

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

2023 NY Slip Op 34307(U)

November 29, 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; and 22  
CAPITAL, INC.,

Defendants.

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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, 231, 268, 290, 339, 342, 343, and 402

were read on this motion by defendant BMF Advance LLC to

VACATE A TEMPORARY RESTRAINT in NYSCEF  
Doc. Nos. 24 and 88

The following e-filed documents, listed by NYSCEF document numbers (Motion 005) 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 246, 247, 258, 259, 260, 261, and 392

were read on this motion by plaintiff to

QUASH SUBPOENAS served by defendant Bridge  
Funding Cap LLC

The following e-filed documents, listed by NYSCEF document numbers (Motion 007) 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 303, 304, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 338, 341, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 374, 390, 393, 397, 398, 399, and 403

STRIKE ANSWERS of defendants Bridge Funding  
Cap LLC and BMF Advance LLC, & CROSS-MOTION  
by defendant BMF Advance LLC for summary

were read on this motion by plaintiff to

judgment

The following e-filed documents, listed by NYSCEF document numbers (Motion 008) 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 401, 404, 405, and 408

CIVIL CONTEMPT against defendant BMF Advance  
LLC

were read on this motion by plaintiff for

LLC

LOUIS L. NOCK, J.

Motion sequence numbers 003, 005, 007, and 008 are consolidated herein for disposition.

The factual background of this action is summarized in this court's decision and order in motion sequence number 001 (NYSCEF Doc. No. 88), to which the reader is referred. As indicated therein (at 3 n 1), at the time of the issuance of said decision and order, all defendants other than defendants Bridge Funding Cap LLC and BMF Advance LLC had been released from the action. As of this writing, the only remaining defendant is defendant BMF Advance LLC (*see*, NYSCEF Doc. No. 400). As a consequence, motion sequence number 005, seeking to quash subpoenas served by former defendant Bridge Funding Cap LLC, and the portion of motion sequence number 007 seeking to strike said former defendant's answer, are dismissed as moot.

*Motion Seq. No. 003:*

In motion sequence number 003, defendant BMF Advance LLC moved to vacate the temporary restraining order contained in this court's order to show cause dated November 17, 2021 (NYSCEF Doc. No. 24), temporarily restraining said defendant (and the other defendants at the time) 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” the third-party defendants named herein (previously defined as the “Resurgence Group”). However, in motion sequence number 004 (which is not included in this decision), plaintiff had moved for disqualification of counsel for BMF Advance LLC (“BMF”), which motion was granted by this court in its decision and order dated February 27, 2023 (NYSCEF Doc. No. 268). As a consequence of that disqualification, that decision and order held BMF’s motion to vacate (seq. no. 003) in abeyance pending BMF’s retention of substitute counsel, which occurred on June 22, 2023 (*see*, NYSCEF Doc. No. 305). Thus, BMF’s motion to vacate (seq. no. 003) is now ripe for decision. The court’s disqualification decision (NYSCEF Doc. No. 268) expressly noted the possible usefulness of “further motion practice with an eye towards summary disposition” once substitute counsel was retained by BMF (*id.*, at 5); hence, said counsel’s instant cross-motion for summary judgment subsumed within motion sequence number 007.

BMF asserts that plaintiff failed to properly perfect its security interests in two of the Resurgence Group entities because they are Nevada entities, not California entities. However, BMF’s argument is of no moment, as plaintiff does hold the first-priority senior secured interest in the two Nevada entities, as follows.

Regarding Resurgence California, LLC (“RC”), Exhibit “I” to BMF’s motion papers (NYSCEF Doc. No. 110) is an official UCC search from the Nevada Secretary of State for RC. It shows 13 UCC filings in total. UCC filing chains 1 through 7 have all been terminated, as indicated in the Search. UCC filing No. 8, which is active, is held by Kubota Credit Corporation, U.S.A., but it only secures specific pieces of equipment, not accounts receivable (*see*, NYSCEF Doc. No. 168). UCC filing No. 9 (2021179911-4), which is active, was filed by Zahav Asset Management, LLC (“Zahav”), on June 25, 2021 (NYSCEF Doc. 169). That UCC filing

perfected Zahav's security interest in RC's accounts receivable. Therefore, that UCC filing, at position number 9, initially filed by Zahav, is the priority lien against RC's accounts receivables. BMF filed two junior UCC filings after Zahav's UCC filing; to wit, UCC filing No. 10 (2022250031-5) on June 28, 2022, and UCC filing No. 12 (2022265100-1) on June 24, 2022. Defendant Bridge Funding Cap, LLC, d/b/a Merchant Capital, filed UCC filing No. 11 (2022251168-2) on July 6, 2022. On September 14, 2022, Zahav assigned UCC filing No. 9 (2021179911-4) to plaintiff. The relevant UCC-3 Amendment and Evidence of Assignment is in the record (NYSCEF Doc. No. 170). Thus, it appears that plaintiff maintains the first-priority perfected interest in RC's accounts receivable.

Regarding Commissions Early, LLC, the record contains a Nevada UCC Search for that entity (NYSCEF Doc. No. 171). There are only 3 UCC filings filed. UCC filing No. 1 (2019018345-1), filed in May 2019, was terminated in November 2019, as indicated. UCC filing No. 2 (2019053745-9) was filed in November 2019 and was terminated in June 2020, as indicated. Finally, UCC filing No. 3 (2021179911-4) was filed by Zahav on June 25, 2021. This is the same UCC filing referenced above in connection with RC. As observed above, Zahav assigned that UCC filing to plaintiff on September 14, 2022 (*see*, NYSCEF Doc. No. 170). Thus, it appears that plaintiff maintains the first-priority perfected interest in Commissions Early LLC's accounts receivable.

BMF's argument that plaintiff waived its prior perfected security interest in the accounts receivable due to its purported failure to continuously enforce its interest in the accounts is refuted by the express terms of Iruka's Future Receivables Sale and Purchase Agreement with BMF, assigned to plaintiff. Under Section 41 of that agreement (NYSCEF Doc. No. 350):

[N]o failure on the part of Buyer [i.e., plaintiff, as assignee of Iruka] to exercise, and no delay in exercising, any right under this Agreement, shall operate as a waiver thereof, nor

shall any single or partial exercise of any right under this Agreement preclude any other or further exercise thereof or the exercise of any other right. The remedies provided hereunder are cumulative and not exclusive of any remedies provided by law or equity.

This language is repeated in Section 5 of the Personal Guaranty (*id.*, Ex. A § 5).

Moreover, a creditor does not waive its prior perfected security interest by not continuously or immediately enforcing such interest (*see, Matter of Estate of Angiulli*, 148 Misc 2d 796, 801 [Surr Ct Oneida County 1990] [“Little need be said on the issue of Hinline’s alleged surrender or waiver of its security interest in the accounts receivable. . . . [T]he administrator has not sustained his burden of proving that Hinline clearly, unequivocally, and decisively acted so as to demonstrate an intent to waive and relinquish its rights in the accounts receivable.”), *affd sub nom Matter of Angiulli*, 178 AD2d 948 [4<sup>th</sup> Dept 1991]; 9 Lawrence’s Anderson, Uniform Commercial Code, § 9-306:35 [3d ed] [“In order to establish a waiver of a security interest, there must be unequivocal conduct by the secured party manifesting such intent, and a mere delay in enforcing his rights upon default will not be construed as a waiver of the security interest.”]). Thus, even if plaintiff paused enforcement of its security interest upon the Resurgence Group’s accounts receivable, it does not necessarily constitute a waiver of its rights.<sup>1</sup>

*Motion Sequence No. 007:*

Plaintiff moves to strike the answer of BMF, referencing various failures by BMF’s prior counsel to appear at conferences. Notably, BMF is now represented by substitute counsel. But that aside, the court is loathe to impose the drastic measure of striking the answer, which might require a finding of willfulness or contumacious conduct (*see, McCarthy v Klein*, 238 AD2d 552 [2d Dept 1997]), in the face of much diligence by BMF’s prior (and present) attorneys

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<sup>1</sup> Although the merits analysis in the textual discussion would not lead to a grant of BMF’s vacatur motion (seq. no. 003), the ultimate dismissal of this action on BFM’s subsequent cross-motion for summary judgment (seq. no. 007), *infra*, necessarily requires vacatur of the temporary restraining order.

throughout other aspects of this litigation. Accordingly, plaintiff's motion to strike BMF's answer, or to seek any other sanction in this regard, is denied for these reasons.

