

**White Oak Commercial Fin., LLC v NY & Co Ecomm  
LLC**

2025 NY Slip Op 30547(U)

February 9, 2025

Supreme Court, New York County

Docket Number: Index No. 650682/2024

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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WHITE OAK COMMERCIAL FINANCE, LLC,  
  
Plaintiff,

- v -

NY AND CO ECOMM LLC, FASHION TO FIGURE  
ECOMM LLC, LORD & TAYLOR ECOMM LLC, LETOTE  
ECOMM LLC, AQUATALIA ECOMM LLC, JOSEPH  
SAADIA, JACK SAADIA, NY AND CO IP LLC, FASHION  
TO FIGURE IP LLC, SAADIA GROUP LLC, RTW  
RETAILWINDS ACQUISITION LLC, LORD & TAYLOR  
ACQUISITIONS LLC, LORD & TAYLOR IP LLC, LETOTE  
IP LLC, AQUATALIA IP LLC, 501 JERSEY AVENUE LLC,  
BROOK WAREHOUSING AND DISTRIBUTION LLC, 1735  
JERSEY AVENUE PROPERTY, LLC, SAADIA  
DISTRIBUTION LLC, 1000 STONY BATTERY  
PROPERTY OWNER LLC, and 1000 STONEY BATTERY  
ROAD LLC,

Defendants.

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INDEX NO. 650682/2024  
  
MOTION DATE --  
  
MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 96, 97, 98, 99, 100, 101, 102, 103, 120, 121, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Plaintiff White Oak Commercial Finance, LLC is engaged in commercial finance.  
  
(NYSCEF Doc. No. NYSCEF [NYSCEF] 2, Complaint ¶4.) Defendants NY &  
Co Ecomm LLC, Fashion to Figure Ecomm LLC, Lord & Taylor Ecomm LLC, LeTote  
Ecomm LLC, and Aquatalia Ecomm LLC (collectively, the borrowers)

“primarily operate e-commerce direct-to-consumer retail apparel businesses on the internet using various web sites to sell well known products bearing the trade names Lord & Taylor, Aquatalia, NY & Co., Fashion to Figure, and LeTote. They also sell and ship certain Aquatalia-branded goods at wholesale, to customers such as Nordstrom, Saks 5th Avenue, and Neiman Marcus.” (*Id.* ¶3.)

In motion 003, plaintiff seeks (1) summary judgment for breach of the loan agreement (see NYSCEF 3, Loan and Security Agreement [Oct. 1, 2020]; NYSCEF 8, Amendment No. 1; NYSCEF 9, Amended Restated Loan and Security Agreement; NYSCEF 13, Amendment No. 2; NYSCEF 17, Waiver and Amendment Nos. 4 and 5; NYSCEF 19, Forbearance Agreement and Amendment No. 6; NYSCEF 23, Amendment No. 7; NYSCEF 25, Amendment No. 9) on the first cause of action against the borrowers and second cause of action against the guarantors<sup>1</sup> in the amount of \$28,305,806.22 as of September 5, 2024 (NYSCEF 137, David Montiel Ramirez<sup>2</sup> aff ¶11[a]); (2) summary judgment on the fourth cause of action against 501 Jersey Avenue LLC (501 Jersey Avenue), a limited recourse guarantor whose obligations are secured by a mortgage,<sup>3</sup> for a declaratory judgment that 501 Jersey Avenue defaulted under the amended loan agreement and owes plaintiff \$16,797,841.81 as of April 31, 2024<sup>4</sup> plus interest thereafter and attorneys' fees; (3) dismissal of defendants' affirmative defenses; and (4) to sever the remaining causes of action.

## Background

Under the second forbearance agreement, defendants acknowledged that the defaults occurred, were continuing and defendants owe plaintiff \$47,501,611.36.

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<sup>1</sup> The guarantor defendants are Joseph Saadia, NY and Co IP LLC, Fashion to Figure IP LLC, Saadia Group LLC, RTW Retailwinds Acquisition LLC, Lord & Taylor Acquisitions LLC, Lord & Taylor IP LLC, LeTote IP LLC, and Aquatalia IP LLC. (NYSCEF 1, Complaint at 1.)

<sup>2</sup> Ramirez is plaintiff's Managing Director. (NYSCEF 137, Ramirez aff ¶1.)

<sup>3</sup> The mortgage encumbers the property located at 501 Jersey Avenue, New Brunswick, NJ 08901 (501 Jersey Mortgage). (NYSCEF 1, Complaint ¶73; NYSCEF 28, Mortgage.)

<sup>4</sup> The amount of \$16,797,841.81 which 501 Jersey Avenue allegedly owes consists of \$15,000,000 in principal and \$1,797,841.81 in default interest from May 31, 2023, to April 31, 2024. (NYSCEF 126, Ramirez aff ¶5; *id.* at 5-6.)

(NYSCEF 29, Second Forbearance Agreement ¶2[a].) Pursuant to the second forbearance agreement, 501 Jersey Avenue was added as a limited recourse guarantor under the amended loan agreement whose guaranty is equal to \$15 million. (*Id.* ¶7.)

This court granted plaintiff's motion for a preliminary injunction enjoining defendants from interfering with plaintiff's taking possession of the collateral and selling the collateral.<sup>5</sup> (NYSCEF 68, Feb. 23, 2024 Decision and Order at 4 [mot. seq. no. 001].) Plaintiff conducted UCC sales resulting in proceeds of \$15,663,690.70. (NYSCEF 99, Ramirez aff ¶8.)

### Discussion

Under CPLR 3212, “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted].) Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted. (See *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) “[S]ummary 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.” (CPLR 3212 [e].)

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<sup>5</sup> The court reminds the parties that the court found **likelihood** of success on the merits, not success. Indeed, defendants concede liability.

## 1. First and Second Causes of Action

Defendants concede that the “sole remaining issues” are the amounts of any deficiency and plaintiff’s recourse. (NYSCEF 123, Ds’ MOL at 1.) Accordingly, the court grants summary judgment on liability on the first and second causes of action for breach of the amended loan agreement. Summary judgment is denied as to damages on the first and second causes of action. The damages issue will be referred to a Special Referee to hear and report.

## 2. Fourth Cause of Action

In addition, the court grants summary judgment on the fourth cause of action which states:

### **“FOURTH CAUSE OF ACTION AGAINST 501 JERSEY AVENUE DECLARATORY JUDGMENT**

102. White Oak repeats and realleges each and every previous allegation as though fully set forth herein.

103. Pursuant to the Second Forbearance Agreement, 501 Jersey Avenue became a limited recourse Guarantor under the Amended Loan Agreement with its liability capped at \$15 million and secured by the 501 Jersey Mortgage.

104. 501 Jersey is in default of its obligations under the Amended Loan Agreement and White Oak is entitled to foreclose the 501 Jersey Mortgage.

105. By reason of the foregoing, White Oak is entitled to a declaratory judgment declaring that 501 Jersey Avenue is in default of the Amended Loan Agreement and reserving White Oak’s right to foreclose the 501 Jersey Mortgage.” (NYSCEF 1, Complaint ¶¶102-105.)

The admitted debt of \$47.5 million far exceeds the \$15.6 million proceeds of the UCC sales. Only two of defendants’ many arguments apply to the fourth cause of action. First, defendants assert that plaintiff’s credibility issues preclude summary judgment because in a foreclosure action in New Jersey on the 501 Jersey Avenue

warehouse, the court found a contradiction in plaintiff's statements. (NYSCEF 125, July 5, 2024 Decision of Superior Court of NJ, Chancery Division vacating default against defendants, at 19.) The issue before the New Jersey court was whether to vacate a default judgment against defendants. (*Id.* at 12.) In addition to a service of process failure, the court found good cause to vacate the default, stating:

“David Ramirez provided a sworn statement that White Oak has not received any payment from the Defendants since May 31, 2023. Comparatively, in the New York Action, Mr. Ramirez offered an affirmation where he advised that, since November 1, 2023, White Oak received \$48,052,558.77 in cash receipts, as well as an additional \$15,663,690.70 in sale proceeds on behalf of the Defendants. At the very least, this raises issues as to White Oak's accounting practices that require further scrutiny.” (*Id.* at 17.)

The court is not estopped by this discrepancy upon which the New Jersey court relied as under any scenario, the admitted debt of \$47.5 million far exceeds the \$15.6 million proceeds of the UCC sales. Even if the court credits defendants' challenges to plaintiff's accounting practices, they do not amount to \$31.9 million (\$47.5-\$15.6).

Defendants claim that this part of the summary judgment motion is an end run around the New Jersey court because this court has no jurisdiction over the property in New Jersey. However, the court rejects this argument because this case and this motion are about the amended loan agreement from which this court's jurisdiction derives. (NYSCEF 9, Amended Loan Agreement ¶¶12.12 [submission to New York jurisdiction provision].)

Defendants claim that this motion is premature because discovery was not provided to defendants prior to this motion. Because defendants failed to timely serve discovery demands, the court issued a discovery schedule. (NYSCEF 170, Dec. 16, 2024 Decision and Order [mot. seq. no. 005]; see Rules of Commercial Div of Sup Ct

[22 NYCRR 202.70 (g)] rule 11.) No motion to dismiss was filed which would have warranted a stay of discovery under the Part 48 Procedures then in effect. The schedule states that all disclosure ends on March 28, 2025. (NYSCEF 170, Dec. 16, 2024 Decision and Order at 1 [mot. seq. no. 005].) Plaintiff has responded to defendants' discovery demands. However, at argument, plaintiff informed the court that by Friday, February 7, 2025, plaintiff intends to produce documents concerning Providence's sale of the first mortgage to plaintiff. In any case, this discovery is not relevant to this decision which concerns the second mortgage and is not related to the first mortgage. Indeed, defendants' discovery demands go to the amount of damages since defendants concede liability.

For the reasons stated on the record on February 3, 2025, plaintiff's motion is granted, in part, as to its claim for a declaratory judgment that defendant 501 Jersey Avenue, as a limited guarantor of payment of \$15 million (plus costs, expenses, and attorneys' fees) is in default of its guarantee. The court rejects the second part of plaintiff's declaratory judgment over which the New Jersey court has jurisdiction. This decision supplements the decision on the record.

### 3. Affirmative Defenses

Plaintiff challenges defendants' affirmative defenses: (1) failure to state a cause of action upon which relief can be granted; (2) waiver and estoppel; (3) laches; (4) unclean hands; (5) claims are barred by documentary evidence; (6) failure to comply with the UCC; (7) failure to join all necessary parties; (8) statute of limitations; (9) failure to mitigate damages; (10) claims are barred by plaintiff's intervening acts or omissions and failure to fulfill conditions precedent to recovery; (11) violation of the implied

covenant of good faith and fair dealing; (12) recoupment and setoff; and (13) unnamed affirmative defenses. (NYSCEF 79, Answer at 17-13.)

“In moving to dismiss an affirmative defense pursuant to CPLR 3211 (b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law.” (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015] [citation omitted].) “[T]he court should not dismiss a defense where there remain questions of fact requiring a trial.” (*Id.* [citation omitted].)

Defendants fail to address plaintiff’s arguments in support of dismissing the affirmative defenses. Instead, defendants argue, among other things, that (1) plaintiff cannot establish damages based on plaintiff’s ledger which is impermissible hearsay (affirmative defense 1); (2) plaintiff’s strategy in making this motion for summary judgment is to avoid its burden to establish a deficiency, if any; (3) in the New Jersey foreclosure action the 501 Jersey Avenue warehouse, plaintiff stated that it had not received any funds to apply to that mortgage debt which the New Jersey court found contradictory since plaintiff had UUC sales of defendants’ inventory; (4) professional fees (not legal fees) e.g. the investment banker, in plaintiff’s ledger charged to defendants are not owed; (5) plaintiff failed to sell defendants’ intellectual property (IP) at market price (affirmative defense 6); and (6) plaintiff disposed of collateral at less than fair market price and did not credit defendants for the sale of its inventory (affirmative defense 6). (See NYSCEF 128, Jack Saadia aff ¶¶4, 6-9, 12-15; NYSCEF 129, email; NYSCEF 130, New York & Company brand appraisal at 8/72; NYSCEF 130, Aquatalia brand appraisal at 8/79; NYSCEF 131, Lord & Taylor brand appraisal at 7/66;

NYSCEF 132, Contract between plaintiff and International Enterprises, Inc; NYSCEF 100, Ledger at 1 [IP sale proceeds]; *id.* at 30 [professional fee charges].)

Accordingly, defendants invoke affirmative defenses 1 and 6 to contest damages on the first and second causes of action and raise issues of fact as to those defenses. Thus, dismissal is inappropriate. These defenses, as well as any other arguments relating to damages on the first and second causes of action, are properly raised before the Special Referee. Further, plaintiff's waiver argument is rejected because defendants did not waive any affirmative defenses contesting damages. (See NYSCEF 29, Amendment no. 11 ¶11.<sup>6</sup>)

As defendants fail to counter plaintiff's arguments in support of dismissing the remaining affirmative defenses, such defenses are dismissed as abandoned. (See *Butler v City of NY*, 202 AD3d 471, 472 [1st Dept 2022]; *Wing Hon Precision Indus. Ltd. v Diamond Quasar Jewelry, Inc.*, 154 AD3d 550, 551 [1st Dept 2017].)

Accordingly, it is

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<sup>6</sup> "Each Loan Party waives and affirmatively agrees not to allege or otherwise pursue any or all defenses, affirmative defenses, counterclaims, claims, causes of action, setoffs or other rights that it may have, as of the date hereof, to contest (a) any Defaults or Events of Default which were or could have been declared by Lender on the date of this Agreement, (b) any provision of the Loan Documents or this Agreement, (c) the right of the Lender to all of the rents, issues, profits and proceeds from the Collateral in accordance with the Loan Documents, (d) any matter acknowledged by the Loan Parties in this Agreement, (e) the Obligations, including without limitation the validity, extent, and enforceability thereof, (f) the Liens of the Lender, including without limitation the validity, extent, priority, perfection and enforceability thereof, in any property, whether real or personal, tangible or intangible, or any right or other interest, now or hereafter arising in connection with the Collateral, or (g) the conduct of the Lender in administering the lending arrangements by and among the Loan Parties and the Lender." (NYSCEF 29, Amendment no. 11 ¶11 [emphasis added].)

ORDERED that the branch of plaintiff's motion that seeks summary judgment in plaintiff's favor on the first and second causes of action is granted as to liability on those causes of action only. The issue of damages is severed and referred to the Special Referee Clerk for assignment to a Special Referee to hear and report; and it is further

ORDERED that the branch of plaintiff's motion that seeks summary judgment in plaintiff's favor on the fourth cause of action of the complaint and a declaratory judgment with respect to the subject matter of that cause of action is granted, in part; and it is further

ADJUDGED and DECLARED that plaintiff is entitled to a declaratory judgment declaring that 501 Jersey Avenue LLC is in default of the amended loan agreement; and it is further

ORDERED that the branch of plaintiff's motion that seeks dismissal of the affirmative defenses is granted, in part, to the extent that the second, third, fourth, fifth, seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth affirmative defenses are dismissed; and it is further

ORDERED that the balance of the action is severed and continued; and it is further

ORDERED that plaintiff shall submit transcript to be so ordered; and it is further

ORDERED that the next discovery update via email is due by 4:00 pm on March 5, 2025, as per the court's email to the parties; and it is further

ORDERED that a Judicial Hearing Officer or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: (1) the issue of

damages defendants owe to plaintiff on the first and second causes of action; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto: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, shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail ([spref@nycourts.gov](mailto:spref@nycourts.gov)) an Information Sheet (accessible 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 Referees Part; and it is further

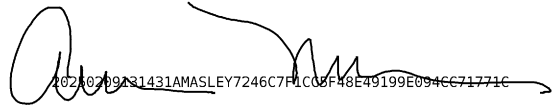
ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from

day to day until completion and counsel must arrange their schedules and those of their witnesses; accordingly, and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing in NYSCEF; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

  
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2/9/2025  
DATE

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ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: