



In the Missouri Court of Appeals

WESTERN DISTRICT

RENAISSANCE LEASING, LLC., ET AL)
APPELLANT,)

v.)

VERMEER MANUFACTURING)
COMPANY, VERMEER GREAT)
PLAINS, INC.,)

RESPONDENTS.)

WD68929

FILED: MAY 5, 2009

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY THE HONORABLE KELLY JEAN MOORHOUSE, JUDGE

Before DIVISION ONE: HAROLD L. LOWENSTEIN, Presiding Judge,
JAMES M. SMART and VICTOR C. HOWARD, Judges

This suit involves claims of breach of contract and misrepresentation brought by two limited liability companies ("LLCs"), all owned and controlled by a single member, who also brings suit individually, against the seller and manufacturer of a piece of heavy equipment. The plaintiffs appeal from the grant of summary judgment in favor of the defendants.

In simplest terms, this suit is a contract action for breach of warranty and an action in tort for misrepresentation relating to the sale of a piece of earth moving

equipment. The plaintiffs assert that the manufacturer misrepresented the capabilities of the machine. Some of the plaintiffs who were in the business of quarrying the overburden rock at the Phenix Quarry in Greene County, asserted that the defendants represented that the machine could quarry and cut rock rather than just move about the overburden.

This cause of action was first brought in federal court and dismissed for lack of subject matter jurisdiction. The suit was subsequently filed in Jackson County Circuit Court. After extensive discovery and numerous motions the defendants were granted summary judgment. This appeal followed.

The complexity of this case relates to the putative transfers of the heavy equipment from the initial purchaser to a series of LLCs owned and controlled by a single individual. There seems to be an agreement among all parties here that no title procedure such as for motor vehicles is necessary for this heavy equipment. For the benefit of the reader, a timeline of factual and legal events is provided. As the analysis of this case involves which parties have standing to bring the asserted claims, a short description of each of the parties is first provided.

I. PARTIES TO THE SUIT¹

Defendant Vermeer Manufacturing (“MANUFACTURER”) is a maker of heavy construction equipment, specifically the T1055 Terrain Leveler (“T1055” or the “Machine”) that was used to “cut down rock, perform[] surface mining and overburden (mounds of stone rubble) removal.” MANUFACTURER also produced a

¹ Parties to the suit are referenced in CAPITAL LETTERS.

larger of more expensive version of the T1055, the T1255 Terrain Leveler. The terrain levelers were advertised as having a large drum that cut down rock and overburden to permit the operator to surface mine without being required to blast rock.

Defendant Vermeer Great Plains, Inc. ("SELLER") is a distributor of MANUFACTURER's machine and sold the machine at issue.

Crush Tech LLC ("Crush") was a limited liability company and the initial purchaser of the Machine. Crush was formed for the purpose of mining the overburden rock at Phenix, a limestone quarry. Crush learned of the Machine in July 2002 and purchased the machine in September 2002 after a two month demonstration period at the quarry. In October 2002, Crush paid \$670,000 for the Machine upon assurance from MANUFACTURER that the T1055 could perform as well as the larger, and more expensive, T1255. Crush was eventually renamed became Mo-Kan Rock and Gravel Company LLC ("Mo-Kan") in April 2003. Mo-Kan was subsequently dissolved and the assets distributed to a single remaining member with a positive capital account balance, John Uhlmann. Neither Crush nor Mo-Kan is a party to the underlying action of this appeal.

Renaissance Leasing LLC ("RENAISSANCE") is a limited liability corporation formed in December 2002. John Uhlmann is the sole member. Plaintiffs assert that RENAISSANCE obtained ownership of the T1055 in December 2002 but cannot support the purported transfer with any documents, such as a bill of sale or corporate resolution. Nevertheless, RENAISSANCE executed a lease of the

Machine back to Crush in December 2002. After Crush was dissolved, RENAISSANCE executed an identical lease of the Machine to Mo-Kan. The Machine was ultimately leased to TEAM, another plaintiff, under the same terms.

Team Excavating LLC (“TEAM”) was formed by John Uhlmann in August 2003. John Uhlmann transferred the remaining assets of Crush/Mo-Kan to TEAM after Mo-Kan was dissolved.

Plaintiff John Uhlmann (“UHLMANN”) initially loaned \$670,000 to Crush to purchase the T1055 machine. UHLMANN ultimately obtained substantially all of the membership of Crush and, subsequently, the remaining assets of the company upon the dissolution of Mo-Kan. UHLMANN and is the sole member of RENAISSANCE and TEAM.

II. TIMELINE OF RELEVANT EVENTS

The complexity of this case stems from the evolution of the UHLMANN business entities and the interrelationships between the various entities. Although unorthodox, a timeline of the factual events and procedural events seems the most expeditious manner in which to reduce twelve volumes of the legal file to the relevant issues. Accordingly, the factual events leading up to the instant suit and the procedural background of the suit are set forth below.

April 2002	Crush is formed by members Jeffrey Hall, Sylvester Holmes, Gary Watts, Terry Watts, and Ben Childress. The purpose of the entity, as described in its business plan, was to exploit the limestone overburden at the Phenix Quarry as aggregate for cement and “expand its current opportunity with the Phenix rock quarry in Green County, Missouri, and to excavate and produce premium native Missouri limestone products.”
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July/August 2002 Crush approached SELLER regarding a new piece of equipment, the T1055. MANUFACTURER and SELLER provide sales materials, videos, and demonstration of the T1055 to Crush, purportedly to show that the product could be used in traditional mining activities, including the cutting of limestone. The T1055 is sent to the Phenix Quarry to crush overburden rock during a two month demonstration period.

September 30, 2002 SELLER executes a sales order for the T1055. Jeffrey Hall, as president of Crush, signs for the company. The sales order notes that the T1055 is to be used for quarry work. A written limited warranty accompanied the sales order. The Machine was warranted to be free from defects and workmanship under normal use and service for one year after the sale. The warranty did not apply to defects caused by collision or accident, excluded consequential and incidental damages, and limited relief to the purchase price of the Machine. The written warranty provided that MANUFACTURER made no other warranties, including warranties of merchantability or fitness for a particular purpose.

October 2002 Crush executes two checks for purchase of the Machine: an October 8th check for \$600,000 and an October 25 check for \$70,000. The money for the purchase came from a loan by UHLMANN, the Uhlmann Company, and the John W. Uhlmann Revocable Trust. MANUFACTURER performs warranty work on the Machine. The Machine is operated at the Phenix Quarry through November.

December 2002 UHLMANN obtains 92.5% of the membership of Crush after, UHLMANN asserts, the members of Crush execute an amended operating agreement. The amended operating agreement is backdated to June 2002 "for tax purposes," specifically so UHLMANN could take losses on previous loans he had made to Crush.

RENAISSANCE is formed with the purpose of owning and leasing Crush's equipment, including the Machine. UHLMANN testified in his deposition that he created RENAISSANCE to protect the money he had loaned to Crush from attachment by Crush's creditors. He stated that he wanted to "protect his investment" by preventing Crush's creditors from attaching the Machine.

Per UHLMANN'S deposition testimony, the T1055, valued at \$670,000 was transferred from Crush to RENAISSANCE without a bill of sale or document establishing the transfer of ownership. The record is devoid of any evidence, such as minutes or corporate records, demonstrating the transfer of the Machine to RENAISSANCE.

- January 2003 RENAISSANCE executes a master lease, leasing the Machine to Crush. Jeffrey Hall, the president of Crush, is fired by UHLMANN. The Machine is moved to a site in Independence where an operator strikes a buried steel beam and runs the machine into a rock wall, both incidents resulting in damage to the Machine.
- February 2003 UHLMANN ousts Gary and Terry Watts from Crush.
- April 2003 Crush experiences continuing financial difficulties. UHLMANN changes the name of the LLC to Mo-Kan. Mo-Kan leases the Machine from RENAISSANCE. Mo-Kan's operating agreement is amended to allow dissolution of the LLC upon a 2/3 vote of the membership interests.
- June/August 2003 Mo-Kan defaults on its lease payments to RENAISSANCE. MANUFACTURER performs warranty work on the Machine. UHLMANN organizes TEAM with UHLMANN as the sole member.
- September 2003 UHLMANN calls a meeting to dissolve Mo-Kan and sends notice to the remaining members. UHLMANN dissolves Mo-Kan and receives the distribution of the remaining assets as the other members have negative capital account balances. The Secretary of State issues a certificate of termination for Mo-Kan.
- June 2004 UHLMANN transfers the assets he received from the dissolution of Mo-Kan to TEAM. RENAISSANCE and TEAM execute a master lease agreement for the T1055.
- December 2005 TEAM carries the T1055 on its balance sheet as an asset.

III. PROCEDURAL TIMELINE

May 2005 UHLMANN, RENAISSANCE, and TEAM file suit against MANUFACTURER and SELLER for damages associated with the purchase of the Machine in United States District Court. Plaintiffs claim that the defendants engaged in misleading advertising in violation of the Lanham Act, 15 U.S.C. 1125, and fraud, negligent misrepresentation, and breach of warranty in violation of state law.

The jurisdictional statement in the federal complaint does not mention that TEAM is the successor entity to Crush.

May 2006 The federal court dismisses the Lanham Act claim on the merits and the state claims for lack of subject matter jurisdiction.

August 2006 The underlying action is filed in Jackson County Circuit Court. The petition is virtually identical to that filed in federal court with respect to the state claims. In the jurisdictional statement, the petition states that when the term "Team" is used, that term includes Crush, a non-party, RENAISSANCE LEASING, and TEAM.

Plaintiffs assert six counts. In Count I, UHLMANN and TEAM bring claims of fraud against MANFUACTURER. In Count II, UHLMANN and TEAM assert claims of negligent misrepresentation against MANUFACTURER. In Count III, TEAM claims that MANUFACTURER and SELLER breached warranties of fitness and merchantability. In the first three counts, UHLMANN and TEAM seek as damages for lost monies loaned, lost business, lost opportunities, lost profits and seeking punitive damages.

In Count IV, TEAM asserts claims of breach of express warranty against MANUFACTURER and SELLER. In Count V, TEAM asserts breach of contract against SELLER. In Counts IV and V, TEAM seeks damages for lost business and lost business opportunities a well as profits and expenses.

In Count VI, TEAM asserts claims of failure to repair against MANUFACTURER and SELLER, seeking damages, both direct and consequential.

- December 2006 Defendants MANUFACTURER and SELLER move for summary judgment on several grounds including plaintiffs' lack of standing. A prolonged sequence of motions and suggestions follow.
- September 2007 The trial court grants summary judgment in favor of MANUFACTURER and SELLER.

IV. ANALYSIS

The issue before this court is jurisdiction: whether any of the plaintiffs below had standing to maintain the suit. The defendants raised standing in the court below and again, here, assert that none of the three plaintiffs had standing to bring suit. "To warrant standing as a party, the prospective plaintiff must have some actual and justiciable interest susceptible of protection through litigation." *F.W. Disposal S., LLC v. St. Louis County*, 168 S.W.3d 607, 611 (Mo. App. 2005).

Standing, being jurisdictional, may be raised at any time. *Gowen v. Cote*, 875 S.W.2d 637, 639 (Mo. App. 1994). "Where, as here, a question is raised about a party's standing, courts have a duty to determine the question of their jurisdiction before reaching substantive issues, for if a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantial issues presented." *Farmer v. Kidder*, 89 S.W.3d 447, 451 (Mo. banc 2002). The issue of standing is reviewed *de novo*. *Executive Bd. Of Mo. Baptist Convention v. Carnahan*, 170 S.W.3d 437, 445 (Mo. App. 2005). This court determines standing as a matter of law on the basis of the petition along with any other non-contested facts accepted as true by the parties at the time the motion to dismiss

was argued.” *Sherwood Nat’l Educ. Ass’n v. Sherwood-Cass R-VIII Sch. Dist.*, 168 S.W.3d 456, 463 (Mo. App. 2005) (internal quotations omitted).

As the issue of standing is dispositive, this court reviews the record to determine whether any of the three plaintiffs—UHLMANN, RENAISSANCE, or TEAM—have standing and are “seeking relieve to have a legally cognizable interest in the subject matter . . . [having] suffered a threatened or actual injury.” *HHC v. City of Creve Coeur*, 99 S.W.3d 58, 73 (Mo. App. 2003).

Plaintiffs’ claims fall into two distinct categories. The first claims are those associated with the sale of the Machine and are brought by UHLMANN and TEAM: Count I – Fraud; and Count II – Negligent Misrepresentation. The second set of claims is associated with ownership of the Machine. These claims are brought only by TEAM include: Count III – Breach of Implied Warranties; Count IV – Breach of Express Warranty; Count V – Breach of Contract; and Count VI – Failure to Repair.

A. UHLMANN

This court first addresses UHLMANN’s standing to bring Counts I and II and finds that UHLMANN has no standing as to these counts. UHLMANN was not a member of Crush at the time the company investigated the capabilities of the machine and decided to purchase the Machine. The members of Crush, and, more specifically, Gary Watts, interacted with MANUFACTURER and SELLER in the purchase of the Machine. UHLMANN testified that the money was advanced to Crush as a loan, not an equity investment in Crush. Accordingly, UHLMANN was a third-party lender to Crush. He testified that he supported Crush’s decision to

purchase the T1055 and to lend the company the money for the purchase based on Gary Watts's recommendation.

As a lender to Crush, UHLMANN does not have standing, individually, to assert claims of fraud and negligent misrepresentation. ***See Curt Ogden Equip v. Murphy Leasing Co.*, 895 S.W.2d 604, 610 (Mo. App. 1995).** Even if UHLMANN able to establish some ownership interest in Crush at the time of the purchase, he would still be without standing as a shareholder has no standing to sue as an individual for damages to a company. ***Warren v. Mercantile Bank of St. Louis*, 11 S.W.3d 621, 622-23 (Mo. App. 1999).** This reasoning holds true for claims of fraudulent misrepresentation made to individual who make personal guarantees for loans in their capacity as corporate representatives. ***World Importing, Inc. v. Mercantile Trust Co.*, 795 S.W.2d 85, 91 (Mo. App. 1991).** Accordingly, UHLMANN, individually, was without standing to bring Counts I and II.

B. RENAISSANCE AND TEAM

As to the claims brought by RENAISSANCE and TEAM, this court first notes that plaintiffs try to assert some form of "blanket" standing arguing that three entities—Crush, RENAISSANCE, and TEAM—are part of a "family" of companies in which UHLMANN is the owner. By asserting that the use of "TEAM" in the petition represents Crush, RENAISSANCE, and TEAM, plaintiffs conflate the interests of a non-party, Crush, and the apposite interests of RENAISSANCE and TEAM. Each company is a distinct legal entity with the right to own property, sue and be sued, contract, and acquire and transfer property. *See Mo. Rev. Stat.*

Section 347.061 (2000); Mo. Rev. Stat. 347.069 (2000). Plaintiffs cannot assert that because UHLMANN is the sole member of one or more of these companies, or that the separate companies are part of a “family” of companies, there is, necessarily, identity of interests. The mere identity of members of officers of two companies does not result in an identity of interest between the two entities. ***See Blackwell Printing Co. v. Blackwell-Wielandy Co., 440 S.W.2d 433, 437 (Mo. 1969).***

To establish standing to bring any claims associated with the purchase or the ownership of the T1055, ownership of the Machine must be established. Either RENAISSANCE or TEAM owned the Machine and could have the requisite standing to bring suit. As discussed below, the record is devoid of any evidence, apart from the conflicting assertions of UHLMANN that would support a finding that either RENAISSANCE or TEAM can establish ownership.

a. RENAISSANCE

RENAISSANCE was formed by UHLMANN in December 2002 with the express purpose of owning and leasing the Machine. The executive vice-president of RENAISSANCE stated in his deposition, that RENAISSANCE was formed as “another arm to aggregate all the assets.” UHLMANN asserted that he formed RENAISSANCE for the purpose of holding the Machine as an asset because he was advised that “putting it into a leasing company would give protection against creditors.” UHLMANN claimed that the loans to Crush came from the Uhlmann Company but that he had personally guaranteed the loans and “those were monies

that they were advancing on my behalf.” He stated that transferring the Machine to RENAISSANCE protected the T1055 that served as security for the loans.²

Plaintiffs assert in the petition and upon appeal that the Machine was transferred from Crush to RENAISSANCE in December 2002. However, the record is devoid of evidence of the purported transfer of interest. The only evidence that RENAISSANCE obtained any interest in the machine is limited to master leases created by RENAISSANCE that purported to lease the Machine first to Crush, then Mo-Kan, and finally, TEAM. Asked if there was a document anywhere in the company files that would show this transfer from Crush, a distinct legal entity, to RENAISSANCE, another distinct legal entity, UHLMANN stated that there was nothing in the file and he did not know where it would be.

Moreover, nothing in the record demonstrates that RENAISSANCE suffered any damages from any breach of contract or breach of warranties. RENAISSANCE does not pray for any relief in either the complaint in federal court or the petition in the case under review.

In that plaintiff RENAISSANCE could not meet the burden to show a cognizable legal interest in the Machine and does not pray for any relief, RENAISSANCE is without standing to bring any claims against MANUFACTURER or SELLER with regard to the purchase or ownership of the T1055.

² UHLMANN was asked: “But what you apparently were doing here in December of ‘02, was you personally taking losses on loans made by the Uhlmann Company that there hadn’t even been a default on yet; is that correct?” Uhlmann replied: “You’d have to talk to my tax accountant on that.”

b. TEAM

TEAM was organized as a limited liability company in June 2003.

UHLMANN asserts that he transferred the assets distributed from the dissolution of Mo-Kan, the successor company to Crush, into TEAM. TEAM was not a purchaser or exposed to any sales pitches or contact with the defendants.

Accordingly, TEAM was not a party to the purchase of the Machine and cannot bring claims for fraud or negligent misrepresentation associated with the purchase of the Machine. Nor can TEAM establish any successor interest or, indeed, any ownership interest in the Machine whatsoever.

A document, dated June 2004, purports to lease the Machine from RENAISSANCE to TEAM. Thus, as of June 2004, TEAM did not have any ownership interest in the T1055. However, without any explication or transfer documents, the T1055 shows up as an asset on TEAM's 2005 balance sheet. TEAM'S status as either an owner (listing the Machine as an asset in 2005) or a lessor (under the June 2004 master lease agreement with RENAISSANCE) is cloudy.

What truly trumps any vestige of a cognizable claim for any legal wrong is the assertion by the appellants that "[t]here was . . . a January 2003 written lease by which Renaissance, as the owner of the [T1055], leased the equipment back to Crush. . . . *Renaissance, which is wholly owned by Uhlmann, has owned the [T1055] since that time.*" (Emphasis added). At best, this admission establishes the status of standing in the shoes of a purchaser or owner for breach of contract

purposes. At worst, it aids a plaintiff who seeks no legal relief and therefore cannot attain standing to bring suit. The statement does nothing to burnish any result that would give the present lessee, TEAM, any proprietary interest in the T1055. Team does not have standing.

The plaintiffs bore the burden to establish their standing; they have not done so. UHLMANN'S utilization of numerous legal entities may provide a legal shield, but that shield may not be disregarded and later ignored in the prosecution of the instant action.

C. RULE 74.04(f) MOTION

Plaintiffs next assert that the trial court erred in denying their March 2007 Rule 74.04(f) motion. The motion was filed to thwart summary judgment and premised on the grounds that essential facts necessary to oppose summary judgment could not be presented due to the foot-dragging of the defendants in the federal case and the continued absence of a key witness, Hall.³

Even if the issue of standing was not dispositive of this appeal, the trial court's discretion to deny additional discovery time to locate a witness, who had been an officer and agent for plaintiffs in a cause of action they first filed in May 2005, is not grounds for reversible error. Point denied.

D. COSTS

The last point raised by appellants related to the trial court's granting of excessive costs to the defendants under Rule 57.03(c)(6). Specifically, the bill of

³ "Jeff Hall, a key employee of plaintiff Team Excavating's predecessor in interest [Crush] has not been located."

costs submitted by MANUFACTURER and SELLER included \$10,022.20 in videography expenses. MANUFACTURER concedes that, pursuant to the rule's language that unless stipulated by the parties "the expenses of video taping is to be borne by the party utilizing it and shall not be taxed as costs," these expenses should not have been included in their motion for costs and the court should be direct their removal. This point is granted.

IV. CONCLUSION

The judgment of the trial court granting summary judgment is affirmed on the basis that the plaintiffs to this suit lack standing. This court treats the judgment as one for the grant of a motion to dismiss for lack of subject matter jurisdiction. The issue as to the taxing of costs must be remedied, and the judgment is reversed and remanded to the trial court with directions to reduce the cost award by \$10,022.20.

Harold L. Lowenstein, Judge

All Concur.