

477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed material facts are appropriately supported in the parties’ respective statements of material fact submitted pursuant to this court’s Local Rule 56.

On May 14, 1999 the plaintiff and its stockholders entered into an Asset Purchase Agreement (“Purchase Agreement”) with Family Living AdultCare Centers, Inc. (“FLAC”). Statement of Genuine Material Facts in Support of Plaintiff’s Motion for Summary Judgment (“Plaintiff’s SMF”) (Docket No. 13) ¶ 1; Counter-Statement of Material Facts (“Defendant’s Responsive SMF”), included in Defendant Baldyga’s Counter-Statement of Material Facts and Additional Statement of Material Facts (Docket No. 15), ¶ 1. The Purchase Agreement is Exhibit A to the Plaintiff’s statement of material facts. The agreement was signed by the defendant in his capacity as chairman and chief executive officer of FLAC. *Id.* At that time, the plaintiff as a Maine corporation engaged in running assisted care facilities. *Id.* ¶ 2. The plaintiff operated three separate facilities with a combined maximum occupancy of 48 residents. *Id.* ¶ 3. The defendant currently operates the business through FLAC

which is a wholly owned subsidiary of AdultCare Centers of America, Inc. Additional Statement of Material Facts (“Plaintiff’s SMF”), included in Defendant Baldyga’s Counter-Statement of Material Facts and Additional Statement of Material Facts, ¶ 40; Plaintiff’s Response to Defendant’s Additional Statement of Material Facts (“Plaintiff’s Responsive SMF”) (Docket No. 19) ¶ 40.¹ The defendant is the sole shareholder of AdultCare Centers of America, Inc. *Id.*

Closing on the sale occurred on June 13, 2000. Plaintiff’s SMF ¶ 4; Defendant’s Responsive SMF ¶ 4. Teresa Little, president of the plaintiff, and Bruce Little, together constituting the sole stockholders of the plaintiff, intended to stay on and run the facilities after the sale. *Id.* ¶¶ 1, 6. A no-publicity provision was included in the Purchase Agreement, prohibiting public announcement of the sale without written approval from both buyer and seller. *Id.* ¶ 7. Despite this provision, word of the sale got out and two of the three managers of the facilities left, requiring the Littles to fill in. *Id.* ¶ 8. This caused marketing and publicity efforts to suffer leading to a decline in census figures. *Id.* The business of assisted care facilities has the potential for fluctuation in occupancy due to sickness, recovery and death of residents. *Id.* ¶ 9. The census of the plaintiff’s facilities dipped to 77.82 % in July, 77.02 % in August, and 75.0% in September. Defendant’s SMF ¶ 50; Plaintiff’s Responsive SMF ¶ 50. While this was the first time the census had been below 80% for three straight months and 75.0% was the lowest census ever reported for the business, *id.*, the Littles believed that a little extra sales effort would bring the census numbers back up, Plaintiff’s SMF ¶ 10; Defendant’s Responsive SMF ¶ 10. In December 1999 FLAC provided a notice of default under the Purchase Agreement based on the adverse business consequences of the declining census figures. *Id.* ¶ 11; Defendant’s

¹ The plaintiff contends that “Defendant declined to address Plaintiff’s Statement of Material Facts #38 and #39 and began his own statement of material facts at 38. Thus, Plaintiff’s #38 and #39 must be deemed to be admitted.” Plaintiff’s Responsive SMF at 2. The statement of material facts submitted by the plaintiff (Docket No. 13) ends with a paragraph numbered 37.

SMF ¶ 50, Plaintiff's Responsive SMF ¶ 50.² Under the terms of the Purchase Agreement the plaintiff had an opportunity to cure the default. Defendant's SMF ¶ 52; Plaintiff's Responsive SMF ¶ 52. In January 2000 the plaintiff claimed that it had cured any default. *Id.* ¶ 53.

FLAC offered to purchase the plaintiff's business for \$3.5 million and the Purchase Agreement reflected that price. *Id.* ¶¶ 43-44. FLAC sought financing for the purchase from the Department of Housing and Urban Development ("HUD"). Plaintiff's SMF ¶ 13; Defendant's Responsive SMF ¶ 13. HUD required improvements in order to provide financing. *Id.* ¶ 16. In order to assure that the improvements would be made, the lender insisted that the necessary funds, approximately \$201,000, be escrowed. *Id.*; Defendant's SMF ¶ 57; Plaintiff's Responsive SMF ¶ 57. The original agreement contemplated a subordinated promissory note from the buyer to the plaintiff for a portion of the purchase price. Plaintiff's SMF ¶ 19; Defendant's Responsive SMF ¶ 19. The defendant agreed to personally sign a separate promissory note for \$201,650. *Id.* ¶ 20. Under the terms of this promissory note, executed June 13, 2000, the defendant promised to repay the entire principal plus interest at a rate of 18% per annum by August 13, 2000. *Id.* ¶ 21.³ Any amounts not paid by August 13, 2000 would accrue interest at a rate of 24% per annum. *Id.* In the event of default, the holder of the note has the option to declare the entire principal balance and accrued interest due immediately. *Id.* The note also contains a provision for attorney fees. *Id.*

² The defendant denies paragraph 11 of the plaintiff's statement of material facts in his responsive statement, but that denial does not address the assertions made in this paragraph of the plaintiff's statement.

³ In his response to this and paragraphs 23, 25-27, and 36 of the plaintiff's statement of material facts the defendant states that he "admits the terms" of the document at issue in each of the numbered paragraphs but "denies the remaining allegations" of the paragraphs "to the extent they are inconsistent with the" document at issue, citing to the entire document. This response is inappropriate under Local Rule 56(c) & (e), which requires each denial to be supported by a citation to "the specific page or paragraph of identified record material supporting" the denial. Particularly when the moving party's statement is that a document does not include certain terms, the responding party must specify the location of such terms in the document if it wishes to deny the assertion, not merely direct the court to search the entire document in order to determine whether there are any such terms. In addition, two of the paragraphs to which the defendant offers this response consist solely of accurate quotations from the documents at issue, making it impossible that those paragraphs could be considered "inconsistent" with those documents to any extent.

No payments have been made under the promissory note. *Id.* ¶ 22. The defendant has delivered to the plaintiff a demand for indemnification for the payments due, and the plaintiff has refused to provide indemnification. Defendant’s Responsive SMF ¶ 22; Affidavit of Donald A. Baldyga, etc. (Docket No. 16) ¶ 35.⁴

The defendant was an experienced businessman, with substantial experience in the nursing home business. Plaintiff’s SMF ¶ 30; Defendant’s Responsive SMF ¶ 30. He has performed due diligence on over two dozen nursing homes. *Id.*

III. Discussion

A. The Plaintiff’s Claim

Under Maine law, a plaintiff may recover on a promissory note when he establishes that the maker executed the note, the note is appended to the complaint, the note provides for acceleration of payment and payment in full upon default, no payment has yet been received, payment is due and owing and the owed amount is stated. *See Ripley v. Mercier*, 482 A.2d 850, 851 (Me. 1984). Once the signature is admitted or established, production of the note entitles the plaintiff to payment “unless the defendant proves a defense or claim in recoupment.” 11 M.R.S.A. § 3-1308(2). Here, the defendant does not dispute that he executed the note nor the fact that he has not made payment on it. Instead, he

⁴ The plaintiff objects to the defendant’s response to paragraphs 22 and 33 of its statement of material facts, as well as paragraphs 55 and 56 of the defendant’s SMF, on the grounds that those statements are based on the “use of a subsequent affidavit to dispute deposition testimony.” Plaintiff’s Responsive SMF at 1, 4. “When an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.” *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994). However, the defendant’s statement at paragraph 35 of his affidavit, upon which his response to paragraph 22 of the plaintiff’s affidavit is based, does not contradict his cited deposition testimony, which is found at page 51 of the Deposition of Donald Baldyga, Exh. C to the plaintiff’s SMF. The same is true of paragraph 33 of the plaintiff’s statement of material facts and paragraphs 55 and 56 of the defendant’s SMF. The plaintiff also objects to the “Defendant’s citing of his Affidavit to allegedly dispute direct quotes [sic] from documents in this case, as he has done in ‘facts’ #21, 23, 25, 26, 27, 35, 36.” Plaintiff’s Responsive SMF at 1. With the exception of his response to paragraph 35 of the plaintiff’s statement of material facts, the defendant does not cite his affidavit but rather the document itself at issue, which happens to be attached to his affidavit. I have already addressed the defendant’s practice of presenting nonspecific denials of allegations concerning the content of documents. See note 3 above. In his response to paragraph 35, the defendant does not dispute a direct quotation from the promissory note, but rather adds qualifying information based on his (*continued on next page*)

argues that recovery on the note is barred by the plaintiff's alleged breach of the Purchase Agreement, by a lack of consideration and by the plaintiff's alleged fraudulent inducement. Defendant Baldyga's Opposition to Plaintiff's Motion for Summary Judgment ("Opposition") (Docket No. 14) at 19-22. In the alternative, the defendant contends that he is "entitled to a trial on his defense of set-off or recoupment." *Id.* at 23.

It is clear that the defendant is not himself a party to the Purchase Agreement. Asset Purchase Agreement (Exh. A to Plaintiff's SMF) at 1, 25. The case law upon which he relies to support his argument that the plaintiff's alleged breach of the Purchase Agreement entitles him to refuse to perform under the note deals with factual situations in which the breach of one party to a single contract excuses the other party from further performance of his duties under that same contract. The defendant cites no authority for the proposition that breach by an entity not a party to the contract at issue of a separate contract excuses a party to the contract at issue from performance, nor is he likely to locate any such authority. It is undoubtedly for this reason that the defendant cites Maine case law setting forth the general proposition that

in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same contracting parties, for the same purposes, and in the course of the same transaction will be considered and construed together, since they are, in the eyes of the law, one contract or instrument.

Hilltop Cmty. Sports Ctr., Inc. v. Hoffman, 755 A.2d 1058, 1062 (Me. 2000) (quoting *Kandlis v. Huotari*, 678 A.2d 41, 43 (Me. 1996)). The problem for the defendant in this instance is that the contracting parties in the two documents are not the same, and he offers no reason to disregard the legal difference between himself and the corporation owned by a corporation of which he is the sole shareholder. The defendant also refers in passing in this section of his argument to his alleged

affidavit, a procedure that is contemplated by Local Rule 56.

entitlement to indemnification under the Purchase Agreement as an agent of the buying corporation for damages arising from an inaccuracy in representations by the seller, Opposition at 14, but a right to indemnification is not a defense to liability on a note. It may serve to reduce or eliminate that liability after it is established, but it cannot bar an action on the note.

The defendant next contends that he received no consideration from the plaintiff in return for his promise to pay set forth in the note and that the note is unenforceable for lack of consideration. While it is basic hornbook law that every contract must be supported by consideration, *e.g.*, *Whitten v. Greeley-Shaw*, 520 A.2d 1307, 1309 (Me. 1987), it is also true that consideration “may consist in some benefit to the promisor or some loss or detriment to the promisee,” *Zamore v. Whitten*, 395 A.2d 435, 440 (Me. 1978). Here, the detriment to the plaintiff is obvious; it provided \$201,560 that it would otherwise have retained from the sale of its business to an escrow account that was not under its control. That is sufficient under Maine law. *See, e.g.*, *Kennebunk Sav. Bank v. West*, 538 A.2d 303, 304 (Me. 1988) (“Consideration can either be a benefit to the promisor or a detriment to or forbearance by the promisee.”). The defendant’s argument would render unenforceable any personal guarantee of a loan the proceeds of which are intended for corporate purposes and is accordingly logically insupportable.

The defendant’s final argument is that he was fraudulently induced to execute the note. This argument is based on his claim that the plaintiff made material misrepresentations about the occupancy levels of the three facilities being sold. Amended Answer, Affirmative Defenses and Counterclaim (Docket No. 4) at 2-3; Defendant’s SMF ¶¶ 48-50, 53-55, 60-62. In his statement of material facts, the defendant specifies an additional four alleged misrepresentations not mentioned in his amended answer. Defendant’s SMF ¶ 63. Most of these allegations are denied by the plaintiff. Plaintiff’s Responsive SMF ¶ 49, 53-55, 60, 62-63. The plaintiff admits that the defendant held the opinion that

an important measure of the financial condition of a residential care facility is its occupancy rate, *id.* ¶ 48; that the census figures at the facilities subject to the Purchase Agreement began to decline after the Purchase Agreement was signed, *id.* ¶ 50; and that Teresa Little confirmed at her deposition actual census figures as of certain dates in 2000, *id.* ¶ 61.

Under Maine law, parol evidence may be introduced to show that a signed document does not reflect the intent of the parties. *Ferrell v. Cox*, 617 A.2d 1003, 1006 (Me. 1992) (action alleging fraud and misrepresentation); *see also Harriman v. Maddocks*, 518 A.2d 1027, 1029 (Me. 1986) (“[a]ny person may introduce parol evidence to evidence the fact of a false and fraudulent representation made for the purpose of inducing that person to execute a contract;” citation and internal punctuation omitted). Accordingly, the plaintiff’s contentions that “nothing on the face of [the] note links it to the purchase and sale of the business” and that nothing “in the Note suggest[s] that payment is suspended or waived because of conditions set forth in the Asset Purchase Agreement,” Motion at 9, are not dispositive. While it is accurate to say that “the warranties and obligations of the Agreement do not run to the instant note,” *id.* at 10, for reasons discussed below, the defense of fraud in the inducement is raised independent of the terms of the Purchase Agreement.

Under Maine law, a party alleging fraud must make a five-part showing which encompasses (1) a false representation (2) of material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act in reliance upon it, as well as a showing that (5) the [party claiming fraud] justifiably relied upon the representation as true and acted upon it to his detriment.

Ambrose v. New England Ass’n of Schs. & Colleges, Inc., 252 F.3d 488, 492 (1st Cir. 2001). The plaintiff argues that any reliance on the alleged misrepresentations by the defendant cannot have been reasonable under the circumstances because the defendant had experience in conducting due diligence on nursing homes, was aware of the declining census figures as evidenced by the service of a notice of default and failed to make a “tangible effort to ascertain additional figures in the months leading up to

the . . . closing,” Motion at 11-12; and that there is no evidence that the allegedly false census numbers “were intended to induce the Defendant to sign this note” because the note was not contemplated until “[s]hortly before the closing,” and “[t]here was no connection between this note and the census figures, in the mind of Teresa and Bruce Little,” *id.* at 12 & Plaintiff’s SMF ¶ 18. The critical factual assertions cited by the plaintiff in support of these arguments are all denied by the defendant, Plaintiff’s SMF ¶¶ 18, 31-32; Defendant’s Responsive SMF ¶¶ 18, 31-32. Although the relationship between the time when the possibility of the escrow and the note at issue was first raised and the provision of the allegedly false information is not entirely clear from the summary judgment record, that record does not allow the drawing of an uncontroverted inference that the alleged misrepresentations were all made before the escrow and the note were first discussed by the parties.

On the present state of the record, the defendant cannot be barred as a matter of law from asserting fraudulent inducement as a defense to the plaintiff’s claim. Accordingly, the motion for summary judgment on that claim must be denied.

B. The Counterclaim

The plaintiff contends that the defendant lacks standing to bring his counterclaim because it “stem[s] from allegations that the Plaintiff has failed to fulfill its obligations under the Asset Purchase Agreement.” Motion at 6. The defendant is not a party to the Purchase Agreement. To the extent that his counterclaim may properly be interpreted as an attempt to assert a claim arising out of that document, the plaintiff is correct.⁵ The defendant asserts that he has standing to bring such claims both as a third-party beneficiary and as a “permitted assignee” of the Purchase Agreement. Opposition at 13-19. However, the Purchase Agreement, which specifically provides that it is an integrated contract, Plaintiff’s SMF ¶ 23 & Purchase Agreement § 11(d), also specifically excludes third-party

⁵ The defendant contends that his counterclaim asserts claims of breach of the Purchase Agreement, entitlement to indemnification
(continued on next page)

beneficiaries, Plaintiff's SMF ¶ 25 & Purchase Agreement § 11(n). The defendant argues that he is nonetheless a third-party beneficiary of the agreement by virtue of section 9(b) which provides indemnification to certain individuals under certain circumstances. Opposition at 14-15. While the defendant appears to qualify as several of the individuals listed in that clause, all that the clause provides him with, at most, is his claim for indemnification. It is not inconsistent with and does not override the clear exclusion of all third-party beneficiaries for general purposes. *See generally Rice Growers Ass'n of California v. F. Carrera & HNO., Inc.*, 234 F.2d 843, 846 (1st Cir. 1956) (contract provisions should be construed as consistent with one another if reasonably possible).⁶ To the extent that the defendant alleges breach of the agreement in his counterclaim, he lacks standing to do so as a third-party beneficiary. In addition, while the defendant might be within the scope of individuals to whom or which the Purchase Agreement may be assigned under its section 11(f), as the defendant contends, Opposition at 16-17, he has submitted no evidence that such an assignment has in fact been made and accordingly lacks standing to enforce any terms of the Agreement as an assignee. *See Sturtevant v. Town of Winthrop*, 732 A.2d 264, 267 (Me. 1999). The plaintiff is entitled to summary judgment on any claim for breach of the Purchase Agreement asserted in the counterclaim.

With respect to the defendant's claim that he is entitled to indemnification from the plaintiff for its claim against him on the note pursuant to section 9(b) of the Purchase Agreement, the plaintiff argues that the provision must be limited to individuals listed in the provision in their corporate capacities as distinct from their individual capacities and that the defendant's execution of the note was undertaken solely in his individual capacity. Plaintiff's Reply to Defendant's Opposition to

under the Purchase Agreement, and negligent misrepresentation. Opposition at 10-12, 17.

⁶ The defendant cites section 203(d) of the Restatement (Second) of Contracts to support his argument that section 9(b) of the Purchase Agreement overrides section 11(n), characterizing the latter as "boilerplate." Opposition at 14-15. However, he has submitted no evidence that section 9(b) was "separately negotiated" and that section 11(n) was not, as would be necessary in order for section 203(d) of the Restatement to apply. Restatement (Second) of Contracts § 203(d) (1981).

Summary Judgment, etc. (“Plaintiff’s Reply”) (Docket No. 18) at 4. This section of the Purchase Agreement provides:

Indemnification by Seller. Seller shall indemnify and hold harmless Buyer and its respective agents, representatives, employees, officers, directors, stockholders, controlling persons and affiliates (collectively, the “Buyer Indemnities”), and shall reimburse the Buyer Indemnities for any damages arising from or in connection with (i) any inaccuracy in any of the representations and warranties of Seller in this Agreement or in any certificate, exhibit, document or other paper delivered by Seller pursuant to or in connection with this Agreement, (ii) any failure of Seller to perform or comply with any agreement to be performed or complied with by it in this Agreement (iii) any retained liability or Excluded Asset . . . and (v) Buyer’s enforcement of Seller’s indemnification obligations contained herein.

Purchase Agreement § 9(B). Neither of the parties provides any authority in support of their respective positions on this issue.

The defendant has provided evidence, disputed by the plaintiff, that both the Purchase Agreement, Defendant’s SMF ¶ 63, and documents delivered by the plaintiff’s agent “in connection with” the Purchase Agreement, *id.* ¶¶ 53-54, 60-61, included inaccurate representations. The defendant’s alleged damages, to the extent that they are not alleged to arise from breach of the Purchase Agreement itself, but rather in connection with those alleged misrepresentations, in that the defendant alleges that he relied on those misrepresentations in executing the personal note at issue, appear to fit within the boundaries of this clause. The plaintiff’s contention that the scope of this provision is limited to indemnities “acting in their corporate capacities,” Plaintiff’s Reply at 4, while attractive at first glance given the First Circuit’s rule that an officer of a corporation may be held liable to third parties for tortious conduct he commits on behalf of the corporation, *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 907 (1st Cir. 1980), is not a reasonable interpretation of the clear language of the provision itself and the context in which it appears, because any damages to these individuals in their corporate capacities as a result of the sale of assets that is the purpose of the

Purchase Agreement is highly unlikely. They are more likely to be injured as individual stockholders or providers of financing for the sale in some capacity. Further, it is not the fact that the Purchase Agreement does not refer to the personal note that governs under these circumstances, as the plaintiff contends, Defendant's Reply at 5, but rather the fact that the note does not include an integration clause or any other term identified by the plaintiff that would prevent the court from considering the factual situation surrounding its execution. The defendant is not entitled to enforce the terms of the Purchase Agreement that do not specifically extend to a person in his position, but he is not barred from invoking the protection of this clause for any reason identified by the plaintiff.

The plaintiff does not address the defendant's contention that he also asserts a claim for negligent misrepresentation in his one-count counterclaim. Opposition at 17-18. Under Maine law,

[a] negligent misrepresentation occurs when [o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Ambrose, 252 F.3d at 492 (citation and internal spacing and punctuation omitted). The counterclaim may reasonably be read to assert, albeit in less than an optimally clear fashion, a claim for misrepresentation independent of a breach of the Purchase Agreement. The defendant offers sufficient evidence that, if believed by a finder of fact, would allow a verdict in his favor on such a claim with respect to the personal note. Defendant's SMF ¶¶ 53-65. Accordingly, the plaintiff is not entitled to summary judgment on this claim.

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion for summary judgment be **GRANTED** with respect to any defense to its complaint based on lack of consideration or breach of

the Asset Purchase Agreement and with respect to those portions of the counterclaim that allege breach of the Asset Purchase Agreement and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 31st day of October, 2001.

David M. Cohen
United States Magistrate Judge

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