

AKF, Inc. v Another Level Health, Inc.

2023 NY Slip Op 34086(U)

November 15, 2023

Supreme Court, New York County

Docket Number: Index No. 652907/2023

Judge: Erika M. Edwards

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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. ERIKA M. EDWARDS PART 10M

Justice

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AKF, INC., D/B/A FUNDKITE,

Petitioner,

- v -

ANOTHER LEVEL HEALTH, INC. D/B/A ANOTHER LEVEL
HEALTH INC, NATHAN SCOTT HANER, ANOTHER LEVEL
HEALTH CONCEPTS INC. and ISAACS FAMILY
CHIROPRACTIC CENTER,

Respondents.

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INDEX NO. 652907/2023

MOTION DATE 09/06/2023,
09/06/2023

MOTION SEQ. NO. 001, 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, 23, 24, 25, 26, 34

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 35, 36, 37

were read on this motion to/for STAY.

Upon the foregoing documents, the court denies Petitioner AKF Inc., d/b/a Fundkite’s (“Petitioner”) Verified Petition and order to show cause filed under motion sequence 001 and the court denies Respondents Another Level Health, Inc. d/b/a Another Level Health Inc’s (“Another Level”), Nathan Scott Haner’s, Another Level Health Concepts Inc.’s and Isaacs Family Chiropractic Center’s (collectively “Respondents”) order to show cause filed under motion sequence 002.

Petitioner brought this Verified Petition and motion by order to show cause seeking to restrain Respondents’ bank accounts pending the resolution of the parties’ arbitration on the grounds that failure to do so will result in an arbitration award in favor of Petitioner which would be rendered ineffectual. Petitioner alleged in substance that Respondents defaulted on the parties’

Revenue Purchase Agreement (“RPA”), dated April 28, 2023, where Respondent Another Level agreed to sell Petitioner \$49,140.00 of Respondent Another Level’s future receipts in exchange for Petitioner providing Respondent Another Level with \$35,100.00, minus \$2,291.00 for fees and costs, for a total amount of \$32,809.00. Respondent Another Level agreed to pay a remittance percentage of 8% in weekly payments of \$1,535.63 to be paid from its Ithink Financial account ending in 6586. Respondents guaranteed the payments. They also agreed that in the event of a default, the total purchase amount would be immediately due, plus a 25% default fee.

Petitioner further alleges that it paid Respondent Another Level the agreed upon \$32,809.00, however, beginning on May 30, 2023, Petitioner began receiving notices from its bank that Respondent Another Level’s weekly payments were declined for insufficient funds. Petitioner further alleges that on June 13, 2023, it received notices from its bank that the weekly payments were declined because Respondent Another Level stopped the payments. Both reasons for failing to make the payments were considered defaults under the terms of the RPA. Petitioner alleges that Respondents failed to respond to Petitioner’s numerous efforts to contact Respondents regarding the payments. At the time of the default, Petitioner alleges that Respondents had only paid \$7,678.15 and owed \$41,461.85 of the purchased amount, plus \$10,365.46 for the 25% default fee, for a total amount due of \$51,827.31.

Petitioner further alleges that it seeks the court order restraining the funds in the bank account because in its experience, merchants like Respondents who default on their RPA by diverting funds from the designated bank accounts and fail to communicate with Petitioner, have no intention of complying with their obligations under the RPA. This is particularly true since the RPA permits the merchants to modify the payment terms should they suffer a slow-down in

their business receipts and even bankruptcy is not considered to be a default under the terms of the RPA. Therefore, Petitioner filed an arbitration proceeding against Respondents to seek enforcement of the terms of the RPA.

On June 22, 2023, the court granted the temporary restraining order portion of Petitioner's order to show cause. The court restrained Respondent Another Level's bank account ending in 6586 at Ithink Financial up to \$41,461.85, pending the hearing on the motion, which was scheduled for August 1, 2023, at 10:00 a.m.

Respondent, who had retained counsel, filed an Answer with Counter-Claims in opposition to the Verified Petition and order to show cause and served discovery demands on Petitioner. Petitioner served its Answer to Respondents' Counter-Claims and refused to respond to Respondents' discovery demands because they were not required to do so under the CPLR.

On August 1, 2023, Respondent's counsel failed to appear in court because he mistakenly believed the appearance to be virtual and Petitioner's counsel was late to court. The court was unable to accommodate either counsel's schedule as it had other matters, so the court defaulted both parties, but adjourned the oral argument to August 24, 2023.

On August 2, 2023, the court signed Respondents' order to show cause under motion sequence 002 which sought an order granting pre-action disclosure and compelling Petitioner to respond to Respondent's discovery demands. The court also granted the temporary restraining order portion of Respondents' order to show cause and the court stayed all deadlines and proceedings in the parties' pending arbitration proceeding, pending the hearing of the matter, which was also scheduled for August 24, 2023.

On August 24, 2023, the court heard oral argument, reserved decisions on the Verified Petition and both orders to show cause and continued the stay in the arbitration until the court's

decision on the motions. The court adjourned the matter to September 6, 2023, at 9:30 a.m. for a settlement conference. On September 6, 2023, the parties appeared for the settlement conference, but were unable to resolve the matter.

Here, the court denies Petitioner's Verified Petition and Petitioner's motion by order to show cause filed under motion sequence 001. The court finds that Petitioner failed to demonstrate its entitlement to the relief requested. The court determines that, although it previously granted Petitioner's request for a temporary restraining order and restrained Respondents' bank account, Petitioner failed to demonstrate its entitlement to a preliminary injunction restraining the account moving forward, or pending the resolution of the arbitration proceedings. Since the order to show cause was signed, Respondents retained counsel and appeared in this proceeding. They sought discovery, albeit improperly, and vigorously opposed Petitioner's Verified Petition and order to show cause. Therefore, it appears that they wish to litigate this matter and are not simply avoiding their obligations under the RPA by failing to communicate with Petitioner. Respondents are entitled to their day in court, or in this case, arbitration. Therefore, Petitioner's remedy is to continue to pursue arbitration, where Respondents may attempt to challenge Petitioner's claims.

Thus, the court lifts the restraint on Respondent Another Level's bank account and the court denies Petitioner's Verified Petition and order to show cause.

The court also denies Respondents' motion by order to show cause filed under motion sequence 002 and finds that Respondents have not demonstrated their entitlement to any of the relief requested. Respondents argue in substance that it is improper for Petitioner to have filed the Verified Petition in this court, while also filing the Arbitration Demand and having two proceedings pending against Respondents simultaneously. Respondents also argue in substance

that it was and is improper for the court to restrain Respondents' funds in aid of the arbitration proceeding. Respondents allege that they do not know when the arbitration proceeding was commenced, so they do not know the arbitration deadlines. Additionally, Respondents request a court order compelling Petitioner to respond to Respondents' discovery demands and for the court to stay the arbitration until completion of discovery so that Respondents can present a vigorous defense at the arbitration proceeding.

Here, the court notes that Respondents seek discovery and a Bill of Particulars regarding the terms of the parties' agreement, the amount paid by Respondents and the amount allegedly owed to Petitioner. All of this information is already known to Respondents and was provided to Respondents with Petitioner's Verified Petition and exhibits, including the RPA and Demand for Arbitration. The court finds no reason to compel Petitioner to respond to Respondents' discovery demands.

The court also finds that Respondents failed to demonstrate that this matter involves the extraordinary circumstances required to warrant a court order granting them discovery in aid of the arbitration proceeding, nor that the continued stay of the arbitration proceeding would be appropriate in this matter. Respondents are free to seek discovery and a further stay from the arbitrator.

Therefore, the court denies Respondents' motion by order to show cause filed under motion sequence 002 and the court immediately lifts the stay of the arbitration deadlines and the arbitration proceeding.

The court has considered any additional argument raised by the parties which was not specifically discussed herein and the court denies any additional requests for relief which were not expressly granted herein.

As such, it is hereby

ORDERED that the court denies Petitioner AKF Inc., d/b/a Fundkite’s Verified Petition and order to show cause filed under motion sequence 001, and the court lifts the restraint on any bank account owned by Respondents, including the account ending in 6586 at Ithink Financial owned by Respondent Another Level Health, Inc. d/b/a Another Level Health Inc., without costs to any party; and it is further

ORDERED that the court denies Respondents Another Level Health, Inc. d/b/a Another Level Health Inc’s, Nathan Scott Haner’s, Another Level Health Concepts Inc.’s and Isaacs Family Chiropractic Center’s order to show cause filed under motion sequence 002, without costs to any party, and the court lifts the stay of the deadlines and the arbitration proceeding as of the date of this decision and order.

This constitutes the decision and order of the court.


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<u>11/15/2023</u> DATE					<hr/> ERIKA M. EDWARDS, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE