

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

WILLIAM C. CARPENTER, JR.  
JUDGE

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RE: Arnold J. Sussman, Robert Skaff, & David J. Towner v. Diamondhead  
Casino Corporation  
C.A. No. N18C-11-091 WCC

Dear Counsel:

After hearing oral arguments on July 13, 2020, the Court reserved judgment on Plaintiffs' Motion for Summary Judgment. As explained below, the Court will grant Plaintiffs' Motion.

On November 10, 2010, Plaintiff Arnold J. Sussman ("Sussman") invested \$50,000 with Diamondhead Casino Corporation ("Diamondhead") and received an

executed Promissory Note (the “Sussman Note”) in return.<sup>1</sup> Pursuant to the terms of the Sussman Note, Diamondhead was required to pay \$50,000 to Sussman by November 10, 2012, plus interest at a rate of nine percent annually.<sup>2</sup> It is undisputed that Diamondhead has failed to pay principal on the Sussman Note and has failed to pay interest payments as of June 30, 2012.<sup>3</sup>

On November 29, 2010, Plaintiff Robert Skaff (“Skaff”) invested \$37,500 with Diamondhead and received an executed Promissory Note (the “Skaff 2010 Note”) in return.<sup>4</sup> Pursuant to the terms of the Skaff 2010 Note, Diamondhead was required to pay \$37,500 to Skaff by November 29, 2012, plus interest at a rate of nine percent annually.<sup>5</sup> It is undisputed that Diamondhead has failed to pay principal on the Skaff 2010 Note and has failed to pay interest payments as of June 30, 2012.<sup>6</sup>

On June 21, 2011, Skaff invested \$25,000 with Diamondhead and received an executed Promissory Note (the “Skaff 2011 Note”) in return.<sup>7</sup> Pursuant to the terms of the Skaff 2011 Note, Diamondhead was required to pay \$25,000 to Skaff by June 21, 2013, plus interest at a rate of nine percent annually.<sup>8</sup> It is undisputed that

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<sup>1</sup> Consol. Compl. Ex. A.

<sup>2</sup> *Id.*

<sup>3</sup> Answ. ¶ 8.

<sup>4</sup> Consol. Compl. Ex. B.

<sup>5</sup> *Id.*

<sup>6</sup> Answ. ¶ 13.

<sup>7</sup> Consol. Compl. Ex. C.

<sup>8</sup> *Id.*

Diamondhead has failed to pay principal on the Skaff 2011 Note and has failed to pay interest payments as of June 30, 2012.<sup>9</sup>

On November 29, 2010, David J. Towner (“Towner”) invested \$25,000 with Diamondhead and received an executed Promissory Note (the “Towner Note”) in return.<sup>10</sup> Pursuant to the terms of the Towner Note, Diamondhead was required to pay \$25,000 to Towner by November 29, 2012, plus interest at a rate of nine percent annually.<sup>11</sup> It is undisputed that Diamondhead has failed to pay principal on the Towner Note and has failed to pay interest payments as of June 30, 2012.<sup>12</sup>

On November 9, 2018, Sussman filed suit against Diamondhead for breach of the Sussman Note. Shortly thereafter, Skaff and Towner filed a Complaint against Diamondhead for breaches of their Promissory Notes as well, resulting in a Consolidated Complaint seeking payment for the principal of four promissory notes (collectively, “the Notes”), plus interest.<sup>13</sup>

In reviewing a motion for summary judgment pursuant to Superior Court Civil Rule 56, the Court must determine whether any genuine issues of material fact exist.<sup>14</sup> The moving party bears the burden of showing that there are no genuine issues of material fact, such that he or she is entitled to judgment as a matter of law.<sup>15</sup>

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<sup>9</sup> Answ. ¶ 13.

<sup>10</sup> Consol. Compl. Ex. D.

<sup>11</sup> *Id.*

<sup>12</sup> Answ. ¶ 16.

<sup>13</sup> Consol. Compl.

<sup>14</sup> Super. Ct. Civ. R. 56(c); *Wilm. Tru. Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).

<sup>15</sup> *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

In reviewing a motion for summary judgment, the Court must view all factual inferences in a light most favorable to the non-moving party.<sup>16</sup> Where it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate, summary judgment will not be granted.<sup>17</sup>

In its defense, Diamondhead does not dispute the material factual allegations; instead, in its answer it raises six affirmative defenses: (1) statute of limitations, (2) failure to state a claim, (3) implied covenant of good faith, (4) bad faith and improper actions, (5) unclean hands, and (6) reduction/offset.<sup>18</sup> However, during oral argument defense counsel agreed that they were only pursuing whether the statute of limitations had been met and whether an offset should occur as a result of a bankruptcy judge's Order.<sup>19</sup> First, it is important to note that each of the Notes includes the following provision regarding Diamondhead's right to raise defenses:

#### 4.6 Payment Not Subject to Set-Off.

The Borrower [Diamondhead] acknowledges that ***it has not and will not be permitted to assert any right of set-off or counterclaim*** with respect to its obligation to pay the principal and interest as of the Maturity Date as set forth herein and ***hereby waives any and all defenses it may have in the future with respect to such payment,*** except to the extent that (a) this Note has been converted into Common Stock in accordance with Article II prior to the Maturity Date, (b) the Borrower's defense is that Borrower has paid part or all of the principal and interest due hereon in accordance with the terms hereof or (c) the

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<sup>16</sup> *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).

<sup>17</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. Ct. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).

<sup>18</sup> Answ.

<sup>19</sup> Plaintiff filed an involuntary bankruptcy petition against Defendant which was dismissed with the Court ordering reimbursement for Defendant's attorney fees and expenses.

Holder has expressly waived its right to such payment in a writing signed by Holder.<sup>20</sup>

Section 4.6 appears to waive Diamondhead's right to assert defenses and any right to set-off. In order to be valid, a waiver "must be voluntarily, knowingly, and intelligently made."<sup>21</sup> The Court assesses the validity of a waiver by the totality of the circumstances.<sup>22</sup> There is no evidence or allegations to suggest that the waiver included in the Notes was not made voluntarily, knowingly, and intelligently. On behalf of Diamondhead, each of the Notes is signed by Deborah Vitale, the President of Diamondhead and a licensed attorney and it appears that Defendant created the Notes signed by Plaintiffs.<sup>23</sup> The Court finds that Section 4.6 waives Diamondhead's right to "any and all defenses" and confirms that Diamondhead has no right to set-off.

However, even if the Court were to consider the issues of the statute of limitations and set-off, it would not accept the positions argued by Diamondhead. It is clear under the Note provisions that the Plaintiffs had the ability to decide if they wanted to declare a default once an interest payment was missed or to wait until the Note matured. At best, the statute of limitations began to run 60 days following maturity and there is no dispute this action was filed just before the six-year statute

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<sup>20</sup> Consol. Compl. Ex. A-D at §4.6 (emphasis added).

<sup>21</sup> *Mazik v. Decision Making, Inc.*, 449 A.2d 202, 204 (Del. 1982).

<sup>22</sup> *Id.*

<sup>23</sup> See Pl.'s Opening Br. in Support of Their Mot. for Summ. J. Ex. 7 ¶1.

of limitation period ran. As such, the Court would have found the litigation timely filed.

As indicated to the parties at oral argument, it certainly seems logical and practical to allow for a set-off between the amount of the promissory note and the amount awarded Diamondhead in the bankruptcy proceeding. However, since the bankruptcy judge specifically indicated that their award was “not subject to any claim of setoff,” this Court will not overrule that finding.<sup>24</sup> Certainly, the parties can agree to a setoff, but the Court will not order one. Plaintiffs’ Motion for Summary Judgment is granted.

## **I. Damages**

### **a. Sussman Note**

Pursuant to the terms of the Sussman Note, Diamondhead has failed to pay the principal of \$50,000 owed to Sussman and has failed to pay interest as of June 30, 2012. Therefore, Diamondhead is ordered to pay Sussman the principal of \$50,000, plus all interest owed, accruing at an annual interest rate set forth in the note.

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<sup>24</sup> Pl.’s Opening Br. in Support of Their Mot. for Summ. J. Ex. 9 (Amended Order, *In re Diamondhead Casino Corp.*, No. 15-11647 (Bankr. D. Del. Sept. 1, 2016)).

**b. Skaff 2010 Note**

Pursuant to the terms of the Skaff 2010 Note, Diamondhead has failed to pay the principal of \$37,500 owed to Skaff and has failed to pay interest as of June 30, 2012. Therefore, Diamondhead is ordered to pay Skaff the principal of \$37,500, plus all interest owed, accruing at the annual interest rate set forth in the note.

**c. Skaff 2011 Note**

Pursuant to the terms of the Skaff 2011 Note, Diamondhead has failed to pay the principal of \$25,000 owed to Skaff and has failed to pay interest as of June 30, 2012. Therefore, Diamondhead is ordered to pay Skaff the principal of \$25,000, plus all interest owed, accruing at an annual interest rate set forth in the note.

**d. Towner Note**

Pursuant to the terms of the Towner Note, Diamondhead has failed to pay the principal of \$25,000 owed to Towner and has failed to pay interest as of June 30, 2012. Therefore, Diamondhead is ordered to pay Towner the principal of \$25,000, plus all interest owed, accruing at an annual interest rate set forth in the note.

IT IS SO ORDERED.

  
Judge William C. Carpenter, Jr.