SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT REED** **PART** **43**

Justice

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AIRBALL CAPITAL LLC,

Plaintiff,

- v -

ROSENTHAL & ROSENTHAL INC.,SUNRISE BRANDS LLC,JOHN HANNA, STUDIO H 33 INC.,DJP HOLDINGS LLC,DONALD J. PLINER OF FLORIDA LLC,DECEMBER TENTH LLC,DJP CONCEPTS IP SUB LLC,JOHN DOES 1-25, JOHN DOES 26-35

Defendant.

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INDEX NO. 651274/2020

MOTION DATE N/A, N/A, N/A

MOTION SEQ. NO. 001 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 50, 52, 54, 55, 59

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 111, 112, 113

were read on this motion to/for DISMISSAL.

HON. ROBERT R. REED, J.:

Defendants Rosenthal & Rosenthal Inc. (hereinafter, Rosenthal) and Sunrise Brands LLC (hereinafter, Sunrise), move separately to dismiss claims against them (motion sequences 1, 4). Plaintiff, Airball Capital, LLC (hereinafter, Airball), as a creditor of parent company Studio H 33, Inc., (hereinafter, H33) alleges that Rosenthal fraudulently conveyed assets of various H33 subsidiaries to Sunrise, which rendered H33 insolvent and unable to repay its $1 million secured loan.

Airball moves for default judgment against defendants John Hanna (hereinafter, Hanna), Studio H33 Inc. (hereinafter, H33), DJP Holdings LLC (hereinafter, DJP Holdings), Donald J. Pliner of Florida LLC (hereinafter, DJP Florida), December Tenth LLC (hereinafter, D10), and DJP Concepts IP Sub LLC (hereinafter, DJP IP) (collectively, non-appearing defendants) (motion sequence 3).

BACKGROUND

"Donald J. Pliner" is a brand of shoes founded in 1989 by its namesake designer (complaint, New York St Cts Electronic Filing System [NYSCEF] Doc No. 1 ¶ 28). The brand's assets were held under several subsidiary business entities, including, but not limited to: DJP Florida, D10, and DJP IP (collectively, subsidiary entities) (*id.*). In 2011, when Mr. Pliner sold a majority stake of the company to a private equity firm, DJP Holdings was formed as a holding company (*id.* ¶ 29). Eventually, Mr. Pliner conveyed all his and his family's interest in the brand to DJP Holdings, and the subsidiary entities were consolidated under DJP Holdings, as the parent company (*id.* ¶¶ 30-31).

Rosenthal is a factoring company that loans funds in exchange for account receivables (*id.* ¶ 3). On August 9, 2013, Rosenthal entered into a factoring agreement with DJP Florida and D10, as well as an intellectual property security agreement with DJP IP (DJP Florida factoring agreement, NYSCEF Doc No. 23; D10 factoring agreement, NYSCEF Doc No. 24; DJP IP agreement, NYSCEF Doc No. 27). Simultaneously, Rosenthal also executed inventory security agreements with DJP Florida and D10 (DJP Florida inventory security agreement, NYSCEF Doc No. 25; D10 inventory security agreement, NYSCEF Doc No. 26).

The factoring and inventory security agreements were still in place on December 28, 2018, when the private equity firm sold DJP Holdings, together with its subsidiaries and assets, to H33, which was then wholly-owned by defendant Hanna (NYSCEF Doc No. 1 ¶ 32). H33 paid four dollars for DJP Holdings and assumed its outstanding debts (*id.* ¶ 33).

In July 2019, Hanna sought new funding for H33 and the subsidiary entities (*id.* ¶ 51). H33 and the subsidiary entities, through Hanna, entered into various loan agreements and took on approximately $4 million in debt and granted a 9% equity interest and a board seat to a nonparty to this action (*id.* ¶ 53-54). On September 12, 2019, plaintiff entered into a $1 million loan agreement with H33 (the Loan Agreement) (Airball Loan Agreement, NYSCEF Doc No. 29). In return, plaintiff received a 10% equity interest and 50% board membership of H33 (NYSCEF Doc No. 1 ¶ 55).

In October 2019, the subsidiary entities met financial hardships and were unable to meet their obligations, including payroll (*id.* ¶ 78). During this time, plaintiff provided Rosenthal's senior vice president with copies of the secured creditors' various agreements with H33 and the subsidiary entities, including a full copy of the Loan Agreement (*id.* ¶ 84). Offers were also solicited for potential buyers for the subsidiary entities (*id.* ¶ 88). An investment banker with ties to Rosenthal was retained by Rosenthal and Hanna to "give the appearance that Rosenthal was acting in a commercially reasonable manner" (*id.* ¶¶ 88, 96). In January 2020, negotiations were initiated with a potential buyer, but while the creditors of H33 and the subsidiary entities believed negotiations were ongoing, Rosenthal and Hanna were in private talks to execute a peaceful possession agreement (hereinafter, PPA) (*id.* ¶¶ 103, 108). At the same time, Rosenthal was supposedly also in private talks to sell the subsidiary entities to Sunrise, another company with which Rosenthal had a factoring agreement (*id.* ¶¶ 123, 153). It is alleged that the PPA was

executed in order to assuage Sunrise that Rosenthal had authority to sell the subsidiary entities, when in fact Rosenthal knew that Hanna lacked authority to sign the PPA in the first place (*id.* ¶ 129).

On January 10, 2020, Rosenthal sent notice of a private sale to take place on January 20, 2020 pursuant to Uniform Commercial Code (UCC) 9-611 and 9-612 (*id.* ¶ 122). On January 15, 2020, Hanna and Rosenthal executed the PPA for the subsidiary entities without board approval (PPA, NYSCEF Doc No. 30; NYSCEF Doc No. 1 ¶¶ 128, 130). Thereafter, on February 7, 2020, Rosenthal sold the subsidiary entities to Sunrise for $7,672,293.76, the exact amount Rosenthal was owed (notice of sale dated February 11, 2020, NYSCEF Doc No. 32).

THE AGREEMENTS

I. Factoring, Intellectual Property Security and Inventory Security Agreements

The DJP Florida and D10 factoring agreements are identical in their relevant parts and state:

> "1. Sales and Assignment
>
> You hereby sell and assign to us, making us absolute owner thereof, all of your Receivables, [...] and we shall have the right to collect and otherwise deal therewith as the sole and exclusive owner thereof. Upon each sale of your Inventory or rendition by you of services, you shall execute and deliver to us such further and confirmatory assignments of your Receivables as we require...
>
> ...
>
> 10. Security Interest; Financial Statements:
>
> 10.1 To secure all of the Obligations, you hereby grant to us a security interest in all of your Accounts, Instruments, Chattel Paper, Documents, Investment property, General Intangibles, Deposit Accounts, Letter of Credit Rights, property at any time in our possession, and the Reserves (whether or not any of the foregoing are specifically assigned to us), in each case whether currently owned or hereafter acquired by you and whether now existing or hereafter arising (whether before, during the effectiveness of, or after the termination of this Agreement) and

wherever located, any security and guarantees therefor, in any goods or property represented thereby, in all of your books and records relating to the foregoing, and any equipment containing such books and records, in all sums of money at any time to your credit with us and in all Proceeds."

(NYSCEF Doc No. 23 at 1, 7; NYSCEF Doc No. 24 at 1, 6-7).

The inventory security agreements are also identical in their relevant parts and state:

"We hereby pledge, assign, consign, transfer and set over to you, and you shall at all times have a continuing general lien upon, and we hereby grant you a continuing security interest in, all of our Inventory and the proceeds thereof.

...

Upon Default, you shall have the right, upon reasonable notice to us, to sell all or any part of our Inventory, at public or private sale, or make other disposition thereof, at which sale or disposition you may be a purchaser whether for credit (by offsetting all or a portion of the amount of indebtedness owing by us to you or otherwise) cash or otherwise."

(NYSCEF Doc No. 25 at 1, 2; NYSCEF Doc No. 26 at 1, 2).

