

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>B&amp;B FINANCIAL SERVICES LLC</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 05-1277</b>
	:	
<b>ANDREW KALLOCK, <u>et al.</u></b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**October 4, 2006**

Plaintiff B&B Financial Services LLC (“B&B”) brings this breach of contract action against Defendants Andrew Kallock (“Kallock”), Comprehensive Business Services (“CBS”), and Processing Plus (together, “Defendants”). Now before the Court is B&B’s uncontested Motion for Summary Judgment. For the reasons that follow, the Motion will be granted.

**I. BACKGROUND**

The recitation of undisputed facts that follows is drawn from B&B’s Requests for Admissions pursuant to Fed. R. Civ. P. 36. See Ex. A to Pl.’s Mot. The Requests to Defendants were served by certified mail and received by them on May 26, 2006. Id. (delivery receipt bearing Kallock’s signature). Defendants, who have consistently failed to respond to B&B’s motions or to orders from this Court, failed to respond to the Requests for Admissions. As a result, the requests must be deemed admitted and “conclusively established” for the purposes of this Motion. Fed. R. Civ. P. 36(b).

On August 12, 2003, Defendants CBS and Processing Plus executed a promissory note (“the Note”) payable to B&B in the amount of \$190,000. The parties simultaneously entered into an agreement governing repayment of the \$190,000 (the “Agreement”). See Pl.’s Req. for Admis. No. 1. In exchange for this investment loan, Defendants agreed to place and maintain ATM machines with various merchants. See Agreement, attached as Ex. B to Pl.’s Mot.

Kallock personally guaranteed payment of the Note. See Pl.'s Req. for Admis. No. 2. By April 30, 2004, Defendants were in default of their obligations under the Note and the Agreement. See Pl.'s Req. for Admis. No. 3. B&B brought the present action seeking damages for breach of contract on March 11, 2005. On July 17, 2006, B&B filed its Motion for Summary Judgment. Defendants have failed to respond.

## **II. LEGAL STANDARD**

When a party fails to respond to a properly filed motion, the Court may treat the motion as uncontested. E.D. Pa. Local R. Civ. P. 7.1(c). Unlike other motions, the Court may not grant an uncontested summary judgment motion without an independent determination that the movant is entitled to judgment under Fed. R. Civ. P. 56. Id. By failing to respond, however, “the nonmoving party waives the right to respond to or to controvert the facts asserted in the summary judgment motion.” Reynolds v. Rick’s Mushroom Serv., 246 F. Supp. 2d 449, 453 (E.D. Pa. 2003) (quoted in Vaira, E.D. Pa. Federal Practice Rules, Comment on Rule 7.1 (Gann)).

In deciding a motion for summary judgment pursuant to Fed. R. Civ. P. 56, the test is “whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.” Med. Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (quoting Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)). “[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court must examine the evidence in the light most favorable to the non-moving party and resolve all reasonable inferences in that party’s favor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, “there can be ‘no genuine issue as to any material fact’ . . . [where the non-moving party's] complete

failure of proof concerning an essential element of [its] case necessarily renders all other facts immaterial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The party moving for summary judgment bears the initial burden of showing the basis for its motion. See Shields v. Zuccarini, 254 F.3d 476, 481 (3d Cir. 2001). If the movant meets that burden, the onus then “shifts to the non-moving party to set forth specific facts showing the existence of [a genuine issue of material fact] for trial.” Id.

### **III. ANALYSIS**

B&B moves for summary judgment on its breach of contract claims. To succeed under Pennsylvania law, B&B must prove: (1) the existence of a contract, including its essential terms, (2) breach of a duty imposed by the contract, and (3) resultant damages.<sup>1</sup> J. F. Walker Co, Inc. v. Excalibur Oil Group, Inc., 792 A.2d 1269, 1272 (Pa. Super. Ct. 2002). B&B has met all three elements and is entitled to summary judgment.

First, B&B has established that Defendants entered into valid contracts. Defendants admit that on August 12, 2003, CBS and Processing Plus executed a promissory note payable to B&B in the amount of \$190,000 and an agreement governing its repayment. See Pl.’s Req. for Admis. No. 1. Furthermore, Kallock contractually guaranteed payment of the Note. See Pl.’s Req. for Admis. No. 2.

Second, B&B has established that Defendants breached the contract. Under the contract,

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<sup>1</sup>The parties have not addressed which state’s law should govern the contract. In contracts cases, this Court applies the choice of law analysis of the forum state, Pennsylvania. In re Complaint of Bankers Trust Co., 752 F. 2d 874, 881-2 (3d Cir. 1984). Under Pennsylvania law, “the place having the most interest in the problem and which is the most intimately concerned with the outcome is the forum whose law should be applied.” Id. Because the contract was executed in Pennsylvania and concerned business transactions in Pennsylvania, the Court finds that Pennsylvania law governs.

Defendants were required to repay B&B's loan by April 30, 2004 or, at B&B's option, convert the investment into "long-term equity or transaction revenue programs." See Agreement, attached as Ex. B to Pl.'s Mot. Defendants admit they have defaulted on the loan by failing to make timely payments to B&B and by failing to repay the original loan amount. See Pl.'s Req. for Admis. No. 3; Pl.'s Mot. for Summ. J. ¶¶ 2-3.

Third, B&B has established damages of \$401,895.26 from Defendants' breach. Under the terms of the parties' agreement, Defendants owe B&B repayment of the \$190,000 loan, \$41,400 in interest, \$20,495.36 in machine maintenance expenses, and \$150,000 in services and interest. See Pl.'s Req. for Admis. No. 5-6; Affidavit of Anthony Braglio, attached as Ex. E to Pl.'s Mot.

#### **IV. CONCLUSION**

For the foregoing reasons, the Court will grant B&B's uncontested Motion for Summary Judgment. An appropriate Order follows.

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**ORDER**

**AND NOW**, this 4<sup>th</sup> day of October, 2006, upon consideration of Plaintiff's uncontested Motion for Summary Judgment (docket no. 37), and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the Motion is **GRANTED**. It is **FURTHER ORDERED** that the Clerk shall enter Judgment for Plaintiff in the amount of \$401,895.26 and mark this case **CLOSED**.

**BY THE COURT:**

/s/ Bruce W. Kauffman \_\_\_\_\_  
**BRUCE W. KAUFFMAN, J.**