BMF has cross-moved, within the procedural context of motion sequence number 007, for summary judgment dismissing the complaint on the ground that the complaint fails to properly plead a cause of action for conversion of collateral assets subject to plaintiff's priority interest, pointing to the broad allegation that "Defendants proceeded to intercept Empire's collateral" (NYSCEF Doc. No. 2 ¶ 42). No allegation is made to the effect that BMF actually took possession of specific funds. Indeed, the complaint simply alleges that BMF "intended to" and "attempted to" "restrain Resurgence Group's accounts receivable" (*id.*, ¶ 46). Where a "plaintiff alleges that a defendant converted money, the money 'must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner'" (*McBride v KPMG Intl.*, 135 AD3d 576, 580 [1<sup>st</sup> Dept 2016]). That said, however: there is an indication in the record that BMF obtained Resurgence Group account receivable money, by virtue of its prior counsel's affirmation acknowledging that "[a]round April 2023 . . . my office began receiving checks from insurance companies on account of" UCC notices sent by his office in December 2021, which checks amounted to the sum of \$434,734.60 (NYSCEF Doc. No. 329). However, said counsel further affirms that said notices "were inadvertently sent" by his office (*id.*).

Accounts receivable can be the subject of a cause of action for conversion (*see, Goldberger v Rudnicki*, 94 AD3d 1047 [2d Dept 2012]). Given the state of affairs involving BMF's conceded possession of Resurgence Group funds, the court is hesitant to dismiss the conversion claim under the principle that a complaint can be conformed to the proof (CPLR 3025). Because BMF's prior counsel affirmed to BMF's inadvertence in issuing UCC notices

and receiving funds, an issue of fact as to BMF's intent exists, precluding summary judgment on the issue of conversion (*Goldstein v Guida*, 74 AD3d 1143, 1144 [2d Dept 2010] ["Conversion is defined as 'an intentional act of domination or control . . . .'"]; *Andre v Pomeroy*, 35 NY2d 361 [1974] [summary judgment is appropriate where there are no disputed material facts]; *Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980] [the moving party on a summary judgment motion must tender sufficient evidentiary proof to warrant judgment as a matter of law]).

BMF's cross-motion also challenges the validity of the cause of action for a declaratory judgment, seeking judicial declaration that "Plaintiff has a superior, present, and legal right under its first-position perfected UCC security interest to collect and possess all property and assets of nonparty Resurgence Group" (NYSCEF Doc. 2 at 8). BMF asserts that the cause of action is not ripe because, in its words, "it fails to allege 'a present, rather than hypothetical, contingent, or remote' controversy" (NYSCEF Doc. No. 327 at 11 [quoting *Ashley Builders Corp. v Town of Brookhaven*, 39 AD3d 442, 443 [2d Dept 2007]]). The court disagrees. Plaintiff and BMF are embroiled in a dispute regarding priority rights over the same assets, namely the accounts receivable of the Resurgence Group. This case is not about a prospective future dispute. A declaratory judgment can be granted where it will have a direct and immediate effect upon the rights of the parties (*see, Enlarged City School Dist. of Middletown v City of Middletown*, 96 AD3d 840 [2d Dept 2012]).

BMF further argues that a cause of action for a permanent injunction has not been properly pled here. This, too, is incorrect. "To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a 'violation of a right presently occurring, or threatened and imminent,' that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced

in his or her favor” (*Caruso v Bumgarner*, 120 AD3d 1174, 1175 (2d Dept 2014)). The complaint sufficiently pleads that BMF intended to and attempted to gain possession of Resurgence Group accounts receivable. Theoretically, if plaintiff could sustain its ultimate burden of proof to the effect that it is entitled to such accounts receivable to the extent of its security interest, then any possession by junior creditors of such accounts, and the subsequent dissipation of such funds, would have caused it irreparable harm.

However, separate and apart from all the foregoing grounds asserted by BMF in support of summary judgment of dismissal of the complaint, is its final ground, which posits that “all claims alleged in the complaint have been rendered moot because plaintiff was paid the full balance allegedly due on the Iruka position” (NYSCEF Doc. No. 327 at 17). BMF draws the court’s attention to the fact that BMF’s prior counsel delivered a cashier’s check to plaintiff’s counsel on June 13, 2023, in the amount of \$380,416.44, in excess of Iruka’s claim for \$331,460.22 (taking into account a calculation for interest accrued), which claim is set forth in plaintiff’s “UCC Lien Notice and Notice of Assignment of Accounts-Receiveable by Assignor to Iruka Capital Group LLC, as Assignee” (the “UCC Lien Notice”) (NYSCEF Doc. No. 7; *see also*, NYSCEF Doc. No. 323 [June 13, 2023, letter from plaintiff’s counsel to the court demonstrating and explaining that payment]). Despite the significant import of that relatively recent payment development, the complaint contains a substantially higher *ad damnum*, in excess of \$5 million (*see*, Amended Complaint [NYSCEF Doc. No. 53]).

In response to BMF’s showing of payment, correlating to the amount noticed in the UCC Lien Notice, plaintiff’s counsel goes no further than to say that: “In fact, the balance owed is far greater, as is often the case when a debtor defaults. The assertion [of BMF’s counsel] also ignores the rights a creditor has to make protective advances or increase the debtor’s underlying

financial obligation through contractual, or consensual adjustments.” (NYSCEF Doc. No. 358 at 15.) But plaintiff’s counsel submits no documentary support in the nature of “protective advances or increase[s] [in BMF’s] financial obligation through contractual, or consensual adjustments” (*id.*).

Once a summary judgment movant has met its initial burden to tender sufficient evidentiary proof to warrant judgment as a matter of law, “the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]; *see also*, *Zuckerman, supra*). “[I]t is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1<sup>st</sup> Dept 2014], *lv denied* 24 NY3d 917 [2015]). Plaintiff has failed to sustain its aforesaid burden in refutation of BMF’s independent evidence of payment of the entire amount noticed in the UCC Lien Notice, plus interest. Accordingly, BMF’s cross-motion for summary judgment is granted, and the amended complaint is dismissed.

*Motion Seq. No. 008:*

Plaintiff has moved for an order of “criminal and civil contempt of court” against BMF, alleging that BMF violated the court’s temporary restraining order. The above dismissal of this action, in and of itself, merits a denial of this motion. However, in the interest of complete thoroughness, the court issues the following denial of the motion for contempt on intrinsic insufficiency grounds, independent of the dismissal of this action.

“A motion to punish a party for civil contempt is addressed to the sound discretion of the court, and the movant bears the burden of proving the contempt by clear and convincing evidence” (*El-Dehdan v El-Dehdan*, 114 AD3d 4, 10 [2d Dept 2013], *affid* 26 NY3d 19 [2015]).

“[A] court may impose punishment for criminal contempt where a person is guilty of ‘[w]ilful disobedience to [the court’s] lawful mandate’ or ‘[r]esistance wilfully offered to [the court’s] lawful mandate’” (*id.*). Insufficient evidence in satisfaction of those heightened standards has been submitted by plaintiff. Therefore, the motion is denied.

Accordingly, it is

ORDERED that plaintiff’s motion to quash subpoenas (seq. no. 005) served by defendant Bridge Funding Cap LLC is dismissed; and it is further

ORDERED that plaintiff’s motion to strike the answer of defendant Bridge Funding Cap LLC (within seq. no. 007) is dismissed; and it is further

ORDERED that plaintiff’s motion to strike the answer of defendant BMF Advance LLC (within seq. no. 007) is denied; and it is

ORDERED that defendant BMF Advance LLC’s cross-motion for summary judgment dismissing the amended complaint (within seq. no. 007) is granted, and said complaint is hereby dismissed; and it is further

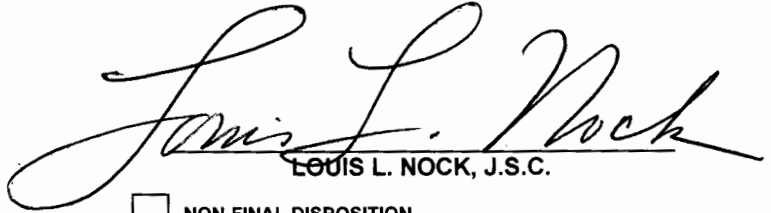
ORDERED that, by virtue of said dismissal, BMF Advance LLC’s motion to vacate the temporary restraining order issued in this action (seq. no. 003) is granted, and such restraints are hereby lifted; and it is further

ORDERED that plaintiff’s motion for an order of criminal and civil contempt (seq. no. 008) against defendant BMF Advance LLC is denied.

This will constitute the decision and order of the court.

ENTER:

11/29/2023  
DATE

  
LOUIS L. NOCK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
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"/>	OTHER
			<input type="checkbox"/>	REFERENCE