

**IN THE CIRCUIT COURT OF KANAWHA COUNTY WEST VIRGINIA**

**VIKING VIDEO & MUSIC INC.,  
A West Virginia Corporation,**

**PLAINTIFF,**

**VS.**

**SUMMIT COMMUNITY BANK, INC.,  
a West Virginia corporation,**

**DEFENDANT.**

**2012 OCT 22 PM 3: 26**

**CATHY S. GATSON, CLERK  
KANAWHA CO. CIRCUIT COURT**

**CIVIL ACTION NO. 12-C-2134**

**COMPLAINT**

Now comes the Plaintiff, Viking Video & Music Inc., by counsel, who for its cause of action against the Defendant, Summit Community Bank, Inc., states as follows:

**PARTIES**

1. Plaintiff, Viking Video & Music Inc. ("Viking"), now is and at all times hereinmentioned was a West Virginia corporation doing business in Kanawha County, West Virginia.

2. The Defendant, Summit Community Bank, Inc. ("Summit"), now is and at all times hereinmentioned was a West Virginia corporation doing business in Kanawha County, West Virginia.

**JURISDICTION AND VENUE**

3. Jurisdiction and venue are proper in this Court in that all of the acts and omissions that occurred by Defendant were in Kanawha County, West Virginia and Defendant does business in Kanawha County, West Virginia.

## **STATEMENT OF FACTS**

4. Viking is in the business of owning and leasing limited video lottery terminals.

5. On or about February 11, 2011, Viking anticipated submitting a bid to the West Virginia Lottery Commission ("Lottery Commission") in an attempt to obtain licenses for 70 limited video lottery terminals at a bid price of \$9,160.00 per terminal ("Bid").

6. In anticipation of making such Bid, Viking approached Summit to obtain financing for said bid.

7. The financing that was to be obtained was an Irrevocable Letter of Credit to be provided by Summit to the Lottery Commission in the full amount of the Bid submitted by Viking.

8. The Bid and accompanying Letter of Credit was to be for the sum of \$641,200.00 (70 terminals x \$9,160.00).

9. On and before February 11, 2011, Viking, by and through its owner, Dennis O. Kerns ("Kerns"), went to Summit at its Southridge location and advised its Senior Vice President, Jason D. Koontz ("Koontz") of his intentions.

10. After proper collateral had been placed by Mr. Kerns, Summit agreed to provide an Irrevocable Letter of Credit for Viking Video for the total amount of the Bid.

11. Mr. Koontz had his assistant, Tammy LNU ("Tammy"), prepare an Irrevocable Letter of Credit for the bank to submit on behalf of Viking's Bid.

12. In addition, Summit, by and through its employee, Tammy voluntarily assumed the duty of performing the mathematical calculation and placing it on the Bid.

13. In preparing the Irrevocable Letter of Credit and performing the mathematical calculation for the Bid for Viking, Tammy erroneously multiplied 70 terminals by \$9,106.00 rather than \$9,160.00. In so doing, the amount placed on the Bid was \$637,420.00 and inconsistent with the bid price per machine. In addition, the Irrevocable Letter of Credit to support the Bid contained the same error.

14. The bid of \$9,160.00 per terminal would have been sufficient for Viking to receive licenses from the Lottery Commission for all 70 terminals had the Bid and Irrevocable Letter of Credit been correct.

15. As a result of the error, the Lottery Commission did not award Viking a license for those 70 terminals.

16. At all times hereinmentioned, Tammy and Koontz were acting within the scope of their employment with Summit, and therefore Summit is liable for their wrongful acts and omissions under the Doctrine of Respondeat Superior.

17. As a result of said errors, Viking has incurred substantial monetary losses as set forth hereinbelow.

## **COUNT I**

### **(Breach of Contract)**

18. Plaintiff realleges, reasserts and incorporates by reference each and

every allegation set forth in Paragraph 1 through 17 of this Complaint as if fully set forth herein.

19. Summit and Viking entered into a contract whereby Summit would provide an Irrevocable Letter of Credit to the Lottery Commission for Viking to support its Bid and provide other related services in exchange for which Viking would compensate Summit through various fees and charges.

20. Implied within this contract was a duty by Summit to undertake its obligations in a reasonably prudent manner and without negligence.

21. Summit breached said duty by miscalculating the total amount of the Bid and Irrevocable Letter of Credit.

22. As a direct and proximate result of said breach of contract, Plaintiff has incurred damages as set forth hereinbelow.

## **COUNT II**

### **(Special Relationship)**

23. Plaintiff realleges, reasserts and incorporates by reference each and every allegation set forth in Paragraph 1 through 22 of this Complaint as if fully set forth herein.

24. There existed by and between Summit and Viking a “special relationship” that extended beyond their contract.

25. Summit had a duty to perform all tasks relating to or on behalf of Viking in a reasonably prudent manner.

26. Summit breached said duty by negligently creating documents which

contained erroneous information.

27. As a direct and proximate result of the Defendant's negligence, Plaintiff has incurred damages as set forth hereinbelow.

### **COUNT III**

#### **(Assumption of Duty)**

28. Plaintiff realleges, reasserts and incorporates by reference each and every allegation set forth in Paragraph 1 through 27 of this Complaint as if fully set forth herein.

29. Defendant assumed the duty of calculating the amount of the Bid and Letter of Credit and preparing the documents associated therewith.

30. By assuming said duty, Defendant was required to perform said duty in a reasonably prudent manner.

31. Defendant breached said duty by negligently calculating the amount of the Bid and Letter of Credit and negligently preparing the Bid and Letter of Credit.

32. As a direct and proximate result of said breach of its duty, Defendant is liable to Plaintiff for damages as set forth hereinbelow.

### **DAMAGES**

33. As a direct and proximate result of the Defendant's wrongful conduct as set forth hereinabove, Plaintiff has incurred damages for having to obtain licenses for 70 terminals at the matching price of \$15,003.00 per terminal for a total of \$1,050,200.10, which was \$409,010.00 greater than the amount for which

it should have received the licenses, if no error by the Defendant had been made. In addition, Plaintiff is entitled to additional interest charges that it has and may pay in the future on the difference in the amount of money borrowed to obtain 70 terminals. Furthermore, the additional \$409,010.00 could have been used by Plaintiff to bid for other terminals which would have generated additional income for ten years. Plaintiff is also entitled to attorney fees.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff demands judgment of and against the Defendant for compensatory damages as to be determined by a jury. Plaintiff requests that the Court award it costs and expenses incurred in bringing this suit, including reasonable attorney fees, and such other relief as the Court deems just.

**PLAINTIFF DEMANDS TRIAL BY JURY!**

**VIKING VIDEO & MUSIC, INC.**

**By Counsel,**

**CICCARELLO, DEL GIUDICE & LAFON**

By: 

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