

Merchants Capital Access, LLC v Supreme Court, Nassau County
2011 NY Slip Op 32300(U)
August 19, 2011
Supreme Court, Nassau County
Docket Number: 003755-11
Judge: Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
MERCHANTS CAPITAL ACCESS, LLC,

TRIAL/IAS PART: 20
NASSAU COUNTY

Plaintiff,

Index No: 003755-11
Motion Seq. Nos. 2 & 3
Submission Date: 6/27/11

-against-

SOUTH SHORE MOTORSPORTS, LLC,
FREDERICK IPPOLITO and SOLIVIA
POWERSPORTS, LLC,

Defendants.

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The following papers having been read on these motions:

- Notice of Motion, Affidavit in Support, Affirmation in Support and Exhibits.....x
- Affidavit in Opposition, Affirmation in Opposition and Exhibit.....x
- Memorandum of Law in Opposition.....x
- Reply Affirmation in Further Support and Exhibit.....x
- Notice of Motion, Affirmation in Support and Exhibit.....x
- Affidavit in Support and Exhibit.....x
- Solivia Memorandum of Law.....x
- Motorsports and Ippolito Memorandum of Law.....x
- Affidavit in Opposition, Affirmation in Opposition and Exhibits.....x
- Affirmation in Response.....x
- Memorandum of Law in Opposition.....x

This matter is before the Court for decision on 1) the motion filed by Plaintiff Merchants Capital Access, LLC (“MCA” or “Plaintiff”) on May 13, 2011, and 2) the motion filed by Defendant Solivia Powersports, LLC (“Solivia”) on May 20, 2011, both of which were submitted on June 27, 2011. For the reasons set forth below, the Court 1) grants Plaintiff’s motion, except that the Court denies Plaintiff’s motion to sever and continue the eleventh cause of action, which the Court hereby dismisses; and 2) grants Solivia’s motion to dismiss the Eleventh Cause of Action seeking injunctive relief, and otherwise denies Solivia’s motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order 1) pursuant to CPLR § 3212(e), granting Plaintiff an award of summary judgment against Defendant South Shore Motorsports, LLC (“SSM”) on the First and Second Causes of Action of Plaintiff’s Verified Amended Complaint (“Complaint”); 2) pursuant to CPLR § 3212(e), granting Plaintiff an award of summary judgment against Defendant Frederick Ippolito (“Ippolito”) on the Third and Fourth Causes of Action of the Complaint; 3) pursuant to CPLR § 3211, dismissing SSM’s and Ippolito’s Affirmative Defenses; and 4) pursuant to CPLR § 3212(e), severing and continuing Plaintiff’s Fifth through Eleventh Causes of action in the Complaint.

Solivia moves for an Order, pursuant to CPLR §§ 3211(a)(7), 3013 and 3016(b), dismissing the Fifth through Eleventh Causes of Action.

B. The Parties’ History

This action was the subject of a prior decision of the Court dated March 31, 2011 (“Prior Decision”) denying Plaintiff’s application for injunctive and other relief. On April 1, 2011, Plaintiff filed an Amended Verified Complaint (“Amended Complaint”) (Ex. G to Bilotti Aff. in Supp.) which is the subject of the motions *sub judice*. The Amended Complaint alleges as follows:

On or about January 10, 2010, Defendant SSM executed a Merchant Agreement (“Original Merchant Agreement”) that was counter-executed by MCA on January 12, 2010. Pursuant to the terms of the Original Merchant Agreement, and in consideration for MCA’s capital advance to SSM in the amount of \$250,000.00, SSM sold a certain percentage of its future credit card receivables totaling \$312,500.00 to MCA. MCA filed a UCC-1 Financing

Statement with respect to SSM's future credit card receivables.

In or about October of 2010, without having paid the advance pursuant to the Original Merchant Agreement, SSM sought a second capital advance from MCA. In an effort to induce MCA to make this second advance, SSM provided MCA with a financial statement reflecting that SSM had a value in excess of \$2 million as of the period ending August 31, 2010. Based on that representation, MCA agreed to renew the \$66,348.72 due from SSM to MCA pursuant to the Original Merchant Agreement, and advanced SSM an additional \$183,651.28 for a total advance of \$250,000.00, which was later memorialized in the Second Merchant Agreement.

On October 15, 2010, without MCA's knowledge or consent, SSM entered into an agreement with Solivia to sell to Solivia substantially all of SSM's assets ("Asset Purchase Agreement"). On October 26, 2010, notwithstanding the execution of the Asset Purchase Agreement, SSM executed the Second Merchant Agreement which was counter executed by MCA on October 28, 2010. Plaintiff alleges that, at all relevant times, Solivia knew or should have known of the existence of the Merchant Agreements and their significance to Plaintiff.

The Amended Complaint contains eleven (11) causes of action, which are as follows:

1) SSM breached the Second Merchant Agreement; 2) SSM is liable for MCA's attorney's fees and other expenses, pursuant to Section 5.7 of the Second Merchant Agreement, in light of its breach of the Second Merchant Agreement; 3) Ippolito is in default of the guaranty ("Ippolito Guaranty") he executed on or about October 26, 2010, to induce MCA to enter into the Second Merchant Agreement; 4) Ippolito is liable for MCA's attorney's fees and other expenses pursuant to his Guaranty; 5) SSM's conveyance of its assets to Solivia was fraudulent pursuant to New York Debtor and Creditor Law ("DCL") § 273; 6) SSM's conveyance of its assets to Solivia was fraudulent pursuant to DCL § 274; 7) SSM's conveyance of its assets to Solivia was fraudulent pursuant to DCL § 275; 8) SSM's conveyance of its assets to Solivia was fraudulent pursuant to DCL § 276; 9) Solivia aided and abetted the breach of the Second Merchant Agreement and Ippolito Guaranty, and the fraudulent conveyance of SSM's assets, for which Plaintiff seeks counsel fees pursuant to DCL § 276-a; 10) Plaintiff has the right to proceed against Solivia, pursuant to DCL § 278, to set aside SSM's conveyance of its assets; and 11) MCA is entitled to a permanent injunction enjoining Solivia and its agents from distributing more than seventy percent (70%) of SSM and/or Solivia's credit card receivables without

MCA's written consent, and directing Solivia and its agents to deliver to MCA credit card receivables accepted by Solivia.

The UCC-1 Financing Statement (Ex. B to Snead Aff. in Supp.) stated that it covered the following collateral:

Certain future credit card, debit card, bankcard, bank card, and other charge card receivables sold by [SSM] and purchased by [MCA] as buyer, pursuant to that certain merchant agreement between seller and purchaser regarding the sale of future receivables 01/14/2010. The sale of the future receivables pursuant to the agreement is intended by the parties thereto to be an outright sale of such future receivables and not intended to be, nor is to be construed as, a financing or an assignment for securing the obligations of the seller. In addition, the agreement prohibits seller from, transferring future receivables to any person, or granting any security interest in its accounts receivable until buyer has received all amounts due under the agreement.

On January 10, 2011, SSM issued a Bill of Sale in the amount of \$207,769.50 for the assets described in the Asset Purchase Agreement. The assets reflected in the Schedule of the Bill of Sale (Ex. F to Snead Aff. in Supp.) consist of the following:

Retail Motorcycle, ATV and [SSM] Store

including the stock in trade, fixtures, used equipment, accounts, parts and accessories, contract rights, lease, good will, licenses, rights under any contract for telephone service or other rental, maintenance or use of equipment, machinery and fixtures at the said premises, more particularly described in the Schedule herein.

The Schedule listed the following:

All furniture, fixtures and equipment located at 4116 Sunrise Highway, Massapequa, New York.

All used inventory located at 4116 Sunrise Highway, Massapequa, New York.

All parts and accessories located at 4116 Sunrise Highway, Massapequa, New York.

Franchises for Yamaha, Suzuki, Kawasaki and BRP.

The Bill of Sale also contained a non-compete clause, pursuant to which SSM agreed:

[N]ot to re-establish, re-open, be engaged in, nor in any manner whatsoever become interested, directly or indirectly, either as employee, as owner, as partner, as agent or as stockholder, director or officer of a corporation or otherwise, in any business, trade or occupation similar to the one hereby sold, within [a] FIVE (5) mile radius

of 4116 Sunrise Highway, Massapequa, New York.

Section 5.9 of the Merchant Agreements, including the Second Merchant Agreement (Ex. C to Snead Aff. in Supp.), titled "Entire Agreement," stated as follows:

This Agreement, together with any addenda or riders hereto to any credit card processing agreement, contains the entire agreement and understanding between Seller and the Buyer and supersedes all prior agreements and understandings related to the subject matter thereof unless otherwise specifically reaffirmed or restated herein.

Thus, the Second Merchant Agreement superseded the First Merchant Agreement.

Pursuant to the terms of the Second Merchant Agreement, in consideration for MCA's capital advance to SSM in the amount of \$250,000.00, SSM sold thirty percent (30%) of its future credit card receivables totaling \$312,500.00 to MCA. As with the Original Merchant Agreement (Ex. A to Snead Aff. in Supp.), the Second Merchant Agreement did not set forth specific dates on which payments were required, and was secured only by a security interest in future credit card receivables.

The Second Merchant Agreement also stated, in pertinent part, as follows:

3. REPRESENTATIONS, WARRANTIES AND COVENANTS

Seller [SSM] and the Guarantor(s) [Ippolito] hereby represent, warrant and covenant that as of this date and during the term of this Agreement:

Section 3.1 *Seller's Conduct*. Seller shall:

- (i) exclusively use the credit card processor approved by the Buyer for the processing of all of its credit card transactions;
- (ii) not take any action to reduce or discourage the use of credit cards or permit any event to occur which could have an adverse effect on the use, acceptance or authorization of credit cards for the purpose of the Seller's services and products;
- (iii) not amend or terminate, or consent to the termination of, the processing agreement with the credit card processor approved by the Buyer, or any authorization to initiate ACH or electronic check payment or to obtain information granted by Seller to Buyer or its agents under Section 1.1 above;
- (iv) not breach or default under the processing agreement with the credit card processor approved by Buyer;
- (v) not change or permit the change of the credit card processor approved by the Buyer or add an additional credit card processor, in each case, without the express prior written

consent of the Buyer;

(vi) not change the account name, password or other access information relating to accounts from which ACH or electronic check payments are to be made without giving Buyer at least ten (10) business days prior written notice of such change;

(vii) not sell, dispose, convey or otherwise transfer its business or all or any substantial portion of its assets, in each case, without the express prior written consent of the Buyer and the purchaser or assignee's assumption of all of the Seller's obligations under this Agreement pursuant to the documentation reasonably satisfactory to the Buyer;

(viii) not sell, dispose, convey or otherwise transfer any of its future credit card receivable;

(ix) not grant any security interest or lien upon its accounts receivable or other assets;

(x) not incur any debt on the business without the express prior written consent of the Buyer; and

(xi) not commit fraud.

4. ADDITIONAL TERMS

Section 4.4 *Remedies*. In the event of (a) any breach or inaccuracy of any representation or warranty made by Seller in this Agreement or in any certificate or other document delivered by or on behalf of Seller pursuant hereto, or (b) any breach or default in the performance by Seller of any covenant or agreement contained in this Agreement or in any certificate or other document delivered by or on behalf of Seller pursuant hereto (any of the foregoing, a "Breach"), the Buyer shall be entitled to all remedies available hereunder, under Article 9 of the Uniform Commercial Code or other applicable law. *In the event that the Seller breaches the covenants in Section 3.1, the Seller agrees that the Buyer will be entitled to, among other things, damages equal to the amount by which the cash attributable to the Purchased Amount of future credit card receivables exceeds the amount of cash received from the credit card receivables that have previously been delivered by the Seller to the Buyer under this Agreement.* The Seller hereby agrees that the Buyer may automatically debit such damages from the Seller's bank account via ACH, electronic check or wire transfer, and/or may notify the credit card processor to remit to the Buyer any and all amounts received by the processor to satisfy the full amount of the then outstanding balance of the Purchased Amount [\$312,500.00]. In addition, and to the extent not prohibited by applicable law and any agreements between the Seller's credit card processor and the applicable credit card association, Buyer and Seller's credit card processor shall be authorized to place Seller on any "terminated merchant file" list with any applicable credit card association in the event of a Breach by

Seller of Section 3.1 hereof. Further, Buyer shall be entitled to collect all indemnified Amounts from Seller and/or Guarantors in accordance with Section 5.7 hereof.

(Emphasis added).

Section 5.7 *Indemnified Amounts*. In the event of a Breach, Seller and Guarantor shall assume liability for and do hereby agree to indemnify, protect, save and keep harmless Buyer and its agents and servants, from and against any and all liabilities, claims, losses, obligations, damages, penalties, actions and suits of whatsoever kind and nature imposed on, incurred by or asserted against Buyer or its agents and servants, in any way relating to or growing out of such Breach (collectively, "Indemnified Amounts"), including, without limitation, the payment of all costs and expenses of every kind for the enforcement of Buyer's right and remedies hereunder, including attorneys' fees and costs in any trial court or appellate court proceeding, any administrative proceeding, any arbitration or mediation, or any negotiations or consultations in connection with any Breach. Such Indemnified Amounts shall bear interest at the highest rate of interest allowed by applicable law until paid.

Simultaneous with the execution of the Second Merchant Agreement, on October 26, 2010, SSM executed a direction letter (Ex. D to Snead Aff. in Supp.) directing its credit card processor, IRN Payment Systems ("IRN"), to pay thirty percent (30%) of its credit card, debit card, Discover and EBT receivables to MCA.

Also on October 26, 2010, Ippolito executed his Guaranty with respect to the Second Merchant Agreement. The Guaranty (Ex. C to Snead Aff. in Supp.) states as follows:

Unconditional Personal Guarantee

IN CONSIDERATION OF THE BUYER ENTERING INTO THIS AGREEMENT, AND TO INDUCE BUYER TO ENTER INTO THIS AGREEMENT, THE UNDERSIGNED PRINCIPAL(S) OF SELLER ("GUARANTOR(S)") HEREBY PERSONALLY GUARANTEE TO BUYER THAT: (1) ALL INFORMATION PROVIDED BY SELLER TO BUYER IN CONNECTION WITH THE TRANSACTION CONTEMPLATED BY THIS AGREEMENT IS TRUE, CORRECT AND COMPLETE, (2) SELLER SHALL NOT REPLACE THE CREDIT CARD PROCESSOR APPROVED BY BUYER OR ENGAGE AN ADDITIONAL CREDIT CARD PROCESSOR, IN EACH CASE, PRIOR TO THE TIME THAT BUYER HAS RECEIVED THE ENTIRE PURCHASED AMOUNT; AND (3) SELLER SHALL NOT BREACH, OR DO ANY OF THE ACTS PROHIBITED BY, SECTION 3.1 OF THIS AGREEMENT. This guarantee shall be the continuing, irrevocable, unconditional and joint and several obligations of the Guarantors and the Guarantors hereby waive demand of payment, notice of presentment, and any and all requirements of notice, defenses, offsets and counterclaims and any other act or omission of Buyer which changes the

scope of the Guarantor's risk, and Guarantors further agree that Buyer may proceed directly against the Guarantors without first proceeding against Seller. Guarantor further guarantees the payment of and agrees to pay all indemnified amounts (as defined in section 5.7 of the Agreement). By signing below Guarantors agree to this Guarantee and each representation, warranty and covenant set forth in section 3 and 4.1 of this Agreement, which representations, warranties and covenants shall survive the termination of this Agreement as provided in Section 5.8 hereof.

On October 29, 2010, MCA wired SSM the sum of \$183,651.28, as reflected on the wire detail report provided (Ex. E to Snead Aff. in Supp.). On January 10, 2011, SSM issued a Bill of Sale to Solivia in the amount of \$207,769.50 for the assets described in the Asset Purchase Agreement. IRN provided MCA with documents reflecting that the last date on which SSM processed any bank card transactions with IRN was February 2, 2011, and MCA has not received any payments from SSM's processing since that date.

John Snead, the President of Plaintiff, affirms that SSM owes Plaintiff the sum of \$269,237.03, plus applicable interest from February 3, 2011, consisting of the Purchase Amount of \$312,500.00 under the Second Merchant Agreement, less payments received in the amount of \$43,262.97.

C. The Parties' Positions

Plaintiff submits that, as outlined in the Snead Affidavit in Support, Plaintiff has demonstrated its entitlement to summary judgment on its breach of contract by establishing 1) the formation of a contract between MCA, SSM and Ippolito, 2) performance by MCA, 3) SSM and Ippolito's failure to perform, and 4) resulting damages. Plaintiff also argues that SSM and Ippolito's affirmative defenses fail to create an issue of fact defeating Plaintiff's right to summary judgment.

Plaintiff submits, further, that pursuant to the terms of the Second Merchant Agreement and Ippolito Guaranty, Plaintiff is entitled to recover expenses and attorney's fees incurred in enforcing its rights under those instruments. Counsel for Plaintiff provides details regarding 1) the services he provided to Plaintiff, 2) the number of hours he expended on this matter, and 3) the expenses incurred by Plaintiff in support of Plaintiff's request for an award of \$5,220.00 representing attorney's fees, costs and expenses.

In opposition, Defendants South Shore and Ippolito submit, *inter alia*, that 1) Plaintiff has failed to submit documentary evidence in support of its request for damages in the sum of

\$269,237.03; 2) Plaintiff has failed to set forth evidence that it performed its obligations under the terms of the Agreements; and 3) Plaintiff has failed to set forth evidence in support of its claim that SSM defaulted under its obligations pursuant to Section 3.1 of the Second Merchant Agreement by, *e.g.*, selling all or any substantial portion of its assets.

In reply, Plaintiffs submit, *inter alia*, that 1) Plaintiff, through the Affidavit in Support of Snead, has provided competent evidence in support of its motion; 2) SSM and Ippolito have failed to produce documentary evidence disputing Snead's affirmation regarding payments made by and sums owed to Plaintiff; and 3) the Court should reject SSM and Ippolito's "disingenuous" claim (Reply Aff. at p. 6) that the sale to Solivia did not represent a sale of all or any substantial portion of SSM's assets.

Solivia argues, *inter alia*, that 1) the allegations in the Fifth through Eleventh Causes of Action are pled with insufficient particularity, and do not give rise to a reasonable inference of fraud; and 2) Plaintiffs fail to allege that the conveyance to Solivia was without fair consideration or would have rendered SSM insolvent.

SSM and Ippolito have submitted a Memorandum of Law in support of Solivia's motion in which they argue, *inter alia*, that 1) Plaintiff has failed to adequately plead causes of action pursuant to DCL §§ 273, 274 and 275 by failing to allege that a conveyance was made without fair consideration, and the affidavit of Ippolito establishes that the sum paid by Solivia for the assets constituted fair consideration; 2) Plaintiff has failed to adequately plead a cause of action pursuant to DCL § 276 by failing to allege that a conveyance was made with actual intent to hinder, delay or defraud a creditor, and failing to plead the alleged fraud with adequate particularity; and 3) in light of the insufficiency of Plaintiff's allegations with respect to violations of DCL §§ 273, 274, 275 and 276, its causes of action for attorney's fees pursuant to DCL § 276-a, and under DCL § 278, must fail as well.

MCA opposes Solivia's motion, submitting that 1) the Complaint alleges cognizable causes of action for a fraudulent conveyance; and 2) Plaintiff has provided adequate details regarding the alleged fraud, including a) the identity of the transferor, b) the identity of the transferee, and c) "badges of fraud," including the allegation that "Defendants defrauded Plaintiff by the transfer of assets from [SSM] to Solivia for less than a fair consideration when [SSM] and Solivia were aware that MCA provided a capital advance to [SSM] after the

execution of the asset purchase agreement, but prior to closing on the sale of assets which rendered [SSM] insolvent” (P’s Memorandum of Law in Opp. at p. 4).

RULING OF THE COURT

A. Summary Judgment Standards

Pursuant to CPLR § 3212(e), summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct 1) that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action; or 2) that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action.

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Standards of Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

C. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). See also *JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia*, *supra*.

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept. 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); see also *Schulman v. Westchester Mechanical Contractors, Inc.*, 56 A.D.2d 625 (2d Dept. 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept. 2001), *app. dismiss.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept. 1994).

The essential elements of a cause of action sounding in fraud are 1) a misrepresentation or a material omission of fact which was false and known to be false by defendant, 2) made for the purpose of inducing the other party to rely upon it, 3) justifiable reliance of the other party on the misrepresentation or material omission, and 4) injury. *Colasacco v. Robert E. Lawrence Real Estate*, 68 A.D.3d 706 (2d Dept. 2009), quoting *Orlando v. Kukiela*, 40 A.D.3d 829, 831 (2d Dept., 2007).

CPLR § 3016(b) provides that an action for fraud must be pled with particularity. Bare allegations of fraud without any allegation of the details constituting the wrong are clearly insufficient to sustain such a cause of action. *Gervasio v. DiNapoli*, 126 A.D.2d 514 (2d Dept. 1987). The requirements of CPLR § 3016(b), however, may be met when the facts are sufficient

to permit a reasonable inference of the alleged conduct. *Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y.3d 486, 492 (2008).

D. Fraudulent Conveyances

Debtor and Creditor Law (“DCL”) § 273 provides that every conveyance made and every obligation incurred by a person who is or who will be thereby rendered insolvent is fraudulent as to creditors without regard to actual intent if the conveyance is made or the obligation incurred without a fair consideration. DCL § 274 provides that every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent. DCL § 275 renders conveyances without fair consideration fraudulent if made by a person intending to incur debts beyond his ability to pay. DCL § 276 renders conveyances made with actual intent to defraud fraudulent as to both present and future creditors.

DCL § 276-a authorizes an award of attorneys' fees in proceedings to set aside a conveyance made with intent to defraud, where such conveyance is found to have been made by the debtor and received by the transferee with actual intent to hinder, delay or defraud either present or future creditors. DCL § 278 provides that where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser, have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or disregard the conveyance and attach or levy execution upon the property conveyed.

Direct evidence of fraudulent intent is often elusive. *Pen Pak Corp. v. LaSalle National Bank of Chicago*, 240 A.D.2d 384, 386 (2d Dept. 1997). Courts, therefore, will consider “badges of fraud,” which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent. *Id.*, quoting *MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 935 (S.D.N.Y. 1995). For example, in *Pen Pak*, the Second Department affirmed the trial court’s denial of defendant’s motion to dismiss the causes of action asserted under DCL § 276 in light of the “badges of fraud” which included

1) the close relationship among the parties to the transaction, 2) the inadequacy of consideration, 3) the transferor's knowledge of the creditor's claims, or claims so likely to arise as to be certain, and the transferor's inability to pay them, and 4) the retention of control of property by the transferor after the conveyance. *Id.*

E. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorneys' fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. See *Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

F. Application of these Principles to the Instant Action

MCA has demonstrated that, as a result of the sale of SSM's assets to Solivia, Defendants breached Section 3.1 of the Second Merchant Agreement. The documentary evidence, including the Bill of Sale, confirms that SSM entered into an agreement with Solivia to sell all or any substantial portion of its assets. First, the Asset Purchase Agreement was titled "Bill of Sale *of Business*" (emphasis added). Moreover, the assets sold by SMS included the "Retail Motorcycle, ATV and [SSM] Store" (emphasis added), including all of its franchise rights.

The Court concludes that the applicable subsection of Section 3.1 was designed to ensure that SSM would be able to continue in business, thereby allowing MCA to continue to collect on the accounts receivable and to be repaid according to the terms of the Second Merchant

Agreement. The Court further determines that the inclusion of the non-competition agreement between Solivia and SSM demonstrates that the intent of that agreement was to put SSM out of business, in violation of Section 3.1(vii) of the Second Merchant Agreement.

Moreover, in light of 1) SSM's sale or transfer of all or any substantial portion of its assets to Solivia, 2) the transfer of title to and operational control of the business, and 3) the non-competition agreement, Plaintiff has demonstrated that SSM not only permitted "any event to occur which could have an adverse effect on the use, acceptance or authorization of credit cards" (subdivision ii), but also that there was a constructive termination with IRN (subdivision iii).

In light of the foregoing, the Court concludes that Plaintiff has demonstrated its entitlement to judgment as a matter of law with respect to its first cause of action for breach of contract and SSM has failed to submit sufficient proof to raise a triable issue of fact. Accordingly, the Court grants Plaintiff MCA summary judgment against SSM on its first cause of action for breach of contract and dismisses the affirmative defenses of SSM and Ippolito. The Court concludes that those affirmative defenses fail to create an issue of fact defeating Plaintiff's right to summary judgment given, *inter alia*, 1) the absence of any documentary or other admissible evidence to substantiate Defendants' conclusory claim that Plaintiff failed to remit the sum of \$250,000.00 to SSM as required by the Second Merchant Agreement, the affirmation of Snead that SSM's payment obligations under the First Merchant Agreement were subsumed in the obligations set forth the Second Merchant Agreement, and the wire detail report which confirmed that MCA advanced an additional \$183,651.28 under the Second Merchant Agreement, and 2) the Court's conclusion that Defendants' usury defense lacks merit, given that the Second Merchant Agreement is not a loan agreement involving the charging of interest to SSM, but rather is an agreement pursuant to which MCA purchased a percentage of SSM's future credit card receivables.

The Court also grants Plaintiff's motion for summary judgment on its third cause of action in light of Ippolito's execution of his "Unconditional Personal Guarantee" with respect to, *inter alia*, the Second Merchant Agreement. Ippolito executed the Guaranty, which clearly reflects his intention to guarantee SSM's payment pursuant to the Second Merchant Agreement and, as discussed *infra*, SSM failed to make payment in accordance with the terms of its obligation under the Second Merchant Agreement.

In light of the Court's determination that Plaintiff has demonstrated its entitlement to summary judgment on the first and third causes of action, the Court also grants Plaintiff's motion for summary judgment on its second and fourth causes of action, seeking attorney's fees pursuant to the Second Merchant Agreement and Guaranty. Although counsel for Plaintiff has provided an affirmation regarding his labor and fees, the Court nonetheless concludes that it has an insufficient basis on which to make an award of counsel fees, and refers that matter to an inquest as well.

In light of the Court's denial of Solivia's motion to dismiss the fifth through tenth causes of action, as discussed *infra*, the Court directs that the remainder of this action, except for the eleventh cause of action which the Court is dismissing, shall be severed and shall continue.

The Court denies Solivia's motion to dismiss Plaintiff's fifth through tenth causes of action, which are based on Plaintiff's allegation that the transfer of assets to Solivia was fraudulent and violated numerous provisions of the Debtor and Creditor Law. The Court denies Solivia's motion in light of evidence supporting the inference that the transfer of assets was fraudulent and Solivia knew of the fraud, including documentation supporting the conclusion that 1) SSM and Solivia entered into the Asset Purchase Agreement prior to SSM's execution of the capital advance agreement with MCA; 2) the Asset Purchase Agreement was for the sale of substantially all of SSM's assets; 3) the sale of the assets was not for fair consideration; 4) the closing on the allegedly fraudulent transfer of assets to Solivia occurred after MCA provided the advance to SSM; 5) Solivia was made aware that MCA was a creditor of SSM; 6) SSM agreed not to compete with Solivia; and 7) SSM is no longer in business.

In light of the foregoing, the Court concludes that Plaintiff has adequately pleaded causes of actions under the DCL §§273, 274, 275 and 276, and has provided adequate specificity regarding the alleged fraud. Given the sufficiency of those allegations, the Court concludes that Plaintiffs have also sufficiently pled causes of action for attorney's fees pursuant to DCL § 276-a, and an application to set aside the transfer of assets pursuant to DCL § 278.

The Court grants the motion to dismiss the eleventh cause of action which seeks a permanent injunction. The Court incorporates by reference the Prior Decision, in which the Court denied Plaintiff's application for permanent injunctive relief, in part based on the Court's conclusion that Plaintiff's injury, if any, is compensable by money damages. The motion papers

now before the Court confirm the Court's prior conclusion that Plaintiff's injury is compensable by money damages and, therefore, the Court dismisses the eleventh cause of action.

In light of the foregoing, it is hereby

ORDERED, that Plaintiff's motion for summary judgment against Defendants South Shore Motorsports, LLC on the first and second causes of action in the Amended Verified Complaint, and against Frederick Ippolito on the third and fourth causes of action in the Amended Verified Complaint, is hereby granted; and it is further

ORDERED, that Plaintiff have judgment against Defendants South Shore Motorsports, LLC and Frederick Ippolito in the sum of \$269,237.03, plus applicable interest from February 3, 2011, attorney's fees and costs to be determined at an inquest; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank N. Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the computation of interest, attorney's fees and costs on September 27, 2011 at 9:30 a.m.; and it is further

ORDERED, that Plaintiff shall serve upon counsel for Defendants, by regular mail, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before September 16, 2011; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against Defendants South Shore Motorsports, LLC and Frederick Ippolito in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.

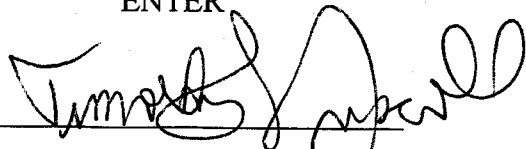
This constitutes the decision and order of the Court.

Counsel for the parties are reminded of their required appearance before the Court for a Preliminary Conference on August 31, 2011 at 9:30 a.m.

DATED: Mineola, NY

August 19, 2011

ENTER


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
AUG 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE