

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

TD EQUIPMENT FINANCE, INC.,	:	August Term 2010
successor by merger to COMMERCE	:	
COMMERCIAL LEASING, LLC,	:	No. 3245
Plaintiff,	:	
v.	:	Commerce Program
PATRICK TRANSPORTATION	:	
COMPANY, PATRICK GAULT and	:	Control Number 11030376
ROSEMARY GAULT,	:	
Defendants.	:	

ORDER

AND NOW, this 1st day of August 2011, upon consideration of TD Equipment Finance, Inc.'s Motion for Summary Judgment and Defendants' response in opposition, it hereby is **ORDERED** that the Motion for Summary Judgment is **granted** against defendants Patrick Gault and Rosemary Gault only. An assessment of damages hearing is scheduled for September 29, 2011 in courtroom 246 City Hall at 10:00 a.m., Philadelphia, Pa. 19106.

BY THE COURT,

MARK I. BERNSTEIN, J.

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OPINION

This is a contract action arising from breaches of equipment leases and surety agreement. On September 26, 2007 and December 24, 2007, defendant Patrick Transportation Company entered into lease agreements with Commerce Commercial Leasing, LLC (“Commerce”) for trailers. Plaintiff TD Equipment Finance, Inc. (“TD Equipment Finance”) is the successor by merger to Commerce Commercial Leasing, LLC and assumed the leases and all collateral agreements arising from the leases between Commerce and defendant Patrick Transportation Company. In connection with the equipment leases, defendants Patrick Gault and Rosemary Gault (hereinafter “Gault”) executed a Surety Agreement in which they personally guaranteed the payment obligations of Patrick Transportation Company to TD Equipment Finance. The Surety Agreement signed by the Gault defendants provides in pertinent part as follows:

To induce you to establish and/or continue financing and/or leasing arrangements with and considers making or continuing certain loans and extending or continuing to extend credit from time to time to Patrick Transportation Company (“Lessee”), the Undersigned, jointly and severally, intending to be legally bound, hereby guarantees and becomes surety for the unconditional and prompt payment and performance to you of all of the now existing or hereafter arising debts, obligations, covenants, and duties of payment or performance of every kind, matured or unmatured, direct or contingent, owing, arising, due or payable to you from Lessee (“Obligations”).¹

¹ Surety Agreement p. 1.

On August 10, 2010, TD Equipment Finance notified defendants of defaults under the leases and guaranty agreement and demanded the return of leased equipment. On August 23, 2010, TD Equipment Finance filed the instant action and filed a motion for writ of seizure. On September 7, 2010, after a hearing, the court entered an order granting seizure of the collateral.² On November 1, 2010, defendant Patrick Transportation Company filed for Chapter 11 bankruptcy protection and the instant action was stayed. On April 21, 2011, the parties stipulated and the court approved the bifurcation of TD Equipment Finance's claims against defendant Patrick Transportation Company and the Gault's. Currently before the court is TD Bank's motion for summary judgment against defendants Patrick and Rosemary Gault only.

On a motion for summary judgment, a non-moving party may not rest on denials of the pleadings, but rather, must present evidence regarding existing issues of fact.³ Here, the Gault's failed to present any theory to defend against allegations and any evidence to support a defense to TD Equipment Finance's claim of default. The Gault's argue that summary judgment should be denied because "Company disputes the amount due and owing based upon factors including but not limited to inapplicable and inaccurate late fees, penalty fees and excessive attorney's fees."⁴ The issues of fact raised by Gault as to the amount owed do not preclude the entry of summary judgment on the issue of default. Gault failed to respond to the allegations of fact contained in TD Equipment Finance's motion for summary judgment.

Allegations of fact contained in a motion must be substantively and appropriately responded to except for limited circumstances in which the factually true responsive answer is

² The order for seizure was contingent and effective upon TD Equipment Finance filing a bond. As of the writing of this opinion, no bond has been posted.

³ Pa. R. C. P. 1035.3.

⁴ Defendant Gault's response to Plaintiff's motion for summary judgment p. 4.

unknown. This rule is particularly important in summary judgment motions where the exact issue presented is whether any question of fact for resolution exists in the case. To avoid summary judgment motions being decided upon lawyer articulations rather than facts of record the summary judgment rule specifically states: "the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion..."⁵ The response must identify issues of fact arising from evidence of record controverting evidence presented in support of the motion or challenge the credibility of one or more witnesses testifying in support of the motion. In the alternative, the response must identify evidence of record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.⁶

Philadelphia Local Rule 1035.2(a)(4) provides: ...The response to the motion shall be divided into paragraphs, numbered consecutively, corresponding to the numbered paragraphs of the motion for summary judgment. The response shall state whether each of the allegation is admitted or denied. No general denial is acceptable. The factual reasons for the denial or dispute must be specifically stated and the "record" ...supporting the denial or dispute must be attached as an exhibit. A response may also include additional allegations demonstrating any genuine issue of material fact, in which event the responding party must reference and attach a copy of the "record" ...which demonstrates the existence of a genuine issue of material fact.⁷

In the case at bar, TD Equipment Finance Company averred in its motion for summary judgment as follows:

⁵ Pa. R. Civ. P. 1035.3; Phila. L. R. 1035.2(a)(4).

⁶ Pa. R. Civ. P. 1035.3; Phila. L. R. 1035.2(a)(4).

⁷ This rule is entirely consistent with Pa. R. Civ. P. 1035.3.

9. The Company is in default under the Leases by, among other things, (1) failing to make payments to TD when those payments came due and (ii) filing a petition for bankruptcy...”

10. ...TD notified Defendants of their defaults under, among other contracts, the Leases and Guaranty, and further demanded that Defendants return the Leased Equipment....The Company and the Defendants failed to cure its defaults under the Leases and Guaranty.”

The Gault defendants responded as follows: “Denied. The averments contained within this paragraph reference a document, the truth of which speaks for itself.” Whether a default occurred due to a failure to make the required monthly payment is a question of fact which requires an admission or denial. The Gault’s failure to properly respond to the allegations of default is an admission of default for failure to pay and therefore an admission of a default.⁸

Since the Gault defendants executed the Surety Agreement and guaranteed payment in the event of default and since a default exists, the motion for summary judgment is granted in favor of TD Equipment Finance and against the Gault defendants. An assessment of damages hearing will be scheduled to determine the amount of the judgment.

BY THE COURT,

MARK I. BERNSTEIN, J.

⁸ The court further notes the filing of a bankruptcy petition also constitutes a default under the Master Lease Agreements. See Master Lease Agreement dated September 26, 2007 pg.2.