

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE: ZAFARILAND OF MISSISSIPPI, LLC**  
**Debtor**

**CASE NO. 04-52227**

**CHAPTER 7**

**ZAFARILAND OF MISSISSIPPI, LLC,  
WILLIAM A. BROWNING AND GRACE S.  
BROWNING**

**Plaintiffs**

**v.**

**ADV. PROC. NO. 04-05081**

**ZAFARILAND FUN CENTER, LLC,  
KEITH SAUCIER AND KAREN LOTT**

**Defendants**

**OPINION**

Before the court is the motion for summary judgment filed by Zafariland Fun Center, LLC, Keith Saucier and Karen Lott, the defendants in the above styled proceeding, as well as the cross motion for summary judgment filed by the plaintiffs in the matter, Zafariland of Mississippi, LLC, William A. Browning and Grace S. Browning. Having considered the pleadings and memoranda submitted by counsel, as well as supporting affidavits, depositions and other documentation, the court concludes that the defendants' motion should be denied and the plaintiffs' cross motion should be granted in part and denied in part as set out below.<sup>1</sup>

**I. FACTUAL BACKGROUND**

1. On June 4, 2003, the plaintiffs signed an Asset Purchase Agreement with the

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<sup>1</sup> The cross motion for summary judgment filed by the plaintiffs is granted to the extent that defendants Saucier and Lott may be sued individually, but denied at this time as to liability due to genuine issues of material fact.

defendants for the sale of assets of a business owned by the defendants.<sup>2</sup> The purchase price under the agreement was \$300,000.00.

2. A petition for relief under Chapter 7 of Title 11 of the United States Code was filed by Zafariland of Mississippi, LLC on May 13, 2004.<sup>3</sup>

3. The above styled adversary complaint was filed by the plaintiffs on June 29, 2004. The complaint requested judgment based upon allegations of fraud and false misrepresentation and upon breach of contract and requested \$500,000 compensatory damages and \$250,000 in punitive damages with interest, fees and costs. The complaint contained allegations that the defendants, sellers in the asset purchase agreement, provided inaccurate financial information on profit and loss statements and tax returns regarding rental payments and certain taxes that made the business appear more profitable than it actually was, and that the plaintiffs relied upon that information in their decision to obtain financing to purchase the assets of the business. The asset purchase agreement indicated that all financial information furnished was complete and accurate and fairly presented the financial position of the sellers. The complaint also alleged that numerous assets were not in working condition and that the defendants had warranted that all machinery and equipment was in useable or working condition.

4. The defendants filed their motion for summary judgment, claiming that defendants

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<sup>2</sup> The Asset Purchase Agreement was signed by sellers Brian Keith Saucier and Karen Lott as Members of Zafariland Fun Center, LLC, and also as selling members individually. The agreement was signed by buyers William A. Browning and Grace S. Browning as Members of Zafariland of Mississippi, LLC, and also as buyer members individually. Separate notarizations were obtained for each, as members of the limited liability companies, and individually.

<sup>3</sup> Subsequently, A petition for relief under Chapter 7 was filed by plaintiffs William and Grace Browning on July 29, 2005.

Saucier and Lott are entitled to be dismissed because they are not proper parties, that the defendants are entitled to summary judgment because the plaintiffs failed to conduct a due diligence investigation prior to executing the asset purchase agreement, and that even if they did conduct a due diligence investigation, the plaintiffs waived their right to object to any defective condition of assets by proceeding with closing the sale and operating the business for a year before filing the action.<sup>4</sup> The motion further alleged that the profit and loss statements accurately reflected rental payments for 2002, and that sales and use taxes were not reflected because they were not expenses.

5. The plaintiffs filed their response and cross motion for summary judgment claiming that the defendants Saucier and Lott are not entitled to summary judgment and that they are named as individual defendants and are individually liable to the plaintiffs, and further claiming that the corporate veil of protection may be pierced. The plaintiffs allege that they did not fail to conduct a due diligence investigation,<sup>5</sup> that the profit loss statements did not reflect actual accrual of rent, and that expenses including insurance premiums and depreciation were not included on the statements. The plaintiffs claim that if the profit and loss statements had accurately reflected actual expenses, the business would not have appeared profitable, and the plaintiffs would not have been enticed into purchasing the assets of a business that was not profitable, which resulted

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<sup>4</sup> Defendants claim the plaintiffs made no effort to verify the accuracy of information in the profit and loss statements and further claim that the plaintiffs business failed through no fault of the defendants but through the plaintiffs own failure to run a successful business.

<sup>5</sup> The plaintiffs indicate they reviewed financial information submitted, including profit and loss statements and tax returns, toured the facility and viewed assets, hired a building inspector and hired an attorney to review financial information and prepare the asset purchase agreement.

in their having to file bankruptcy. The motion stated that the damages award should include rescission of the contract purchase price of \$300,000, reimbursement of the plaintiff's personal investment of \$45,500, compensatory damages for the bankruptcy they were forced to file and punitive damages.

7. Briefs were submitted by the parties on the motions for summary judgment.

## II. CONCLUSIONS OF LAW

The court has jurisdiction over the parties and subject matter pursuant to 28 U.S.C. § 1334 and § 157.<sup>6</sup> The parties have requested summary judgment pursuant to Federal Rule of Civil Procedure 56, made applicable by Federal Rule of Bankruptcy Procedure 7056. The Fifth Circuit has indicated that:

[S]ummary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”. Fed.R.Civ.P. 56(c). “An issue is ‘genuine’ if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party.” *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir.2000) (citation omitted). A fact-issue is material only if its resolution could affect the action's outcome. *E.g., St. David's Health Care Sys. v. United States*, 349 F.3d 232, 234 (5th Cir.2003). The evidence and inferences from the summary judgment record are viewed in the light most favorable to the nonmovant. *E.g., Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir.1994).

*Minter v. Great American Ins. Co. of New York*, 423 F.3d 460 (5<sup>th</sup> Cir. 2005). *See also, Bledsoe v. City of Horn Lake, Miss.*, 449 F.3d 650 (5<sup>th</sup> Cir. 2006)(when facts are disputed the court does

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<sup>6</sup> It is noted that in the Memorandum Opinion and Order from the District Court entered June 9, 2005, denying the defendants' motion to withdraw the reference, the court stated that although the matters involved in the adversary proceeding are not traditional core matter, the defendants submitted to the core jurisdiction of the bankruptcy court.

not determine the credibility of the evidence and draws all justifiable inferences in favor of the nonmovant); *Mauder v. Metropolitan Transit Authority of Harris County, Tex.*, 446 F.3d 574 (5<sup>th</sup> Cir. 2006)(summary judgment is only appropriate if the evidence shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law); *Man Roland, Inc. v. Kreitz Motor Exp., Inc.* 438 F.3d 476 (5<sup>th</sup> Cir. 2006)(in determining whether there is a dispute regarding a material fact we consider all the evidence in the record but do not make credibility determinations or weigh the evidence).

A.

The defendants request summary judgment on certain issues they claim have been abandoned and claim that others have been newly presented by the plaintiffs. The defendants argue that the plaintiffs, by failing to respond to the defendant's arguments in support of its motion for summary judgment or addressing the issues in their cross motion for summary judgment, have abandoned claims that certain assets purchased as part of the asset purchase agreement were not in working condition at the time of the purchase and that sales and use tax were not properly collected by the defendants. The court concludes that the defendants are not entitled to summary judgment on these issues based on the record before it at this time. Even if the failure to respond to summary judgment on such issues were considered as a default, the court must look at what is presented in the summary judgment proceedings before it.<sup>7</sup> The court

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<sup>7</sup> See, *Ward v. Dr. Pepper Bottling Company of Texas*, 1998 WL 664962 (N.D.Tex. 1998)(although court may not enter default summary judgment by virtue of failure to respond, it may accept as undisputed the facts described in the motion); *Action Steel Supply, Inc. v. Dixie Pipeline, LLC*, 1999 WL 33537204 (N.D.Miss. 1999)(although court may not grant summary judgment simply because there has been no opposition to the motion, the court may accept as undisputed the movant's version of facts and grant the motion where movant made prima facie showing of entitlement to summary judgment); *Wienco, Inc. v. Katahn Associates, Incorporated*,

must conclude that the defendants have not presented a prima facie showing on these issues relating to asset condition and payment of certain taxes that would entitle them to summary judgment.

The defendants further argue that the plaintiffs' use of documents subpoenaed from (Ross King Walker and BancorpSouth - i.e. the defendants' insurance company and banking institution) to support their claims of misrepresentation of profitability are not properly before the court and that the plaintiffs failed to file a motion to amend their complaint to include these allegations. The defendants further claim that the plaintiffs have not provided proof that they expended \$45,000 of personal funds in association with the purchase or operation of Zafariland and failed to amend the complaint to include this allegation. The court considers the plaintiffs' allegations as additional or supplemental allegations in support of claims originally presented in the complaint, i.e., that the financial information in the profit and loss statements or tax returns was inaccurate and misleading as to the company's profitability and that the plaintiffs are entitled to compensatory damages, rather than as new claims. However, even if considered new, the court would conclude that the plaintiffs would not be precluded from raising them at this stage of proceedings. In the case of *Eiden v. Home Depot USA, Inc.*, 2006 WL 1490418 (E.D.Cal. 2006), the court stated that:

Rule 8(a)'s "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed. 2d 1 (2002). Where, as here, plaintiff discovered new alleged violations during the discovery period that were not pled in the complaint,

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965 F. 2d 565 (7<sup>th</sup> Cir. 1992)(motion for summary judgment cannot be granted simply because there is no opposition, instead, court must find that construing all material facts in the movant's favor as a result of the non-movant's defaulted filing, summary judgment is appropriate).

but disclosed to defendant in sufficient time to permit defendant to address them in discovery and by way of law and motion, the court concludes plaintiff is not precluded from raising these allegations on a motion for summary judgment or at trial.

*Id.* at 5.<sup>8</sup> See also, *Mortkowowitz v. Texaco Inc.*, 842 F. Supp. 1232 (N.D.Cal. 1994)(new allegations asserted in opposition to a motion for summary judgment may in some instances be treated as a motion to amend the complaint). The court concludes that the defendants' claim that the plaintiffs have not amended their complaint provides an insufficient basis for preclusion of evidence or for summary judgment at this point on the allegations relating to information obtained in discovery regarding insurance premiums and bank records. The court does not herein make any determination as to whether the matters must be raised in an amended complaint.

### **B.**

The defendants further argue that Saucier and Lott are not proper parties to this lawsuit as members of a limited liability company pursuant to Miss. Code Ann. § 79-29-305 and that the plaintiffs have not demonstrated that the court should pierce the corporate veil to impose personal liability on these defendants. That section provides the following:

- (1) A person who is a member of a limited liability company is not liable, by reason of being a member, under a judgment, decree or order of a court, or in another manner, for a debt, obligation or liability of the limited liability company, whether arising in contract, tort or otherwise or for the acts or omissions of any other member, manager, agent or employee of the limited liability company.
- (2) A member of a limited liability company is not a proper party to a proceeding by or against a limited liability company, by reason of being a member of the limited liability company, except:
  - (a) Where the object of the proceeding is to enforce a member's right against or liability to the limited liability company; or
  - (B) In a derivative action brought pursuant to Article 11 of this

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<sup>8</sup> In a footnote, the court indicated, "That is not to stay that amendment of the complaint is not the better practice-clearly it is." *Id.* at 6, n.6.

chapter.

(3) Notwithstanding the provisions of subsections (1) and (2) of this section, under a limited liability company agreement or under another agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of the limited liability company.

Miss. Code Ann. § 79-29-305 (1972). However, the plaintiffs indicate that the suit is against Saucier and Lott as individual defendants and not due to their status as members of a limited liability company. Defendants Saucier and Lott signed the asset purchase agreement as members of Zafariland Fun Center, LLC, and also signed separately, individually. Additionally, separate notorizations were obtained for the defendants as members of the limited liability company, and individually. In the cited statute itself, subsection (3) contemplates that members might take such action making themselves liable in an individual capacity. Miss. Code Ann. § 79-29-305 (1972). The court concludes that Saucier and Lott are named as defendants in their individual capacities, and as such, are proper defendants in this proceeding and that the defendants are not entitled to summary judgment on the basis that they are not proper parties, and that the plaintiffs are entitled to summary judgment on this issue on their cross motion. In addition, the court notes that to the extent there may be any issues involving piercing the corporate veil, the court would conclude that there are genuine issues of material fact regarding the requisites for piercing the corporate veil, and to the extent this is pursued by the parties summary judgment would not be appropriate as to those issues.

### C.

The parties have requested summary judgment on issues relating to the accuracies, or inaccuracies, of financial information or asset information provided to the plaintiffs prior to execution of the asset purchase agreement, including the amount of rent paid by the plaintiffs,



whether the information was provided on an accrual basis, and whether other items were properly reported or disclosed including insurance, depreciation and taxes. Also included in the summary judgment requests are issues relating to whether the plaintiffs conducted due diligence prior to execution of the asset purchase agreement. The court concludes that there are genuine issues of material fact on all of these remaining issues based upon the pleadings and documentation submitted to the court and that summary judgment would not be appropriate at this point. The defendants' motion for summary judgment and the plaintiffs' cross motion for summary judgment should be denied as to these issues.

An order will be entered consistent with these findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58. This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

**DATED** this the 9th day of August, 2006.

*/s/ Edward R. Gaines*  
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EDWARD R. GAINES  
UNITED STATES BANKRUPTCY JUDGE

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