

Capital Bus. Credit LLC v Sierra Fashions Inc.

2017 NY Slip Op 31219(U)

June 5, 2017

Supreme Court, New York County

Docket Number: 653563/2012

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x
CAPITAL BUSINESS CREDIT LLC,

Plaintiff,

-against-

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SIERRA FASHIONS INC., SIERRA SPORTSWEAR
INC., DOLLZ SPORTSWEAR INC., SANDEEP
SHARMA, KAMAL JOSHI, LOOPS FARMER INC.,
SRIVANIVAS RAO, REFUEL, INC., DEALS
TO BUY NY, INC., and RAHUL BISWAS,

DECISION AND ORDER

Defendants.

-----x
JEFFREY K. OING, J.S.C.:

Plaintiff Capital Business Credit LLC ("Capital") moves, pursuant to CPLR 3212(e), for an order granting Capital partial summary judgment against individual defendant Sandeep Sharma ("Sharma") on the second and fourth causes of action.¹

Plaintiff also moves, pursuant to CPLR 3211(b), to dismiss Sharma's affirmative defenses and counterclaims asserted in his answer dated April 14, 2015.

Background

This action arises out of the business relationship between Capital and defendants Sierra Fashions Inc. ("Sierra Fashions"), Sierra Sportswear Inc. ("Sierra Sportswear"), Dollz Sportswear

¹While Capital's notice of motion makes reference to the first and fourth causes of action, the moving papers make clear that Capital meant to refer to the second and fourth causes of action.

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("Dollz", and, collectively with Sierra Fashions and Sierra Sportswear, the "Companies") and Sharma (collectively with the Companies, the "Sierra defendants").

Capital is a Delaware limited liability company operating as a commercial lender, with its principal place of business in the county and state of New York (Grbic Aff., dated 4/8/16, ¶ 7). The Companies are all New York corporations engaged in selling men's and women's clothing; Sharma is the president and sole shareholder of all three (Id., ¶ 9). On October 25, 2010, Capital and the Companies entered into three separate, but substantially identical factoring agreements, under which the Companies sold their accounts receivable to Capital in exchange for cash advances and other financial services (Id., ¶ 11 and Ex. 1, factoring agreements, §§ 1, 4). As part of the agreements, the Companies granted Capital a security interest in "all of our accounts, contract rights, ... customer lists, ... general intangibles[,] ... the proceeds and products thereof, any security and guarantees therefor, ... in all of our books and records relating to the forgoing, ... and any of our property at any time in your possession" (Id., § 9). Further, the Companies each signed a separate but substantially identical "Security Agreement Supplement -- Inventory," giving Capital a security interest in "all [i]nventory now and hereafter owned by [the

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Companies]" (Grbic Aff., Ex. 2, supplemental security agreements, § 1).

As a further part of the transaction, Sharma entered into three separate, but substantially identical personal guarantees of the factoring agreements (Grbic Aff., Ex. 4, "Sharma guarantees"). The Sharma guarantees provided that Sharma "guarantee[d] and agree[d] to be liable for the full and indefeasible payment and performance when due of all [then] existing and future indebtedness, obligations or liabilities of [the Companies] to [Capital]" (Id. at 1). The Sharma guarantees are "absolute, unconditional and continuing" (Id. at 2). In the event of an action based on the Sharma guarantees, Sharma agreed "not to assert against [Capital] any setoff or counterclaim which [the Companies] may have" and waived "the right to interpose any defense based upon any statute of limitation or any claim of laches" (Id.). Further, Sharma agreed, in any such action, to pay Capital "the amount of all expenses (including reasonable attorney's fees) ... [and] to pay any interest at the highest lawful rate on all amounts payable to [Capital] hereunder" (Id. at 1). Sharma and Capital agreed that the Sharma guarantees could only be terminated on ninety days written notice (Id. at 3 ["[t]his is a continuing Guaranty and written notice as above provided shall be the only means of termination"]). Finally, the

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Sharma guarantees "embodie[d] the whole agreement of the parties and [could] not be modified except in writing, and no course of dealing between [Capital] and [Sharma would] be effective to change or modify [the Sharma guarantees]" (Id.).

On August 24, 2012, Sharma informed Capital that he had closed the Companies and was no longer doing business (Grbic Aff., ¶ 20).² Capital then sent demand letters to Sharma on August 24, 2012 (Grbic Aff., Ex. 5, 8/24/12 demand letter) and September 4, 2012 (Grbic Aff., Ex. 6, 9/4/12 demand letter), stating that the Companies had defaulted under the factoring agreements. Capital sought immediate payment of all sums due and owing to Capital and possession of all existing inventory, and demanded that the Companies not sell or remove any of their inventory "from its present locations" (Grbic Aff., Ex. 5, 8/24/12 demand letter at 2). Sharma claims he never received these letters (Sharma Aff. dated 4/26/16, ¶ 17). The parties dispute whether Sharma cooperated with Capital during this process. The record reflects that there were delays in Capital obtaining access to the books, records, and inventory (Grbic

²There are voluminous factual disputes in the record regarding the parties' business relationship, and the events that led to Sharma shutting down the business. As they are not relevant to the interpretation of the Sharma guarantees that are the basis of this motion, however, the court does not recount them here.

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Aff., ¶¶ 23-28; exhibits 7-9, correspondence regarding Capital's inventory control).

At the same time, Sharma claims that the parties briefly engaged in discussions regarding a peaceful turnover of the Companies' inventory and records in exchange for releasing him from the Sharma guarantees (Sharma Aff., ¶¶ 18-22, 25). Sharma mentions that he engaged Marilyn Simon, an attorney referred by Capital, in order to represent him in the process (Id., ¶ 19). While Sharma claims that there was an oral agreement to release him (id., ¶ 25), there is no dispute that the parties never entered into a written agreement to release Sharma from the Sharma guarantees. In any event, the negotiations did not bear fruit, and Capital sent a final demand letter (Grbic Aff., Ex. 10, 10/5/12 demand letter) before commencing this action.

Procedural History

Capital commenced this action against the Companies and Sharma on October 10, 2012. The next day, this Court signed an order to show cause enjoining the Companies and Sharma from interfering with Capital's right to access the books and records regarding the Companies then-existing inventory, and from altering or destroying any of the books, records, or inventory (NYSCEF Doc. No. 40, order to show cause dated 10/11/12). Shortly thereafter, on November 1, 2012, Sharma filed a voluntary

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petition, under Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the Southern District of New York (Grbic Aff., Ex. 14, bankruptcy petition). Sharma's petition noted that his debts were primarily business debts, listed Capital as holding an unsecured nonpriority claim based on the Sharma guarantees, and listed the Companies as codebtors liable to Capital (Id. at 1, 17, 21). The petition did not, however, seek bankruptcy protection for the Companies. The bankruptcy petition was an event of default under the Sharma guarantees (Grbic Aff., Ex. 4, Sharma guarantees at 3).

On December 20, 2012, this Court stayed the instant action against Sharma due to the bankruptcy filing, and extended the previously entered injunction against the Companies (NYSCEF Doc. No. 43, order dated 12/20/12). This Court then entered an interim order allowing Capital to amend the complaint to add Kamal Joshi ("Joshi"), Srihanivas Rao ("Rao"), Rahul Biswas ("Biswas"), Loops Farmer, Inc. ("Loops Farmer"), Refuel, Inc. ("Refuel"), and Deals to Buy NY, Inc. ("Deals") as defendants (NYSCEF Doc. No. 100, interim order dated 2/27/13). The amended complaint alleges, in relevant part, that the new defendants conspired with and aided Sharma in disposing of and converting the Companies' inventory to "frustrate any eventual judgment by Capital" (amended complaint, ¶ 1). The amended complaint asserts

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causes of action for: breach of the factoring agreements against the Companies (first cause of action); breach of the Sharma guarantees against Sharma (second cause of action); breach of a corporate guaranty against Sierra Fashion (third cause of action); recovery of fees and expenses against the Sierra defendants (fourth cause of action); fraudulent misrepresentation against the Companies (fifth cause of action); conversion against the Companies (sixth cause of action); conversion against the new defendants (seventh cause of action); a preliminary injunction against all defendants (eighth cause of action); a permanent injunction against all defendants (ninth cause of action); and an accounting against the Sierra defendants (tenth cause of action).

On May 13, 2013, Capital commenced an adversary proceeding against Sharma in the Bankruptcy Court, objecting to the discharge, in bankruptcy, of the Sierra defendants' collective debt to Capital (Grbic Aff., Ex. 17, bankruptcy complaint). In response, Sharma asserted counterclaims for fraud, breach of contract, and violation of the bankruptcy stay (Grbic Aff., Ex. 18, Sharma bankruptcy answer at 10-13). Sharma alleged that Capital failed to abide by the terms of the factoring agreements, and fraudulently induced him to enter into the factoring agreements (Id. at 10-12). Further, Sharma claimed that Capital's continuing litigation against the Companies in the

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instant action was a violation of the bankruptcy stay (Id. at 12-13).

On December 16, 2013, Capital moved in the Bankruptcy Court for summary judgment barring the discharge of the Sierra defendants debts to Capital (Grbic Aff., ¶ 42). On November 4, 2014, the Bankruptcy Court issued a decision granting Capital's motion (Grbic Aff., Ex. 20, Bankruptcy Court decision). The Bankruptcy Court held that Sharma had failed to "preserve adequate books and records" related to the debts to Capital, and was therefor not entitled to discharge of those debts (Id. at 15). Specifically, the Bankruptcy Court found that "[t]he Companies offices ... contained no books or records; [that] their computers were devoid of any data", and that Sharma's assertions to the contrary did not create a triable issue of fact (Id. at 17, 19). Further, the Bankruptcy Court dismissed Sharma's counterclaims, holding that he could not bring claims for fraud and breach of the factoring agreements, because those claims properly belonged to the Companies (Id. at 22-23). Finally, the Bankruptcy Court held that the automatic stay protected Sharma only, and that litigation against the Companies was therefore permitted under the Bankruptcy Code (Id. at 24). The Bankruptcy Court later signed an order effectuating its decision (Grbic Aff., Ex. 21, Bankruptcy Court order dated 11/21/14).

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Meanwhile, in the instant action, Capital moved, pursuant to CPLR 603, to sever the claims against the Companies, and, pursuant to CPLR 3215, for a default judgment against the Companies on those claims (NYSCEF Doc. No. 156, Order to Show Cause dated 6/24/13 at 3-4). On July 9, 2013, this Court granted Capital's motion, severed the claims, and awarded Capital a default judgment against the Companies on liability (NYSCEF Doc. No. 176, Tr. dated 7/9/13 at 4-5). Capital then settled an order on notice reflecting the decision, and provided for Capital to file a note of issue with respect to the damages claims against the Companies so that this Court could schedule an inquest on damages and attorneys' fees (NYSCEF Doc. No. 182, Order dated 9/5/13). Capital subsequently filed a note of issue as to the damages claims against the Companies (NYSCEF Doc. No. 185, note of issue dated 9/26/13).

After reviewing the parties' papers, this Court referred the issue of damages to the Special Referee Part (NYSCEF Doc. No. 207, supplemental order dated 5/5/14). On June 16, 2014, a hearing was held before the Honorable Ira Gammerman, J.H.O., who issued a report and recommendation that Sierra Fashions owed \$583,823.98, Dollz owed \$1,329,274.54, and Sierra Sportswear owed \$861.28, for a total judgment of \$1,913,959.80 (NYSCEF Doc. No. 213, tr dated 6/16/14 at 65-66). On January 13, 2015, this Court

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granted Capital's motion to confirm the report (NYSCEF Doc. No. 235, order dated 1/13/15), and directed entry of a judgment against the Companies in those amounts, plus costs, disbursements, and post-judgment interest (NYSCEF Doc. No. 244, order dated 2/24/15 at 2-3).

On April 14, 2015, after he withdrew his appeal of the Bankruptcy Court decision, Sharma answered Capital's amended complaint, and asserted counterclaims for fraud and breach of contract, as well as twenty-five affirmative defenses (NYSCEF Doc. No. 247, Sharma answer dated 4/14/15 at 11-29). The allegations in the counterclaims are substantially the same as those in Sharma's answer in the Bankruptcy Court proceeding.

Discussion

Capital now moves for an order to sever and grant partial summary judgment against Sharma on its second and fourth causes of action, and for summary judgment dismissing the fraud and breach of contract counterclaims.

Summary judgment is appropriate where there are no disputed material facts (Andre v Pomeroy, 35 NY2d 361 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (Id.

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at 562). The reviewing court, however, should accept the opposing party's evidence as true (Hotopp Assoc. v Victoria's Secret Stores, 256 AD2d 285 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (Negri v Stop & Shop, 65 NY2d 625 [1985]).

I. The Sharma Guarantees

The second cause of action for breach of contract seeks a judgment against Sharma under the Sharma guarantees in the amount of the Companies' indebtedness. The fourth cause of action, to the extent alleged against Sharma, seeks to recover Capital's attorneys' fees, costs, and disbursements incurred in enforcing the Sharma guarantees. As both causes of action concern the Sharma guarantees, and Sharma's sparse arguments in opposition are addressed to the general enforceability of those documents, this Court will address both causes of action together.

Breach of contract requires allegations of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010]).

"Where, as here, a creditor seeks summary judgment upon a written guaranty, the creditor need prove no more than an absolute and unconditional guaranty, the underlying debt, and the guarantor's

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failure to perform under the guarantee" (Kensington House Co. v Oram, 293 AD2d 304, 304-05 [1st Dept 2002]).

Capital offers the unconditional Sharma guarantees, proof of the debt owed by the Companies, as set forth in the J.H.O.'s report dated June 16, 2014, and Sharma's failure to pay. Capital also offers the Sharma guarantees' provision for "expenses (including reasonable attorney's fees)" (Grbic Aff., Ex. 4, Sharma guarantees at 1).

In response, Sharma raises several arguments. First, he claims that Capital's motion is procedurally flawed because it was filed more than 120 days after the note of issue dated September 26, 2013. Second, he claims that he did not unconditionally agree to guaranty the Companies' indebtedness to Capital, and, if he did, the parties orally agreed to release him from the Sharma guarantees. Finally, he claims that he is entitled to unspecified discovery.³ This Court notes that Sharma does not challenge the guarantees' attorney's fees and expenses provision.

³Sharma also claims that it was unethical for Capital to refer him to Marilyn Simon, his prior counsel, because of her connection to Capital, and her communications with Capital before and after her brief representation of him. Sharma's argument on this point is largely incoherent, and he fails to explain what Simon's representation has to do with his liability under the Sharma guarantees. Further, Sharma's vague assertions do not give rise to any suggestion of unethical conduct.

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As argued by Sharma, CPLR 3212(a) provides that summary judgment motions must be filed within "one hundred twenty days after the filing of the note of issue," absent an earlier deadline set by the court. Here, Capital filed a note of issue on September 26, 2013, with respect to the severed damages claims against the Companies, as directed by this Court in its order dated September 5, 2013. This note of issue did not relate to the claims asserted against Sharma. Thus, Sharma's argument is without merit. Moreover, Capital filed the note of issue while the bankruptcy stay was still in place against Sharma himself (NYSCEF Doc. No. 185, note of issue dated 9/26/13). Capital has not yet filed a note of issue related to the claims against Sharma. Further, Capital could not move for summary judgment against Sharma until April 2015, when Sharma answered the amended complaint and issue was joined, more than a year and a half after the note of issue was filed (CPLR 3212 (a) ["[a]ny party may move for summary judgment in any action, after issue has been joined"]). As no note of issue has yet been filed with respect to the claims against Sharma himself, the 120-day period has not yet started to run.

On the merits, Capital has made out a prima facie case for summary judgment. Contrary to Sharma's argument, the Sharma guarantees explicitly state that they are "absolute,

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unconditional and continuing" (Grbic Aff., exhibit 4, Sharma guarantees at 2). Sharma does not deny that he signed the Sharma guarantees. Further, Sharma admitted in his answer that he had absolutely and unconditionally guaranteed the Companies' indebtedness, disputing only that the Sharma guarantees were an inducement for Capital to fund his business (NYSCEF Doc. No. 247, Sharma answer, ¶ 24). Sharma is now bound by that admission (see Kimso Apartments, LLC v Gandhi, 24 NY3d 403, 412 [2014] ["As a general matter, statements in [a] corporations' pleadings that they owed ... money constitute formal judicial admissions"]). Further, Sharma does not seriously contest the Companies' indebtedness or his failure to pay under the Sharma guarantees. Indeed, counsel for the Sierra defendants has already conceded the Companies' liability (see NYSCEF Doc. No. 176, Tr. dated 7/9/13 at 3-4 ["THE COURT: Your opposition is limited to the extent that the default -- you're not arguing liability because that would be a hard aspect, but you're arguing that we want to have at least a demand at inquest of damages issue. MR. CHAUBEY: Yes, your Honor."])

Sharma's next argument that the parties orally agreed to release him from the guarantees is similarly unavailing. Any such agreement would be ineffective based on the language of the Sharma guarantees, which provide that they may only be modified

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in writing, "and no course of dealing between [Capital] and [Sharma] shall be effective to change or modify" them (Grbic Aff., Ex. 4, Sharma guarantees at 3). "A ... written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent" (General Obligations Law § 15-301 [1]; see also Paramount Leasehold, L.P. v 43rd St. Deli, Inc., 136 AD3d 563, 568 [1st Dept 2016] [internal quotation marks and citations omitted] ["Thus, if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls"]).

Here, Sharma argues that the parties were in the process of negotiating a peaceful possession agreement in exchange for his release, and that he fully complied with Capital's demands. Both assertions are disputed by Capital. Even if they were not, however, the record is devoid of a written agreement that releases Sharma from the Sharma guarantees. Thus, the Sharma guarantees control Sharma's liability (see Paramount Leasehold, L.P., 136 AD3d at 568).

Lastly, Sharma argues that "[Capital] has failed to provide any discovery or proposed deposition[s] to [the Sierra

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defendants],” discovery which Sharma claims will show that Capital engineered the Companies’ default in order to take possession of their inventory and lucrative business (Sharma memo. at 6).

CPLR 3212(f) does provide that “the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had” if the nonmoving party shows that “facts essential to justify opposition may exist but cannot then be stated.” Sharma’s attempt to utilize this provision, however, fails for two reasons. First, Sharma fails to “identify what information is in the exclusive control of [Capital] that would raise a material issue of fact” (Erkan v McDonald's Corp., 146 AD3d 466, 467 [1st Dept 2017]). A “claimed need for discovery without some evidentiary basis suggesting that discovery may lead to relevant evidence is insufficient to avoid the grant of summary judgment” (Cioe v Petrocelli Elec. Co., Inc., 33 AD3d 377, 378 [1st Dept 2006]). Second, Sharma had over a year to seek discovery between the time when he filed his answer and Capital filed the instant motion. He may not now seek to delay resolution of these claims when he has made no effort to obtain discovery during that period (Unisource, Inc. v Wolfe, 169 AD2d 567, 568 [1st Dept 1991] [plaintiff’s summary judgment motion granted in spite of defendant’s allegation that necessary

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facts were unavailable, where "defendant made no reasonable attempt to secure those facts in the time since commencement of the action"]).

Accordingly, given that Sharma has failed to raise a material issue of fact in opposition to enforcement of the Sharma guarantees, that branch of Capital's motion for summary judgment on the second cause of action is granted. In its notice of motion, Capital also seeks prejudgment interest on the second cause of action from May 31, 2014. As Sharma does not oppose this relief, it is granted as of that date.

Further, as Sharma has failed to proffer any opposition at all regarding Capital's right to its costs and reasonable attorney's fees for this enforcement action, that branch of Capital's motion for summary judgment on the fourth cause of action, as alleged against Sharma, is granted as to liability. The amount of expenses and reasonable attorney's fees to which Capital is entitled under that fourth cause of action will be referred to a Special Referee or Judicial Hearing Officer.

II. The Affirmative Defenses

Capital also moves, pursuant to CPLR 3211(b), to dismiss Sharma's affirmative defenses. CPLR 3211(b) provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." "On a

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motion to dismiss affirmative defenses pursuant to CPLR 3211(b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law" (534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 541 [1st Dept 2011]). "[A] defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (Warwick v Cruz, 270 AD2d 255, 255 [2d Dept 2000]). When the defendant, however, fails to raise a previously pleaded affirmative defense in opposition to a motion for summary judgment, or fails to oppose dismissal of the defense, the defense should be dismissed (Town of N. Elba v Grimditch, 131 AD3d 150, 163 n 4 [3d Dept 2015] ["To the extent that defendants have not briefed any issues with respect to their remaining affirmative defenses and counterclaims, we deem any arguments related thereto to be abandoned"]; Starkman v City of Long Beach, 106 AD3d 1076, 1078 [2d Dept 2013] ["Further, the first, second, and fourth affirmative defenses must be dismissed on the ground that the defendants did not oppose the dismissal of those affirmative defenses]).

Here, Sharma has alleged twenty-five affirmative defenses, some of which are duplicative. Capital has made a prima facie case for summary judgment on its second and fourth causes of action, and Sharma has failed to raise an issue of material fact

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in opposition. Indeed, Sharma fails to raise any factual issues or even to respond to Capital's arguments to dismiss his affirmative defenses. Thus, all twenty-five of his affirmative defenses must be dismissed (Grimditch, 131 AD3d at 163 n 4; Starkman, 106 AD3d at 1078).

Accordingly, that branch of Capital's motion to dismiss Sharma's twenty-five affirmative defenses is granted, and they are hereby dismissed.

III. Counterclaims

Capital also moves, pursuant to CPLR 3212, for summary judgment dismissing Sharma's counterclaims, which allege fraudulent inducement to enter into the factoring agreements (first counterclaim), and breach of the factoring agreements (second counterclaim).

Capital argues that these claims belong to the Companies and, therefore, Sharma lacks standing to assert them on his own behalf. Capital further argues that the Sharma guarantees explicitly prohibit Sharma from asserting counterclaims belonging to the Companies in an action to enforce the Sharma guarantees. Sharma does not address Capital's arguments but argues, in opposition, that issues of fact in the record preclude granting summary judgment to dismiss the counterclaims.

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Capital is correct on all counts. The principle is well settled that claims for fraudulent inducement and breach of contract belong to the parties to the contract (e.g. Parker & Waichman v Napoli, 29 AD3d 396, 399 [1st Dept 2006] ["(O)nly the parties to a contract have standing to sue for its breach"]). Thus, the counterclaims are personal to the Companies, and not to Sharma himself. "When a guarantor is sued on the guaranty, as is the case here, he or she cannot raise a claim or defense which is personal to the principal debtor, such as breach of the principal contract, unless it extends to a failure of consideration for the principal contract" (I Bldg, Inc. v Hong Mei Cheung, 137 AD3d 478, 478 [1st Dept 2016]). Sharma fails to allege a failure of consideration for the factoring agreements. Further, the Sharma guarantees specifically provide that, in an action to enforce them, Sharma may not assert any counterclaims belonging to the Companies (Grbic Aff., Ex. 4, Sharma guarantees at 2). Thus, as argued by Capital, Sharma lacks standing to assert the counterclaims.

Additionally, this Court notes that the Bankruptcy Court has already dismissed the same exact counterclaims (compare Grbic Aff., Ex. 18, Sharma bankruptcy answer at 10-12, with NYSCEF Doc. No. 247, Sharma answer at 27-29) on the same exact grounds (Grbic Aff., Ex. 20, Bankruptcy Court decision at 22-23). As Sharma's

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counterclaims were necessarily decided in the bankruptcy action, and were, in fact, dismissed on the same grounds as Capital argues in the instant action, Capital is entitled to summary judgment dismissing the counterclaims because they are barred by res judicata (UBS Sec. LLC v Highland Capital Mgt., L.P., 86 AD3d 469, 473-74 [1st Dept 2011] [Res judicata provides that "as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action"])).

For the foregoing reasons, that branch of Capital's motion for summary judgment dismissing Sharma's counterclaims is granted, and they are hereby dismissed.

Accordingly, it is hereby

ORDERED that the branch of plaintiff's, Capital Business Credit, LLC, motion for partial summary judgment against defendant Sandeep Sharma, on its second cause of action is granted; and it is further

ORDERED plaintiff is granted judgment on the second cause of action in the amount of \$1,913,959.80, together with interest at 25% per annum from the date of May 31, 2014, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and

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disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of plaintiff's motion for partial summary judgment on the fourth cause of action is granted as to liability; and it is further

ORDERED that the amount of expenses and reasonable attorney's fees to which plaintiff is entitled to under the fourth cause of action is respectfully referred to a Special Referee or Judicial Hearing Officer; and it is further

ORDERED that the above-noted reference to the Special Referee or Judicial Hearing Officer is to hear and report with recommendations, or if the parties so-agree, to hear and determine; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/suptctmanh at the "references" link under "Courthouse Procedures") shall assign this matter to an available Special Referee to hear and report or hear and determine as specified above; and it is further

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ORDERED that counsel shall immediately consult one another and counsel for plaintiffs shall, within fifteen (15) days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referee Part; and it is further

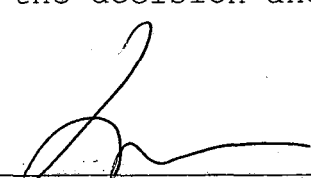
ORDERED that any motion to confirm or reject the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and 22 NYCRR § 202.44; and it is further

ORDERED that the branch of plaintiff's motion to dismiss defendant Sandeep Sharma's first and second counterclaims and twenty-five affirmative defenses is granted, and they are hereby dismissed; and it is further

ORDERED that the action shall continue as to the remaining defendants, and as to all remaining causes of action.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/5/17


HON. JEFFREY K. OING, J.S.C.