VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CARLOS C. CADENAS
Plaintiff,

v. Case No.: CL-2010-00158

MAX CLEANERS, INC.
Defendant.

MOTION TO STRIKE DEFENDANT'S ANSWER AND MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, by counsel, for his Motion for Summary judgment pursuant to Virginia Supreme Court Rule 3:20 and in support thereof respectfully states as follows:

1. Rule 3:20 states in pertinent part:

> Any party may make a motion for summary judgment at any time after the parties are at issue...If it appears from the pleadings...the admissions, if any, in the proceedings...that the moving party is entitled to judgment, the court shall enter judgment in that party's favor
> Summary judgment, interlocutory in nature, may be entered as to the undisputed portion of a contested claim or on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment shall not be entered if any material fact is genuinely in dispute...

2. Plaintiff filed its Complaint with this Court on January 6, 2010 alleging that Defendant was liable to Plaintiff based on a default of a Note with the face amount of $60,000, a copy of which is attached hereto as Exhibit 1.

3. Defendant filed its Answer on February 18, 2010, copy of which is attached hereto as Exhibit 2.

4. Defendant's Answer admitted to each and every allegations of the Complaint with the exceptions of paragraphs 12 and 13 which alleged:

> 12. Max owes a five percent (5%) late charge on each late payment through date of judgment.
>
> 13. A Statement of Account is attached hereto as Exhibit 4.

5. Defendant failed to deny paragraph 14 of the Complaint regarding Plaintiff's entitlement to attorney's under the Note, therefore this allegation is deemed admitted pursuant to Rule 1:4(e).

6. Despite Defendant's numerous admissions as to the debt, it raises what are entitled "Affirmative Defenses".

7. The first "Affirmative Defense" references an allegation of fraud, albeit with insufficient specificity as is required with any allegation of fraud. (Ex. 2 at ¶ 14)

8. The second "Affirmative Defense" references an unspecified breach of contract by Plaintiff and indeterminate "damages suffered by the Defendant". (Ex. 2 at ¶ 15)

9. The third "Affirmative Defense" references an unspecified "breach of a restrictive covenant" that resulted in indeterminate "damages suffered by the Defendant." (Ex. 2 at ¶ 16)

10. The fourth and final "Affirmative Defense" references "tortuous interference committed by Plaintiff" that resulted in yet more indeterminate "damages suffered by the Defendant." (Ex. 2 at ¶ 17) As tortuous interference sounds like a painful and inconvenient condition, it is not a recognized legal cause of action in Virginia. However, a cause of action may lie for "tortious interference" if it were plead, which it was not.

11. Not a single one of Defendant's "Affirmative Defenses" make mention of any figure to which Defendant believes he was damaged.

12. Not a single one of Defendant's "Affirmative Defenses" mention any setoff against the liability it has admitted through its Answer.

13. Not a single one of Defendant's "Affirmative Defenses" are plead with sufficient particularity to satisfy Rule 1:4(d) which states:

> Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense.

14. Defendant's so called "Affirmative Defenses" fail to "clearly inform the opposite party of the true nature of the claim or defense" and are in violation of Rule 1:4(d).

15. Defendant's "Affirmative Defenses" are not affirmative defenses at all. An affirmative defense is defined as:

> A defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if the allegations in the complaint are true. The defendant bears the burden of proving an affirmative defense. Black's Law Dictionary, 9th Ed., p.482 (2009) (*see* Ex. 3)

16. Defendant's "Affirmative Defenses" do not fit this definition because, assuming for the sake of argument that the defenses were sufficiently plead, (which Plaintiff asserts they were not), the defenses reference unspecified fraud and not fraud in the inducement, but simply the tort of fraud, which Plaintiff has reason to believe involves a wholly separate set of facts from those involving Note sued upon.

17. Further, the second defense alleges breach of an unspecified contract which Plaintiff believes refers to a contract other than the Note sued upon.

18. Further, the third defense mentions the breach of a restrictive covenant which is clearly not the same contract as the Note.

19. Further still, the fourth defense mentions a cause of action for what can only be presumed to be the tort of tortious interference, with nothing more.

20. Plaintiff contends that Defendant has attempted to plead a claim of set-off or recoupment and not affirmative defenses.

21. Plaintiff relies upon the Virginia Supreme Court's holding in Odessky v. Monterey Wine Co., 188 Va. 184 (1948) in which it held:

> It is generally held under statutes similar to Code, section 6144, that that which is **the subject of set-off must be a liquidated demand, a debt against a debt**. Id at 189 *citing* Bunting v. Cochran, 99 Va. 558, 39 S.E. 229; Tidewater Quarry Co. v. Scott, 105 Va. 160, 52 S.E. 835, 115 Am. St. Rep. 864; Baker Co. v. Hartman, 139 Va. 612, 124 S.E. 425; *and* Dexter-Portland Cement Co. v. Acme Supply Co.,147 Va. 758, 766, 133 S.E. 788. (emphasis added)

22. Based on the nature of the vague defenses stated and the fact that no amount of set-off has been alleged, and the nature of two of the defenses being in tort (i.e. fraud and tortious interference), these defenses, even if properly identified as claims in set-off, these defenses are barred from being brought against a liquidated debt claim such as the Plaintiff's Note, to which Defendant has admitted to all allegations except for the 5% late penalty.

23. Plaintiff further contends that normally, such a defendant's recourse would be to file a counterclaim and serve it upon the Plaintiff to possibly have other claims arising out of different sets of facts to be litigated in one proceeding. This is clearly set forth in Virginia Supreme Court Rule 3:9 which states in pertinent part:

> *(a)Scope.* A defendant may, at that defendant's option, plead as a counterclaim any cause of action that the defendant has against the plaintiff or all plaintiffs jointly, whether or not it grows out of any transaction mentioned in the complaint, whether or not it is for liquidated damages, whether it is in tort or contract, and whether or not the amount demanded in the counterclaim is greater than the amount demanded in the complaint.

24. Further Va. Code § 8.01-272 makes provisions for such counterclaims if properly pleaded which states in pertinent part:

> In any civil action, a party may plead as many matters, whether of law or fact, as he shall think necessary. A party may join a claim in tort with one in contract provided that all claims so joined arise out of the same transaction or occurrence. The court, in its discretion, may order a separate trial for any claim. Any counterclaim shall be governed by the Rules of the Supreme Court of Virginia.

25. Plaintiff contends that because Defendant has not properly brought its allegations of set-off in a counterclaim and the fact that the 21 days for filing pursuant to Rule 3:9(b)(i) have expired, they must be stricken from the record and deemed a nullity.

26. To support its contention that under Odessky that a set-off must be a liquidated claim to be valid against a liquidated claim and for the proposition that a counterclaim is the proper vehicle for a defendant to bring unliquidated claims against liquidated claims, Plaintiff relies upon the Virginia Supreme Court's holding in Piland Corp. v. League Construction, 238 Va. 187 (1989) in which it held:

> Finally, we consider whether Virginia law permits a defendant to set off, by counterclaim, an unliquidated debt against a liquidated debt. Relying on Phelps-Dodge Industries v. Piedmont Elec. Supply, 523 F. Supp. 201, 202 (W.D. Va. 1981), League contends that, although one may plead unliquidated damages as a set-off in a counterclaim, in Virginia there is no substantive right to set off unliquidated damages against liquidated damages. The Federal District Court for the Western District of Virginia, relying on Odessky v. Monterey Wine Co., 188 Va. 184, 190, 49 S.E.2d 330, 332 (1948), and Dexter-Portland Co. v. Acme Co., 147 Va. 758, 770, 133 S.E. 788, 791 (1926), ruled that the defendant could prevail only if it could show that the debt owed by the plaintiff was liquidated. Phelps, 523 F. Supp. at 202.
>
> However, Rule 3:8, adopted in 1971, states in pertinent part:
>
> defendant may . . . plead as a counterclaim any cause of action at law for a money judgment in personam that he has against the plaintiff . . . whether or not it grows out of any transaction mentioned in the notice of motion for judgment, *whether or not it is for liquidated damages . . . .* (Emphasis supplied.)
>
> The language of this rule explicitly allows a defendant to plead, as a counterclaim, any cause of action at law whether or not it is for liquidated damages. It would be patently illogical for the Rules of Court, as a matter of procedure, to encourage a defendant to plead unliquidated damages as a set-off, while not recognizing, as a matter of substance, his right to set off the unliquidated damages against the plaintiff's liquidated damages. We hold, therefore, pursuant to Rule 3:8 and in the interests of judicial economy, that there is no requirement in Virginia that a debt be liquidated

in order to be raised as a set-off in a counterclaim. Piland Corp. v. League Construction, 238 Va. 187, 190-191.

27. As a final point, Plaintiff contends that the Defendant has already plead its "Affirmative Defenses" as a separate case that was filed with this Court prior to the instant case on August 18, 2009 as case number CL-2009-0011984.

28. Plaintiff further contends that the Court records will reflect that case number CL-2009-0011984 was nonsuited by Defendant, Max Cleaners, Inc. on August 6, 2010.

29. Plantiff points out that the proper recourse for Defendant would have been to move to consolidate for trial its case filed on August of 2009 with this case filed in January 2010 which Defendant never took the opportunity to do prior to suffering a nonsuit.

30. Plaintiff contends that based on the Defendant's admissions, there are no facts material to the issue of liability genuinely in dispute. The only genuine issue as to the amount of damages relates to the 5% late fee. An itemized statement showing the undisputed amount (entire amount minus the late fee, with attorneys fees to be determined later) is attached as Exhibit 4 and incorporated by reference.

WHEREFORE the Plaintiff having fully set forth the grounds for his motion respectfully request that this court enter an order:

A. Striking the portion of Defendant's Answer entitled "Affirmative Defenses" from the record; and

B. Granting Plaintiff judgment against Defendant in the undisputed amount of $69,853.37 plus attorney's fees; and

C. Set a hearing for the Defendant's argument as to the five percent (5%) late fee and Plaintiff's proof as to attorney's fees.

Respectfully submitted,
CARLOS C. CADENAS
By counsel

Richard H. Nguyen, Esq. VSB 66677
Nguyen & Nguyen, P.C.
6402 Arlington Blvd. Suite 371
Falls Church, VA 22042
(703)534-0805 tel
(703)534-3047 fax
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY certify that on this 10th day of September, 2010, a true and accurate copy of the foregoing Motion to Strike and Motion for Summary Judgment was sent via facsimile to:

M. Javad Khan, Esq and Simon M. Osnos, Esq
Osnos and Associates, LLC
via fax #(703)356-8428

Richard H. Nguyen