IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: **CHAPTER 11**

B.C. ROGERS POULTRY, INC. **CASE NO. 01-06516-EE**
B.C. ROGERS PROCESSORS, INC.,
Jointly Administered

JOHN M. ROGERS, SR., AND
J. KELLEY WILLIAMS, AS TRUSTEE OF THE
J. KELLEY WILLIAMS REVOCABLE TRUST **PLAINTIFFS**

VS. **ADVERSARY NO. 03-00122-EE**

THE CIT GROUP/EQUIPMENT FINANCING, INC.,
AND H. KENNETH LEFOLDT, AS LIQUIDATING
TRUSTEE OF THE B.C. ROGERS LIQUIDATING TRUST **DEFENDANTS**

James W. O'Mara
Debra M. Brown
Phelps Dunbar LLP
Post Office Box 23066
Jackson, MS 39225-3066

Attorneys for Plaintiffs

William H. Leech
Danny E. Ruhl
Copeland, Cook, Taylor & Bush, P.A.
P.O. Box 6020
Ridgeland, MS 39157

Attorneys for Defendant The CIT Group/Equipment Financing, Inc.

J. Walter Newman, IV
248 East Capitol Street, Suite 539
Jackson, MS 39201

Attorney for Defendant H. Kenneth Lefoldt, Jr., as Liquidating Trustee of the B.C. Rogers Liquidating Trust

Edward Ellington, Judge

MEMORANDUM OPINION ON (1) *MOTION FOR PARTIAL SUMMARY JUDGMENT;* (2) *MOTION FOR PARTIAL SUMMARY JUDGMENT FOR FAILURE TO MEET BURDEN OF PROOF;* (3) *MOTION TO STRIKE REGARDING AFFIDAVITS OF JOHN M. ROGERS, SR., J. KELLEY WILLIAMS, AND TITO ECHIBURU*; AND (4) *MOTION TO STRIKE DEPONENT'S CORRECTION SHEET OF JOHN M. ROGERS, SR.*

This matter came before the Court on *The CIT Group/Equipment Financing Inc.'s Motion for Partial Summary Judgment* and *The CIT Group/Equipment Financing Inc.'s Motion for Partial Summary Judgment for Failure To Meet Burden of Proof* filed simultaneously by The CIT Group/Equipment Financing, Inc. ("CIT"). John M. Rogers, Sr. ("Rogers") and J. Kelley Williams, as Trustee of the J. Kelley Williams Revocable Trust ("Williams")[1] filed a *Consolidated Response to Motions for Partial Summary Judgment.* CIT filed simultaneously *The CIT Group/Equipment Financing, Inc.'s Reply in Support of its Motion for Partial Summary Judgment* and *The CIT Group/Equipment Financing Inc's Reply in Support of its Motion for Partial Summary Judgment for Failure To Meet Burden of Proof.*

In addition, there are before the Court two motions filed by CIT challenging the summary judgment evidence submitted by Rogers and Williams, namely *The CIT Group/Equipment Financing, Inc.'s Motion To Strike Regarding Affidavits of John M. Rogers, Sr., J. Kelley Williams, and Tito Echiburu* and *The CIT Group/Equipment Financing, Inc.'s Motion To Strike Deponent's Correction Sheet of John M. Rogers, Sr.* Rogers and Williams filed responses in opposition to these motions.

The Court has considered the pleadings and the briefs filed by the parties and finds that

[1] Williams is a plaintiff in this proceeding only in his capacity as Trustee of the J. Kelley Williams Revocable Trust. In the interest of clarity, this Court will refer to him both in his individual capacity and in his capacity as Trustee as "Williams," except where his identity is otherwise relevant.

genuine issues of material fact remain in dispute and, therefore, *The CIT Group/Equipment Financing Inc.'s Motion for Partial Summary Judgment* and *The CIT Group/Equipment Financing Inc.'s Motion for Partial Summary Judgment for Failure To Meet Burden of Proof* should be denied. Moreover, for the reasons stated below, the Court finds that *The CIT Group/Equipment Financing, Inc.'s Motion To Strike Regarding Affidavits of John M. Rogers, Sr., J. Kelley Williams, and Tito Echiburu* should be denied, and *The CIT Group/Equipment Financing, Inc.'s Motion To Strike Deponent's Correction Sheet of John M. Rogers, Sr.* should be granted.

FINDINGS OF FACT

To better understand the material facts surrounding the transactions that gave rise to this proceeding, it is necessary to begin with a summary of certain background facts which are not wholly undisputed, but which CIT claims are immaterial to the issues presented in its summary judgment motions.

In 1999, the year before the poultry industry experienced an economic downturn, Rogers, Williams, and two related trusts sold all of their stock in B.C. Rogers Poultry, Inc. and B.C. Rogers Processors, Inc. (the "Debtors") to the Employee Stock Ownership Trust ("ESOT"). Until then, Rogers and Williams were the sole directors and owners of the Debtors. The Debtors entered into an Amended and Restated Revolving Credit and Term Loan Agreement ("Revolving and Term Loan Agreement") with Suntrust Bank, certain John Hancock entities, and other lenders (collectively referred to as the "Senior Lenders") pursuant to which they borrowed $50 million in order to refinance existing debt, expand working capital, and finance the cash portion of the ESOT purchase, approximately $25 million. Also as part of the ESOT purchase, the Debtors provided Rogers and Williams promissory notes in the approximate amount of $25 million, under which both of them

received quarterly cash payments, representing accrued interest.

During the summer of 2000, the Senior Lenders expressed concerns to the Debtors, Rogers, and Williams about the Debtors' capital shortfall and also claimed that the Debtors were in breach of the Revolving and Term Loan Agreement. The Senior Lenders, the Debtors, Rogers, and Williams began re-negotiating the terms of the Revolving Term Loan Agreement. Although Rogers and Williams were not parties to that contract, they would lose their quarterly cash payments in the event the Debtors defaulted.

As part of the re-negotiation, the Senior Lenders proposed a refinancing plan that required the Debtors to reduce their capital inventory and incur no additional indebtedness. Also, the Senior Lenders' proposal, which was ultimately implemented, required the Debtors to obtain a minimum of $4 million in sale/leaseback financing on equipment purchased by the Debtors that prior year. To implement the proposal, the Debtors contacted CIT, as well as other entities, to determine its interest in providing the sale/leaseback financing on some of the Debtors' own equipment. CIT was aware that the Senior Lenders were requiring the sale/leaseback transaction as a component of the Debtors' overall financial restructuring and specifically was aware that the Senior Lenders required at least $4 million.

The Debtors generated a list of equipment that they had purchased in the past year at a total original cost of over $4 million, and proposed that CIT use the list in connection with the sale/leaseback transaction. Upon receiving the list, CIT obtained an appraisal from Loeb Equipment and Appraisal Company ("Loeb") that indicated the value of the equipment was about $4.2 million as of October 24, 2000.

During the Debtors' negotiations with CIT, CIT considered Rogers and Williams as a source

to secure the sale/leaseback transaction. Initially, CIT contemplated them each putting up $500,000 to guarantee the transactions. In subsequent negotiations, CIT proposed that they provide guaranties and/or letters of credit in various amounts. Rogers and Williams realized that by agreeing to secure the sale/leaseback arrangement, they improved their own chances of recovering the Debtors' debt to them.[2] In the end, Rogers and Williams each agreed to provide separate $1.5 million irrevocable standby letters of credit, naming CIT as the beneficiary.[3] Both letters of credit were subject to automatic renewal.

The facts set forth so far are not those CIT relies upon in support of its summary judgment motions but are provided herein only as general background information. The specific facts that CIT claims are undisputed follow from this point forward, beginning on December 28, 2000, when the Debtors entered into a Master Lease Agreement ("Lease") with CIT.

Thereafter, the Debtors sold CIT the equipment listed in a separate attachment to the Lease (hereinafter "Equipment") for $4 million, and CIT leased that same Equipment back to the Debtors for a sixty-month term. As part of the closing, the letters of credit obtained by Rogers and Williams were provided to CIT. The Debtors entered into a separate Loan Agreement with Rogers and Williams under which the Debtors agreed to reimburse them in the event CIT drew upon the letters of credit.

On November 19, 2001, the Debtors filed voluntary petitions for relief under chapter 11 of

---

[2] The debt amounted to approximately $25 million.

[3] According to Rogers and Williams, they agreed to provide the letters of credit only after CIT represented to them on December 14, 2000, that the value of the equipment subject to the sale/leaseback was about $4.2 million, as reflected in the list of equipment attached to Loeb's appraisal report.

the Bankruptcy Code. By then, the Debtors had defaulted in their payments under the terms of the Lease. With this Court's approval, the Debtors sold their poultry operations in late December 2001, to Koch Foods of Mississippi, LLC, Koch Properties of Mississippi, LLC, and Koch Farms of Mississippi, LLC (collectively referred to as "Koch"). This sale did not include the Equipment leased from CIT.

By Agreed Order entered on December 20, 2001, the Debtors agreed, inter alia, to pay CIT all amounts due under the Lease by a date certain or else their failure to do so would result in the Lease being deemed rejected under the provisions of 11 U.S.C. § 365,[4] at which time CIT also would be granted relief from the automatic stay. The Debtors failed to bring their payments current and for this reason, the Lease was deemed rejected as of December 27, 2001.[5] At this time, CIT had the authority to recover its Equipment from the premises of the poultry operations.

On January 4, 2002 and January 8, 2002, CIT took steps to draw on the letters of credit provided by Rogers and Williams. Shortly thereafter, CIT received $1.5 million from the issuer of the letter of credit obtained by Williams. Rogers, however, obtained a Temporary Restraining Order from a Louisiana state court that enjoined payment of the funds. CIT received $1.5 million from the letter of credit provided by Rogers only after dissolution of the Temporary Restraining Order, on or about January 14, 2002.

In an attempt to recover the sums drawn upon their letters of credit, Rogers and Williams each commenced on February 7, 2002, separate, but nearly identical, state court actions against CIT

---

[4] Hereinafter all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

[5] Rogers and Williams contend the Lease was deemed rejected on January 1, 2002.

and Koch. On February 19, 2002, CIT and Koch removed the lawsuits to federal district court, where they were consolidated and then transferred to this Court for adjudication.

During this same time period, CIT began negotiating with Koch about the possibility of Koch purchasing some or all of the Equipment. CIT engaged Equipment Exchange Company of America, Inc. ("EEC") to conduct a physical inspection and appraisal of the Equipment. EEC submitted an appraisal report to CIT, effective as of March 22, 2002. Thereafter, Koch offered to purchase certain of the Equipment for $1.3 million.

On June 5, 2002, and June 20, 2002, CIT sent letters to counsel for Rogers and Williams informing them of Koch's $1.3 million offer. CIT wrote in its letters that should Rogers and Williams wish to make a higher offer than Koch, or should they wish to purchase from CIT its position as lessor under the Lease (and thereby accede to CIT's rights thereunder), they should contact CIT's counsel. CIT also advised Rogers and Williams that some of the Equipment subject to the lease had been "double-leased" due to an earlier lease. Rogers and Williams objected to the sale but did not extend a higher offer. On October 8, 2002, CIT and Koch closed the sale to Koch of certain items of Equipment for $1,308,200. The sale items included a John Food Equipment Rotary Bird Opener that EEC had inadvertently failed to inspect or appraise as part of its report

By *Agreed Order*, this Court on February 5, 2004, consolidated this proceeding with Adversary Proceeding Case No. 02-0078, previously commenced by CIT against the Debtors. Also, as part of that *Agreed Order,* the Trustee of the B.C. Rogers Liquidating Trust, H. Kenneth Lefoldt, was substituted for the Debtors as a party. Rogers and Williams filed their Amended Complaint

against CIT and Koch[6] on February 23, 2004, and later, on April 4, 2006, filed their Second Amended Complaint.[7]

The claims set forth by Rogers and Williams in the Second Amended Complaint that are the subject of the instant summary judgment motions can be summarized as follows: (1) CIT breached a duty to mitigate its damages in the event of a default by the Debtors under the Lease (the "Damages Mitigation Claim"); (2) CIT breached a duty of good faith and fair dealing (the "Good Faith/Fair Dealing Claim"); (3) CIT violated the terms of the Lease by failing to draw the same amounts, at the same time, from the two letters of credit (the "Draws Timing Claim"); (3) the Lease is void to the extent it is unconscionable or otherwise inconsistent with law (the"Void Lease Claim"); (4) CIT's draws under the letters of credit were unauthorized and were in bad faith (the "Unauthorized Draws Claim"); (5) CIT and Koch negligently and/or intentionally conspired to the detriment of Rogers and Williams by allowing Koch to use and possess the Equipment without reasonable compensation, selling the Equipment to Koch for less than its fair market value, and causing certain items of Equipment not to be subject to the Lease (the "Conspiracy Claim"); (6) the terms of the Lease are materially different from those presented to Rogers and Williams to induce them to procure the letters of credit and thus, there was a failure of consideration for the issuance of the letters of credit (the "Failure of Consideration Claim"); and (7) CIT negligently and/or intentionally made material misrepresentations to them regarding what equipment would be subject

[6] On March 22, 2007, Koch was dismissed pursuant to a $10,000 Offer of Judgment and a related Agreed Final Judgment of Dismissal.

[7] Rogers and Williams amended their complaint to allow the J. Kelley Williams Revocable Trust to participate as a party in these proceedings, given that the letter of credit in dispute was drawn upon its account, and to clarify that Williams' claims against CIT arose out of his capacity as Trustee.

to the Lease (the "Misrepresentation Claim"). CIT asserts that it is entitled to partial summary judgment in its favor as to all of the foregoing claims of Rogers and Williams and as to their requests for punitive damages and attorney's fees.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this adversary proceeding pursuant to 28 U.S.C. § 1334.

II.

A. Motions to Strike

The Court first addresses the motions filed by CIT to strike certain matters included by Rogers and Williams in their response to CIT's summary judgment motions.[8]

CIT has moved to strike the affidavits of Rogers and Williams in their entirety. (Rogers & Williams' Exs. 15 & 10). CIT contends that the affidavits of Rogers and Williams are identical and for this reason alone could not accurately reflect their personal knowledge. In the alternative, CIT has moved to strike paragraphs 2 and 3, and the first sentence of paragraph 5, of Rogers' affidavit. CIT contends that those passages in Rogers' affidavit directly contradict his prior deposition testimony and constitute "sham" testimony manufactured for the purpose of creating disputed material facts. For this same reason, CIT has moved to strike paragraph 4 of the affidavit of Tito

---

[8] Rogers and Williams filed a motion to strike the declaration of Vincent Wieckowski that CIT submitted in support of both of its summary judgment motions. By *Agreed Order*, CIT withdrew Wieckowski's declaration, including all exhibits attached thereto, and substituted an amended declaration in its place. Also, CIT agreed to strike those portions of its briefs that included material facts supported by the original declaration.

Echiburu. (Rogers & Williams' Ex. 1).

Specifically, CIT challenges Rogers' testimony that he applied for the letter of credit because he realized that doing so advanced his chances of recovering the debt owed to him by the Debtors and that he would not have done so if he had known the true value of the Equipment subject to the Lease. As to the affidavit of Tito Echiburu, CIT challenges his affidavit testimony that the Debtors' purpose for entering into the Lease was to provide the Debtors with additional capital. Finally, CIT takes issue with the statement by Tito Echiburu that the Equipment remained under the Debtors' "control" on the ground that "control" is a legal term that constitutes an impermissible legal conclusion.

The Court finds that CIT's motion should be denied. Although the affidavits of Rogers and Williams may be identical, this fact in itself is insufficient to show that they lacked personal knowledge about the subject matter of their testimony. As Rogers and Williams pointed out in their response, their claims against CIT are identical and thus, it is not surprising that their testimony on certain matters is also identical.

Moreover, the Court finds that the testimony of Rogers and Tito Echiburu challenged by CIT does not contradict prior deposition testimony or at least does not do so with a clear intent to deceive CIT or this Court. *See* Adams v. Banks, No. 5:08cv154(DCB)(MTP), 2009 WL 3215426 (S.D. Miss. Sept. 30, 2009) (denying motion to strike where affidavit provided more details and clarification); Henderson v. Black & Veatch Corp., No. 1:04CV36, 2005 WL 1863533 (N.D. Miss. Aug. 4, 2005) (denying motion to strike because even though "there are some inconsistencies, the affidavits can be fairly read to be consistent with deposition testimony and at the same time refute the defendants' interpretation of the deposition testimony"). This Court is well aware that a party

may not defeat a summary judgment motion using an affidavit that is so inconsistent with prior deposition testimony as to constitute an obvious sham. S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.2d 489, 495 (5th Cir. 1996). However, this Court declines to strike the challenged testimony here where the affidavits are not wholly contradictory.

Also, the context in which the word "control" is used by Tito Echiburu in his affidavit does not rise to the level of a legal opinion, as suggested by CIT. Even if it did, this Court is capable of disregarding any such inappropriate summary judgment evidence. *See* United States v. City of Aberdeen, 929 F. Supp. 989, 993 (N.D. Miss. 1996) (denying motion to strike on ground that "court is quite capable of disregarding legal conclusions").

CIT has also moved to strike the correction sheet submitted by Rogers that contained changes to portions of his deposition testimony. The basis for CIT's motion, inter alia, is that the correction sheet failed to include the reasons for the proposed deposition changes as required by Rule 30(e) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7030 of the Federal Rules of Bankruptcy Procedure. Thereafter, Rogers submitted an amended correction sheet that included the reasons for the changes, but the submission was untimely.

Rule 30(e) provides that "the deponent shall have thirty days . . . in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them." Fed R. Civ. P. 30(e). Thus, both the initial and amended correction sheets submitted by Rogers failed to comply with the literal requirements of Rule 30(e) because the initial correct sheet did not explain Rogers' reasons for making the changes, and the second sheet was submitted well after thirty days.

The Court of Appeals for the Fifth Circuit has indicated in an unpublished opinion that

deponents must strictly comply with all procedural aspects of Rule 30(e). Reed v. Hernandez, 114 Fed. Appx. 609, 611 (5th Cir. 2004) ("Rule 30(e) does not provide any exceptions to its requirements.") Although Reed does not constitute binding precedent, our district courts have found its reasoning persuasive. *See, e.g.,* Betts v. Gen. Motors Corp., No. 3:04cv169-M-A, 2008 WL 2789524 (N.D. Miss. July 16, 2008) (striking proposed deposition correction sheet because it failed to state reasons for changes); Crawford v. Hare Mortgage, LLC, No. 4:05CV186LR, 2006 WL 1892072 (S.D. Miss. July 10, 1986) (striking errata sheet because explanations were insufficient to constitute "reasons"). Accordingly, this Court follows the majority approach, as espoused in Reed, and finds that CIT's motion to strike the correction sheet of Rogers should be granted.[9]

B. Summary Judgment Standard

The Court now turns to CIT's summary judgment motions. Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, provides that "[t]he judgment sought should be rendered if the pleadings, the discovery . . . , and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). As explained by the United States Supreme Court in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Rule 56 should be construed with "due regard not only for the rights of persons asserting claims and defenses . . . but also for the rights of persons opposing such claims and defenses to demonstrate . . . prior to trial, that the claims and defenses have no factual basis." Id. at 327. In order to survive a motion for summary judgment, the

[9] Notably, Rogers and Williams did not attach either the original or amended correction sheets to the portions of Rogers' testimony submitted in response to CIT's summary judgment motions (Rogers & Williams' Exs. 13 & 14), and, thus, they are not part of the summary judgment record.

non-movant may not rest solely upon unsupported allegations. Moore v. Miss. Valley State Univ., 871 F.2d 545, 549 (5th Cir. 1989). Instead, in order to withstand a motion for summary judgment, the non-movant must set forth specific facts which demonstrate that there are genuine issues to be tried. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

The movant bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Archie v. State Farm Fire & Cas. Co., 813 F. Supp.1208, 1211 (S.D. Miss. 1992). In evaluating a motion for summary judgment, a court must resolve all ambiguities and draw all reasonable inferences in the non-movant's favor. Dorē Energy Corp. v. Prospective Inv. & Trading Co., 570 F.3d 219, 224 (5th Cir. 2009). A court cannot try issues on summary judgment, only determine if there are issues to be tried. Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986).

1. CIT's Motion for Partial Summary Judgment

The crux of CIT's first summary judgment motion, and the issue that the parties belabor in their briefs, is whether Rogers and Williams have standing to assert any or all of their claims against CIT. CIT contends in its brief that Rogers and Williams lack standing because (1) "Plaintiffs do not have a direct, legally cognizable cause of action against CIT" and (2) "Plaintiffs cannot subrogate to the rights of the Debtors." Specifically, CIT challenges the following claims alleged by Rogers and Williams in their Second Amended Complaint: Damages Mitigation Claim, Good Faith/Fair Dealing Claim, Draws Timing Claim, Void Lease Claim, and Unauthorized Draws Claim.

At the outset, CIT points out that neither Rogers nor Williams are parties to the Lease, nor

do they have any contractual relationship whatsoever with CIT. The Debtors' rejection of the Lease under § 365 was the equivalent of a breach of the Lease, but not its termination,[10] and did not affect the parties' substantive rights under the Lease.[11] Thus, the Debtors retain whatever rights they had against CIT under the Lease. CIT, however, does not cite any authority holding that a rejection of the Lease deprives any other parties from asserting rights of subrogation under the Lease.

Next, CIT challenges Rogers and Williams' allegations in their Second Amended Complaint that they "had surety relationships with CIT and the Debtors" and are therefore "subrogated to the rights and defenses of the Debtors under the Lease" by pointing out that in the sale/leaseback transaction they are mere "applicants" for letters of credit and the "independence principle" prevents them from asserting the same equitable subrogation rights that a guarantor would enjoy.

In response to CIT's contention that they lack standing, Rogers and Williams devote voluminous attention in their brief to the issue of whether the Lease is a "true lease" or a secured financing agreement. They contend that if the Lease is in reality a disguised security agreement, then their letters of credit secured the performance by the Debtors of the obligations of the Debtors under the Lease. Therefore, Rogers and Williams, as sureties, are subrogated to the rights and remedies of the Debtors. *See, e.g.*, In re Greenville Auto Mall, 278 B.R. 414 (N.D. Miss. 2001) (applying UCC provision identical to Miss. Code Ann. § 75-1-201(37) and finding that the lease sufficed as "de facto" security agreement).

The analysis presented by Rogers and Williams overlooks the more straightforward question

---

[10] *See* In re Austin Dev. Co., 19 F.3d 1077, 1083 (5th Cir.), *cert. den. sub nom*., Sowashee Venture v. E.B., Inc., 513 U.S. 874 (1994).

[11] *See* Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co., 83 F.3d 735, 742-2 (5th Cir. 1996).

of what rights, if any, they have against CIT as applicants of the letters of credit. In order to ensure full payment in the event of a default by the Debtors, CIT could have required a cash security deposit, a separate security agreement covering different equipment, or some other form of credit support, but instead CIT required the Debtors to procure a letter or letters of credit. Rogers and Williams' contention that the Lease is not a "true lease" but a secured financing arrangement does not answer the issue raised by CIT as a preliminary matter.[12]

In determining whether Rogers and Williams have standing, it is thus necessary to begin with a brief overview of letters of credit law.[13] A letter of credit is an engagement by an issuer, usually a bank, made at the request of a customer (or applicant) for a fee, to honor a beneficiary's drafts or other demands for payment upon satisfaction of the conditions set forth in the letter of credit. Miss. Code Ann. § 75-5-102. At common law, the issuer of a letter of credit had a direct obligation to pay independent of the underlying contract between the customer and the beneficiary as long as the documents presented satisfied the terms of the letter of credit. *See, e.g.*, Pringle-Associated Mortgage Corp. v. S. Nat'l Bank, 571 F.2d 871, 874 (5th Cir. 1978). This feature of a letter of credit is known as the "independence principle" and has been described as the "most unique and mysterious part of the letter of credit transaction." 3 James J. White & Robert S. Summers, Uniform Commercial Code § 26-2 (5th ed. 2007). In Mississippi, the independence principle is

---

[12] Whether the sale/leaseback transaction is a true lease or a security agreement may be important for other reasons. For example, a lessor has different rights than a secured creditor on default. *See, e.g.*, Siemens Fin. Serv., Inc. v. PhyMed Diagnostic Imaging Center of Dallas, Inc., 42 U.C.C. Rep. Serv. 2d (CBC) 1199 (N.D. Tex. June 6, 2000) (under equipment lease, there is no requirement to sell repossessed equipment in a "commercially reasonable manner").

[13] The Lease does not contain a choice of law provision. All parties apparently agree that this transaction is governed by Mississippi law.

codified in Miss. Code Ann. § 75-5-103(d), which states:

> Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.

Id.

In the context of letters of credit, courts in the past have disagreed about whether to apply the common-law doctrine of equitable subrogation. The United States Supreme Court defined the doctrine in American Surety Co. v. Bethlehem National Bank, 314 U.S. 314, 317 (1941), as follows: "Among the oldest . . . doctrines is the rule of subrogation whereby 'one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other.'" *Id*. (citations omitted). One of the many prerequisites to equitable subrogation is that the party seeking the benefit of subrogation not be primarily liable for the debt that the party paid. St. Paul Prop. & Liab. Ins. Co. v. Nance, 577 So. 2d 1238, 1241 (Miss.1991). For this reason, some courts have held that because an issuer of a letter of credit is primarily liable–in that a letter of credit imposes an independent duty to pay–an issuer *is not* entitled to equitable subrogation. In re Argrownautics, Inc., 125 B.R. 350 (Bankr. D. Conn. 1991). Other courts have held to the contrary, that is, that an issuer is secondarily liable because its duty to pay does not arise until a party to the underlying transaction has defaulted. Accordingly, an issuer *is* entitled to equitable subrogation. In re Valley Vue Joint Venture, 123 B.R. 199 (Bankr. E.D. Va. 1991).

In 1996, Mississippi adopted revisions to Article 5 of the Uniform Commercial Code governing letters of credit, as drafted by the National Conference of Commissioners on Uniform

State Laws (NCCUSL) and the American Law Institute (ALI). *See* John M. Czarnetzky, Symposium on the Uniform Commercial Code: Article: Modernizing Commercial Financing Practices: The Revisions to Article 5 of the Mississippi UCC, 66 Miss. L.J. 325 (1996). The revisions to Article 5 resolved the subrogation question in letter of credit transactions in favor of letter of credit applicants and issuers, as follows:

> (a) An issuer that honors a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.
>
> (b) An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in subsection (a).

Miss. Code Ann. § 75-5-117. As revised, § 75-5-117 explicitly places an applicant who has paid an issuer of a letter of credit in the same position as if that person were a guarantor. This revision overruled cases such as Tudor Development Group, Inc. v. United States Fidelity & Guaranty Co., 968 F.2d 357, 362 (3d Cir. 1992), that denied an issuer of a letter of credit the right to seek subrogation on the ground that an issuer's obligation under a letter of credit was "primary" whereas a guarantor's obligation was "secondary." Tudor Dev. Group, Inc., 968 F.2d at 362. Instead, § 75-5-117 embraced the view of the dissenting opinion in Tudor Development Group, Inc. that a letter of credit issuer is functionally the same as a guarantor, and accordingly is entitled to equitable subrogation. Tudor Dev. Group, Inc., 968 F.2d at 364-71 (Becker, J., dissenting) (denying equitable subrogation after payment of letter of credit would amount to pointless formalism).

The cases cited by CIT in its brief in support of its contention that the principle of

independence bars Rogers and Williams from seeking equitable subrogation were decided before enactment of the extensive revisions to Article 5 in 1996, and for that reason are inapposite.[14] *See, e.g.*, Tudor Dev. Group, Inc., 968 F.2d at 362; In re East Texas Steel Facilities, Inc., 117 B.R. 235, (N.D. Tex. 1990). CIT, nevertheless, gives short shrift to § 75-5-117 in its briefs and contends that the statute carves out only limited exceptions to the independence principle. CIT then insists that the statute does not apply here because the exceptions do not specifically grant an applicant of a letter of credit (such as Rogers and Williams) rights of subrogation against a beneficiary (like CIT).

CIT misconstrues the nature of Miss. Code Ann. § 75-5-117. This provision does not create narrow exceptions but instead removes the independence principle as a basis for denying equitable subrogation. Notably, subsection (d) of Miss. Code Ann. § 75-5-117 maintains the integrity of the independence principle, and thus the usefulness of letters of credit in the world of commercial financing, by conferring subrogation rights only *after* a beneficiary has been paid:

> (d) Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in subsections (a) and (b) do not arise until the issuer honors the letter of credit or otherwise pays . . . . Until then, the issuer, nominated person and the applicant do not derive under this section present or prospective rights forming the basis of a claim, defense or excuse.

Miss. Code Ann. § 75-5-117. In this way, subsection (d) eliminates the concerns provoked by the often-criticized decision in Twist Cap, Inc. v. Southeast Bank of Tampa (In re Twist Cap, Inc.), 1 B.R. 284 (Bankr. M.D. Fla. 1979), which enjoined payment of a letter of credit, thus diminishing its value as a commercial device.

---

[14] For a discussion of how the outcome of these cases would change by applying Section 5-117, see Robert A. Sullivan, Banking Law Symposium: Rights of Subrogation in Letters of Credit Transactions, 41 St. Louis L.J. 47 (1996).

Moreover, CIT makes too much of the omission in the statute granting an applicant subrogation rights against a beneficiary. Typically, a standby letter of credit transaction is a three-party arrangement involving two contracts and the letter of credit. The three parties include: (1) the party who procures the letter of credit (the applicant), (2) the issuer (usually a bank), and (3) the beneficiary of the letter of credit. Resolution Trust Corp. v. United Trust Fund, Inc., 57 F.3d 1025, 1030 (11th Cir. 1995). The first contract, between the applicant and issuer, requires the applicant to reimburse the issuer for payments made on the letter of credit; the second contract, usually between the applicant and the beneficiary, forms the underlying transaction. 3 James J. White & Robert S. Summers, Uniform Commercial Code § 26-2 (15th ed. 2007). The facts of this case are unusual because of the involvement of additional parties to the letter of credit transaction–Rogers and Williams, who themselves are not parties to the Lease. It is therefore not surprising that the statute does not address the subrogation rights of an applicant against the beneficiary since they are usually already parties to the underlying transaction. In any event, Miss. Code Ann. § 75-5-103 specifically recognizes that Article 5 does not govern all the rules and concepts of letters of credit and a statement of a rule "does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified . . . . " *Id.*; *see* Ochoco Lumber Co. v. Fibrex & Shipping Co., 994 P.2d 793, 795 (Or. Ct. App. 2000).

For the above reasons, this Court concludes that on the record before it, the independence principle does not preclude Rogers and Williams from asserting their claims against CIT under the doctrine of equitable subrogation. This conclusion, however, is not tantamount to a holding that Rogers and Williams have rights of equitable subrogation under the facts presented here. Rogers and Williams still must show that they are entitled to subrogation of the Debtors' rights under state

law.

CIT next contends that even if Rogers and Williams have standing to assert their claims under the doctrine of equitable subrogation, their claims are subject to the same defenses CIT could assert against the Debtors under the law of surety. Nance, 577 So. 2d at 1241. CIT articulates the following defenses: (1) Rogers and Williams are estopped from alleging that CIT failed to dispose of the Equipment in a good faith and commercially reasonable manner, (2) the terms of the Lease granted CIT the right to keep any excess proceeds resulting from the disposition of the Equipment, and (3) CIT complied with the terms of the Lease.

Although these defenses, without question, are proper matters for consideration at trial, they are not proper fodder for summary judgment because the viability of CIT's defenses hinge upon whether the sale/leaseback arrangement between CIT and the Debtors was a true lease or a secured transaction, as Rogers and Williams contend. The resolution of this issue determines if this transaction is governed by Article 2A or Article 9 of the Miss. Code of 1972, as amended and requires a factual determination based upon the expectation of the parties at the time they executed the Lease. *Compare* In re Triplex Marine Maintenance, Inc., 258 B.R. 659 (E.D. Tex. 2000) (under amended definition in § 1-207(37), alleged lease was not a true lease but a disguised security agreement) *with* In re Yarbrough, 211 B.R. 6754 (W.D. Tenn. 1997) (applying Miss. Code Ann. § 75-1-207(37) and finding that rental-purchase agreement was a lease and not a security interest). Rogers and Williams have shown in their consolidated response the existence of numerous disputed facts related to this issue, including, but not limited to, whether the Debtors were obligated to make all Lease payments and whether CIT retained some economically meaningful interest in the Equipment at the end of the Lease term.

Assuming this transaction constitutes a secured transaction, Rogers and Williams again have shown in their consolidated response that this proceeding is replete with numerous material factual issues that remain in dispute, including, but not limited to, whether CIT failed to mitigate its damages, whether CIT's disposition of the Equipment breached its duty of good faith and fair dealing, and whether CIT presented the letters of credit for payment in a manner consistent with the parties agreement. In any event, this Court has the discretion to deny CIT's summary judgment motion to give the parties an opportunity to fully develop their claims and defenses at trial. *See* Kunin v. Feofanov, 69 F.2d 59, 61 (5th Cir. 1995).

2. CIT's Motion for Partial Summary Judgment for Failure To Meet Burden of Proof

In its second summary judgment motion, CIT contends that there are insufficient facts or evidence to establish the essential elements of the remaining claims included in Rogers and Williams' Second Amended Complaint. These claims are the Conspiracy Claim and the Misrepresentation Claim. Again, Rogers and Williams have demonstrated in their consolidated response that genuine issues of material facts exist as to each of these claims, including, but not limited to, whether there was a tacit agreement between CIT and Koch to deny Rogers and Williams the benefit of a commercially reasonable disposition of the Equipment and whether CIT intentionally or negligently overstated the value of the Equipment subject to the Lease.

CONCLUSION

In conclusion, viewing all facts in the light most favorable to Rogers and Williams, the Court finds that genuine issues of material fact exist. Accordingly, *The CIT Group/Equipment Financing Inc.'s Motion for Partial Summary Judgment* and *The CIT Group/Equipment Financing Inc.'s Motion for Partial Summary Judgment for Failure To Meet Burden of Proof* should be denied. A

separate judgment consistent with this Memorandum Opinion will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

Also, for the reasons set forth above, *The CIT Group/Equipment Financing, Inc.'s Motion To Strike Regarding Affidavits of John M. Rogers, Sr., J. Kelley Williams, and Tito Echiburu,* should be denied, and *The CIT Group/Equipment Financing, Inc.'s Motion To Strike Deponent's Correction Sheet of John M. Rogers, Sr.* should be granted. A separate order will be entered consistent with this Memorandum Opinion.

SO ORDERED this the 16th day of November, 2009.

/s/ EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: **CHAPTER 11**

B.C. ROGERS POULTRY, INC. **CASE NO. 01-06516-EE**
B.C. ROGERS PROCESSORS, INC.,
Jointly Administered

JOHN M. ROGERS, SR., AND
J. KELLEY WILLIAMS, AS TRUSTEE OF THE
J. KELLEY WILLIAMS REVOCABLE TRUST **PLAINTIFFS**

VS. **ADVERSARY NO. 03-00122-EE**

THE CIT GROUP/EQUIPMENT FINANCING, INC.,
AND H. KENNETH LEDFOLDT, AS LIQUIDATING
TRUSTEE OF THE B.C. ROGERS LIQUIDATING TRUST **DEFENDANT**

FINAL JUDGMENT ON *MOTION FOR PARTIAL SUMMARY JUDGMENT* AND *MOTION FOR PARTIAL SUMMARY JUDGMENT FOR FAILURE TO MEET BURDEN OF PROOF*

Consistent with the Court's opinion entered contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that *The CIT Group/Equipment Financing Inc.'s Motion for Partial Summary Judgment* is hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that *The CIT Group/Equipment Financing Inc.'s Motion for Partial Summary Judgment for Failure To Meet Burden of Proof* is hereby denied.

This judgment is a final judgment for purposes of Federal Rules of Bankruptcy Procedure 7054 and 9021.

SO ORDERED this the 16th day of November, 2009.

/s/ EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE