

**EmpireMediHoldings, LLC v Bridge Funding Cap  
LLC**

2022 NY Slip Op 32135(U)

July 5, 2022

Supreme Court, New York County

Docket Number: Index No. 656511/2021

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LOUIS L. NOCK PART 38M**

*Justice*

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EMPIREMEDIHOLDINGS, LLC,  
  
Plaintiff,

**INDEX NO.** 656511/2021

**MOTION DATE** 11/16/2021

**MOTION SEQ. NO.** 001

- v -

BRIDGE FUNDING CAP LLC D/B/A MERCHANT CAPITAL,  
CLOUDFUND, LLC, LIFETIME FUNDING, LLC, BMF  
ADVANCE, LLC, EBF HOLDINGS, LLC D/B/A EVEREST  
BUSINESS FUNDING, ALVA ADVANCE, LLC, and 22  
CAPITAL, INC.,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, and 87

were read on this motion for PRELIMINARY INJUNCTION.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that plaintiff’s motion for a preliminary injunction is granted as follows.

***Background:***

The Security Interest Assigned to Plaintiff

Plaintiff EmpireMediHoldings, LLC ("Empire" or "Plaintiff"), issues cash advances based on a business's future accounts receivables. On December 31, 2020, nonparties to this action known as Resurgence California LLC, Advanced Recovery Solutions, LLC, Pearl of the Sea Retreat, LLC, A New Start Treatment & Recovery, LLC, MUSE, The Well Recovery Partners, Inc., Balboa Horizons Recovery Services Inc., Coastal Recovery Health & Wellness, Inc., A Plus C Quality Constructions LLC, Coastal Recovery, Inc., Commissions Early, LLC, Better Soul Inc., and Stephen James Fennelly (collectively, the "Resurgence Group") entered into

a Future Receivable Sale and Purchase Agreement with plaintiff's assignor, Iruka Capital Group, LLC ("Iruka"). As security for Iruka's Future Receivable Sale and Purchase Agreement, Resurgence Group granted Iruka a security interest in the following collateral ("Collateral"):

As security for the prompt and complete payment and performance of any and all liabilities, obligations, covenants or agreements of Seller under this Agreement (and any future amendments of this Agreement, if any) (hereinafter referred to collectively as the "Obligations"), Seller [Resurgence Group] hereby pledges, assigns and hypothecates to Buyer [Iruka] (collectively, "Pledge") and grants to Buyer [Iruka] a continuing, perfected and first priority lien upon and security interest in, to and under all of Seller's right, title and interest in and to the following (collectively, the "Collateral"), whether now existing or hereafter from time to time acquired:

- a. all accounts, including without limitation, all deposit accounts, accounts-receivable, and other receivables, chattel paper, documents, equipment, general intangibles, instruments, and inventory, as those terms are defined by Article 9 of the Uniform Commercial Code (the "UCC"), now or hereafter owned or acquired by Seller; and
- b. all Seller's proceeds, as such term is defined by Article 9 of the UCC.

(See, Affidavit of Aron Hacoen [NYSCEF Doc. No. 10].)

On February 12, 2021, Iruka caused a UCC-1 financing statement to be filed with the State of California covering the Collateral detailed in the Future Receivable Sale and Purchase Agreement ("Financing Statement") (*see*, NYSCEF Doc. No. 12). The Financing Statement defined the covered collateral as: "accounts receivable, cash, cash proceeds, accounts, chattel paper, equipment, general intangibles, inventory, instruments related to the receipts, instruments related to the future receivables."

On or about October 25, 2021, Resurgence Group defaulted under the terms of the Future Receivable Sale and Purchase Agreement and Iruka sent notice to Resurgence Group's clients and customers notifying them of Resurgence Group's default and directing them to forward all funds owed to Resurgence Group, to Iruka's collection attorney's office until the outstanding

amount was paid in full (*see*, NYSCEF Doc. No. 7). Iruka also restrained certain accounts receivable owed to Resurgence Group.

On November 5, 2021, Empire received an assignment of Iruka's aforesaid priority security interest (*see*, NYSCEF Doc. Nos. 6, 13) (the "Iruka Assignment Agreement").

### Defendants' Security Interest

Defendants are also in the business of issuing cash advances conditioned on a business' receivables.<sup>1</sup> Defendants had also contracted with Resurgence Group and secured Resurgence Group's obligations by filing their own UCC-1 financing statements against the same Collateral on August 19, 2021 (*see*, Affirmation of Ariel Bouskila, Esq., ¶ 4). Defendants have similarly claimed that Resurgence Group breached their respective agreements, to them, and that Resurgence Group currently owes Defendants a certain amount of receivables.

### This Action and the Instant Motion

It is alleged that Defendants have begun contacting Resurgence Group's customers, clients, and payment processors, directing them to make payments owed to Resurgence Group directly to Defendants. The complaint alleges that plaintiff holds a priority lien interest in the Collateral (UCC filing in February 2021), superior to Defendants' lien interest (UCC filing August 2021) and, therefore, asserts causes of action against Defendants for: (i) conversion of any portion of the Collateral seized or caused to be seized by Defendants; and (ii) a permanent injunction against any such seizure so as to allow plaintiff "to collect and possess the Collateral of nonparty Resurgence Group" (Complaint ¶ 55).

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<sup>1</sup> The claims in this action against defendants Cloudfund, LLC, Lifetime Funding, LLC, EBF Holdings, LLC d/b/a Everest Business Funding, Alva Advance, LLC, and 22 Capital, Inc., have been discontinued (*see*, NYSCEF Doc. No. 25). Thus, the only remaining defendants are Bridge Funding Cap LLC d/b/a Merchant Capital and BMF Advance, LLC.

Plaintiff has moved, by order to show cause filed November 18, 2021 (NYSCEF Doc. No. 24), for a preliminary injunction: (i) declaring plaintiff to have a superior lien interest in the Collateral; (ii) restraining defendants from interfering with said interest in any way; and (iii) ordering the remittance of any portion of the Collateral seized or caused to be seized by defendants directly to plaintiff. The order to show cause contains a temporary restraining order issued by this court as follows:

One: Defendants are restrained from transferring, dissipating, encumbering, hypothecating, or otherwise disposing of or consuming, any and all money and/or assets received by the defendants in connection with cash advance agreements between themselves and non-parties Resurgence California LLC, Advanced Recovery Solutions LLC, Pearl of the Sea Retreat LLC, MUSE, The Well Recovery Partners Inc., Balboa Horizons Recovery Services Inc., Coastal Recovery Health & Wellness Inc., Coastal Recovery Inc., A Plus C Quality Constructions LLC, Commissions Early LLC, Better Soul Inc., and Stephen James Fennelly; and

Two: Defendants are restrained from taking any measures to procure such money and/or assets[.]

(NYSCEF Doc. No. 24 at 3.)

***Discussion:***

Likelihood of Success on the Merits

Plaintiff has made a preliminary showing that Defendants are all junior lien holders, none of which are entitled to collect Resurgence Group's Collateral, including all accounts receivable, free of Empire's senior, perfected, security interest in those same receivables. Plaintiff was assigned all obligations due by Resurgence Group to Iruka under the Iruka Assignment Agreement. Resurgence Group defaulted on its obligations owed to Iruka, assigned to Empire, since at least October 25, 2021. The provisions of the UCC indicate that that plaintiff's perfected first-priority security interest in the Collateral in February 2021 would entitle it to all of Resurgence Group's accounts receivable to the extent of its interest. UCC § 9-601 recites: "(a)

Rights of secured party after default. After default, a secured party has the rights provided in this part and, except as otherwise provided in Section 9-602, those provided by agreement of the parties. A secured party: (1) may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure; and (2) if the collateral is documents, may proceed either as to the documents or as to the goods they cover."

UCC §§ 9-322 governs priority among competing perfected secured creditors and § 9-609 governs priority of creditors' rights to possession of collateral. Pursuant to § 9-322(a)(1), "[c]onflicting perfected security interests . . . rank according to priority in time of filing or perfection."

Defendants, on the other hand, filed their UCC financing statements in August 2021. As such, since Empire's security interest was properly perfected prior to Defendants' security interests, a *prima facie* showing has been made that plaintiff's security interest in the accounts receivable (as well as the rest of the Collateral) has priority over Defendants' junior security interests (*see*, UCC § 9-322 [a] [1]). With respect to enforcement following default, UCC § 9-609(a)(1) provides that "[a]fter default, a secured party . . . may take possession of the collateral." As explained in Official Comment 5 to § 9-609, a first-priority secured creditor also has a first-priority right of possession and may demand possession of collateral from a junior secured creditor: "Conflicting rights to possession among secured parties are resolved by the priority rules of this Article. Thus, a senior secured party is entitled to possession as against a junior claimant. Non-UCC law governs whether a junior secured party in possession of collateral is liable to the senior in conversion. Normally, a junior who refuses to relinquish possession of collateral upon the demand of a secured party having a superior possessory right to the collateral would be liable in conversion."

In *Blue Heron Constr., LLC v. Fiberglass Structures & Tank Co., Inc.* (49 AD3d 1225 [4th Dept 2008]), the perfected, first-priority secured creditor was, as Empire is presently doing, pursuing its default remedies at the same time that the court was determining which creditor had priority to possess certain accounts receivable. The court held that the first-priority secured creditor had priority to possession of accounts receivable because it established that the borrower had defaulted and that the creditor had “properly exercised its rights in the event of default under that security agreement” (*id.*, at 1226). Just as in *Blue Heron*, Empire would seem to have a first-priority right to possession of the Collateral based on the Events of Default under the Iruka Assignment Agreement. Any security interest Defendants have in the accounts receivable would be junior to Empire’s first-priority security interest (*see also, SPG Advance, LLC v KeyBank N.A.*, 198 AD3d 584 [1<sup>st</sup> Dept 2021]).

#### Irreparable Harm and Balance of the Equities

Pursuant to CPLR § 6301, a plaintiff may obtain injunctive relief if defendants threaten to harm plaintiff's rights in the subject of the action and such harm could render the judgment ineffectual. Here, Plaintiff appears to have a pre-existing interest in the Collateral, including all accounts receivable, that was perfected by Plaintiff’s priority UCC lien filed first in time. The subject of this action is conversion of those accounts receivable and for a permanent injunction preventing Defendants from interfering with such Collateral pending termination of Plaintiff’s superior right. Plaintiff is, thus, entitled to a preliminary injunction enjoining Defendants from restraining and collecting the accounts receivable which belong to plaintiff to prevent the ultimate judgment in this case from being rendered ineffectual and to maintain the *status quo* (*see, F.F. Shore & Co. v Rومانer*, 1 AD2d 690 [2d Dept 1955] [in an action to rescind purchase of defendant's business, plaintiff was entitled to a preliminary injunction restraining defendant

from selling notes given as part of purchase price]). If Defendants are permitted to seize or dissipate the Collateral, any judgment which might be ultimately rendered in favor of Plaintiff as priority lien holder would be rendered worthless.

Here, although the documentary evidence points toward Plaintiff as the priority lien holder, until the question of priority is finally answered by the court (whether by trial or summary judgment motion), the temporary restraining order presently existing in the order to show cause (NYSCEF Doc. No. 24) should continue unabated as the least restrictive means of maintaining the *status quo* pending final disposition of plaintiff's claims in this action.<sup>2</sup>

Defendants' counsel acknowledges the fact that defendants' security interest filing was August 2021, which post-dates plaintiff's February 2021 filing (*see*, NYSCEF Doc. No. 29 ¶ 4). But counsel's argument in opposition focuses on another action, pending in Ontario County (*Merchant Capital v Resurgence California, LLC*, index No. 130964/2021 [Sup Ct Ontario County]) (NYSCEF Doc. No. 32), in which the Resurgence Group, as the defendants therein, have asserted a defense of usury as against the claims asserted there by Merchant Capital – which is the d/b/a for defendant Bridge Cap LLC herein (*see*, NYSCEF Doc. No. 29 ¶¶ 6-9). The court finds that observation to be too tenuous a circumstance to prevent the issuance of preliminary injunctive relief on this motion, in this action.

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<sup>2</sup> Plaintiff has asked for a preliminary injunction to the greater extent of actual remittance of any seized Collateral to it. The court refrains from going that far while the case pends prior to final disposition. Rather, as indicated, the most reasonable measure is to continue the temporary restraint on transfer, dissipation, encumbrance, hypothecation, or other change of status affecting the Collateral.

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction is granted to the extent that the temporary restraint issued in the order to show cause (NYSCEF Doc. No. 24) shall continue pending further order of the court.

This will constitute the decision and order of the court.

ENTER:



<u>7/5/2022</u>			<hr/>	
DATE			LOUIS L. NOCK, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE