IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LOUIS J. CAPANO, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 10C-11-228 WCC
	)	
DARIN A. LOCKWOOD and DON A. LOCKWOOD, jointly and severally,	)	
	)	
Defendants.	)	

Submitted: December 3, 2013
Decided: January 9, 2014

Plaintiff's Renewed Motion for Summary Judgment – GRANTED IN PART, DENIED IN PART
Defendants' Renewed Joint Motion for Summary Judgment – GRANTED IN PART, DENIED IN PART
Defendant Darin A. Lockwood's Motion for Leave to File an Amended Answer, Counterclaim, and Third-Party Complaint – DENIED
Defendant Donald A. Lockwood's Motion for Leave to File an Amended Answer, Counterclaim, and Third-Party Complaint – DENIED

MEMORANDUM OPINION

Jeffrey M. Weiner, Esquire, 1332 King Street, Wilmington, DE 19801. Attorney for Plaintiff Louis J. Capano, III.

John W. Paradee, Esquire and Nicole M. Faries, Esquire, Prickett, Jones & Elliott, PA, 11 North State Street, Dover, DE 19901. Attorney for Defendant Darin A. Lockwood.

Constantine Malmberg, III, Young, Malmberg & Howard, P.A., 30 The Green, Dover, DE 19901. Attorney for Defendant Don A. Lockwood.

CARPENTER, J.

Before the Court are the following four (4) motions: (1) Plaintiff's Renewed Motion for Summary Judgment; (2) Defendants' Renewed Joint Motion for Summary Judgment; (3) Defendant Darin A. Lockwood's ("Darin") Motion for Leave to File an Amended Answer, Counterclaim, and Third-Party Complaint; and (4) Defendant Donald A. Lockwood's ("Don") Motion for Leave to File an Amended Answer, Counterclaim, and Third-Party Complaint. On the Cross-Motions for Summary Judgment, Plaintiff's and Defendants' Motions are both GRANTED IN PART and DENIED IN PART. Defendants' Motions for Leave to File an Amended Answer, Counterclaim, and Third-Party Complaint are hereby DENIED.

FACTUAL BACKGROUND

The motions currently before the Court arise from a failed business venture that dates back to 2004. Specifically, Plaintiff ("LIII") and Louis J. Capano, Jr. ("LJC") formed a company, Milton Investments, LLC ("Milton"), in which they were the sole members and Defendants formed a company, Lockwood Brothers II, LLC ("LBII"), in which they were the sole members. In December 2004, Darin and Plaintiff, as authorized members of their respective companies, LBII and Milton, signed an agreement to form a new company, North Milton Development Group, LLC ("NMDG"). Under NMDG, a series of agreements were negotiated and executed in connection with the purchase of land located outside of Milton, Delaware (the "Rust

Property"). The parties intended to use the Rust Property for both commercial and residential real estate development.

In order to purchase the Rust Property, NMDG entered into a loan agreement with Wilmington Trust Company ("WTC") for two (2) loans: (1) a December 17, 2004 acquisition loan for $7,130,000.00 (the "Acquisition Loan"); and (2) an October 15, 2007 loan for $1,000,000.00 (the "Working Capital Loan") (collectively, the "Loans"). The Loans were originally represented to this Court as having been guaranteed by all of the principals of Milton and LBII. However, LJC never signed the loan documents and, although Plaintiff admits that he personally guaranteed the Loans, there is no copy of his execution of some critical documents.

The day prior to NMDG's formation, a contribution agreement (the "2004 CA") was created that would have had the four principals of Milton and LBII personally guaranty the Acquisition Loan. The 2004 CA was intended to not only guarantee the Acquisition Loan from WTC but also give the parties a right of contribution in the event that WTC made a demand on one or more, but not all, of the guarantors. Unknown to Defendants, LJC never signed the 2004 CA. Further, although the 2004 CA stated that all parties thereto were personally guarantying the Acquisition Loan, LJC did not execute any documents to commit to the personal guaranty.

Although WTC loaned over $8 million to NMDG, the downturn in the housing market precluded the development project on the Rust Property from proceeding as planned. As a result, at all times relevant to this litigation the land has largely remained farmland that has been rented out for agricultural purposes. The land's rental income of approximately $15,000, the only gross revenue from the Rust Property, was insufficient to pay the monthly interest and by August 20, 2010, NMDG was behind on the Loans. On September 24, 2010, WTC's then-Vice President, Jeremy Abelson ("Abelson"), sent an email to the Plaintiff stating:

> Louis, we sent an email to Darin notifying him of the need to pay the October 1 payments for the two North Milton loans. These invoices have still not been paid for September 1. This is a quarter end, so it's extra "special." Thanks for your anticipated help on this matter.

The parties have not produced Plaintiff's response (if any) to this email, nor have the parties uncovered an email from Abelson to Darin, as referenced. Darin represented to the Court that he does not recall receiving such email. Abelson then sent a second email to Plaintiff on September 29, 2010, which stated: "Louis, sorry the nag, but the two loans are still due for 9/1. Will these two loans be paid for September?" Plaintiff responded minutes later with "Will go to the bank today[ ]" and Abelson thanked him. These two emails from Abelson are the disputed "demands" made of Plaintiff to pay the Loans.

Thereafter, Plaintiff alone paid 100% of the monthly payments on the Loans through April 2011, totaling $192,509.20 on the Acquisition Loan and $26,999.78 on the Working Capital Loan. Plaintiff seeks contribution from Defendants, equal to 50% of the amounts paid, pursuant to the terms of the 2004 CA.

PROCEDURAL BACKGROUND

This case has been extensively litigated since November 27, 2010, when the original Complaint was filed. The Defendants' initial Motions to Dismiss were denied by order dated December 28, 2011. Darin's renewed Motion to Dismiss was denied from the bench after argument was presented to the Court on March 7, 2012. Later, after some discovery was completed, all parties filed motions for summary judgment which were denied by Memorandum Opinion dated May 31, 2013. Darin then filed a motion for reargument, which was denied by letter from the Court dated June 19, 2013.

With these dispositions, the parties continued with discovery. On October 31, 2013 and November 6, 2013, Darin and Don respectively, filed the current Motions for Leave to File an Amended Answer, Counterclaim, and Third-Party Complaint. Plaintiff responded to the Motions on November 14, 2013 and this Court heard argument on November 20, 2013, where the Court reserved decision. Also in November of this year, Plaintiff and Defendants both filed renewed Motions for Summary Judgment. This Court heard argument on the Cross-Motions and reserved

decision. This Memorandum Opinion serves as the Court's resolution of all outstanding motions. The Court is addressing these Motions together as they involve similar issues surrounding: (1) LJC's involvement in the underlying transactions and lack of involvement in the current suit and (2) the existence of a demand by WTC through Abelson such that Defendants' contribution was triggered.

Specifically, in Defendants' Renewed Motion for Summary Judgment they argue that (1) the new knowledge of LJC's lack of guaranty and signature renders the 2004 CA barred by the statute of frauds and/or unenforceable for want of consideration and (2) since WTC never made a formal demand and such is a condition precedent to contribution under the 2004 CA, contribution by Defendants was never triggered. Plaintiff's Renewed Motion for Summary Judgment argues that Defendants' purported defenses are unfounded and, since WTC made a demand through Abelson, they are entitled to judgment as a matter of law. Plaintiff concedes in his Motion that whether or not the Working Capital Loan is subject to Defendants' required 50% contribution under the 2004 CA might be an issue of fact that remains for trial.

Similarly, in the Motions for Leave to File an Amended Answer, Counterclaim, and Third-Party Complaint, Defendants argue that since they recently learned through discovery that LJC had not signed a personal guaranty for the Acquisition Loan nor

had he signed the 2004 CA, this new discovery requires them to amend their answer, file a counter-claim against Plaintiff, and file a third-party complaint against LJC.

STANDARD OF REVIEW

In reviewing a motion for summary judgment pursuant to Rule 56, the Court must determine whether any genuine issues of material fact exist.[1] Specifically, the moving party bears the burden of showing that there are no genuine issues of material fact so that he is entitled to judgment as a matter of law.[2] Further, the Court must view all factual inferences in a light most favorable to the non-moving party.[3] Therefore, summary judgment will not be granted if it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate.[4]

Superior Court Civil Rule 56(h) provides:

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.[5]

[1] Super. Ct. Civ. R. 56(c); *Wilm. Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).
[2] *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).
[3] *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[4] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).
[5] Super. Ct. Civ. R. 56(h).

"The questions before this Court are questions of law, not of fact, and the parties by filing cross motions for summary judgment have in effect stipulated that the issues raised by the motions are ripe for a decision on the merits."[6]

Herein, Defendants also seek leave to amend their pleadings. Under Delaware law, the standard for granting leave to amend pleadings is liberal and "shall be freely given when justice so requires."[7] Unless Plaintiff can show "(1) undue influence, (2) bad faith or dilatory motive, (3) continued failure to cure deficiencies by prior amendments, (4) undue prejudice, or (5) futility of amendment," leave should be granted.[8] Whether a motion to amend is granted is a matter within the trial court's discretion.[9]

DISCUSSION

A. CROSS-MOTIONS FOR SUMMARY JUDGMENT

1. Lack of LJC Execution of the 2004 CA

In the Court's May 31, 2013 Opinion denying Plaintiff's original Motion for Summary Judgment, it allowed further discovery so the parties could explore and untangle what was clearly a poorly conceived and executed arrangement between the parties. This has led to the unequivocal finding that LJC, in spite of representations

[6] *Health Corp. v. Clarendon Nat. Ins. Co.*, 2009 WL 2215126, at *11 (Del. Super. July 15, 2009).
[7] Sup. Ct. Civ. R. 15(a).
[8] *Gotham Partners v. Hallwood Realty*, 1999 WL 1022069, at *2 (Del. Ch. Oct. 18, 1999).
[9] *Sykes v. NTB-Nat'l Tire & Battery*, 2012 WL 1415794, at *2 (Del. Sup. Apr. 12, 2012).

made to the Court to the contrary by counsel, never executed the 2004 CA and never intended to personally guarantee the Loans. Equally disturbing is that it appears that beyond the creation of Milton, LJC has no recollection of this transaction nor appears to have participated in any meaningful way with this venture. To a large degree the same can be said for Don Lockwood. If one was totally cynical, it would perceive this real estate transaction is nothing more than a wild idea of two young people who needed the stature and financial means of their wealthy father and brother to pull off the deal. The issue here has also been complicated by what seems to be a lack of oversight by counsel for the parties and their failure to ensure that all necessary documents were appropriately executed by the parties during the underlying transaction. As a result, Defendants argue that because LJC did not sign the 2004 CA, that document is unenforceable as it is barred by the statute of frauds and/or unenforceable for want of consideration.

While the Court can appreciate the Defendants' frustration upon learning of LJC's limited involvement and guarantees in this transaction, the allegations that they now want to procure in this litigation and the damages they claim, relate to investments and obligations separate and distinct from interest payment claims made by the bank and paid by the Plaintiff. Those claims, as argued to the Court, related to whether the Defendants would have ever entered into the joint venture based upon

alleged misrepresentations made by the Capanos, not their obligations under the documents they freely executed. As such, while related, the Court finds these arguments provide no basis to terminate the limited litigation now before the Court in Defendants' favor.

Furthermore, whether LJC signed the 2004 CA in his individual capacity or not, it has no effect on the Defendants' obligation. If the 2004 CA had been fully executed by all parties, then the Plaintiff and his father were required to contribute 50% together. That obligation has been met. Defendants were obligated to pay the other half and they have failed to meet that obligation. Plaintiff, after emails from Abelson, paid the total obligation. As such, LJC's obligation under the 2004 CA and payments thereunder is a dispute between the Plaintiff and his father but is not material to Defendants' required contribution. While the Defendants have made creative and challenging arguments regarding the overall transaction, this is really a simple case of enforcing an agreement to which the Defendants freely, with advice of counsel, agreed.

Pursuant to the 2004 CA, "in the event a demand is made by Bank [(WTC)] on any one or more but not all of the guarantors, . . . (ii) LJC and LIII shall have the right of contribution against Darin and Don [(Defendants)], jointly and severally, for any payments made by LJC and/or LIII to Bank by reason of such demand in excess of

their Liability Share."[10] While LJC has no right of contribution himself, Plaintiff acknowledges he is bound by the 2004 CA and has paid the total amount allegedly demanded by the bank. Under the 2004 CA this payment triggers the obligation of the Defendants and the Court can find no good faith basis not to enforce their agreement. Since Defendants have not disputed the payments made by Plaintiff and have made no contribution under the agreement, the only issue that remains is whether those payments were appropriately made in response to a "demand" from WTC such that Defendants' contribution is triggered.

2. Demand

As quoted above, Defendants' contribution is not triggered unless WTC made a demand upon one or more, but not all, of the guarantors. This Court previously held in its May 31, 2013 Memorandum Opinion that the emails from Abelson were sufficient demand upon Plaintiff. Therein, the Court highlighted the informality surrounding the underlying business venture and explained that while "demand" is a term of art in the banking industry, the 2004 CA did not invoke that technical term or even define the term. In its ruling the Court noted:

> The Court recognizes that, generally, a more formal demand is made upon a guarantor by written notice that is either served personally or by means of a recognized courier. Additionally, the Court notes that the contract will

[10] Defs.' Mot. Summ. J., Ex. A.

> often define what constitutes an acceptable means of making a demand or providing sufficient notice. Here, however, the 2004 CA did not define what constituted sufficient "demand" on a guarantor. Further, neither the circumstances surrounding the formation of the contracting companies nor the means by which the loans were secured proceeded with the utmost formality. Specifically, the Court notes that NMDG was essentially a company in name only as it was formed from an agreement between Milton and LBII, which were shell companies effectively comprised of two pairs of individuals. In addition, the Court is not surprised by the lack of formality in WTC's correspondence; WTC's failed management oversight and poor banking practices in the real estate arena ultimately led to its downfall. Nevertheless, in the Court's view, WTC's actions of sending communications via e-mail to the individual guarantors was not only sufficient to constitute demand on one or more of the guarantors but was also a method that would be generally recognized as adequate by all parties.[11]

Although the present argument is made with the benefit of Abelson's deposition, it does not change the Court's previous ruling. While Abelson explained at his deposition how the bank would proceed in demanding payment for a loan in default, he also explained that his emails constituted an informal demand for interest payment. The Court will not look beyond the plain meaning of the term "demand" as used in the 2004 CA to add the gloss of banking terminology. Instead, the Court reads "demand" as its plain meaning and finds that Abelson's requests for payment were demands under the 2004 CA. Therefore, it is undisputed that Plaintiff made payments

[11] *Capano v. Lockwood*, C.A. No. N10C-11-228, at 9-10 (Del. Super. Dec. 28, 2011).

beyond his required contribution, which, under the terms of the 2004 CA, were in response to a demand by WTC through its representative Abelson. As such, Defendants are required to contribute their share as designated under the 2004 CA.

3. The Working Capital Loan

The 2004 CA was signed in connection with the Acquisition Loan but nothing has been provided to the Court to reflect that it extended to the Working Capital Loan. Therefore, although Plaintiff is entitled to summary judgment because the 2004 CA was binding upon Defendants and demand was made, this finding only applies to the Acquisition Loan and not the Working Capital Loan. The 2004 CA explicitly states that it applies to the Acquisition Loan only. Accordingly, Defendants' Renewed Motion for Summary Judgment is granted in part, excluding the Working Capital Loan from Defendants' required contribution. Accordingly, Plaintiff is entitled to contribution from Defendants pursuant to the terms of the 2004 CA which would be one half of the total amount of $192,509.20 paid by the Plaintiff on the Acquisition Loan.[12] There is no contribution due for Plaintiff's payments of the Working Capital Loan.

[12] Pursuant to the terms of the 2004 CA, the Defendants are jointly and severally liable and one half of their joint obligation is $48,127.30.

B. DEFENDANTS' MOTIONS FOR LEAVE TO AMEND

After review of Defendants' Motions for Leave to File an Amended Answer, Counterclaim, and Third-Party Complaint and the proposed amendments, the Court finds that, in the interest of justice, leave should not be granted. The amendments would add three affirmative defenses, a counterclaim and a third-party defendant. Although the new claims and defenses arise out of the same failed business venture, to add these expansive claims of fraudulent conduct to an otherwise simple lawsuit would unduly over broaden the issues presented in this litigation. Defendants wish to add a plethora of fraud-based allegations which would explode this lawsuit beyond the anticipations of Plaintiff, which would be highly prejudicial to Plaintiff at this stage. Defendants are free to file and pursue their claims in a separate lawsuit should they wish and it would seem that the statute of limitations would not be a hindrance as the basis of the new allegations stem from recently discovered evidence. However, the Court finds that adding these expansive claims now, especially with the award of summary judgment on the undisputed material facts before the Court, would be highly prejudicial and futile to the case presented before the Court.

CONCLUSION

For the aforementioned reasons, Plaintiff's Renewed Cross-Motion for Summary Judgment is GRANTED IN PART, requiring Defendants' contribution on the Acquisition Loan, and DENIED IN PART, excluding the Working Capital Loan from contribution under the 2004 CA. Defendants' Renewed Cross-Motions for Summary Judgment are also GRANTED IN PART, in that the 2004 CA does not apply to the Working Capital Loan, but in all other aspects are DENIED. Defendants' Motions for Leave to File an Amended Answer, Counterclaim, and Third-Party Complaint are hereby DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.