IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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| DEERE CREDIT, INC.,<br>Plaintiff,<br>vs.<br>GRUPO GRANJAS MARINAS S.A. de C.V., and SHRIMP CULTURE II, INC.,<br>Defendants. | **No. 4:06-cv-00184-JEG**<br><br>**O R D E R** |

This matter is before the Court on Plaintiff's Motion for Summary Judgment, which Defendants resist. The matter is fully submitted, and the Court finds that a hearing is not necessary given the circumstances of the record.

**SUMMARY OF MATERIAL FACTS**

On October 26, 2001, Plaintiff Deere Credit, Inc. ("Deere Credit"), entered into an Agreement of Sale with Reservation of Title ("the Agreement") with Inter Sea Farms Venezuela, C.A. ("Inter Sea"), Defendant Grupo Granjas Marinas, S.A. de C.V. ("Grupo Granjas"), and Defendant Shrimp Culture II, Inc. ("Shrimp Culture"). Pursuant to the Agreement, Deere Credit was the Seller, Inter Sea was the Buyer, and Grupo Granjas and Shrimp Culture were Guarantors. The Agreement pertained to the financing through Deere Credit of various items of equipment that Inter Sea selected from the manufacturer, including but not limited to tractors, excavators, and scrapers.

On July 10, 2003, Deere Credit filed a complaint against Grupo Granjas and Shrimp Culture for a suit on guaranty, asserting that Inter Sea was in default on its obligations under the Agreement.[1] Ultimately, that case was resolved through Amendment II to the Agreement, dated November 1, 2004, and the parties stipulated to a dismissal of the case with prejudice.

[1] Southern District of Iowa Case No. 4:03-cv-10381.

On April 20, 2006, Deere Credit again filed a complaint against Grupo Granjas and Shrimp Culture for suit on a guaranty. Deere Credit asserts that Inter Sea is again in default on its obligations under the Agreement and the 2004 amendments thereto and seeks to enforce Grupo Granjas' and Shrimp Culture's obligations under the Agreement. On July 25, 2006, Deere Credit filed a Motion for Summary Judgment, arguing that pursuant to the terms of the Amended Agreement, Grupo Granjas and Shrimp Culture each jointly and severally guaranteed Inter Sea's obligations under the Amended Agreement, and that they are each jointly and severally liable to Deere Credit for any and all amounts due and owing under the Amended Agreement from Inter Sea to Deere Credit. Deere Credit asserts there are no issues of genuine fact and that it is entitled to judgment as a matter of law.

Defendants resist the motion for summary judgment, claiming there is a genuine issue of material fact regarding whether or not Deere Credit is required to first file suit and obtain a judgment against Inter Sea prior to the institution of an action directly against the guarantors. Defendants assert that upon entering into the written agreements that are the subject matter of this lawsuit, their understanding was that Deere Credit would pursue Inter Sea prior to seeking enforcement of the guaranty obligations, although there is no such clause in the Agreement or amendments thereto. Defendants contend that under controlling Venezuelan law, a guaranty cannot stand as a separate obligation and that it is necessary to first obtain judgment and liquidate the claim against the underlying debtor, which in this case Defendants assert is Inter Sea.

## APPLICABLE LAW AND DISCUSSION

### I. Standard of Review.

"[C]laims lacking merit may be dealt with through summary judgment under Rule 56." Swierkiewicz v. Soreman, 122 S. Ct. 992, 998-99 (2002). Summary judgment is a drastic remedy, and the Eighth Circuit has recognized that it "must be exercised with extreme care to

prevent taking genuine issues of fact away from juries." Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990).[2] "The judgment sought 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." Fed. R. Civ. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Herring v. Canada Life Ins. Co., 207 F.3d 1026, 1029 (8th Cir. 2000).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Celotex, 477 U.S. at 323); see also Shelter Ins. Co. v. Hildreth, 255 F.3d 921, 924 (8th Cir. 2001); McGee v. Broz, 251 F.3d 750, 752 (8th Cir. 2001). Once the moving party has carried its burden, the opponent must show that a genuine issue of material facts exists. Nat'l Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co., 165 F.3d 602, 607 (8th Cir. 1999). The court gives the nonmoving party the benefit of all reasonable inferences and views the facts in the light most favorable to that party. de Llano v. Berglund, 282 F.3d 1031, 1034 (8th Cir. 2002); Pace v. City of Des Moines, 201 F.3d 1050, 1052 (8th Cir. 2000); Prudential Ins. Co. v. Hinkel, 121 F.3d 364, 366 (8th Cir. 1997).

"Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact exists and that the moving

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[2] The present action is postured as a trial to the Court. An argument can be made that the standards may be relaxed in a case set for trial to the judge rather than a jury, see Weinberger v. Hynson, 412 U.S. 609, 622 (1973) ("If this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment."), but that argument seems rejected by courts noting Rule 56 makes no distinction between jury and bench trials. See, e.g., Med. Inst. of Minn. v. Nat'l Ass'n of Trade & Technical Schs., 817 F.2d 1310, 1315 (8th Cir. 1987).

party is entitled to judgment as a matter of law." Shelton v. ContiGroup Companies, Inc., 285 F.3d 640, 642 (8th Cir. 2002) (citing Henerey v. City of St. Charles, 200 F.3d 1128, 1131 (8th Cir. 1999)). Summary judgment should not be granted if the court can conclude that a reasonable trier of fact could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Burk v. Beene, 948 F.2d 489, 492 (8th Cir. 1991). In light of these standards, the Court considers the present motion.

**II. Defendants' Resistance Papers Fail to Conform to the Local Rules.**

The Federal Rules of Civil Procedure, along with federal law, grant each district court the power to adopt rules to govern its proceedings. Fed. R. Civ. P. 83(a)(1); 28 U.S.C. §2071(a). "Rules of practice adopted by the United States District Courts . . . have the force and effect of law, and are binding upon the parties and the court which promulgated them until they are changed in the appropriate manner." Biby v. Kansas City Life Ins. Co., 629 F.2d 1289, 1293 (8th Cir. 1980) (citing Weil v. Neary, 278 U.S. 160 (1929)). Local Rule 56.1(b) mandates that a party resisting a motion for summary judgment must file certain documents including the following:

1. A brief that conforms with the requirements of Local Rule 7.1(e) in which the resisting party responds to each of the grounds asserted in the motion for summary judgment;

2. A response to the statement of material facts in which the resisting party expressly admits, denies, or qualifies each of the moving party's numbered statements of fact, filed as an electronic attachment to the brief under the same docket entry;

3. A statement of additional material facts that the resisting party contends preclude summary judgment, filed as an electronic attachment to the brief under the same docket entry; and

4. An appendix that conforms with the requirements of section "e" of this rule, filed as an electronic attachment to the brief under the same docket entry.

Defendants' response to the motion for summary judgment contained none of these items. Rather, the response filed by Defendants consisted solely of three pages of various factual allegations and arguments, none of which was supported by citations to case law or an appendix. This response was later supplemented with the untimely filing of an affidavit that was offered in support of Defendants' response to the motion for summary judgment. Deere Credit filed a motion to strike this affidavit, arguing the filing was untimely. The Honorable Celeste Bremer, Magistrate Judge, ultimately granted the motion to strike, thus the affidavit of Maria Milagros Nava de Fonseca will not be considered in deciding the present motion. Defendants' response does not comply with the Local Rules of this Court and is not a proper response to the motion. This is not a hyper-technical application of the Court's rules; compliance with these procedures is fundamental to a reasonable and accurate analysis of a dispositive motion.

"The failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact." LR 56.1(b). Based upon Defendants' failure to respond as required by the Local Rules, Defendants are deemed to have admitted all of the facts contained in Deere Credit's Statement of Undisputed Material Facts, which includes admission of the following facts:

- On October 26, 2001, Deere Credit entered into a written agreement with Inter Sea, Grupo Granjas and Shrimp Culture entitled "Agreement of Sale with Reservation of Title", pursuant to which Inter Sea purchased, under a reservation of title, various items of equipment.

- In December 2001 and again on November 1, 2004, the parties amended the Agreement.

- Inter Sea failed to comply with the terms of the Amended Agreement by failing to pay various installment payments when due and failing to pay the full amount of the security deposit as required under the Agreement.

- Pursuant to paragraph 12 of the Amended Agreement, upon the occurrence and during the continuation of any event of the default committed by Inter Sea, Deere Credit declared the unpaid balance owed under the Amended Agreement immediately due and payable.

- Inter Sea continues to remain in default of its obligations to Deere Credit.
- Inter Sea has been in default with amounts past due since February, 2005.
- As of April 15, 2006, Inter Sea's outstanding balance on the account was $2,438,969.90.
- Deere Credit has requested that Inter Sea cure its defaults and pay the amounts due and owing under the Amended Agreement, but Inter Sea has refused or otherwise failed to do so.
- Pursuant to the terms of the Amended Agreement, Grupo Granjas and Shrimp Culture each jointly and severally guaranteed Inter Sea's obligations under the Amended Agreement.

**III. Liability.**

Both parties agree that the Agreements are governed by and are to be construed in accordance with the laws of Venezuela.[3] Deere Credit has included in its appendix to the motion for summary judgment the declaration of Andrews Lapadula Osio, an attorney duly licensed to practice law in Venezuela. Mr. Osio obtained his law degree from the Universidad Católica Andrés Bello, located in Venezuela, and has earned his Master of Laws from the Boston University School of Law. Mr. Osio states in his declaration that he is a public interpreter licensed by the Minister of Justice of Venezuela as an official interpreter of the English and Spanish languages since 1996. It is in that capacity that Mr. Osio declares and certifies a true and correct translation of the relevant portions of the Venezuelan laws that are applicable in this case.

Defendants argue there is a genuine issue of material fact over whether or not under Venezuelan law Deere Credit is required to first file suit and obtain a judgment against Inter Sea

[3] The Agreement specifically states, "This Agreement shall be governed by and construed in accordance with the laws of Venezuela, without giving effect to any conflict of laws rules."

prior to the institution of an action directly against Defendants as guarantors.[4] Defendants assert that under controlling Venezuelan law, a guaranty cannot stand as a separate obligation, and it is necessary to first obtain judgment and liquidate the claim as against the underlying debtor in this case. Defendants have not timely provided the Court with an English translation of the Venezuelan law they cite in support of these assertions.[5] Deere Credit has provided the Court with the translation of Mr. Osio, which includes an English translation of Venezuelan Commercial Code Article 547. The translation reads, "The commercial guarantor is jointly liable as the principal debtor, without the right to request the benefits of excussion or division." The Amended Agreement specifically states that each of the Defendants, as guarantors, are jointly and severally liable for all obligations of Inter Sea. Clearly, both by the terms of the Amended Agreement and through the language contained in Article 547 of the Venezuelan Commercial Code, Defendants are jointly liable for the debt of Inter Sea. The Court has been provided with no Venezuelan authority which indicates it is necessary to first obtain a judgment against the primary debtor before proceeding against the guarantor of the debt. In addition, the Amended Agreement specifically indicates that the guarantors are jointly and severally liable, a concept that means Defendants are separately and equally responsible for the debt of Inter Sea. This record also lacks any indication the parties would be precluded from reaching terms by way of contract that would not otherwise be available under Venezuelan law. More specifically, the Acceleration Clause of the Amended Agreement states that Deere Credit is entitled to the rights and remedies under Venezuelan law; however, the Court has been provided with no authority to

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[4] Because this issue is presented as a genuine issue of material fact, it is analyzed from the perspective of what Venezuelan law is, rather than an interpretation of Venezuelan law and its effect, which would be a question of law.

[5] Even were this Court to consider the Declaration of Maria Milagros Nava de Fonseca, which was properly stricken by order of the Magistrate Judge, the document appears to provide a legal argument rather than approaching the state of Venezuelan law as an issue of fact.

indicate that proceeding directly against Defendants is somehow contrary to these Venezuelan rights and remedies.

Based upon Defendants' admission of the facts contained in Deere Credit's Statement of Undisputed Material Facts, the fact that the Amended Agreement expressly provided Defendants would be jointly and severally liable for the debt of Inter Sea, and Defendants' failure to provide the Court with Venezuelan authority that Deere Credit must first obtain a judgment against Inter Sea before proceeding against Defendants, no genuine issue of material fact exists, and Deere Credit is entitled to judgment as a matter of law.

**CONCLUSION**

Under the circumstances of this record, Plaintiff's Motion for Summary Judgment (Clerk's No. 9) must be **granted**.

**IT IS SO ORDERED.**

Dated this 1st day of February, 2007.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT