

BFG 104 LLC v Greenwich Bus. Capital, LLC

2024 NY Slip Op 30983(U)

March 24, 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

-----X
BFG 104 LLC,

Plaintiff,

- v -

GREENWICH BUSINESS CAPITAL, LLC, JOHN PONTE,
and DANIELLE DESROSIERS,

Defendants.
-----X

INDEX NO. 652255/2023

MOTION DATE _____

MOTION SEQ. NO. 012 013

**DECISION + ORDER ON
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 221, 222, 223, 224, 225, 226, 227, 228, 240, 243, 244, 245, 246, 254, 321, 322, 323, 385, 386

were read on this motion to/for VACATE/LIFT - STAY

The following e-filed documents, listed by NYSCEF document number (Motion 013) 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 241, 242, 247, 248, 249, 250, 252, 253, 255, 256, 289

were read on this motion to/for MODIFY

Upon the foregoing documents, it is¹

In motion seq. no. 012, plaintiff BFG 104 LLC (BFG) asks the court to (1) lift the automatic stay of discovery and direct defendants to respond to discovery,² and (2) enjoin defendant Greenwich Business Capital, LLC (Greenwich) from further prosecution of the proceeding against BFG and Banana Funding Group, Inc. (Banana)³

¹ The court has reviewed and where appropriate considered additional documents mentioned in the parties' papers but omitted in this autogenerated caption for both motions.

² BFG's first request was granted on the record on January 18, 2024. (NYSCEF 289, Tr at 28:21-25.)

³ Greenwich attempted to initiate a third-party action against Banana and the defendants in the Related NY Action with the same causes of action as those in the Related NY Action. (NYSCEF 213, October 20, 2023 Third-Party Summons and Complaint.) However, Greenwich's documents were returned by the NY County Clerk for correction on October 24, 2023 because Greenwich's new third-party caption did not

in the Kent County Superior Court in Kent County, Rhode Island, captioned *Greenwich Business Capital, LLC v Danielle Desrosiers, et. al.*; KC-2023-1056 (RI Action), or, in the alternative, stay the RI Action during the pendency of this action and the related NY action captioned *Greenwich Business Capital et. al. v BFG 104 LLC et. al.*, Index No. 655261/2023 (Related NY Action.) (NY St Courts Elec Filing Doc No. [NYSCEF] 221, Proposed Order to Show Cause.)

In motion 013, Greenwich moves for modification of the preliminary injunction which was determined on the record on January 18, 2024. (NYSCEF 289, Tr at 28:21-25.)

BFG commenced this action on May 9, 2023. (NYSCEF 1, Summons and Complaint.) According to its amended complaint, BFG is a factoring company that funds, at a discount, merchant cash providers such as Greenwich in exchange for a right to receive (RTR) payments from future transactions. (NYSCEF 64, Amended Complaint [AC] ¶1.) “Greenwich and BFG entered into sixty-one Purchase & Sale Agreements [PSAs] whereby Greenwich, through Ponte and/or Desrosiers, sold RTR to BFG, and it represented and warranted that it was the sole owner of such RTR. Thereafter, BFG paid the “Advance Amount” as required under each P&S, and Defendants proceeded to make installment payments until May 1, 2023, when it failed to make the required installment payments.” (*Id.* ¶3.)

match Greenwich's counterclaim caption; Greenwich has yet to fix it. Accordingly, there is no third-party action.

This action is for breach of contracts⁴ and fraud arising from Greenwich's admissions that defendants (i) sold BFG fabricated RTR; (ii) used merchant contracts that were fictitious in transactions with BFG; and (iii) made installment payments from Greenwich's own bank accounts, rather than merchant bank accounts which would have alerted BFG to a problem. (*Id.* ¶4.) BFG's AC consists of seven causes of action: (1) fraud against all defendants; (2) breach of the 2022 Master Funding Agreement (MFA) against Greenwich; (3) breach of the 2020 MFA against Greenwich; (4) breach of the Tri-Party Agreement⁵ against Greenwich; (5) breach of the performance guaranty against defendant Desrosiers; (6) breach of the performance guaranty against defendant Ponte; and (7) injunctive relief and declaratory judgment that "(i) BFG is the owner of the Purchased RTR and as a result of BFG's security interest, BFG has the right to collect on all Greenwich's RTR; (ii) any deposit made, directly or indirectly, by Defendants of collections from the Purchased RTR and all other RTR which are pledged to BFG pursuant to the Funding Agreements (i.e., Greenwich's RTR) into an account other than the Segregated Account (Greenwich's Bank of America account) is a breach of the Funding Agreements; and (iii) any attempts to instruct the ACH, directly or indirectly, to divert collections away from BFG until Greenwich's obligations are met is

⁴ The contracts at issue are the 2020 and 2022 MFAs, 61 PSAs and performance guaranties by Desrosiers and Ponte. (NYSCEF 64, AC ¶¶12-43.) BFG refers to these contracts as the "Funding Agreements" while Greenwich refers to the same agreements as the "Banana Agreements." The court uses the term "Agreements."

⁵ The parties also entered the Tri-Party Agreement with VeriCheck LLC (d/b/a ACHWorks) which facilitates the financial transactions at issue. (NYSCEF 6, Tri-Party Agreement.) ACH stands for automated clearing house.

(<https://www.investopedia.com/terms/a/ach.asp>.)

illegal and constitutes a conversion and breach of the Funding Agreements.” (*Id.* ¶¶ 61-116.)

Greenwich counterclaims that BFG breached the PSAs with late advance payments and by charging Greenwich full monthly installment payments when BFG only provided partial financing. (NYSCEF 41, June 20, 2023 Answer with Counterclaims at 8.)

On September 27, 2023, Greenwich moved to dismiss BFG’s AC, arguing that BFG is lending not factoring and thus the contracts between the parties here are usurious and void. (NYSCEF 191, Greenwich’s Memo of Law at 9/31.⁶) That motion is sub judice.

In the Related NY Action, filed October 24, 2023, Greenwich asserts 17 causes of action that BFG and its parent Banana, affiliates, agents, and employees⁷ are destroying Greenwich’s business by manipulating the reimbursements to BFG such that BFG transferred the risk of the merchant cash advance business entirely to Greenwich. (655261/23: NYSCEF 1, Complaint; 655261/2023: NYSCFE 12, First Amended Complaint [FAC] ¶¶2, 46, 50.) Central to Greenwich’s theory of the case is that BFG is a lender and its loans are subject to usury laws. (655261/2023: NYSCEF 12, FAC ¶41.)

⁶ NYSCEF pagination.

⁷ The court refers to the defendants in the Related NY Action collectively as BFG. Defendant Banana Funding Group LLC is allegedly controlled by its CEO Eyal Levy and allegedly established defendant BFG 104, LLC (BFG) as a subsidiary. (655261/23, NYSCEF 12, FAC ¶2.) Defendants BFG NY and ABC Company are allegedly also subsidiaries of Banana. (*Id.* ¶10.) Defendant Lee Levy Havakuk is allegedly president of Banana and BFG. (*Id.* ¶12.) Defendant Lir Glas is allegedly Director of Operations of BFG. (*Id.* ¶13.) Defendant Arthur Grand is allegedly an employee of Banana and BFG. (*Id.* at ¶14.) Defendant Dedicated Financial GBC (DF) is allegedly Banana’s collections agent. (*Id.* ¶2.) Banana Funding Group, Inc. is listed in the caption but not defined in the FAC of the Related NY Action.

In Greenwich's first cause of action for fraud, Greenwich alleges "representations were completely and knowingly false since Grand, Levy and Havakuk, and each of them, knew that the PSAs were not purchases of receivables and would not be treated as purchases of receivables, but as loans with absolute or static payment obligations" (*id.* ¶138) and "failed to suspend or reduce any installment payments from Greenwich (where the Purchased RTR's performance slowed or stopped) or provide any reconciliations of monthly loan payment installments or of amounts overcollected under the PSAs." (*id.* ¶139.) Greenwich admits the New York actions are related and will seek consolidation. (*id.* ¶1.)

In the RI Action, initiated November 14, 2023 (NYSCEF 227, RI Action Complaint), Greenwich asserts that BFG breached the Agreements by (i) conspiring with Greenwich's employees Desrosiers and/or Ferra to create a BFG wholly owned company to "replace" Banana as the so-called 'collection agent' to continue to pull ACH payments directly from merchants without raising suspicion (NYSCEF 322, RI Action Amended Complaint [RI Complaint] ¶37-38); by (ii) continuing to advance funding to Greenwich after Desrosiers' disclosure regarding Greenwich's cashflow problem (*id.* ¶48-49); by (iii) continuing to purchase RTR and advance funds to Greenwich even with actual or constructive notice of Greenwich's financial position (*id.* at ¶52); by (iv) failing to verify funding about purchased RTR (*id.* ¶57); and by (v) breaching the Agreements to collect from Greenwich's merchants including those not listed or identified on any PSAs, and thus converting Greenwich's RTR. (*id.* at ¶66.) Greenwich asserts 23⁸

⁸ There are 23 causes of action listed in the RI Complaint since Greenwich has two causes of action labeled Count II, both for breach of the Agreements, two different

causes of action in the RI Action including Count I(d)⁹ (at 18/40) that the parties' agreements are in fact loan agreements not factoring agreements (*id.* ¶65) and Count I (c) (at 18/40) that BFG breached the Agreements. (See *also id.*, Breach of Contract Count ¶¶ 71-76.) In addition, Greenwich alleges the following against BFG: breach of implied covenant of good faith and fair dealing (*id.*, ¶83-86); unjust enrichment from breach of the Agreements (*id.* ¶91-95), tortious interference with contract (*id.* ¶117-121); tortious interference with prospective business advantage (*id.* ¶132-136); negligence and civil conspiracy (*id.* ¶¶137-140, 149-152); breach of fiduciary duty (*id.* ¶167-171); and violation of R.I. Gen. Laws §7-15-1 entitled RICO (*id.* ¶172-176.)

BFG seeks to enjoin Greenwich from proceeding in the RI Action against BFG and its affiliates and principals. For injunctive relief under CPLR 6301, the movant must establish likelihood of success on the merits of the action; the danger of irreparable harm in the absence of a preliminary injunction; and a balance of equities in favor of the moving party. (*Gliklad v Cherney*, 97 AD3d 401, 402 [1st Dept 2012] [citations omitted].) "It is only in extreme and extraordinary cases that the court will break the rule of comity which forbids the granting of an injunction to stay proceedings which have been commenced in a foreign court of competent jurisdiction." (*E. B. Latham v Mayflower*, 278 AD 90, 94 [1st Dept 1951].) However, there are exceptions where the party who seeks to enjoin a proceeding of a sister state or foreign court clearly demonstrates that "the suit sought to be enjoined was brought in bad faith, motivated by fraud or an intent to harass the party seeking the injunction, or if its purpose was to

theories are listed as counts labeled IV, and two different theories are both labeled Count VII.

⁹ Greenwich seeks seven other declarations in Count I.
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evade the law of the domicile of the parties.” (*Chayes v Chayes.*, 180 AD2d 566, 566 [1st Dept 1992], quoting *George Hyman Construction Company v Precision Walls*, 132 AD2d 523, 526 [2nd Dept 1987].)

BFG seeks a stay arguing that the RI Action is “entirely duplicative” of the NY Actions. (NYSCEF 228, BFG’s Memorandum of Law in Support at 17/20.) BFG claims that the RI Complaint arises from the same Agreements and the same contractual funding relationship between BFG and Greenwich as well as Desrosiers’ and Ferra’s fraudulent conduct as employees of Greenwich. (NYSCEF 254, BFG’s Reply Memorandum of Law, at 10/15.) As evidence of this similarity, BFG offers that several of the allegations in the RI Complaint are copied and pasted from Desrosiers’ first affidavit which defendants submitted in this action. (*Id.*) Further, BFG points to eight causes of action against BFG in the RI Action that are identical to Greenwich’s causes of action against BFG in the Related NY Actions: breach of the Agreements, declaratory judgment that BFG is a lender not a factor, breach of the covenant of good faith and fair dealing, unjust enrichment, fraud, tortious interference with contract, tortious interference with prospective business, breach of fiduciary duty. (NYSCEF 228, BFG’s Memorandum of Law in Support at 11/20.)

Greenwich counters that the RI action “widely differs from the narrow universe of parties and issues” in the NY actions. (NYSCEF 246, Greenwich’s Memorandum of Law in Opposition, at 12/16.) Greenwich states that the RI Action involves nine different named defendants. (*Id.*) However, “the presence of additional parties . . . will not necessarily defeat a motion . . . where . . . ‘both suits arise out of the same subject matter or series of alleged wrongs.’” (*White Light v On the Scene*, 231 AD2d 90, 94 [1st

Dept 1997], quoting *Kent Dev. Co. v Liccione*, 37 NY2d 899, 901 [1975].) Greenwich argues that the RI Action “involves a series of events, actions or conduct at variance with and/or outside of the scope of parties’ rights and/or obligations vis-à-vis certain contracts or agreements, and, further, in violation of NACHA regulations and other banking rules, guidelines or regulations.” (NYSCEF 246, Greenwich’s Memorandum of Law at 12/16.) However, Greenwich fails to identify those regulations, rules, or guidelines. Greenwich also fails to explain why those claims could not be pursued here in New York where Greenwich initiated its action against BFG and the court has experience applying the laws of other jurisdictions.

The court finds that BFG has established likelihood of success because Greenwich’s Rhode Island claims are duplicative of its first filed claims in the NY Actions and even earlier when Greenwich’s motion to dismiss is considered. The actions involve the same Agreements, people, entities and events.

There is also a risk of conflicting results. For example, this court could agree with Greenwich that BFG is a lender and the Rhode Island court could disagree or vice versa. Parallel actions should be enjoined when there is a possibility of conflicting rulings. (*Jay Franco and Sons Inc. v G Studios, LLC*, 34 AD3d 297 [1st Dept 2006]; see also *Interested Underwriters at Lloyd’s v H.D.I. Ill Assoc.*, 213 AD2d 246 [1st Dept 1995] [Subsequently commenced Colorado action properly enjoined where defendants caused delays in New York, “a contrary decision in Colorado would interfere with the New York court’s ability to resolve the issues before it,” and facts indicated forum shopping].) BFG also argues that defendants’ inconsistent legal theories and conflicting allegation in New York and Rhode Island could lead to conflicting results though FG’s

identification of Greenwich's conflicting allegations are irrelevant to this decision.

(NYSCEF 228, BFG's Memorandum of Law at 13-15/20.)

The court agrees that the forum selection clause is permissive, not mandatory and, thus, this decision is not based on it. (NYSCEF 246, Greenwich's Memorandum of Law at 620.) The clause contains no mandatory language such as "exclusive" or "shall be brought." (NYSCEF 12, 2020 MFA at 19-20.) When such mandatory language is absent, and the clause only provides that the undersigned submit to a certain jurisdiction, such "Service of Suit Clause" does not bind the parties to litigate in a particular forum. (*See Brooke Group v JCH Syndicate* 488, 87 NY2d 530, 534 [1996].) "The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning." (*Brooke*, 488, 87 NY2d 530, 534.) There is no manifestation of intent to limit jurisdiction exclusively to New York courts in the MFAs in this case. Nevertheless, Greenwich has made a choice to assert its claims in the New York Actions and in its motion to dismiss. Having made such a choice, Greenwich is now bound by it.

Likewise, Rhode Island law does not alter the fact that Greenwich cannot proceed in two jurisdictions with identical claims. Greenwich argues that BFG is named in the RI Action because Rhode Island's declaratory judgement statute requires that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." (R.I. Gen. Laws § 9-30-11.) While the Rhode Island Supreme Court has held that this provision is mandatory and that failure to join all persons who have an interest that would be affected by the

declaration is ordinarily fatal to an action, the case is clearly limited to zoning matters. (*Thompson v Town Council of Town of Westerly*, 487 A2d 498, 499 [Sup Ct of RI 1985].) Again, the New York actions are principally contract actions. Greenwich cannot convert a breach of contract to a declaratory judgment to evade this court's jurisdiction or forum shop. (See *Certain Underwriters at Lloyds, London v Millennium Holdings LLC*, 52 AD3d 295 [1st Dept 2008].)

BFG has established irreparable harm. "In making [a showing of probable irreparable harm], the movant must demonstrate that irreparable harm is 'imminent, not remote or speculative, and the alleged injury must be one incapable of being fully remedied by monetary damages.'" (*Madden Intern., Ltd. v Lew Footwear Holdings Pty Ltd.*, 50 Misc 3d 1210(A) *5 [Sup Ct, NY County 2016] [quoting *Reuters Ltd. v United Press Int'l, Inc.*, 903 F2d 904, 907 (2d Cir 1990)], *affd*, 143 AD3d 418 [1st Dept 2016].) Irreparable harm has been found when plaintiffs were forced to engage in duplicative litigation and unnecessary expense. (See *Babcock & Wilcox Co. v Control Components, Inc.*, 161 Misc 2d 636 [Sup Ct, NY County 1993].) BFG will be irreparably harmed if it must litigate Greenwich's duplicative claims in New York and Rhode Island.

The court finds the balance of the equities favors BFG. BFG's argument that equity favors a party who merely seeks a defendant to comply with its contractual obligations is inapplicable since the forum selection provision is permissive, as discussed above. (*Bank of Am., N.A. v PSW NYC LLC*, 29 Misc 3d 1216(A) *10 [Sup Ct, NY County 2010]; NYSCEF 228 at 18.) However, Greenwich will suffer no harm since its New York claims are identical to its RI claims against BFG and its affiliates. Further, in the absence of opposition –citing the law is not opposition-- the court accepts

BFG's contention that Greenwich failed to alert the RI Court to the NY Actions which demonstrates bad faith. (See *In re Estate of Bauman*, 140 Misc 2d 412, 415 [NY County Sur Ct 1988] [foreign action could not have been brought in good faith, in part because they did not disclose to the foreign court that a proceeding was already pending in the New York concerning the same issue and parties.]

Therefore, Greenwich is enjoined from proceeding in Rhode Island with its claims against BFG 104, LLC, Banana Funding Group LLC, Eyal Levyly BFG NY, ABC Company to the extent it is related to BFG or Banana, Lee Levy Havakuk, Lir Glas, Arthur Grand, and Dedicated Financial GBC.

Greenwich's request for an undertaking of \$1,976,924.47 is denied. BFG has already given an undertaking in this case. As to the amount of the undertaking, and as discussed with the parties on the record previously, it is difficult for the court to calculate the potential damages to Greenwich given Desrosier's admissions of fabricated RTR and fictitious transactions; the undertaking cannot be based on fictional damages. Therefore, the court finds the present undertaking of \$500,000 is sufficient.

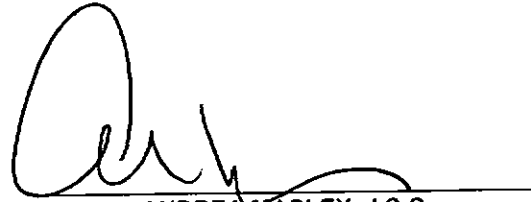
Accordingly, it is

ORDERED that motion 012 is granted and the parties shall proceed with discovery expeditiously; and it is further

ORDERED that BFG's motion for a preliminary injunction is granted in part and Greenwich Business Capital, LLC is enjoined from further prosecution of the proceeding against BFG and Banana Funding Group, Inc. in the Kent County Superior Court in Kent County, Rhode Island, captioned *Greenwich Business Capital, LLC v Danielle Desrosiers, et. al.*; KC-2023-1056. Greenwich is also enjoined from proceeding against

BFG's related persons and entities and named in the Related NY Action: Eyal Levyly, BFG NY, ABC Company, Lee Levy Havakuk, Lir Glas, Arthur Grand, and Dedicated Financial GBC to the extent they are the intended defendants in the RI Action but named as ABC Company Defendants 1-100 or John Doe Defendants 1-100; and it is further

ORDERED that motion 013 is granted in part.



ANDREA MASLEY, J.S.C.

3/24/2024
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
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<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
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<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: