

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL**

**CASUAL CONCEPTS AKA
CARGO FURNITURE,**

Plaintiff,

vs.

**PATRICIA KIMBALL, GEORGE KIMBALL,
and PATRICIA KIMBALL d/b/a REAL WOOD
FURNITURE,**

Defendants.

CIVIL NO. 529/1999

ACTION ON CONTRACT

NOT FOR PUBLICATION

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(Defendant, *pro se*)

CABRET, P.J.

MEMORANDUM OPINION

(September 13, 2000)

Casual Concepts, also know as Cargo Furniture ("Casual Concepts"), sued Defendants Patricia Kimball and George Kimball alleging that the defendants are liable for the price of items they allegedly purchased from the plaintiff. George Kimball denied Casual Concepts allegations, and Patricia Kimball is in default for failing to answer the Complaint. The matter is now before the Court on Casual Concepts' Motion for Summary Judgment. For reasons which follow, the Court will deny the relief requested, but will grant Casual Concepts a default judgment against

Defendant Patricia Kimball. In addition, the Court will, *sua sponte*, grant summary judgment in favor of Defendant George Kimball unless Plaintiff establishes a material fact concerning his liability for the claimed damages.

I. FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

In its Complaint, Casual Concepts alleges that "Patricia Kimball, is a business person in St. Croix d/b/a Real Wood Furniture [and that] George Kimball, her husband[,], was the operator and in control of said business."¹ According to the Complaint, "Plaintiff shipped merchandise on account to Defendants during, 1996, in the sum of \$37,069.62; that Defendants, jointly and severally, owe Plaintiff a balance in the sum of \$37,069.22; [and] that Defendants have failed to pay for the merchandise (sic)."²

Both Defendants were served by publication, but only George Kimball, *pro se*, answered the Complaint. In his answer, George Kimball denied liability and affirmatively asserted that Plaintiff failed to state a cause of action against him upon which relief can be granted. George Kimball further asserted that "[t]he business with which Defendant may have transacted business was owned by co-defendant Patricia Kimball and not defendant George Kimball."³ The Territorial Court Clerk entered a default against Patricia Kimball on May 8, 2000. *See* Terr. Ct. R. 47 (providing for entry of default upon failure to answer).

¹ Complaint at paragraph 3.

² Complaint at paragraph 4.

³ Answer of George Kimball at paragraph 2 of Affirmative Defenses.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Casual Concepts has now moved for summary judgment against both Defendants, arguing that the undisputed evidence shows it is entitled to judgment as a matter of law. In support of its motion, Casual Concepts asserts that "Defendants, as husband and wife, operated Real Wood Furniture and listed both names as contact persons in (sic) Dealer Credit Application with Plaintiff."⁴ Casual Concepts contends that because the damages are liquidated, it is entitled to summary judgment against Defendants in the sum prayed for plus interest and attorney fees. George Kimball has not responded to the motion.

In support of its allegations, Casual Concepts submits three exhibits. The first exhibit is an affidavit of the controller for Casual Concepts. The affidavit establishes that "Real Wood Furniture Co." of St. Croix purchased items from Casual Concepts and is indebted to the plaintiff for the purchase price of \$37,069.62⁵. The second exhibit is a copy of an account history which, like the affidavit, establishes that Real Wood Furniture is indebted to Casual Concepts in the principal amount of \$37,069.62. The third document is a copy of a "Dealer Credit Information" form which due to the poor copy quality is of limited value. The form does reveal, however, that the credit account was opened under the name of "Real Wood Furniture Co."

⁴ Motion for Summary Judgment at 1.

⁵ Affidavit of Linda C. Hardy.

III. DISCUSSION

Due to the procedural posture and evidence presented in this case, the Court concludes that Casual Concepts is entitled to a default judgment against Patricia Kimball, but that the plaintiff is not entitled to summary judgment against George Kimball. In fact, the pleadings and evidence of record indicate that George Kimball is entitled to summary judgment on Plaintiff's claim against him.

A. Default Judgment Against Patricia Kimball.

Casual Concepts is entitled to default judgment against Patricia Kimball. Rule 48 of the Territorial Court Rules authorizes the Court enter the judgment, and the evidence before the Court firmly establishes the amount of the plaintiff's damages. *See generally Jones v. Winnetoesaukee Realty*, 990 F.2d 1, 4 (1st Cir. 1993) (holding that entry of default establishes fact of damage and court must determine amount of damage). The Complaint and exhibits submitted by Casual Concepts show that Patricia Kimball, as the owner of Real Wood Furniture Company, failed to pay for items she purchased for her company and is therefore liable to Casual Concepts for the \$37,069.22 price of those items. In addition, inasmuch as the parties' credit agreement did not specify a rate of interest, the Court will award prejudgment interest at the rate of nine percent from February 2, 1997, the last "due-date" reflected on Casual Concepts' invoice to Real Wood Furniture Company. *See V.I. Code Ann. tit. 11, §951 (a) (4) (1998)* (providing for interest of nine percent on contract amount when no rate is specified). Finally, Casual Concepts has presented counsel's affidavit which shows that it has incurred \$1447.50 in fees and costs of

\$200.96 which the Court will award to the plaintiff.⁶

B. Plaintiff's Motion for Summary Judgment Against George Kimball.

To prevail on its Motion for Summary Judgment against George Kimball, Casual Concepts must show that "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 [it is] entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Under this standard, the Casual Concepts "bears the initial burden of showing that no genuine issue of material fact exists. But once [Casual Concepts] properly supports a motion for summary judgment, [Kimball] 'may not rest upon the mere allegations or denial of [his] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial.' Any doubts are resolved in favor of [Kimball] whose allegations are taken to be true." Mingolla v. Minnesota Mining and Mfg. Co., 893 F. Supp. 499, 503 (D.V.I. 1995) (citations omitted). And, although Local Rule of Civil Procedure 7.1(j) generally authorizes a court to treat unopposed motions as conceded, motions for summary judgment do not fall within that rule. See Anchorage Associates v. V.I. Bd. of Tax Review, 922 F.2d 168 (3d Cir. 1990). Thus, notwithstanding George Kimball's failure to respond to the motion for summary judgment, the Court must still determine whether Casual Concepts has presented sufficient evidence to establish that it is entitled to judgment as a matter of law. See id.

⁶ The Court will not award fees for "estimated time pending" as reflected on counsel's affidavit as the evidence of such fees is speculative.

A review of the limited evidence of records reveals that Casual Concepts has not met its burden. Construing this evidence in George Kimball's favor, as the Court must do on Plaintiff's Motion for Summary Judgment, the Court finds that at best it presents a fact issue concerning his liability for the debt. Indeed, all the evidence presented by Casual Concepts shows that the entity which purchased the items was a company named Real Wood Furniture Company. In fact, all three exhibits presented by Casual concepts -- the controller's affidavit, the account history and the credit information form -- all unequivocally establish that the items were purchased by Real Wood Furniture Company. Casual Concepts has presented no evidence indicating that George Kimball agreed to be liable for the debts of Real Wood Furniture Company. Moreover, the only alleged nexus between George Kimball and the debt is that he was listed as a contact person for Real Wood Furniture Company, was purportedly the business manager and was married to the owner, Patricia Kimball. Casual Concepts has cited no authority establishing George Kimball's liability under these circumstances and the Court is not aware of any. Thus, Casual Concepts is not entitled to summary judgment against George Kimball. Instead, these circumstances indicate that George Kimball is entitled to summary judgment against Casual Concepts on its claim against him. Before entering such judgment *sua sponte*, however, the Court will provide Casual Concepts and opportunity to present evidence and argument supporting its claim. See Suid v. Phoenix Fire and Marine Ins. Co., 26 V.I. 223, 226 (D.V.I. 1991) (discussing court's authority to enter summary judgment *sua sponte*).

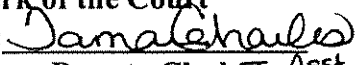
IV. CONCLUSION

For the reasons stated above, the Court concludes that Casual Concepts is entitled to default judgment against Defendant Patricia Kimball. Casual Concepts has not established, however, that it is entitled to summary judgment against George Kimball. Moreover, both the limited evidence of record and the allegations in Casual Concepts' Complaint indicate that summary judgment should be entered in favor of George Kimball on Plaintiff's claim against him. The Court will therefore enter such judgment unless Casual Concepts points to evidence establishing a material fact.



MARIA M. CABRET
Presiding Judge

ATTEST:
DENISE D. ABRAMSEN
Clerk of the Court

By: 
Deputy Clerk J. Asst II

Dated: 9/14/00