

Natural Choice Farms, Inc. v Nebraska Meat Corp.
2011 NY Slip Op 33659(U)
February 28, 2011
Supreme Court, Nassau County
Docket Number: 013580-10
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER

SCAN

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
NATURAL CHOICE FARMS, INC.,

TRIAL/IAS PART: 20
NASSAU COUNTY

Plaintiff,

Index No: 013580-10

-against-

Motion Seq. Nos: 1 & 2
Submission Date: 1/3/11

NEBRASKA MEAT CORP. and
GERALD ROMANOFF,

Defendants.
-----x

The following papers having been read on these motions:

- Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits....x
- Notice of Cross Motion, Affirmation in Opposition/Support and Exhibit.....x
- Defendant's Memorandum in Opposition/Support.....x
- Affirmation in Further Support, Affidavit in Further Support and Exhibits....x
- Affidavit in Opposition/Further Support.....x
- Defendant's Reply Memorandum in Further Support.....x

This matter is before the Court for decision on 1) the motion filed by Plaintiff Natural Choice Farms, Inc. ("NCF" or "Plaintiff") on November 12, 2010, and 2) the cross motion filed by Defendant Gerald Romanoff ("Romanoff"), both of which were submitted on January 3, 2011. For the reasons set forth below, the Court 1) grants the branch of Plaintiff's motion for a default judgment against Defendant Nebraska Meat Corp. in the sum of \$252,166.45, plus attorney's fees, interest and costs, and refers that matter to an inquest for the determination of attorney's fees, interest and costs; 2) denies Plaintiff's motion for summary judgment against Defendant Gerald Romanoff; and 3) denies Defendant Romanoff's cross motion in its entirety.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order 1) pursuant to CPLR § 3212, granting Plaintiff summary

judgment against Defendant Romanoff in the sum of \$252,166.45, plus interest and attorney's fees; and 2) pursuant to CPLR § 3215, granting Plaintiff a default judgment against Defendant Nebraska Meat Corp. ("Nebraska Meat") in the sum of \$252,166.45, plus interest and attorney's fees.

Defendant Romanoff opposes Plaintiff's motion, and cross moves for an Order 1) pursuant to CPLR § 3212, granting Romanoff summary judgment dismissing the action against him; and 2) awarding sanctions against NCF for its allegedly frivolous conduct. Plaintiff opposes Romanoff's motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Rose Aff. in Supp.) alleges as follows:

First Cause of Action

On or about July 30, 2009, NCF and Nebraska Meat entered into a written credit application agreement ("First Agreement"), pursuant to which NCF agreed to sell to Nebraska Meat, on credit, goods, wares and merchandise ("Goods") at the "agreed upon prices and reasonable values" (Compl. at ¶ 6). On or about between December 1 and December 29, 2009, NCF, at the request of Nebraska Meat, sold and delivered to Nebraska Meat merchandise at the agreed upon price and reasonable value of \$252,166.24, as set forth in the invoices ("Invoices") provided (Ex. A to Compl.). Nebraska Meat breached the First Agreement by failing to pay the balance of \$252,166.24 due to the Plaintiff.

Second Cause of Action

On or about February 12, 2010, NCF and Nebraska Meat entered into a second written agreement ("Second Agreement"), pursuant to which Nebraska Meat confessed to the amounts due Plaintiff, and affirmed its obligation to make payment to Plaintiff. Nebraska Meat breached the Second Agreement by failing to pay the balance of \$252,166.24 due to the Plaintiff.

Third through Sixth Causes of Action

In the third cause of action, Plaintiff seeks payment of \$252,166.24 from Nebraska Meat, with respect to the First Agreement, under the theory of goods sold and delivered. In the fourth cause of action, Plaintiff alleges that Romanoff guaranteed the obligations of Nebraska Meat, and seeks payment of \$252,166.24 pursuant to that guarantee ("Guarantee"). In the fifth cause of action, Plaintiff alleges that both Defendants are indebted to Plaintiff in the sum of \$252,166.24, jointly and severally, under the theory of account stated. In the sixth cause of

action, asserted against both Defendants, Plaintiff seeks recovery of collection costs including attorney's fees, interest and returned check fees, pursuant to the Agreements.

In his Answer (Ex. B to Rose Aff. in Supp.), Romanoff denies, or denies knowledge and information sufficient to form a belief as to the truth of, many of the allegations in the Complaint. Romanoff also asserts nine (9) affirmative defenses:¹ 1) the Complaint fails to state a claim on which relief can be granted; 2) the action is barred by the doctrine of laches, 3) the action is barred by the doctrine of estoppel; 4) the action is barred by the doctrine of unclean hands, 5) Plaintiff fails to state a claim against Romanoff because he never executed a personal guarantee, 6) Romanoff always acted in his representative, not individual, capacity, 7) Plaintiff's claims are barred by Plaintiff's own material breaches of the Agreements, 8) Plaintiff's claims are barred by Plaintiff's own breach of the implied covenant of good faith and fair dealing; and 9) Plaintiff's claims are barred by Plaintiff's failure to duly demand the amounts claimed to be owed.

In his Affidavit in Support, Robert Fisse ("Fisse"), the President of NCF, affirms as follows:

On or about July 30, 2009, NCF and Nebraska Meat entered into the First Agreement (Ex. C to Fisse Aff. in Supp.), pursuant to which NCF provided a line of credit to Nebraska Meat in connection with Nebraska Meat's purchase of Goods from NCF. The Agreement contained a personal guaranty by Romanoff of payment obligations due to NCF. Specifically, the second page of the Guarantee contains the following language:

I, We hereby state the foregoing information is correct and agree to pay all balances to [NCF]. For credit extended in accordance with the established credit terms. Further, should it be necessary to institute any legal proceedings for collection of any balances due to [NCF], I, we, agree to pay attorney's fees. I, we, authorize [NCF] to investigate the references and banks listed, and other credit sources pertaining to my, our credit and financial responsibility. All amounts due to [NCF] are payable in accordance with payment terms granted by [NCF]. I, we agree to pay 1 ½ % interest on all balances past due. I, we agree to pay the amount of \$25.00 for all checks returned to my, our bank. I, we will notify [NCF] of any change in ownership of my, our business. I, we, in consideration of extending credit at my, our request, personally guarantee prompt payment of any obligation to [NCF], whether now existing or herein after incurred, and agree to pay on demand any sum which is due to [NCF].

Must be signed by any corporate officer, Individual Owner or Partner

¹ Romanoff denotes two separate affirmative defenses as the "Third Affirmative Defense," and thus the "Fourth Affirmative Defense" is actually the fifth affirmative defense, etc.

Signature: [signature of Romanoff] Date: 7/30/09 [handwritten]

Signature: _____ Date: _____

On or about December 1 through December 23, 2009, NCF, pursuant to the First Agreement, and at the request of Defendants, sold and delivered to Defendants Goods for the agreed upon price and reasonable value of \$252,166.24. During that period, NCF sent Invoices (Ex. D to Fisse Aff. in Supp.) to Defendants for the Goods delivered. Defendants accepted and retained the Invoices without objection to any item on the Invoices. Defendants breached the terms of the First Agreement by failing to pay the balance of \$252,166.24, despite due demand. NCF performed its obligations under the First Agreement.

On or about February 12, 2010, NCF and Nebraska Meat entered into the Second Agreement, titled a "General Payment Agreement" (Ex. E to Fisse Aff. in Supp.), pursuant to which Nebraska Meat confessed to the amounts due to NCF, and affirmed its obligation to NCF based on its sale of Goods to Defendants as outlined. Fisse submits that the Second Agreement also contained a personal guaranty by Romanoff, and affirms that Romanoff signed the Second Agreement in both his corporate and personal capacity. The Second Agreement 1) is between NCF and Nebraska Meat; 2) sets forth payment terms; 3) reflects that the Agreement is "binding upon the parties, their successors, assigns and personal representatives;" and 4) is signed as follows:

First Party: [signature of Romanoff] CEO Printed Name/Title: Jerry Romanoff, CEO
Nebraska Meats

Second Party: [signature of Fisse] Printed Name/Title: Robert Fisse- Pres
Natural Choice Farms, Inc.

Fisse affirms that Defendants breached the terms of the Second Agreement by failing to pay the balance of \$252,166.24, despite due demand. NCF performed its obligations under the Second Agreement.

Fisse avers, further, that the First Agreement contained a provision for the payment of attorney's fees in the event that NCF was required to institute a collection action. In addition, the First and Second Agreements contained provisions regarding the payment of interest on all outstanding balances due.

