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

THE CIT GROUP/EQUIPMENT FINANCING, INC.,

Plaintiff,

VS.

DANIEL MCKEE,

Defendant.

No. 4:05-cv-00259-JEG

ORDER ON PLAINTIFF'S SUMMARY JUDGMENT

This matter comes before the Court on Plaintiff's Motion for Summary Judgment. Plaintiff CIT Group/Equipment Financing, Inc. ("CIT") is represented by Julie Johnson McLean. Defendant Daniel McKee ("McKee") is represented by David Morse. The matter came on for hearing November 3, 2005, and the case is fully submitted and ready for ruling.

SUMMARY OF MATERIAL FACTS

CIT is a Delaware corporation with its principal place of business in New Jersey.

McKee owns Danny's Diggin' 'N Dozin', Inc. ("Danny's"), an Iowa corporation with its principal place of business in Davis County, Iowa.

On October 23, 2002, Danny's entered into a "Security Agreement - Conditional Sale Contract" ("Contract") with Mid Country Machinery, Inc. ("Mid Country") of Fort Dodge, Iowa, for the purchase of new excavating equipment. McKee signed the

Contract as president of Danny's. At the time of execution, the Contract secured \$208,083.70 in debt. McKee signed a guaranty for the Contract in his individual capacity. Also on October 23, Mid Country entered into a "Without Recourse Seller's Assignment" ("Assignment"), assigning its contract rights to CIT.

Danny's subsequently failed to make payments, and on December 27, 2004, CIT sent Danny's a Notice of Default in the amount of \$3,951.89. On January 12, 2005, CIT sent Danny's a notice of its intent to accelerate the entire unpaid balance of \$136,482.29. Also on January 12, CIT sent McKee, as guarantor, a notice of its intent to accelerate. On February 8, 2005, Danny's filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Southern District of Iowa.¹

CIT filed a Complaint in this Court on May 5, 2005, asserting that Danny's and McKee failed to perform payment obligations under the Contract and demanding recovery of the remaining balance from McKee pursuant to his obligations under the guaranty. McKee filed his Answer on May 27, 2005, wherein he denied all facts except the citizenship of Danny's and himself, and raised the affirmative defense of lack of subject matter jurisdiction.

¹ <u>In re Danny's Diggin' 'N Dozin', Inc.</u>, No. 05-00596 (Bankr. S.D. Iowa filed Feb. 8, 2005). The Bankruptcy Court entered the final decree November 30, 2005, and closed the case on December 1, 2005. Danny's retained attorney Jerrold Wanek to represent it in the bankruptcy proceeding. Ms. McLean appeared in the bankruptcy proceeding several times representing the interests of CIT.

CIT moved for summary judgment on August 23, 2005, claiming McKee cannot generate a question of material fact as to his obligations as guarantor under the Contract. McKee correctly points out that this motion does not comply with Local Rule 56.1(a), as CIT did not file a separate statement of material facts, number each paragraph of facts, or provide record cites for each paragraph. McKee filed a resistance, a response to CIT's statement of facts, and additional material facts on September 16, 2005. McKee asserts that the only facts in dispute are the jurisdiction, amount of debt, amount of attorney's fees, and whether the Contract and guaranty entitle CIT to recover attorney's fees for expenses it incurred in conjunction with Danny's bankruptcy proceeding.² CIT responded to McKee's resistance on September 28, 2005.

CIT invokes the jurisdiction of this Court based on diversity of citizenship under 28 U.S.C. § 1332 because CIT's place of incorporation and principal place of business are both outside the state of Iowa and the amount outstanding on the loan exceeds

² In its Motion for Summary Judgment, CIT sought to recover attorney's fees. In subsequent filings, CIT withdrew the fee issue for purposes of the summary judgment motion. The Court interprets this as converting CIT's motion into one for partial summary judgment on the issues of jurisdiction and the amount of outstanding debt. Because CIT withdrew the fee issue, the Court will not consider in this order whether the Contract obligates McKee to pay attorney's fees CIT incurred while participating in Danny's bankruptcy proceeding.

\$75,000.3 McKee disputes this Court's jurisdiction, claiming that as an assignee of an Iowa company, CIT is limited to the forums that would have been available to Mid Country. In support of his position, McKee cites paragraph 6 of the Contract, which provides, "If Seller does in fact assign this Security Agreement to CIT, then after such assignment: (a) CIT . . . shall have all the rights and remedies of Seller hereunder."

APPLICABLE LAW AND DISCUSSION

I. STANDARD FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is proper "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). A summary judgment motion should be interpreted by the trial court to dispose of factually unsupported claims and defenses. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986); Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Therefore, the trial judge is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. Id. However,

³ Despite some initial dispute over the exact amount outstanding, as discussed below, the amount in controversy in this action was at all times in excess of \$75,000.

the Court is bound to view the facts in the light most favorable to the nonmoving party and to give that party the benefit of any reasonable factual inferences. <u>E.g.</u>, <u>Girten v.</u> McRentals, Inc., 337 F.3d 979, 983 (8th Cir. 2003).

While the moving party must initially make a showing of the basis for its motion and the portions of the record that support the party's assertion that there is no issue of material fact, the moving party is not required by Rule 56 to support its motion with affidavits or other similar materials negating the opponent's claim. <u>Hartnagel v.</u>

Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Celotex, 477 U.S. at 323).

When the moving party has carried its initial burden, the non-moving party must proffer specific facts demonstrating the existence of a genuine issue for trial and may not rely on mere allegations. Vaughn v. Roadway Express, Inc., 164 F.3d 1087, 1089 (8th Cir. 1998) (citing Celotex, 477 U.S. at 324). The nonmoving party must make a satisfactory showing on every element of its case for which it has the burden of proof at trial. Wilson v. Sw. Bell Tel. Co., 55 F.3d 399, 405 (8th Cir. 1995); see also Celotex, 477 U.S. at 322. "[T]o survive the defendant's motion, [the plaintiff] need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Anderson, 477 U.S. at 257.

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." <u>Id.</u> at 248. It is

thus the task of the trial court to "assess the adequacy of the nonmovants' response and whether that showing, on admissible evidence, would be sufficient to carry the burden of proof at trial." <u>Hartnagel</u>, 953 F.2d at 396 (citing <u>Celotex</u>, 477 U.S. at 322).

II. DIVERSITY JURISDICTION AND CONTRACT ASSIGNMENT

Although federal courts are courts of limited jurisdiction, 28 U.S.C. § 1332 grants district courts original jurisdiction "of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, . . . and is between (1) citizens of different States" It has long been held that diversity jurisdiction requires all defendants to be diverse from all plaintiffs. See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806), overruled on other grounds, 43 U.S. (2 How.) 497 (1844).

To prevent improper manufacturing of diversity, Congress enacted legislation that removed cases from the jurisdiction of the district courts if diversity was based on assignment of a note or chose in action where the original parties were not diverse.

Sowell v. Fed. Res. Bank of Dallas, 268 U.S. 449, 453 (1925). The purpose of this "assignee clause" was to prevent diversity jurisdiction created by assignment in cases where diversity would not otherwise exist. Id. In 1948, Congress enacted the modern version of the assignee clause at 28 U.S.C. § 1359.⁴ In its current version, § 1359

⁴ The history of the assignee clause is further discussed in <u>Steinberg v. Toro</u>: Said Section 1359 represents a recent revision of the law applicable in

provides "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359 (2000).

McKee contends that the terms of the Contract itself limit CIT to the remedies and forums available to Mid Country, and therefore CIT is precluded from invoking the

> cases wherein assignees or other transferees seek to invoke the jurisdiction of the federal courts. Its effect has been to simplify judicial determination of the right of such assignees or transferees to invoke federal jurisdiction. Prior to its enactment in 1948, there were two statutes which could effect the right of an assignee or transferee to bring an action in the federal courts. These were contained in Section 41(1) and Section 80 of Title 28, U.S.C., March 3, 1911, C. 231, secs. 41(1), 37, 36 Stat. 1091, 1098.

Said Section 41(1) provided generally that an assignee, in order to invoke the jurisdiction of the federal courts, would be required to show both jurisdiction to support his own case and that there would have been jurisdiction if the assignor had brought the action instead of the assignee.

On the other hand, said Section 80 was specifically applicable to cases involving an improper or collusive invoking of federal jurisdiction . . . [t]hus, under the former Section 80, if the assignee or transferee was improperly or collusively made a party by the assignment or transfer, for the purpose of conferring on him status that would enable him to invoke the jurisdiction of the federal courts, the court was required to dismiss the action forthwith.

The enactment of said Section 1359 has had the effect of narrowing the area wherein it is required to judicially determine the right to invoke federal jurisdiction to those cases involving an improper or collusive making of parties, by assignment or otherwise, for the purpose of invoking such jurisdiction.

Steinberg v. Toro, 95 F. Supp. 791, 794 (D.P.R.1951).

jurisdiction of this Court because Mid Country and McKee are not diverse. Specifically, McKee claims the following Contract language supports his proposition: "If Seller does in fact assign this Security Agreement to CIT, then after such assignment: (a) CIT, as assignee, shall have all the rights and remedies of Seller hereunder."

The burden is upon the Plaintiff to establish jurisdiction. McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 183-89 (1939). CIT asserts it has met this burden because the assignment was bona fide and the resulting complete diversity between itself, a Delaware corporation, and McKee, an Iowa resident, entitles it to be heard in federal district court.

CIT relies largely on <u>Drexel Burnham Lambert Group v. Galadari</u>, 777 F.2d 877 (2d Cir. 1985). In <u>Drexel</u>, the court held that § 1359 did not provide an alternative ground for reversal when the promissory note in question was assigned within six weeks of execution and seventeen months before suit was filed, and the assignment was for "facially valid business purposes." <u>Drexel</u>, 777 F.2d at 881. CIT argues the assignment in this case clearly falls within the parameters of <u>Drexel</u> because it was executed the same day as the Contract and for a valid business purpose, in that CIT is in the business of purchasing commercial paper.

McKee does not question the validity of or motive behind the assignment.

Instead McKee argues that <u>Drexel</u> is inapposite because in that case the alternative

forum was a foreign tribunal where the applicable law was in its infancy, whereas here CIT has an adequate alternative forum in the Iowa state court system. However, the Drexel court's analysis of alternative forums occurred in the context of its discussion of international comity, not § 1359. Id. at 879-80.

The matter now before the Court is a routine transaction involving commercial paper. On this record, there is no basis on which to find the transfer was made for purposes of creating federal court jurisdiction. The transfer was clearly made in the context of purchasing the debt obligation, with the expectation that the result would be a stream of payments, not litigation. Accordingly, the Court finds the Assignment was bona fide and executed for a valid business purpose.

"[W]hen an assignment or transfer is bona fide, other required jurisdictional grounds being satisfied, the assignee or transferee may maintain an action in the federal courts and it is immaterial whether or not his assignor or transferor could have done so."

Steinberg v. Toro, 95 F. Supp. 791, 794 (D.P.R. 1951). In Steinberg, the defendant, a citizen of Puerto Rico, entered into a contract with a corporation organized in Puerto Rico. Steinberg, 95 F. Supp. at 792-93. The corporation later purported to assign its rights under the contract to the plaintiff, a resident of New York. Id. The plaintiff brought suit for breach of contract in federal district court, claiming jurisdiction based on the complete diversity between himself and the defendant. Id. at 793. Defendant

claimed, *inter alia*, that the contract was collusively assigned to invoke federal jurisdiction. <u>Id.</u> After discussing the history of the assignment clause and § 1359, <u>see supra n.4</u>, the court found the citizenship of the assignor immaterial in determining diversity jurisdiction in an action brought by the assignee, as long as the assignment was bona fide and not collusively made to invoke federal jurisdiction. <u>Steinberg</u>, 95 F. Supp. at 794. Though the court eventually found it did not have jurisdiction, it did so based on the plaintiff's failure to prove a valid assignment. <u>Id.</u> at 797-98 (noting plaintiff's failure to produce a written assignment and finding evidence the corporation maintained residual control over the contract).

Unlike Steinberg, CIT presented evidence as to the existence and validity of the Contract, Assignment, and guaranty, including copies of the documents. As previously noted, McKee does not dispute the validity of the Assignment, nor does he claim that it was collusively make to improperly invoke the jurisdiction of the federal courts per § 1359. Because the Assignment was validly executed and complete diversity resulted, it is immaterial whether or not Mid Country could have brought suit in district court.

Steinberg, 95 F. Supp. at 794; see also Steele v. Hartford Fire Ins. Co., 788 F.2d 441, 444 (7th Cir. 1986) ("If otherwise valid, the assignment will not run afoul of [§ 1359] merely because its effect is to confer federal jurisdiction.") (finding full discussion of the issue unnecessary, as the parties would have been completely diverse without the

assignment); Nat'l Sur. Corp. v. Inland Prop., Inc., 286 F. Supp. 173, 183-84 (D. Ark. 1968) ("When section 1359 is invoked against an assignee who has brought suit in federal court, the question for determination is the genuineness of the assignment rather than its motivation. If the assignment or transfer is a bona fide, actual transaction whereby the . . . assignee becomes the real party in interest, section 1359 is not applicable"); Hartford Accident and Indem. Co. v. Sullivan, 846 F.2d 377, 382 (7th Cir. 1988) ("As the wording of section 1359 indicates, if the assignment is not collusive or otherwise improper, the assignee's citizenship determines whether his suit is within the diversity jurisdiction.").

McKee does not present any case law supporting his position that the Assignment limits CIT's rights, other than to distinguish CIT's reliance on the <u>Drexel</u> case.

Therefore, it appears his argument is semantic: that assignment of Mid Country's rights to CIT means that CIT has *only* the rights of Mid Country. The two are not mutually exclusive, however. It is possible for CIT to assume Mid Country's rights under the Contract, while still retaining its own rights as a Delaware corporation, especially given the absence of any language in either the Contract or the Assignment attempting to limit CIT's remedies (such as choice-of-law provisions or forum selection clauses). Further, McKee's argument would effectively prevent any assignment, collusive or not, from ever creating federal diversity jurisdiction. The language to which he objects is simply

a statement of assignment of rights and remedies, and the definition of assignment itself is "[t]he transfer of rights" Black's Law Dictionary (8th ed. 2004).

McKee has not presented a valid challenge to C.I.T's assertion of diversity jurisdiction. Therefore, the Court finds CIT has met its burden to prove jurisdiction and will proceed to the merits of CIT's Motion for Summary Judgment.

III. AMOUNT OF OUTSTANDING DEBT

McKee claims a genuine issue of material fact exists regarding the amount of outstanding debt for which he is liable to CIT under the Contract and guaranty. Specifically, McKee claims that CIT's calculations fail to properly credit the monthly adequate protection payments Danny's made under the terms of the bankruptcy plan.

CIT agrees Danny's monthly \$2,000 payments should be deducted from the amount of debt outstanding on the Contract; however, it claims the calculations attached to its reply already credit McKee for Danny's June, July, and August, 2005 payments. CIT further provides an affidavit from Eva Kirch, a bankruptcy specialist employed by CIT, attesting that the appropriate credits have been made. However, in McKee's resistance, he still disputes that adequate credits have been made.

Following the hearing, the Court permitted McKee additional time to review CIT's balance sheets and determine if any material dispute existed as to the amounts credited for the bankruptcy protection payments. Supplemental filings by McKee

dispute only the omission of one \$2,000 adequate protection payment made in October 2005, and one \$2,650.81 payment made around November 1, 2005, as part of the bankruptcy reorganization plan. CIT filed a second affidavit of Eva Kirch, acknowledging receipt of a \$2,000 payment in October, though Kirch attests this was actually late payment of the installment due September 30.5 CIT denies receiving any payment pursuant to the bankruptcy plan; however, counsel speculated that perhaps counsel for Danny's retained the payment pending his application for final decree in Bankruptcy Court. The application was filed November 30 and subsequently approved by the Bankruptcy Court.

McKee does not dispute that Danny's defaulted in its obligation under the Contract, nor does he dispute that the guaranty renders him personally liable for this default. By its terms, the guaranty allows CIT to proceed against McKee without first instituting collection proceedings against Danny's. The supplemental filings by the parties disclose no issue of material fact regarding the amount of outstanding debt.

In the absence of further communication from the parties after the close of the bankruptcy case, the Court assumes Danny's did tender the \$2,650.81 payment upon entry of the final bankruptcy decree. Both parties acknowledge one \$2,000 payment

⁵ The payment schedule attached to CIT's supplemental filing includes credit for a \$2,000 payment received October 3, which was not included on the payment schedule submitted with CIT's reply.

tendered in October 2005. Therefore, the Court finds CIT is entitled to judgment in its favor in the amount of \$119,247.20.6

CONCLUSION

The Assignment from Mid Country to CIT created complete diversity between the parties and was not made to improperly or collusively invoke jurisdiction. Accordingly, the Court is not deprived of diversity jurisdiction under 28 U.S.C. § 1359.

The Court finds no dispute as to Danny's default and the corresponding obligation of McKee as guarantor to pay the amount of outstanding debt. Accordingly, the Court grants CIT's motion for summary judgment as to the issues of jurisdiction and the obligation of McKee to satisfy the debt in the amount of \$119,247.20. Plaintiff's Motion for Summary Judgment (Clerk's No. 4) is **granted** as to matters addressed in this order and is **denied** as to the claim for attorney fees and costs.⁷ Because the issues

⁶ This calculation reflects the \$212,898.01 claimed outstanding in CIT's supplemental filing of November 23, 2005 (including the \$2,000 October payment), minus the \$2,650.81 payment that the Court assumes Danny's tendered at the close of the bankruptcy case. To the extent such payment was not tendered, or this calculation is not an accurate representation of the outstanding debt as of the date of this order, the Court expects the parties to file a motion under Federal Rule of Civil Procedure 59(e) to alter or amend within ten days of entry of judgment, or to initiate a separate action to recover any amounts in discrepancy.

⁷ The partial denial of the Motion for Summary Judgment is based upon the withdrawal of that issue during the briefing and at oral argument, as well as the lack of a complete record at this time, and is without prejudice to a subsequent motion or other proceedings directed to that issue.

of a legal basis for fees and costs, as well as the reasonable amounts, remain before the

Court can enter a final order for judgment, the parties are directed to report to the Court

within 20 days of the date of this Order whether these additional issues can be resolved

informally or will require further judicial proceedings.

IT IS SO ORDERED.

DATED this 8th day of December, 2005.

JAMES E. GRITZNER, JUDGE

UNITED STATES DISTRICT COURT