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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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GENERAL ELECTRIC CAPITAL
CORPORATION; CEF FUNDING II
L.L.C. and CEF FUNDING V, LLC,

Civ. No. S-09-3296 FCD EFB

Plaintiffs,

v.

MEMORANDUM AND ORDER

TEN FORWARD DINING, INC.;
DELIGHTFUL DINING, INC.; KOBRA
RESTAURANT PROPERTIES, L.L.C.,
et al

Defendants.

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This matter is before the court on plaintiffs, General Electric Capital, CEF Funding II, L.L.C., and CEF Funding V, L.L.C.'s (collectively "plaintiffs") motion for summary judgment or, in the alternative, partial summary judgment against defendants Ten Forward Dining, Inc. ("Ten Forward"), Delightful Dining, Inc. ("Delightful Dining"), TGIA Restaurants ("TGIA"), Kobra Restaurant Properties, LLC ("Kobra"), and Abolghassem Alizadeh ("Alizadeh") (collectively, "defendants"). Defendants

1 Alizadeh and Kobra oppose the motion. For the reasons set forth
2 below,¹ plaintiff's motion is GRANTED.

3 **BACKGROUND**

4 This action involves defendants attempt to seek redress for
5 alleged breach of several loan documents consummated by plaintiff
6 and the above named defendants. Defendants Ten Forward,
7 Delightful Dining, TGIA and Kobra each entered into at least one
8 "Equipment Loan and Security Agreement" with plaintiffs.

9 (Pls.' Stmt. of Uncontroverted Facts [UF], filed Aug. 09, 2011,
10 [Docket # 85-2], ¶¶ 1, 12, 21, 32, 45, 56.) To secure the loan,
11 defendants granted plaintiffs a security interest in a wide
12 variety of defendants' property, including, but not limited to:
13 inventory, equipment, goodwill, furniture, machinery and
14 appliances, among others.² (UF ¶¶ 3, 14, 23, 34, 47, 58.)

15 Plaintiffs perfected their security interests in the various
16 collateral by either (1) filing a UCC Financing Statement with
17 the California Secretary of State or (2) filing the deed of trust
18
19

20 ¹ Because oral argument will not be of material
21 assistance, the court orders this matter submitted on the briefs.
E.D. Cal. L.R. 230(g).

22 ² Defendants contend that UF 34 is "disputed" because
23 "Alizadeh was not involved in and has no knowledge of the account
24 during this time period." (Defs.' Resp., filed Sept. 02, 2011,
25 [Docket # 89-2], ¶ 34.) Plaintiff, however, provided a true and
26 correct copy of the loan agreement establishing the accuracy of
27 UF 34. Thus, UF 34 is undisputed. (Declaration of Mark Johnson,
28 filed Aug. 09, 2011, [Docket # 86], ¶ 35.); Fed. R. Civ. P.
56(e)(2) ("If a party fails to properly support an assertion . .
. the court may consider the fact undisputed for purposes of the
motion.") The loan agreement was originally made between
plaintiffs and Capital City Restaurants, Inc; it was later
assigned to TGIA and guarantied by Alizadeh. (Id. ¶ 40, Ex. U.)

1 with the relevant county.³ (UF ¶¶ 4, 15, 24, 35, 49, 60.)

2 As an inducement to plaintiffs to make the aforementioned
3 loans, Alizadeh executed and delivered to plaintiffs an
4 unconditional guaranty of payment and performance, personally
5 guaranteeing the obligations owed under the loans described
6 above.⁴ (UF ¶¶ 5, 16, 25, 36, 50, 61.) To secure the Ten
7 Forward and Ten Forward/Delightful Dining Loans, Alizadeh
8 executed a security agreement, granting plaintiffs a security
9 interest in a wide variety of Alizadeh's property, including, but
10 not limited to: equipment, furniture, property, and raw
11 materials. (UF ¶¶ 6, 26.) Plaintiffs perfected their interest
12 in the Alizedah collateral by filing a UCC Financing Statement
13 with California Secretary of State. (UF ¶¶ 7, 27.)

14 Defendants, and each of them, failed to make scheduled
15 payments of principal and interest due pursuant to the loan
16 terms.⁵ (UF ¶¶ 9, 18, 29, 42, 52, 63.) As of the date of

17
18 ³ Defendants "dispute" UF 35 for the same reason it
19 disputed UF 34. Defendants' contentions in that regard are
20 unavailaing for the same reason as stated above — plaintiff
21 submitted the security instrument to the court establishing the
22 accuracy of the statement. (See Declaration of Mark Johnson,
23 filed Aug. 09, 2011, [Docket # 86], ¶ 38.)

24 ⁴ Defendants contend that the UF 61 is "disputed" because
25 th loan was paid in full, and thus, the guaranty was dissolved.
26 However, while plaintiffs submitted admissible evidence of the
27 default, defendants have failed to set forth any evidence in
28 support of this contention, and thus, have failed to raise a
genuine issue of material fact. Moreover, the entire amount of
the debt was accelerated, and thus, the entire amount of the loan
is due and owing, not just the amount required to bring the loan
current.

⁵ Defendants contend that the failure to make payments on
the Ten Forward and Kobra loans is "disputed" because the "time
frame is not clear." This, however, is not a proper objection.
Plaintiffs submitted admissible evidence in the form of its
representative's declaration that defendants failed to make

1 plaintiffs' motion for summary judgment, each defendant remained
2 in default on the loan obligations. (Id.) Plaintiffs have
3 accelerated the obligations owing under the loan documents, thus,
4 the amounts owing under the various loans are currently due in
5 full, pursuant to the terms of the loan documents. (Id.)

6 In November 2009, plaintiffs filed this action alleging
7 breach of the various loan documents. (Compl., filed Nov. 25,
8 2009, [Docket # 1].). The corporate defendants, along with
9 defendants Kobra and Alizadeh, filed an answer in January 2010
10 through counsel, Patricia Lee. (Answer, filed Jan. 11, 2010,
11 [Docket # 11].) In October 2010, Patricia Lee filed a Motion to
12 Withdraw as Attorney. (Mot. to Withdraw, filed Oct. 15, 2010,
13 [Docket # 60].) On October 29, 2010, the court granted the
14 motion to withdraw and informed defendants that corporations
15 cannot appear in the action without legal counsel. (Order, filed
16 Oct. 29, 2010, [Docket # 64].) The court directed the corporate
17 defendants to retain alternate counsel within 30 days of the
18 court order. (Id.)

19 In May 2011, the court permitted defendants Kobra and
20 Alizadeh to substitute Paul Anthony Warner as their attorney of
21 record. (Order, filed May 13, 2011, [Docket ## 70-71].) However,
22 the corporate defendants Ten Forward, Delightful Dining, and TGIA
23 failed to retain alternate counsel, despite the court's order

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25 required payments on the loans. Defendants failed to submit
26 admissible evidence to create a triable issue as to whether it
27 did fail to make scheduled payments on the various loans.
28 Indeed, defendants admit, in their opposition, that they missed
payments. (Pls.' Opp'n, filed Sept. 02, 2011, [Docket # 89] at
2:21.); See Fed. R. Civ. P. 56(e)(2) ("If a party fails to
properly support an assertion . . . the court may consider the
fact undisputed for purposes of the motion.")

1 directing them to do so. (Pl.'s Mot. to Strike [Docket # 72],
2 filed May 24, 2011, at 4). Accordingly, the court granted
3 plaintiffs' motion to sanction those corporate defendants by
4 striking their answer. (Order, filed May 24, 2011, [Docket #
5 72].)⁶

6 STANDARD

7 Summary judgment is appropriate when it is demonstrated that
8 there exists no genuine issue as to any material fact, and that
9 the moving party is entitled to judgment as a matter of law.
10 Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144,
11 157 (1970).

12 Under summary judgment practice, the moving party

13 always bears the initial responsibility of informing
14 the district court of the basis of its motion, and
15 identifying those portions of "the pleadings,
16 depositions, answers to interrogatories, and admissions
on file together with the affidavits, if any," which it
believes demonstrate the absence of a genuine issue of
material fact.

17 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the
18 nonmoving party will bear the burden of proof at trial on a
19 dispositive issue, a summary judgment motion may properly be made
20

21 ⁶ Plaintiffs contend that the court should enter summary
22 judgment against defendants Ten Forward, Delightful Dining, and
23 TGIA, as their answer has been struck, and thus, the allegations
24 in the complaint are deemed admitted. "An allegation—other than
25 one relating to the amount of damages—is admitted if a
26 responsive pleading is required and the allegations is not
27 denied." Fed. R. Civ. P. 8(b)(6). Where a party fails to deny
28 the allegations in the complaint, those allegations must be taken
as admitted. Fontes v. Porter, 156 F.2d 956, 957 (9th Cir.1945).
In this case, the answer of defendants Ten Forward, Delightful
Dining, and TGIA were stricken by the court for failure to obtain
counsel. None of these defendants either filed a renewed answer
or obtained corporate counsel. Thus, the allegations in the
complaint against these corporate defendants are deemed admitted.

1 in reliance solely on the 'pleadings, depositions, answers to
2 interrogatories, and admissions on file.'" Id. at 324. Indeed,
3 summary judgment should be entered against a party who fails to
4 make a showing sufficient to establish the existence of an
5 element essential to that party's case, and on which that party
6 will bear the burden of proof at trial. Id. at 322. In such a
7 circumstance, summary judgment should be granted, "so long as
8 whatever is before the district court demonstrates that the
9 standard for entry of summary judgment, as set forth in Rule
10 56(c), is satisfied." Id. at 323.

11 If the moving party meets its initial responsibility, the
12 burden then shifts to the opposing party to establish that a
13 genuine issue as to any material fact actually does exist.
14 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
15 585-87 (1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S.
16 253, 288-289 (1968). In attempting to establish the existence of
17 this factual dispute, the opposing party may not rely upon the
18 denials of its pleadings, but is required to tender evidence of
19 specific facts in the form of affidavits, and/or admissible
20 discovery material, in support of its contention that the dispute
21 exists. Fed. R. Civ. P. 56(e). The opposing party must
22 demonstrate that the fact in contention is material, i.e., a fact
23 that might affect the outcome of the suit under the governing
24 law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986),
25 and that the dispute is genuine, i.e., the evidence is such that
26 a reasonable jury could return a verdict for the nonmoving party,
27 Id. at 251-52.

28 In the endeavor to establish the existence of a factual

1 dispute, the opposing party need not establish a material issue
2 of fact conclusively in its favor. It is sufficient that "the
3 claimed factual dispute be shown to require a jury or judge to
4 resolve the parties' differing versions of the truth at trial."
5 First Nat'l Bank, 391 U.S. at 289. Thus, the "purpose of summary
6 judgment is to 'pierce the pleadings and to assess the proof in
7 order to see whether there is a genuine need for trial.'" Matsushita,
8 475 U.S. at 587 (quoting Rule 56(e) advisory
9 committee's note on 1963 amendments).

10 In resolving the summary judgment motion, the court examines
11 the pleadings, depositions, answers to interrogatories, and
12 admissions on file, together with the affidavits, if any. Rule
13 56(c); SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir.
14 1982). The evidence of the opposing party is to be believed, and
15 all reasonable inferences that may be drawn from the facts placed
16 before the court must be drawn in favor of the opposing party.
17 Anderson, 477 U.S. at 255. Nevertheless, inferences are not
18 drawn out of the air, and it is the opposing party's obligation
19 to produce a factual predicate from which the inference may be
20 drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224,
21 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898 (9th Cir. 1987).

22 Finally, to demonstrate a genuine issue, the opposing party
23 "must do more than simply show that there is some metaphysical
24 doubt as to the material facts. . . . Where the record taken as a
25 whole could not lead a rational trier of fact to find for the
26 nonmoving party, there is no 'genuine issue for trial.'" Matsushita,
27 475 U.S. at 586-87, 106 S. Ct. at 1356.

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1 Defendants, however, have failed to submit admissible
2 evidence to create a triable issue of material fact that would
3 preclude summary judgment in this instance. Defendants submitted
4 a single declaration, which relates only to plaintiffs' damages.
5 (See Decl. of Abolghassem Alizadeh, filed Sept. 02, 2011, [Docket
6 # 89-4].)

7 First, defendants dispute the amounts plaintiffs submit is
8 owed under each loan because plaintiffs allegedly "withdrew \$1.8
9 million from Mechanics Bank account violating the Tri-Party
10 agreement and in turn taking the funds and not applying them
11 toward the loan." (See Defs.' Resp. to Pls.' Statement of
12 Uncontroverted Facts, filed Sept. 02, 2011, [Docket # 98-2].)
13 This argument lacks merit for a number of reasons. First, on
14 January 11, 2010, defendants filed a counterclaim against
15 plaintiffs for breach of contract based on the exact same
16 allegation. (See Defs.' Counterclaim, filed Jan. 11, 2010,
17 [Docket # 12].) In response, plaintiffs filed a motion to
18 dismiss the counterclaim under Federal Rule of Civil procedure
19 12(b)(6). (Pls.' Mot. to Dismiss, filed Feb. 04, 2010, [Docket #
20 25].) After defendants filed a statement of non-opposition, the
21 court dismissed defendants' counterclaim in May, 2010. (See
22 Order, filed May 07, 2010, [Docket # 46].) Moreover, apart from
23 Alizadeh's unsupported and conclusory allegations in his
24 declaration, defendants have failed to submit any evidence of the

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26 his personal knowledge of the loan agreements and defendants
27 compliance therewith. Indeed, defendant Alizadeh personally
28 contacted the declarant via email when seeking an update on the
amount owing under the various loans. (See Decl. of Abolghassem
Alizadeh, filed Sept. 02, 2011, [Docket # 89-4].)

1 existence of any such agreement or how plaintiffs allegedly
2 breached it. See National Steel Corp. v. Golden Eagles Ins.
3 Corp., 121 F.3d 496, 502 (9th Cir. 1997) (holding that conclusory
4 statements without factual support are insufficient to defeat a
5 motion for summary judgment.)

6 Plaintiffs have submitted evidence establishing the exact
7 amounts owed with respect to each of the loans at issue. (See
8 Declaration of Mark Johnson, filed Aug. 09, 2011, [Docket # 86],
9 ¶¶ 13, 22, 33, 46, 56, 67.) Defendants contend that these
10 numbers may be inaccurate. In support of this contention,
11 defendants submitted two emails sent from plaintiffs'
12 representative, Mark Johnson, to Alizadeh, "indicating different
13 amounts than claimed in [p]laintiff's motion." (See Decl. of
14 Abolghassem Alizadeh, filed Sept. 02, 2011, [Docket # 89-4].)
15 These emails, however, are irrelevant as they represent the
16 amount owing at a different time than that represented by
17 plaintiffs' evidence. More specifically, the two emails
18 represent the amount owing as of August 2011, and September 2010,
19 whereas the amount established by plaintiffs' evidence is the
20 amount owing as of *June 2011*. Therefore, because defendants'
21 evidence is irrelevant, it does not create a triable issue of
22 fact as to the amounts due under the various loans.

23 Finally, defendants contend that the court should defer
24 consideration of the motion because "further information
25 regarding the application of funds received from various
26 activities as well as the activities and sources as well as the
27 determination of the resulting interest calculations is
28 unavailable to [d]efendants." (Defs.' Opp'n, filed Sept. 02,

1 2011, [Docket # 89], at 6:15-18.) Federal Rule of Civil
2 Procedure 56(d) provides that: [i]f a nonmovant shows by
3 affidavit or declaration that, for specified reasons, it cannot
4 present facts essential to justify opposition, the court may: (1)
5 defer consideration of the motion or deny it; (2) allow time to
6 obtain affidavits or declarations or to take discovery; or (3)
7 issue any other appropriate order." In this case, defendants
8 have failed to point to "specified reasons" as to why they have
9 not been able to gather the specific facts, nor how those facts
10 would create a triable issue. Moreover, plaintiffs filed the
11 complaint in this matter in November of 2009. Nevertheless,
12 defendants have failed since the filing of the complaint *two*
13 *years ago* to conduct any written or oral discovery; these
14 defendants cannot now invoke rule 56(d) in an attempt
15 to circumvent their utter lack of diligence and continue to drag
16 this matter out without justifiable cause. To this end, the
17 court declines to defer consideration of the motion.

18 **CONCLUSION**

19 For the foregoing reasons, plaintiffs' motion for summary
20 judgment is GRANTED.

21 DATED: October 3, 2011

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24 FRANK C. DAMRELL, JR.
25 UNITED STATES DISTRICT JUDGE
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