Counsel for Plaintiff affirms that Nebraska Meat was served with the Summons and Complaint, as reflected by the Affidavit of Service and Affidavit of Compliance with CPLR §

3215(g)(4) provided (Exs. F and G to Rose Aff. in Supp.). Nebraska Meat has failed to answer, move or otherwise appear within the time limits provided by the CPLR, has made no request for an extension of time to appear, and has not been granted any such extension.

In an Affidavit dated November 24, 2010 (Ex. A to Yousuf Aff. in Opp./Supp.), Romanoff affirms, *inter alia*, as follows: 1) the First Agreement does not bear his signature; 2) he “[does] not recall” ever signing the First Agreement (Romanoff Aff. at ¶ 3); 3) the signature on the First Agreement “bears no resemblance” to his true signature, which does appear on the Second Agreement (*Id.*); and 4) although he signed the Second Agreement, that document contains no personal guaranty, and no personal guaranty was ever intended with respect to the Second Agreement; Romanoff affirms that he signed the Second Agreement in his capacity as the Chief Executive Officer (“CEO”) of Nebraska Meats, not in his personal capacity.

Counsel for Romanoff affirms that she advised counsel of Romanoff’s claim that he did not sign the First Agreement, as well as her opinion that “the forgery was evident from a comparison of the Credit Application and the General Payment Agreement” (Yousuf Aff. in Supp./Opp. at ¶). Counsel for Romanoff expresses her displeasure with the fact that, despite her insistence, Plaintiff’s counsel would not agree to withdraw Plaintiff’s motion. The Court does not share the view of counsel for Romanoff that any forgery is “evident” from a review of the relevant documentation, or that Plaintiff’s allegation that Romanoff executed a guaranty is frivolous, and, therefore, is unpersuaded by her argument that Plaintiff was compelled to withdraw its motion simply because she insisted that he do so. Accordingly, the Court denies the branch of Romanoff’s motion seeking sanctions without further discussion.

In his Affidavit in Further Support, William Demarzo (“Demarzo”), an employee of Plaintiff, affirms as follows:

Demarzo has been involved in the wholesale meat business for over ten (10) years. In or about July of 2009, he went to work for Plaintiff as a salesperson. When he began that employment, Plaintiff was not involved in any business dealings with Defendants. Demarzo has known Romanoff for over twenty (20) years, and was aware that Romanoff owned Nebraska Meat. Shortly after beginning his employment with Plaintiff, Demarzo contacted Romanoff to inquire whether he would be interested in conducting business with Plaintiff. Romanoff responded that he would be amenable to ordering products from Plaintiff.

NCF required new customers to fill out and sign a written credit application agreement containing credit information and customer payment obligations regarding all products that will

be sold. This agreement also contained a personal guarantee provision, and required a corporate officer, individual owner or partner to sign the agreement both in his corporate and personal capacities. If NCF approved the application, it established a line of credit for the customer, permitted the customer to order products and began to ship the product without first receiving payment, and without demanding that payment be made on delivery.

When Demarzo first spoke with Romanoff, he advised him that he would be required to sign the credit application agreement, and Romanoff agreed that he would do that. Romanoff introduced Demarzo to Mabel Chan ("Chan"), his purchasing agent, who became Demarzo's contact person when he contacted Nebraska Meat. Demarzo dealt primarily with Chan, and with Romanoff when Chan was unavailable.

On July 29 and 30, 2009, Demarzo and Chan corresponded via e-mail (Ex. A to Demarzo Aff.) regarding certain issues. Specifically, on July 30, 2009, Demarzo sent an email to Chan to confirm certain pick-up dates, and faxed her a blank credit application with a request that it be completed and faxed back the same morning. That application was identical to the application contained in Exhibit C of Plaintiff's initial motion papers. Several hours later, when he had not heard from Chan, Demarzo again emailed Chan and asked her to fax the credit application to him. Chan responded via an email in which she confirmed a pick-up date and advised Demarzo that the credit application was "on its way" (Ex. A at p. 8). Later that day, Chan faxed the completed credit application to Demarzo which contained Romanoff's signature and the date.

Based on the information in the application provided, Plaintiff advised Nebraska Meat that it would open a line of credit for them in the amount of \$25,000. Nebraska's Meat's first order with NCF occurred simultaneously with NCF's receipt of the executed credit application, and began the business relationship between the parties.

Demarzo provides a transaction summary report (Ex. B to Demarzo Aff.) reflecting the details of all orders placed by Nebraska Meat with NCF since July of 2009. This report confirms that Nebraska Meat ordered product from NCF on a regular basis, and NCF shipped that product to Nebraska Meat. Nebraska Meat made all required payments between July and November of 2009.

In or about November of 2009, Fisse and Demarzo met with Romanoff at his warehouse in New Jersey to discuss future business between the parties. Romanoff advised them that Nebraska Meat's business was growing, he had been negotiating with his bank regarding increasing his credit line and he had met with a mortgage broker. Romanoff said that he was waiting for approval from a lender to refinance certain loans which would provide him with

more working capital to invest in Nebraska Meat. Romanoff also asked Fisse and Demarzo to increase his line of credit with NCF and they agreed to an increase that would allow Nebraska Meat to order product over \$250,000 on credit.

Demarzo submits that, based on his numerous conversations with Romanoff, Romanoff was “fully aware” (Demarzo Aff. at ¶ 24) of the credit terms in the First Agreement, including his personal guarantee. NCF would not have sold product on credit to Nebraska Meat unless it had received the executed credit agreement containing Romanoff’s personal guarantee.

In his Affidavit in Further Support, Romanoff confirms that Chan was an employee of Nebraska Meat who was responsible for purchasing goods and coordinating with suppliers on behalf of Nebraska Meat. While conceding that he advised Demarzo that Chan was a contact person and purchaser at Nebraska Meat, Romanoff submits that he never identified or held Chan out as his personal agent. Thus, Romanoff contends, Chan had no authority to act on behalf of Romanoff personally.

C. The Parties’ Positions

Plaintiff submits that it has demonstrated its right to judgment against the Defendants by establishing that: 1) Plaintiff performed its obligations under the First Agreement by providing Nebraska Meat with a line of credit, and delivering the Goods as reflected in the Invoices; 2) Romanoff’s failure to dispute the items on the Invoices in his Answer constitutes an admission that the Invoices are an itemization of the Goods, and contain the reasonable value and/or agreed upon price of each item sold; 3) Defendants’ receipt and retention of the Invoices without objection entitle Plaintiff to judgment on the theory of account stated; 4) Romanoff guaranteed Nebraska’s payment pursuant to both Agreements; 5) Nebraska Meat breached its obligations under the First and Second Agreements by failing to make payment to Plaintiff; 6) Romanoff breached his obligations under the First and Second Agreements by failing to pay Plaintiff for the indebtedness of Nebraska Meat; 7) as a result of those breaches, Plaintiff suffered damages in the amount of \$252,166.24, plus interest from December 23, 2009; and 8) Plaintiff is entitled to collection costs, including attorney’s fees and interest, pursuant to the terms of the Agreements.

Romanoff submits, *inter alia*, that 1) the Court should deny Plaintiff’s motion for summary judgment as to Romanoff because neither of the Agreements creates personal liability on the part of Romanoff; 2) because the signature on the Second Agreement is an “obvious forgery” (D’s Memorandum of Law at p. 4), it cannot serve as the basis for the imposition of personal liability on Romanoff; 3) assuming, *arguendo*, that the Second Agreement does contain

Romanoff's signature, it is not an enforceable guaranty of Nebraska Meat's obligations because it does not contain sufficiently definite terms to be enforceable; 4) the Second Agreement cannot serve as the basis for imposition of personal liability on Romanoff in light of the absence of any terms purporting to impose such personal liability, and Romanoff's signature on that document in his capacity as CEO of Nebraska Meat; and 5) the Court should award sanctions against Plaintiff and/or its counsel for allegedly frivolous conduct in pursuing this motion.

In reply, Plaintiff submits, *inter alia*, that 1) in light of the language in the Second Agreement that it is binding on "the parties, their successors, assigns and personal representatives," and Romanoff's admission to executing the Second Agreement, Plaintiff has demonstrated Romanoff's personal liability to Plaintiff for the obligations of Nebraska Meat; 2) Romanoff's "self serving and conclusory denial" (Rose Aff. in Further Supp. at ¶ 8) that he signed the Second Agreement is insufficient to defeat Plaintiff's right to summary judgment against Romanoff on his guarantee; 3) even if Romanoff did not execute the First Agreement, he is nonetheless liable to Plaintiff under the doctrine of agency and/or ratification by virtue of Chan's communications with Plaintiff; and 4) Plaintiff's motion for sanctions, in addition to being utterly lacking in merit, is particularly troubling in light of the concession of counsel for Romanoff that "she too would not voluntarily discontinue the case against the individual defendant at this early juncture based only on an attorney's letter regarding the issue if the tables were turned and she were in my shoes" (*Id.* at ¶ 34).

In response, Romanoff submits, *inter alia*, that 1) Romanoff is in the "best position" to testify to the genuineness of his signature (Romanoff Reply Mem. at p. 2) and a comparison of the signatures on the Agreements reveals that they are "entirely different" (*Id.*) 2) the documentation submitted by Plaintiff does not suggest that Chan acted on behalf of Romanoff personally; and 3) Plaintiff's ratification argument is misplaced because it was Nebraska Meat, not Romanoff, who benefitted from the First Agreement.

RULING OF THE COURT

A. Summary Judgment Standards

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. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

Although a defaulting defendant is deemed to have admitted all the allegations in the complaint, the legal conclusions to be drawn from such proof are reserved for the Supreme Court's determination. *McGee v. Dunn*, 75 A.D.3d 624, 624 (2d Dept. 2010), quoting *Venturella-Ferretti v. Ferretti*, 74 A.D.3d 792 (2d Dept. 1992) and citing, *inter alia*, CPLR § 3215(b). There is no mandatory ministerial duty to enter a default judgment against a defaulting party. *Id.*, citing *Resnick v. Lebovitz*, 28 A.D.3d 533, 534 (2d Dept. 2006), quoting *Gagen v. Kipany Prods.*, 289 A.D.2d 844, 846 (2d Dept. 2006) (internal citations omitted). Instead, the court must determine whether the motion was supported with enough facts to enable the court to determine that a viable cause of action exists. *Id.*, quoting *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71 (2003). In determining whether the plaintiff has a viable cause of action, the court may consider the complaint, affidavits, and affirmations submitted by the plaintiff. *Id.* at 625, quoting *Litvinskiy v. May Entertainment Group, Inc.*, 44 A.D.3d 627, 627 (2d Dept. 2007).

C. Relevant Causes of Action

A cause of action for breach of contract requires allegations of the existence of a contract, plaintiff's performance under the contract, defendant's breach of the contract and resulting damages. *JPMorgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 803 (2d Dept. 2010).

For an action on an account stated, where the parties have agreed that the defendant owes the plaintiff a certain amount of money on an account, the plaintiff must prove that 1) there has been an accounting of the alleged debt; 2) there is a specific balance due to the plaintiff by the defendant; 3) the defendant expressly or impliedly promised to pay the plaintiff; and 4) the defendant has not paid. *See Bock v. Breindel*, 5 A.D.2d 1007 (2d Dept. 1958); *Tridee Assoc., Inc. v. Board of Educ. of City of New York*, 22 A.D.3d 833 (2d Dept. 2005); *United Consolidated*

Industries v. Mendel's Auto Parts, Inc., 150 A.D.2d 768 (2d Dept. 1989).

Courts permit recovery on an account stated theory because in such a case, the parties have, by their own conduct, evidenced an agreement as to the balance of a debt. *See Reisman, Peirez & Reisman, L.L.P. v. Gazzara*, 15 Misc. 2d 1113 (A) (Sup. Ct. Nassau Co. 2007). In determining whether there is a viable account stated cause of action, a court must consider whether the defendant has objected to the account within a reasonable time (*Id.*), and whether the account stated is the product of fraud or mistake, which renders it unenforceable as a matter of law. *Rodkinson v. Haecker*, 248 N.Y. 480 (1928). An account stated is not synonymous with open or running account. *See Romeo v. Bimco Industries Inc.*, 57 A.D.2d 947 (2d Dept. 1977). To prove an account stated, a plaintiff need not show details of the original debt, but only that the defendant received the account and kept it for reasonable time without objection. *United Consolidated Industries v. Mendel's Auto Parts, Inc.*, *supra*. The defendant has the burden to prove fraud, mistake, or that it never accepted the account stated. *Id.*

In an action for goods sold and delivered, a plaintiff must demonstrate that on a certain date, it sold and delivered certain goods to the defendant at the defendant's request; that the goods were of reasonable value or agreed price; and that payment was demanded by the plaintiff, but not made. *See United Consolidated Industries v. Mendel's Auto Parts, Inc.*, *supra*. A plaintiff may elect to include with the pleadings a schedule of goods or services rendered, listing the individual goods, the date of each transaction, and the agreed value or price. *See CPLR* §3014. *See also*, Siegel, *Practice Commentaries*, McKinney's CPLR § 3016(b), C3016:9 (1991); and *Duban v. Platt*, 23 A.D.2d 660 (2d Dept. 1965), *aff'd*, 17 N.Y.2d 526 (1966).

Generally speaking, statements in a pleading must "give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR § 3013; and *Sullivan v. Sullivan*, 180 Misc.2d 433 (Sup. Ct. Suffolk Co. 1999). CPLR § 3016(f) provides, in part: "In an action involving the sale and delivery of goods, or the performing of labor or services, or the furnishing of materials, the plaintiff may set forth and number in his verified complaint the items of his claim and the reasonable value or agreed price of each." Where an itemized schedule is included in the pleadings in an action for goods sold and delivered, and sets forth the elements of the plaintiff's claim and reasonable value of the alleged sum due, the pleading requirements of CPLR § 3016(f) are satisfied. *See O'Callaghan v. Republic Western Insurance Co.*, 269 A.D.2d 114 (1st Dept. 2000).

D. Guaranty

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 Court of Appeals, in *Salzman Sign Co. v. Beck, supra*, held as follows with respect to personal guarantees for corporate obligations:

In modern times most commercial business is done between corporations, [and] everyone in business knows that an individual stockholder or officer is not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded, the nearly universal practice is that the officer signs twice, once as an officer and again as an individual.

10 N.Y.2d at 67.

See Khiyaye v. MikeSad Enterprises, Inc., 66 A.D.3d 845 (2d Dept. 2009) (affirmed trial court's dismissal of complaint against individual defendant based on documentary evidence, where contract established that individual defendant executed contract solely in his corporate capacity); *Summit Rovins & Feldesman v. Fonar Corp.*, 213 A.D.2d 201 (1st Dept. 1995) (summary judgment properly granted in favor of individual defendant in absence of direct and explicit evidence of actual intent by him to be held personally liable for corporation's debts, citing *Salzman, supra*, at 67); *Stuyvesant Plaza Inc. v. Emizack, LLC.*, 307 A.D.2d 640 (3d Dept. 2003) (affirmed trial court's order granting summary judgment dismissing the complaint against individual defendant who submitted proof that she never intended to execute personal guaranty and plaintiff provided no competent proof in opposition). *Cf. Star Video Entertainment, LP v J&I Video Distributing, Inc.*, 268 A.D.2d 423 (2d Dept. 2000) (triable issue of fact existed where individual signed his name and word "Pres" underneath language on credit application providing that "the undersigned personally guarantees payment of the account").

E. Ratification and Apparent Authority

Ratification is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority, and it relates back and supplies original authority to execute an agreement. *Rocky Point Properties, Inc. v. Sear-Brown Group, Inc.*, 295 A.D.2d 911, 913 (4th Dept. 2002), quoting *Holm v. C.M.P. Sheet Metal*, 89 A.D.2d 229, 232 (4th Dept. 1982). Ratification requires full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language. *Id.*, quoting *Holm, supra*, at 233.

Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. *150 Beach 120th Street, Inc. v. Washington Brooklyn Limited Partnership*, 39 A.D.3d 722, 723 (2d Dept. 2007), citing *Standard Funding Corp. v. Lewitt*, 89 N.Y.2d 546, 551 (1997), quoting *Hallock v. State of New York*, 64 N.Y.2d 224, 231 (1984) (internal citations omitted). A person cannot, by his own acts, imbue himself with the apparent authority to act for a principal. *Morgold, Inc. v. ACA Galleries, Inc.*, 283 A.D.2d 407, 408 (2d Dept. 2001), citing, *inter alia*, *Standard Funding Corp., supra*.

E. Attorney's Fees

Provisions or stipulations in contracts for payment of attorney's 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). Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that they are reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). The court should consider the following factors in determining the reasonable value of the services rendered: 1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, 2) the lawyer's experience, ability and reputation, 3) the amount involved and benefit resulting to the client from the services, 4) the customary fee charged for similar services, 5) the contingency or certainty of compensation, 6) the results obtained, and 7) the responsibility involved. *Diaz v. Audi of America, Inc.*, 57 A.D.3d 828, 830 (2d Dept. 2008). In making an award of attorney's fees, the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered. *NYCTL 1988-1 Trust v. Shabbos, Inc.*, 37 A.D.3d 789, 791 (2d Dept. 2007), quoting *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006).

F. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion for a default judgment against Defendant Nebraska Meat Corp. in the sum of \$252,166.45, plus attorney's fees, interest and costs, and refers that matter to an inquest for the determination of attorney's fees, interest and costs. Plaintiff has demonstrated its right to judgment against Nebraska Meat Corp. by demonstrating proof of service of the summons and the complaint, and providing affidavits setting forth the facts constituting the claim, the default, and the amount due. Plaintiff has also make a *prima facie* establishing the causes of action against the defaulting party. Specifically, Plaintiff has demonstrated that 1) Nebraska Meat entered into, and breached, the First and Second Agreements by its failure to make payment; 2) on specified dates, Plaintiff sold and delivered the Goods to Nebraska Meat at its request, the goods were of reasonable value or agreed price and payment was demanded by the Plaintiff, but not made; and 3) there has been an accounting of the alleged debt, there is a specific balance due to the Plaintiff by Defendant Nebraska Meat, Nebraska Meat expressly or impliedly promised to pay the Plaintiff; and Nebraska Meat has not paid that balance. Defendants have presented no evidence to defeat Plaintiff's right to judgment against Nebraska Meat. There is, however, an insufficient basis on which to determine the appropriate counsel fee award and, accordingly, the Court refers the determination of that issue, as well as interest and costs, to a Special Referee.

The Court denies Plaintiff's motion for summary judgment, and Defendant's cross motion for summary judgment, in light of the disputed issues of fact, including but not limited to 1) whether Romanoff executed the First Agreement; 2) whether Romanoff executed a personal guaranty in connection with the Second Agreement; and 3) whether Romanoff is deemed to have ratified the First Agreement by virtue of his continuing to order goods on credit, which benefitted the company of which he was CEO and, therefore, arguably benefitted him. With respect to the Second Agreement, although Romanoff placed the words "CEO" next to his signature, the language reflecting that the agreement was "binding on the parties, their successors, assigns and personal representatives," raises factual issues as to whether Romanoff personally guaranteed the Second Agreement. As noted *supra*, the Court denies Romanoff's application for sanctions.

Accordingly, it is hereby

ORDERED, that Plaintiff is granted judgment against Defendant Nebraska Meat Corp. in the sum of \$252,166.45, plus attorney's fees, interest and costs; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank N. Schellace to hear and determine all issues relating to the determination of attorney's fees, interest and costs, with respect to the judgment against Defendant Nebraska Meat Corp., on March 29, 2011 at 9:30 a.m.; and it is further

ORDERED, that counsel for Plaintiff shall serve upon Defendant Nebraska Meat Corp., 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 March 18, 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 the Defendant Nebraska Meat Corp. in accordance with the decision of the Special Referee; and it is further

ORDERED, that counsel for Plaintiff and counsel for Defendant Gerald Romanoff shall appear before the Court for a Preliminary Conference on April 4, 2011 at 9:30 a.m.

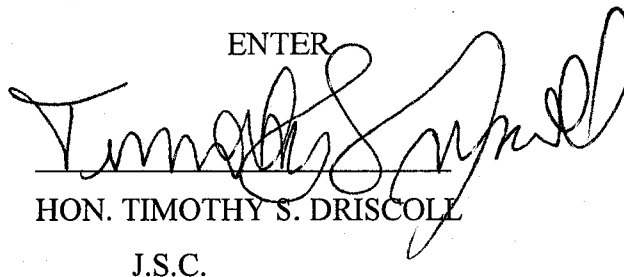
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY

February 28, 2011

ENTER



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

ENTERED
MAR 04 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE