

**Empiremediholdings, LLC v Bridge Funding Cap  
LLC**

2023 NY Slip Op 30604(U)

February 27, 2023

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,

- 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,22 and  
CAPITAL, INC.,

Defendants.

-----X

BRIDGE FUNDING CAP LLC D/B/A MERCHANT CAPITAL  
  
Third-Party Plaintiff,

-against-

RESURGENCE CALIFORNIA, LLC D/B/A RESURGENCE  
CALIFORNIA, RESURGENCE CA, LLC, RESURGENCE  
BEHAVIORAL HEALTH, LLC, ADVANCED RECOVERY  
SOLUTIONS, LLC, PACIFIC MANOR RECOVERY, LLC,  
RESURGENCE TX, LLC, NEW START TREATMENT &  
RECOVERY CENTER, and STEVEN FENNELLY

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 135, 143, 144, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, and 231

were read on this motion to VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 163, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, and 208

were read on this motion to DISQUALIFY COUNSEL.

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595978/2022

LOUIS L. NOCK, J.

Upon the foregoing documents, motion sequence numbers 003 and 004 are consolidated for disposition in accordance with the following memorandum opinion. The court assumes familiarity with the facts and prior history of this action as set forth in its prior decisions (NYSCEF Doc. Nos. 88, 89).

Defendant BMF Advance, LLC (“BMF”) moves, by order to show cause, to vacate this court’s prior order restraining BMF from disposing of monies received from the third-party defendants pursuant to cash advance agreements (Mot. Seq. No. 003). This motion is supported in part by the affidavit of Stephen J. Fennelly, who is the former owner of third-party defendants Resurgence California, LLC, Resurgence Behavioral Health, LLC, and A New Start Treatment & Recovery Center, and the present owner of third-party defendants Advanced Recovery Solutions, LLC and Resurgence TX, LLC (Fennelly aff. dated August 26, 2022, NYSCEF Doc. No. 92, ¶¶ 2, 4). It is this affidavit that engenders plaintiff’s present motion to disqualify BMF’s counsel (Mot. Seq. No. 004), as Fennelly and his companies are presently represented in other actions by plaintiff’s counsel herein, Ashlee Colonna Cohen, Esq., as Fennelly himself attests (Fennelly aff. dated September 22, 2022, NYSCEF Doc. No. 160, ¶ 6). The court, thus, turns first to the disqualification motion.

The sequence of events leading to the first Fennelly affidavit, as set forth on the record by counsel during oral argument, is largely undisputed. Fennelly initially contacted BMF’s counsel Steven Wells, Esq., and Wells at first told him that he could not speak to him without counsel (tr of proceedings dated December 15, 2022, NYSCEF Doc. No. 231 at 9-10). After Fennelly asserted that Ms. Colonna Cohen did not represent him and had never spoken with him, he stated that he wished to speak with Mr. Wells, and that he was represented by a Troy Schell, Esq.

(Wells affirmation, NYSCEF Doc. No. 188, ¶ 4). Mr. Wells states that all further communication took place either through or in the presence of Schell (*id.*, ¶ 5). Throughout the months of conference calls and emails that Mr. Wells had with Fennelly and Schell, it is undisputed that Mr. Wells never reached out to Ms. Colonna Cohen to inform her that one of her clients was speaking with him without her (NYSCEF Doc. No. 231 at 10). Mr. Wells was aware when he spoke to Fennelly and Schell that Ms. Colonna Cohen represented Fennelly; but elected to take Fennelly at his word that she didn't represent him without making any attempt to confirm such with Ms. Colonna Cohen or anyone at her firm (NYSCEF Doc. No. 188, ¶¶ 8, 12). Further, in conjunction with the communications between Fennelly and Mr. Wells, and the drafting of the affidavit, there were at least exploratory conversations that in exchange for his assistance with BMF's collection efforts Fennelly might obtain a release from his personal guarantee of the cash advance agreements, though admittedly no such release was ever procured (*id.*, ¶ 48).

“[W]hether to disqualify an attorney rests in the sound discretion of the Court” (*Harris v Sculco*, 86 AD3d 481 [1st Dept 2011]). “A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted” (*Lipschitz v Stein*, 65 AD3d 573, 576 [2d Dept 2009]). “The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination” (*id.*)

As applicable here, the Rules of Professional Conduct provide that “a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law” (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 4.2[a]). This rule is meant to prevent “interference by those

lawyers with the client-lawyer relationship, and un-counseled disclosure of information relating to the representation” (Rule 4.2 comment [1]). Moreover, the application of the rule is broad, applying to “communications with any party who is represented by counsel concerning the matter to which the communication relates (Rule 4.2 comment [2]). Even where, as here, the represented party initiates the communication, the lawyer has a duty to end it when the attorney knows, or should know, that such communication is prohibited (Rule 4.2 comment [3]; comment [8] [“Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious”]). Violation of this rule is grounds for disqualification (*Matter of Brian R.*, 48 AD3d 575, 576 [2d Dept 2008]).

Here, Mr. Wells argues that the presence of Fennelly’s other attorney Schell neutralizes the effect of his failure to break off communications with Fennelly or inform Ms. Colonna Cohen of the communications. Yet as stated above, an attorney may not ignore the obvious. Mr. Wells was aware at all times that Ms. Colonna Cohen had appeared as counsel for Fennelly in several lawsuits related to the instant action, however he never contacted Ms. Colonna Cohen to confirm Fennelly’s assertion that she did not represent him, an assertion which he now retracts (Fennelly aff. dated September 22, 2022, NYSCEF Doc. No. 160, ¶ 6). Indeed, Mr. Wells’ affirmation sets forth a detailed account of his communications with Fennelly and Schell in an attempt to bolster the veracity of Fennelly’s testimony and establish that he confirmed the same with Fennelly several times. However, and despite his prior knowledge of Ms. Colonna Cohen’s status as counsel, Mr. Wells’ affirmation is devoid of any attempt to independently confirm Fennelly’s representation that he was not represented by Mr. Wells’ opposing counsel in the instant action. As Ms. Colonna Cohen points out in her affirmation, Fennelly’s affidavit contains information regarding four separate lawsuits in which she represents him, including one in which Mr. Wells

appeared on behalf of BMF as plaintiff (notices of appearance, NYSCEF Doc. Nos. 5, 15, *BMF Advance LLC v Resurgence California LLC et al*, Index. No. 531515/2021, Supreme Court, Kings County). Thus, Mr. Wells fell short of Rule 4.2's dictate and was able to garner material information regarding a lawsuit in which he Fennelly are adverse, the exact situation Rule 4.2 is meant to prevent (*Niesig v Team I*, 76 NY2d 363, 370 [1990] ["By preventing lawyers from deliberately dodging adversary counsel to reach--and exploit--the client alone, (the predecessor to Rule 4.2) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions"]). Schell's presence does not cure the violation, as he is not counsel of record in any of the related lawsuits. Moreover, Mr. Wells cites no authority for the proposition that his subjective good faith in believing Fennelly's assertions regarding Ms. Colonna Cohen's representation, or lack thereof, outweighs his failure to confirm that fact directly with Ms. Colonna Cohen. At the very least, the failure to do so creates the appearance of improper conduct, and merits disqualification.

Turning to the motion to vacate the court's prior order, in light of the decision to disqualify Mr. Wells and his firm from representing BMF, decision on the motion must await the appearance of new counsel. However, the court notes that the core question in this matter of who has senior creditor rights and what they may do or not do in enforcing those rights prior to junior creditors are essentially questions of law rather than fact, and may be susceptible to summary disposition. Such disposition would also resolve, of necessity, whether BMF and the other defendants should continue to be restrained from enforcing their own rights against the merchant entities relevant to this action. Accordingly, the court holds the motion to vacate in abeyance, to be renewed upon the appearance of new counsel, and informs the parties that the court may, at that time, require further motion practice with an eye towards summary disposition.

Accordingly, it is hereby

ORDERED that the motion to disqualify counsel for defendant BMF Advance, LLC is granted and Steven Wells, Esq., and Wells Law, PC, are hereby disqualified from representing defendant BMF Advance, LLC in this matter, and it is further

ORDERED that counsel for the movant, within 21 days after the entry of this order, shall serve a copy of this order with notice of entry upon counsel for all other parties and upon defendant BMF Advance, LLC; and it is further

ORDERED that the action is stayed from this date until 30 days after service of a copy of this order with notice of entry upon counsel for all parties and upon defendant BMF Advance, LLC who shall, within said period, retain another attorney in place of the attorney named above; and it is further

ORDERED that the new attorney retained by defendant BMF Advance, LLC shall serve upon all parties a notice of appearance and file same with the Clerk of the General Clerk's Office and the Clerk of the Part within said 30-day period; and it is further

ORDERED that such filing with the Clerk of the General Clerk's Office and the Clerk of the Part 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); and it is further

ORDERED that motion sequence number 003 is held in abeyance pending the appearance of new counsel; and it is further

ORDERED that counsel are directed to appear for a conference in Room 1166, 111 Centre Street, on April 19, 2023, at 10:00 AM.

This constitutes the decision and order of the court.

ENTER:



<u>2/27/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE