

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOHN A. PARKINS, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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**Re: Tri-Supply & Equipment, Inc. v. Southside Utilities and
William E. Oliver, III
C.A. No. 07C-09-164 JAP**

Submitted: September 1, 2009
Decided: September 11, 2009

On Plaintiff's Motion for Partial Judgment on the Pleadings
DENIED

Dear Counsel:

Plaintiff Tri-Supply & Equipment, Inc. has moved for partial judgment on the pleadings seeking a judgment against Defendant Oliver who allegedly guaranteed the obligations of Defendant Southside Utilities

under Southside’s contract with Tri-Supply. Based on the pleadings before the Court and the unusual circumstances of this case, the Court finds that Defendant Oliver adequately denied he personally guaranteed the debt and will therefore deny Tri-Supply’s motion.

I. STANDARD OF REVIEW

Pursuant to Superior Court Civil Rule 12(c), a party may move for judgment on the pleadings “[a]fter the pleadings are closed but within such time as not to delay the trial.”¹ When deciding a Rule 12(c) motion, “the nonmoving party is entitled to the benefit of any inferences that may fairly be drawn from its pleading.”² The Court will grant the motion when “no material issues of fact exist and the movant is entitled to judgment as a matter of law.”³

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiff Tri-Supply leased various pieces of construction equipment to Defendant Southside pursuant to a Rental Agreement and Credit Agreement. Southside later defaulted on its rental payments and Tri-Supply

¹ Super. Ct. Civ. R. 12(c).

² *Gonzalez v. Apartment Communities Corp.*, 2006 WL 2905724, at *1 (Del. Super.).

³ *Id.*

instituted this action alleging breach of contract, unjust enrichment, and conversion. The Court entered a default judgment against Southside during the course of this litigation.

In addition to suing Southside, Tri-Supply also named Mr. Oliver, the president of Southside, as a defendant on the theory that he executed a personal guarantee of Southside's payments. Oliver admits that he "signed the Credit Agreement in his capacity as President of Southside."⁴ This, of course, does not end the inquiry. The question here is whether he also admitted he personally guaranteed the debt.

Paragraph 8 of the Complaint alleges that the "Credit Agreement also contains a personal guaranty (the 'Guaranty'), signed by Oliver in his individual capacity, upon which Oliver personally guaranteed the debts of Southside."⁵ In his Answer, Oliver stated "It is admitted that Exhibit A is attached to the Complaint. Exhibit A speaks for itself. To the extent that a response is required, it is denied."⁶ Tri-Supply also served an Affidavit of Demand along with its Complaint pursuant to 10 *Del. C.* § 3901.⁷ Oliver

⁴ Compl., D.I. 1, at ¶ 7; Ans., D.I. 5, at ¶ 7.

⁵ Compl., at ¶ 8.

⁶ Ans., at ¶ 8.

⁷ 10 *Del. C.* § 3901(a) provides:

In all actions upon bills, notes, bonds or other instruments of writing for the payment of money or for the recovery of book accounts, on foreign judgments, and in all actions of scire facias on recognizances, judgments or mortgages, the plaintiff may specifically require the defendant or defendants to answer any or all allegations of the complaint by an affidavit setting forth the specific nature

failed to specifically deny that he guaranteed the loan in his Affidavit of Defense

Based on Oliver's Answer, Tri-Supply filed the present motion seeking a determination that Oliver personally guaranteed, and is therefore liable for, the debts of Southside.

III. DISCUSSION

Defendant Oliver's Answer is ambiguous. While he admits signing the Credit Agreement in his capacity as President, he does not admit personally guaranteeing the debts of Southside; rather he states that the Credit Agreement "speaks for itself" and denies any remaining allegations relating to his personal guarantee.⁸ The admission that the Agreement speaks for itself may suggest that Oliver is admitting that he guaranteed payment since that guarantee appears in the agreement. Adding to the confusion is that Defendants admitted that Oliver signed the agreement as president; the ostensible signature of Oliver in his individual capacity appears nearly identical to the admitted signature as president. Despite the ambiguities, the Court concludes that the defendants' denial of the remaining

and character of any defense and the factual basis therefor, by the specific notation upon the face of the complaint that those allegations must be answered by affidavits.

⁸ Ans., at ¶ 8.

allegations of paragraph 8 of the Complaint -- which include the allegation that “Oliver personally guaranteed the debts of Southside” -- constitutes a denial the allegation that Oliver guaranteed Southside’s payments to Tri-Supply.

Neither side referred to the Affidavit of Defense filed by Southside and Oliver in their moving and responding papers. At oral argument the Court *sua sponte* noted that Oliver had failed to deny the guarantee in his affidavit and questioned the effect of the absence of such a denial. The Court requested, and the parties supplied, supplemental written argument on this issue.

Pursuant to 10 *Del. C.* § 3901, Oliver’s affidavit should have included “the specific nature and character of any defense and the factual basis therefore.”⁹ The purpose of requiring an affidavit of defense is to provide for the quick resolution of actions on instruments where there is no defense.¹⁰ In this case, Tri-Supply cannot claim to be prejudiced by the Affidavit of Defense when it clearly has not relied on the affidavit at any point during this litigation. Rather, it is Oliver who would be prejudiced if the Court were to grant judgment in Tri-Supply’s favor at this point in the

⁹ 10 *Del. C.* § 3901(a).

¹⁰ See *In re Cartree, Inc. v. Severin Builders, Inc.*, 1997 WL 529589, at *1 (Del. Super.) (refusing to enter a default judgment and allowing the defendant to amend his answer to include an affidavit of defense because the amendment “promote[d] a fair and expeditious trial of this case upon its merits rather than procedural technicalities”).

litigation where he has a possible defense to the action and Tri-Supply has had ample notice of that defense.¹¹ Consequently, under the unusual circumstances of this case, the Court holds that Oliver is not bound by his failure to deny the guarantee in his Affidavit of Defense.

The final issue which the Court must address is whether Oliver will be bound by his admission in the Answer that the signature on the contract as president of Southside is his. He seeks leave to amend his Answer so as to deny this. Leave to amend is freely given in the absence of prejudice to the moving party¹², and Tri-Supply will not be prejudiced by the proposed amendment. Even if Tri-Supply was misled by the Answer, no later than last April it understood that Oliver might be denying that he guaranteed the debt. That month Tri-Supply propounded the following interrogatory on Oliver:

If you contend that Mr. Oliver did not guaranty the debt of Southside Utilities as alleged in the Complaint, or if you otherwise contend that the guaranty alleged in the Complaint is not enforceable against Mr. Oliver, state all facts, identify all persons with knowledge, and identify all documents that support your contention.¹³

¹¹ See *Snow v. MAP Constr.*, 2008 WL 116205 (Del. Super.) (stating that “even where the affidavit of defense is defective, courts liberally permit amendments to avoid default judgment where the defendant chooses to offer a meritorious defense”).

¹² *Grace Bros., Ltd. V. Sienna Holdings, Inc.* 2009 WL 1799120 (Del. Ch. June 5, 2009)(“leave to amend shall be freely given when justice so requires”)(internal quotation marks omitted); *Wright v. Chait*, 1988 WL 67687 (Del. Super. June 17, 1988)(“The courts of this State . . . regularly and liberally grant leave freely to amend in the absence of prejudice”).

¹³ Pl. Mot. to Compel, D.I. 26, at Ex. C.*Id.* at Ex. A.

In his response to that interrogatory, Oliver provided information, albeit sparse, requested by the interrogatory.¹⁴ By providing this information defendant Oliver put Tri-Supply on notice that he denied he guaranteed Southside's debt. Whatever ambiguity which may have arisen from Oliver's Answer was resolved by his response to the interrogatory. Tri-Supply, therefore, had ample notice that Oliver was denying he executed a personal guarantee and had reason to inquire into the authenticity of the signatures on the contract. The Court will therefore allow Defendant to amend his Answer so as to deny that the signatures appearing on the contract are his. It will, however, allow Tri-Supply to introduce paragraph 7 of the Complaint and the corresponding paragraph of the original Answer as an exhibit at trial.

IV. CONCLUSION

For the reasons stated above, Tri-Supply's motion for partial judgment on the pleadings is **DENIED**. Defendant Oliver is granted leave to amend paragraph 7 of his answer.

IT IS SO ORDERED.

¹⁴ *Id.* at Ex. B.

Very truly yours,

John A. Parkins, Jr.

cc: Prothonotary