IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

PITA, LLC, and the MILAN PUSKAR REVOCABLE TRUST RESTATED 9/28/11,

Plaintiffs,

vs.

SCOTT S. SEGAL et al.,

Defendants,

Civil Action No. 18-C-372
Judge Phillip D. Gaujot

ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO PLAINTIFFS, GRANTING PARTIAL SUMMARY JUDGMENT TO DEFENDANT SEGAL, AND ENTERING JUDGMENT AGAINST DEFENDANT SEGAL

The Court, after due consideration of the parties' briefing and oral arguments,[1] hereby enters judgment as follows, finding that there are no genuine disputes of material fact, and makes the following findings of fact and conclusions of law:

Summary of Rulings

Plaintiffs' Amended Complaint states four counts against the Defendants. Count I is fraud in the inducement by PITA, LLC, ("PITA") against Defendants. Count II is fraud in the inducement by the Milan Puskar Revocable Trust Restated 9/28/2011 ("Trust") against Defendants. Count III is breach of contract by PITA against Defendants. Count IV is contribution by the Trust against Defendants.

[1] The Court stated rulings from the bench during its January 13, 2022, and March 7, 2022, hearings, some of which the Court subsequently, upon review of briefs and transcripts, reversed *sua sponte* during the May 27, 2022, hearing. *See* "Order" dated April 27, 2022. None of the reversed rulings was reduced to writing and none was certified as final pursuant to Rule 54(b), which states in part, "In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

emailed to counsel

Defendants, the Estate of Stanley M. Hostler and the Estate of Leonard P. Harris, settled with Plaintiffs. Third-Party Defendant United Bank was dismissed from the case and Defendant's counterclaims against Plaintiffs were dismissed in the Order Granting Plaintiffs' Motion for Partial Summary Judgment and Third-Party Defendant's Motion for Summary Judgment, entered on August 13, 2021. The only remaining Defendant is Scott S. Segal, ("Defendant").

Defendant's Motion for Summary Judgment as to the fraud in the inducement claims made by Plaintiffs is granted. The Court finds that Plaintiffs have not met the burden of clear and convincing evidence necessary to support allegations of fraud, and that Plaintiffs' allegation of fraud based upon a promise to perform does not support a claim for fraud. Accordingly, Counts I and II are dismissed with prejudice.

Count III, PITA's claim for breach of contract is also legally insufficient as a matter of law and Defendant's Motion for Summary Judgment is granted as to that count. The Court finds that under the facts of this case, PITA is not a non-interested independent third party but is one and the same with the Trust. The Court finds that the Trust provided the funds to pay the Note in full in 2017. In this case equitable principles limit recovery against co-guarantors to their pro rata contributive share through a claim for contribution. Accordingly, PITA's breach of contract claim is dismissed with prejudice.

As to Count IV, the Court grants the Trust summary judgment for its claim for contribution against Defendant. The Court finds that Defendant Segal and the Trust are equally responsible for the remaining balance on the Note after the settlements of the Estate of Hostler and the Estate of Harris are deducted from the Note's balance. Accordingly, judgment is granted for the Trust against Defendant Segal in the amount of **$975,952.08.**

Defendant's motion based upon West Virginia Code § 45-1-1 et. seq., is denied as moot. The Court finds that this Code section is not applicable to the Trust's claim for contribution on the Note. (After PITA's breach of contract claim was dismissed, the Court rules that West Virginia Code § 45-1-1 does not apply to this matter.)

The Court also finds and concludes that the Estate of Milan Puskar does not owe any contribution for Mr. Puskar's $1 million guaranty because the Estate closed in 2015 without any claim being made.

Standard of Review

Rule 56(c) of the West Virginia Rules of Civil Procedure provides, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

"Summary judgment is not a remedy that may be exercised at the circuit court's option. It is a remedy that must be granted where there is not genuine disputed issue of fact." L. Palmer & R. Davis, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 5th, at §56[2] (2017) (footnote omitted).

"The mere assertion that there exists a 'genuine issue of material fact' without a corresponding demonstration of what specific factual issues remain to be resolved, is insufficient to avoid summary judgment." Id. (footnote omitted).

"Determinations involving questions of law are within the sole province of the Court…the Court must resolve questions of law and cannot delegate that responsibility to the jury." *Id.* at §56[2][a].

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* (footnote omitted).

"[A] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

The Court is to apply a burden-shifting analysis to determine if summary judgment is warranted. If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure. *Horizon Ventures of W. Va., Inc. v. Am. Bituminous Power Partners, LP*, 857 S.E.2d 33, 38-39

Findings of Fact

This matter arises from a failed medical technology company called Protea Biosciences, Inc. ("Protea"). In 2009, Protea opened a $3 million line of credit with Centra Bank[2] (the "Note").

[2] United Bank is the successor in interest to Centra Bank through merger.

The Note was guaranteed by the common obligation of Milan Puskar, Scott Segal, Leonard P. Harris, and Stanley M. Hostler, individually, in the amount of $1 million each.[3] In 2010, Mr. Puskar provided a guaranty to Centra Bank, by and through the Trust, in the amount of $3 million while the other guaranties were unchanged. In 2011, Mr. Puskar passed away. In early 2017, the Note had a balance of approximately $3 million. The Trust, Mr. Segal, Mr. Harris, and the Estate of Stanley Hostler re-collateralized the outstanding $3 million loan by signing a "Change in Terms Agreement" for the Note. The agreement provided, in part, **"Any Party liable for the Existing Debt, including...guarantors...are not relieved of any obligation except as expressly relieved in this Agreement or any other writing."** The Change in Terms Agreement also had an Oral Agreement Disclaimer which stated **"This Agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties."** No other written agreement nor other writing has been presented purporting to relieve Mr. Segal, Mr. Harris, Mr. Hostler, nor the Trust from their guaranty agreements relative to the Protea Note. Despite the aforesaid disclaimer, Mr. Segal, Mr. Harris, and Mr. Hostler subsequently asserted an oral agreement between Mr. Puskar and Mr. Segal, Mr. Harris, and Mr. Hostler.

On November 21, 2017, PITA, LLC, was incorporated as a Domestic Profit Limited Liability Company with funds provided by the Trust. PITA purchased the Protea Note from United Bank for $3,026,904. On December 1, 2017, Protea filed for bankruptcy constituting a default under the Centra Bank commercial loan agreement with Protea.

[3] Of the four guarantors, only Mr. Segal is still alive.

By letter dated December 8, 2017, PITA requested Defendants Segal, Harris, and Hostler advise PITA of their "intentions to honor the obligations to repay the portion of the Protea Note which was personally guaranteed." After making the written request to honor their obligations under their $1 million guaranty agreements, the aforesaid Defendants refused to do so relying, in part, on an alleged oral agreement by Mr. Puskar before his death in 2011 to "take care of" the Protea Note in the event of a default even though they each signed the Change in Terms Agreement in 2017 representing that no such oral agreement existed.

PITA is not a non-interested independent third party but is wholly financed by the Trust and was created solely to acquire the Note, release the collateral that Protea and guarantors had posted, and pursue a financial recovery on the Trust's behalf from the other guarantors. The Trust provided all the funds for PITA's acquisition of the Note, and PITA has never had any income or funds other than what has been provided to it by the Trust and the recovery of contribution from the co-guarantors. PITA has no employees nor does it own any assets other than the Note. In verified discovery responses, Plaintiffs admitted that only the Trust has "...funded PITA's attorney fees, accounting and other expenses related to the collection of the Note."

CONCLUSIONS OF LAW

1. Plaintiffs' Fraud Counts

The Court finds that Plaintiffs have not met the burden of clear and convincing evidence necessary to support allegations of fraud and that Plaintiffs' allegations of fraud based upon a promise to perform do not support a claim for fraud. To sustain a fraud claim under West Virginia law, a plaintiff must prove three elements by clear and convincing evidence:

> (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified

> under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it.

Trafalgar House Constr., Inc. v. ZMM, Inc., 211 W. Va. 578, 567 S.E.2d 294, 300 (2002); *see also Tri-State Asphalt Prods. v. McDonough Co.*, 182 W. Va. 757, 763, 391 S.E.2d 907 (1990) ("Allegations of fraud, when denied by proper pleading, must be established by clear and convincing proof.")

Additionally, "[f]raud cannot be predicated on a promise not performed. To make it available there must be a false assertion in regard to some existing matter by which a party is induced to part with his money or his property." *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 746 S.E.2d 568, 576 (W. Va. 2013). Stated differently, "the representation required, in order that there be actionable fraud, must ordinarily relate to a past or existing fact, or to an alleged past or existing fact, and not to future occurrences." *Janssen v. Carolina Lumber Co.*, 137 W. Va. 561, 73 S.E.2d 12, 17 (W. Va. 1952) (emphasis supplied). *See Elk Refining Co. v. Daniel*, 199 F.2d 479, 482 (4th Cir. 1952) ("The burden of proving fraud is unquestionably heavy, *Hunt v. Hunt, Trustee*, 91 W. Va. 685, 114 S.E. 283, and it is also well established that one cannot rely blindly upon a representation without suitable investigation and reasonable basis. *Buena Vista Co. v. Billmyer*, 48 W. Va. 382, 37 S.E. 583.")

Plaintiffs argue that their fraud claims meet the essential elements in an action for fraud. They allege (1) each of the co-guarantors signed the 2017 Change of Terms Agreement representing they had no oral agreements with any other party; (2) that either those representations or their current defense of an alleged oral agreement with Mr. Puskar was false; (3) United Bank was justified in relying upon the co-guarantors' written representation that they had no oral agreement; and (4) that PITA, as successor-in-interest to United Bank, has been damaged because

it has been forced to litigate the defense of an alleged oral agreement with Mr. Puskar. This argument is rejected by the Court.

"Fraud cannot be predicated on a promise not performed." *Gaddy Eng'g Co.*, 746 S.E.2d at 576. Furthermore, there is no evidence of fraud or deceit relating to a past or existing fact, or to an alleged past or existing fact. Additionally, the Court finds that identifiable damages do not exist with respect to Plaintiffs' fraud claim and the damage claim simply mirrors the damage claims found in the breach of contract claim and contribution claim.

Accordingly, Counts I and II for fraud in the inducement are dismissed with prejudice.

2. PITA Breach of Contract Claim

The Court finds that PITA is not a non-interested independent third party entity separate and apart from the Trust for the purpose of obtaining the assignment of the Note, but rather is one and the same with the Trust. The Court finds that the Trust actually paid the Note in 2017 by advancing the funds to PITA to purchase the Note. The Trust formed PITA to acquire the Note for the purpose of obtaining contributing monetary relief from the other guarantors pursuant to their individual guarantees.

The Plaintiffs allege that Defendant never raised the defense of alter ego/veil piercing and that the evidence is undisputed that PITA, LLC, is a West Virginia limited liability company with a separate corporate existence from the Trust. This Court finds the facts of the case clearly show that PITA and the Trust are the same as aforesaid, and Plaintiffs' argument relative to alter ego/veil piercing is rejected by the Court. The Court finds that this matter is not a contract claim but a claim for contribution based upon principles of equity.

Accordingly, PITA's claim for breach of contract against Defendant is dismissed with prejudice. Payment of the Note balance on November 21, 2017, by PITA/Trust, was a satisfaction

of the Note as far as United Bank was concerned, and the assignment of the Note to PITA was not to a non-interested independent third party. PITA, alone, cannot now assert a breach of contract claim against other guarantors.[4] Plaintiffs are limited as a matter of law to the contributive share of its co-guarantors under its claim for contribution.

Trust's Claim for Contribution against Defendant Segal

As to Count IV, the Court grants summary judgment for the Trust. The Court finds that Defendant Segal and the Trust are equally responsible for the remaining balance on the Note after the settlements of the Estate of Hostler and the Estate of Harris are deducted from the Note's balance.

In 2009, Milan Puskar, Scott Segal, Leonard Harris, and Stanley Hostler all signed $1 million individual guaranties in favor of Centra Bank to secure the $3 million Note for Protea Biosciences. Thereafter, the Trust executed a guaranty in favor of United Bank in the amount of $3 million. The Court has previously found that the Milan Puskar guarantee was discharged at the time of his death when no claim was made against his estate. Therefore, the Court further finds that Defendants Segal, Harris, Hostler, and the Trust each owe one quarter share of the outstanding balance of the Note.

Defendant Segal argues that the Trust's 2010 guaranty of $3 million means that the proportionate values of the guaranties should change the shares, i.e., 50% for the Trust and one-sixth shares for Harris, Hostler, and Segal. This argument is rejected by the Court.

"When two or more persons have bound themselves as guarantors, they are generally presumed to be equally liable for a proportion of liability on the note guarantied, and in the event

[4] An assignment by United Bank to PITA, had Pita been a non-interested independent third party entity separate and apart from the Trust, may have given PITA the right to maintain an action for breach of contract to enforce the guaranty agreements against the defendants, however potentially subject to the provisions of West Virginia Code §45-1-1 *et. Seq.*

that one of them has paid more than his or her share of the amount owed, he or she is entitled to demand contribution from the others." 38A C.J.S. Guaranty § 159 (footnote omitted).

As the Court summarized the law in *Desrosiers v. Russell*, 660 So. 2d 396, 398 (Fla. Dist. Ct. App. 1995):

> When a person pays more than his share of a common obligation, the law gives him the remedy of contribution to obtain from the other obligors payment of their respective shares of the obligation. 12 Fla.Jur.2d Contribution, Indemnity and Subrogation § 1 (1979). Where two or more persons have bound themselves as guarantors, they are generally presumed to be equally liable for a proportion of the liability on the note guaranteed. *Curtis v. Cichon*, 462 So.2d 104 (Fla. 2d DCA 1985). In the event that one of the guarantors has paid more than his share of the amount owed, he is entitled to demand contribution from the others. *Fletcher v. Anderson*, 616 So.2d 1201 (Fla. 2d DCA 1993); 38 Am. Jur.2d Guaranty § 128 (1968).

See also Woods-Tucker Leasing Corp. of Georgia v. Kellum, 641 F.2d 210, 215 n.7 (5th Cir. 1981) ("guarantors who jointly execute an agreement of guaranty are equally liable on the agreement"); 38 Am. Jur. 2d Guaranty § 90 ("If a principal obligation is guaranteed by two or more persons, each must pay the proportional share of the liability, and a guarantor who has paid more than his or her share is entitled to contribution from the others and may sue to enforce that right.") (footnotes omitted); *Id.* ("co-guarantors are equally bound, and each is required to contribute equally") (footnotes omitted); 38A C.J.S. Guaranty § 154 ("In accordance with the general principles of contribution, as a general rule, where one of several guarantors pays more than his or her proportionate part of the principal's debt, that guarantor is entitled to contribution.")

The law is similarly clear on the question of attorneys' fees: When one guarantor sues another on the basis of the latter's guaranty, the plaintiff guarantor is not entitled to attorneys' fees. This is true even if, as here, the plaintiff guarantor has acquired the underlying note. A long line of decisions from around the country—including from the Federal District Court in Wyoming and the State Supreme Courts of Delaware and Arkansas—has so held. Several of those courts

have observed that to allow one guarantor to claim attorneys' fees against another merely because the first one happened to acquire the note "would serve to undermine the basic tenets of guaranty law." *Amphibious Ptrs., LLC v. Redman*, 2006 WL 8430940, at *4 (D. Wyo. Dec. 7, 2002). *See also Tomaszewicz v. Wiman*, 2002 WL 397003, at *7 (Tex. App. Mar. 14, 2002) (rejecting claim for attorneys' fees by plaintiff guarantor that had received assignment of note and then sued co-guarantors); *Halford v. S. Cap. Corp.*, 279 Ark. 261, 262–64 (1983) (rejecting claim for attorneys' fees by plaintiff who was guarantor that had received assignment of note and then sued co-guarantors); *Collins v. Throckmorton*, 425 A.2d 146, 151–52 (Del. 1980) (rejecting attempt to shift attorneys' fees to co-guarantors, and holding, "Allowing the plaintiff to expand his rights as co-guarantor against the defendants simply because he obtained an assignment of the note upon satisfaction thereof would serve to undermine the basic tenets of guaranty law"); *Weitz v. Marram*, 34 Md. App. 115, 122–23 (Md. Ct. Spec. App. 1976) (holding that guarantor who purchased loan and sued co-guarantors could not claim attorneys' fees; fee-shifting language in loan agreement did not apply to action against other guarantors).

Defendant's Motion for Summary Judgment based upon West Virginia Code § 45-1-1

Defendant argued that PITA was required to sue all guarantors of the Note, including the Trust, under West Virginia Code § 45-1-1, *et seq*. West Virginia Code Chapter 45, Suretyship and Guaranty, Article 1, "Sureties, Guarantors, Indorsers, Bail, and Principals," states as follows at Section 1, "Demand that Creditor Sue:"

> The surety, guarantor or indorser (or his committee or personal representative) of any person bound by any contract may, if a right of action has accrued thereon, require the creditor (or his committee or personal representative), by notice in writing, forthwith to institute suit thereon; and if he be bound in a bond with collateral condition or for the performance of some collateral undertaking, he shall

> also specify in such notice the breach of the condition or undertaking for which he requires suit to be brought.

W.Va. Code § 45-1-1. West Virginia Code § 45-1-2, "Discharge of Surety, Guarantor, or Indorser by Failure of Creditor to Sue" states:

> If such creditor or his committee or representative shall not, within a reasonable time after such notice, institute suit against every party to such contract who is a resident in this State, and not insolvent, and prosecute the same with due diligence to judgment and by execution, he shall forfeit his right to demand of such surety, guarantor or indorser or his estate, and all his cosureties and their estates, the money due by any such contract for the payment of money, or the damages sustained by any breach of the collateral condition or undertaking specified as aforesaid. But the conditions, rights, and remedies against the principal debtor shall remain unimpaired thereby.
>
> W. Va. Code § 45-1-2.

Because the Court has dismissed PITA's breach of contract claim, this argument is denied as moot.[5] Accordingly, Defendant's Motion for Summary Judgment based upon West Virginia Code § 45-1-1 *et seq.* is denied.

3. The Estate of Milan Puskar Does Not Have Any Liability for Contribution

The Court also rules that the Estate of Milan Puskar, which closed in 2015 without any claim being made against it relevant to this matter does not owe any contribution for Mr. Puskar's $1 million guaranty. Additionally, the Estate is not a party to this case.

Accordingly, it is THEREFORE ORDERED judgment for the Trust against Defendant Segal in the amount of $975,952.08. This sum is calculated as follows: On November 21, 2017, PITA/Trust paid United Bank $3,026,904.16. The Estate of Hostler and Estate of Harris each paid (or agreed to pay over time) $537,500 to the Plaintiffs leaving a principal balance of $1,951,904.16. Dividing the principal balance equally between the Trust and Segal leaves Defendant Segal

[5] Had the Court allowed PITA's breach of contract claim to proceed, then and in that event, West Virginia Code § 45-1-1 *et seq.* may have been relevant.

responsible for $975,952.08. The judgment bears pre-judgment interest at the rate of 7% from December 8, 2017, the date PITA requested Defendants Segal, Harris, and Hostler to advise it of their intentions to honor the obligations to repay the portion of the Protea Note, and thus the date the cause of action accrued. Pre-judgment interest shall run until the date of entry of this Order. The judgment also bears post-judgment interest at the judicial rate of 4% from the date of entry of this Order until paid.

Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the Court directs entry of this Order as a Final Order as to the claims and issues above upon an express determination that there is no just reason for delay and upon an express direction for the entry for judgment.

All objections are hereby preserved.

IT IS SO ORDERED.

The Clerk of this Court shall provide certified copies of this Order to the following:

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ENTER THIS 21st DAY OF JULY, 2022:

Phillip D. Gaujot, Chief Circuit Judge

ENTERED: July 21, 2022

DOCKET LINE 204, Jean Friend, Clerk

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.

Jean Friend/s Circuit Clerk