IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BEDROCK STONE AND STUFF, INC., HOWARD YOUNG and DEBRA YOUNG, His Wife,	)	Civil Action No. 04-CV-02101
Plaintiffs	)	
vs.	)	
MANUFACTURERS AND TRADERS TRUST COMPANY,	)	
Defendant	)	

* * *

APPEARANCES:
RICHARD H. WIX, ESQUIRE
On behalf of Plaintiffs

MORTON R. BRANZBURG, ESQUIRE
CAROL A. SLOCUM, ESQUIRE
GLENN A. WEINER, ESQUIRE
On behalf of Defendant

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on three post-trial motions filed by the parties: (1) Plaintiffs Howard Young and Debra Young's Motion for a New Trial Pursuant to Rule 59 F.R.C.P. filed June 6, 2005;[1] (2) Plaintiff Bedrock Stone and Stuff, Inc.'s Motion to Mold Judgment to Include Prejudgment Interest

[1] The Memorandum of Law of Defendant Manufacturers & Traders Trust Company in Opposition to Plaintiffs Howard Young and Debra Young's Motion for a New Trial Pursuant to Rule 59 F.R.C.P. was filed June 27, 2005.

filed June 9, 2005;[2] and (3) the Motion of Defendant Manufacturers and Traders Trust Company for Judgment as a Matter of Law or, in the Alternative, for a New Trial or Remittitur filed June 17, 2005.[3]

For the reasons expressed below, we deny Plaintiffs Howard Young and Debra Young's Motion for a New Trial Pursuant to Rule 59 F.R.C.P.; we deny Plaintiff Bedrock Stone and Stuff, Inc.'s Motion to Mold Judgment to Include Prejudgment Interest; and we grant in part and deny in part the Motion of Defendant Manufacturers and Traders Trust Company for Judgment as a Matter of Law or, in the Alternative, for a New Trial or Remittitur.

More specifically, regarding plaintiffs' motion for a new trial, we conclude that we did not err in limiting plaintiffs to one cause of action; granting defendant's motion for a directed verdict against plaintiffs Howard Young and Debra Young; dismissing the Youngs as plaintiffs despite their assertion that they were third-party beneficiaries of the contracts between Bedrock Stone and Stuff, Inc. ("Bedrock") and Manufacturers and Traders Trust Company ("M&T Bank"); or refusing to permit plaintiffs to present evidence regarding the amount the Bank paid

---

[2] The Memorandum of Law of Defendant, Manufacturers and Traders Trust Company in Opposition to Plaintiff Bedrock Stone and Stuff, Inc.'s Motion to Mold Judgment to Include Prejudgment Interest was filed June 27, 2005.

[3] Plaintiff Bedrock Stone and Stuff Inc.'s Brief in Response to Defendant's Motion for Judgment as a Matter of Law, or in the Alternative, a New Trial or Remitittur was filed July 1, 2005.

to its counsel.

Next, we deny plaintiffs' motion for prejudgment interest because plaintiffs are not entitled to such interest as a matter of law.

Finally, regarding defendant's post-trial motions, we deny defendant's motion for a directed verdict or a new trial based upon an insufficiency of evidence at trial. However, we grant defendant's request for remittitur and reduce the amount of the jury's Verdict from $2,600,000 to $1,500,000 because we conclude that based upon the evidence adduced at trial, the jury's verdict was excessive and beyond the amount needed to make the plaintiff whole. Furthermore, we conclude that damages in the amount of $1,500,000 are appropriate in this matter.

JURISDICTION

This action is before the court on diversity jurisdiction. Plaintiff Bedrock Stone & Stuff, Inc. is a Pennsylvania corporation and plaintiffs Howard and Debra Young are residents of the Commonwealth of Pennsylvania. Defendant Manufacturers and Traders Trust Company is a New York corporation. The amount in controversy is in excess of $75,000. See 28 U.S.C. § 1332.

VENUE

Venue is proper in the United States District Court for the Eastern District of Pennsylvania because the events and

omissions giving rise to plaintiffs' claims allegedly occurred in this district, namely, in Berks County, Pennsylvania. See 28 U.S.C. §§ 118, 1391(b).

PROCEDURAL HISTORY

On December 3, 2003 plaintiffs Howard Young, Debra Young and Bedrock Stone & Stuff, Inc. commenced this action by filing a Complaint in the United States District Court for the Middle District of Pennsylvania. In their Complaint, plaintiffs contend that defendant Manufacturers and Traders Trust Company, owed them a duty of good faith and fair dealing, which they contend defendant breached. Moreover, plaintiffs contend that defendant breached agreements to loan plaintiff Bedrock an additional $30,000 for working capital needs and to honor and pay certain critical overdrafts on the corporate checking account until the entire $30,000 was advanced.

On February 23, 2004 the Answer of Defendant Manufacturers and Traders Trust Company with Affirmative Defenses was filed. On February 11, 2004, prior to filing its answer to plaintiffs' Complaint, defendant filed a motion for change of venue to have this action transferred from the Middle District of Pennsylvania to the United States District Court for the Eastern District of Pennsylvania. By Memorandum and Order dated May 13, 2004, United States District Judge Yvette Kane transferred venue of this action from the Middle District to this court.

On May 14, 2004 a certified copy of the record from the Middle District was received by the Clerk of Court for the Eastern District of Pennsylvania and the case was assigned to the undersigned. On September 28, 2004 a Rule 16 Status Conference was conducted by the undersigned at which time we set certain deadlines including deadlines for the completion of discovery, filing of dispositive motions and a trial date.

By Order and Opinion of the undersigned dated and filed May 25, 2005 we denied defendant's motion for summary judgment.

A jury trial was conducted before the undersigned on May 24, 25, 26, 27, 31 and June 1 and 2, 2005. On May 31, 2005 we granted in part and denied in part defendant's motion for a directed verdict. Specifically, we granted a directed verdict against plaintiffs Howard Young and Debra Young, and we denied defendant's motion for a directed verdict against plaintiff Bedrock Stone and Stuff, Inc.

The jury heard testimony from eight witnesses for plaintiffs and one defense witness. In addition plaintiffs introduced 33 exhibits into evidence at trial. Defendant introduced no exhibits. At the close of the trial, the jury returned a verdict in favor of plaintiff Bedrock and against defendant M&T Bank.

Specifically, the jury found that defendant bank breached a contract to loan Bedrock an additional $30,000 for

working capital, and breached a separate contract to honor and pay certain critical checks drawn on the Bedrock checking account despite the fact that there were insufficient funds in the Bedrock checking account to cover the overdrafts. Moreover, the jury found that defendant bank breached a duty of good faith and fair dealing owed to Bedrock. However, the jury found against plaintiff Bedrock and for defendant M&T Bank on plaintiff's claim that defendant breached an agreement to refinance plaintiff's entire indebtedness.

The jury further determined that Bedrock suffered monetary damages as a consequence of defendant's breaches and that the monetary damages were reasonably foreseeable to defendant. Finally, the jury awarded compensatory damages to Bedrock in the amount of $2,600,000 as a result of defendant's breaches.

FACTS

Based upon the pleadings, record papers, exhibits and the testimony of the witnesses at trial, the verdict of the jury indicates that the jury found the pertinent facts to be as follows.

Plaintiff Bedrock Stone and Stuff, Inc. was incorporated by plaintiff Howard Young. Mr. Young was the President and sole shareholder of Bedrock; and his wife, plaintiff Debra Young, was the company's Secretary. Bedrock was

in the business of manufacturing and selling soil and mulch to golf courses, landscapers and wholesalers.

In September 1998 Pennsylvania National Bank and Trust Company, which subsequently became Keystone Financial Bank, N.A. ("Keystone") extended financing to Bedrock. The financing took various forms over the years and included an equipment purchase loan for $138,000, a term loan for $580,000, a $475,000 line of credit and a second equipment purchase loan for $30,000.

Security for the various loans consisted in part of the personal sureties of Howard Young and Debra Young. While there was some testimony about these prior loans and personal guarantees, plaintiffs did not offer into evidence at trial any of the underlying loan documents or their promissory notes evidencing their personal guarantees.

In October 2000 defendant M&T Bank acquired Keystone by merger, thereby acquiring the commercial loan obligations of Bedrock the personal guarantees of the Youngs.

From 1998 to 2000 Bedrock's operating income and gross profit increased. However, beginning in 2001, Bedrock's operating income and gross profit began to decrease. Plaintiffs contend that the decrease in Bedrock's income was because of a six-month drought, the purchase of real estate for the Bedrock business and the cost of obtaining permits for the property from the Pennsylvania Department of Environmental Protection.

In September or October 2002 because of Bedrock's cash flow problems, the financial deterioration of the company and continued overdrafts of Bedrock's checking account, Jeffrey O'Neill, a loan officer at defendant bank, and his immediate supervisor, James Donovan, decided to refer Bedrock's loan obligations to the Special Assets Division of defendant bank. In early December 2002 oversight of Bedrock's loan obligations was assigned to Joseph E. Warner, III, Vice President and Loan Workout Specialist for defendant.

On December 6, 2002 Mr. Warner, Mr. O'Neill, Mr. Young, Lisa Thompson, Esquire (counsel for plaintiffs), and Richard Althouse (Business Manager for Bedrock), met at the Bedrock work site. The purpose of this meeting was to introduce Mr. Warner as Bedrock's new account officer. The condition, future outlook and future needs of Bedrock were discussed at this time.

Prior to the Bedrock account being assigned to Mr. Warner, Mr. O'Neill would approve the payment of overdrafts. The parties disagree if only some, or all, overdrafts were approved by Mr. O'Neill. After Mr. Warner took over the account, defendant continued to honor some, but not all overdrafts. Plaintiffs contend that Mr. Warner agreed to pay all critical checks. The testimony of Mr. Warner and Mr. O'Neill makes it unclear what defendant actually agreed to pay regarding Bedrock's overdrafts.

In December 2002 plaintiff provided projections prepared by Richard Althouse for expected future profits of Bedrock's business for the years 2003, 2004 and 2005. Specifically, plaintiff Bedrock expected pre-tax earnings in calendar year 2003 of $169,000; in year 2004, of $146,000; and in year 2005, of $163,967. After review of those projections, Mr. Warner agreed that Bedrock's income projections for these three years were realistic. In an internal memorandum to his superior at the bank urging approval of the additional financing sought by Bedrock, Mr. Warner stated "Additionally, the company has provided projections showing increased sales and lower expenses, which seem realistic."[4]

In a letter dated December 19, 2002 defendant agreed to extend to plaintiffs an additional $30,000 in financing for Bedrock's working capital needs if Bedrock could meet five specific conditions. As outlined in the letter, the five conditions were as follows:

> 1. The Bank will require a direct assignment of all permits, licenses, and approvals for the current operation of the business.
>
> 2. The Bank will require that all past due interest be paid at the time of loan closing. The current amount due is $8,469.24. This amount is subject to change as the December loan payments become due and payable.

[4] See Plaintiff's Exhibit 6, an undated memo from bank Vice President Joseph E. Warner to bank official Michael Wallace.

> 3. The Bank will require a mortgage on the business property, subject only to the purchase money mortgage already in place.
>
> 4. The Bank will require the unlimited guaranties of Howard and Debra Young.
>
> 5. The Bank will require that all indebtedness be cross-defaulted and cross-collateralized.

Plaintiff's Exhibit 2.

The December 19, 2002 letter set forth other conditions and agreements. Defendant agreed to accommodate plaintiffs' seasonal business by providing a principal repayment moratorium during the winter months, with an accelerated principal repayment schedule during Bedrock's peak season. Furthermore, defendant requested that plaintiffs provide a list of its most crucial accounts payable and agreed "[u]pon receipt and review of this information, the Bank may approve additional overdrafts on your corporate checking account until the $30,000 can be advanced."

On December 19, 2002 plaintiffs agreed to the terms and conditions and executed an acknowledgment and acceptance of those terms. Howard Young testified at trial that all of the five terms could be met by plaintiffs.

On January 7, 2003 defendant formally withdrew its offer to provide the $30,000 in financing to plaintiffs. Moreover, defendant advised Bedrock that it would no longer honor any overdrafts from the corporate checking account.

Based upon the testimony, the parties dispute the course of negotiations after January 2003. Defendant contends that it required plaintiffs to provide certain information regarding the future projections for Bedrock and details concerning plaintiffs' representations regarding possible investment in the business by some of Bedrock's customers.

Plaintiffs contend that they were willing and able to, and in fact did, provide defendant with the information it sought. Furthermore, plaintiffs contend that on February 13, 2003 Mr. Warner verbally indicated that defendant was going to commit to lending additional money to Bedrock and also to refinance all of Bedrock's outstanding loans. Plaintiffs further contend that Mr. Warner requested additional information which was communicated to him on February 14, 2003 and that plaintiffs began contacting all of their unsecured creditors to begin a plan to avoid bankruptcy in anticipation of receiving the extra financing from defendant bank.

In a letter dated February 21, 2003 defendant advised plaintiff that it was unwilling to agree to refinance plaintiffs' indebtedness. Defendant further declined to extend the $30,000 for working capital needs and demanded that plaintiff repay the overdrawn balance of the corporate checking account in the amount of $14,954.12.

On March 5, 2003 defendant filed Confession of Judgment Complaints in order to collect the amounts owed by plaintiffs. Defendant confessed judgment on all of Bedrock's outstanding commercial obligations.

In April 2003 Bedrock filed a petition under Chapter 11 of the United States Bankruptcy Code and Howard Young and Debra Young each filed a voluntary petition under Chapter 13 of the Bankruptcy Code.

Bedrock remained in business until July 2003 when it ultimately ceased operations.

STANDARD OF REVIEW

Rule 59 of the Federal Rules of Civil Procedure permits a party to move the court for a new trial or to alter or amend a judgment. A district court may grant a new trial to prevent injustice or correct a verdict that is against the weight of the evidence. American Bearing Company, Inc. v. Litton Industries, Inc., 729 F.2d 943, 948 (3d Cir. 1984).

However, a new trial may not be granted to allow a losing party to assert a new theory that it could have, but did not, raise at trial. Grumman Aircraft Engineering Corporation v. The Renegotiation Board, 482 F.2d 710, 721 (D.C. Cir. 1073), rev'd on other grounds, 421 U.S. 168, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975). Moreover, such motions are not intended to merely relitigate old matters. Montgomery County v. Microvote

Corporation, No. Civ.A. 97-6331, 2001 U.S. Dist. LEXIS 8727 (E.D.Pa. June 25, 2001)(Kelly, J.).

INDIVIDUAL PLAINTIFFS' POST-TRIAL MOTIONS

In their post-trial motion, plaintiffs Howard Young and Debra Young contend that the undersigned trial judge erred as follows: (1) in limiting plaintiffs to one cause of action; (2) in granting defendant's motion for a directed verdict against plaintiffs Howard Young and Debra Young; (3) in dismissing the Youngs as plaintiffs because they were third-party beneficiaries of the contracts between Bedrock and M&T Bank; and (4) in refusing to permit plaintiffs to present evidence of the amount of money which the bank paid to its counsel for legal collection fees in this case. We address plaintiff's four claims in order.

Denying Additional Claims

(Plaintiffs' Contentions)

Plaintiffs assert that at the commencement of trial we erred in limiting them to one cause of action. Plaintiffs contend that we limited them to a single cause of action for breach of the duty of good faith and fair dealing. Plaintiffs argue that we recognized our mistake when we submitted three additional breach of contract claims to the jury. Plaintiffs aver that their Complaint alleges four causes of action including negligence, breach of contract, promissory estoppel and breach of the duty of good faith and fair dealing.

Plaintiffs argue that our failure to permit them to proceed on all of their causes of action entitles them to a new trial because we did not rule that plaintiffs could submit their breach of contract cause of action to the jury until after the Youngs were dismissed from the case.

Denying Additional Claims

(Defendant's Contentions)

Defendant opposes plaintiffs' motion for a new trial in it entirety. More specifically, defendant asserts that each of the four theories plaintiffs were precluded from presenting were legally and factually deficient.

Defendant argues that any claim by plaintiffs for negligence is barred by the gist-of-the-action and economic-loss doctrines. Specifically, defendant contends that the gist-of-the-action doctrine precludes plaintiffs from recasting breach of contract claims as tort claims.

The doctrine bars tort claims: (1) which 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 alleged liability stems from the contract; (4) where the tort claim essentially duplicates a breach of contract claim; or (5) where the success of the tort claim is wholly dependent upon the terms of the contract.

Furthermore, the doctrine bars any tort claim which arises out of the alleged non-performance of an express or implied contractual obligation. Any tort claims that are inextricably intertwined with the contract claims should be dismissed. Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10 (Pa.Super. 2002); Werwinski v. Ford Motor Company, 286 F.3d 661 (3d Cir. 2002).

Regarding the economic-loss doctrine, defendant contends that plaintiffs may not recover in tort for purely economic injuries which flow from a contractual relationship and which are not accompanied by physical injury or damage to property. Werwinski, supra.

In this case, defendant asserts that these two doctrines (gist-of-the-action doctrine and economic-loss doctrine) prohibit plaintiffs from asserting a tort claim in this matter. Moreover, defendant argues that even if plaintiffs could assert a tort claim, they presented no evidence from which a jury could determine the appropriate standard of care, let alone that the bank deviated from it.

Next, defendant contends that to prove a claim for promissory estoppel, plaintiffs must establish that there is no enforceable agreement between the parties. Defendant asserts that plaintiffs have consistently argued, and the jury found, that there were agreements between the parties. Thus, there can

be no cause of action for promissory estoppel.

Denying Additional Claims

(Discussion)

For the following reasons we deny plaintiffs' motion for a new trial on this issue.

Plaintiffs' Complaint contains 38 separate paragraphs which are not separated into individual causes of action. Rule 8 of the Federal Rules of Civil Procedure does not require that claims be set forth in separate counts. Moreover, federal notice pleading requires only a "short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment of relief the pleader seeks." Fed.R.Civ.P. 8(a)(2) and (3). In addition, all pleadings "shall be so construed as to do substantial justice." Fed.R.Civ.P. 8(f).

After reviewing plaintiffs' Complaint, we conclude that plaintiffs do not plead a cause of action for either negligence or promissory estoppel. Regarding negligence, there is no mention in the Complaint of any duty owed to plaintiffs, how that duty was breached or that a breach was the proximate cause of any harm to plaintiffs.

Moreover, regarding a claim for promissory estoppel, we agree with defendant that even if a promissory estoppel cause of action were pled, plaintiffs must establish that there is no enforceable agreement between the parties. However, that is

contrary to every assertion which plaintiffs made in this matter. Defendant correctly asserts that plaintiffs have consistently argued, and the jury found, that there were agreements between the parties. Thus, there can be no cause of action for promissory estoppel.

As we concluded at trial, plaintiffs' Complaint does assert causes of action for breach of contract and breach of the duty of good faith and fair dealing and no more.[5]

Plaintiffs did not cite any legal authority to support this portion of their post-trial motion. Rule 7.1(c) of the Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania requires that every motion "shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion. E.D.Pa.R.Civ.P. 7.1(c).

Under this district's Local Rules, failure to cite any applicable law is enough to deny a motion as without merit because "zeal and advocacy is never an appropriate substitute for case law and statutory authority in dealings with the Court." Marcavage v. Board of Trustees of Temple University of the Commonwealth System of Higher Education, No. Civ.A. 00-5362, 2002 U.S. Dist. LEXIS 19397 at n. 8 (E.D.Pa. Sept. 30, 2002) (Tucker, J.). See also Purcell v. Universal Bank, N.A.,

[5] See Notes of Testimony of the trial conducted before the undersigned on May 31, 2005 at pages 78-100.

No.Civ.A. 01-2678, 2003 U.S. Dist. LEXIS 547 (E.D.Pa. Jan. 3, 2003)(Van Antwerpen, J.). Hence, because plaintiff did not provide any legal authority for their contentions of error on this issue, we deny plaintiff's motion on that basis as well.

Next, we agree with defendants that the gist-of-the-action and economic-loss doctrines each bar a negligence claim in this matter. Accordingly, we deny plaintiff's post-trial motion on that basis.

Finally, plaintiffs did not object when prior to commencement of jury selection we originally determined that they had asserted only one cause of action.[6] Moreover, when the issue of additional claims came up during the charge conference[7], plaintiff sought only to add claims for breach of contract, not negligence or promissory estoppel. Because there was evidence in the record to support breach of contract claims, and reading plaintiffs' Complaint in an effort to do substantial justice, we added those claims, over the objection of defendant, to the

[6] Immediately prior to the commencement of jury selection, the undersigned held a brief conference in the jury room adjacent to the courtroom being utilized in the James A. Byrne United States Courthouse, Philadelphia, Pennsylvania. During the conference, the undersigned discussed the possibility of settlement and reviewed with counsel for the parties the two-page statements of the parties containing their respective contentions. At that time, the undersigned expressed to counsel his belief that the only claim brought by plaintiffs in their Complaint was a claim asserting a breach of the duty of good faith and fair dealing on behalf of all plaintiffs against defendant M&T Bank. At that time, plaintiffs' counsel did not object to the court's characterization that plaintiffs' case only consisted of a single claim.

[7] See Notes of Testimony of the trial conducted before the undersigned on May 31, 2005 at pages 78-101.

verdict slip to be submitted to the jury.

We consider plaintiffs' failure to object to our determination that there was only one cause of action (a cause of action for breach of the duty of good faith and fair dealing) and failure to object at any time prior to post-trial motions to our not allowing claims for negligence or promissory estoppel, to constitute a waiver of those issues. See Danvers Motor Co., Inc. v. Bob Chambers Ford, 432 F.3d 286 (3d Cir. 2005). Moreover, as noted above, a new trial may not be granted to allow a losing party to assert a new theory that it could have raised, but did not raise, at trial. Grumman, supra.

Accordingly, we deny plaintiffs' motion for a new trial on their contention that we erred in limiting them to one cause of action.

Granting Directed Verdict

(Plaintiffs' Contentions)

Plaintiffs' second contention of error is that we erred in granting defendant's motion for a directed verdict against plaintiffs Howard Young and Debra Young. Specifically, plaintiffs argue that it was uncontested that the Youngs each personally guarantied the debt of Bedrock by signing guaranty contracts with the Bank. Thus, plaintiffs allege that it was error to dismiss the Youngs even though the actual contracts were not entered into evidence.

Furthermore, plaintiffs contend that the testimony of the witnesses at trial would support a theory that the bank breached its duty of good faith and fair dealing to the Youngs when they were forced into bankruptcy, which in turn caused the bank to enter confessions of judgment against the Youngs. The Youngs further assert that they have damages separate from their corporation because filing for bankruptcy caused the Youngs to lose their only source of income (health insurance) and because their personal credit reputations were damaged.

Granting Directed Verdict

(Defendant's Contentions)

Defendant contends that the court properly dismissed the Youngs as parties. Defendant argues that although certain witnesses acknowledged the existence of contracts between the Youngs and the bank, the contracts were never submitted into evidence. Therefore, the jury could neither determine the terms of those contracts, nor assess whether a breach of those terms, either express or implied, had occurred. Thus, defendant asserts, the court did not err.

Defendant also argues that the Youngs presented no evidence that they suffered any compensable damages. Defendant contends that it is well established that stockholders and employees of a corporation may not assert claims against other persons for damages that result indirectly to an individual

because of injuries to the corporation. Temp-Way Corporation v. Continental Bank, 139 B.R. 299 (E.D.Pa. 1992).

Granting Directed Verdict

(Discussion)

For the following reasons, we deny plaintiffs' motion for a new trial on this issue.

Again, we note that plaintiffs have not cited any legal authority to support their contentions concerning our granting a directed verdict. Thus, we deny this portion on plaintiffs' motion on that basis.

Moreover, at trial plaintiffs did not seek to re-open their case-in-chief to submit any underlying loan guarantees into evidence in order to establish a contract between the Youngs and the bank. Thus, the individual plaintiffs cannot now complain that we erred by dismissing them from this action for their failure to enter into evidence any supporting information and documents which they could have requested to be admitted into evidence or otherwise be made part of the record, but did not.

Finally, in addition to the reasons which we articulated on the record at trial in support of granting defendant's motion for a directed verdict against the Youngs[8], which we incorporate here, there is an additional reason to support the directed verdict against the Youngs.

[8] See Notes of Testimony of the jury trial conducted before the undersigned on May 31, 2005 at pages 10-12.

Guarantors of a corporation's debt, even if those guarantors are also stockholders, do not have standing to bring an action if the only harm suffered is derivative of the harm the corporation suffered. Synthes (U.S.A.) v. Globus Medical, Inc., No.Civ.A. 04-1235, 2005 U.S. Dist. LEXIS 19962 (E.D.Pa. Sept. 14, 2005)(Stengel, J.); Baer v. Glanzburg Tobia & Associates, Inc., No.Civ.A. 01-684, 2002 U.S. Dist. LEXIS 12165 (E.D.Pa. Jan. 10, 2002)(Kaufmann, J.); Temp-Way, supra.

In this case, plaintiffs assert that the Bank's actions (in breaching certain contracts to loan addition funds and to pay critical checks, and in breaching the duty of good faith and fair dealing owed to the corporation) caused plaintiffs Howard Young and Debra Young to lose their only source of income (their health insurance) and to lose their personal credit and reputations. We conclude that all of these alleged damages are derivative to the harm suffered by the corporation.

Therefore, based upon the cases cited above, plaintiffs do not have standing to assert any claims individually. As a result, we did not err in granting defendant's motion for a directed verdict and dismissing the Youngs from this case. Accordingly, we deny plaintiffs' motion for a new trial on this basis.

Third-Party Beneficiaries

(Plaintiffs' Contentions)

Next, plaintiffs argue that we erred in dismissing all claims of individual plaintiffs Howard Young and Debra Young. These plaintiffs claim that they each have viable claims as third-party beneficiaries of the contracts between Bedrock and M&T Bank. Plaintiffs rely on Section 302 of the Restatement Second of Contracts.[9] In particular, the Youngs contend that the purpose of the contracts between the bank and Bedrock was to enable Bedrock to continue in business. Moreover, the contracts between Bedrock and the bank were negotiated by Howard Young for his benefit and the benefit of his wife.

---

[9] Section 302 of the Restatement Second of Contracts provides:

> § 302 Intended and Incidental Beneficiaries
>
> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> > (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> > (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Third-Party Beneficiaries

(Defendant's Contentions)

Defendant asserts that the Youngs do not qualify as intended third-party beneficiaries of the additional contracts which the jury found to exist between M&T Bank and Bedrock. Moreover, defendant argues that this issue was not raised before the jury and that plaintiffs may not raise it now for the first time. Grumman, 482 F.2d at 721.

In addition, defendant contends that for one to qualify as a third-party beneficiary entitled to assert a claim under a contract, the intention to benefit that third-party usually must affirmatively appear in the contract itself. Because no such intent to benefit the individual plaintiffs appears in any contract between plaintiff Bedrock and M&T Bank, defendant argues, the Youngs do not qualify as third-party beneficiaries.

Third-Party Beneficiaries

(Discussion)

For the following reasons, we deny plaintiffs' post-trial motion on this issue.

We agree with defendant that plaintiffs did not contend that they are third-party beneficiaries of the contracts between Bedrock and the bank until filing their post-trial motion. Furthermore, in their Complaint plaintiffs Howard Young and Debra Young do not plead that they are third-party beneficiaries of

these contracts. Therefore, on those two bases, we deny plaintiffs' post-trial motion on this issue.

Moreover, we also would deny plaintiffs' post-trial motion on this issue on the merits. In Scarpitti v. Weborg the Supreme Court of Pennsylvania stated the following:

> [A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, unless, the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies 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.

530 Pa. 366, 372-373, 609 A.2d 147, 150-151 (1992).

In this case, plaintiffs have not demonstrated an express intention in the contracts between Bedrock and M&T Bank to benefit the Youngs as third-party beneficiaries. Neither do we find the circumstances in this case so compelling as to effectuate an intention of the parties to make the Youngs third-party benficiaries.

The Youngs were merely guarantors of the debt incurred by their corporation to provide the bank with additional security for the loans made to Bedrock. The relationship was not created for the benefit of the Youngs. Rather, the guarantees by the Youngs were for the benefit of the bank in order to provide the

bank with additional security for the loans in the event of Bedrock's default.

Thus, we conclude that the exception to the general rule that a third-party beneficiary must be named does not apply in this case. Accordingly, we deny plaintiff's post-trial motion on this issue.

Bank Attorneys' Fees

(Plaintiffs' Contentions)

Plaintiffs' final allegation is that we erred in refusing to permit them to present evidence of the amount of money paid by M&T Bank to its counsel for legal fees. Specifically, plaintiffs sought to establish that in confessing judgment against plaintiffs, defendant charged collection fees of more than ten times the amount of the legal fees actually paid by the bank. Plaintiffs contend that this excess payment constitutes damages suffered by them when defendant confessed judgment against Bedrock on the underlying promissory notes.

Bank Attorneys' Fees

(Defendant's Contentions)

Defendant contends that we correctly excluded the evidence about the amount paid for attorneys' fees. Furthermore, defendant asserts that plaintiffs fail to identify how the proposed evidence would have established any element of any claim

asserted by them or explain why they should be permitted to mount a collateral attack on the amount of the confessed judgments when they did not do so in the underlying state court proceedings.

Bank Attorneys' Fees

(Discussion)

Again, on this issue, plaintiffs do not cite any legal authority in support of their position. Therefore, we deny plaintiffs' post-trial motion for their failure to comply with Local Rule 7.1(c).

At trial we sustained defendant's objection to plaintiffs' offer of this evidence. We reasoned that the amount of legal fees paid by the Bank to its counsel was irrelevant to any issue in the case. We concluded that the amount paid by the bank to its lawyers for legal services rendered to the bank in connection with the bank's efforts to collect plaintiffs' delinquent loan payments, was a matter of private contract between the bank and its lawyers. We reasoned that what was relevant to the bank's confession of judgment against plaintiffs was the amount of collection fees which plaintiffs agreed to pay the bank in their loan agreement.

Through their loan agreement with plaintiffs, the bank had the right to charge plaintiffs the collection fee which was expressed as a percentage of the default amount owed by plaintiffs, and which plaintiffs agreed to, irrespective of the

actual collection costs incurred by the bank.

We expressed our reasons for this ruling on the record at trial,[10] and we incorporate those reasons here.

Accordingly, for all the foregoing reasons, we deny Plaintiffs Howard Young and Debra Young's Motion for a New Trial Pursuant to Rule 59 F.R.C.P.

CORPORATE PLAINTIFF'S MOTION FOR PREJUDGMENT INTEREST

(Plaintiff's Contentions)

Plaintiff Bedrock Stone and Stuff, Inc. filed a motion to mold its judgment to include prejudgment interest. Bedrock contends that it is entitled as of right to prejudgment interest accruing from January 7, 2003 until June 2, 2005, the date of the verdict. Bedrock further contends that the fact that damages are not liquidated does not preclude an award of prejudgment interest. Plaintiff relies on two Pennsylvania cases for these propositions, Thomas H. Ross, Inc. v. Seigfried, 405 Pa.Super. 558, 592 A.2d 1353 (1991) and Penneys v. Pennsylvania Railroad Company, 408 Pa. 276, 183 A.2d 544 (1962). Plaintiff also relies on section 354 of the Restatement (Second) of Contracts in support of its request for prejudgment interest.

[10] See Notes of Testimony of the trial conducted before the undersigned on May 26, 2005 at pages 127-138.

Prejudgment Interest

(Defendant's Contentions)

Defendant asserts that plaintiff is not entitled to any award of prejudgment interest. Prejudgment interest "is a right which arises upon breach or discontinuance of the contract provided the damages are then ascertainable by computation and even though a bona fide dispute exists as to the amount of the indebtedness." Brisbin v. Superior Valve Company, 398 F.3d 279, 294 (3d Cir. 2005).

Prejudgment interest may be recovered only if defendant commits a breach of contract (1) to pay a definite sum of money; (2) to render a monetary performance the monetary value of which is stated in the contract; (3) to render a performance the monetary value of which is ascertainable by a mathematical calculation from a standard fixed in the contract; or (4) to render a performance the monetary value of which is ascertainable from established market prices of the subject matter. Black Gold Corporation v. Shawville Coal Company, 730 F.2d 941, 943 (3d Cir. 1984).

In this case, defendant asserts that there was no breach of contract to pay a definite sum of money. Rather, the breach of contract was based upon M&T Bank's withdrawal of a proposal to lend money. Defendant relies on the decision in St. Paul at Chase Corporation v. Manufacturers Life Insurance

Company, 262 Md. 292, 278 A.2d 12 (Md. 1971) for the proposition that a contract to loan money is not equated with a contract to pay money on a certain day.

Defendant concedes that the court, in some circumstances, can award prejudgment interest in its discretion. Montgomery County v. Microvote Corporation, No. Civ.A. 97-6331, 2001 U.S. Dist. LEXIS 8737 (E.D.Pa. June 25, 2001)(Kelly, J.). Factors the court should consider include: (1) the diligence of plaintiff in prosecuting the action; (2) whether defendant has been unjustly enriched; (3) whether the award would be compensatory; and (4) whether there are counterveiling equitable considerations which militate against an award of prejudgment interest. Microvote, supra.

Defendant asserts that none of the following factors should result in any equitable award of prejudgment interest.

Prejudgment Interest

(Discussion)

For the following reasons, we agree with defendant.

The award in this matter is not susceptible to a mathematical calculation based upon the amount contained in any contract breached by defendant. The compensatory damages awarded by the jury and remitted by this court could all flow from defendant's breach of its duty of good faith and fair dealing. This type of damage is not the kind contemplated by either the

Pennsylvania courts or the Restatement (Second) of Contracts when awarding prejudgment interest in a contract case. Accordingly, we deny plaintiffs' motion to mold the verdict to include prejudgment interest.

DEFENDANT'S POST-TRIAL MOTION

Sufficiency of Evidence

(Defendant's Contentions)

Defendant raises numerous issues in its post-trial motion regarding the sufficiency of the evidence. Defendant contends that because of a lack of evidence to support the verdict, it is entitled to either judgment as a matter of law or, in the alternative, to a new trial.

In Lightnin Lube, Inc. v. Whitco Corporation, 4 F.3d 1153 (3d Cir. 1993), the United States Court of Appeals for the Third Circuit set forth the standard to be employed in reviewing a motion for judgment as a matter of law:

> Such a motion should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability. In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version. Although judgment as a matter of law should be granted sparingly, a scintilla of evidence is not enough to

> sustain a verdict of liability. "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party."

4 F.3d at 1166 (Citations omitted.)

In addition, a new trial may be granted, even when judgment as a matter of law is inappropriate, "when the verdict is contrary to the weight of the evidence or when a miscarriage of justice would result if the verdict were to stand." Brennan v. Norton, 350 F.3d 399, 430 (3d Cir. 2003).

Initially, defendant contends that plaintiff Bedrock failed to present sufficient evidence for a reasonable jury to believe that Bedrock and the bank agreed to an additional $30,000 loan and agreed that the bank would pay critical check overdrafts on Bedrock's behalf. Defendant further asserts that plaintiff has the burden of proof on proving the existence of a contract, including many material terms which the bank contends are missing. More specifically, M&T Bank asserts that all it entered into was an agreement to agree, and that such preliminary proposals are not enforceable contracts in Pennsylvania.

Defendant argues that the December 19, 2002 letter which is the alleged basis of the contract does not contain such material terms as the interest rate or a repayment schedule and that plaintiff failed to fill in these missing essential terms

with any competent evidence.

Next, defendant alleges that plaintiff Bedrock failed to provide sufficient evidence to establish the existence of an oral agreement to cover "critical" checks. Defendant asserts that the evidence proffered by plaintiff on this point was conflicting and inconsistent. Moreover, defendant asserts that this purported agreement was not supported by consideration. In addition, defendant asserts that plaintiff Bedrock did not establish that it suffered any harm from the bank's failure to pay critical checks.

Defendant further contends that plaintiff failed to establish that it could comply with all the express conditions of the bank's December 19, 2002 proposal letter. Specifically, defendant alleges that the additional $30,000 loan was conditioned upon a requirement that Bedrock deliver to the bank a mortgage on Bedrock's business property. Defendant avers that plaintiff failed to prove that this condition could be satisfied.

Defendant also asserts that plaintiff did not provide any evidence to support the jury's finding that the bank breached a duty of good faith and fair dealing. Defendant contends that it did nothing more than it was contractually permitted to do. Thus, defendant asserts it could not have breached a duty of good faith and fair dealing.

Sufficiency of Evidence

(Plaintiff's Contentions)

Plaintiff Bedrock contends that there is more than sufficient evidence to support the jury's verdict in this matter. For example, plaintiff maintains that there was sufficient evidence to support a breach of contract related to the additional $30,000 in financing. Plaintiff avers that based upon the testimony of Howard Young, it was ready, willing and able to fulfill all of the conditions for the granting of the loan. Moreover, there was additional consideration in the form of an additional mortgage on Bedrock's property and the direct assignment of Bedrock's licenses to the bank which would increase the collateral that the bank would hold in the business.

Furthermore, based upon the testimony of numerous witnesses, including the bank's own representatives and of plaintiff Howard Young, plaintiff asserts that there was sufficient evidence to support the finding of a breach of the oral promise to pay critical checks and that it was harmed by the failure to pay there critical checks.

Finally, plaintiff asserts that many of the arguments made by defendant here are the same arguments rejected by the court in the motion for directed verdict.

Sufficiency of Evidence

(Discussion)

For the following reasons we deny defendant's motion for judgment as a matter of law and its motion for a new trial.

Based upon the evidence adduced at trial, we conclude that there was sufficient evidence to sustain the jury's verdict. Specifically, the testimony of Howard Young, which the jury could have found credible, alone provided sufficient evidence to support the jury's findings that defendant M&T Bank (1) breached a contract to provide an additional $30,000 in financing; (2) breached a contract to pay certain critical checks; and (3) breached its duty of good faith and fair dealing with regard to these and the other contracts it had with Bedrock.

Moreover, we note that the jury found against plaintiff and in favor of defendant on plaintiff's claim for breach of an agreement to provide refinancing of all of Bedrock's loans with the bank. This evidences the care and attention which the jury gave to the evidence and details presented in this matter, as well as their understanding of the subtleties of the issues. Under the circumstances of this case, the jury's split verdict contradicts defendant's assertion that the jury was somehow blinded by sympathy toward plaintiffs.

Accordingly, because we disagree with defendant's characterization of the evidence and conclude that there was sufficient evidence to support the jury's verdict in this matter, we deny both defendant's motion for judgment as a matter of law and its motion for a new trial.

Remittitur

(Defendant's Contentions)

Defendant M&T Bank seeks remittitur of the $2,600,000 verdict which the jury awarded to plaintiff Bedrock. Defendant asserts that the jury's verdict far exceeds any rational appraisal or estimate of damages and is manifestly excessive. Defendant contends that this award more than puts plaintiff back into the position it would have been if there was no breach. Defendant argues that the evidence at trial did not establish any measure of damages, much less this excessive amount.

Defendant further asserts that plaintiff Bedrock did not establish either that Bedrock could not obtain the $30,000 additional financing elsewhere, that it would have incurred higher costs with replacement financing, that the $30,000 loan and payment of overdrafts was for any other purpose than general working capital, or that Bedrock lost any specific advantageous bargain because of the actions of M&T Bank.

Finally, defendant asserts that there was no basis for the jury to award any damages, that the value of Bedrock's

assets are not a reasonable measure of damages, nor is either the speculative lost profits nor the amount plaintiff owed the bank a proper measure of damages.

Remittitur

(Plaintiff's Contentions)

Plaintiffs contend that the award should not be remitted because it is neither excessive, nor shocks the conscience.

Remittitur

(Discussion)

A district court "should be alert to [its] responsibility to see that jury awards do not extend beyond all reasonable bounds." Walters v. Mintec/International, 758 F.2d 73, 82 (3d Cir. 1985). A verdict is excessive as a matter of law if it exceeds any rational appraisal or estimate of the damages that could be based on the evidence before the jury. However, damages awards that are merely excessive or so large as to appear contrary to reason, are subject only to remittitur rather than a new trial. Brunnemann v. Terra International, Inc.,975 F.2d 175, 178 (5th Cir. 1992).

Remittitur of a jury's verdict is warranted where the jury verdict is unsupported by the evidence and exceeds the amount needed to make the plaintiff whole. See Hurley v.

Atlantic City Police Department, 933 F.Supp. 396 (D.N.J. 1996). It is the court's responsibility to review a damage award to determine if it is rationally based and remit the verdict only if it is so excessive to "shock the judicial conscience". Williams v. Martin Marietta Alumina, Inc., 817 F.2d 1030, 1038 (3d Cir. 1987).

Finally, as stated by the Untied States Court of Appeals for the Third Circuit:

> A jury has a very broad discretion in measuring damages; nevertheless, a jury may not abandon analysis for sympathy for a suffering plaintiff and treat injury as though it were a winning lottery ticket. There must be a rational relationship between the specific injury sustained and the amount awarded.

Gumbs v. Pueblo International, Inc., 823 F.2d 768, 773 (3d Cir. 1987).

Taking all of these factors into consideration, and in recognition of the testimony and exhibits presented at trial, we hold that a compensatory damages award of $1,500,000 is appropriate in this case. We find that in the circumstances of this case the jury's evaluation of compensatory damages was so excessive as to shock our judicial conscience. However, we do not conclude that the jury was so inflamed that the verdict must be set aside. However, we do give deference to the jury's obvious determination that a relatively large award is called for in this case.

Plaintiff's business manager Richard Althouse testified regarding projected future net profits in calendar year 2003 of $169,000; in year 2004, of $146,000; and in year 2005, of $163,967. The total projected profits for those three years comes to $478,967. Defendant's corporate representative Joseph E. Warner, III, Vice President and Loan Workout Specialist, indicated that the projections by Mr. Althouse were realistic.[11]

In addition, Howard Young testified that he considered his business to be his retirement.[12] We conclude that a reasonable inference from that statement is that he intended to work at his business until retirement. Mr. Young further testified that at the time of trial he was 44 years old.

Furthermore, based upon the evidence adduced at trial, it appears that Bedrock grew quickly between the late 1990's and early 2001. The Youngs invested heavily in purchasing land to operate the business and spent nearly $200,000 on obtaining required approvals from the Commonwealth of Pennsylvania, Department of Environmental Protection. Moreover, the business was becoming increasingly more profitable until a drought in 2002 that affected all similar businesses.

---

[11] See Plaintiff's Exhibit 6, an undated memo from bank Vice President Joseph E. Warner to bank official Michael Wallace.

[12] Notes of Testimony of the trial conducted before the undersigned on May 27, 2005 at page 49.

Based upon the testimony of Dan Banfe and Charles Kaiser (two of Bedrock's best customers), the circumstances in the landscaping business improved dramatically after 2002. They also testified that Howard Young was a unique supplier in the industry. More specifically, both Mr. Kaiser and Mr. Banfe testified that Bedrock and Mr. Young provided an exceptionally top quality product and service to their customers at a reasonable cost.

Taking all of these factors into account, together with the ups and downs, the seasonal nature, and the competitiveness, of the landscaping supply business, as well as Bedrock's relatively heavy debt load, all of which the jury could have also reasonably found based upon the evidence, in addition to its specific findings that the Bank breached two contracts and its duty of good faith and fair dealing toward Bedrock, we conclude that in addition to the three years projected lost profits testified to by Mr. Althouse, an additional seven years lost profits at $146,000 each would also be an appropriate measure of damages in this case.

An additional seven years of lost profits at $146,000 per year equals $1,022,000. This added to the combined projected net profits of $478,967 for years 2003, 2004 and 2005 equals $1,500,967. We have rounded that figure to $1,500,000 and conclude that it an appropriate measure of damages that would be

reasonably foreseeable by defendant for its conduct in this matter. The remitted award of $1,500,000 is therefore appropriate.

Accordingly, we grant defendant's request for remittitur and remit the jury's award to $1,500,000.

CONCLUSION

For all the forgoing reasons, we deny plaintiffs' motions for a new trial and for prejudgment interest and deny defendant's motions for a directed verdict and for a new trial. However, we grant defendant's request for remittitur and reduce the jury's verdict from $2,6000,000 to $1,500,000.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BEDROCK STONE AND STUFF, INC.,	)	
HOWARD YOUNG and	)	Civil Action
DEBRA YOUNG, His Wife,	)	No. 04-CV-02101

	)
Plaintiffs	)
	)
vs.	)
	)
MANUFACTURERS AND TRADERS	)
TRUST COMPANY,	)
	)
Defendant	)

O R D E R

NOW, this 31st day of March, 2006, upon consideration of the following motions:

(1) Plaintiffs Howard Young and Debra Young's Motion for a New Trial Pursuant to Rule 59 F.R.C.P., which motion was filed June 6, 2005; together with:

Memorandum of Law of Defendant Manufacturers & Traders Trust Company in Opposition to Plaintiffs Howard Young and Debra Young's Motion for a New Trial Pursuant to Rule 59 F.R.C.P., which memorandum was filed June 27, 2005;

(2) Plaintiff Bedrock Stone and Stuff, Inc.'s

Motion to Mold Judgment to Include Prejudgment Interest, which motion was filed June 9, 2005; together with:

Memorandum of Law of Defendant, Manufacturers and Traders Trust Company in Opposition to Plaintiff Bedrock Stone and Stuff, Inc.'s Motion to Mold Judgment to Include Prejudgment Interest, which memorandum was filed June 27, 2005; and

(3) Motion of Defendant Manufacturers and Traders Trust Company for Judgment as a Matter of Law or, in the Alternative, for a New Trial or Remittitur, which motion was filed June 17, 2005; together with:

Plaintiff Bedrock Stone and Stuff Inc.'s Brief in Response to Defendant's Motion for Judgment as a Matter of Law, or in the Alternative, a New Trial or Remitittur, which brief was filed July 1, 2005;

upon consideration of the briefs of the parties; after oral argument held November 15, 2005; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that Plaintiffs Howard Young and

Debra Young's Motion for a New Trial Pursuant to Rule 59 F.R.C.P. is denied.

IT IS FURTHER ORDERED that Plaintiff Bedrock Stone and Stuff, Inc.'s Motion to Mold Judgment to Include Prejudgment Interest is denied.

IT IS FURTHER ORDERED that Motion of Defendant Manufacturers and Traders Trust Company for Judgment as a Matter of Law or, in the Alternative, for a New Trial or Remittitur is granted in part and denied in part.

IT IS FURTHER ORDERED that defendant's motion for judgment as a matter of law or in the alternative for a new trial is denied.

IT IS FURTHER ORDERED that defendant's motion for remittitur is granted.

IT IS FURTHER ORDERED that the jury's Verdict entered June 3, 2005 in the amount of $2,600,000 is reduced to $1,500,000.

IT IS FURTHER ORDERED that the judgment entered June 3, 2005 in favor of plaintiff Bedrock Stone and Stuff, Inc. and against defendant Manufacturers and Traders Trust Company in the amount of $2,600,000 is vacated.

IT IS FURTHER ORDERED that judgment is entered in favor of plaintiff Bedrock Stone and Stuff, Inc. and against defendant Manufacturers and Traders Trust Company in the amount of $1,500,000.

IT IS FURTHER ORDERED that the Clerk of Court shall

mark this matter closed.

BY THE COURT:

/s/ James Knoll Gardner

James Knoll Gardner

United States District Judge