

ENTERED ON  
SEP 24 2010  
DOCKET

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
MASOOM VANJARIA,	)	CASE NO. 09-74443 - MHM
Debtor.	)	
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IN RE:	)	CHAPTER 7
YUSUFALI LORGAT,	)	CASE NO. 09-70663 - MHM
Debtor.	)	
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GAJAANAN INVESTMENT, LLC,	)	
Plaintiff,	)	
v.	)	<b>ADVERSARY PROCEEDING</b>
MASOOM VANJARIA,	)	<b>NO. 09-6516</b>
Defendant.	)	
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GAJAANAN INVESTMENT, LLC,	)	
Plaintiff,	)	
v.	)	<b>ADVERSARY PROCEEDING</b>
YUSUFALI LORGAT,	)	<b>NO. 09-6424</b>
Defendant.	)	

**ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

The complaint filed by Gajaanan Investment, LLC ("Plaintiff") seeks an order lifting stay on Plaintiff's action filed in Georgia State Court against Yusufali Lorgat and

Masroom Vanjaria (“Defendants”) and also seeks a determination that any relief granted to Plaintiff in that action is a nondischargable debt under 11 U.S.C. § 523(a)(2)(A).

Plaintiff asserts that Defendants sold a gas station to Plaintiff by actual fraud. Defendants filed a motion for summary judgment, which Plaintiff opposes. For the reasons set forth below, Defendants’ motion is denied.

## **I. STATEMENT OF FACTS**

Defendants are the sole shareholders of Shahil & Sohail Corporation, Inc. (“S&S”). S&S owned a gas station and convenience store business under the trade name “Easy Kwik Trip Gas Station” located at 3612 Mundy Mill Road, Gainesville, Georgia 30504 (the “Premises”). S&S subleased the Premises from Pantry, Inc. (“Pantry”) who leased the gas station from W.W. Roberts Construction Company, Inc. (the “Landlord”). S&S entered into an agreement with Plaintiff to sell the gas station and convenience store business (the “Business”) to Plaintiff, including all inventory, supplies and equipment (the “Property”) which was signed February 11, 2008 (the “Agreement”). Plaintiff paid \$246,469.88 to S&S to purchase the Business, and Defendants signed the Agreement with Sunitaben Patel (“Patel”), a representative of Plaintiff. Defendants also signed a bill of sale and seller’s affidavit affirming that no liens or encumbrances attached to the Property.

The next day, February 12, 2008, Patel and Defendants signed a sublease assignment that purported to assign S&S’s sublease with Pantry, Inc. to Plaintiff. Plaintiff and Defendants have submitted two different documents, each alleged to be the actual sublease assignment the parties signed February 12, 2008. The signature page of the two documents is identical, including the capitalization errors “masoom vanjaria” and “president.” Page one of Defendants’ document references a sublease between Defendants and Pantry dated September 21, 2007. Page one of Plaintiff’s document instead references a “Lease Assignment Agreement” between Tiku One, Inc., Divyesh

Sharma and S&S dated September 20, 2006. Tiku One, Inc. and Divyesh Sharma are not referenced in any other document provided by Plaintiff or Defendants. Plaintiff's document also contains numerous misspellings and grammatical errors.

The lease between Pantry and the Landlord terminated November 30, 2008, but provided options to extend the lease in two-and-one-half-year and five-year terms through May 30, 2026. Pantry did not elect to extend the lease term beyond November 30, 2008. The document assigning Defendants the sublease with Pantry incorporated the original sublease and amendments, which firmly set the date of sublease termination as October 31, 2008. Under the sublease between Pantry and Defendants, Defendants were required to obtain written consent from Pantry before they could assign their interest. Pantry did not consent to an assignment of the sublease, and was not aware any such assignment occurred until August 2008. Because Pantry was neither informed of nor consented to a potential assignment of the sublease, Defendants lacked the authority to assign the sublease to Plaintiff under the contract. Additionally, Defendants were not only aware of the pending expiration of the sublease, but also attempted to negotiate with the Landlord to either extend their lease beyond the term of the sublease with Pantry or to purchase the property. Defendants did not reach an agreement with the Landlord.

In July 2008, Plaintiff learned that the Property purchased from S&S was, in fact, subject to a lien, and S&S had defaulted on the loan.<sup>1</sup> In August 2008, Plaintiff received notice from Pantry, Inc. that the sublease for the Premises would expire November 30, 2008 and Pantry, Inc. had no plans to renew the sublease. In early 2008, Plaintiff filed a complaint in Georgia State Court against S&S and Defendants seeking damages for breach of representations and warranties, and fraud. Defendants filed petitions initiating their Chapter 7 cases April 27, 2009 (Lorgat) and June 3, 2009 (Vanjaria).

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<sup>1</sup> Defendants failed to controvert Plaintiff's allegation that Defendants signed affidavits affirming no liens attached to the Property when they knew the Property was, in fact, subject to a lien.

## II. CONCLUSIONS OF LAW

Pursuant to FRCP 56(c), incorporated in Bankruptcy Rule 7056, a party moving for summary judgment is entitled to prevail if no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. The burden of proof is on the moving party to establish that a genuine issue of material fact is absent. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Clark v. Coats & Clark, Inc.*, 929 F. 2d 604 (11th Cir. 1991). Unless the moving party satisfies its burden to show an absence of a genuine issue of material fact, no burden of going forward arises for the opposing party to show that a genuine issue of material fact exists, a principle which applies regardless of which party has the burden of proof at trial. *Adickes*, 398 U.S. at 157; *Clark*, 929 F. 2d at 607.

Under 11 U.S.C. § 523(a)(2)(A), a debt is not dischargeable if it was obtained by fraud. The elements of fraud under 11 U.S.C. §523 and Georgia law have been held to be substantially the same. *Sterling Factors, Inc. v. Whelan*, 245 B.R. 698, 705-706 (N.D. Ga. 2000). A plaintiff must establish (1) that the debtor made a false representation; (2) intended to deceive the plaintiff; (3) that the plaintiff relied on that representation; (4) that the plaintiff was justified in her reliance; and (5) that the plaintiff sustained a loss due to that representation. *Id* at 705.

## III. DISCUSSION

A plaintiff seeking to establish fraud under 11 U.S.C. §523 must demonstrate that she was justified in her reliance on a false representation made by the debtor. *Sterling Factors*, 245 B.R. at 705. If Defendants' alleged sublease assignment, which references a sublease between S&S and Pantry, Inc., is the true sublease assignment, then the expiration date of the sublease is November 30, 2008 because contracts can incorporate by reference other agreements. *Bowman v. Walnut Mountain Property Owners*

*Association, Inc.*, 553 S.E.2d 389, 393 (Ga. Ct. App. 2001). Plaintiff's reliance on any false representation Defendants may have made is called into question if Defendants' document is the true sublease assignment. However, Plaintiff submitted a document also alleged to be the sublease assignment that is materially different from Defendants' sublease assignment. Clearly, only one of these documents could be authentic, and one or both of these documents could be forgeries. The evidence is in dispute.

A party moving for summary judgment has the burden of proving that no dispute of material fact exists. *Adickes*, 398 U.S. at 157; *Clark*, 929 F. 2d at 607. Defendants have not met this burden. Accordingly, it is hereby

**ORDERED** that Defendants' motion for summary judgment is *denied*.

IT IS SO ORDERED this, the 23<sup>rd</sup> day of September, 2010.

  
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MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE