

**Altium Growth Fund, L.P. v Tingo Group, Inc.**

2023 NY Slip Op 32031(U)

June 15, 2023

Supreme Court, New York County

Docket Number: Index No. 651910/2023

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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ALTUM GROWTH FUND, L.P., ALTO OPPORTUNITY  
MASTER FUND, SPC - SEGREGATED MASTER  
PORTFOLIO B, EMPERY ASSET MASTER LTD.,  
EMPERY TAX EFFICIENT, L.P., EMPERY TAX  
EFFICIENT III, L.P.

Plaintiff,

- v -

TINGO GROUP, INC. F/K/A MICT, INC.,

Defendant.

INDEX NO. 651910/2023

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for ORDER OF ATTACHMENT.

Upon the foregoing documents and as discussed on the record (6.15.23), the Plaintiffs' motion for an attachment pursuant to CPLR 6201(1) must be granted to the extent that shares in the Defendant Company worth \$16 million (as of today's price) are attached.

An attachment is appropriate in an action for a money judgment pursuant to CPLR 6212 where the plaintiff can demonstrate (i) a likelihood of success on the merits, (ii) grounds for an attachment pursuant to CPLR 6201 exists, and (iii) the amount demanded from the defendant exceeds all counterclaims known to plaintiff.

The Plaintiffs have demonstrated a likelihood of success on the merits by clear and convincing evidence. This is a straightforward case where the Plaintiffs held puts in the Defendant Company which were exercisable upon the occurrence of a Fundamental Transaction:

Notwithstanding anything to the contrary, in the event of a Fundamental Transaction, the Company or any Successor Entity (as defined below) shall, at the Holder's option, exercisable at any time concurrently with, or within 30 days after, the consummation of the Fundamental Transaction (or, if later, the date of the public announcement of the applicable Fundamental Transaction), purchase this Series A Warrant from the Holder by paying to the Holder an amount of cash equal to the Black Scholes Value (as defined below) of the remaining unexercised portion of this Series A Warrant on the date of the consummation of such Fundamental Transaction

...

The payment of the Black Scholes Value will be made by wire transfer of immediately available funds within the later of (i) five Business Days of the Holder's election and (ii) the date of consummation of the Fundamental Transaction

(NYSCEF Doc. No. 17, § 3[e]).

When a transaction occurred which the Plaintiffs claimed was a Fundamental Transaction, the Plaintiffs exercised their put option between December 8-23, 2022 claiming that a Fundamental Transaction occurred and that payment was required within five business days per the terms of the agreement. The Company refused to honor the agreement, claiming that a Fundamental Transaction had not occurred. The Plaintiffs brought suit in April 2023. Subsequently, the stock price rose 250% and then May 11, 2023 — approximately five months after the put exercise and one month after the Plaintiff sued, the Company filed an affirmation in this case asking the Court to enter judgment in certain amounts. To be clear they paid nothing to Plaintiff and certainly not within the time required. Thus, they breached the agreement.

Significantly, Section 5.13 of the SPA provides:

5.13 Rescission and Withdrawal Right. Notwithstanding anything to the contrary contained in (and without limiting any similar provisions of) any of the other Transaction Documents, whenever any Purchaser exercises a right, election, demand or option under a Transaction Document and the Company does not timely perform its related obligations within the periods therein provided, then such Purchaser may rescind or withdraw, in its sole discretion from time to time upon written notice to the Company, any relevant notice, demand or election in whole or in part without prejudice to its future actions and rights; provided, however, that in the case of a rescission of an exercise of a Warrant, the applicable Purchaser shall be required to return any shares of Common Stock subject to any such rescinded exercise notice concurrently with the return to such Purchaser of the aggregate exercise price paid to the Company for such shares and the restoration of such Purchaser's right to acquire such shares pursuant to such Purchaser's Warrant (including, issuance of a replacement warrant certificate evidencing such restored right)

(NYSCEF Doc. No. 19, § 5.13).

To be clear, the Plaintiff's right to rescission would of course include their right to rescind their summary judgment motion in lieu of complaint. Thus, on May 12, 2023, the Plaintiffs exercised their bargained for contractual right to rescind the put. Three days later, on May 15, 2023, the Plaintiffs indicated that they would then exercise their put option to receive shares. The Defendants did not honor this demand either. And, on May 23, 2023, the Plaintiffs then filed their Amended Complaint. Thus, the Plaintiffs have demonstrated by clear and convincing evidence their likelihood of success on the merits.

Grounds for an attachment exist under CPLR 6201(1). The Defendant is a foreign corporation not qualified to do business in the state. Thus, the requirements of CPLR 6201(1) are satisfied. It also appears that grounds for an attachment exist under CPLR 6201(3), which provides for an attachment where a defendant, with intent to defraud creditors or frustrate the enforcement of a

judgment that might be rendered in the plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts. As alleged the defendants in this case are alleged to have sent substantial Company property to a company in Africa that is the subject of a major fraud concern and where outside counsel has been retained to conduct an investigation. In addition, even though the defendant has now acknowledged that a Fundamental Transaction did occur and urged this Court to enter judgment, no attempt was made to make any payments to the Plaintiff. Under the circumstances and given this admission, and the Defendant's request to enter judgment in favor of the Plaintiffs in a particular way and without prejudgment interest, this is prima facie evidence of an intent to defraud and frustrate a judgment.

It is beyond dispute that the amount of the claims exceed any counterclaims. Thus, the requirements for attachment are well satisfied.

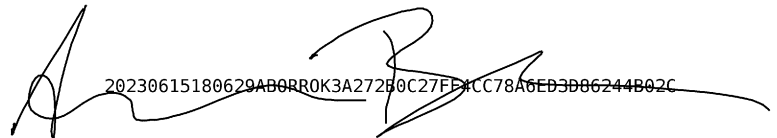
However, the Plaintiffs are not, entitled to an order compelling the Defendant to deposit money from outside the state to an account within the state or with the Court (*see Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541 [2000], *see also Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 202 [2010]). Nor are the Plaintiffs entitled to an attachment which includes their liquidated damages on the record before the Court as they have not submitted sufficient information for the Court to assess whether such liquidated damage provision is enforceable as they contend.

The Plaintiffs are directed to obtain a copy of the transcript (6.15.23) and have it uploaded to NYSCEF.

It is hereby ORDERED that the motion for an attachment is granted to the extent of attaching shares in the Defendant company totaling \$16 million as valued as of the date of this order; and it is further

ORDERED that the Plaintiffs shall submit a proposed order of attachment by email ([sfc-part53@nycourts.gov](mailto:sfc-part53@nycourts.gov)) and by filing on NYSCEF by 5pm on Tuesday, June 20, 2023; and it is further

ORDERED that the Plaintiffs shall file an undertaking in the amount of \$10,000 in the event it is decided that the Plaintiffs were not entitled to an attachment.

  
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6/15/2023  
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: