

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

2023 NY Slip Op 34282(U)

December 7, 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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ALTIUM GROWTH FUND, L.P., ALTO OPPORTUNITY  
MASTER FUND, SPC - SEGREGATED MASTER  
PORTFOLIO B, EMPEYR ASSET MASTER LTD.,  
EMPEYR TAX EFFICIENT, L.P., EMPEYR TAX  
EFFICIENT III, L.P.

Plaintiff,

- v -

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

Defendant.

INDEX NO. 651910/2023

MOTION DATE N/A, N/A

MOTION SEQ. NO. 005 006

**DECISION + ORDER ON  
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 120, 125, 126, 127, 128, 129, 130, 131

were read on this motion to/for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 210

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The Plaintiffs' motions for contempt (Mtn. Seq. No. 005) and for summary judgment (Mtn. Seq. No. 006) are granted and the Defendant's cross-motion for summary judgment is denied. The Defendant is directed to order a copy of the transcript (12.7.23) and have the transcript uploaded to NYSCEF.

Reference is made to (i) a Decision and Order of this Court dated June 15, 2023 (the **Prior Decision**; NYSCEF Doc. No. 66) pursuant to which this Court granted the Plaintiffs' motion for an attachment.

The facts of this case (none of which are in dispute) have been discussed extensively at prior hearings and conferences. Briefly, the Plaintiffs purchased various Warrants from the Defendant's predecessor, MICT, Inc. (**MICT**) pursuant to various Securities Purchase Agreements (each an **SPA**, and together collectively, the **SPAs**) in November 2020, February 2021, and March 2021. The Warrants permitted the Plaintiffs to exercise their Warrants, in whole or in part, to receive shares in MICT or its successor upon delivery of a notice of exercise and required MICT or its successor to tender such shares within two trading days (NYSCEF Doc. No. 17, § 2[a]). The Warrants also provided that, in the event of a "Fundamental Transaction," the Plaintiffs could exercise an option to require MICT or its successor to purchase Warrants by cash payment equal to the Black Scholes Value of the Warrants "within the later of (i) five Business Days of the Holder's election and (ii) the date of consummation of the Fundamental Transaction" (*id.*, § 3[e]).

Significantly, the parties negotiated that the Plaintiffs could exercise a right of rescission if MICT or its successors did not timely perform (*i.e.*, timely pay or timely deliver the shares):

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 [emphasis added]).

In May 2022, MICT entered into an agreement and plan of merger with the Defendant. The merger was consummated on December 1, 2022, and publicly announced in a Form 8-K on December 6, 2022. The Plaintiffs timely claimed that this merger constituted a Fundamental Transaction within the meaning of the SPAs, exercised the option on their Warrants between December 8-23, 2022, and indicated that cash payment was due within five days.

It is undisputed that the Defendant did not timely perform its obligation to pay the amount then due (and has not attempted to perform by tendering cash payment) and, instead, initially claimed that a Fundamental Transaction had not occurred such that no money was in fact due. The Plaintiffs then sued in April 2023 by summary judgment in lieu of complaint. Subsequently, the stock price of the Defendant rose 250%. The Defendant then changed its tune and attempted to reverse its prior position on May 11, 2023 (well after the five-day period) and indicated that the prior transaction was in fact a Fundamental Transaction. Remarkably, **the Defendant still did not make any payment** and instead merely filed an affirmation asking the Court to enter judgment.

Inasmuch as the Defendant had not timely (or even belatedly) made any payment (*i.e.*, performed), the Plaintiffs then exercised their bargained for contractual right of rescission pursuant to Section 5.13 of the SPAs and withdrew their motion for summary judgment in lieu of complaint.

Three days later, the Plaintiffs again exercised their option, this time to receive shares in the Defendant in exchange for their Warrants. The Defendants again refused to honor the exercise of the Warrants, rejected the Plaintiffs' notice, refused to deliver shares to the Plaintiffs and did not tender any cash payment in respect of its position that the prior Plaintiffs' election (which they had rejected when the share price was lower) was "irrevocable."

In the Prior Decision, the Court granted the Plaintiffs' order of attachment finding that they demonstrated a likelihood of success on the merits by clear and convincing evidence that the Defendant (who was subject to the jurisdiction of this Court) was in breach and that they were entitled to judgment as a matter of law and that the Defendant had attempted to dissipate assets such that they would not be able to satisfy the judgment. On July 13, 2023, the Court so-ordered the Plaintiffs' proposed order of attachment (NYSCEF Doc. No. 75), requiring the Defendant to deliver shares in value totaling \$16 million as of the date of the Prior Order and requiring the Defendant to "true-up" the number of shares to the extent that the volume weighted average price of the Defendant's stock decreased in excess of 15%.<sup>1</sup> The Court subsequently so-ordered an amended order of attachment dated September 14, 2023 (NYSCEF Doc. No. 102), and containing the same "true-up" provision. Based on the Defendant's alleged failure to properly "true-up" the deposited stock in accordance with this Court's clear order, the Plaintiffs filed a motion seeking to hold the Defendant in contempt.

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<sup>1</sup> The 15% buffer was for the benefit of the Defendant so that immediate redeposit was not required at the close of each day if there was a drop in share price.

The parties stipulated on September 28, 2023 (NYSCEF Doc. No. 106), that although the Defendant disputes the validity of the Plaintiffs' notices of exercise, had they been honored by the Defendant, the proceeds from the sales of the common stock resulting from those exercises constitute the Plaintiffs' direct damages and total \$17,304,467.81 (comprised of \$7,274,718 to Altium Growth Fund, LP [**Altium**], \$1,191,016.40 to Alto Opportunity Master Fund, SPC – Segregated Master Portfolio B [**Alto**], and \$8,838,733.41 to Empery Asset Master Ltd., Empery Tax Efficient, L.P. and Empery Tax Efficient III, L.P [collectively, **Empery**]).

The Plaintiffs filed an amended complaint on May 23, 2023, alleging causes of action for (i) a declaratory judgment that (x) they validly rescinded their election to receive cash for their Warrants and (y) they hold valid and exercisable Warrants and may undertake any action with respect to those Warrants pursuant to the SPAs and the Warrants (first cause of action), (ii) breach of contract (second cause of action), and (iii) indemnification and attorneys' fees (third cause of action).

### Discussion

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of any material issues of fact requiring trial (*id.*).

To prevail on a cause of action for breach of contract, a plaintiff must demonstrate (i) the existence of a contract, (ii) the plaintiff's performance thereunder, (iii) the defendant's breach thereof, and (iv) resulting damages (*Lebedev v Blavatnik*, 193 AD3d 175, 182-183 [1st Dept 2021]).

On the record before the Court, and as discussed (tr. 12.7.23), there are no issues of material fact for trial and the Plaintiffs are entitled to summary judgment. The Warrants and the SPAs constitute valid contracts. The Plaintiffs performed under the Warrants and the SPAs by exercising and rescinding their options in the manner that the parties agreed that the Plaintiffs were permitted. The Defendants never performed their obligations in connection with the December 2022 exercise because they did not make payment within five days (or at any time subsequent to such time period where it could be said that the Plaintiffs waived their right to require payment within five days). The Plaintiffs therefore had the right to rescind which they exercised. The Defendant also never performed in connection with the May 2023 Warrant exercise by delivering the shares. As discussed above, there are no issues of fact as to the amount of damages due Plaintiffs. Accordingly, the Plaintiffs' motion for summary judgment is granted.

For completeness the Court notes that the Defendant is simply not correct that there has been an irrevocable conversion of the warrants for cash, an election of remedies, or a waiver of the Plaintiffs' carefully negotiated rights set forth in the SPAs. As discussed previously, the Defendant's failure to perform (*i.e.*, timely pay or timely tender the shares) forecloses these

arguments. Under the doctrine of election of remedies, where a party breaches a contract, the non-breaching party may choose to terminate or continue the contract, but if it chooses to continue the contract, it loses the right to terminate the contract because of the default (*Awards.com, LLC v Kinko's Inc.*, 42 AD3d 178, 188 [1st Dept 2007]). For an election of remedies to bar the pursuit of relief, the party must have chosen between inconsistent remedies and, in reliance upon that election, the party must have gained an advantage or the opposing party must have suffered some detriment (*331 East 14th St. LLC v 331 East Corp.*, 293 AD2d 361, 361 [1st Dept 2002]). By seeking to enforce the exercise of the Warrants, the Plaintiffs chose to continue the SPAs (which SPAs give them the right to rescind) which they properly exercised. The rescission right could only have been extinguished by payment and a potential waiver of the time periods set forth in the SPAs. There are no facts that either occurred. Waiver requires a voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable (*Golfo v Kycia Assoc., Inc.*, 45 AD3d 531, 532-533 [2d Dept 2007]). By pursuing enforcement of their rights under the SPAs and the Warrants, the Plaintiffs did not intentionally abandon their contractual rights. They were entitled to rescission so long as the Defendant failed to timely pay or timely deliver the shares. Thus, there has been no waiver of any rights and the Plaintiffs' motion for summary judgment is granted. The Defendant's cross-motion for summary judgment is denied. For completeness, as provided in the SPAs (NYSCEF Doc. No. 17, § 5[g]), the Plaintiffs are entitled to costs and expenses, including attorneys' fees, in connection with this action. They shall deliver a bill, if there is any dispute as to its reasonableness, the parties shall email the Court and the Court shall issue a supplemental order referring the issue to a judicial hearing officer to hear and determine.

The Plaintiffs' motion for contempt must also be granted. To make a finding of civil contempt, the Court must determine that (i) a lawful order of the court clearly expressing an unequivocal mandate was in effect, (ii) it appears with reasonably certainty that the order has been disobeyed, (iii) the party to be held in contempt had knowledge of the court's order, and (iv) the right of a party to the litigation is prejudiced (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]). Civil contempt must be demonstrated by clear and convincing evidence (*Classe v Silverberg*, 168 AD3d 603, 604 [1st Dept 2019]). The order of attachment and the amended order of attachment explicitly require that, in the event the Defendant's stock declines in excess of 15% of the value as of the date of the Prior Decision, the Defendant shall, within 48 hours, deliver an equivalent number of additional shares to satisfy the \$16 million value of the attachment. This was clear on its face and expressly discussed. Even if it was not initially clear as the Defendant now posits, it was certainly clear based on the express language of the order of attachment that the Court issued and which order was discussed with counsel. Equally importantly, the Defendant has wilfully and contumaciously failed to comply with the order. Thus, the motion for civil contempt is granted. The Defendant may however purge its civil contempt by filing the shares necessary to properly true-up the attachment to the \$16 million value by 10am on Tuesday, December 12, 2023. If the Defendant fails to properly purge its civil contempt, the Plaintiff shall promptly email Part 53 ([sfc-part53@nycourts.gov](mailto:sfc-part53@nycourts.gov)) and the Court will issue a supplemental order holding the Defendant in criminal contempt. Although nothing previously prevented the parties from negotiating to have the shares deposited with a mutually agreeable third-party financial institution or with Plaintiff's counsel pursuant to an escrow agreement, the Court notes that it issued a supplemental order (12.7.23) instructing the County Clerk to hold the stock certificates. If any issues arise with filing the certificates with the County Clerk, the parties shall promptly

enter into an agreement to deposit the shares in escrow with a mutually agreed-upon third-party financial institution or for counsel to the Plaintiffs to hold the certificates in escrow.

It is hereby ORDERED that the Plaintiffs' motion for summary judgment is granted; and it is further

ORDERED that the Defendants' cross-motion for summary judgment is denied; and it is further

ORDERED that the Plaintiff's shall submit judgment on notice; and it is further

ORDERED that the Plaintiffs' motion for civil contempt is granted; and it is further

ORDERED that the Defendant may purge its civil contempt by delivering the shares necessary to true-up the value of the attachment to \$16 million by 10am on Tuesday, December 12, 2023; and it is further

ORDERED that, if the Defendant fails to purge its civil contempt by properly delivering the necessary shares, the Plaintiff shall promptly email Part 53 ([sfc-part53@nycourts.gov](mailto:sfc-part53@nycourts.gov)) and the Court will issue a supplemental order holding the Defendant in criminal contempt and shall impose additional sanction; and it is further

ORDERED that the Defendant shall pay the Plaintiffs' reasonable costs and expenses, including attorneys' fees, in connection with this action; and it is further

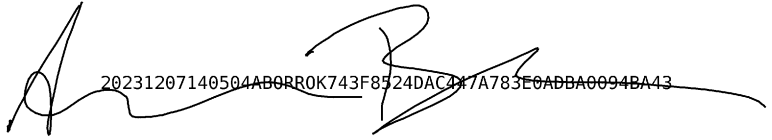
ORDERED that, if the Defendant fails to purge its civil contempt, the Defendant shall be sanctioned in the amount of \$250 and shall be required to deposit said amount with the County Clerk, together with a copy of this order with notice of entry, for transmittal to the New York State Commissioner of Taxation and Finance; and it is further

ORDERED that written proof of the payment of this sanction shall be provided to the Clerk of Part 53 and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that proof of such payment is not provided in a timely manner, the Clerk of the Court, upon service upon them of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Commissioner and against the Defendant in the aforesaid sum; and it is further

ORDERED that, within two weeks of the date of this Decision and Order, the Plaintiffs shall provide to the Defendants an itemized invoice of its costs and expenses in connection with this action and, if the parties can not agree on the amount of reasonable costs and expenses within 30 days, the parties shall promptly notify Part 53 ([sfc-part53@nycourts.gov](mailto:sfc-part53@nycourts.gov)) and the issue will be referred to a JHO/Special Referee; and it is further

ORDERED that the Defendant shall order a copy of the transcript (12.7.23) on an expedited basis.

  
20231207140504ABORROK743F8524DAC417A783E0ADBA0094BA43

12/7/2023  
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED  DENIED

GRANTED IN PART  OTHER

APPLICATION:  SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE