

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

CITIZENS BANK, to the Use of	:	
Saltaire, LLC, a Delaware Limited	:	C.A. No. 04C-07-004 JTV
Liability Company, as assignee and	:	Consolidated with 04L-07-034
purchaser,	:	and 04J-07-019
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
EAGLE STEEL PRODUCTS, INC.,	:	
GREGORY KIMMEL and	:	
JOHN O'CONNELL,	:	
	:	
Defendants.	:	

Submitted: April 15, 2005

Decided: May 13, 2005

**ORDER**

Upon Plaintiff's Motion for Summary  
Judgment. Denied.

Patrick Scanlon, Esquire of Law Offices of Patrick Scanlon, P.A., Milford, Delaware;  
attorneys for the Plaintiff.

Charles Gruver, III, Esquire of Charles Gruver, III, P.A., Hockessin, Delaware;  
attorneys for Defendant John O'Connell.

Bernard G. Conaway, Esquire of Fox Rothschild, LLP, Wilmington, Delaware;  
attorneys for Defendant Gregory Kimmel.

Roy Shiels, Esquire of Brown Shiels Beauregard & Chasanov, Dover, Delaware;  
attorneys for the Defendant Eagle Steel Products, Inc.

WITHAM, R.J.

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C.A. No. 04C-07-004  
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Upon consideration of Plaintiff's motion for summary judgment and the record before this Court, it appears to the Court:

Eagle Steel Products, Inc. ("Eagle Steel") executed a Note and Line of Credit Agreement with Citizens Bank in the principal amount of \$300,000.00. Gregory Kimmel ("Kimmel") and John O'Connell ("O'Connell") both signed Guaranty and Suretyship Agreements with Citizens Bank on behalf of Eagle Steel obligating them to make payment on the Note in the event of default. On July 2, 2004, Citizens Bank filed a complaint against Eagle Steel, Kimmel and O'Connell alleging that all defaulted on their respected obligations.

Saltaire, LLC ("Plaintiff"), who purchased the Note from Citizens Bank, has filed a motion for summary judgment contending that no genuine issues of material fact exist and it is entitled to judgment as a matter of law.<sup>1</sup> Plaintiff contends that the facts of this case are simple: Eagle Steel was insolvent as of April 1, 2004, the payments on the Note were rightfully accelerated as a result of its insolvency, Defendants failed to make the accelerated payments due for May 15, 2004, June 15, 2004 and November 15, 2004, and Defendants have produced no evidence suggesting that the payments on the Note have been made. Accordingly, Plaintiff contends that summary judgment is warranted because neither a genuine issue of material fact nor a valid defense exists.

Defendant O'Connell contends that summary judgment is inappropriate because genuine issues of material fact remain as to whether Eagle Steel was

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<sup>1</sup> Defendant Kimmel is also a member of Saltaire, LLC.

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insolvent, whether payments on the Note were made and whether O'Connell signed the Note as an individual or only in his capacity as President of Eagle Steel. Defendant Kimmel has not argued against summary judgment and instead has concurred with Plaintiff that payments on the note were not current. Eagle Steel has not declared its position regarding Plaintiff's motion for summary judgment.<sup>2</sup>

Superior Court Civil Rule 56(c) provides that judgment "shall be rendered forthwith if 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."<sup>3</sup> On a motion for summary judgment the Court examines the record to determine whether any material issues of fact exist. Summary judgment will only be granted when, after viewing the record in a light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.<sup>4</sup> Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances.<sup>5</sup>

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<sup>2</sup> Counsel for Eagle Steel has filed a motion to withdraw as he apparently lacks any authority to act on behalf of Eagle Steel because the company is currently deadlocked between Kimmel and O'Connell.

<sup>3</sup> Super. Ct. Civ. R. 56.

<sup>4</sup> *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973); *see also McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994).

<sup>5</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

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Upon careful consideration of the record before this Court, the history between the parties and the procedural posture of this case, this Court finds summary judgment to be inappropriate as a more thorough inquiry into the facts is warranted to clarify the application of the law to the specific circumstances of this case.<sup>6</sup> This Court is doubtful sufficient evidence exists demonstrating payments on the Note have been made since the only evidence produced by Defendants indicating payment is an affidavit signed by Defendant Kimmel which he subsequently retracted in a second signed affidavit. Regardless, such a finding would not be case dispositive on a motion for summary judgment as this Court finds that, after viewing the record in a light most favorable to Defendant O'Connell, a genuine issue of material fact exists concerning Eagle Steel's insolvency which allegedly was the event of default that triggered the accelerated payments. Also, because the Note contains the signature of O'Connell followed by the notation "Pres.", a genuine issue of material fact exists as to whether Defendant O'Connell signed the note as an individual or solely in his capacity as President of Eagle Steel.

Accordingly, after viewing the record in a light most favorable to Defendant O'Connell, this Court finds that genuine issues of material fact remain and a more thorough inquiry into the facts of this case is desirable; therefore, Plaintiff's motion for summary judgment is hereby *denied*.

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<sup>6</sup> All parties agreed to have this case consolidated with other pending cases and argued before President Judge Vaughn. However, because the parties argued this motion on April 15, 2005 prior to informing this Court of their agreement to consolidate, the Court will resolve this motion.

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IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Order Distribution