

*W. J. ...*

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. BERNARD J. ...

PART 60

Index Number: 650091/2010  
WEBSTER BUSINESS CREDIT

INDEX NO. \_\_\_\_\_

vs  
DURHAM, TIMOTHY

MOTION DATE \_\_\_\_\_

Sequence Number: 001

MOTION SEQ. NO. \_\_\_\_\_

SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

*Comments  
002  
9/17/10  
EC*

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

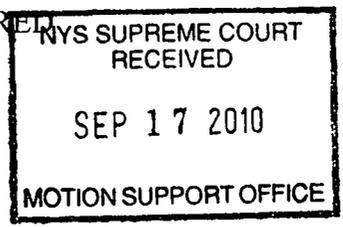
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED



Dated: 9/15/2010

*[Signature]*  
\_\_\_\_\_  
HON. BERNARD J. ... J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIV. PART 60

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WEBSTER BUSINESS CREDIT CORPORATION,

Plaintiff,

- against -

Index No. 650091/2010

TIMOTHY DURHAM, OBSIDIAN ENTERPRISES, INC.,  
and DIAMOND INVESTMENTS, LLC d/b/a DIAMOND  
AUTO SALES,

Defendants.

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**APPEARANCES:**

Attorneys for the Plaintiff:

HAHN & HESSEN LLP  
488 Madison Avenue  
New York, NY 10022  
By: Zachary G. Newman, Esq.  
Annie P. Power, Esq.

Attorneys for the Defendants:

CROWELL MORING  
590 Madison Avenue, 20<sup>th</sup> Floor  
New York, NY 10022-2524  
By: James Maisano, Esq.

**Fried, J.:**

Plaintiff, Webster Business Credit Corp. (“Webster”), brings this motion for summary judgment in lieu of complaint, pursuant to CPLR § 3213. Defendants, Timothy Durham (“Durham”), Obsidian Enterprises, Inc. (“Obsidian”), and Diamond Investments LLC d/b/a Diamond Auto Sales (“Diamond”), oppose the motion on several grounds, but argue, primarily, that summary disposition is improper because Plaintiff’s entitlement to a sum certain cannot be ascertained without reference to documents outside of the instruments

submitted in connection with this motion.

Briefly, the events giving rise to this action are as follows. In 2001, Defendant Durham, through Obsidian, a holding company, acquired U.S. Rubber Reclaiming, Inc. (“U.S. Rubber”), a company that reclaims and supplies butyl rubber to the United States tire industry. In June 2008, Webster, a financial services company, entered into a credit and security agreement with U.S. Rubber (the “Credit Agreement”). The Credit Agreement provided for a \$3.5 million revolving credit facility and an additional \$500,000 term loan to U.S. Rubber. (*See Zautra Aff.*<sup>1</sup> Ex. 1.) Pursuant to the Credit Agreement, U.S. Rubber executed a Revolving Credit Note, in favor of Webster, for the principal sum of \$3.5 million, “or such lesser unpaid amount as may be outstanding . . .” (*Zautra Aff.* Ex. 2), and a Term Loan Note for \$500,000 (*Zautra Aff.* Ex. 3).

Defendants Obsidian and Durham simultaneously entered into two separate Guarantees with Webster (the “Obsidian Guaranty” and the “Durham Guaranty”), whereby Obsidian and Durham each unconditionally guaranteed the punctual payment of U.S. Rubber’s obligations arising under the Credit Agreement (including both the revolving credit facility and the term loan), and agreed to pay all costs of collection, including attorneys’ fees. (*See Zautra Aff.* Exs. 4 and 5.) At the same time, Diamond executed a Guaranty whereby it agreed to guarantee payment of U.S. Rubber’s obligations under the term loan, and agreed to pay all costs of collection and attorneys’ fees (the “Diamond Guaranty”). (*See Zautra Aff.* Ex. 6.)

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Affidavit of Joseph Zautra in Support of Plaintiff’s Motion for Summary Judgment in Lieu of Complaint.

There is no dispute that U.S Rubber defaulted on its obligations under the Credit Agreement, and that both U.S. Rubber and the Defendants were timely and properly notified of the defaults. There is also no dispute that U.S. Rubber and Defendants were notified of Webster's acceleration of U.S. Rubber's indebtedness, rendering all obligations immediately due and payable under the Guaranties. On December 4, 2009, Webster sent letters to Durham and Obsidian, demanding payment of \$3,011,034.17, which was the principal amount due under the Credit Agreement as of that date, plus interest and costs of collection. (See Zautra Aff. Exs. 11 and 12.) By letter dated December 7, 2009, Webster demanded that Diamond remit to it all proceeds from the sale of a certain automobile (the "Dusenberg"), which had been pledged as collateral for the term loan. (See Zautra Aff. Ex. 13.) There is no dispute that Defendants have not made any payments to Webster.

Webster asserts that the Credit Agreement and the three Guaranties, along with an affidavit setting forth the Guarantors' nonpayment, is sufficient proof of its entitlement to summary judgment under CPLR § 3213. Defendants, however, argue that it is impossible to ascertain the amounts allegedly due without resort to extrinsic documents, and that the evidence submitted by Webster is therefore insufficient to warrant summary judgment.<sup>2</sup>

A plaintiff establishes a prima facie case under CPLR § 3213 by demonstrating that the instrument at issue is one that is for the payment of money only, and that the defendants failed to make payment thereunder. *Seaman-Andwall Corp. v. Wright Machine Corp.*, 31 A.D.2d 136 (1st Dep't 1968), *aff'd* 29 N.Y.2d 617 (1971); *see also Boland v. Indah Kiat*

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Although they did not cross-move for such relief, Defendants also argue that Webster's action should be dismissed for failure to join a necessary party, and in light of a related action pending in the U.S. District Court for the Northern District of Indiana. I have considered these arguments, and I find them to be unavailing.

*Finance (IV) Mauritius Ltd.*, 291 A.D.2d 342 (1st Dep't 2002). An unconditional guarantee qualifies as an instrument for the payment of money only under CPLR § 3213. *European American Bank & Trust Co. v. Schirripa*, 108 A.D.2d 684 (1st Dep't 1985). Moreover, even a guarantee that does not set forth a sum certain may be the proper subject of § 3213 relief. *Manufacturers Hanover Trust Co. v. Green*, 95 A.D.2d 737 (1st Dep't 1983). Once plaintiff has set forth a prima facie case, the defendant may, nonetheless, defeat the motion by raising a triable issue of fact with respect to a bona fide defense. *Banesto Banking Corp. v. Teitler*, 172 A.D.2d 469 (1st Dep't 1991).

Here, although Defendants argue that there exists a triable issue of fact as to the amounts due and owing under the Guaranties, this is not sufficient to defeat Plaintiff's motion. The cases that they rely upon to support the proposition that the Credit Agreement and Guaranties do not qualify for § 3213 treatment because they do not provide for payment of a sum certain are inapposite. In *Ian Woodner Family Collection v. Abaris Books, Ltd.*, 284 A.D.2d 163 (1st Dep't 2001), the First Department reversed an order granting summary judgment under CPLR § 3213 because extrinsic evidence was needed to determine not only the quarterly amounts due under a promissory note, but also whether the defendants had actually defaulted according to the note's terms. Likewise, in *Bonds Financial, Inc. v. Kestrel Technologies, LLC*, 48 A.D.3d 230, 231 (1st Dep't 2008), the First Department found that summary judgment under § 3213 was improper where the revolving credit agreement at issue set forth several events of default, other than non-payment, and the plaintiff's claim thus required resort to an external document to define an event of default. Furthermore, the defendant established a triable issue of fact by raising the question of whether the default was

continuing in accordance with the terms of the agreement. *Id.* at 231.

Here, there is no dispute that U.S. Rubber defaulted under the terms of the Credit Agreement. Indeed, U.S. Rubber acknowledged as much in writing. (*See* Zautra Reply Aff. Ex. 3.) There is also no dispute that the Guaranties set forth unconditional promises to pay in the event of such default, and there is thus nothing in *Ian Woodner* or *Bonds Financial* that prohibits treating these Guaranties as instruments for the payment of money only.

Defendants also rely on *Weissman v. Sinorm Deli, Inc.*, 88 N.Y.2d 437, 446-48 (1996), but in that case, the instrument at issue was an indemnification agreement, which the Court of Appeals expressly concluded did not amount to a guaranty. The Court concluded that the indemnification agreement did not qualify as an instrument for the payment of money only because it did not adequately describe the present and future liabilities and obligations of the purported indemnitors. *Id.* at 445. Here, by contrast, the Credit Agreement provided for a revolving credit line of up to \$3.5 million, and a term loan of \$500,000. The Obsidian and Durham Guaranties expressly provide for the unconditional guaranty of “the punctual payment, when due, whether by acceleration or otherwise, and at all times thereafter, of all Obligations of Borrower to Lender arising under [the Credit Agreement].” (*Zautra Aff. Exs. 5 and 6.*) The Diamond Guaranty contains the same provision, but then goes on to expressly limit the “maximum amount of Obligations subject to this Guaranty” to the “aggregate amount of Obligations with respect to the Term Loan outstanding from time to time.” (*Zautra Aff. Ex. 7.*) There can be no doubt that each of the Guaranties thus represents an explicit promise by each of the Defendants to pay a sum of money. The fact that the amount to be paid may fluctuate depending on the amount of the revolving credit

outstanding at a given time does not take the Guaranties outside the realm of § 3213. *See Manufacturers Hanover Trust Co. v. Green*, 95 A.D.2d 737, 737 (1st Dep't 1983) ("A guarantee may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain."); *see also European American Bank v. Cohen*, 183 A.D.2d 453, 453 (1st Dep't 1992) (although a note did not recite a sum certain, it was an instrument for the payment of money only because it contained "an unconditional promise to pay on a certain day the current balance in defendant's line of credit, an amount readily ascertainable from plaintiff's bank records.")

Webster moved for the instant relief on February 4, 2010, asserting that, as of January 21, 2010, the Defendants were liable for \$3,013,558.49 (including principal, fees and interest) in connection with the Revolving Credit Note, and for \$350,816.75 (including principal and interest) under the Term Loan Note. (*See Zautra Aff.* ¶¶ 14-15, Ex. 7.) Due to the subsequent liquidation of certain collateral and Webster's collection of certain accounts receivable, the amount of U.S. Rubber's indebtedness as of June 22, 2010 had been reduced to \$158,333.41, plus interest and costs. (*See Massave Aff.*<sup>3</sup> ¶ 3.) According to Don Lagrone, the President of U.S. Rubber, as of June 29, 2010, "all parties agree that this Revolving Credit Note has been fully paid off." (*Lagrone Aff.*<sup>4</sup> ¶ 9.) Mr. Lagrone further averred that the projected balance on the Term Loan Note would be between \$95,000 and

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Affidavit of Gordon Massave in Further Support of Plaintiff's Motion for Summary Judgment in Lieu of Complaint, June 22, 2010.

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Affidavit of Don Lagrone in Further Opposition to Motion for Summary Judgment in Lieu of Complaint, June 29, 2010. This sur-reply was authorized at the June 23, 2010 motion hearing. (*See Hr'g Tr.* 3, 5, 21, June 23, 2010.)

\$105,000 as of July 10, 2010. (*Id.* ¶ 12.)

There is no dispute that the amount due under the Credit Agreement has been reduced by Webster's collection of accounts receivable and payments on liquidated collateral, and there is no dispute that the Guaranties provide for payment, by the Guarantors, of not only any outstanding balance under the Credit Agreement, but also of interest and the costs of collection, including reasonable attorneys' fees. Moreover, at oral argument, counsel for the Defendants conceded that determination of the amount actually payable under the Guaranties might be properly achieved by inquest.<sup>5</sup> (Hr'g Tr. 16, June 23, 2010.) It is therefore appropriate to grant Plaintiff's motion for summary judgment in lieu of complaint as to liability, and to refer the issue of damages, including interest, costs of collection and reasonable attorneys' fees to a special referee.

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint (Mot. Seq. No. 001) is GRANTED as to liability; and it is further

ORDERED that the issue of damages, including calculation of the amount due and owing as of the date of entry of this Order, interest, costs of collection, and reasonable attorneys fees, is hereby referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the

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When asked whether the amount due could be determined at an inquest, Mr. Maisano, for the Defendants, stated, ". . . I think we could probably have inquest hearing and figure out the actual amount due. We can't do it from these papers is my argument. Yes, I agree, if we had an inquest hearing to calculate on that day at that moment the actual amount due, yes." He was then asked, "Why is that not sufficient to grant summary judgment and send it to inquest?" Mr. Maisano replied, "If the Court – if that's what the Court's decision is, I could understand it." (Hr'g Tr. 16, June 23, 2010.)

parties, as permitted by C.P.L.R. § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk (Room 119) to arrange a date for the reference to a Special Referee.

Date: September <sup>15</sup>~~15~~, 2010



ENTER:

  
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J. S.C.  
**HON. BERNARD J. FRIED**