Growbright Enters., Inc. v Barski
2012 NY Slip Op 33508(U)
September 7, 2012
Supreme Court, New York County
Docket Number: 650596/2010
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD, Justice PART 35

Index Number : 650596/2010
GROWBRIGHT ENTERPRISES, INC.
vs.
BARSKI, MR., SAM
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INTERIM ORDER
INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____
Answering Affidavits — Exhibits ____ | No(s). ____
Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

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

Motion sequence 006 is decided under motion sequence 005.

In accordance with the accompanying memorandum decision, it is hereby

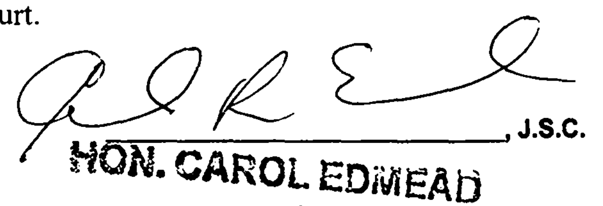
ORDERED that the motions sequence No. 005 and sequence No. 006 are held in abeyance, pending a hearing on the issues of plaintiff Growbright Enterprises, Inc.'s standing, *i.e.*, whether Growbright Enterprises, Inc. was a party or third-party beneficiary of the Trade Deals Pte., Ltd./Impulse Industries, LLC's contract through an assignment, or, alternatively, whether defendants understood that they were dealing with both Growbright and Trade Deals for purposes of the Unilever and the Crest goods transactions; and it is further

ORDERED that the parties shall appear for the hearing at Part 35, Room 438, 60 Centre Street, New York, New York, on October 22, 2012, at 10:00 a.m.; and it is further

ORDERED that counsel for plaintiff Growbright Enterprises, Inc. shall serve a copy of this **interim order** with notice of entry upon all parties within 20 days of entry.

This constitutes the interim decision and order of the court.

Dated: 9/7/2012



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

1. CHECK ONE: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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GROWBRIGHT ENTERPRISES, INC.

Index No: 650596/2010

Plaintiff,

INTERIM DECISION/ORDER

-against-

Motions Sequence 005 & 006

SAM BARSKI, SAMTASTIC INDUSTRIES, INC., and IMPULSE INDUSTRIES, LLC

Defendants.

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

MEMORANDUM DECISION

In this action to recover amounts owed for goods purportedly sold and delivered, defendants Sam Barski ("Barski"), Samtastic Industries, Inc. ("Samtastic"), and Impulse Industries, LLC ("Impulse") (collectively, "defendants") move for (1) summary judgment to dismiss the complaint of plaintiff Growbright Enterprises, Inc. ("Growbright") for lack of standing pursuant to CPLR §3211(a)(3); (2) partial summary judgment in favor of Barski pursuant to CPLR §3211(a)(7)[1]; and (3) summary judgment to dismiss Growbright's complaint as against Impulse pursuant to CPLR §3211(a)(1) and (7).

Growbright opposes the motion and moves separately for summary judgment pursuant to

[1] The court notes that while defendants cite to CPLR 3211(a)(7), the court treats their motion as a motion for summary judgment. CPLR 321 (c) empowers the court to treat a motion to dismiss as a motion for summary judgment, after adequate notice to the parties, when the proof submitted to the court is as complete as it usually is on a motion for summary judgment pursuant to CPLR 3212 (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:44). Notice is not required, however, when the parties have laid bare their proof and clearly charted a summary judgment course (*see, Matter of Weiss v North Shore Towers Apts. Inc.*, 300 AD2d 596 [2d Dept 2002]; *Kavoukian v Kaletta*, 294 AD2d 646, 647 [3d Dept 2002]). Here, defendants served their answer to the complaint and did not otherwise move pursuant to CPLR 3211. And, the affidavits and other evidence submitted by the parties clearly charted a summary judgment course.

CPLR 3212 on its claims against Impulse, Samtastic and Barski, and to dismiss Impulse's counterclaims.

Background Facts

Growbright is a wholesaler of health and beauty aid consumer products. Non-party Trade Deals Pte., Ltd. ("Trade Deals"), is Growbright's counterpart or "affiliate" located in Singapore. Shunmugavel Jayaveerapandian ("Jaya") is a sole shareholder and president of Growbright, as well as of Trade Deals.

Impulse and Samtastic each are wholesale purchasers of consumer products for resale to wholesale distributors, with a principal place of business at 139 Ocean Avenue Lakewood, New Jersey. Barski is Samtastic's owner and CEO.

Growbright alleges that sometime in 2009,[2] "by and through [its] affiliated entity Trade Deals," it consigned to Impulse various Unilever goods for the total amount of $193,255.00 (Invoice No. 312091, dated December 15, 2009) (the "Unilever invoice"). In addition, Growbright sold outright, again, by and through Trade Deals, an array of discounted Crest products to Impulse for a price of $197,156.00 (Invoice No. 00212091, dated December 29, 2009) (the "Crest invoice"), which, according to the parties' agreement, was to be paid within 30 days. Growbright alleges that Impulse and Samtastic are *alter ego* entities, and that defendants, collectively, never paid Growbright for these goods, despite taking ownership of them. The goods were initially ordered by Barski for Impulse. However, by the time they were delivered to the warehouse in New York, Impulse allegedly changed its mind and was no longer interested in

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[2] The court's record contains no facts as to the dates of the purchase orders or shipments of the goods described in these two invoices.

the goods.[3] Growbright demanded from defendants payment in the aggregate amount of $390,411.00 due under the two invoices. However, defendants never paid Growbright the amounts allegedly owed.

Growbright's complaint alleges two causes of action for breach of contract against Impulse, and three causes of action against all defendants for unjust enrichment, liability based on an *alter ego* and piercing the corporate veil theory, and conversion. In their answer, defendants assert various affirmative defenses, and Impulse asserts a counterclaim against Growbright, containing two counts, for breach of contract and for unjust enrichment, on the ground that Growrbight owes money to Impulse for the discounts on *prior* shipments, pursuant to six separate invoices dated April 2009 through January 2010. Impulse claims these six shipments were delayed or otherwise non-conforming. Impulse seeks damages on the counterclaim in the amount of at least $62,300.00.

Both plaintiff and defendants move for summary judgment.

In their motion, defendants argue that Growbright has no standing to bring this suit, as it is neither a party, nor an assignee, or a third-party beneficiary of a contract. Neither is it otherwise "in privity" with any of the defendants. The invoices indicate that Impulse's sales transactions at issue were with Trade Deals, rather than with Growbright. Thus, Growbright is not the rightful owner of the goods and was not damaged by any defendants' acts. There is no evidence that Trade Deals properly assigned its claims to Growbright or that Growbright gave any consideration for the alleged assignment to Trade Deals.

Further, Impulse never entered into contract with Growbright (or Trade Deals) and never

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[3] Parenthetically, the court notes that the facts are unclear as to whether Impulse cancelled the order and notified Trade Deals or Growbright of the cancellation.

[* 5]

received the goods in question. Instead, Samtastic accepted them and requested that Trade Deals re-invoice the subject goods to Samtastic (Barski transcript, pp. 9-10; 15-16; 110 -111, exhibit J). Neither did Impulse grant any authority to either Samtastic or Barski to bind Impulse to any such agreement (*see* affidavit of Impulse's sole owner and manager Joel Weiss ("Weiss"). Growbright's president Jaya admitted that he never spoke with Impulse's principal Weiss.

Neither did Samtastic or Barski enter into a contract based on the Unilever or the Crest invoices with Growbright or Trade Deals. Samtastic is not Impulse's *alter ego* as these entities do not share the same ownership structure. Barski is the sole owner of Samtastic, but he is not a member or manager of Impulse (Weiss transcript, pp. 7-9, exhibit I; Barski's Affidavit).

In the event that the Court finds that Growbright has standing, "[t]he only viable claim in this action, is for unjust enrichment against Samtastic." Said claim against Impulse and Barski should be dismissed because neither Impulse nor Barski personally received the goods, or otherwise derived any benefit from the goods. Barski did not assume any personal liability pursuant to the subject invoices and thus, cannot be held liable to plaintiff based on the piercing the corporate veil theory.[4] And in any event, Growbright does not allege any requisite fraud, or other necessary elements for piercing Samtastic's or Impulse's corporate structure.

Further, Samtastic and Impulse's business relationship cannot be characterized as a "joint venture," notwithstanding Impulse's owner Weiss's testimony that Samtastic sometimes engaged in "joint ventures" with Impulse to purchase and sell goods, as Weiss used this term casually,

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[4] Plaintiff's Complaint alleges that "Samtastic is Impulse's alter-ego" (¶38); "Barski exercised domination and control over Impulse and Samstatic [sic] such that he entirely controlled all of their operations and affairs during the times when Impulse undertook transactions with the Plaintiff" (¶41); "as a direct result of [. . .] Barski's exercise of domination and control over Impulse and Samstatic [sic] and his apparent transfer of assets to and from such entities, the Plaintiff's ability to recover on its claims may be substantially impaired"(¶42).

rather than in its legal sense (Bernstein Affirmation, ¶55, footnote 2; Weiss transcript, pp. 7-12, exhibit I). The only connection between Samtastic and Impulse is that Samtastic acted as a "limited agent" or a "deal broker" for purposes of the Unilever and the Crest transactions and that Barski placed the purchase orders for the goods at issue.

Further, plaintiff's claim for conversion should be dismissed as against all defendants since neither Barski, individually, nor Impulse were in possession of any of the goods referenced in the subject two invoices; and, while Samtastic accepted the goods, Trade Deals never requested that Barski or Samtastic return them (Barski Affidavit; Jaya transcript pp. 75-77; 142-143, exhibit K).

In opposition and in its summary judgment motion, Growbright argues that defendants are jointly and severally liable for their failure to pay for the goods. Growbright entered into agreements with [all] defendants[5] collectively; they accepted the goods; retained them without protest; derived profit by reselling the goods to third-parties; and their failure to pay caused plaintiff damages.

Growbright has standing to sue defendants because Trade Deals orally assigned any and all of its rights with respect to the relevant invoices to Growbright (Growbright's general manager Toshiyuki Takahashi ("Takahashi") Affidavit, ¶ 4, exhibit 9). And, since Growbright and Trade Deals share common ownership (*see* Plaintiff's Second Amended Interrogatory Responses, No. 2 (a), pp. 2-3, exhibit 12), the exchange of consideration [for the assignment] between the two entities is apparent.

Furthermore, Growbright has standing based on "functional equivalent of contractual

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[5] The court notes that while Growbright's complaint only alleges breach of contract claims against Impulse, in its motion papers, Growbright appears to assert that a contract existed between Growbright and Samtastic.

[* 7]

privity." Defendants knew that they were dealing with Growbright as Trade Deals's counterpart, and that Growbright was expecting payment from defendants. During his deposition, Sam Barski testified as to his dealings with "Jaya," the owner of both Trade Deals and Growbright, and referred to Growbright, plaintiff and Trade Deals interchangeably. And in any event, defendants waived their defense as to Growbright's lack of standing, when Impulse asserted counterclaims against Growbright for breach of contract, [premised on Impulse's *prior* transactions with Growbright].

Also, argues Growbright, it had valid contracts with Impulse because defendants admit that the goods were ordered for Impulse; the invoices indicate Impulse as a purchaser; and Growbright was not aware of Impulse's alleged withdrawal from the transaction until Growbright demanded payment (Takahashi Affidavit ¶13, exhibit 3). At that time, Barski tried to convince Growbright to re-issue the invoices to Samtastic, promising to remit the overdue payment on the two invoices at issue upon Growbright's compliance.[6]

Further, Impulse, Samtastic and Barski are jointly and severally liable to Growbright because Barski acted on behalf of both Impulse and Samtastic, who were co-venturers in their dealings with Growbright. The shipments were made to defendants' warehouse and defendants shared in profits from the sales. Barski testified that [on prior occasions] he handled the transactions on behalf of Impulse:

> "I represented Impulse at the time[7] to make sure everything we ordered comes in a timely manner with the correct dating. So anything that happened, I was the broker, the guy in the middle. [. . .] I was supposed to be dealing with all the issues."
> (Barski transcript pp. 97; 101-104).

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[6] The court notes that in support, plaintiff submits an email from Barski to Jaya, dated June 24, 2009, wherein Barski asks Jaya to invoice it to "samtastic" (see exhibit 3 to Takahashi Affidavit).

[7] The court notes that it is not clear from the record to what transactions Barski refers when he states "at that time."

[* 8]

Likewise, Impulse's principal Weiss described Impulse's and Samtastic's *prior* business dealings with Growbright as follows:

> "We had certain things that we bought, and we had that relationship that, if you bring me the deal then you would get 25 percent and things like that.
> If a deal is going bad or sour, I would expect him to cough up the money. You get 25 percent of the *gains*, you get 25 percent of the *loss*."
> (Weiss transcript, p. 14).
>
> ***
>
> A. So for an example, if he would find a product like through Jaya [Growbright's principal], he would buy the product, he dealt with Jaya, it was his account he [Barski] would buy it. If I put up the money, I would put it under my company and give up part of the profit.
> Q. Like joint [venturers], is it fair to say you had joint ventures with Mr. Barski?
> A. Exactly.
> (Weiss transcript, p. 9).

Growbright's principal Jaya testified that Barski was Growbright's only contact with Impulse (Jaya transcript, p. 37); and, Barski acknowledged at his deposition that Samtastic owed money to Growbright (Barski transcript, pp. 18; 59).

Further, Samtastic and Barski's conduct indicates that they also had a contractual obligation to Growbright, pursuant to the New York Uniform Commercial Code ("UCC") Article 2, governing the sale of goods, since they accepted the goods without objection, and promised to pay for them.

Growbright is also not precluded from asserting a claim for unjust enrichment against Samtastic, since Growbright with Samtastic had contracts with Impulse, and not with Samtastic. Barski admitted that Samtastic sold the goods and retained the proceeds without paying for them. Likewise, Impulse, Samtastic and Barski personally, are liable for conversion[8] of the proceeds

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[8] The court notes that Growbright only asserts arguments as to conversion in its opposition to defendants' motion (sequence 005). And while, Growbright's summary judgment motion (sequence 006), seeks judgment "on its claims against [all] defendants," its motion papers contain no arguments with respect to this cause of action, or with

obtained from the sale of the consigned Unilever goods.

In its summary judgment motion, Growbright seeks judgment against all defendants on all its claims. Growbright also seeks summary dismissal of Impulse's breach of contract and unjust enrichment counterclaims, in which Impulse seeks damages allegedly incurred as a result of the non-conforming deliveries of six *prior* shipments of goods, pursuant to certain invoices.[9] Growbright argues that Impulse failed to identify any written contractual term, violated by Growbright, so as to render the goods non-conforming; in the absence of specific time provisions, the "time for shipment or delivery or any other action under a contract if not agreed upon" shall be a reasonable time (UCC § 2-309 [1]); and, there is no indication that the goods in this case or any prior deliveries of goods did not arrive to the defendants' warehouses within "reasonable time."

Furthermore, Impulse failed to raise objections within 10 days as to the quality or timeliness of the deliveries after it had a reasonable opportunity to inspect the goods, and thus, pursuant to the UCC, is deemed to have "accepted" the goods without objection. Moreover, the non-conforming goods defense as to these other six shipments was raised long after defendants accepted and re-sold [a large part of] the goods identified in the relevant invoices. The report, emailed by Barski to Growbright on May 6, 2010, entitled "Crest Report," states that 3,052 cases, or one-third of the goods from the six prior shipments, have been sold (see exhibit 10 to Israel

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footnote 8 contd.

respect to the cause of action for *unjust enrichment*.

[9] In its counterclaim, Impulse claims that [upon ordering the goods in the six shipments], it informed Growbright, that the separate shipments were required to arrive one month apart, starting at the end of April 2009; however, the goods were delivered with one to three months' delays, and certain products in each shipment were short-dated (Impulse's Amended Answer and Counterclaim, ¶9; Weiss Affidavit; Barski transcript, pp. 10 -19; Weiss transcript, pp. 109-119).

Affirmation). Growbright also argues it is entitled to recover the contract price for the Crest Goods, (pursuant to UCC § 2-709) on the Crest invoice, and the amount of profit it would have made from full performance by defendants (pursuant to UCC § 2- 708 [2]), on the Unilever consignment goods.

In response, defendants add that the alleged assignment of the claims from Trade Deals to Growbright is invalid because it is not in writing and not supported by any consideration. Growbright also failed to show that Trade Deals would not seek the same relief from defendants on the same contracts.

Neither does Growbright have standing based on the functional equivalent of contractual privity with defendants, because defendants did not have business dealings with Growbright prior to the Unilever and the Crest transactions and were not aware of Growbright's participation in the purchase and sale of the subject goods (Weiss Affidavit ¶4). And, Impulse did not waive its defense of the lack of standing, as it asserted its counterclaim "to the extent that Growbright is deemed [by the court] to have standing to bring this action" (Defendants' opposition at 18, footnote 2).

Defendants maintain that neither Impulse, nor Barski or Samtastic, are liable to Growbright based on the alleged contracts. The court should not permit Growbright to assert, for the first time in its summary judgment motion, that defendants are liable as "joint venturers," as it is prejudicial to defendants since they were unable to properly defend themselves in this matter, *i.e.*, - engage in discovery and develop factual allegations. And in any event, defendants did not form a joint venture for purposes of the Unilever and the Crest goods shipments and defendants' arrangement for sharing the profits and losses was merely contractual in nature and existed only

for the limited purpose of each deal/shipment. Growbright failed to show the requisite elements of a joint venture.

Growbright's conversion claims should be dismissed because they are based on the alleged contracts. Moreover, no claim for conversion can be asserted against Impulse or Barski because they never received any goods or any of Growbright's money, and the money allegedly converted was not in specific tangible funds to which Growbright was entitled to immediate possession.

Further, defendants' joint and several liability cannot be predicated on a veil piercing or *alter ego* theory. Growbright failed to show any resulting fraud, and in any event, Growbright abandoned this claim since it failed to assert it in its motion for summary judgment.

Finally, Growbright is not entitled to dismissal of Impulse's counterclaim. Impulse is entitled to a discount (or offset) of the amounts due for the Unilever and Crest goods. Barski testified that he complained to Growbright that the "merchandise . . . was short-dated [and] sent . . . not in a timely frame"; the "shipments that were [due] to be 30 days apart [instead, were sent] 5 days apart" (Barski transcript, pp. 13-22); and, Growbright informed Trade Deals that each untimely or otherwise non-conforming shipment would be discounted (Weiss transcript; Weiss Affidavit). Furthermore, Growbright previously acknowledged that there were problems in the delivery times and short-dating of the goods and "gave considerable discounts to Impulse throughout the trade relationship" (exhibit A to Weiss Affidavit). Impulse argues that Growbright breached its contract with Impulse by failing to issue proper discounts "or additional goods" to make Impulse whole (Weiss Affidavit), and, as a result of the breach, Impulse has been damaged in the amount of at least $111,648.56. And, Growbright was unjustly enriched in the

same amount.

In further support of its summary judgment motion, Growbright reiterates that it has standing as an assignee of Trade Deals. Even though the Complaint does not expressly state that defendants entered into a "joint venture," the pleadings, together with the moving papers, allege sufficient facts to place defendants on notice that this additional theory of liability for breach of the sales contracts by Impulse and Samtastic will be asserted against them. Growbright assumed that Impulse and Samtastic were indivisible based on the parties' prior course of dealings and only learned about the nature of their relationship in the process of discovery in this action; and a showing of an express agreement for a joint venture is not required, since the mutual intent of joint venturers may be implied from the totality of the circumstances. Barski and Weiss testified that they collectively conducted the business deals and, since a joint venture is "a partnership for a limited purpose," each defendant was bound by the subject contracts for the purpose of carrying out the venture's business.

Growbright understood that Barski had authority to act on behalf of Impulse. Barski testified that he did not pay Growbright for the goods because he had "tremendous pressure from Weiss [Impulse's principal] who was sitting with so much merchandise, and because there were a lot of open issues relating to the "dating" of goods [in the prior six shipments, for which Impulse is now seeking the offset] (Barski transcript, p. 104). And, Barski continued to act as Impulse's agent, when he repeatedly promised [in his emails] to send the payments owed to Growbright, and Growbright reasonably relied upon Barski's representations. Growbright was not required to investigate whether Barski actually had the authority he claimed to have.

As to the counterclaims, defendants failed to present any evidence of any specific delivery

time requirements in the sales contracts with respect to the six shipments; or that they objected to the alleged untimely arrivals within a reasonable time.

Discussion

Defendants' Motion (Sequence No. 005)

A defendant moving for summary judgment must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). The movant must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

"The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990]. As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.*, 161

AD2d 218, 554 NYS2d 604 [1st Dept 1990]).

Standing (CPLR 3212 [a][3]).

"Standing to sue requires that a party have an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" (*see Caprer v Nussbaum*, 36 AD3d 176, 825 NYS2d 55 [2d Dept 2006], *citing New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). "[I]n order to have standing in a particular dispute, [a plaintiff] must demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law" (*Caprer v Nussbaum*, 36 AD3d 176, 825 NYS2d 55 [2d Dept 2006], *citing Matter of Fritz v Huntington Hosp.*, 39 NY2d 339, 346 [1976]).

A plaintiff lacks standing to sue on a contract if there is no contractual or other privity between plaintiff and defendant (*see DeLine v CitiCapital Commercial Corp.*, 24 AD3d 1309, 807 NYS2d 247 [4th Dept 2005]; *Cinderella Holding Corp. v Calvert Ins. Co.*, 265 AD2d 444, 696 NYS2d 858 [2d Dept 1999]; *M. Paladino, Inc. v Lucchese & Son Contr. Corp.*, 247 AD2d 515, 515 [1998]; *Decker v Chuang*, 185 AD2d 613, 614 [1992]). "In order to be entitled to enforce a contractual obligation, a plaintiff must be a party to or an intended beneficiary of the contract (*Caprer v Nussbaum*, 36 AD3d 176, 825 NYS2d 55, *citing Esco Credit Corp. v Diamantis*, 189 AD2d 798 [2d Dept 1993]). Intended beneficiaries, as opposed to incidental beneficiaries, have enforcement rights concerning the contract of which they are a third-party beneficiary (*see Fourth Ocean Putnam Corp v Interstate Wrecking Co.*, 485 NY2d 208, 210 [1985]).

Here, defendants established through the documentary evidence, that Growbright was not

a party to the contract between Impulse and Trade Deals, did not own the goods and did not sustain damages from any of defendants' acts *(see Grinnell v Ultimate Realty, LLC*, 38 AD3d 600, *supra)*. The alleged contracts here consist of two invoices, which identify Impulse as the purchaser and Trade Deals as the seller of the goods, and neither of the invoices identifies or refers to Growbright (see exhibits 1 and 2 to Takahashi Affidavit). And, at least as to Impulse, its president Weiss testified that it did not deal with Growrbight for purposes of the Unilever and Crest shipments. Furthermore, there is no evidence of a written assignment of claims from Trade Deals to Growbright.

To the extent that defendants challenge Growbright's standing on the ground of an invalid assignment, Growbright's evidence raises triable issues of fact (*see Deutsche Bank Nat. Trust Co. v Rivas*, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012][the issue of standing could not be determined as a matter of law on the record because of the question of fact as to whether the plaintiff was the lawful holder of the note when it commenced the action]; *Caplash v Rochester Oral & Maxillofacial Surgery Associates, LLC*, 48 AD3d 1139, 851 NYS2d 769 [4th Dept 2008][an issue of fact whether plaintiff has standing to seek dissolution]; *Golub Corp. v Northeastern Indus. Park Inc.*, 188 AD2d 729, 590 NYS2d 579 [3d Dept 1992][the facially valid written lease assignment, read in conjunction with the pleadings and General Obligations Law §13–105, gave plaintiff the initial standing necessary to pursue its claims, and the parties' arguments with respect to the validity of the assignment must await trial for an appropriate determination]).

Generally, all claims and causes of action are assignable, unless "forbidden by law or clearly limited by agreement or waiver" (*see*, General Obligations Law, §13–101; *M.W. Zack*

Metal Co. v International Navigation Corp. of Monrovia, 112 AD2d 865, 493 NYS2d 145 [1st Dept 1985], *citing generally*, 6 NY Jur2d, Assignments, §§4, 12). And, any form of assignment which purports to assign or transfer a cause of action confers upon the transferee such title or ownership as will enable that party to sue upon it (*American Banana Co., Inc v Venezolana International de Aviacion S.A. (VIASA)*, 67 AD2d 613, 411 NYS2d 889 [1st Dept 1979] *affd* 49 NY2d 848, 427 NYS2d 789 [1980]; *Portfolio Recovery Associates, LLC v King*, 55 AD3d 1074, 866 NYS2d 395 [3d Dept 2008], *rev on other grounds* 14 NY3d 410, 927 NE2d 1059 [2010][plaintiff established standing to sue on the debt as assignee of the bank where plaintiff submitted affidavits evidencing the assignment to it of the claim and copies of account statements and defendant's original application]). "No particular words are necessary to effect an assignment; it is only required that there be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right in the things assigned" (*Leon v Martinez*, 84 NY2d 83, 638 NE2d 511 [1994]).

Furthermore, it has been held that "an assignment does not have to be supported by consideration and it may be made by an oral communication" (*M.S. Textiles, Ltd. v Rafaella Sportswear, Inc.*,293 AD2d 261, 739 NYS2d 386 [1st Dept 2002][plaintiff vendor who sought to recover payments for goods sold and delivered established standing at trial, based on the allegations that certain charge-backs from its factors were reassignments, and "no particular words or writings [were] necessary to effect an assignment"]; *American Banana*, 67 AD2d at 614 [internal citations omitted]). And in any event, the defense that an assignment is not supported by consideration is not available to the alleged debtor or obligor like Impulse (*see Park Place Cleaners v Essig*, 18 AD2d 896, 237 NYS2d 969 [1st Dept 1963]; *see also* NY Jur2d §40).

Here, the underlying invoices make no provision prohibiting assignment; the purported assignor's (Trade Deals's) president Jaya (who is also the president of the assignee Growbright) testified at his deposition that Trade Deals orally assigned the claims for payments on the Unilever and Crest invoices to Growbright; the assignor's general manager Takahashi (who is also general manager of the assignee Growbright) attested in his sworn affidavit that Trade Deals assigned "any and all of its rights with respect to its agreement with Impulse and shipments of the Goods referenced in Trade Deals' Invoice nos. 212091 and 312091," and that such assignment "included without limitation, any and all present and continuing rights (i) to make claim for, collect, [and] receive any of the sums of money payable to Trade Deals or receivable from the Defendants in connection with the shipment and delivery of [said] goods and (ii) to bring actions and proceedings for enforcement of the rights referenced in [. . .] the Complaint" (Takahashi Affidavit, sworn to on April 27, 2011, ¶ 4, exhibit 9). Based on this evidence, a trier of fact could draw a reasonable inference that Growbright stands in the shoes of Trade Deals for purposes of its claims for non-payment on the Unilever and Crest invoices (see *Portfolio Recovery Associates, LLC v King*, 55 AD3d 1074; *see also American Banana*, *supra* ["any issue as to the *bona fides* of the oral assignment is preserved for resolution at a plenary trial"]).

Furthermore, based on the complaint's allegations that Growbright consigned the Unilever goods and sold the Crest goods to Impulse "by and through [its] affiliated entity Trade Deals," and in light of the testimonial evidence about the parties' course of dealings, an issue of fact exists as to whether defendants were aware of Growbright's participation in the Unilever and the Crest goods transactions, and understood that Growbright and Trade Deals were one and the same for the purposes of these transactions, so as to create "contractual or other privity" between

Growbright and defendants [Impulse or Samtastic] (*see DeLine v CitiCapital Commercial Corp.*, 24 AD3d 1309; *Cinderella Holding Corp. v Calvert Ins. Co.*, 265 AD2d 444). Notably, at his deposition, Samtastic's president Barski referred to "Trade Deals" and "Growbright" or "plaintiff" when describing the Unilever and the Crest transactions, without distinguishing between the two entities.

Thus, at this juncture, the court cannot determine whether Growbright was a party or a third-party beneficiary of the Trade Deal/Impulse contract through an assignment, and alternatively, whether defendants understood that they were dealing with both Growbright and Trade Deals for purposes of the Unilever and the Crest goods transactions, so as to have standing to bring this action.[10] Therefore, the court directs a hearing on the issue of standing as indicated above, and the balance of the issues raised by the parties' motion is held in abeyance pending the determination of said issues (*see Caplash v Rochester Oral & Maxillofacial Surgery Associates, LLC*, 48 AD3d 1139, *supra* [directing a hearing on the issue of plaintiff's standing to seek dissolution]; *US Bank Nat. Assn. v Cange*, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012][hearing conducted on the issue of standing]).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motions sequence No. 005 and sequence No. 006 are held in abeyance, pending a hearing on the issues of plaintiff Growbright Enterprises, Inc.'s standing, *i.e.*, whether Growbright Enterprises, Inc. was a party or third-party beneficiary of the Trade

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[10] The court notes that plaintiff's argument that defendants waived their lack of standing defense, is without merit, since Impulse's counterclaims are premised on the sums allegedly due for Impulse's *prior* transactions with Growbright, which do not involve the Unilever or the Crest invoices at issue in the complaint (Impulse's Amended Answer and Counterclaim, p. 7) (emphasis added).

Deals Pte., Ltd./Impulse Industries, LLC's contract through an assignment, or, alternatively, whether defendants understood that they were dealing with both Growbright and Trade Deals for purposes of the Unilever and the Crest goods transactions; and it is further

ORDERED that the parties shall appear for the hearing at Part 35, Room 438, 60 Centre Street, New York, New York, on October 22, 2012, at 10:00 a.m.; and it is further

ORDERED that counsel for plaintiff Growbright Enterprises, Inc. shall serve a copy of this **interim order** with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

Dated: September 7, 2012

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

HON. CAROL EDMEAD