Grodnick v Weisgal
2007 NY Slip Op 30637(U)
February 2, 2007
Supreme Court, New York County
Docket Number: 0600747/2006
Judge: Carol R. Edmead
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SCANNED ON 2/5/2007

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD, Justice

PART 35

Grodnick, Scott

- v -

Weisgal, Benjamin

INDEX NO. 600747/06

MOTION DATE 10/5/06

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for dismiss defense

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
FEB 05 2007
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of Plaintiff's motion for summary judgment dismissing the first counterclaim is granted only to the extent of dismissing defendant's claim for a corporate accounting; and it is further

ORDERED that the branch of Plaintiff's motion to dismiss the second, third, fourth, and fifth counterclaims is denied; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment dismissing the sixth, seventh, and eighth counterclaims is granted; and it is further

ORDERED that the branch of Plaintiff's motion to dismiss Defendant's first, second, third, fifth, and sixth affirmative defenses is granted; and it is further

ORDERED that the branch of Plaintiff's motion to dismiss Defendant's fourth affirmative defense is denied; and it is further

ORDERED that the branch of Plaintiff's motion to dismiss Defendant's seventh and eighth affirmative defenses is granted, without opposition; and it is further

Dated: ______________________ ______________________ J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

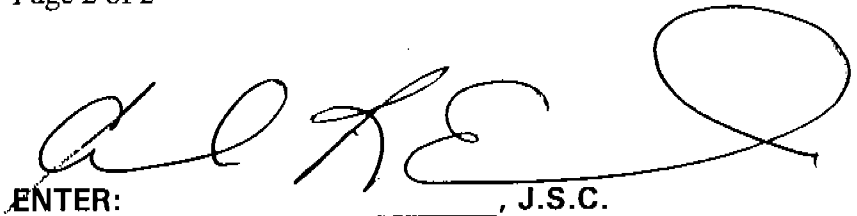
ORDERED that the branch of Plaintiff's motion for an order granting summary judgment on all causes of action or, in the alternative, on the first and second causes of action, is denied without prejudice; and it is further

ORDERED that the branch of Defendant's cross-motion to amend the Answer as to the proposed second and fourth counterclaims is granted; and it is further

ORDERED that the branch of Defendant's cross-motion to amend the Answer to assert the ninth cause of action is denied.

This constitutes the decision and order of the Court.

FILED
FEB 05 2007



Dated 2/2/07 ENTER: ______________________, J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

--x

SCOTT R. GRODNICK,

Plaintiff,

-against-

BENJAMIN H. WEISGAL,

Defendant.

--x

Index No. 600747-2006

Sequence 001
DECISION/ORDER

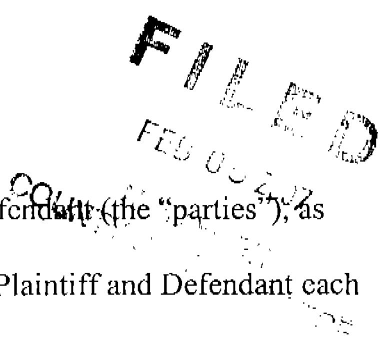
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover moneys loaned directly to or paid to third parties on behalf of defendant, Benjamin H. Weisgal (“Defendant”), plaintiff, Scott R. Grodnick (“Plaintiff”) now moves for summary judgment on his complaint, and to dismiss Defendant’s affirmative defenses and counterclaims.

Motion for Summary Judgment

In support of his motion, Plaintiff asserts the following facts and bases for judgment in his favor:



The Buy-In Loan

Pursuant to a Purchase Agreement between Plaintiff and Defendant (the “parties”), as Purchasers, and Dominick Tonacchio (“Tonacchio”), as the Seller, Plaintiff and Defendant each obtained a one-third interest of two companies, a plumbing supply business, D.T. Supply Corp. (“DT Supply”) and a kitchen and bath store, D.T. Baths Plus, Inc. (“DT Baths”) (collectively, “Companies”). Tonacchio retained one-third interest of the Companies.

Plaintiff asserts that Defendant lacked sufficient funds to cover his 50% share of the

down payment due at closing (the "Closing") of the Purchase Agreement. Therefore, Plaintiff took out a home equity loan and loaned $25,000 to Defendant, which Defendant agreed to repay, with interest, by the end of December 31, 2003.[1] Defendant made numerous monthly interest payments on this loan, and acknowledged, through a series of emails, his obligation to repay this debt.

Plaintiff claims that prior to the purchase, Plaintiff and Defendant reviewed and discussed an Accountant's Report, which showed that the companies had generated substantial losses and were operating in the "red," and decided to buy low and turn the Companies around.

Merrill Lynch Business Financial Services, Inc. ("Merrill Lynch") Line of Credit

Within days after the Closing, the Companies' lender, North Fork Bank, advised the parties that it was canceling the Companies' line of credit. Thus, on May 24, 2004, DT Supply entered into a line of credit agreement for $600,000 with Merrill Lynch. The parties, Tonacchio, and DT Baths each conditionally guaranteed payment of the line of credit. In addition to his personal guaranty, Plaintiff also pledged as collateral $744,381.16 in securities he maintained in a Merrill Lynch brokerage account.

By demand notice dated February 8, 2005, Merrill Lynch advised that there was an overdraft of $7,651.75 on the loan account, and that as of February 7, 2005, $607,651 was due and owing on the account. Merrill Lynch demanded that DT Supply bring the loan balance below the maximum loan amount, and that annual corporate tax returns and various financial records be provided within 15 days after the date filed with the internal revenue service and no

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[1] In his Answer, Defendant admits that Plaintiff provided him with $25,000 to partially fund Defendant's acquisition of the Companies (Exh. B ¶6).

later than 120 days after the close of the fiscal year. Therefore, on February 16, 2005, Plaintiff paid $7,651.45 to bring the loan balance below the maximum credit line. Since the Companies' annual tax returns had not yet been filed, and 120 days of the end of the Companies' fiscal year of December 31, 2004 had not yet expired, the production of documents required by Merrill Lynch had not been an issue. Merrill Lynch advised Plaintiff that it would take no further action against the Companies until at least May 2005. However, Tonacchio later advised Merrill Lynch that the Companies were no longer operational, which constituted an event of default of the line of credit agreement. At this point, Merrill Lynch demanded immediate repayment of the full credit line in the amount of approximately $607,639.47. Plaintiff ultimately paid the entire amount due, which was two-thirds more than his equitable share of the indebtedness. Plaintiff asserts that he paid $307,645.47 more than his equitable share of DT Bath's obligation to Merrill Lynch. Though Defendant never objected to the monthly statements Plaintiff emailed to him concerning Defendant's equitable share of the debt due to Plaintiff, Defendant failed to reimburse Plaintiff.

Arbitration Expenses and Corresponding Legal Representation Fees

After the line of credit was issued by Merrill Lynch, the parties concluded that Tonacchio "bamboozled" them into purchasing their interest in the Companies. Thus, the parties agreed to commence arbitration proceedings against Tonacchio, and hired Weiss & Hiller to pursue their claims for rescission, breach of contract, fraud, and breach of fiduciary duty. Plaintiff continued to report to work until the date the arbitration was commenced. Defendant was Plaintiff's co-claimant and did not assert any claims against Plaintiff in the arbitration.[2]

[2] Defendant admits in his Answer that Weiss & Hiller represented the parties in the arbitration.

By Stipulation dated April 20, 2005, the parties settled their arbitration with Tonacchio. As part of the settlement, the parties transferred and assigned their respective interests back to Tonacchio. Tonacchio signed general releases in favor of the parties, and the parties released Tonacchio and DT Baths from their unconditional guarantees, leaving the parties each responsible to pay half the debt owned to Merrill Lynch. The parties have not held any interest in the Companies since the settlement.

Plaintiff asserts that he paid the American Arbitration Association ("AAA") $9,625.00, which was $4,812.50 more than his contractual and equitable share of expenses regarding the arbitration. Plaintiff also paid Weiss & Hiller $957.92, which was $478.96 more than his contractual and equitable share of legal fees.

Landlord-Tenant Legal Representation Fees

During the pendency of the arbitration proceedings, certain Tonacchio-controlled entities, acting as landlord of commercial premises occupied by the Companies, commenced non-payment proceedings against the Companies. In defense of these proceedings, Plaintiff paid Borah, Goldstein to represent and protect the parties' joint interests the entire retainer fee of $2,500, and an additional $1,159.43, which is $1,829.72 more than his contractual and equitable share.[3]

Plaintiff asserts that to date, Defendant has paid Plaintiff $56,335.00 on account of the above debts, without protest and without any reservation of rights, and that no issues of fact exist as to Defendant's liability to Plaintiff for the amounts owed.

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[3] Defendant admits in his Answer that Borah, Goldstein represented the parties in the landlord tenant proceeding.

Plaintiff also contends that Defendants' counterclaims lack merit.

Plaintiff argues that the first counterclaim seeking an accounting of the Companies' finances from plaintiff must be dismissed since Plaintiff has not held any interest in the Companies since April 20, 2005, and lacks authority to provide an accounting.

Also, Plaintiff's purported representation that he reviewed the financial records and that the Companies were in sound condition, are insufficient to support Defendant's second counterclaim for fraud. In any event, Defendant cannot validly claim justifiable reliance of any such statements, since such statements constitute speculation and expressions of hope, and are not actionable. Also, Defendant acknowledged and agreed in the Purchase Agreement that they were well aware of the gross receipt of the businesses and the expenses of the businesses and had the opportunity to review the books and were satisfied with the results. And, Defendant's failure to assert a claim for fraud against Plaintiff in the Arbitration precludes Plaintiff from asserting it here. Plaintiff notes that in the parties' Arbitration Demand, they alleged that Tonacchio made misrepresentations to both of them and concealed the Companies' true financial condition from both of them. For these reasons, Defendant's third counterclaim for negligence also fails.

Defendant's fourth counterclaim for fraudulent inducement also fails, because Defendant cannot claim justifiable reliance on Plaintiff's purported misrepresentation that obtaining the $600,000 Line of Credit would cure the financial difficulties of the Companies. Moreover, the fraudulent inducement counterclaim fails because in the Purchase Agreement, Defendant agreed to become obligated for the Companies' Line of Credit.

Defendant's fifth counterclaim for breach of fiduciary duty also lacks merit, since it lacks the required specificity, and the corporate taxes were paid. Also, Tonacchio indemnified the

parties for all claims by third-parties, and agreed to file and pay the corporate taxes at no cost to the parties. Similarly, the sixth counterclaim alleging that Plaintiff breached his fiduciary duty to Defendant by allowing the Companies to exceed the Line of Credit and failing to provide the financial documents to Merrill Lynch lacks merit. Plaintiff contends that the sixth counterclaim, which attempts to recast a corporate claim as an individual one, ignores the fact that, *inter alia*, no financial documents were due to Merrill Lynch at the time the Line of Credit was terminated. Further, Defendant does not allege any damage stemming from this purported breach. Moreover Defendant, as the Chief Operating Officer responsible for day-to-day operations, also received Merrill Lynch's demand and therefore could have responded to same.

Further, the seventh counterclaim for attorneys' fees is unsupported by any statute or contract bestowing such an obligation upon plaintiff.

Finally, Defendant's eighth counterclaim to recover monies Defendant paid to Tonacchio in settlement of the Arbitration should be dismissed because it is predicated on a finding of liability under the aforementioned counterclaims, which lack merit.

Plaintiff further argues that the affirmative defenses lack merit. Plaintiff avers that the complaint states a cause of action for breach of contract, contribution, and for unjust enrichment, and therefore, the first affirmative defense alleging the contrary, must be dismissed. The second affirmative defense for a set off also must be dismissed unless Defendant sets forth evidence of a set off in an amount greater than what he owes Plaintiff. The third affirmative defense asserting the statute of frauds also fails, because all of the obligations sued upon were capable fo being performed within one year. Further, Defendant's fourth, fifth, sixth, and eighth affirmative defenses of estoppel, fraud, unclean hands, and culpable conduct in diminution of damages are

unsupported by any facts. Also, the seventh affirmative defense of lack of personal jurisdiction based upon improper service also fails, since Defendant's time to move for judgment on this ground expired.[4]

Defendant's Cross-Motion and Opposition

In response, Defendant cross moves to amend his answer in the proposed form to, *inter alia*, plead with additional particularity his second and fourth counterclaims sounding in fraud, and to add an additional (ninth) counterclaim for breach of fiduciary duty for failing to perform an in-depth financial analysis of the Companies as agreed to by the parties. Defendant also argues that the proposed answer also particularizes his first, second, third, fourth, fifth and sixth affirmative defenses.

In opposition, Defendant argues that numerous issues of fact exist precluding summary judgment. Defendant points out that issues exist as to whether all of the alleged debts were corporate debts or were debts of the Plaintiff, the extent of the debts or on what the money was spent, and how Plaintiff applied the monies Defendant gave him. There is also an issue regarding Plaintiff's fiduciary duty to perform due diligence on the Companies before entering into the Purchase Agreement. Further, there is an issue as to whether Plaintiff fraudulently induced defendant to signing the guaranty on the Merrill Lynch Line of Credit. Plaintiff misrepresented that Merrill Lynch required a guaranty, that Plaintiff's pledge of collateral would cover the repayment of the Line of Credit, that the Line of Credit would solve the Companies' operating cash requirements, and that the operating income from the Companies would service

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[4] As Defendant has not opposed the dismissal of the seventh and eighth affirmative defenses, such defenses are hereby dismissed.

the debt and provide the income to make monthly repayments on the Line of Credit. Notably, argues Defendant, Plaintiff provided no documentary support for his claim that Merrill Lynch conditioned the Line of Credit upon the unconditional guarantees. Presumably, Merrill Lynch would require Defendant's guaranty if Plaintiff misrepresented that Defendant was a shareholder of the Companies on the loan application. In addition, it is unlikely that Defendant's guaranty was necessary, as Plaintiff misrepresented, since the Line of Credit was entirely collateralized by Plaintiff's securities. Also, there is an issue of fact as to whether Defendant executed the guaranty as an "accommodation party" which would preclude Plaintiff from recovering any contribution from Defendant under the guaranty pursuant to UCC §3-415 (1) and (5). Further, there is an issue of whether the Line of Credit was "called in" or voluntarily paid off by Plaintiff, since the Demand Notice states that Plaintiff requested the pay-off amount.

Defendant claims that the basis of his fraud claims is that Plaintiff did not properly assess the Companies' financial documents in rendering his purported expert opinion with respect to the financial security of the Companies at the time of his analysis, *i.e.*, it was not a prediction. And, Defendant argues, Plaintiff made fraudulent representations about what analysis and investigation he performed.

Even assuming that there was no fraudulent inducement and that Defendant is not deemed an accommodating party, the amount due under the guaranty remains at issue, since there were four guarantors and Defendant is not liable for the share of the other guarantors. The effect of releasing the co-guarantors is also at issue, and precludes summary relief.

Moreover, summary judgment cannot be granted since Defendant asserted claims for fraud, negligence, and estoppel, regardless of whether the fraud claim was improperly pleaded.

Further, the exchange of extensive discovery is needed in connection with the issues of fact present in this case.

With respect to his counterclaims, Defendant asserts that an accounting of the books and records of the Companies and Plaintiff is necessary to determine how Plaintiff spent the Line of Credit and applied the monies received by Defendant. Such records are in the possession of Plaintiff, who was the Treasurer and CFO of the Companies.

The second counterclaim for fraudulent inducement is sufficiently pleaded, especially since Plaintiff and Defendant were "unified in interest" and Defendant, who lacked any expertise in analyzing the books and records, could reasonably rely upon Plaintiff's superior expertise in financial analysis and accounting. Also, Defendant's fraudulent inducement counterclaim does not fall within the arbitration clause in the Purchase Agreement, because such claim arises from Plaintiff's actions prior to the entering into the Agreement, and not under the Agreement as required for arbitration. Even assuming the arbitration clause applies, Defendant waives arbitration for the sake of judicial economy. Nor is Defendant estopped from raising the counterclaim for fraudulent inducement for failing to do so in the arbitration proceeding, since such arbitration dealt with Tonacchio's fraud, Defendant was not required to raise such claim, and Defendant only learned of Plaintiff's lack of due diligence during the settlement of the arbitration. Similarly, the fraudulent inducement claim related to the Line of Credit is also meritorious. The Purchase Agreement refers to a Line of Credit for $450,000, therefore belying Plaintiff's claim that Defendant agreed to a $600,000 Line of Credit from Merrill Lynch 7 months thereafter. Further, there is no evidence that Defendant's payments were made toward the Line of Credit or toward something else. As such, Defendant's payments do not constitute a

ratification of the Line of Credit, especially if Defendant's purported agreement to the Line of Credit was procured by fraud.

Defendant also maintains that his counterclaims for negligence and breach of fiduciary duty are sufficiently pleaded. As for Plaintiff's failure to perform his duties as Treasurer and CFO, Defendant contends that Plaintiff caused the Companies to incur unnecessary penalties, debts, and expenses by failing to satisfy the Companies' tax obligations and that the Line of Credit was improperly used to satisfy these obligations, thus increasing Defendant's liability. Moreover, Plaintiff failed to point out that the $60,000 designated in the settlement of the arbitration were to offset the interest and penalties Tonacchio would have to pay to resolve the tax arrears. Therefore, it cannot be said that Defendant did not suffer damages as a result of Plaintiff's failure to timely pay tax obligations. Furthermore, Plaintiff failed to prevent the overdraft of the Line of Credit and failed to provide Merrill Lynch with requested financial documents. As such, Plaintiff breached his fiduciary duty to Defendant as an officer of the Companies and co-guarantor of the Line of Credit. Defendant maintains that he was subsequently damaged by Merrill Lynch's increased oversight and scrutiny.

Defendant also maintains that his counterclaim to recover costs of the arbitration is the direct result of Plaintiff's negligence, fraud, and breach of fiduciary duty, and caused Defendant to compromise the fraud claims against Tonacchio and settle the arbitration for a loss.

In reply, Plaintiff opposes the cross-motion, arguing the proposed amended answer lacks merit, and that Defendant failed to raise a genuine issue of fact. Plaintiff argues that the only differences between the original Answer and the proposed Amended Answer are that, in the proposed Amended Answer, Defendant (1) deleted the two affirmative defenses alleging

improper service of process and statute of frauds, and (2) added a ninth counterclaim for breach of fiduciary duty in connection with the Initial Buy-In and Purchase Agreement that is redundant of the second and third counterclaims, and thus lack merit for the same reasons.

Plaintiff contends that had the $600,000 Line of Credit not been applied to the $450,000 then outstanding in North Fork Bank Line of Credit, which the parties were obligated to pay, Merrill Lynch would not have extended the Line of Credit to the Companies. And, North Fork Bank would have sued the parties to collect on the outstanding debt.

Further, Defendant's claim of mismanagement is a claim to be asserted as a shareholder's derivative suit, which Defendant claims he is not. Further, Plaintiff contends that he need not account for how the Companies used their Line of Credit as a condition to reimbursement by Defendant under the guaranty. Having paid off the debt Defendant owed to Merrill Lynch, Plaintiff argues that he is subrogated to the rights of such creditor as against Defendant. Thus, Defendant's request for leave to amend his answer lacks merit.

As to Defendant's payments, neither party earmarked the payments to any specific item of Defendant's accumulated indebtedness. Thus, Plaintiff seeks to set the amount of Defendant's payment off against the total principal amount due. Further, there is no need for an accounting since Defendant has the cancelled checks evidencing payments made, and, Defendant's payment of $53,912.20 on March 15, 2005, the same date Plaintiff used his personal funds to pay Merrill Lynch's Line of Credit, belies his claim that such payment was not on account of the Merrill Lynch debt. And, Defendant has no right to an accounting of Plaintiff's personal finances.

Further, that the parties never became shareholders of the Companies is inconsequential, since they signed the guarantees.

In Defendant's reply in further support of his cross-motion to amend the answer, Defendant maintains that his motion to amend should be granted since the counterclaims set forth in the proposed amended answer are meritorious. Additionally, since Plaintiff has failed to meet his burden on summary judgment his motion must be denied.

Defendant states that Plaintiff's reply has said nothing to preclude Defendant from being able to amend his answer and has said nothing to dispute Defendant's counterclaims. Moreover, Plaintiff failed to deny a number of salient issues alleged by Defendant, thus demonstrating that material issues of fact exist.

Defendant reiterates that an accounting is necessary to determine whether Plaintiff is entitled to reimbursement and an issue of fact exists as to whether Plaintiff exercised the proper due diligence. Furthermore, Plaintiff's alleged breach of fiduciary duty is not negated simply because Defendant acknowledged that he had an opportunity to review the books, when the responsibility was delegated to, and assumed by, Plaintiff.

Moreover, the fraud claims against Plaintiff in this action, and Tonacchio in the Arbitration, are mutually exclusive, and the Arbitration finding does not protect Plaintiff. Additionally, Defendant maintains that Plaintiff fails to recognize that Defendant's fraud claims do not relate to statements of prediction or expectation and Plaintiff fails to address the underlying issue raised in Defendant's counterclaims and affirmative defenses.

Defendant further states that Plaintiff was not absolved from his responsibility to properly perform his due diligence merely by personally investing in the Companies. Additionally, the fact that Plaintiff may have loaned Defendant money does not diminish Plaintiff's duty.

Lastly, Defendant never acknowledged that he agreed to repay the alleged debts in

question to Plaintiff. Rather, a review of the e-mails in question reveals that Defendant only acknowledged that he would address the issue of repayment in the future. Moreover, even if there was an acknowledgment, the ratification of a debt procured by fraud is unenforceable.

Discussion

As a general rule, to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). Thus, the proponent of a motion for summary judgment makes a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413

NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).[5]

I. *Defendant's Counterclaims*

A. First Counterclaim: Accounting

The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship (*see Saunders v AOL Time Warner, Inc.*, 18 AD3d 216, 217 [1st Dept 2005]; *Palazzo v Palazzo*, 121 AD2d 261 [1st Dept 1986]). The existence of a fiduciary relationship between a plaintiff and a defendant, and wrongdoing on the part of a defendant are essential elements where an accounting is demanded (*see* 1 N.Y. Jur. 2d Accounts and Accounting § 34).

Plaintiff's contention that he has not held any interest in the Companies since April 20, 2005, and lacks authority to provide an accounting of the Companies' finances does not warrant dismissal of the first counterclaim. To the extent the first counterclaim seeks an accounting of the Companies' books and records, such claim is dismissed. It is undisputed that Plaintiff has not held any interest in the Companies since 2005, and Plaintiff is no longer an officer of the Companies. Thus, Plaintiff lacks the capacity to provide Defendant with an accounting of the Companies' books and records.

However, that an accounting of the Companies' records cannot be asserted against Plaintiff does not dispose of the first counterclaim. The first counterclaim also seeks an

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[5] Though Plaintiff cites to CPLR 3016 [b], CPLR 3211 [a], and CPLR 3212 in support of his motion for dismissal, Plaintiff never articulates any arguments related to CPLR 3211 [a]).

accounting of Plaintiff's personal records for the period in which he was CFO and Treasurer of the Companies, based on the allegation that he improperly converted funds from the Line of Credit and other corporate assets to his own personal use. It cannot be disputed that a confidential or fiduciary relationship existed between the parties. Thus, Plaintiff is precluded from diverting income from the Companies into his personal account. Plaintiff's motion fails to adequately address this latter portion of the first counterclaim. Plaintiff's statement that the $600,000 was applied to the outstanding North Fork Bank Line of Credit, in and of itself, is insufficient to negate the allegations in the first counterclaim. Therefore, as Plaintiff failed to show entitlement to dismissal of the first counterclaim regarding Plaintiff's personal financial records, Plaintiff's motion for summary judgment dismissing the first counterclaim is granted only to the extent of dismissing defendant's claim for a corporate accounting.

B. Second Counterclaim: Fraud in the Inducement of the Purchase Agreement

In order to assert a claim of fraud, Defendant must allege (1) a misrepresentation or a material omission of material fact which was false and known to be false by the Plaintiff, (2) made for the purpose of inducing the other party to rely on it; (3) the Defendant reasonably relied upon it, and (4) suffered injury as a result of such reliance (*see Lama Holding Co. V Smith Barney, Inc.*, 88 NY2d 413, 421, 646 NYS2d 76, 80 [1996]; *Swersky v Dreyer and Traub,* 219 AD2d 321, 326, 643 NYS2d 33 [1st Dept 1996]).

The misrepresentation must be pleaded with sufficient particularity to give adequate notice (CPLR 3016(b); *see Foley v D'Agostino*, 21 AD2d 60, 64 [1st Dept 1964]). The language of 3016(b) merely requires that a claim of misrepresentation be pleaded in sufficient detail to

give adequate notice (*see Foley v D'Agostino*, 21 AD2d 60, 64 [1st Dept 1964]). Indeed, the Court of Appeals has specifically noted that this rule "is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977] [citation omitted]). Further, "a plaintiff . . .need only plead that he relied on misrepresentations made by the defendant . . . since the reasonableness of his reliance [generally] implicates factual issues whose resolution would be inappropriate at this early stage" (*Guggenheimer v Bernstein Litowitz Berger & Grossman LLP*, 11 Misc3d 926, 810 NYS2d 880 [Sup. Ct. New York County 2006]).

In the instant case, Defendant alleges that Plaintiff represented that his extensive experience as a CPA rendered him qualified to both review the corporate books and records of the Companies and conduct a thorough investigation to evaluate the financial health and status of the Companies (Ans. ¶23-23). Plaintiff allegedly represented that he conducted the investigation, and then assured Defendant that the Companies were financially secure and a good investment (Ans. ¶24). In the proposed Answer, Defendant adds additional representations made by Plaintiff, *to wit*: that he would perform "due diligence" on the Companies, and that he conducted a review of the Companies' financial and accounting records, the status of the Companies' existing Line of Credit, the sales and revenue history of the Companies, and the Companies' relationship and credit terms with existing key vendors, suppliers and distributors. Defendant also alleges that Plaintiff knew the representations were false when made, and were made with the intent to deceive and defraud Defendant into entering into the Purchase Agreement and in order to obtain monies from Defendant toward Plaintiff's purchase of his interest in the

Companies. Further, in reliance upon such representations, Defendant entered into the Purchase Agreement and authorized his mother to advance Plaintiff monies to his detriment.

The Court determines that the allegations are sufficiently particular to support a fraud cause of action.

Contrary to Plaintiff's contention, his statement that the Companies were in sound financial condition and a sound investment is sufficient to maintain a fraud claim. "Statements of opinion or belief, whether as to matters of fact are not representations and are not actionable, unless expressly guaranteed, or unless defendant stands in a position of trust with respect to plaintiff, or unless defendant has special knowledge or skill and knows that plaintiff does not and is relying defendant's opinion as a dealer or expert" (1 NY PJI3d 3:20 at 154-55) (internal citations omitted). "The Court of Appeals has made clear that a false statement of opinion, whether law or of fact, if misrepresented as a sincere opinion, is actionable, provided there is reasonable reliance" (*Id.*).

In this regard, it cannot be said, as a matter of law, that Defendant cannot claim justifiable reliance. In *Stuart Silver Assoc., Inc. v Baco Development Corp.* (245 AD2d 96 [1st Dept 1997]), the limited partners in a real estate development partnership brought action against the general partners for fraud regarding expected return on investments. The court held that the limited partners could not establish reasonable reliance due to their own business knowledge and expertise (*Id.* at 99). The court stated that, "[w]here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on [the other party's] misrepresentations" (*Id.* at 98-

99, citing *88 Blue Corp. v Reiss Plaza Assos.*, 183 AD2d 662, 664).

Here, the parties disagree as to whether Defendant could have evaluated the financial condition of the Companies for himself, to the same extent and degree as Plaintiff, despite Plaintiff's expertise. Accordingly, an issue of fact remains and the Court cannot conclude, as a matter of law, that Plaintiff did not fraudulently induce Defendant into entering into the Purchase Agreement.

As to whether this counterclaim must be dismissed because Defendant had the opportunity to bring it in arbitration, Plaintiff's contention is misplaced. The arbitration clause states, "In the event of any dispute arising among the parties hereto, under this Agreement, the parties agree such dispute shall be settled by arbitration...." As noted by Defendant, the alleged fraud did not arise under the Purchase Agreement, but rather, prior to entering into the agreement.

It has been held that the doctrines of *res judicata* and collateral estoppel may serve to bar the subsequent re-litigation of an entire claim or a single issue which had previously been determined by arbitration (*see Port Authority of New York and New Jersey, Office of Contract Arbitrator*, 254 AD2d 194 [1st Dept 1998], leave to appeal dismissed in part, denied in part, 93 NY2d 913 [1999]; *Clemens v Apple*, 65 NY2d 746 [1985]). However, in the situation where an issue or claim that has not been determined by arbitration is the subject of a later proceeding, the prior arbitration is not a bar to the later proceeding (*see ICN Pharmaceuticals, Inc., v Bristol-Meyers Co.*, 245 AD2d 182 [1st Dept 1997]; *Niles v Quiles*, 245 AD2d 435 [2nd Dept 1997]). Furthermore, an action cannot be precluded by a prior arbitration if the arbitration did not reach

the question in the instant action, even though the arbitrator could have ruled on the question (*see Niles v Quiles*, 245 AD2d 435 [2d Dept 1997]). Where a claim has allegedly been resolved by an arbitration award determination is to be made by the court and not by the arbitrator (*see Rembrandt Industries, Inc. v Hodges Intern, Inc.*, 38 NY2d 502 [1976]).

Here, Defendant's claim is actionable. Defendant's claim arises from actions that occurred before the Purchase Agreement took effect. Furthermore, Defendant did not have the opportunity to litigate this matter during the Tonacchio arbitration since that proceeding addressed Tonacchio's fraud and Defendant learned of Plaintiff's alleged fraud through said arbitration.

Since leave to amend a pleading should be freely granted, and Defendant has made an evidentiary showing that the proposed amendment alleges, with sufficient particularity, a claim for fraud, Defendant's application to amend the Answer as to the proposed second counterclaim is granted (*see Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York,* 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe,* 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano,* 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

Based on the above, Plaintiff's motion to dismiss such counterclaim is denied.

C. Third Counterclaim: Negligence

To state a claim for negligence under New York law, plaintiff must allege a duty owed, a breach of that duty, causation, and damages. Although Defendant claims that Tonacchio made

misrepresentations to Plaintiff and Defendant, and concealed the Companies' true financial condition from both of them, such factors do not eliminate issues of fact as to whether Plaintiff breached his duty toward Defendant. According to the Complaint, Plaintiff was negligent in his failure to properly analyze the financial status of the Companies, which resulted in defendant giving plaintiff money for an option to purchase shares in the Companies and incurring unnecessary penalties, debts, and expenses. Furthermore, Plaintiff's contention that "plaintiff owed no duty to defendant - an experienced businessman, represented by counsel, who exercised his own business judgment" is flatly contradicted in the record.

Based on the record presented, and construing the counterclaim liberally in favor of Defendant in the face of Plaintiff's motion for summary judgment, the Court finds that the counterclaim contains sufficient allegations to support a claim for negligence. An issue of fact exists as to whether Plaintiff breached his duty to perform the due diligence concerning the financial health of the Companies, and whether this caused Defendant to be injured.

Accordingly, Plaintiff's motion for summary dismissal of Defendant's third counterclaim is denied.

D. Proposed Fourth Counterclaim: Fraud in the Inducement of the Line of Credit

As to the proposed fourth counterclaim regarding the Merrill Lynch Line of Credit, Defendant alleges that Plaintiff misrepresented and warranted that (a) the Line of Credit would remedy the financial condition of the Companies; (b) the operating income from the Companies would service the debt on the Line of Credit; (c) without Defendant's co-guaranty of the Line of Credit, Merrill Lynch would not approve and issue the Line of Credit; and (d) that the guaranty

would never be enforced by Merrill Lynch because Plaintiff was pledging his stock portfolio as collateral. Defendant also alleges that Plaintiff knew these representations to be false when made and were intended to defraud Defendant. Furthermore, in reliance upon Plaintiff's statements Defendant executed the guaranty.

Contrary to Plaintiff's contention, Defendant's pleading is sufficiently particular pursuant to CPLR 3016(b) to sustain a cause of action for fraudulent inducement. Further, Defendant's contention that the documentary evidence, namely, the Agreement, wherein Defendant obligated himself to pay the Line of Credit, does not dispose of the claims that Plaintiff made certain misrepresentations and warranties to induce Defendant to execute the Agreement.

And, as with Defendant's second counterclaim, the contested issue is whether Defendant's reliance upon Plaintiff's statement was reasonable. The Court's reasoning with regard to the fraud alleged in the second counterclaim is applicable to the instant counterclaim. Accordingly, Plaintiff's motion for summary judgment on Defendant's fourth counterclaim is denied.

Therefore, Plaintiff's motion to dismiss the fourth counterclaim is denied.

Further, since leave to amend a pleading should be freely granted, and Defendant has made an evidentiary showing that the proposed amendment alleges, with sufficient particularity, a claim for fraudulent inducement, Defendant's application to amend the Answer as to the proposed fourth counterclaim is granted (*see Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York,* 280 AD2d 374 [1st Dept

2001]; *Bencivenga & Co. v Phyfe,* 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano,* 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini,* 157 AD2d 590 [1st Dept 1990]).

E. Fifth Counterclaim: Breach of Fiduciary Duty to Corporate Tax Payments

To assert a cause of action for breach of fiduciary duty, Defendant must plead the following three elements: (1) the existence of a fiduciary duty between the parties; (2) the breach of that duty by Plaintiff; and (3) damages suffered by Defendant as a result of Plaintiff's breach (*see DDCLAB Ltd. v E.I. DuPont De Nemours and Co.*, 2005 WL 425495 [SDNY 2005], citing *Kidz Cloz, Inc. v Officially for Kids, Inc.*, 2002 WL 392291, *4 [SDNY Mar. 13, 2002] [citing *Cramer v Devon Group, Inc.*, 774 F.Supp. 176, 184 [SDNY1991]). "Under New York law a fiduciary relationship arises when one has reposed trust or confidence in the integrity or fidelity of another who thereby gains a resulting superiority of influence over the first, or when one assumes control and responsibility over another" (*Reuben H. Connelly Corp. v Mark I Mktg. Corp.*, 893 F .Supp. 285, 289 [SDNY1995] [citation omitted]). A conventional business relationship alone does not give rise to a fiduciary relationship (*Oursler v Women's Interart Ctr., Inc.,* 566 NYS2d 295, 297 [N.Y.App.Div1991]; *Feigen v Advance Capital Mgmt. Corp.,* 541 NYS2d 797, 799 [N.Y.App.Div1989]). In the context of a commercial contract, a fiduciary duty may nevertheless exists where the parties specifically agree to it or if "'one party's superior position or superior access to confidential information is so great as virtually to require the other party to repose trust and confidence in the first party'"(*see Ross v FSG PrivatAir Inc.,* 2004 WL 1837366, *5 [SDNY Aug. 17, 2004], *quoting Calvin Klein Trademark Trust v Wachner,* 123 F.Supp.2d 731, 734-34 [SDNY2000]).

Plaintiff failed to establish, as a matter of law, that the fifth counterclaim it lacks the required specificity, that the corporate taxes were paid, that Tonacchio indemnified the parties for all claims by third-parties, and agreed to file and pay the corporate taxes at no cost to the parties,

Defendant alleges that Plaintiff caused the Companies to incur unnecessary penalties, debts, and expenses by failing to satisfy the Companies' tax obligations and that the Line of Credit was improperly used to satisfy these obligations, thus increasing Defendant's liability, resulting in damages. Moreover, argues Defendant, Plaintiff failed to point out that the $60,000 designated in the settlement of the arbitration offset the interest and penalties Tonacchio would have to pay to resolve the tax arrears.

Here, a fiduciary relationship existed between Plaintiff and Defendant. However, Plaintiff failed to establish that Defendant's counterclaim is so lacking that it does not allege that Plaintiff failed to properly perform his duties as Treasurer and CFO. Moreover, Plaintiff does not address the heart of Defendant's counterclaim which is that the $60,000 designated in the settlement of the arbitration were to offset the interest and penalties Tonacchio would have to pay to resolve the tax arrears. Therefore, discovery may reveal that but for Plaintiff's failure to timely satisfy the Companies' tax obligations Defendant would not have been in a position to have to pay Tonacchio any of the $60,000. Consequentially, Plaintiff failed to prove that Defendant did not suffer damages.

Accordingly, Plaintiff's motion to dismiss Defendant's fifth counterclaim is denied.

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F. Sixth Counterclaim: Breach of Fiduciary Duty as to DT Supply's Default Under the WCMA Loan and Security Agreement

Defendant's claim that Plaintiff breached his duty "to the Companies with respect to the Line of Credit overdraft" (Def. Memo of Law in Opp., p. 22) cannot be maintained. The Court of Appeals expressly recognized a right of the shareholder to sue in his individual capacity if the individual person sued owes a duty to the shareholder that is separate and independent from any duty that is owed to the corporation. However, the Court of Appeals in *Abrams v Donati* (supra) specifically stated:

> "(b)ut allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually . . . . A complaint[,] the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed though leave to replead may be granted in an appropriate case (internal citations omitted).
>
> (*Corso v Byron*, 11 Misc 3d 1072, 816 NYS2d 694 [Sup Ct New York County 2006]).

Defendant failed to assert any facts indicating that Plaintiff owed a duty independent from the duty to the Corporation regarding the Line of Credit. Therefore, Defendant's counterclaim alleging that Plaintiff failed to ensure that the Companies' Line of Credit did not exceed $600,000 lacks merit. Plaintiff's contention that neither he nor Defendant was on the Premises when Merrill Lynch issued the Demand Notice, and that he stopped coming to work in January 2005, does not establish that Plaintiff satisfied his fiduciary duty toward the Defendant to properly manage the finances of the Companies.

For the same reasons, Defendant's claim that Plaintiff failed to provide Merrill Lynch with financial documents is a claim belonging to a shareholder in a shareholder derivative action,

and thus cannot be alleged by Plaintiff in this action. And, Defendant failed to assert any facts indicating that Plaintiff owed a duty independent from Plaintiff's purported duty to the Corporations to address Merrill Lynch's request for records. In any event, the submissions indicate that no financial documents were due at the time Merrill Lynch terminated the Companies' Line of Credit. Thus, Defendant's sixth counterclaim cannot be predicated on the failure to forward financial records to Merrill Lynch.

Thus, Plaintiff's motion for summary judgment dismissing Defendant's sixth counterclaim is granted.

G. Seventh Counterclaim: Attorney's Fees

It is well settled that a party is not entitled to an award of an attorney's fee absent an agreement between the parties, statutory authorization, or court rule (*Crispino v Greenpoint Mortg. Corp.*, 769 NYS2d 553 [2d Dept 2003] *citing Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492, 549 NYS2d 365, 548 NE2d 903; *Glatter v Chase Manhattan Bank*, 239 AD2d 68, 669 NYS2d 651). As there is no agreement, statute, or court rule applicable to the instant case, Defendant is not entitled to attorney's fees. Accordingly, Plaintiff's motion for summary judgment on Defendant's seventh counterclaim is granted.

H. Eighth Counterclaim: Arbitration and Mediation Costs

Defendants' separate damage counterclaim for arbitration and mediation costs stems from Plaintiff's negligence and fraud in the inducement claims, which survive Plaintiff's dismissal motion. Such separate damages, may be alleged in connection with the continuing causes of action. Therefore, the eighth counterclaim, which is redundant of the continuing causes of

action, cannot be asserted as a separate claim. Accordingly, Plaintiff's motion for summary judgment on Defendant's eighth counterclaim is granted.

I. Proposed Ninth Counterclaim: Breach of Fiduciary Duty as to the Initial Buy-In

Here, Defendant alleges that based upon their Agreement, Plaintiff had a fiduciary duty to Defendant to properly perform the due diligence and research the Companies' financial condition. Defendant further alleges that Plaintiff breached this duty because his review fell below the level expected and required by an experienced CPA.

The "breach of fiduciary duty" counterclaim is based on the same allegations set forth in the counterclaims for negligence and fraud, and is therefore redundant. Therefore, the application to amend the Answer to assert the ninth cause of action is denied as lacking in merit (*see generally, Leather v U.S. Trust Co. of New York*, 279 AD2d 311, 720 NYS2d 448 [1st Dept 2001]).

II. *Affirmative Defenses: Dismissal Pursuant to CPLR 3211 [b]*

"The standard of review on a motion to dismiss an affirmative defense pursuant to CPLR 3211(b) is akin to that used under CPLR 3211(a)(7), *i.e.*, whether there is any legal or factual basis for the assertion of the defense (*see Winter v Leigh-Mannell*, 51 AD2d 1012, 381 NYS2d 112). The truth of the allegations must be assumed, and if under any view of the facts a defense is stated, the motion must be denied" (*Matter of Ideal Mutual Ins. Co. v Becker,* 140 AD2d 62, 67, 532 NYS2d 371 [1st Dept 1988]). "'If there is any doubt to the availability of a defense, it should not be dismissed' [citation omitted]" (*see Nahrebeski v Molnar,* 286 AD2d 891, 730 NYS2d 646 [4th Dept 2001]).

A. First Affirmative Defense: Failure to State a Cause of Action

Upon review of the Complaint and the submissions, the Court determines that Plaintiff's Complaint states a cause of action for, *inter alia*, contribution under the unconditional guaranty and breach of contract for failure to repay moneys advanced to Defendant. Thus, Plaintiff's motion to dismiss Defendant's first affirmative defense of failure to state a cause of action is granted.

B. Second Affirmative Defense: Set-Off

A set-off is a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor (*see* Black's Law Dictionary [8th ed. 2004]). Here, Plaintiff admits Defendant is entitled to a set-off. In light of issues of fact as to the viability of Defendant's counterclaims, dismissal of the affirmative defense of set-off cannot be granted, at this juncture. Thus, Plaintiff's motion to dismiss Defendant's second affirmative defense is granted..

C. Third, Fourth, Fifth, and Sixth Affirmative Defense: Estoppel, Fraud in the Inducement, Unclean Hands, and Breach of Fiduciary Duty

Plaintiff contends that these affirmative defenses are required to be alleged with particularity and are unsupported by any facts. Defendant counters that these defenses relate to the frauds and breaches of fiduciary duty committed by Plaintiff and are particularized in the proposed Amended Answer.

Since issues of fact exist as to, *inter alia*, Plaintiff's alleged fraud, Plaintiff's motion to dismiss Defendant's third, fifth, and sixth affirmative defenses alleging estoppel, unclean hands, and fraud/breach of fiduciary duty/malfeasance is denied (*cf. Willett v Lincolnshire Management,*

Inc., 302 AD2d 271, 756 NYS2d 9 [1st Dept 2003] [dismissal of the affirmative defenses that plaintiff's claim was barred by the doctrines of estoppel and unclean hands since there was no evidence of wrongdoing by plaintiff was proper]).

D. Seventh and Eighth Affirmative Defenses

Defendant's seventh and eighth affirmative defenses alleging statute of frauds and lack of personal jurisdiction, respectively, are dismissed, without opposition.

III. *Plaintiff's Motion for Summary Judgment on Claims One and Two Pursuant to CPLR 3212(e)*

Based on the court's earlier discussions, Plaintiff's motion for summary judgment pursuant to CPLR 3212 [b] or, in the alternative, 3212 [e] is premature at this juncture. Discovery, including depositions of the parties, are warranted. Therefore, summary judgment in favor of Plaintiff is denied, without prejudice.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of Plaintiff's motion for summary judgment dismissing the first counterclaim is granted only to the extent of dismissing defendant's claim for a corporate accounting; and it is further

ORDERED that the branch of Plaintiff's motion to dismiss the second, third, fourth, and fifth counterclaims is denied; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment dismissing the sixth, seventh, and eighth counterclaims is granted; and it is further

ORDERED that the branch of Plaintiff's motion to dismiss Defendant's first, second, third, fifth, and sixth affirmative defenses is granted; and it is further

ORDERED that the branch of Plaintiff's motion to dismiss Defendant's fourth affirmative defense is denied; and it is further

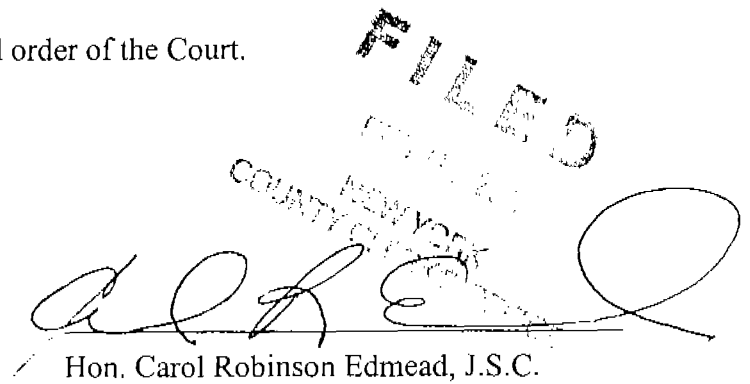
ORDERED that the branch of Plaintiff's motion to dismiss Defendant's seventh and eighth affirmative defenses is granted, without opposition; and it is further

ORDERED that the branch of Plaintiff's motion for an order granting summary judgment on all causes of action or, in the alternative, on the first and second causes of action, is denied without prejudice; and it is further

ORDERED that the branch of Defendant's cross-motion to amend the Answer as to the proposed second and fourth counterclaims is granted; and it is further

ORDERED that the branch of Defendant's cross-motion to amend the Answer to assert the ninth cause of action is denied.

This constitutes the decision and order of the Court.



Dated: February 2, 2007

Hon. Carol Robinson Edmead, J.S.C.