

BFG 104 LLC v Greenwich Bus. Capital, LLC

2024 NY Slip Op 30167(U)

January 12, 2024

Supreme Court, New York County

Docket Number: Index No. 652255/2023

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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BFG 104 LLC,		INDEX NO. <u>652255/2023</u>
Plaintiff,		MOTION DATE _____
- v -		MOTION SEQ. NO. <u>008</u>
GREENWICH BUSINESS CAPITAL, LLC, JOHN PONTE, and DANIELLE DESROSIERS,		
Defendants.		DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 141, 142, 143, 163, 164, 165, 172

were read on this motion to/for VACATE STAY.

In this action, plaintiff BFG 105 LLC (BFG) alleges that defendants Greenwich Business Capital, LLC (Greenwich) and John Ponte, Greenwich's managing member, (together, Moving Defendants) sold BFG over \$10 million in fake receivables. (NYSCEF 64, July 18, 2023 Amended Complaint.)

In motion seq. no. 008, Moving Defendants ask to vacate the court's June 22, 2023 decision granting BFG's request for a preliminary injunction.¹ (NYSCEF 42, Decision and Order [mot. seq. no. 001].) Alternatively, Moving Defendants seek to modify the preliminary injunction by (1) "Clarifying that its restrictions and/or putative requirements only apply with respect to 'Purchased RTR' (as that term is used or defined in the 2022 MFA and 2020 MFA) and accounts used by Greenwich to collect

¹ On the record, Moving Defendants' counsel withdrew the request to vacate the entire Decision and Order, stating "[w]e are not asking to vacate this entire preliminary injunction at this time." (NYSCEF 192, tr at 15:18-19.)

Purchased RTR, and not to Greenwich's] other merchants, receivables or accounts that were not explicitly sold to Plaintiff pursuant to either of the MFAs ('Other Greenwich Merchants')" and (2) "Increasing the undertaking amount to \$5,671,655.00, which amount is required to indemnify Greenwich for its likely losses, representing its share in and to the Purchased RTR as of May 24, 2023, in the event the Preliminary Injunction was improperly issued." (NYSCEF 96, OSC [mot. seq. no. 008].)

The preliminary injunction currently provides:

ORDERED that the motion is granted and defendants, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant are enjoined from (i) using any money taken from the collections from Greenwich's RTR; (ii) taking any action, directly or indirectly, to stop VeriCheck, LLC dba ACHWorks (the "ACH") from directing all collections on Greenwich's RTR to a bank account identified by BFG; (iii) preventing BFG from having read-only access to Greenwich's "Segregated Account" (Bank of America); and (iv) instructing any of Greenwich's merchants to divert payments to Greenwich, or any of its affiliates, through another ACH provider or through any other means;

ORDERED that defendants shall provide plaintiff with read-only access to any and all accounts in which Greenwich's merchants pay Greenwich and where Greenwich maintains its RTR; and it is further

While the Moving Defendants fail to indicate specific changes in their motion papers, at argument, the Moving Defendants sought the following three changes:

1. In paragraph (i), change "Greenwich's RTR" to "Purchased RTR" as defined in the Master Funding Agreement (MFA). "Purchased RTR" is "the RTR that has been listed on one of the 61 purchase and sale agreements." (NYSCEF 192, tr 14:20-15:7.

This change is rejected as a review of the few P&Ss before the court demonstrates no significant difference between the RTR and Purchased RTR. (NYSCEF 5, 184, 185, 186, 187, P&S #46, #33, #45, #43, and #30, respectively.) In a few instances, there were some minor collections before the P&S was executed

decreasing the RTR. (See e.g. NYSCEF 184, P&S #33.) However, the court will modify the injunction to limit plaintiff's collections to the merchants listed on Schedule A of the 61 P&Ss. "BFG and Greenwich entered into sixty-one (61) P&Ss subject to the MFAs." (NYSCEF 64, Amended Complaint ¶¶33; See NYSCEF 5, 184, 185, 186, 187, P&S #46, #33, #45, #43, and #30, respectively.) BFG alleges that defendants owe BFG \$10,075,438 on these 61 P&Ss. (NYSCEF 64, Amended Complaint ¶¶33; NYSCEF 4, Excel Chart of P&S agreements and amounts due on each agreement.) Schedule A to each P&S lists eligible merchants.

In P&S § 3(a), defendant declares that "[Greenwich] is the sole owner of the Purchased RTR and ...; [Greenwich] has full power and authority to sell each of the Purchased RTR and has duly authorized their sale to [BFG] pursuant to [the] Purchase and Sale Agreement and the Master Funding Agreement...." (NYSCEF 64, Amended Complaint ¶¶36.) If BFG has collected funds, pursuant to the injunction, from merchants not listed in the 61 P&Ss, then BFG shall segregate those funds until such time as the court determines whether either party is entitled to those funds. While BFG may be entitled to all of Greenwich's RTR because BFG has a security interest in all of Greenwich's RTR, (NYSCEF 12, 2022 MFA §VII[5]), such an order at this stage is premature with so many disputed issues.

2. In paragraph (iv), "instructing any of the Purchased RTR to divert payments to Greenwich through another ACH processor." (NYSCEF 192 tr 15:9-12.)

This change is rejected as incomprehensible. However, the court reiterates that the preliminary injunction clearly provides that defendants are prohibited from contacting merchants and directing funds to be paid to defendants.

3. “[M]odify the next paragraph to the extent that it asks for read-only access to any and all accounts in which Greenwich's merchants pay, I would change Greenwich's merchants to Purchased RTR.” (NYSCEF 192, tr 15:13-17.)

This change is rejected for the same reason that #1 is rejected. Moreover, the Moving Defendants’ proposal is unworkable. For BFG to have real time access to view electronic bank accounts, there is no way to redact entries of some merchants.

As an explanation for failing to give BFG access, the Moving Defendants claim that Bank of America (BofA) shut Greenwich’s account because of irregularities. (NYSCEF 192, tr 36:9-11.) At argument, the Moving Defendants were directed to provide the BofA statements to BFG. (*Id.* 38:12-39:2.) The court will also modify the preliminary injunction to provide BFG with read access to any and all financial institutions to which Greenwich deposits merchants' receivables. BFG may see all such accounts even if they receive funds from merchants not listed on the P&Ss. Greenwich shall immediately identify to BFG the banks and last four digits of such accounts while arrangements are made for view only access.

The court directed BFG to provide the Moving Defendants with a list of merchants with whom Moving Defendants are not to communicate. (*Id.* 42:6-8.)

At argument on September 22, 2023, the court directed counsel to the Moving Defendants to direct them to not make threats and if in fact such threats have been made, they shall stop immediately.

Moving Defendants also seek to increase the amount of the undertaking which is currently set at \$1,000. Instead, movants seek an undertaking of \$5.6 million. They claim that of the \$10,078,482.50 that BFG asserts as the balance owing to BFG, the balance is actually \$9,968,015.00, of which \$4,297,351.00 is BFG’s share and the

remaining \$5,671,665.00 belongs to movants. (NYSCEF 97, Ponte Aff. ¶ 33; NYSCEF 98, Chart.) This request is rejected as Moving Defendant's proof is inadequate. It consists of a chart, but there is no back up for the chart. Ponte states that BFG's records are the source of the information, but Ponte does not say that he created the chart or what records were reviewed and by whom. (NYSCEF 97, Ponte aff ¶33.) However, the court finds that \$1,000 is inadequate given the amounts at issue in this case. The Moving Defendants' attorneys' fees alone could exceed \$100,000. However, Moving Defendants have failed to provide the court with any actual reliable data on which to base this assessment. Accordingly, the undertaking is set at \$500,000.

Accordingly, it is

ORDERED that BFG to provide the Moving Defendants with a list of merchants with whom Moving Defendants are not to communicate, if it has not already done so; and it is further

ORDERED that Moving Defendants shall not make threats and if in fact such threats have been made, they shall stop immediately; and it is further

ORDERED that the Moving Defendants' motion 08 to modify the injunction is denied, but the injunction is modified as follows:

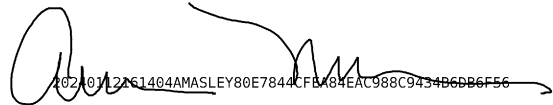
ORDERED that the motion for a preliminary injunction is granted and the preliminary injunction shall read as follows:

ORDERED that defendants, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant are enjoined from (i) using any money taken from the collections from Greenwich's RTR; (ii) taking any action, directly or indirectly, to stop VeriCheck, LLC dba ACHWorks (the "ACH") from directing all collections from merchants *listed on Schedule A of the 61 P&Ss* of Greenwich's RTR to a bank account identified by BFG; (iii) preventing BFG from having read-only access to *any of Greenwich's financial institutions to which Greenwich deposits merchants' receivables*. *BFG may see all such accounts even if they receive funds from*

merchants not listed on the P&Ss. Greenwich shall identify the last four digits of such accounts; and (iv) instructing any of Greenwich’s merchants listed on Schedule A of the 61 P&Ss to divert payments to Greenwich, or any of its affiliates, through another ACH provider or through any other means; ORDERED that defendants shall provide plaintiff with read-only access to any and all accounts in which Greenwich’s merchants pay Greenwich and where Greenwich maintains its RTR; and it is further

ORDERED that Moving Defendants shall provide BFG with the BofA statements within 3 business days of this order, if not already provided; and it is further

ORDERED that the undertaking is \$500,000.



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1/12/2024

DATE

ANDREA MASLEY, 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