The intellectual property security agreement states in part:

"We have received Guarantees each dated August 9, 2013 from DJP Concepts IP Sub, LLC (hereinafter referred to as "you") pursuant to which you have guaranteed Obligations (as defined in the Guarantees) of Donald J. Pliner of Florida, LLC and December Tenth, LLC., respectively.

...

2. Grant of Security Interest

As collateral security for your prompt and complete payment and performance of all Obligations under the Guarantees, you hereby pledge and hypothecate in favor of us, and grant to us a security interest in all of your right, title and interest (a) in and to the Trademarks and the good will of the business symbolized by the Trademarks, [. . .] (b) in and to the Patents and the good will of the business symbolized by the Patents, [. . .] (c) in and to the Copyrights and the good will of the business symbolized by the copyrights [. . .] (d) all of your right title and interest in [. . .] all Licenses..."

(NYSCEF Doc No 27 at 1, 3-4).

II. Airball's Loan Agreement

The loan agreement dated September 12, 2019 between H33 and Airball states:

Section 3.01. Grant of Security Interest

> "Each of Borrower hereby grants, pledges and assigns a Lien in the Collateral to and for the benefit of Lender, to secure the prompt payment in full and performance when due of all of the Obligations. Borrower represents, warrants and covenants to Lender that: (a) the Lien granted by it herein is and shall at all times continue to be a perfected, second priority (subject to Permitted Liens having priority by operation of law and except to the extent otherwise expressly provided in any Loan Document or expressly agreed to in writing by Lender) subject In the Collateral (subject only to Permitted Liens); (b) it has rights in and the power to transfer each item of the Collateral upon which it purports to grant a Lien pursuant to the Loan Documents, free and clear of any and all Liens or claims of others, other than Permitted Liens; and (c) no effective security agreement, mortgage, deed of trust, financing statement (as that term is defined in the Uniform Commercial Code), or other security or Lien instrument covering all or any part of the Collateral is or will be on file or of record in any public office, except those relating to Permitted Liens."

(Airball loan agreement, NYSCEF Doc No. 29, Article III, Section 3.01.).

Collateral is defined as:

> "[C]ollectively, all right, title and interest of Borrower, whether now owned or hereafter acquired or arising (or in which such Borrower has rights or the power to transfer rights to a secured party), in, to or upon all Accounts, Chattel Paper, Collateral Accounts, commercial tort claims, Documents, Equipment, General intangibles, Goods, instruments, Inventory, Investment Property, Letter-of-Credit Rights, Permits, Supporting Obligations, Books and Records, real property, motor vehicles and other title vehicles, and all other assets, tangible and intangible, real and personal, of Borrower and all Proceeds (in whatever form or nature) of the foregoing..."

(*id.* at Article I, Section 1.01.).

In addition to the above, H33 agreed to certain negative covenants, so long as the debt remained unpaid. In part it states:

> "Borrower shall not and shall not permit any Subsidiary of Borrower directly or indirectly to
>
> ...
>
> (b) Merge, dissolve, liquidate, consolidate with or into another Person, or Dispose of (whether in one transaction or in a series of transactions) all or substantially all of its assets (whether now owned or hereafter acquired) to or in favor of any Person..."

(*id.* at Article VII, 7.04.).

III. The Peaceful Possession Agreement

The PPA states in relevant part:

"1. Acknowledgements. The Credit Parties [DJP Florida, D10 and DJP IP] and Guarantors [Hanna, H33, DJP Holdings, et al.] each hereby acknowledge, confirm and agree that:

a. Obligations. As of the close of business on January 14, 2020, the Credit Parties and each Guarantor (subject to any limitation set forth in Guarantor's Guarantee) were jointly and severally liable and indebted to Lender [Rosenthal] for all Obligations arising under or in connection with (i) the Factoring Agreement in the aggregate principal amount of not less than $5,172,000 in revolving loans, $67,000 in term loans, plus interest accrued and accruing thereon, and letters of credit in the undrawn face amount of not less than $675,315.90, (ii) MPOAA in the aggregate principal amount of not less than $547,198.48, and $6,313.91 in letter of credit fees, $186,018.15 in lender fees and $1,356 in other fees, plus, (iii) in each case, any other interest accrued ...

2. Peaceful Possession and Surrender of Collateral.

The Credit Parties hereby surrender, deliver, grant and turn over to Lender, and Guarantors hereby acknowledge and consent to the surrender, delivery, grant and turnover by the Credit Parties to Lender of, peaceful possession of the Collateral, wherever located, and the products and proceeds of such Collateral."

(NYSCEF Doc No. 30 at 2-3).

ARGUMENTS

Plaintiff asserts causes of action for: (1) intentional fraudulent conveyance against all defendants; (2) constructive fraudulent conveyance against all defendants; (3) violation of UCC 610 and damages pursuant to UCC 9-625 against Rosenthal; (4) a declaration of validity of plaintiff's liens pursuant to UCC 9-617 against Sunrise and the subsidiary entities; (5) tortious interference with contract against Rosenthal; (6) breach of contract against H33, Hanna and Sunrise; (7) action on a guaranty against H33, Hanna and Sunrise; and (8) a declaration that plaintiff holds higher equity in H33 on account of its defaults under the Loan Agreement.

Moving defendants argue that plaintiff does not have standing to sue under the Debtor and Creditor Law (DCL) or the UCC, as it is not a creditor of the entities whose assets were transferred, and thus, the first cause of action for actual fraudulent conveyance, the second cause of action for constructive fraudulent conveyance and the third cause of action for violation of UCC 9-610, must be dismissed. Defendants argue that Airball was only a lender to H33, and not a creditor of the subsidiary entities and therefore cannot challenge the sale. Moreover, the sale of the subsidiary entities led to the extinguishment of an antecedent debt that precludes any claims for fraudulent conveyance. Moving defendants also move for dismissal of the complaint in its entirety pursuant to LLC Law 808 (a), as Airball is an unregistered foreign LLC conducting business in New York, precluded from access to New York's courts.

Rosenthal also moves for dismissal of the fifth cause of action against it for tortious interference with contract. It argues that Rosenthal's sale of the subsidiary entities was pursuant to its rights as a secured creditor under the UCC, as well as the contracts in place and that enforcement of its rights does not give rise to a claim for tortious interference with contract.

Additionally, Sunrise moves for dismissal of the fourth cause of action seeking a declaration of the validity of plaintiff's alleged liens pursuant to UCC 9-617, the sixth cause of action sounding in breach of contract and the seventh cause of action seeking to recover on a guaranty. It argues that Airball never possessed a security interest in the subsidiary entities and therefore has no liens. Moreover, Sunrise cannot be held liable for H33's purported breach of the Loan Agreement as a consequence of Sunrise's purchase of the subsidiary entities from Rosenthal. Neither can it be held liable for H33's guaranty of the Loan Agreement based upon its purchase of the subsidiary entities from Rosenthal when Rosenthal was not a party to the guaranty.

In opposition, plaintiff avers that the Loan Agreement with H33 encompassed all of H33's tangible and intangible assets, including the subsidiary entities, thereby conferring upon Airball, creditor status sufficient to sue pursuant to the DCL and UCC. Moreover, it argues that the complaint has sufficiently stated claims for both actual and constructive fraudulent conveyance because it alleges Rosenthal acted in bad faith, demonstrated by various badges of fraud. Furthermore, plaintiff claims that Rosenthal violated UCC 610 by selling the subsidiary entities for inadequate consideration and failed to make a commercially reasonable effort to negotiate a better sale price. Plaintiff alleges that Rosenthal's economic interest defense to tortious interference of contract is inapplicable here because the complaint has laid out allegations of malice and fraud. Lastly, Airball avers that moving defendants have failed to meet their burden of proving that Airball is conducting business in New York in order to invoke LLC Law 808 (a).

DISCUSSION

On a motion to dismiss, the court must accept as true the facts alleged in the complaint and give the plaintiff the benefit of every possible inference (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). "The court is not authorized to assess the merits of the complaint or any of its factual allegations, but [may only] determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "[A]llegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" (*Caniglia v Chicago Trib.-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]). If the defendant seeks dismissal of the complaint based on

documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

A. Standing

"On a defendant's motion to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law" (*Arch Bay Holdings, LLC-Series 2010B v Smith*, 136 AD3d 719, 719 [2d Dept 2016]; *see also* CPLR 3211 [a] [3]). "To defeat the motion, a plaintiff must submit evidence which raises a question of fact as to its standing" (*Arch Bay Holdings, LLC-Series 2010B*, 136 AD3d at 719).

"In order for a party to challenge a conveyance as fraudulent pursuant to the NYDCL, the party must be a creditor within the meaning of that statute" (*First Keystone Consultants, Inc. v Schlesinger Elec. Contrs., Inc.*, 871 F Supp 2d 103, 116 [ED NY 2012]). A creditor is defined as a person having a claim, "whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured" (DCL § 270).

In *Martes v USLife Corp.* (927 F Supp 146, 148 [SD NY 1996]), defendant USLIFE, the parent company of judgment debtor Title-Dallas, sold all of its stock in judgment debtor Title-Dallas to a third party, Title-USA. Thereafter, Martes filed a lawsuit against Title-Dallas and received a judgment against that company, which shortly thereafter was in liquidation. Martes then filed an action against USLIFE for fraudulent conveyance, attempting to collect the debt owed to him by judgment debtor Title-Dallas. The court in *Martes* granted summary judgment

to defendant USLIFE, holding that there could be no fraudulent conveyance of which the plaintiff could complain when the "only entity that transferred anything . . . was USLIFE. [P]laintiff was not a creditor of USLIFE; he was a creditor only of Title-Dallas. Hence, he lacks standing to complain of any fraud in the sale of USLIFE of its shares in Title-Dallas" (*id.* at 148-149).

Likewise here, Airball is not a creditor of the subsidiary entities. Its complaint admits as much (complaint, NYSCEF Doc No. 1 ¶ 1). While Airball cites to *Stillwater Liquidating LLC v CL Recovery Trading Fund III, L.P.* (2019 NY Slip Op 33108[U], *1 [Sup Ct, NY County 2019]), and *In re Platinum-Beechwood Litig.* (427 F Supp 3d 395, 454-455 [SD NY 2019]) for the proposition that a creditor of a parent company can sue for fraudulent conveyances by its subsidiaries, the role of the plaintiffs in both cases was that of a court-appointed receiver, one whose sole responsibility it was to ensure that assets rightfully belonging to the creditors were recovered. To reject standing in those cases "would undermine plaintiff's very purpose" (*Stillwater Liquidating LLC,* 2019 NY Slip Op 33108[U], *4). That is not the case here where Airball is neither a court-appointed receiver nor trustee, but simply a creditor of the holding company attempting to claw back funds it believes it has a stake in (*135 East 57th St., LLC v 57th St. Day SPA, LLC*, 2014 NY Slip Op 31802[U] *9 [Sup Ct, NY County 2014] ["Plaintiff, as creditor, can attack only conveyances made by its debtor"]; *cf. Interasian Resources Gr., LLC v Shakedown St. - NYC, LLC*, 2009 NY Slip Op 31080[U] * __ [Sup Ct, NY County 2009] [motion to dismiss fraudulent conveyance denied where certain defendants defaulted on its factoring agreements and peacefully surrendered all of its assets to creditor who then sold it for less consideration than the value of assets]).

Nor can Airball claim that the Loan Agreement bound the subsidiary entities when the contract was only between itself and H33 (*see Daley v Related Cos.*, 198 AD2d 118, 118-119 [1st Dept 1993] ["the alleged Agreement was solely between the plaintiff and Related, and subsidiaries of a plaintiff's employer are not liable on a contract entered into by the employer with its former officers or directors where the signatory to the contract was the parent corporation and the contract contained no provision which would bind the subsidiaries"]; *see Edgreen v Learjet Corp.*, 180 AD2d 562, 563 [1st Dept 1992] ["each of the agreements which form the basis of plaintiffs' claims indicate, on their face, that the signatory was Integrated, by one of its officers, and not defendants, herein. Nor do the agreements purport to bind defendants"]).

DCL §§ 273, 274, and 276 protects only creditors, or future creditors, of persons making certain conveyances, and plaintiff is not a creditor of the subsidiary entities (*see Hart v Rametta*, 2014 NY Slip Op 30836[U], *2 [Sup Ct, NY County 2014]). Therefore, moving defendants' motion to dismiss the first and second causes of action sounding in actual and constructive fraudulent conveyance is granted.

For the reasons discussed above, the third and fourth causes of action must also be dismissed against Rosenthal and Sunrise. Moving defendants have established that plaintiff is neither a debtor, obligor nor one holding a security interest or lien in the subsidiary entities that would entitle it to the remedies offered under UCC § 9-625 or a declaration pursuant to UCC § 9-617. In opposition, plaintiff fails to raise any question of fact as to its standing by adopting or ratifying any obligations in the loan agreement, nor does it attempt to pierce the corporate veil (*see Phoenix Grantor Trust v Exclusive Hosp., LLC*, 172 AD3d 923, 924 [2d Dept 2019]).

B. Tortious Interference with Contract

The elements of a cause of action for tortious interference with contract are "(1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages" (*Tri-Star Light. Corp. v Goldstein*, 151 AD3d 1102, 1105 [2d Dept 2017]). The third element of intentional procurement or inducement requires that a plaintiff allege that the contract would not have been breached "but for" the defendant's conduct (*see Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006] ["plaintiff has failed to allege that but for defendants' actions Ms. Blige would have continued her contract with plaintiff. Consequently, plaintiff's contentions are insufficient to state a cause of action against defendants for tortious interference with contractual relations"]; *see Washington Ave. Assoc., Inc. v Euclid Equip.*, 229 AD2d 486, 487 [2d Dept 1996]; *see Michele Pommier Models, Inc. v Men Women NY Model Mgmt, Inc.*, 14 F Supp 2d 331, 335-336 [SD NY 1998]).

Plaintiff's complaint alleges that Airball and H33 were parties to the Loan Agreement, that Rosenthal was aware of the Loan Agreement and Rosenthal interfered with the Loan Agreement by "induc[ing] H33 and Hanna to breach the Loan Agreement by executing the PPA, which purportedly conveyed all of the material assets of H33 and collateral in which Plaintiff held a security interest" in violation of certain negative covenants in the contract (NYSCEF Doc No. 1 ¶ 219). Plaintiff alleges that Rosenthal induced H33 and Hanna to execute the PPA by misrepresenting that board approval was not necessary and plaintiff was damaged as a result (*id.* ¶¶ 219, 222). However, as plaintiff states in its complaint, the contract had already been breached by H33's failure to comply with schedule 2.02 of the loan agreement, for repayment of the loan and identification of a suitable merger target (NYSCEF Doc No. ¶¶ 57, 65, 66, 172) and

therefore it cannot show that "but for" Rosenthal's alleged interference a breach would not have occurred.

Accordingly, the fifth cause of action is dismissed.

C. Breach of Contract and Enforcement of Guaranty

Generally, a corporation which acquires the assets of another is not liable for its predecessor's breaches of contract (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983]). "Exceptions exist where the corporation impliedly assumed its predecessor's liability, there was a consolidation or merger of seller and purchaser, or the transaction is entered into fraudulently to escape the predecessor's obligations" (*Oorah, Inc. v Covista Communications, Inc.*, 139 AD3d 444, 445 [1st Dept 2016] [internal quotations and citations omitted]; *Schumacher*, 59 NY2d at 245)

Plaintiff avers that Sunrise bears successor liability for H33's alleged breach of the Loan Agreement. It cites to *SungChang Interfashion Co. v Stone Mountain Accessories, Inc.* (2013 WL 5366373, *1, 2013 US Dist LEXIS 137868 [SD NY, Sept. 25, 2013, No. 12 CIV. 7280 ALC DCF]), where the court denied a motion to dismiss an action by a junior secured creditor for successor liability claims. In *SungChang*, Rosenthal, a creditor and factor of a company, obtained the assets of said company through a PPA and then sold it in a UCC foreclosure sale, extinguishing Rosenthal's debts but leaving the plaintiff, an unsecured creditor, with no way to recover (*id.*). The purchasing company retained the same employees, operated the same line of business and used the same address as the foreclosed company (2013 WL 5466373, at *16, 2013 US Dist LEXIS 137868, at *46). Airball also cites to *Tommy Lee Handbags Mfg. v 1948 Corp.* (971 F Supp 2d 368, 372 [SD NY 2013]), with similar underlying facts, and argues that

Rosenthal's "use of PPAs in this fraudulent manner is its modus operandi" (NYSCEF Doc No. 39 at 2).

The instant complaint alleges that Rosenthal obtained the PPA from Hanna and the subsidiary entities with actual intent to defraud the subsidiary entities' creditors, including plaintiff, and Sunrise was aware of the subsidiary entities' fraud and entered the transaction with intent to obtain the subsidiary entities' assets without satisfying its obligations to its secured creditors, thereby sufficiently setting forth a valid claim for successor liability breach of contract (NYSCEF Doc No. 1 ¶ 227, plaintiff's memorandum of law in opposition to defendant Sunrise's motion to dismiss, NYSCEF Doc No. 109 at 7).

Sunrise argues that it is not H33's successor and that the subsidiary entities' assets were not purchased from H33, but from Rosenthal, which was not a party to the loan agreement. Therefore, Airball cannot state a cause of action for a breach of contract arising out of Sunrise's purchase of the subsidiary entities.

First, plaintiff has failed to establish that there is privity of contract between itself and Sunrise, nor has it demonstrated that Sunrise was an intended third party beneficiary of the loan agreement (*Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 104 [2d Dept 2009] ["Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties"]). Plaintiff's argument that Sunrise should be treated as the successor of the subsidiary entities because the sale to Sunrise was entered into fraudulently to evade the **creditors of H33**, must fail [emphasis added]. As stated above, in order to state a cause of action for successor liability based upon fraud, a plaintiff must plead that the obligations the corporation was attempting to escape were those of its predecessor (*Oorah, Inc.*, 139 AD3d at 445). That is not the case here. Airball was not a creditor of the subsidiary

entities that were sold. Moreover, while the facts cited by Airball in *Sungchang* and *Tommy Lee* are almost identical to the instant matter, the status of the plaintiffs in both cases were that of creditor of the company whose assets were purchased, while here, again, Airball is not such a creditor.

For the same reasons, the action on a guaranty must also fail.

Accordingly, sixth and seventh causes of action must be dismissed against Sunrise.

D. LLC Law 808 (a)

LLC Law 808 (a) provides:

> "A foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such limited liability company shall have received a certificate of authority in this state."

The burden is on the party seeking to impose the barrier limitation to show that the foreign LLC's activities are "permanent, continuous, and regular" (*Access Point Medical, LLC v Mandell*, 2011 NY Slip Op 32107 [U], __ [Sup Ct, NY County 2011], *affd* 106 AD3d 40 [1st Dept 2013]; *Spectrum Origination LLC v Hess*, 2014 NY Slip Op 31034 [U], at *4 [Sup Ct, NY County 2014]). In order to rebut the presumption that the corporation does business in its state of incorporation rather than New York, moving defendants have the burden of proving that the foreign corporation's activity here is systematic and regular (*Access Point Medical, LLC,* 2011 NY Slip Op 32107 [U], __).

Defendants' evidence, that Airball's three members are "headquartered in New York City," (Rosenthal's reply memorandum, NYSCEF Doc No. 55 at 12) falls short of the requisite showing of "permanent, continuous, and regular" (*Spectrum Origination LLC*, 2014 NY Slip Op 31034 [U], *5-6 [finding that a foreign LLC owning an office and holding a security interest in

property, both located in New York City, was insufficient to determine whether the LLC's activities were permanent, continuous, and regular]).

E. Default Judgment

Plaintiff seeks an order granting a default judgment against the non-appearing defendants, due to their failure to appear in the instant action.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant must show proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing (*see* CPLR 3215 [f]; *Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2d Dept 2011]). While a defaulting defendant admits all factual allegations of the complaint and all reasonable inferences therefrom, it does not admit legal conclusions which are reserved for the court's determination (*McGee v Dunn*, 75 AD3d 624, 624 [2d Dept 2010]). "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.* [internal quotations and citations omitted]). "Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default" (*Green v Dolphy Constr. Co.*, 187 AD2d 635, 636 [2d Dept 1992]).

Here, plaintiff's proof was sufficient to establish that the non-appearing defendants were served with the summons and complaint, but plaintiff only had viable causes of actions against H33 for breach of contract, action on a guaranty and declaratory judgment. The complaint fails to sufficiently allege the remaining claims against the other non-appearing defendants. The other non-appearing defendants were not party to the loan agreement, and while Airball urges this Court to disregard the corporate form, its pleadings are insufficient to establish piercing the corporate veil.

In regards to the claim for actual fraudulent conveyance, plaintiff recites badges of fraud but only against Rosenthal and Sunrise, not the non-appearing defendants. As for the constructive fraudulent conveyance cause of action, "[a]n essential element to proving [the claim] is that the transfer lacks fair consideration" and a repayment on an antecedent debt is explicitly stated in the statute as constituting fair consideration (*In re Zerbo*, 397 BR 642, 657 [Bankr ED NY 2008]; *see Matter of Town of Southampton v Chiodi*, 75 AD3d 604, 606 [2d Dept 2010] [denying as futile leave to amend pleadings to assert claims under both DCL §§ 273 and 276 on the grounds that "transfers of assets … made to satisfy antecedent corporate obligations were not fraudulent, even though their effect was to reduce the assets available"]). Thus, "a conveyance which satisfies an antecedent debt made while the debtor is insolvent is neither fraudulent nor otherwise improper, even if its effect is to prefer one creditor over another" (*Ultramar Energy v Chase Manhattan Bank*, 191 AD2d 86, 90-91 [1st Dept 1993]).

Accordingly, Airball's motion for leave to enter a default judgment is granted only on causes of action six through eight, against defendant H33.

CONCLUSION

Accordingly, it is

ORDERED that defendant Rosenthal & Rosenthal Inc.'s motion to dismiss (motion sequence number 1) is granted in its entirety and the complaint is dismissed in its entirety against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that plaintiff Airball Capital, LLC's motion for default judgment (motion sequence number 3) against Studio H 33 is granted, without opposition, on the sixth cause of

action (breach of contract), seventh cause of action (action on a guaranty) and eight cause of action (declaratory judgment) and is otherwise denied; and it is further

ORDERED that the Clerk of the Court is hereby directed to enter a default judgment against defendant Studio H 33 Inc. on the sixth cause of action (breach of contract), seventh cause of action (action on a guaranty) and eight cause of action (declaratory judgment) in favor of plaintiff against Studio H 33 in the amount of $1 million, plus 14% interest per annum, from the date of October 12, 2019, together with costs and disbursements, as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

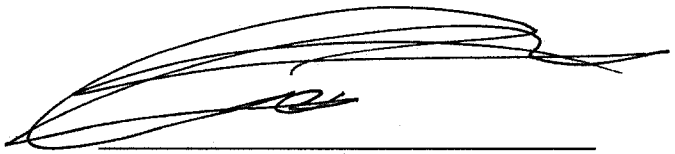
ORDERED that defendant Sunrise Brands LLC's motion to dismiss (motion sequence number 4) is granted in its entirety and the complaint is dismissed in its entirety against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal of defendants Rosenthal and Rosenthal Inc and Sunrise Brands LLC and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, on the defendant, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).



11/10/2021
DATE

ROBERT REED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE