STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 27, 2016)

WEST DAVISVILLE REALTY CO., LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2015-5306**
	:	
ALPHA NUTRITION, INC. d/b/a DOGGIEFOOD.COM; and DAVID PAOLO,	:	
	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. Before the Court is Plaintiff West Davisville Realty Co., LLC's (West Davisville) Motion for Summary Judgment pursuant to Rule 56 of the Superior Court Rules of Civil Procedure. Following the entry of a default judgment against Defendant Alpha Nutrition, Inc. d/b/a Doggiefood.com (Alpha Nutrition), Defendant David Paolo (Paolo) is the remaining defendant. The Court has jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

In September of 2012, Alpha Nutrition entered into a lease agreement with West Davisville. Pl.'s Ex. 8. Under that lease agreement, West Davisville agreed to lease part of a commercial warehouse in North Kingstown, Rhode Island to Alpha Nutrition for a period of five years. Id. However, sometime in late 2014, Alpha Nutrition encountered significant economic troubles, which resulted in its inability to pay rent to West Davisville. Paolo Aff. at ¶ 4. With a mounting backlog of rent payments due to West Davisville and with the prospect of continued

financial difficulty, Alpha Nutrition turned to Paolo, an experienced businessman, for guidance. Id. at ¶¶ 4-5.

According to Paolo, he became aware that Alpha Nutrition was in financial trouble sometime in 2015. Id. Specifically, he explained that he learned "Alpha Nutrition was having a hard time paying its rent to West Davisville . . . [and] also owed money to West Davisville for past due rent." Id. at ¶ 4. As part of a broader strategy to correct Alpha Nutrition's economic course, Paolo advised Alpha Nutrition's former owner, Anthony Gabriele (Gabriele), to reach out to West Davisville "to determine whether West Davisville was willing to terminate its lease with Alpha [Nutrition] prior to the full term of the written lease." Id. at ¶ 6; Gabriele Aff. at ¶ 1. Then, acting on Alpha Nutrition's behalf, Paolo did just that; he reached out to West Davisville and inquired as to the potential for an early lease termination. Paolo Aff. at ¶¶ 6-8.

Paolo then engaged West Davisville's managing member, Steven DiCenso, in negotiations in an attempt to resolve Alpha Nutrition's lease payment dilemma. Id. at ¶¶ 6-10. These informal negotiations culminated on June 25, 2015 with the signing of the Termination and Release Agreement (Agreement). Id. at ¶ 10; see Pl.'s Ex. 1 at 1 (Agreement). According to the terms of the Agreement, West Davisville allowed Alpha Nutrition to terminate its lease prior to its natural expiration in exchange for $62,362.50; the amount in back rent owed. Agreement at 1. Paolo signed the Agreement twice: once as the President/CEO of Alpha Nutrition and a second time in his individual capacity. Id. at 3. Elsewhere in the Agreement, Paolo was identified as the contact person for Alpha Nutrition. Id. at 2.

Executed contemporaneously with the Agreement were two additional documents: (1) a Promissory Note and (2) a Personal Guaranty. Pl.'s Exs. 2 and 3. The Promissory Note provides that:

> "FOR VALUE RECEIVED, the undersigned, **David Paolo, individually and Alpha Nutrition, Inc.**, a Rhode Island corporation (jointly and severally, the "Borrower"), does hereby promise to pay to the order of **West Davisville Realty Co., LLC** . . . (the "Lender") the principal sum of Sixty Two [sic] Thousand Three Hundred Sixty-Two and 50/100 ($62,362.50) Dollars . . . ." Pl.'s Ex. 2 at 1.

The Promissory Note was "made pursuant to the terms of [the Agreement]" and included an eighteen-month payment schedule for the $62,362.50 owed to West Davisville. Id. Paolo signed the Promissory Note twice: once on behalf of Alpha Nutrition and a second time in his individual capacity. Id. at 2.

Moreover, although Paolo signed the Promissory Note in his individual capacity, he also signed a Personal Guaranty for the $62,362.50 due to West Davisville. Pl.'s Ex. 3 at 2. Executed "for the benefit of West Davisville," the Personal Guaranty provides that Paolo, as the guarantor, "absolutely and unconditionally guarantee[d] . . . punctual payment . . . and [] performance by [Alpha Nutrition]." Id. at 1. The Personal Guaranty also recites that it was made "in consideration of [West Davisville's] agreement to terminate the Lease and accept the [Promissory] Note and Termination Agreement." Id.

After Paolo executed the aforementioned documents, on July 1, 2015, Alpha Nutrition made its first payment due under the agreed upon payment schedule. DiCenso Aff. at ¶ 7; Pl.'s Ex. 2 at 1. However, the check Alpha Nutrition presented for its second payment was returned for insufficient funds. Pl.'s Ex. 4. Shortly thereafter, West Davisville, through its attorney, sent a demand letter to Paolo identifying two problems: (1) the payment due for August 2015 was made with a check that was returned for insufficient funds; and (2) neither Alpha Nutrition nor Paolo had tendered valid payment subsequent to the payment made on July 1, 2015. Id. From the time West Davisville sent the demand letter in October of 2015, neither Alpha Nutrition nor Paolo has made the payments required by the terms of the Promissory Note. DiCenso Aff. at

¶ 10; Answer at ¶ 13 ("Admitted that payments were not made in accordance with the schedule of payments specified in the promissory note."). Two months after sending the demand letter to Paolo, West Davisville filed suit for breach of contract.

On February 3, 2016, the Court entered a default judgment against Alpha Nutrition. In early May 2016, West Davisville moved for summary judgment. In Paolo's memorandum opposing summary judgment and during the hearing on West Davisville's Motion for Summary Judgment, an issue was raised as to whether Paolo was in fact a corporate officer of Alpha Nutrition. Although he had signed the Agreement as the President/CEO of Alpha Nutrition, Paolo has presented an affidavit in which he attests that he "never actually became a shareholder or officer of Alpha." Paolo Aff. at ¶ 13.

Following the hearing, Paolo submitted a second affidavit "to clarify certain factual issues that perhaps were not sufficiently communicated in [his] first [a]ffidavit." Paolo Second Aff. at ¶ 3. In his second affidavit, Paolo stated that when he signed the Agreement, Promissory Note, and Personal Guaranty:

> "I was considering becoming an owner of Alpha Nutrition and, based on information then available to me, I believed that I was going to become a stockholder. I do not deny that I held myself out as a stockholder of Alpha [Nutrition].
>
> . . .
>
> "However, . . . I had no legal obligation to assume the debts of Alpha [Nutrition]. It was my belief that I could have walked away from any deal with West Davisville with no personal liability whatsoever." Id. at ¶¶ 9-10.

In neither his first nor second affidavit does Paolo dispute that at the time of the Agreement, he "believe[d] he was acting as the President and Chief Executive Officer of Alpha Nutrition." Answer at ¶ 7. While Paolo has stated that he never became a corporate officer with Alpha

Nutrition, it is undisputed that he "held himself out as President and Chief Executive Officer of Alpha Nutrition." Id. at ¶ 3.

II

Standard of Review

"It is a fundamental principle that '[s]ummary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously.'" Takian v. Rafaelian, 53 A.3d 964, 970 (R.I. 2012) (alteration in original) (quoting Emp'rs Mut. Cas. Co. v. Arbella Prot. Ins. Co., 24 A.3d 544, 553 (R.I. 2011)). However, summary judgment is appropriate where "'there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" Id. (quoting Classic Entm't & Sports, Inc. v. Pemberton, 988 A.2d 847, 849 (R.I. 2010) (internal citation omitted)); see Super. R. Civ. P. 56(c). Moreover, although the Court must "review[] the evidence and draw[] 'all reasonable inferences in the light most favorable to the nonmoving party,'" id. (quoting Pemberton, 988 A.2d at 849), the nonmoving party still bears "the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions." Am. Express Bank, FSB v. Johnson, 945 A.2d 297, 299 (R.I. 2008) (internal quotation marks omitted) (quoting Tanner v. The Town Council of E. Greenwich, 880 A.2d 784, 791 (R.I. 2005)). Finally, in ruling on a motion for summary judgment, the Court is instructed to "look for factual issues, not determine them." Steinhof v. Murphy, 991 A.2d 1028, 1032-33 (R.I. 2010) (quoting Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981)).

III

Discussion

In asking the Court to grant its Motion for Summary Judgment, West Davisville argues that Paolo—by failing to make payments on the $62,362.50 owed under the terms of the Agreement, Promissory Note, and Personal Guaranty—is in breach of contract. According to West Davisville, Paolo, a sophisticated businessman, was the President/CEO of Alpha Nutrition at the time he signed the Agreement, Promissory Note and the accompanying Personal Guaranty. For West Davisville, it follows that there was consideration for valid contract formation because the benefit of relieving Alpha Nutrition of its obligations under the five-year lease is imputed to Paolo in his capacity as a corporate officer. Thus, West Davisville argues, Paolo is personally liable for the payments due under the Promissory Note and Personal Guaranty. As its remedy, West Davisville seeks the payments owed in addition to its attorneys' fees, costs, and expenses arising out of this dispute.

Paolo counters that he is not in breach of contract because the Agreement, Promissory Note, and Personal Guaranty lack the consideration necessary to form a binding contract as to him. He asserts that he is not, nor ever was, a corporate officer of Alpha Nutrition and therefore received no direct benefit for signing the aforementioned documents. Thus, Paolo argues that without consideration flowing directly to him, he is not contractually bound to pay the $62,362.50 due under the Agreement, Promissory Note, and Personal Guaranty.

In addition, Paolo argues that the Agreement, Promissory Note, and Personal Guaranty were induced by fraud. In his answer, Paolo alleges that Gabriele, Alpha Nutrition's former owner, misrepresented Alpha Nutrition's financial state at the time of the Agreement. Answer at 3, ¶ 2. However, in his subsequent affidavits, Paolo points to another source of fraud, shifting

his aim from Gabriele to West Davisville. Specifically, he alleges that Steven DiCenso, West Davisville's managing member, misrepresented not only that "Alpha [Nutrition] owed back rent in the amount of $62,362.50, which amounted to six [] months' of unpaid rent[,]" but also "that Alpha [Nutrition] might eventually owe more rent because West Davisville was facing a potential vacancy of the Leasehold." Paolo Second Aff. at ¶ 8. Paolo argues that had he not been misled as to the existence of a new tenant occupying Alpha Nutrition's former space, he would not have signed the Agreement, Promissory Note, or Personal Guaranty.

Paolo's final argument is that West Davisville failed to mitigate damages under the now-defunct lease agreement. According to Paolo, West Davisville had a duty to mitigate its damages under the old lease by finding a new tenant, and that when it did so the amount due in back rent owed should have decreased. Paolo contends that by failing to tell him of the existence of a substitute tenant, and therefore misrepresenting the true amount due under the old lease, West Davisville fraudulently induced Paolo into signing the Agreement, Promissory Note, and Personal Guaranty.

Turning to Paolo's status with Alpha Nutrition, West Davisville has offered the following evidence in support of its contention that Paolo was in fact a corporate officer when he signed the Agreement, Promissory Note, and Personal Guaranty:

- Paolo signed the Agreement as Alpha Nutrition's President/CEO. Agreement at 3;
- Paolo is identified as the "principal shareholder" of Alpha Nutrition in the Agreement. Id. at 1;
- Paolo signed the Promissory Note on behalf of Alpha Nutrition. Pl.'s Ex. 2 at 2;
- Paolo has admitted that he held himself out as a corporate officer of Alpha Nutrition—namely, its President and CEO. Answer at ¶ 3;
- Paolo "believe[d] he was acting as the President and Chief Executive Officer of Alpha Nutrition" when he entered into the Agreement. Id. at ¶ 7;
- Paolo is listed as one of Alpha Nutrition's three shareholders in the acquisition agreement between GoGo Media Networks, Inc. and Alpha Nutrition. Pl.'s Ex. 11 at 1, 20;

- Paolo is named as the CEO of Alpha Nutrition on its annual filing for 2015. Pl.'s Ex. 5;
- Paolo is identified as the "chairman of the Board" of Alpha Nutrition and a "25% equity owner" in an online news article from May 2014. Pl.'s Ex. 7; and
- Paolo has been named as both a shareholder and corporate officer of Alpha Nutrition by Gabriele, Alpha Nutrition's former owner. Gabriele Aff. at ¶¶ 1-4.

According to West Davisville, this evidence conclusively proves that there is no genuine issue of material fact as to Paolo's status as a corporate officer of Alpha Nutrition.

To rebut that contention, Paolo has offered the following evidence:

- Paolo attested that he never became a shareholder or corporate officer of Alpha Nutrition. Paolo Aff. at ¶ 13; and
- Paolo filed a handwritten note with the Secretary of State in which he wrote that he should be removed as President/CEO of Alpha Nutrition in its annual filing report because he has "never held the office of President of Alpha Nutrition, Inc." (Paolo Second Aff. at ¶ 24; Ex. D. attached thereto).

Paolo relies on this evidence to argue that this Court cannot grant West Davisville's Motion for Summary Judgment because there is a genuine issue of material fact regarding his status with Alpha Nutrition.

The Court finds that, taken together, the evidence in these two documents amount to more than a mere "bald assertion that [factual issues] do exist" with respect to whether Paolo was a corporate officer of Alpha Nutrition. See Johnson, 945 A.2d at 300 (alteration in original) (quoting Egan's Laundry & Cleaners, Inc. v. Cmty. Hotel Corp. of Newport, R.I., 110 R.I. 719, 723, 297 A.2d 348, 351 (1972)). Mindful of its duty to "look for factual issues, not determine them," the Court accepts that Paolo has provided competent evidence to raise an issue of fact as to his status with Alpha Nutrition.[1] See Steinhof, 991 A.2d at 1032-33. However, while it may

[1] West Davisville also argues that the Court should apply the sham affidavit doctrine and disregard Paolo's first affidavit in which he disavows his status as a corporate officer. According to the sham affidavit doctrine, a court may disregard an affidavit if "it constitutes an attempt to create a sham fact issue" solely for the purpose of precluding summary judgment. Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986). However, mindful of its role in relation to that of

be unclear as to whether Paolo was in fact a corporate officer of Alpha Nutrition, this fact is not material to the outcome of West Davisville's case.

Again, summary judgment is proper where "there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Takian, 53 A.3d at 970 (emphasis added) (internal citation omitted). Thus, "a factual dispute alone will not defeat a motion for summary judgment, 'the requirement is that there be no genuine issue of material fact.'" Bucci v. Hurd Buick Pontiac GMC Truck, LLC, 85 A.3d 1160, 1169 (R.I. 2014) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "'[A] 'material fact' is one that has the potential of affecting the outcome of the case.'" Id. at 1175 n.7 (quoting Calero–Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004)).

Here, as explained below, the fact that Paolo was (or was not) a corporate officer of Alpha Nutrition is immaterial to the outcome of this case. See id.

A

Consideration

Under Rhode Island law, it is well settled that the essential elements of a contract include "'competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.'" DeLuca v. City of Cranston, 22 A.3d 382, 384 (R.I. 2011) (mem.) (quoting DeAngelis v. DeAngelis, 923 A.2d 1274, 1279 (R.I. 2007)). "[C]onsideration consists either in some right, interest, or benefit accruing to one party or some forbearance, detriment, or responsibility given, suffered, or undertaken by the other." Hayes v. Plantations Steel Co., 438

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the jury, the Court declines to apply the sham affidavit doctrine here. When considering a motion for summary judgment, the Court passes not on the credibility of the evidence, but instead on whether the evidence raises a genuine issue of material fact. See, e.g., R.I. Econ. Dev. Corp. v. Wells Fargo Sec., LLC, No. PB 2012-5616, 2016 WL 3541422, at *3 (R.I. Super. June 22, 2016).

A.2d 1091, 1094 (R.I. 1982). To determine whether consideration is present, the Court applies the bargained-for exchange test, which "provides that something is bargained for, and therefore constitutes consideration, 'if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.'" DeAngelis, 923 A.2d at 1279 (quoting Filippi v. Filippi, 818 A.2d 608, 624 (R.I. 2003)).

Moreover, it is equally well established that "a valid guaranty must be supported by consideration . . . ." Tri-Town Constr. Co., Inc. v. Commerce Park Assocs. 12, LLC, 139 A.3d 467, 477 (R.I. 2016) (hereinafter Tri-Town). As the Rhode Island Supreme Court has held, "'[w]hen a corporate officer agrees to be liable for a debt of the corporation, it is not necessary for consideration to move to the officer personally. It is enough if the corporation receives the consideration.'" Id. (alteration in original) (quoting Katz v. Prete, 459 A.2d 81, 86 (R.I. 1983)). "Although some guarantees are supported by separate consideration that flows directly to the guarantor, a guarantor who is also a corporate officer need not receive a separate benefit." Id. (citing Restatement (Third) Suretyship & Guaranty § 9(2)(a)). So, while consideration must be present, "there is no requirement that the guarantor receive a direct benefit." Id.

This Court now holds that the same rule applies for a guarantor who holds himself out as a corporate officer. See id. at 477-78. This holding is consistent with the principles articulated in the Restatement cited in Tri-Town, which provides that "[a] secondary obligation does not fail for lack of consideration if . . . the underlying obligation is supported by consideration and the later creation of the secondary obligation was part of the exchange for which the obligee bargained." Id. (quoting Restatement (Third) Suretyship & Guaranty § 9(2)(a)). Thus, for the Court to find sufficient legal consideration necessary to personally bind the guarantor, it need not find that the guarantor in fact was a corporate officer; rather, all that is necessary is that the

guarantor held himself out as a corporate officer and the underlying contract was supported by legal consideration for which the guarantor bargained. See id.

Here, it is undisputed that Paolo held himself out to West Davisville as a shareholder and corporate officer of Alpha Nutrition. Answer at ¶ 3; Paolo Second Aff. at ¶ 9. Furthermore, when he signed the Agreement, Promissory Note, and Personal Guaranty, Paolo "believe[d] he was acting as the President and Chief Executive Officer of Alpha Nutrition." Answer at ¶ 7. Therefore, so long as consideration flowed from Alpha Nutrition to West Davisville, and vice versa, the Agreement, Promissory Note, and Personal Guaranty formed a binding contract.[2] DeLuca, 22 A.3d at 384.

That is precisely the case here: the Agreement, Promissory Note, and Personal Guaranty are indeed supported by legal consideration. See DeAngelis, 923 A.2d at 1279. According to the plain language of the Agreement, West Davisville promised to allow Alpha Nutrition out of its five-year lease in exchange for Alpha Nutrition's promise—and in turn, Paolo's promise—to pay a sum of $62,362.50 over an eighteen-month period. Pl.'s Ex. 1 at 1; Pl.'s Ex. 2 at 1. Alpha Nutrition received the benefit of freedom from its future lease obligations while West Davisville was able to recoup the back rent owed under the prior lease. These two bargained-for promises—flowing to and from Alpha Nutrition and West Davisville—suffice as legal consideration to form a binding contract. See DeAngelis, 923 A.2d at 1279.

Accordingly, the consideration which flowed to Alpha Nutrition as a result of the Agreement is imputed to Paolo's Personal Guaranty. See Tri-Town, 139 A.3d at 477-78; see also Restatement (Third) Suretyship & Guaranty § 9(2)(a). Although the consideration for the

[2] In accordance with Rhode Island law, all of the relevant documents here—the Agreement, Promissory Note, and Personal Guaranty—are construed together. See Stanley-Bostitch, Inc. v. Regenerative Envtl. Equip. Co., Inc., 786 A.2d 1063, 1065 (R.I. 2001).

Agreement and Promissory Note did not move to him personally, Paolo signed the Personal Guaranty while holding himself out as a corporate officer of Alpha Nutrition, meaning that the consideration sufficient to bind Alpha Nutrition to the Agreement and Promissory Note was sufficient to bind Paolo to his Personal Guaranty. See Tri-Town, 139 A.3d at 477-78. Paolo, by holding himself out to West Davisville as a corporate officer of Alpha Nutrition, did not need to receive a direct personal benefit for making his Personal Guaranty—it was enough that Alpha Nutrition received the benefit. See id.

The Personal Guaranty's plain language supports this conclusion. As the Personal Guaranty provides, West Davisville was "unwilling to accept the [] Agreement and [Promissory] Note as consideration for the early termination . . . without the personal guaranty of [Paolo] . . . ." Pl.'s Ex. 3 at 1 (emphasis added). In other words, the Agreement and Promissory Note were "supported by consideration and the later creation of the [Personal Guaranty] was part of the exchange for which [West Davisville] bargained." See Restatement (Third) Suretyship & Guaranty § 9(2)(a). Therefore, Paolo's Personal Guaranty is supported by legal consideration sufficient to form a valid contract. See Tri-Town, 139 A.3d at 477-78; DeAngelis, 923 A.2d at 1279; Restatement (Third) Suretyship & Guaranty § 9(2)(a).

As the Court alluded to above, for purposes of summary judgment, it is wholly immaterial to the outcome of this case whether Paolo was in fact a corporate officer of Alpha Nutrition on June 25, 2015, when he signed the Agreement, Promissory Note, and Personal Guaranty. See Bucci, 85 A.3d at 1175 n.7. Rather, the only fact material to whether Paolo's Personal Guaranty formed a valid, binding contract is the undisputed fact that he held himself out as a corporate officer of Alpha Nutrition—namely as its President/CEO. See Tri-Town, 139 A.3d at 477-78; Restatement (Third) Suretyship & Guaranty § 9(2)(a); Paolo Second Aff. ¶ 9;

Answer at ¶ 3. Under his Personal Guaranty, Paolo "absolutely and unconditionally guarantee[d]" to pay the $62,362.50 owed to West Davisville in accordance with the terms of the Agreement and Promissory Note. Pl.'s Ex. 3 at 1. Paolo has failed to make those required payments since July of 2015. See DiCenso Aff. at ¶ 10; Answer at ¶ 13. Therefore, Paolo is in breach of contract.[3]

B

Fraud

Next, the Court addresses Paolo's affirmative defense of fraud in the inducement. Certainly, Rhode Island law recognizes fraud in the inducement as a defense to a contract's validity. See Bjartmarz v. Pinnacle Real Estate Tax Serv., 771 A.2d 124, 127 (R.I. 2001) (per curiam). "[I]f one is induced to enter into a contract based upon a fraudulent statement from the other party to the contract, then the party who has been fraudulently induced is not bound by the contract." Id. A party alleging fraud in the inducement must establish its claim by clear and convincing evidence. R.I. Hosp. Trust Nat'l Bank v. Howard Commc'ns Corp., 980 F.2d 823, 828 (1st Cir. 1992) (citing Halpern v. Pick, 522 A.2d 197, 197 (R.I. 1987)).

[3] Although the parties primarily focus on Paolo's personal liability for the Personal Guaranty, the Court notes that he is also personally liable for the Promissory Note. Paolo is both a co-maker of and signatory to the Promissory Note. See Pl.'s Ex. 2. His unqualified signature—as David Paolo, the individual—coupled with the Promissory Note's language designating him and Alpha Nutrition, jointly, as "the Borrower," gives rise to such personal liability. Id.; see Dalo v. Thalmann, 878 A.2d 194, 197-98 (R.I. 2005) (finding personal liability for the co-maker of a note and quoting G.L. 1956 § 6A-3-116(a), which provides, in pertinent part, that "[e]xcept as otherwise provided in the instrument, two or more persons who have the same liability on an instrument as makers . . . are jointly and severally liable in the capacity in which they sign"); see Pl.'s Ex. 2 at 1, 2. Moreover, for the reasons expressed in this Decision, the Promissory Note does not fail for want of consideration. See Tri-Town, 139 A.3d at 477-78. Thus, regardless of the validity of the Personal Guaranty, Paolo is personally liable for the Promissory Note's payment. See Dalo, 878 A.2d at 197-98.

When a defendant raises the defense of fraud in the inducement to prevent the granting of summary judgment, he must "set forth specific facts showing the existence of a genuine issue of material fact." St. Paul Fire & Marine Ins. Co. v. Russo Bros., 641 A.2d 1297, 1301 (R.I. 1994). "'[E]vidence that 'is merely colorable or is not significantly probative' cannot deter summary judgment.'" R.I. Hosp. Trust Nat'l Bank, 980 F.2d at 828 (quoting Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794 (1st Cir. 1992)). The Rhode Island Supreme Court has "consistently [] declared that a party opposing summary judgment 'bears the burden of proving the existence of a disputed material issue of fact and, in so doing, has an affirmative duty to produce specific evidence demonstrating that summary judgment should be denied.'" Brochu v. Santis, 939 A.2d 449, 452 (R.I. 2008) (quoting Hudson v. City of Providence, 830 A.2d 1105, 1106 (R.I. 2003)). Accordingly, the opposing party "may not 'rest upon mere allegations or denials in the pleadings, mere conclusions, or mere legal opinions.'" Id. (quoting R.I. Depositors Econ. Prot. Corp. v. Tasca, 729 A.2d 707, 709 (R.I. 1999)).

Here, Paolo has not set forth any evidence to raise a genuine issue of material fact as to whether he was fraudulently induced into signing the Agreement, Promissory Note, and Personal Guaranty. Paolo relies on a single allegation in his answer to support his defense that Gabriele falsely represented to him Alpha Nutrition's business situation. See Answer at 3, ¶ 2.[4] Such a bare allegation of fraud in the inducement is insufficient to raise a genuine issue of material fact and deter summary judgment. See Brochu, 939 A.2d at 452; St. Paul Fire & Marine Ins. Co., 641 A.2d at 1301. Beyond the bare allegation in his answer, Paolo has not presented any evidence to support his claim of fraud in the inducement; thus, Paolo has failed to meet his

[4] Paolo's affirmative defense reads as follows: "Fraud in the inducement, specifically that a prior shareholder of Alpha Nutrition, Inc., Tony Gabriele, falsely represented the business situation of Alpha Nutrition, causing this Defendant to enter into a guarantee which benefited Mr. Gabriele." Answer at 3, ¶ 2.

"affirmative duty to produce specific evidence demonstrating that summary judgment should be denied." Brochu, 939 A.2d at 452 (internal citation omitted).

Furthermore, although Paolo alleges specific fraudulent misrepresentations in his two affidavits, they are wholly unsupportive of and are irrelevant to the allegation in his answer. The inconsistent focus of Paolo's fraud defense shifts from the allegation in his answer to the allegations in his two affidavits. In his answer, Paolo alleges fraud on the part of Gabriele. Answer at 3, ¶ 2. However, in his two affidavits, Paolo shifts his allegations of fraud to West Davisville, asserting that West Davisville, through its managing member, Steven DiCenso, misrepresented the amount of back rent Alpha Nutrition owed under the prior lease. See Paolo Aff. at ¶ 15; Paolo Second Aff. at ¶¶ 8, 17. These allegations—raised for the first time in his affidavits submitted in opposition to summary judgment—are irrelevant to his defense as pled in his answer. Compare Answer at 3, ¶ 2, with Paolo Aff. at ¶ 15; Paolo Second Aff. at ¶¶ 8, 17. Steven DiCenso's statements are not probative of Gabriel's alleged misrepresentation to Paolo—they are immaterial and irrelevant to the outcome of Paolo's bare allegation that Gabriele misrepresented the state of Alpha Nutrition's business situation. See Bucci, 85 A.3d at 1175 n.7. In offering a moving target of allegedly fraudulent statements—raising one type of fraud in his pleading but opposing summary judgment on another—Paolo has fallen well short of "set[ing] forth specific facts showing . . . a genuine issue of material fact" to successfully oppose summary judgment. St. Paul Fire & Marine Ins. Co., 641 A.2d at 1301; see also Johnson, 945 A.2d at 299.

Moreover, considering the single allegation of Gabriel's misrepresentation, Paolo has failed to establish his defense of fraud in the inducement by clear and convincing evidence. See R.I. Hosp. Trust Nat'l Bank, 980 F.2d at 828. The bare assertion of fraud in his answer, without more, does not amount to clear and convincing evidence of fraud in the inducement. See id.;

Bjartmarz, 771 A.2d at 127; Answer at 3, ¶ 2. Therefore, with no genuine issue of material fact as to whether Paolo was fraudulently induced into signing the Agreement, Promissory Note, and Personal Guaranty, and because Paolo failed to carry his burden of proving such fraud by clear and convincing evidence, the Court concludes that Paolo's affirmative defense of fraud in the inducement fails.

C

Duty to Mitigate

The Court now turns to Paolo's final affirmative defense. Paolo contends that West Davisville failed to mitigate its damages under the prior lease, which resulted in a misrepresentation of the true amount of rent owed. According to Paolo, that duty to mitigate should void his obligations under the Agreement, Promissory Note, and Personal Guaranty. Paolo bases this argument on Steven DiCenso's misrepresentations regarding the existence of a substitute tenant. Under Rhode Island law, it is true that "a party claiming injury that is due to breach of contract . . . has a duty to exercise reasonable diligence and ordinary care in attempting to minimize its damages." Tomaino v. Concord Oil of Newport, Inc., 709 A.2d 1016, 1026 (R.I. 1998) (citing Bibby's Refrigeration, Heating & Air Conditioning, Inc. v. Salisbury, 603 A.2d 726, 729 (R.I. 1992)). However, Paolo's argument regarding the duty to mitigate is misplaced.

Here, West Davisville does not have a duty to mitigate damages under the Agreement, Promissory Note, and Personal Guaranty. Paolo's argument is misplaced because it relates to the original lease, which is now defunct, and not to the Agreement, Promissory Note, and Personal Guaranty that have given rise to this case. Had West Davisville sued for breach of contract under the original five-year lease agreement, it would have had a duty to mitigate its damages, which may have been satisfied by finding a new tenant to replace Alpha Nutrition. See

Tomaino, 709 A.2d at 1026. However, in the present case before the Court, the Agreement, Promissory Note, and Personal Guaranty replaced the prior five-year lease and any duty to mitigate resulting from its breach.

Unlike a landlord-tenant agreement, where a landlord has a duty to minimize its damages when pursuing a tenant in breach, the Promissory Note and Personal Guaranty here carry with them no such duty to mitigate. Any potential duty to mitigate damages under the now-defunct prior lease is irrelevant: Paolo is in breach of a Promissory Note and Personal Guaranty, not a landlord-tenant contract. Alpha Nutrition owed back rent to West Davisville and nearly three more years in future rent obligations; however, West Davisville agreed to forego the future payments due under the lease in exchange for $62,362.50. Any duty to mitigate that may have decreased the potential sum owed under the prior five-year lease has no impact on the amount Paolo agreed to pay under the Agreement, Promissory Note, and Personal Guaranty.[5] Therefore, because West Davisville has no duty to mitigate its damages here, Paolo's final affirmative defense fails.

D

Attorneys' Fees

Finally, the Court considers whether West Davisville is entitled to reasonable attorneys' fees, costs, and expenses arising out of this lawsuit in accordance with the terms of the

[5] Furthermore, according to Paolo, the sum of $62,362.50 represents the amount owed under the prior lease for unpaid back rent to West Davisville. Paolo Second Aff. at ¶ 13. Notably, this sum did not include the remaining obligations under the prior lease that was to run through 2017, which totaled upwards of $300,000 in future rent payments. See Pl.'s Ex. 8; Pl.'s Ex. 13. Thus, even with a duty to mitigate under the prior lease, the Agreement voided the future payment obligations that could have been decreased by mitigation in the event of a breach; such as finding a new tenant. In other words, if West Davisville found a new tenant prior to the date of the Agreement, that would have had no impact on the sum that Alpha Nutrition owed in back rent; rather, only the now-defunct future payments would have been affected by mitigation.

Agreement and Promissory Note. The Court interprets a contractual provision regarding the award of reasonable attorneys' fees no differently than other contractual language. See Am. Condo. Ass'n, Inc. v. Mardo, 140 A.3d 106, 116 (R.I. 2016) (explaining that a contractual provision regarding the mandatory awarding of attorneys' fees was "susceptible to only one meaning, and we must apply that plain and ordinary meaning"). Thus, "[c]lear and unambiguous language set out in a contract is controlling in regard to the intent of the parties to such contract and governs the legal consequences of its provisions . . . [and] is assigned its ordinary [] meaning." Dudzik v. Leesona Corp., 473 A.2d 762, 765 (R.I. 1984).

Here, pursuant to the clear and unambiguous terms of the Promissory Note, West Davisville is entitled to reasonable attorneys' fees, costs, and expenses. As the Promissory Note provides,

> "In the event that any holder of this Note [West Davisville] shall exercise or endeavor to exercise any of its remedies hereunder, the Borrower [Paolo and Alpha Nutrition] shall pay all reasonable costs and expenses incurred in connection therewith, including, without limitation, reasonable attorneys' fees, and the holder thereof may take judgment for all such amounts in addition to all other sums due hereunder." Pl.'s Ex. 2 at 2 (emphasis added).

A plain reading of this provision is "susceptible to only one meaning"—Alpha Nutrition and Paolo agreed to pay West Davisville's reasonable attorneys' fees, costs, and expenses for legal disputes arising out of the Promissory Note. See Mardo, 140 A.3d at 116; Dudzik, 473 A.2d at 765.

Although there is a contractual basis to award West Davisville reasonable attorneys' fees, costs, and expenses, the amount still needs to be determined. "[I]f there is a contractual basis for awarding attorneys' fees"—as is the case here—then it is within this Court's discretion to determine the amount. Tri-Town, 139 A.3d at 478. In accordance with the procedure outlined in Tri-Town, this Court can make its determination as to the precise dollar figure only after West

Davisville has an opportunity to prove and Paolo has an opportunity to contest "the necessity and reasonableness of legal fees." Id. at 479-80. "[T]o prove the necessity and reasonableness of legal fees," West Davisville must offer competent and independent evidence, in the form of an affidavit or expert testimony, "from counsel who is a member of the Rhode Island Bar and who is not representing the parties to the action . . . ." Id. at 479-80. West Davisville's independent affidavit or expert testimony must include "the criteria on which [the] fee award is to be based." Sisto v. Am. Condo. Ass'n, Inc., 140 A.3d 124, 129 n.7 (R.I. 2016) (quoting Colonial Plumbing & Heating Supply Co. v. Contemporary Constr. Co., 464 A.2d 741, 744 (R.I. 1983)). Paolo will then have an opportunity to submit his own affidavit or expert testimony from an independent Rhode Island attorney regarding the necessity and reasonableness of the fees West Davisville requests. See Tri-Town, 139 A.3d at 479-80. After considering the evidence from both parties, the Court will determine the actual amount that West Davisville will receive.[6]

Therefore, for the purposes of this Motion, the Court finds that the Promissory Note entitles West Davisville to reasonable attorneys' fees, costs, and expenses. See Pl.'s Ex. 2 at 2. However, the amount to which West Davisville is entitled will be determined at a later time in accordance with the procedure outlined above.

IV

Conclusion

After reviewing the evidence in the light most favorable to Paolo, the Court finds no genuine issue of material fact as to whether Paolo held himself out as a corporate officer of Alpha Nutrition, see Bucci, 85 A.3d at 1169, and concludes that West Davisville is entitled to

[6] This amount is known as the "lodestar," which "is the starting point for determining the reasonableness of attorney's fees and is 'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" Sisto, 140 A.3d at 129 n.7 (quoting Matter of Schiff, 684 A.2d 1126, 1131 (R.I. 1996)).

judgment as a matter of law that Paolo is in breach of contract. See Takian, 53 A.3d at 970; see also Super. R. Civ. P. 56(c). Therefore, the Court grants West Davisville's Motion for Summary Judgment.

Prevailing counsel shall present an appropriate order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**West Davisville Realty Co., LLC v. Alpha Nutrition, Inc., et al.**
CASE NO:	**PC-2015-5306**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 27, 2016**
JUSTICE/MAGISTRATE:	**Silverstein, J.**
ATTORNEYS:	
For Plaintiff:	**Glen R. Whitehead, Esq.** **Paul V. Sullivan, Esq.**
For Defendant:	**Daniel P. McKiernan, Esq.**