STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)
) CIVIL ACTION NO. 2015-CP-10-4549
C. GORDON LOVINGOOD, JR., C3)
INVESTMENTS, INC., and PPC12, LLC)
)
Plaintiffs,)
) **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**
v.)
)
VICTOR APAT; ANTHONY)
MCALLISTER; J. ERIC WADE d/b/a CT)
TOURING; and PEARL CO. SC, LLC,)
)
Defendants.)

On May 22, 2015, Defendants Anthony McAllister, J. Eric Wade d/b/a CT Touring, and Pearl Co., SC, LLC filed a Motion for Summary Judgment on the Plaintiffs' claims of contractual indemnity, equitable subrogation, and breach of fiduciary duty. On September 8, 2015, Plaintiffs filed a Motion for Partial Summary Judgment on the issues of all counterclaims asserted by Defendants and on their claims for contractual indemnity and breach of fiduciary duty. Plaintiffs and Defendants submitted memoranda of law in support of their respective positions, and a hearing on the motions was held before the Court on October 19, 2015. After careful consideration of the facts, testimony, and arguments presented on this matter, the Court hereby grants Defendants' Motion for Summary Judgment and grants Plaintiffs' Motion for Partial Summary Judgment on the counterclaims.

FINDINGS OF FACT[1]

Plaintiff C. Gordon Lovingood and Defendant Victor Apat organized PPC12, LLC in 2007 to own and operate a 1996 Pilatus PC-12 aircraft. (Lovingood Dep. 9:6-10:8) The PPC12 aircraft was financed with a loan from Cessna Finance Corporation. (Lovingood Dep. 10:13-12:2) The financing required monthly principal and interest payments of $15,816. (Lovingood Dep. 14:13-19) According to Lovingood, Plaintiff C3 Investments, Inc., a corporation owned by Lovingood, was the borrower under the promissory note to Cessna Finance, and he purports to have been a personal guarantor of the Cessna Finance loan. (Lovingood Dep. 10:13-12:2)

Lovingood and Apat had equal fifty percent (50%) interests in PPC12 and contributed equally to the aircraft's fixed and variable expenses. (Lovingood Dep. 10:9-12, 14:10-24) East Shore Aviation ("East Shore") managed the aircraft for PPC12 and used it for charter flights. (Lovingood Dep. 19:10-20:5, 21:8-22:3, Ex. 1) East Shore leased the aircraft from PPC12 for charter flights, but PPC12's charter income was not sufficient to cover the aircraft's expenses. (D. Gibbons Dep. 109:22-110:16; Lovingood Dep. 51:19-52:1) After the recession began in 2008, Lovingood and Apat reduced their use of the aircraft and struggled to pay the aircraft's expenses. (D. Gibbons Dep. 72:17-73:19; M. Gibbons Dep. 42:10-43:3) Due to their reduced use and desire to reduce their share of expenses, Lovingood and Apat, with East Shore's assistance, looked for new members to join PPC12 in late 2010 and early 2011. (D. Gibbons Dep. 73:5-19; M. Gibbons Dep. 42:10-43:3, 46:5-11; Lovingood Dep. 24:18-27:1; McAlister Dep. 11:4-13; Wade Dep. 26:6-10) At that time, selling the aircraft was not financially feasible because of decreased demand during the recession. (Lovingood Dep. 49:12-50:15)

[1] Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. See Rule 52, SCRCP.

In early 2011, Defendants were solicited to become members of PPC12. Defendants were informed that PPC12 owed more under the loan than the aircraft was worth and that it needed new members to increase usage and reduce Apat's and Lovingood's share of the aircraft's expenses. (Wade Dep. 13:23-14:2, 26:1-10, 27:6-22; McAlister Dep. 11:4-13, 14:7-16:5) Defendants were told that they would need to pay an initial contribution to create reserves for future maintenance and upgraded avionics. (Pearlstine Dep. 16:13-21; McAlister Dep. 14:7-16:5; Wade Dep. 26:22-27:1) Lovingood never got current on the amounts he owed to PPC12, and the amount Lovingood owed to PPC12 continued to increase during the time Defendants were members of PPC12. (Wade Dep. 145:21-146:18; Gibbons Dep. Ex. 6) In addition, no engine reserves were ever created for the aircraft. (Wade Dep. 146:14- 147:23)

As part of the solicitation of Defendants, Lovingood represented that he was the guarantor of the loan on the aircraft and that he wanted to reduce his ownership interest in PPC12. (Lovingood Dep. 51:4-5, 52:12-22) As such, the parties anticipated that if Defendants became members of the aircraft, they would work together to refinance the loan on the aircraft. (Lovingood Dep. 60:25-64:1) However, Defendants never agreed or expressed any intent to personally guaranty any debt associated with the aircraft or replace Lovingood as guarantor on the loan, especially considering they knew the aircraft was upside down financially. (Lovingood Dep. 60:17-23, 61:25-62:3, 63:11-16; McAlister Dep. 14:7-16:4; Pearlstine Dep. 33:10-17, 36:14-19; Apat Dep. 31:16-32:15)

In or around April, May, and June of 2011, Wade, McAlister, and Pearl Co. became members of PPC12, respectively. Pearl Co. and McAlister each paid an initial contribution of $40,000 for respective twenty-five percent (25%) interests in the company. (McAlister Dep.

22:19-23:1, 26:8-15; Pearlstine Dep. 16:13-24) Wade paid a $20,000 initial contribution for a twelve and one-half percent (12.5%) interest. (Wade Dep. 117:25-118:4; Lovingood Dep. Ex. 5)

When Defendants joined PPC12, the Operating Agreement was amended. (Lovingood Dep. Ex. 4) The Operating Agreement specifically provides that "[n]o member is personally liable for any debt, obligation, or liability of the Company, whether arising in contract, tort or otherwise." (Lovingood Dep. Ex. 4 § 3.5) Under Sections 3.6 and 3.7 of the Operating Agreement, the members were required to pay their share of the aircraft's fixed and variable expenses to be eligible to use it. (Lovingood Dep. Ex. 4 §§ 3.6 and 3.7) The Operating Agreement provides that the member's "usage is not allowed if a Member is not current with all financial obligations required by the Company." (Lovingood Ex. 4 § 3.7) The Agreement provides no other remedy for a member's failure to pay his share of aircraft expenses. (Lovingood Dep. 54:1-55:25; Apat Dep. 29:23-30:11)

The Operating Agreement also provides that the members "shall endeavor to refinance the debt associated with the ownership of the asset no later than January 1, 2014. This may include negotiations with Cessna Finance or related companies to reduce the outstanding debt. [Lovingood] agrees to assist in this process." (Lovingood Ex. 4 § 4.3(f))The Operating Agreement contains no provisions governing a member's dissociation from PPC12 or prohibiting the members from owning other aircraft. (Lovingood Dep. 85:13-21) In fact, Lovingood also owned other aircraft while he was a member of PPC12. (Lovingood Dep. 51:8-12)

At the time Defendants joined PPC12, PPC12's 2010 property taxes in the amount of $43,181.94 were delinquent; however, this was not disclosed to Defendants prior to becoming members. (Lovingood Dep. 43:20-45:23) Soon after Defendants made their initial contributions to PPC12, a portion of those funds was used to pay the delinquent 2010 property taxes without

consulting Defendants. (McAlister Dep. 39:2-42:13) After discovering the tax expenditure, McAlister objected to the use of funds for delinquent taxes and expressed his understanding that Defendants' contributions were not to be used for PPC12's delinquent debts. (McAlister Dep. Ex. 3) In addition to using Defendants' initial contributions to pay delinquent taxes, PPC12 never set up engine or maintenance reserves or upgraded the avionics. (McAlister Dep. 45:20-46:14; Pearlstine Dep. 49:6-9)

In late 2011 and early 2012, Wade initiated efforts to refinance PPC12's loan and obtained a commitment from a local lender to refinance the debt. (Wade Dep. 62:17-63:3) Because PPC12 owed more than the aircraft was worth, the lender only agreed to provide partial refinancing, which was several hundred thousand dollars short of what was owed to Cessna Finance at that time. Lovingood was not willing to pay the difference between the amount owed to Cessna Finance and the amount which PPC12 could obtain in financing from a new lender. (*Id.*; D. Gibbons Dep. 99:16-100:21) PPC12 also attempted to refinance the loan with Cessna Finance under different terms, but Cessna Finance would not refinance or amend the terms and conditions of its loan to PPC12. (Lovingood Dep. 68:22-69:2; D. Gibbons Dep. 95:4-99:12)

Upon futile efforts to refinance the aircraft and Defendants being aggrieved by PPC12's use of their capital contributions to pay delinquent taxes and failure to establish reserves and upgrade avionics, Defendants began looking for a new aircraft that would not be associated with PPC12 with others who were not members of PPC12. (McAlister Dep. 51:19-54:17; Wade Dep. 8:8-10:22) In the summer of 2012, Defendants, along with other partners, located another Pilatus PC-12 to purchase, and established CP Aviation, LLC to own and operate that aircraft. (Wade Dep. 10:22) CP Aviation purchased the aircraft, and it was relocated from England to the United States in or around September or October 2012. (Wade Dep. 55:25-56:7; D. Gibbons Dep. 20:16-

21:3) Although the CP Aviation aircraft is now available for charter through East Shore, it did not become eligible for charter until February 2013. (D. Gibbons Dep. 14:10-17:20)

On September 4, 2012, Wade called Lovingood to inform him that Defendants were dissociating from PPC12 effective October 1, 2012 and would be using the new aircraft owned by CP Aviation. (Wade Dep. 10:9-22, 122:16-123:24; Lovingood Dep. 101:3-112:2) Although there is some dispute regarding the specifics of the phone conversation, it is immaterial because Lovingood admits that Wade informed him that Defendants had "decided to move in a different direction" and were buying another airplane. (Lovingood Dep. 101:3-18) After receiving Wade's call, Lovingood emailed David Gibbons of East Shore, stating "Just got a call from Eric. I think we need to meet on this soon. No one has told me anything about this situation. So, I am asking you to get everyone together so we can get this resolved without any problems." (Lovingood Dep. 109:17-112:2, Ex. 7)

Further, Defendants' intent to dissociate from PPC12 effective October 1, 2012 was confirmed in another email from David Gibbons to Lovingood and Apat on October 22, 2012. In that email, Gibbons stated, "**We were only recently informed by the other members that they notified you by phone of their intention to leave PPC12 effective October 1st**. Those members have not used the aircraft since that time and are current with their financial obligations." (Lovingood Dep. Ex. 8) Lovingood admits that the October 22nd email confirmed Defendants' intent to dissociate from PPC12. (Lovingood Dep. 115:25-116:4) Although Lovingood disputes that Defendants' attempt to dissociate from PPC12 was legally effective (Lovingood Dep. 116:13-22), Lovingood has repeatedly admitted that Defendants expressed their intent to dissociate. (Lovingood Dep. 118:3-119:10) In addition, Defendant Apat admits that he understood that Defendants had either dissociated or were intending to dissociate around

October 1, 2012. (Apat Dep. 34:24-38:3) Apat was the registered agent of PPC12 under the Operating Agreement, and according to Lovingood, Apat was the managing member of PPC12 at the time. Michael Gibbons, who worked for East Shore and was the pilot of the PPC12 aircraft, similarly confirms that it was his understanding that Defendants had dissociated effective October 1, 2012. (M. Gibbons Dep. 77:14-79:17)

On October 28, 2012, approximately one week after Defendants' dissociation from PPC was confirmed to Lovingood, the PPC12 aircraft suffered catastrophic engine failure leaving Atlanta on a charter flight and the pilot had to make an emergency landing. (M. Gibbons Dep. 18:4-24:11, 48:7-11; D. Gibbons Dep. 44:7-45:6, 123:2-4) It was determined that a First Stage Planetary Gear in the aircraft's Pratt Whitney engine had seized. The aircraft was inoperable, needed major engine repairs, and remained at Peachtree-Dekalb airport for months. (Lovingood Dep. 121:5-126:10) After the engine failure, Lovingood took control of management of the aircraft from East Shore and had the engine repaired at Epps Aviation in Atlanta. (Lovingood Dep. 128:13-138:11; D. Gibbons Dep. 101:10-107:6) Lovingood and his attorneys negotiated a reduced-cost repair and overhaul of the engine, under the terms of Pratt-Whitney's warranty. (Lovingood Dep. 128:13-138:11) Because the aircraft was inoperable, East Shore removed it from its charter certificate in December 2012. (D. Gibbons Dep. 17:21-18:3) Ultimately, Lovingood sold the aircraft in February 2014 and paid off the loan to Cessna Finance. (Lovingood Dep. 178:25-179:14) According to Lovingood, he or Plaintiff C3 Investments paid for all repairs to the aircraft and the interest payments on the loan after the aircraft suffered engine failure until it was sold. (Lovingood Dep. 140:22-144:13) Lovingood and C3 Investments allege that they incurred expenses of over $530,000 to repair and sell the aircraft. Lovingood did not inform Defendants that the aircraft's engine failed and did not seek contributions for loan

payments. (Lovingood Dep. 124:22-126:10-11, 133:6-136:7) He did not include them in discussions with the engine manufacturer. (Lovingood Dep. 124:22-126:10, 133:6-136:7) He did not seek their consent before authorizing repairs to the aircraft and did not involve them in the sale of the aircraft. (Pearlstine Dep. 33:13-14)

On August 29, 2013, Plaintiffs filed suit against Defendants and Apat for all expenses incurred for the aircraft after it suffered engine failure. Plaintiffs assert claims of breach of fiduciary duty, contractual indemnity, and equitable subrogation. Defendants answered the complaint by denying the allegations and asserting counterclaims and crossclaims against Lovingood and Apat asserting fraudulent and negligent misrepresentations and concealment regarding how PPC12 would use Defendants' initial contributions. In addition, Defendants asserted a counterclaim against Lovingood for breach of fiduciary duty.

CONCLUSIONS OF LAW

This Court has subject matter and personal jurisdiction over the parties, and this matter is properly before the Court. Summary judgment is proper when it is clear there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56, SCRCP; Baird v. Charleston County, 333 S.C. 519, 529 (1999) In determining whether any triable issues of fact exist, the evidence and all inferences which can reasonably be drawn from the evidence is viewed in the light most favorable to the non-moving party. Hamiter v. Retirement Div. of the S.C. Budget & Control Bd., 326 S.C. 93, 96 (1997). "The trial court should grant summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element of the party's case." Fender & Latham, Inc. v. First Union Nat'l Bank of S.C., 316 S.C. 48, 50 (Ct. App. 1994). A party opposing a motion for summary judgment may not rest on the mere allegations of his pleadings, but must set forth or

point to specific facts showing that there is a genuine issue of material fact. *See* Rule 56(c), SCRCP; Strickland v. Madden, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994). The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *See* George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Contractual Indemnity

Plaintiffs seek contractual indemnification from Defendants under the Operating Agreement for the fixed expenses incurred to repair the PPC12 aircraft and pay the financing costs to Cessna Finance from October 2012 to present. According to Plaintiffs, Defendants are responsible for these contributions because they did not dissociate pursuant to S.C. Code Ann. § 33-44-601. Plaintiffs' claim for contractual indemnification is based on their argument that the Operating Agreement obligates all members of PPC12 to make contributions to the company for the aircraft's fixed expenses. "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990). "Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties." Rock Hill Tel. Co. v. Globe Communs., Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (Ct. App. 2004).

Any right for contractual indemnification that Plaintiffs have against Defendants must arise under the terms of the Operating Agreement. "The operating agreement of a limited liability company is a binding contract that governs the relations among the members, managers, and the company ... [and] operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to

some matter that statutory law will apply." Clary v. Borell, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012).

Plaintiff C3 Investments, Inc.'s claim for contractual indemnification fails because C3 Investments was neither a member of PPC12 nor a party to the Operating Agreement. Plaintiffs have not presented any evidence to the contrary or any legal grounds on which C3 Investments could maintain a claim for contractual indemnification under the Operating Agreement. There is no genuine dispute of material fact that a contract between C3 Investments and Defendants did not exist. Therefore, C3 Investments cannot maintain a claim for contractual indemnification as a matter of law. Defendants are entitled to summary judgment on C3 Investments' claim for contractual indemnification, and that claim is hereby dismissed.

In addition, Plaintiff Lovingood also cannot maintain a claim for contractual indemnification because the PPC12 Operating Agreement contains no provision addressing contractual indemnity between its members. Lovingood claims that he is entitled to indemnification under Sections 3.6 and 8.2 of the Operating Agreement. Those provisions, however, do not provide him a remedy for contractual indemnification, and he cites no operable language in those sections that would entitle him to indemnification. Section 3.6 of the Agreement merely governs the members' usage of the PPC12 aircraft and requires members to pay the fixed and variable expenses of the aircraft for such usage. Nothing in that section requires a member to indemnify another member for expenses incurred with respect to the aircraft. Thus, Section 3.6 does not support Plaintiffs' claim for contractual indemnification.

While Section 8.2(c) provides for PPC12 to indemnify members for expenses incurred by a member "in the ordinary course of the business of the Company or for the preservation of the Company's business or property," that provision does not require a member to indemnify

another member under any circumstance and neither does S.C. Code Ann. § 33-44-403. While Lovingood may conceivably have a cause of action for contractual indemnification against PPC12 under Section 8.2(c), he has failed to sue PPC12. This claim is not viable because the Operating Agreement does not provide for contractual indemnification among members. Therefore, Defendants are entitled to summary judgment on Lovingood's claim for contractual indemnification, and that claim is dismissed accordingly.

Plaintiffs' claim for contractual indemnity fails because Defendants properly dissociated by expressing their intent to dissociate from PPC12 prior to Plaintiffs incurring the expenses they seek to recover. § 33-44-601 and § 33-44-602 govern the manner in which a member may dissociate from a limited liability company. A dissociation occurs, among other ways, as a result of "the company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member." § 33-44-601(1). Section 33-44-601 does not require that such notice be given in any particular manner or form unless otherwise provided in the company's operating agreement. Rather, § 33-44-602 provides that, "[u]nless otherwise provided in the operating agreement, a member has the power to dissociate from a limited liability company at any time, rightfully or wrongfully, by express will pursuant to § 33-44-601(1)." That section further provides that if "the operating agreement has not eliminated a member's power to dissociate, the member's dissociation from a limited liability company is wrongful only if . . . it is in breach of an express provision of the agreement."

In this case, Defendants properly dissociated from PPC12 pursuant to §§ 33-44-601 and 33-44-602 prior to Plaintiffs incurring the expenses they seek to recover. The evidence demonstrates that Defendants expressed their will to dissociate from PPC12 in September and that all members of PPC12 and its manager knew of Defendants' intent to dissociate no later than

October 22, 2012. An email sent by PPC12's manager, David Gibbons, expressly confirms that Defendants had provided notice of their intent to dissociate effective October 1, 2012. As a result, PPC12 and its members had notice of Defendants' express will to withdraw as members of PPC12, and their dissociation was effective prior to the engine failure and aircraft expenses.

Lovingood admits that as of October 22, 2012 he was aware of Defendants' intent to withdraw from PPC12. Because Plaintiffs cannot deny that Defendants had expressed their intent to dissociate prior to the engine failure, they claim that Defendants had to do more than provide notice of their intent to withdraw to effectuate the dissociation. This argument has no merit because the Operating Agreement is completely silent on dissociation and does nothing to eliminate a member's right to dissociate under § 33-44-601(1). As such, § 33-44-601(1) governs Defendants' dissociation under these circumstances, and this section clearly holds that a member's dissociation is effective upon "the company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member." It is undisputed that PPC12 had notice of Defendants' express will to withdraw from PPC12 no later than October 22, 2012. Therefore, Defendants dissociated from PPC12 prior to the engine failure and have no contractual obligation under the Operating Agreement to make contributions for expenses and financing costs incurred after their dissociation.

In addition, Lovingood's and PPC12's actions after the aircraft suffered engine failure further demonstrate that PPC12 had notice of Defendants' intent to withdraw from the company. After the aircraft suffered engine failure, neither Lovingood nor PPC12 informed Defendants of the incident. PPC12 sent no further invoices to Defendants for the continuing expenses of the plane, such as loan payments, and Defendants were never consulted about the management of the aircraft while it sat grounded. Furthermore, Lovingood approved the repairs of the aircraft

without obtaining consent of Defendants, despite the fact that the Operating Agreement required consent of seventy-five percent (75%) of all members. PPC12 then sold the aircraft without consulting or obtaining approval of Defendants.

According to Plaintiffs, Defendant Apat was the managing member of PPC12 at the time the aircraft suffered engine failure. (Pls.' Mem. Opp'n Mt. Summ. J. p. 3) The Operating Agreement also named Apat as PPC12's registered agent. Apat admitted that it was his understanding that Defendants dissociated on or about October 1, 2012, prior to the aircraft suffering engine failure. (Apat Dep. 34:24-38:3) As a result, there is no genuine issue of material fact that PPC12, through its managing member and registered agent, had notice of Defendants' dissociation prior to the aircraft's engine failure. As such, Defendants were no longer members of PPC12 when Plaintiffs incurred the expenses they now seek to recover under their claim for contractual indemnification, and they are entitled to summary judgment on Plaintiffs' claim for contractual indemnification on this basis as well.

Equitable Subrogation

Under South Carolina law, subrogation is "broadly defined as the substitution of one person in the place of another with reference to a lawful claim or right." Shumpert v. Time Ins. Co., 329 S.C. 605, 610, 496 S.E.2d 653, 655 (Ct. App. 1998). Under equitable subrogation, one who pays a debt on behalf of another only steps into the shoes of the original creditor. Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 601, 538 S.E.2d 15, 31 (Ct. App. 2000). Plaintiffs Lovingood and C3 Investments, Inc. allege that they, on behalf of PPC12, made payments on the promissory note for the PPC12 aircraft held by Cessna Finance and for repairs to the aircraft performed by Epps Aviation and are therefore entitled to equitable subrogation. To the extent that the doctrine of equitable subrogation applies in this case, Plaintiffs Lovingood and C3 Investments would

have only acquired the rights of Cessna Finance and Epps Aviation, as the original creditors. Neither Cessna Finance nor Epps Aviation had any recourse against Defendants under the promissory note or the agreement to make repairs. Moreover, Defendants did not sign guaranties to pay any debts of PPC12, and the PPC12 Operating Agreement expressly provides that no member shall be personally liable for the debts of PPC12. (Lovingood Dep. Ex. 4 §§ 3.5, 8.2(a))

Plaintiffs have failed to proffer any evidence or legal arguments in support of their equitable subrogation claim. Plaintiffs cannot recover against Defendants under the doctrine of equitable subrogation because the original creditors of PPC12 have no right or claims against Defendants. *See* Kuznik, 342 S.C. at 610, 496 S.E.2d at 655 (ruling that equitable subrogation could not be applied by one partner against his other partners for debts paid on behalf of the partnership because the partnership's creditor had no recourse against the other partners). Therefore, Defendants are entitled to summary judgment on Plaintiffs' claim for equitable subrogation, and that claim is also dismissed.

Breach of Fiduciary Duty

Plaintiffs assert a cause of action against Defendants for breach of fiduciary duty of loyalty under § 33-44-409(b)(3) based on Defendants' alleged competition with PPC12 arising from their ownership and operation of another aircraft. To establish a breach of fiduciary duty, the plaintiff must prove, (1) the existence of a fiduciary duty, (2) a breach of the duty owed to the plaintiff by defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012). Plaintiff C3 Investments, Inc.'s claim for breach of fiduciary duty claim fails because C3 Investments cannot establish the existence of any fiduciary duty that Defendants owed to C3 Investments. Under § 33-44-409, a member of a member-managed limited liability

company owes a duty of loyalty to the company and its other members. *See* § 33-44-409(a) ("The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and duty of care imposed by subsections (b) and (c).") C3 Investments was not a member of PPC12, and it had no relationship with Defendants. As such, Defendants did not owe C3 Investments any fiduciary duty. Plaintiffs have not provided any evidence that a fiduciary relationship existed between Defendants and C3 Investments. Therefore, there is no genuine issue of fact on this matter, and Defendants are entitled to summary judgment on Plaintiff C3 Investments' breach of fiduciary duty claim.

Additionally, none of the Plaintiffs can maintain a claim of breach of fiduciary duty under § 33-44-409(b)(3) because they cannot establish the second element of that claim – i.e., that Defendants breached the fiduciary duty of loyalty. Section 33-44-409(b) provides that the only fiduciary duty that a member of a member-managed limited liability company owes to the company and the other members is the duty of loyalty, which includes the duty "to refrain from competing with the company in the conduct of the company's business before the dissolution of the company." § 33-44-409(b)(3). A member's duty of loyalty under § 33-44-409(b)(3) terminates upon the member's dissociation from the company. § 33-44-603(4).

Plaintiffs cannot recover under their claim for breach of fiduciary duty because they cannot prove that Defendants' alleged breach of the duty of loyalty proximately caused them any damages. Shortly after Defendants dissociated from PPC12 and began operating another aircraft, the PPC12 aircraft became inoperable after suffering engine failure and was no longer used for member or charter flights from the time it became inoperable until it was sold. As a result, even if Plaintiffs can establish a breach of fiduciary duty by Defendants, Plaintiffs cannot establish that they suffered any damages as a result of such breach. Although Plaintiffs assert that they are

entitled to damages associated with the expenses they incurred to repair the aircraft and pay the loan payments after the aircraft suffered engine failure in October 2012, those damages were not the result of Defendants' alleged breach of duty of loyalty. To the extent that Defendants are liable for any of those damages, that liability must arise from a contractual or statutory obligation to pay contributions to PPC12 or indemnify Plaintiffs. And to the extent that Defendants breached a duty of loyalty to Plaintiffs by competing against PPC12, the resulting damages must necessarily arise from the wrongful competition, which is completely separate from the expenses of the aircraft, such as maintenance, repairs, and financing costs. Therefore, Plaintiffs cannot prove the third element of their breach of fiduciary duty claim, and Defendants are entitled to summary judgment on this claim on this basis as well.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs seek summary judgment on Defendants' counterclaims against Lovingood for fraud, fraudulent concealment, and negligent misrepresentation.

Fraud

In order to prevail on any of the counterclaims alleging fraud, the Defendants must prove those claims by clear, cogent and convincing evidence. Anderson v. Citizens Bank, 294 S.C. 387, 365 S.E. (2d) 26 (Ct. App. 1987). The elements of fraud are: a representation; its falsity; its materiality; knowledge of its falsity or a reckless disregard of its truth or falsity; intent that the representation be acted upon; hearer's ignorance of its falsity; hearer's reliance on its truth; hearer's right to rely; and hearer's consequent and proximate injury. E.g., Florentine Corp., Inc. v. PEDA I, Inc., 339 S.E. (2d) 112 (1985). A nondisclosure becomes fraudulent only when a party having knowledge of facts has a duty to disclose them. The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between

the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties. Jacobson v. Yaschik, 155 S.E.2d 601, 605-606 (S.C. 1967)

Constructive Fraud

To establish constructive fraud, the counterclaim defendants must establish all elements of actual fraud, except the element of intent. O'Quinn v. Beach Associates, 272 S.C. 95, 249 S.E.2d 734 (1978). Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud while intent to deceive is an essential element of actual fraud. Giles v. Lanford & Gibson, Inc., 328 S.E.2d 916 (Ct. App. 1985). However, in a constructive fraud case, where there is no confidential or fiduciary relationship, and an arm's length transaction between mature, educated people is involved, there is no right to rely. Poco-Grande Investments v. C&S Family Credit, Inc., 301 S.C. 323, 391 S.E.2d 735 (Ct. App. 1990). This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests. Id. Ardis v. Cox, 431 S.E.2d 267, 269-270 (S.C. Ct. App. 1993).

Negligent Misrepresentation

To establish liability for negligent misrepresentation, the Defendants must show that the Plaintiff 1) made a false representation to the Defendants, (2) had a pecuniary interest in making the representation; (3) owed a duty of care to see that he communicated truthful information (4) breached that duty by failing to exercise due care. The Defendants must also establish that they

justifiably relied on the representation; and suffered a pecuniary loss as the proximate result of their reliance. Sauner v. Public Serv. Auth., 581 S.E.2d 161, 166 (S.C. 2003); AMA Management Corp. v. Strasburger, 420 S.E.2d 868 (Ct. App. 1992). "Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation." Id. Winburn v. Insurance Co. of North America, 287 S.C. 435, 443, 339 S.E.2d 142, 147 (Ct. App. 1985).

Breach of Fiduciary Duty

To establish their claim that the Plaintiff breached a fiduciary duty, the Defendants must establish both the existence of a fiduciary relationship and a breach of the responsibility of the fiduciary to act in good faith and with due regard to the interests of the one imposing the confidence. Moore v. Moore, 599 S.E.2d 467, 473 (S.C. Ct. App. 2004). For members of a Limited Liability Company, those duties are defined by the South Carolina Limited Liability Company Act, which states:

> (a) The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and the duty of care imposed by subsections (b) and (c).
>
> (b) A member's duty of loyalty to a member-managed company and its other members is limited to the following: (1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity; (2) to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and (3) to refrain from competing with the company in the conduct of the company's business before the dissolution of the company.
>
> (c) A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law. S.C. Code Ann. § 33-44-409.

Applying these standards to the facts of the case, the only evidence in the record that supports the Defendant's counterclaims is the testimony of David Gibbons, the aircraft manager, that Defendant Apat instructed him to pay $21,672.71 in 2010 Charleston County Property taxes from the PPC12, LLC operating account. (Deposition of D. Gibbons, p. 69, line 4-p. 72, line 6; Ex. 7, p. 44, lines 20-p. 45, line 19) Perhaps this testimony may support the crossclaims against Apat; however, there is no evidence in the record suggesting that Lovingood had any knowledge or involvement in Apat's act. There is no evidence that Lovingood performed any act that would violate the fiduciary duties imposed by § 33-44-409. There is no evidence suggesting that Lovingood made any material representation whatsoever to Defendants Wade, McAllister, or Pearlstine.

The evidence before the Court on summary judgment establishes that Lovingood was not the managing member of the LLC, had no actual knowledge that the taxes of the aircraft were overdue, and made no representations otherwise to the Defendants. The testimony of record shows that Lovingood was not aware that the 2010 property taxes were unpaid before being notified by the County, and Lovingood then paid his share of the 2010 property taxes directly to Charleston County after receiving such notice. All of this occurred before Defendants McAllister and Pearlstine became members of PPC12, LLC.

Moreover, the Court finds as a matter of law that the Defendants' allegation that Lovingood failed to disclose the status of the 2010 property taxes on the PPC12, LLC aircraft cannot support a claim of fraud, fraudulent concealment, constructive fraud, or negligent misrepresentation. This case involves an arms-length transaction between sophisticated, successful businessmen. None of the counterclaiming defendants performed a public records search to ensure that any 2010 taxes had been paid prior to becoming members of the LLC. A

search of those records would have taken minutes and would have established the status of all past tax payments. Under these facts, it is wholly unreasonable for the counterclaiming defendants to have relied upon an alleged representation on the status of property taxes. Even if such a representation had been made, the counterclaiming defendants had no right to rely on that representation, given the ease with which the information could have been ascertained from the public records. Moseley v. All Things Possible, 719 S.E. 2d 656, 658-659 (S.C. 2011).

There is no evidence in the record that Lovingood made any representation, misrepresentation, or committed any act that would support the counterclaims against him. Defendants Wade, McAllister, and Pearlstine became members of PPC12, LLC, after having full opportunity to examine the books and records of the LLC, and to question Apat and the aircraft manager of East Shore Aviation. There is no evidence in the record that any misrepresentation or false statement was ever made to them, and no evidence suggesting they had a right to or actually did rely on such statements. Accordingly, as to the counterclaims, there is no material question of fact for the trier of fact to decide, and the counterclaims must fail. Accordingly, this Court hereby grants the Plaintiffs' Motion for Partial Summary Judgment, dismissing the counterclaims of Defendants Wade, McAllister, and Pearlstine against Plaintiff Lovingood.

CONCLUSION

Based on the record herein, there are no genuine issues of material fact on Plaintiffs' claims, and Defendants Anthony McAlister, J. Eric Wade d/b/a CT Touring, and Pearl Co. SC, LLC are entitled to judgment on all of Plaintiffs' claims. I further conclude that there are no genuine issues of material fact on Defendants' counterclaims against Lovingood, and Plaintiffs' Motion for Partial Summary Judgment is also granted.

IT IS THEREFORE ORDERED that:

1) Defendants' Motion for Summary Judgment is hereby GRANTED, and Plaintiffs' claims are dismissed in their entirety.

2) Plaintiffs' Motion for Partial Summary Judgment is hereby GRANTED.

AND IT IS SO ORDERED.

The Honorable J.C. Nicholson, Jr.

November 30, 2015

Charleston, South Carolina