinski v. Ford Motor Company, 286 F.3d 661 (3d. Cir. 2002). If the only damages from the alleged tort are economic, the tort claims cannot stand. Id.

The heart of the Plaintiffs' negligence and strict liability counts is Datavision's alleged failure to design and produce labels that worked. All of the damages allegedly suffered by the Plaintiffs are purely economic in nature, allegedly resulting from Datavision's workmanship. These claims are exactly the types of tort claims that the doctrines of gist of the action and economic loss are designed to prevent. Therefore, summary judgment is granted in favor of Datavision on the counts of negligence and strict liability.

C. Plaintiffs' Fraudulent Misrepresentation Claim Fails As A Matter of Law.

Plaintiffs allege that Datavision made numerous fraudulent misrepresentations, both before and after the orders for the Labels were placed. Datavision counters that the Plaintiffs' fraudulent misrepresentation claim is barred by the gist of the action and/or the economic loss doctrines. In the alternative, Datavision alleges that the Plaintiffs failed to satisfy the elements necessary to succeed under a fraud claim. The Court finds that the gist of the action doctrine bars any claim of fraud based upon alleged misrepresentations made after the orders were placed. As to the allegations of fraud occurring prior to the placement of the orders, the Court holds the Plaintiffs' claim fails as a matter of law.

1. Fraud in the performance is barred by the gist of the action.

The portion of Plaintiffs' claim that is based upon misrepresentations after the placement of the orders is barred by the gist of the action doctrine. These allegations center on representations

made by Datavision on the testing it performed and the assurances it made after the orders were placed. Therefore, the representations were made when Datavision was in the process of performing its part of the transaction with New Hope. The Pennsylvania Superior Court in Etoll, Inc. v. Elias/Savion Advertising, Inc. specifically held that claims of fraud in the performance of the contract are barred by the gist of the action doctrine. 811 A.2d 10, 20 (Pa. Super. 2002)("Thus, we conclude that . . . the gist of the action doctrine should apply to all claims for fraud in the performance of a contract."). Given this clear precedent, the Court holds that the portion of the Plaintiffs' fraud claim base upon misrepresentations made by Datavision in the performance of the contract is barred.

2. Plaintiffs' allegations of fraud in the inducement are dismissed as a matter of law.

The remaining portion of the Plaintiffs' fraud claim, based upon alleged misrepresentations made in the inducement of the contract, fails as a matter of law.[8] Plaintiffs' fraud in the inducement allegations concern representations made on Datavision's website and statements made by a Datavision sales representative promoting the company. In order to proceed on a fraud count a plaintiff must allege and prove the following:

a. a representation was made;
b. that is material to the transaction;
c. made falsely, with knowledge of falsity or with recklessness regarding its truth or falsity;

[8] Regarding Datavision's economic loss doctrine argument, this Court has held that a claim of fraud is not barred by this doctrine. See Teledyne Technologies, Inc., v. Freedom Force Corporation, 2002 WL 748898 (Pa. Comm. Pl. 2002). As to the gist of the action argument, the Etoll court limited its holding to fraud in the performance and did not address whether fraud in the inducement is barred. 811 A.2d at 19. Whether gist of the action bars fraud in the inducement need not be addressed in this case because the Court finds the fraud claim fails on other grounds.

d. with the intent leading another to rely on it;
e. which is justifiably relief upon; and,
f. the resulting injury was proximately caused by the reliance.

Bortz v. Noon, 556 Pa. 486, 499, 729 A.2d 555, 559 (Pa. 1999).

In addition to the aforementioned required elements, Pennsylvania courts have held that puffing is not actionable in fraud. "Puffery is an exaggeration or overstatement in broad, vague and commendatory language." Castrol, Inc. v. Pennzoil Company, 987 F.2d 939 (3d. Cir. 1993). When reviewing claims of fraud, "misrepresentation must be distinguished from mere 'puffing.'" Berkebile v. Brantly Helicopter Corporation, 462 Pa. 83, 103, 337 A.2d 893, 903 (1975). See also Huddleston v. Infertility Center of America, 700 A.2d 453 (Pa. Super. Ct. 1997)(holding that representation that defendant's clinic was the "premier" surrogacy program in the country amounted to mere puffing.)

Furthermore, mere breaches of a promise to do something in the future have been held not actionable under fraud. "The breach of a promise to do something in the future is not fraud." Bash, D.D.S. v. Bell Telephone Company of Pennsylvania, 411 Pa.Super. 347, 601 A.2d 825 (1992)(citing Edelstein v. Carole House Apartments, Inc., 220 Pa.Super. 253, 286 A.2d 658, 661 (1971)). "Moreover, 'an unperformed promise does not give rise to a presumption that the promisor did not intend to perform when the promise was made.'" Id. (citing Fidurski v. Hammill, 328 Pa. 1, 3, 195 A. 3, 4 (1937).

The Court finds that the Plaintiffs' allegations as to the representations on the website and of the salesperson constitute nothing more than puffing and/or alleged breaches of promises to do something in the future. Therefore, summary judgment on the fraudulent misrepresentation claim is granted in favor of Datavision.

D. New Hope's Claim for Punitive Damages Is Dismissed.

Under Pennsylvania law, punitive damages are not awardable for breach of contract. See The Flynn Company v. Peerless Door & Glass, Inc., 2002 WL 1018937, *3 (Pa. Com. Pl. (2002); Johnson v. Hyundai Motor America, 698 A.2d 631, 639 (1997). Because of the dismissal of counts I, II and IV, the only count remaining against Datavision is count III, breach of warranties and, therefore, the claim for punitive damages is dismissed.[9]

E. New Hope's Claim For Future Damages Fails As A Matter Of Law

New Hope's claim for damages of lost profits is entirely based upon speculation and, therefore, not recoverable under Pennsylvania law. In order to recover damages for breach of contract, a causal connection must be shown between the breach and the loss. Logan v. Mirror Printing Company of Altoona, PA., 410 Pa. Super. 446, 600 A.2d 225 (1991); See also Northeastern Vending Company v. P.D.O., Inc., 414 Pa. Super. 200, 206, 606 A.2d 936, 939 (1992)(stating

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[9] Even assuming Plaintiffs' fraud claim was not dismissed, a claim for punitive damages is not automatic. "Under Pennsylvania law, in an action based on fraud, the measure of damages is "actual loss". Kaufman v. Mellon National Bank & Trust Co., 366 F.2d 326 (3rd Cir.1966). The plaintiff may also recover punitive damages where there are aggravated circumstances. Long v. McAllister, 275 Pa. 34, 118 A. 506 (1922).

> However, it is fraud which is the basis for the recovery of compensatory damages, and the same fraud is not alone a sufficient basis upon which to premise an award of punitive damages. If the rule were otherwise, punitive damages could be awarded in all fraud cases. This is not the law. The rule, rather, is that for punitive damages to be awarded there must be acts of malice, vindictiveness and a wholly wanton disregard of the rights of others. (citations omitted)

Smith v. Renaut, 387 Pa.Super. 299, 309, 564 A.2d 188, 193 (1989). The allegations contained in the Complaint do not state a basis for punitive damages, even assuming the fraud count remained.

affirmative evidence that the damages are from the breach of contract must be produced.) The Pennsylvania Superior Court succinctly set for the test for lost profits as follows:

> The general rule of law applicable for loss of profits in both contract and tort actions allows such damages where (1) there is evidence to establish them with reasonable certainty, (2) there is evidence to show that they were the proximate consequence of the wrong; and, in the contract actions, that they were reasonably foreseeable.

Delahanty v. First Pennsylvania Bank, N.A., 381 Pa. Super. 90, 120, 464 A.2d 1243, 1258 (1983)(citing R.I. Lampus Co. v. Neville Cement Products Corp., 474 Pa. 199, 378 A.2d 288 (1977), Frank B. Bozzo, Inc. v. Electric Weld Division, 283 Pa. Super. 35, 423 A.2d 702 (1980), Restatement, 2d, Contracts § 351)).

New Hope has the "burden to establish by proper testimony the damages . . . sustained." Gordon v. Trovato, 234 Pa.Super. 279, 282, 338 A.2d 653, 654 (1975)(citing Link v. Highway Express Lines, Inc., 444 Pa. 447, 282 A.2d 727 (1971). Failure to meet this burden prevents the issue from being submitted to the jury. Id. New Hope has failed to meet its burden.

1. Plaintiffs' Damages Memo

Plaintiffs prepared and submitted a Final Damages Memo (the "Memo") setting forth the damages allegedly suffered. New Hope claims damages in the amount of $413,793, broken down as follow:[10]

1.	Losses in Capitalization and Sales Revenue:	$110,533
2.	First Printing Losses:	$21,110
3.	Second Printing Losses:	$94,050
4.	Third Printing Losses:	$188,100
	Total:	**$413,793**

[10] Plaintiffs' Memorandum of Law In Opposition to Defendant's Motion Seeking Summary Judgment, Exhibit 24, Page 9.

The portion of New Hope's damages attributed to future damages is based upon projected sales for future printings. The dollar amount of such damages is $282,150 (the "Future Damages Claim").

New Hope planned to run a second printing of 50,000 books (the "Second Printing"), evenly divided between the Novels. New Hope calculated the quantity of the Second Printing using past distributor orders and market experience for the calculation of new orders. New Hope identifies various Anderson News locations and News Group as existing distribution centers to receive the Second Printing. New Hope also planned to use new distributors, identified as Levi Home Entertainment, Harrisburg News, Hudson Valley News, Sher Distributing Company, Atlas News and Koen Pacific.

Presumably after the Second Printing sold out, New Hope planned on running a third printing (the "Third Printing"). The Third Printing was to "blanket the country" by covering all markets through existing and new distributors.[11] New Hope asserts a single order from Anderson News, which services large chains such as K-Mart, could be as large as 100,000 books. Therefore, New Hope believes the sales losses for the Third Printing should be based upon an order of no less than 1000,000 copies.[12]

2. <u>New Hope Does Not Satisfy Its Burden To Prove Causation.</u>

New Hope does not offer sufficient evidence to establish a causal link between the alleged scanning problems and the distributors' failure to place additional orders. For example, New Hope states when discussing the Second Printing that because of strong sales "Anderson News distribution

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[11] Plaintiffs' Memorandum of Law In Opposition to Defendant's Motion Seeking Summary Judgment, Exhibit 24, Page 8.

[12] New Hope does not state whether this is for both Novels or just one.

centers across the country were prepared to pick up the titles if they sold well in Florida."[13] Yet, not a single document to or from Anderson is produced to support this statement and/or evidence Anderson canceled orders because of faulty labels. The same is true for any of the other distributors cited by New Hope as not reordering because the scanning problems.

It is even clearer that New Hope's claim for damages based upon the Third Printing is also based upon speculation. New Hope does not offer sufficient evidence that any distributor was interested in reordering the Novels for a second printing, let alone a third printing. New Hope's Third Printing Damages claim is based upon a chain of unsupported assumptions, starting with the unsubstantiated assumption that the Second Printing was going to be a successful. Even the wording of the Memo invites speculation. "For instance, Anderson News services large chains, such as K-Mart, where single orders *can be* 100,000 books."[14]

New Hope has the burden to prove causation between Datavision's alleged conduct and the lack of any reorders from distributors. It is clear under Pennsylvania law that there must be affirmative evidence that the losses resulted from the breach of the contract. See Northeastern Vending Company v. P.D.O., Inc., 414 Pa.Super. 200, 206, 606 A.2d 936, 939 (1992). New Hope fails to adduce such evidence.

3. New Hope Fails To Allege Sufficient Evidence To Establish Its Future Damages Claim With Reasonable Certainty

In addition to assuming there would be reorders, New Hope asserts that the sales rate for the Novels over a two year period would be 90%. This is based upon New Hope's sales record for initial

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[13] Plaintiffs' Memorandum of Law In Opposition to Defendant's Motion Seeking Summary Judgment, Exhibit 24, Page 4.

[14] Id. (emphasis added).

orders sold through Casino Distributors. New Hope asserts Casino Distributors initially placed two orders for both Novels that totaled 784 copies and proceeded to sell 92% of the ordres. Therefore, New Hope asserts that regardless of using new distributors, larger printings and selling in an expanded market, New Hope would still sell a minimum of 90% of all orders.

New Hope presents insufficient evidence to support this extraordinary sales rate. Casino Distributors' sales were confined to a limited market, the South Jersey and Atlantic City area. New Hope's planned marketing expansion would go well beyond the original limited geographic area, with the Third Printing to be national. New Hope proffers no analysis or evidence that both of his Novels would maintain such an admittedly high sales level in greater markets over a two year period.

For example, New Hope presents no market studies, no comparisons to book sales of the same genre in the same proposed sale regions, no comparisons to other successful newly self-published authors and no comparisons to other books marketed in the same fashion that New Hope planned. The trier of fact is given only the optimism of a new author and publishing company to make its finding. "[L]ost profits may not be awarded where the evidence leaves the trier of fact without any guidance except for speculation. Birth Center v. St. Paul Companies, Inc., 727 A.2d 1144 (Pa.Super. 1999). New Hope's foundation for the Future Damages Claim is based upon unsupported conjecture and does not allow a trier of fact to find for it on Future Damages with reasonable certainty.

4. Plaintiffs' Expert Reports Have The Same Failings As New Hope's Memo

Plaintiffs retained two experts to assist in the their calculation of lost sales. The first report was prepared by Bob Ederman ("Ederman"), a Publishing Consultant. The second report was

prepared by John A. Morris ("Morris") of Execs Inc. Both reports give an expanded background of the mass market paperback industry and the importance of the UPC bar code in sales. However, the reports do not assist New Hope in satisfying its evidentiary burden in proving causation and in laying a foundation for damages to be awarded with reasonable certainty. Both reports rely on New Hope's unsubstantiated assumptions and do not contain sufficient analysis or evidence to take the Future Damages Claim out of the realm of speculation.

For example, neither of the reports independently discusses New Hope's projected orders, sales or the methodology used to reach such figures. Instead, each report merely adopts what is set forth the Memo. Regarding sales, neither of the reports discuss or address on what basis the Novels success with Casino Distributors, in a relatively small market such as South Jersey would, or could, translate into national sales of one hundred thousand copies or more.[15]

Ederman, did attach to his report several charts and graphs concerning historical mass market sales, purchase motivation and consumer purchasing. However, these charts give only the most generalized overview. For example, none of the charts breakdown sales figures between authors who self-publish and authors who use established publishing houses. The charts also do not breakdown sales among new authors, new self-published authors and established authors with national name recognition.[16] The trier of fact is left to guess the significance of the gross numbers

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[15] Surprisingly, the reports also do not address the quality of the actual product being sold, the Novels. Ederman discusses the covers and interior for appearance, but there is no discussion of whether either of the Novels are well written and likely to sell in the numbers and in the markets New Hope predicted. The actual quality of the writing and story is apparently irrelevant in book sales.

[16] The report of Morris is even more lacking in detail than Ederman's report. Other than to confirm that UPC bar codes are still used, the report contains no discussion of the Novels, New Hope, or the alleged facts of the case.

set forth in the charts and how the numbers apply to New Hope's circumstances.

Therefore, New Hope has failed to put forth sufficient evidence to establish a causal relationship between the alleged failure of the Labels to scan and its Future Damages Claim. Furthermore, New Hope has failed to present evidence to establish its Future Damages with reasonable certainty. As a result, New Hope's Future Damages Claim is dismissed.

IV. CONCLUSION

For the reasons set forth above, summary judgment is granted to Datavision on (1) all claims of Plaintiff Frederick Schofield, (2) Counts I, II and IV and (3) the claims for punitive damages and future damages. The case will proceed to trial on Count III, breach of warranties.

BY THE COURT:

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GENE D. COHEN, J.

Dated: 6/24/03