

**Avanza Group, LLC v BFG 102, LLC**

2025 NY Slip Op 33242(U)

August 28, 2025

Supreme Court, New York County

Docket Number: Index No. 651927/2023

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M**

*Justice*

-----X	<b>INDEX NO.</b>	<u>651927/2023</u>
THE AVANZA GROUP, LLC		05/16/2025, 05/16/2025, 05/20/2025,
Plaintiff,	<b>MOTION DATE</b>	<u>05/20/2025</u>
- v -		
BFG 102, LLC et al	<b>MOTION SEQ. NO.</b>	<u>011 012 013</u> <u>014</u>
Defendant.		

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 011) 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 334, 432, 433, 434, 435, 436, 437, 438, 439, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486

were read on this motion to/for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 335, 407, 408, 409, 410, 411, 440, 441, 442, 443, 444, 445, 446, 447, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509

were read on this motion to/for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 323, 324, 325, 326, 327, 328, 329, 330, 331, 336, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 514

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 332, 333, 337, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 515

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

Upon the foregoing documents, motions 011 and 012 and their associated cross-motions are denied, and motions 013 and 014 are granted.

**Background**

These motions arise out of an acrimonious and voluminous litigation history. Relevant for these motions, Plaintiff The Avanza Group, LLC is a company that provides merchant cash

advances. They had received funding from Defendant BFG 102, LLC pursuant to a funding agreement between the parties. In 2023, a dispute arose between the parties as to whether Plaintiff was in breach of the agreement. Defendant's then-counsel, non-party Elizabeth Conway, Esq., sent letters to Plaintiff's automated clearing house and several of Plaintiff's clients, regarding a diversion of funds purportedly in compliance with the terms of the funding agreement. Ms. Conway is employed by Golenbock Eiseman Assor Bell & Peskoe LLP ("GEABP", collectively with Ms. Conway and Michael S. Devorkin the "GEABP Parties"). Multiple lawsuits arose out of these events, including this underlying proceeding. Defendant has since filed for bankruptcy, had a change in leadership, and is currently represented by new counsel.

In April of 2025, Plaintiff filed non-party subpoenas that were so ordered by the Court. One sought discovery of documents from GEABP, and another sought to depose Conway. These Subpoenas had a May 5, 2025, date. The parties afterwards agreed to postpone all discovery, with non-party depositions to be conducted before December 31, 2025. Various communications were exchanged between the parties and Mr. Devorkin related to discovery in this and related proceedings, with the parties disputing the substance and characterization of said communications. Letters to the Court were filed in May, requesting a discovery conference and objecting to the Subpoenas. Several days later, Plaintiff sought to set a deposition date for Conway with three days' notice. Then on May 16, Plaintiff filed the two motions to hold the GEABP Parties in contempt (011, 012), and in response Defendant and the GEABP Parties filed the instant two motions to quash (seq. 013, 014).

### **Discussion**

In motion seq. 011, Plaintiff seeks to hold Conway in contempt for failure to appear at the May depositions and to compel her to comply with the So-Ordered Subpoenas. The GEABP Parties oppose and cross-move for sanctions and Anti-SLAPP costs. In motion seq. 012, Plaintiff seeks to hold Devorkin and GEABP in contempt for a failure to provide documents in response to the May 5 Subpoena. BFG opposes motion 012, and the GEABP Parties have cross-moved for Rule 130 sanctions on 012 as well as Anti-SLAPP fees on 011. For the reasons that follow, the motions for contempt and the cross-motions for sanctions and fees are denied. The motions to quash are granted.

*The Court Declines to Hold the GEABP Parties in Contempt*

Plaintiff is seeking to hold the GEABP Parties in contempt for failing to comply with the so-ordered subpoena. A failure to comply with a subpoena by simply refusing to appear and failing to file for a protective order can be grounds for holding a non-party in contempt. *See, e.g., McNulty v. McNulty*, 81 A.D.2d 581, 581 – 82 [2nd Dept. 1981]. Here, the GEABP Parties did file for a protective order, but Plaintiff argues that the motions to quash are untimely. It appears that while the GEABP Parties did not move to quash until after the return date, the parties had communicated about the opposition to the subpoena prior to the return date. They discussed reaching out to chambers for a conference prior to filing a motion in accordance with part rules, and while this letter was sent after the return date it was discussed among the parties beforehand. Additionally, there was discussion between the parties about Defendant and the GEABP Parties being under the impression that the agreement to adjourn discovery deadlines applied to the so-ordered subpoenas. Under these facts, the Court declines to hold the GEABP Parties in contempt at this time.

*Plaintiff Has Not Shown that the Information Sought Is Not Available from Another Source*

When a party is seeking to depose an opposing party's counsel, there is a three-part test applied, where the moving party must show "that the information they seek in deposing defendants' counsel is material and necessary, that they have a good faith basis for seeking it, and that the information is not available from another source." *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401, 408 [1st Dept. 2018]. Among other reasons, Defendant and the GEABP Parties have argued that the subpoenas are not enforceable because Plaintiff has failed to establish that the information sought (relating to client directions to Conway and GEABP from Defendant regarding the letters sent out to Plaintiff's clients) is not available from another source. Plaintiff points to statements made by GEABP in another proceeding that certain former employees of Defendant have moved out of the country as evidence that it would be fruitless in this matter to attempt to get the information sought from another source. But that is not sufficient to establish that the information Plaintiff seeks cannot be obtained from another party, such as from Defendant's current employees (some of whom may have knowledge from the relevant time period) or that the former employees are unavailable and cannot provide testimony or documents.

If Plaintiff wishes to learn what communications passed between Conway (acting on behalf of Defendant) and Plaintiff's clients, they have also not shown that that information is not available from the clients named in the subpoena. There are no claims asserted against Conway in this action, therefore any information that Plaintiff seeks to obtain from her would relate to her representation of Defendant and directions given her from Defendant. As Defendant's counsel at the time in question, the factors from *Liberty Petroleum* must be satisfied before Conway can be deposed or the documents relating to Conway's representation of Defendant can be produced.

Because Plaintiff has not, at this time, established that the information sought cannot be obtained from other sources, the motions to quash the two subpoenas should be granted.

*The Court Declines to Issue Sanctions in This Matter*

The GEABP Parties have cross-moved for sanctions under both Rule 130 and Anti-SLAPP. They argue that the subpoenas were brought in an attempt to retaliate for actions taken in a related case and to harass the GEABP Parties. Sanctions can be granted by a court under 22 NYCRR § 130-1.1 when it is “completely without merit in law” or “undertaken primarily to [...] harass.” The Court does not find that the subpoenas or the motions for contempt fall under the Rule 130 definition of frivolous conduct. The information Plaintiff seeks is not primarily to harass but instead relates to claims and arguments that they have consistently pursued across the related proceedings. Nor are the motions for contempt without merit in law, in part because the GEABP Parties did not attempt to move to quash until after the return date. The Court will not be granting Rule 130 sanctions.

The GEABP Parties also have moved for attorneys’ fees under the Anti-SLAPP law, based on the argument that the subpoenas are “merely a continuation of Avanza’s retaliatory campaign” from a related action. This argument fails for several reasons. To begin, the GEABP Parties have not established that the motions for contempt fall under the ambit of the Anti-SLAPP law. Furthermore, even if they did, as addressed above in the Rule 130 analysis, Plaintiff would have a good faith basis for their claims. Therefore, the Court will not be granting attorneys’ fees under Anti-SLAPP in this matter. Accordingly, it is hereby

ADJUDGED that motions 011 and 012 and their associated cross-motions are denied; and it is further

ADJUDGED that motions 013 and 014 to quash the subpoenas issued to Elizabeth Conway, Esq., and Golenbock Eiseman Assor Bell & Peskoe LLP, are granted.

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8/28/2025  
DATE

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LYLE E. FRANK, 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