MEDRDAD JON JAHANSHAHI, SHAHROKH NAGHDI and HAPPY VALLY ROASTERS, INC., Plaintiffs	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, Pennsylvania
vs.	:	NO. 99-00,899
CENTURA DEVELOPMENT CO., INC. and KEITH L. ECK, Individually and as President of Centura Development Co., Inc., Defendants	:	PRELIMINARY OBJECTIONS

OPINION AND ORDER

The matter before the Court concerns the Preliminary Objections of Defendants in the above captioned matter to the Complaint filed by Plaintiffs on June 11, 1999. The allegations against Defendants as set forth in the Complaint are as follows: In September of 1996, Defendant Centura Development Co., Inc., was the owner of the former Hardees' building located at 1915 East Third Street, Williamsport, Pennsylvania. Complaint paragraph 6. Defendant Keith L. Eck was the sole owner and operator of the Defendant company. Complaint paragraph 7. In that same month, Plaintiff Mehrdad Jon Jahanshahi and "the Defendant" entered into negotiations for "Plaintiff" to rent the building, renovate it and operate a Kenny Rogers Roasters restaurant at the site. Complaint paragraph 10. Defendants further allege Keith Eck promised repeatedly between September of 1996 and July of 1997, "on behalf of himself and his corporation," that Defendants would lease the building to Plaintiffs. Complaint paragraph 11. The parties exchanged leases to confirm final details of the contract. Complaint paragraph 12. In reliance upon the promise to lease, Plaintiffs performed site inspections, analysis and "demographics," hired an architect, traveled to Williamsport and New York (where they purchased equipment and made a commitment to purchase more equipment

the following week) and incurred costs to make copies of the building drawings and mail them to contractors. Complaint paragraphs 13-17, 19, 20. Plaintiffs further aver that when Plaintiffs traveled to Williamsport on July 9, 1997 and signed the lease and other documents prepared by "the Defendant," Keith Eck did not sign the lease but promised to do so in the future. Complaint paragraphs 17-18. However, on July 22, 1997, Defendant Keith Eck advised Plaintiffs he changed his mind and withdrew his agreement to the lease, as he had received an offer to sell the building for $750,000.00. Complaint paragraph 21. At that point, Defendant Keith Eck offered, on behalf of himself and his corporation, to pay Plaintiffs' losses and out-of pocket expenses. ***Ibid.*** Plaintiffs aver total out of pocket expenses were $50,717.00. Complaint paragraph 23. Plaintiffs are also seeking $70,000.00 for loss of anticipated profits. Complaint paragraph 29.

The Complaint contains three Counts. Count I is a Breach of Contract claim for a "Breach of Promise to Enter into Lease Agreement." In this count, Plaintiffs refer to "the Defendant" until the "Wherefore" clause, at which point Plaintiffs demand judgment against "*Defendants* Centura Development Co., Inc. and Keith Eck, jointly and severally." Complaint page 6 (emphasis added).

In Count II, deemed "Detrimental Reliance" which is "Stated in Alternative to Count I," Plaintiffs incorporate the prior paragraphs, then claim "the *Defendant*, through its duly authorized officers, agents and representatives, to wit: Defendant Eck, as acting within the scope of his employment and authority, deliberately made and/or permitted to be made representations…which they knew or should have known were false and misleading, as follows…" Complaint paragraph 33 (emphasis added). Plaintiffs then proceed to refer to both

the "Defendant" and "Defendants" as having made these false and misleading misrepresentations, in the following manner: The "Defendant" was looking for Plaintiffs to open a restaurant in the subject building. Complaint paragraph 33A. No one else was interested in the property and "*Plaintiffs*" (plural) were the only "*entity*" with which "Defendants" were negotiating.[1] Complaint paragraph 33B (emphasis added). The "Defendant" knew Plaintiffs were expending money in reliance on promises made by the "Defendant" and in fact encouraged Plaintiffs to spend the money to "bring the lease agreement to consummation." Complaint paragraph 33C. "Defendant" met with Plaintiffs, representatives of the restaurant chain, the architect and contractors, and even made suggestions concerning renovation of the building. Complaint paragraph 33D. Plaintiffs then claim the actions and statements of "the *Defendant* were false and misleading and were intended by Keith L. Eck to induce Plaintiffs to enter into the lease agreement and expend monies…" Complaint paragraph 34 (emphasis added). Plaintiffs were induced by and justifiably relied upon the misrepresentations of "Defendant." Complaint paragraph 35. At the conclusion of this Count, Plaintiffs demand judgment against "Centura Development Co., Inc. and Keith Eck, jointly and severally, the *Defendant*…" Complaint page 8 (emphasis added).

Count III is labeled "Breach of Contract to Reimburse Plaintiffs for Out of Pocket Expenses." Here, Plaintiffs refer to the agreement "Defendant Keith Eck" allegedly made with Plaintiffs to reimburse them for out of pocket expenses if they "would hold on, not complain about the change in plans, and be ready to sign the lease agreement if the $750,000

[1] One of Defendants' Preliminary Objections, discussed *infra*, requests Plaintiffs be required to more clearly identify which party would be entitled to recovery if any claim is successful.

did not germinate." Complaint paragraph 40. Plaintiffs accepted this offer and waited until "Defendant Centura Development Co. Inc. found out if Defendant Centura Development Co. Inc." received the money (from the prospective buyer). Complaint paragraph 41. "Defendant Centura Development Co., Inc." did complete the sale, but "Centura Development Co. Inc. and Keith Eck, Defendants" failed to pay Plaintiffs' out of pocket expenses. Complaint, paragraph 42. For this count, Plaintiffs demand judgment against "Defendants Centura Development Co. Inc. and Keith Eck, jointly and severally," but for the amount of $120,717.00, which includes the loss of anticipated profits, rather than for the amount of $50,717.00 as claimed earlier in the Complaint for Plaintiffs' out of pocket expenses. Complaint page 9.

Defendants' Preliminary Objections contains six counts. Five of the counts are in the nature of demurrers. The Pennsylvania Supreme Court has stated the standard of review for granting preliminary objections in the nature of a demurrer as follows:

> All material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.

McMahon v. Shea, 688 A.2d 1179, 1181 (Pa. 1997) (citation omitted).

Count I is a demurrer to the Complaint as relates to Defendant Keith L. Eck, individually and as President of Centura Development Co., Inc. Defendants allege the Complaint avers no basis for individual liability on the part of Mr. Eck. Supporting Brief p. 2-3. Defendants cite ***Electron Energy Corporation v. Short***, 597 A.2d 175 (Pa.Super. 1991), for the proposition that "[I]t is fundamental contract law that one cannot breach a contract that one is not a party to." ***Id***. at 178.

However, in ***Electron Energy Corporation***, the issue before the appellate Court was whether an individual who was a signatory to a contract on behalf of a corporation could be held personally liable for its breach. The Court concluded he could not, absent a showing in the contract that he intended to be personally bound. Such is not the issue before us.

Plaintiffs' response to the objection is that in this case, facts have been pled in the Complaint which justify piercing the corporate veil. *See* "Brief in Opposition to Defendant's [sic] Preliminary Objections" pp. 1-3. We disagree.

> In deciding whether to pierce the corporate veil, courts are basically concerned with determining if equity requires that the shareholders' traditional insulation from personal liability be disregarded and with ascertaining if the corporate form is a sham, and constituting a façade for the operations of the dominant shareholder. Thus, we inquire, *inter alia*, whether the corporate formalities have been observed and corporate records kept, whether officers and directors other than the dominant shareholder himself actually function, and whether the dominant shareholder has used the assets of the corporation as if they were his own.

Village at Camelback v. Carr, 538 A.2d 528, 533 (Pa.Super. 1988) (citations omitted). ***Village at Camelback*** involved the defendants'/appellees' demurrer to a complaint which alleged the controlling stockholder of the corporation, in his individual capacity, as well as the corporate defendants, had breached a contract of express and implied warranties. The complaint further alleged negligence and misrepresentation of both the individual and corporate defendants. Plaintiff/appellant sought to impose individual liability upon the controlling stockholder, in part, on a theory of piercing the corporate veil. The trial Court sustained the demurrer; however, the Superior Court reversed the decision and reinstated the complaint against the individual controlling stockholder.

Relying upon the case of ***Wicks v. Milzoco Builders, Inc.***, 470 A.2d 86 (Pa. 1983), the Superior Court clearly articulated the Pennsylvania law that a court may pierce the corporate veil when the owner is liable because the owner is not a bona fide independent entity. ***Village at Camelback*** at 533. In the case before it, the plaintiff/appellant had averred in the complaint that it would be inequitable for the corporate "facades" of the corporation to shield the individual defendant/appellee from liability. ***Id.*** at 535. The complaint also alleged the corporate defendants/appellees were alter egos of the individual defendant/appellee because: the corporations were insufficiently capitalized; there was an intermingling of funds; other officers and directors of the corporations, if any, were not functioning; the corporations failed to observe corporate formalities; the corporations did not pay dividends in the regular and ordinary course of business; the individual defendant/appellee held himself out as individually conducting such affairs without use of the corporate names and without identifying that his actions were taken as an officer or employee of the corporation. ***Ibid.***

Conversely, in the instant case, Plaintiffs have pled no such facts, nor indeed any facts which would allow this Court to determine whether the corporation of Centura Development Co., Inc., is nothing more than a façade or the alter ego of Keith Eck. *See also* ***Hanrahan v. Audobon Builder, Inc.***, 614 A.2d 748 (Pa.Super. 1992) (a review of the record revealed the individual defendants treated the corporation as a proprietorship, but more importantly, there was an abundance of testimony concerning the commingling of personal and corporate funds); ***Lycoming County Nursing Home v. Commonwealth***, 627 A.2d 238 (Pa.Cmwlth. 1993) (piercing of the corporate veil was proper where it was clear the defendant Association was the instrumentality of the defendant County and public policy would be

defeated if the County were allowed to rely on the independence of the Association; also, the purpose of the Pennsylvania Prevailing Wage Act would be circumvented if the corporate veil was not pierced).

Nevertheless, and despite Plaintiffs' failure to so argue, we believe Plaintiffs have pled, at a bare minimum, sufficient facts to make out a claim of individual liability against Defendant Keith L. Eck (if, of course, we find the Complaint sufficiently sets forth that a contract existed such that he could be liable for its breach). In ***Village at Camelback***, the Pennsylvania Superior Court distinguished between liability imposed as a result of piercing the corporate veil from individual liability against a defendant in a contract claim, where sufficiently pled.[2]

The Court found the trial court had ignored facts pled in the complaint against the controlling stockholder "as an individual, alleging that he undertook personal obligations in connection with the [contract], committed torts in his capacity as an officer of the various corporate defendants, and breached a personal fiduciary duty." ***Id.*** at 534. This allowed the Court to find plaintiff/appellee had pled sufficient ultimate facts to support a claim of relief against the controlling stockholder as an individual and as a corporate officer, *in addition to* facts which might support piercing the corporate veil.

With respect to the controlling stockholder, one Frank P. Carr, III, the Superior Court found that:

> …[A]ppellant has, in the most general terms, set forth a claim against Carr individually for breach of warranties personally extended by Carr. Read as a whole, the complaint alleges that

[2] The appellate Court also discussed individual liability for misfeasance on a participation theory in tort, inapplicable in the instant case as this claim has not been raised by Plaintiffs.

> legally binding promises and representations were made by Carr in his individual capacity, that those promises and representations were not fulfilled or were untrue, and that the members of the association relied upon those promises and representations to their detriment. We find these allegations, which we must at this juncture accept as being true, minimally sufficient to state a claim against Carr individually.

Ibid.

Given the similarity of the facts and issues raised in ***Village at Camelback*** and the instant case, it is clear that the Superior Court has prescribed the standard we must apply upon reading the complaint as a whole. Here, Plaintiffs have pled that Defendant Keith Eck made representations to Plaintiffs in an individual capacity, as well as on behalf of the corporation, which were false and misleading, upon which Plaintiffs relied to their detriment. Mindful that we must accept these allegations as true for purposes of determining the demurrer, Defendant Keith Eck may not be dismissed as a Defendant at this stage of the proceedings.

Count II is a request for a more specific pleading. Defendants allege that, even if Plaintiffs succeed on any allegation in the Complaint, all three named Plaintiffs would not be entitled to recovery. Defendants seek to have this Court compel Plaintiffs to name the exact party in interest for whom they are seeking recovery. Supporting Brief pp. 2-3.

This Court finds merit in Defendants' argument. The Complaint does not clearly set forth whether the alleged agreements were made with, and on behalf of, the individual Plaintiffs or the Plaintiff corporation. We would suspect the latter, but it is Plaintiffs who must clarify their claims as to which Plaintiff is entitled to what relief.

Moreover, as should be evident from our summary of the Complaint, *supra*, this Court is frustrated by the confusion caused by Plaintiffs' indiscriminate use of "Defendant" and

"Defendants" in their claims against the individual Defendant, Keith Eck, the corporate Defendant, Centura Development, Inc., or both. Curiously, rather than object to this aspect of the Complaint and request an amendment, Defendants instead focus their objection solely upon whether Keith Eck can be held liable on an individual basis. As we have stated, that objection cannot be sustained. However, Plaintiffs will be directed to amend the Complaint to state clearly to which Defendant or entity they refer throughout the Complaint.

Count III is in the nature of a demurrer to Count I of the Complaint, which alleges a breach of contract for Defendants' failure to enter into a lease agreement with Plaintiffs. Defendants argue no lease or similar contract exists; therefore, there can be no breach of contract. Defendants further argue that, as there was no contract, neither was there a meeting of the minds, nor any consideration given. Consequently, there was no breach. Supporting Brief pp. 4-5.

"It is black letter law that in order to form an enforceable contract, there must be an offer, acceptance, consideration or mutual meeting of the minds." ***Jenkins v. County of Schuylkill***, 658 A.2d 380, 383 (Pa.Super. 1995). Negotiations concerning the terms of a possible future contract do not result in an enforceable agreement unless there is manifestation of an intent to be bound. ***Ibid.***

We can only assume that when arguing no contract exists, Defendants mean to argue there is no *written* contract in existence. We make no determination whether the contracts actually existed, or whether they were required to be in writing to be legally binding upon Defendants. It may well be that subsequent pleadings will show a Statute of Frauds

violation or other reason why Plaintiffs cannot recover. These matters are not currently before us.

However, we note that "if the parties orally agree to all of the terms of a contract between them and mutually expect the imminent drafting of a written contract reflecting their previous understanding, the oral contract may be enforceable." ***Kazanjian v. New England Petroleum Corp.***, 480 A.2d 1153, 1157 (Pa.Super. 1984). Moreover, an oral agreement may be enforceable and legally binding without a writing. ***Ibid.*** The ***Kazanjian*** Court relied upon Section 27 of the Restatement Second of Contracts, which provides:

> **§ 27. Existence of Contract Where**
>
> **Written Memorial is Contemplated**
>
> **Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.**
>
> **Comment:**
>
> a. Parties who plan to make a final written instrument as the expression of their contract necessarily discuss the proposed terms of the contract before they enter into it and often, before the final writing is made, agree upon all the terms which they plan to incorporate therein. This they may do orally or by exchange of several writings. It is possible thus to make a contract the terms of which include an obligation to execute subsequently a final writing which shall contain certain provisions. If parties have definitely agreed that they will do so, and that the final writing shall contain these provisions and no others, they have then concluded the contract.

Ibid. Here, Plaintiffs have pled the existence of two agreements, which they aver Defendants breached. The first is the agreement to lease the building. Plaintiffs claim that several writings were exchanged and the final contract was prepared by Defendants and executed by Plaintiffs;

the only thing lacking was Defendants' signature, which Plaintiffs aver Keith Eck promised to provide. The second claimed agreement was for Defendants to pay Plaintiffs' out of pocket expenses in lieu of Plaintiffs' enforcing their rights respective to the first agreement.

The elemental aspects of an enforceable contract are an offer, acceptance, consideration or mutual meeting of the minds. ***Schreiber v. Olan Mills***, 627 A.2d 806, 808 (Pa.Super. 1993). When seeking to enforce an agreement, one may look to the conduct of the parties to ascertain acceptance of the agreement. ***Ibid.***

Plaintiffs claim the agreements arose out of Defendants' offers to (1) lease the building and then (2) to pay Plaintiffs' out of pocket expenses. Plaintiffs aver they accepted these offers, relying upon them to their detriment by incurring expenses and not acting to enforce the lease agreement when advised Defendants might sell the property to a third party instead of leasing it to them. As the Superior Court has said: "The requirement of consideration as an essential term of a contract is nothing more than a requirement that there be a bargained for exchange. Consideration confers a benefit upon the promisor or causes a detriment to the promisee." ***Cobaugh v. Klick-Lewis, Inc.***, 561 A.2d 1248, 1250 (Pa.Super. 1989).

Further, Plaintiffs claim Defendant Keith Eck met with the individual Plaintiffs pursuant to the lease, even making suggestions as to how Plaintiffs should renovate the building to suit their purposes. Additionally, Mr. Eck allegedly made promises to execute the lease agreement and then later to pay Plaintiffs' out of pocket expenses if they refrained from seeking to enforce the lease agreement. These averments, if true, could justify a determination

by the finder of fact that a mutual meeting of the minds had occurred, sufficient to impose liability upon Defendants.

Accordingly, we find the elemental aspects of an enforceable contract have been minimally pled. Again, these averments are accepted as true for purposes of determining these preliminary objections. Given this standard, Defendants argument that there is no contract avails them nothing at this point in the proceedings.

Further, we note for the benefit of the parties that in a recent franchise agreement case before this Court, we were asked to grant summary judgment, in part, as Plaintiffs had not made out a cause of action for breach of contract, but rather only for "a breach of good faith." ***Louis A. Cupiccia and L.P.L., Inc. v. West Coast Entertainment Corporation, et al***., Lyc. Co. No. 97-01,817 (1999). We declined to grant summary judgment on this ground, relying upon the case of ***Creeger Brick v. Mid-State Bank***, 560 A.2d 151 (Pa.Super. 1989), wherein the appellate court stated:

> Section 205 of the Restatement (Second) of Contracts suggests that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." A similar requirement has been imposed upon contracts within the Uniform Commercial Code by 13 Pa.C.S. §1203. The duty of "good faith" has been defined as "[h]onesty in fact in the conduct or transaction concerned." See: 13 Pa.C.S. §1201; Restatement of Contracts §705, comment a. Where a duty of good faith arises, it arises under the law of contracts, not under the law of torts.

Creeger Brick at 153-154 (citations omitted). We point this out only because this claim is the essence of Plaintiff's Complaint, read as a whole.

Evidence of preliminary negotiations, or an agreement to enter into a contract, does not alone constitute a contract. ***Channel Home Centers, Division of Grace Retail Corp.***

v. Grossman, 795 F.2d 293 (3d Circ. 1986), *cited in* ***Jenkins v. County of Schuylkill***, 658 A.2d 380, 383 (Pa.Super. 1995). The ***Jenkins*** Court discussed the ***Grossman*** opinion at length, noting that in ***Grossman***, the plaintiff was not arguing that a lease existed, but rather that there was a mutually binding obligation to negotiate in good faith.[3]

Relying on Pennsylvania contract law, the ***Grossman*** Court employed a three-part test to determine whether such an agreement was enforceable. They asked (1) whether both parties manifested an intent to be bound by the agreement; (2) whether the terms of the agreement were sufficiently definite to be enforced; and (3) whether there was consideration on both sides. ***Id***. at 299. The ***Grossman*** Court determined that a letter of intent and the circumstances surrounding its adoption supported a finding that the parties intended to be bound by an agreement to operate in good faith.

However, in ***Jenkins*** the Court found that a letter to the plaintiff stating the parties will outline the lease terms at an upcoming meeting was not a detailed letter of intent; from the letter, it appeared no specific terms were even agreed upon and the language did not reveal that the parties intended to be bound by any terms of the original specifications. ***Jenkins*** at 385.

Here, Plaintiffs refer to multiple documents exchanged during the course of negotiations, including one last lease agreement, which Defendants prepared, Plaintiffs signed and Defendant Keith Eck promised to sign in the future. However, no documents have been submitted to this Court for our consideration. We have already determined we will not dismiss

[3] This common law duty to perform in good faith was distinguished from a duty of good faith in the bargaining or formation stages of the contracting process. *See* ***Grossman***, *supra*, at 299.

this action based upon Defendants' assertion that there is no contract. However, with respect to the alleged breach of the agreement to lease, if Plaintiffs intend to claim breach of the written agreement to which they refer in the Complaint, Plaintiffs are directed to clearly plead this averment and attach the document as an Exhibit to the Amended Complaint. Pa.R.C.P. No. 1019(h).[4] If instead, Plaintiffs' theory with respect to the lease agreement is the breach of an oral contract, this must be clearly stated.

Count IV is a demurrer to Count III of the Complaint, wherein Plaintiffs seek recovery for an alleged breach of contract for Defendants' failure to pay Plaintiffs' out of pocket expenses, pursuant to an agreement between the parties. Defendants assert no written agreement is pled or attached as an exhibit to the Complaint which could serve as a basis for this claim; further, there are no factual allegations in the Complaint which speak to a meeting of the minds or the furnishing of consideration. Supporting Brief pp. 5-6. We apply the same reasoning to this objection as to the demurrer to Count III, *supra*, and consequently this objection will also be overruled.

Count V is in the nature of a demurrer to the requests of Plaintiffs made in Counts II and III of the Complaint for attorneys' fees. Supporting Brief p. 6. Plaintiffs' response to this objection is as follows:

> The Plaintiffs are taking the position that the attorney's fees requested in the complaint are the attorney's fees which the Plaintiffs had extended in Paragraph 30(c) of the contract, and furthermore, the Plaintiffs are of the position that if the Court deems that the contract which was signed by the Plaintiffs that was offered by the Defendant out of his computer would constitute a

[4] Pa.R.C.P. No. 1019(h) states, in relevant part, as follows: "A pleading shall state specifically whether any claim or defense set forth therein is based upon a writing. If so, the pleader shall attach a copy of the writing…"

> written contract, then attorney's fees would be permitted if said contract indicated attorney's fees are a recoverable damage.

Brief in Opposition to Defendant's [sic] Preliminary Objections p. 4. We are particularly frustrated by this response given that, as discussed *supra*, no written agreement was provided this Court so that we could determine whether, in fact, Paragraph 30(c) provides for attorney's fees.

Parties are generally responsible for their own counsel fees absent statutory authority, agreement of parties, or some other recognized exception. ***Mantzell v. Mantzell***, 559 A.2d 535 (Pa.Super. 1989). This Court will overrule the objection because, and only because, we fully expect the Amended Complaint will be accompanied by the written agreement in which the provision for attorney's fees in Paragraph 30(c) appears. If instead, Plaintiffs base their breach of the lease claim upon the existence of an oral contract and for this or some other reason fail to furnish such documentation, we are certain this issue will be revisited.

Finally, Count VI is a demurrer to Paragraph 29 of the Complaint, wherein Plaintiffs "seek damages" for lost profits in the amount of $70,000.00. Defendants (again) assert the Complaint contains no allegation that a binding contract was mutually agreed upon and entered into; further, the Complaint does not reveal, in any way, how the sum is determined as lost profits, other than by "some vague references to site analysis and demographics." Supporting Brief pp. 6-7. We have disposed of Defendants' first argument in consideration of the demurrers in Counts III and IV, *supra*. With respect to whether Plaintiffs have sufficiently pled lost profits, the Court notes initially that in paragraph 30 of Plaintiffs' Complaint, Plaintiffs aver the information regarding site analysis and demographics upon which Plaintiffs base their lost profits claim was provided to the defense. Therefore, rather than being provided

only "vague references to site analysis and demographics," Plaintiffs aver the specific methodology used to calculate the damages is actually in the possession of Defendants. Defendants mischaracterize the averment, rather than object on the ground that they in fact have not been given the information. Yet again, we remind Defendants that this averment must be accepted as true for the purposes of determining preliminary objections.

Moreover, Pa.R.C.P. No. 1021(b) provides that any pleading demanding relief for unliquidated damages shall not claim any specific sum. It has been held that a loss of profit resulting from a breach of contract is not an item of special damage and may therefore be claimed in a lump sum, without setting forth in detail the basis for that figure. ***Wagner v. Ostrowski***, 65 Luz.L.Reg. 223 ( ). Conversely, it has been held that where a plaintiff claims damages for loss of profits in a breach of warranty action, these are special damages which must be pleaded specifically. ***Hickman v. Bross***, 58 D.&C. 2d 125 (1972). However, in the case of ***Holt's Cigar Co. v. 222 Liberty Association***, 591 A.2d 743 (Pa.Super. 1991), the Superior Court looked to Rule 1021 to determine that a loss of profits award must be reversed as a claim for lost profits had not been properly pled in the complaint. The Court found the plaintiff-appellee had only claimed relief in the form on liquidated damages only. The Court continued: "Nowhere in the pleadings is there a claimed breach of commercial lease in a more general sense upon which a lost profits award might have been granted, nor is there a claim for unliquidated damages, *i.e.*, lost profits, in conformity with Rule 1021." Therefore, given the view of the Superior Court, this objection must be overruled.[5]

[5] Of course, if a party cannot produce evidence to establish a loss with reasonable certainty, that party cannot recover for the loss claimed. Restatement of Contracts, Second, §352.

ORDER

AND NOW, this 5th day of November 1999, Defendants' Preliminary Objections in the nature of demurrers are OVERRULED. Defendants' Preliminary Objections regarding a more specific pleading are SUSTAINED. Plaintiffs shall file an Amended Complaint, consistent with the foregoing Opinion, within twenty (20) days of the date of this Order.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
Scott A. Williams, Esquire
David F. Wilk, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)