SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** 47

Justice

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ABL ADVISOR, LLC,LOUIS FORSTER, LANTERN ENDOWMENT PARTNERS, L.P.

Plaintiffs,

- v -

PATRIOT CREDIT COMPANY, LLC,BLUEFIN CAPITAL PARTNERS, LLC,

Defendants.

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INDEX NO. 651985/2015

MOTION DATE N/A, N/A

MOTION SEQ. NO. 020 021

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 020) 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527

were read on this motion to/for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 021) 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546

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

In this action, for breach of a participation agreement in a secured loan, ABL Advisor, LLC, Louis Forster and Lantern Endowment Partners, L.P. (Plaintiffs) move by order to show cause pursuant to Judiciary Law § 753 (A) (3) for an order holding (1) Patriot Credit Company LLC and Bluefin Capital Partners LLC (Defendants), along with non-parties Ian Peck (Peck, principal of Defendants), Terrence Doran (Doran, employee of Defendants) and Peter Levine, Esq. (Levine, former counsel of Defendants) in civil contempt of court for failing to respond or respond fully to post-judgment and enforcement subpoenas; and (2) Defendants, and non-parties Peck and Levine for failing to comply with the court's January 13, 2021 order [January 2021 Order; NYSCEF Doc. No. 458] (mot seq no 20; NYSCEF Doc. No. 464). Defendants cross

move pursuant to CPLR § 2221 (e) for an order granting them leave to reargue[1] their prior motion to vacate the default judgment and upon vacatur for summary judgment pursuant to CPLR § 3212; and pursuant to CPLR §§ 2304 and 3104 (a) for an order quashing or modifying information subpoenas served on defendants and non-parties Ian Peck and Terence Doran (NYSCEF Doc. No. 494). Non-party Peter M. Levine cross moves pursuant to CPLR §§ 5224(a)(3)(iii) and 5240 for an order quashing or modifying subpoenas served on him; pursuant to 22 NYCRR § 130-1.1(c) for sanctions; and for an award of costs and disbursements.

Defendants also move separately pursuant to §§ CPLR 2304 and CPLR 3104 (a)[2] for an order quashing or limiting Plaintiffs' subpoenas issued to non-parties Bank of America and Wells Fargo Bank (mot seq no 21; NYSCEF Doc. No. 528).

BACKGROUND

In March 2020, Plaintiffs obtained a money judgment against Defendants (Judgment; NYSCEF Doc. No. 340; Plf. Brief at 1). Plaintiffs then began post-judgment collections efforts, including serving information subpoenas, subpoenas duces tecum, subpoenas ad testificandum, and bank garnishments" (*id.*; referencing Mills Aff., ¶ 3). Some of Plaintiffs' enforcement mechanisms were returned as undeliverable and for others they did not receive a response (*id.*). Defendants, Peck, Doran and Levine were each served with post-judgment subpoenas and each either failed to respond or failed to respond to Plaintiff's satisfaction (*id.*; referencing Mills Aff., ¶¶ 3, 14, 19). According to Plaintiffs, Matthew Press, (Press), current counsel for Defendants and Peck, has argued on several occasions that compliance with the subpoenas was not warranted and taken measures to otherwise delay compliance (*id.* at 1-2).

[1] Defendants' motion cites subsection (e) but subsection (d) is the correct section when moving to reargue. Consequently, defendants cross motion will be treated as moving to both reargue and renew.
[2] In both their cross motion and their separate motion, Defendants misidentify the CPLR section as 3013(a).

For example, on October 7, 2020, according to Plaintiffs, Press asserted that his clients would not comply with the subpoenas because of Defendants' pending motion to vacate (mot seq no 017). However, on November 2, 2020 Defendants' application for a stay of all discovery was denied (Plf. Brief at 2; referencing NYSCEF Doc. No. 432 [November 2, 2020 Order]). Also on October 7, 2020, Defendants filed a motion seeking to quash subpoenas (mot seq no 18), stay all post-judgment discovery and enforcement efforts. Defendants' request was denied in the November 2, 2020 order except that depositions of Defendants and Peck were stayed pending resolution of the motion (*id.*; referencing November 2, 2020 Order). On October 28, 2020, Defendants again filed a motion to quash by order to show cause (mot seq no 19), which included the same request for a stay of all post-judgment enforcement stated in the then-pending motion to quash (*id.*; referencing November 2, 2020 Order).

The November 2, 2020 Order allows Plaintiffs to continue to seek information via paper discovery, and take third party depositions but disallowed Plaintiffs from taking Defendants' depositions (NYSCEF Doc No 432). pending a decision on Defendants' motion to vacate and motions to quash (i.e., mot seq nos 17, 18 and 19). On November 12, 2020 according to Plaintiffs, "Press refused to comply with the subpoenas because they were out of date, ignoring that the reason they were out of date was because his clients had failed to comply" (*id.*; referencing Mills Aff., ¶ 4). After the January 2021 Order was issued deciding motion sequence numbers 16-19 (details to be discussed below), and directing Defendants, Peck, Levine and Doran to comply with the subpoenas, according to Plaintiffs, Press advised Plaintiffs that he would respond to the outstanding subpoenas, on behalf of Defendants and Peck, by January 29, 2021 (*id.*; referencing Mills Aff., ¶ 6). According to Plaintiffs when they followed up on February 8, 2021, "Press advised he would respond to the outstanding subpoenas, on behalf of

Defendants and Peck" by February 12, 2021 (*id.* at 3; referencing Mills Aff., ¶ 7). However, Plaintiffs claim that as of February 23, 2021, Plaintiffs received "no further contact" from Press regarding his clients' compliance, "Doran has made no effort to contact" Plaintiffs despite due demand, and "Levine responded meaningfully to just 6 out of 17 items [in his subpoena]" (*id.*; referencing Mills Aff., ¶¶ 8, 14 and 19).

DISCUSION

Plaintiffs' Motion and Defendants' Opposition/Cross Motion

Plaintiffs argue that Defendants and their principal (Peck) should be held in contempt for failing to comply with the post-judgment subpoenas and for failing to comply with the January 2021 Order (Plf. Brief at 3). The January 2021 Order, in relevant part: (1) granted Plaintiffs' motion (mot seq no 16) and directed Levine to respond to the information subpoena within 30 days of entry the order; (2) denied Defendants' motion (mot seq no 17) to vacate the summary judgment order and related relief; (3) denied Defendants' motion (mot seq no 18) which sought to quash the subpoenas issued to them and to stay post-judgment enforcement efforts; and (4) denied Defendants' motion (mot seq no 19) which sought to quash the subpoenas and restraining notices issued to them, Peck, Doran and other non-parties, but granted Plaintiffs' cross motion to the extent of ordering that the subpoenas attached to that motion be responded to within 30 days of entry of the order (January 2021 Order at 2-3).

Plaintiffs assert that they have made sufficient accommodations for Defendants, Peck and Doran to allow them to comply with the subpoenas, but that they continue to "show a willful and egregious disregard for the law and this Court's orders," and thus all should be held in contempt (Plf. Brief at 3-8). Plaintiffs also assert that non-party Levine should be held in contempt for failing "to fully and meaningfully comply with the information subpoena as ordered by the

Court," and that Levine "has had more than enough time, since May 2020, to comply with his legally mandated obligations" (*id.* at 9-10).

Defendants contend, "as an initial matter," that the court should grant them leave to renew their prior motion (sequence number 17), which sought to vacate the default judgment against them because the court's denial of that motion was "solely on grounds that Defendants presented no reasonable excuse for their default" (Press aff. ¶ 11). Specifically, Defendants contend that their prior counsel, Jones Law Firm P.C. (Jones), served them "at a defunct former address" with the motion to withdraw and the court granted the withdrawal motion without staying the then-pending motion by Plaintiffs for summary judgment, and determined that "this defect is attributable to Mr. Peck himself, who was obligated to provide his prior attorneys with current addresses of the entities they were retained to represent" (*id.*, ¶¶ 11-12; quoting relevant portion of January 2021 Order). Defendants also contend that their engagement letter with Jones listed their current address, and Jones "intentionally chose to serve [them] at a wrong address," but they "did not include a copy of the Jones engagement letter as an exhibit in connection with their initial motion [seeking to vacate judgment] because they believed it was unnecessary to do so" (*id.*, ¶ 13). Defendants further contend that Peck, in his affidavit, "denied receiving any other form of notice from Jones" about the withdrawal motion, which "created a factual dispute concerning whether Jones actually sent a purported email to Mr. Peck," and that the court's January 2021 Order "placed an impossible burden upon Peck to establish how and why Jones failed to send the email" (*id.*, ¶¶ 14-15). Hence, Defendants request that this court grant them "leave to reargue its decision in the [January 2021] Order that Defendants failed to establish a reasonable excuse for their default on the summary judgment motion" (*id.*, ¶ 16).

Plaintiffs argue in reply/opposition to the Cross Motion (Plf. Reply; NYSCEF Doc. No. 527), that Defendants' Cross Motion to reargue their prior motion to vacate the summary judgment (and the resulting Judgment) must be denied on three grounds: (1) it is not timely; (2) it is not based on facts that this court overlooked or misapprehended; and (3) it is not based on matters of fact not offered on their prior motion to vacate the Judgment (Plf. Reply at 8-13).

Defendants' Cross Motion to Reargue/Renew

Addressing Defendants Cross Motion first, pursuant to CPLR § 2221 (d) (3) a motion to reargue must be made within thirty days after service of the order determining the prior motion. Since the January 2021 Order was served on Defendants on January 14, 2021, Defendants' motion to reargue had to be filed by no later than February 12, 2021. Because defendants' Cross Motion was filed on April 5, 2021, it is untimely. Moreover, with respect to whether facts were overlooked or misapprehended by the court, the Jones engagement letter was signed by Peck (on behalf of Defendants) in August 2019, which was in Defendants possession before their filing of the prior motion to vacate in September 2020 but was not presented to the court. Consequently, these facts could not have been overlooked or misapprehended by the court and cannot serve as a basis for a motion to reargue. Indeed, as noted above, Defendants concede that they did not include the Jones engagement letter as an exhibit to their prior motion to vacate "because they believed it unnecessary to do so" (Cross Motion, ¶ 13). Defendants' subjective belief does not constitute "facts" that were overlooked or misapprehended by the court.

Moreover, Peck's affidavit in support of Defendants' prior motion to vacate was considered and on their Cross Motion, Defendants do not offer a new affidavit from Peck with any additional facts, but instead resubmit the same affidavit except this time it is unsigned (NYSCEF Doc No 486). Further Jones's affidavit of service shows that Jones "mailed the

relevant documents to Defendants and e-mailed them to [Peck] at ipeck@artcapitalgroup.com," and Peck has not denied that the address to which Jones e-mailed the documents is his actual e-mail address (*id.*).

Finally, the January 2021 Order observes that Defendants' motion to vacate (mot seq no 17) was essentially an attempt to reargue Jones's motion to withdraw as counsel as permitted in the December 20, 2019 order. Even then it was too late for Defendants to reargue the December 20, 2019 Order, and "Peck's conclusory assertion that he did not receive the notice of withdrawal . . . is insufficient [for the reasons stated therein]" (*id.* at 2). Therefore, to the extent that Defendants' cross motion is to reargue, it will be denied.

Even if Defendants' cross motion is treated as a motion to renew pursuant to CPLR § 2221 [e], it must still be denied because Defendants failed to show facts unknown to them when they made the prior motion and if known, failed to demonstrate a reasonable excuse for not presenting those facts or evidence earlier (*Sullivan v Harnisch*, 100 AD3d 513, 514 [1st Dept 2012]). To the extent that defendants rely on the Jones engagement letter, as noted above it was in their possession when they made the prior motion, and their belief that they did not believe it was necessary to include it with the prior motion is an insufficient excuse for not including it with that motion.

Accordingly, Defendants' Cross Motion seeking leave to reargue/renew their prior motion to vacate the judgment will be denied.

Plaintiffs' Contempt Motion

Plaintiffs seek to hold Defendants and others in civil contempt for failure to comply with subpoenas issued by Plaintiffs and for failure to comply with the January 2021 Order.

CPLR § 5251 provides that "[r]efusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title . . . shall be punishable as a contempt of court." To establish civil contempt under Judiciary Law § 753, Plaintiffs must show by clear and convincing evidence that: (1) a lawful order clearly expressing an unequivocal mandate was in effect; (2) the order has been disobeyed; (3) the party to be held in contempt must have had knowledge of the order; and (4) prejudice to the right of a party to the litigation. *El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 29 (2015).

Defendants contend that the court "lacks jurisdiction even to consider Plaintiffs' motion for contempt because Plaintiffs did not provide the statutory notice required by Judiciary law § 756" (Cross Motion, ¶¶ 17-21). The relevant law provides that a motion seeking the imposition of civil contempt must contain on its face a notice that the punishment sought contain this legend in bold: "WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT" (Judiciary Law § 756). Defendants contend that because Plaintiffs' proposed and amended orders to show cause did not include the required warning language, they "failed to comply with the strict statutory requirements of Judiciary Law § 756 [and thus] lack jurisdiction to bring this motion" (Cross Motion, ¶ 21).

In reply, Plaintiffs aver that they are in compliance with Judiciary Law § 756 because the required language was stated in the order to show cause, "both as initially filed and as amended" (Plf. Reply at 6; referencing NYSCEF Doc Nos. 464 and 478). A review of the docket maintained for this case and the documents filed therein demonstrates that Plaintiffs' order to show cause complies with Judiciary Law § 756. Therefore, Defendants' jurisdictional contention has no merit.

Defendants next contend that "Plaintiffs cannot demonstrate with clear and convincing evidence that Defendants, or non-parties Peck or Doran, failed to comply with a lawful, clear and unequivocal order" (Cross Motion, ¶¶ 22-25), and that "the Court did not adjudicate Defendants' objections" to the various subpoenas, which are "defective and unenforceable" (*id.*, ¶¶ 26-44). Specifically, Defendants contend that the court's order is "ambiguous as written," because it only stated that "the subpoenas attached to the motion papers must be responded to" (*id.*, ¶ 22), and the subpoenas are also "overbroad and unduly burdensome," because they "seek documents belonging not only to the recipients of the subpoenas, but also documents belonging to a broad range of affiliates and/or affiliated entities, none of which either is a judgment debtor or the recipient of a subpoena" (*id.*, ¶¶ 29-37). Defendants also raise various sundry issues, such as that the subpoenas served on non-parties that required attendance or production of papers did not include payment of fees, that the information subpoena did not include a self-addressed stamped envelope, and that the subpoenas were improperly served (*id.*). Defendants request, therefore, that the subpoenas be quashed or limited pursuant to CPLR 2304 and 3103 (*id.*, ¶¶ 45-47).

In reply, Plaintiffs assert that Defendants made "many of the same arguments" when they sought to quash the subpoenas three times in the past (in connection with motion sequence numbers 17, 18 and 19), and the Court rejected these arguments, including in the January 2021 Order (Plf. Reply at 13). Plaintiffs also argue that the court's order is "not ambiguous" because it clearly stated that the subject subpoenas "must be responded to within 30 days of entry of the order" (*id.*). Plaintiffs also assert that the sundry issues Defendants raised are "minor" or "meritless" because "this Court considered and rejected them" (*id.* at 14). For instance, Plaintiffs argue that "mislabeling" a subpoena ad testificandum as a subpoena duces tecum is "irrelevant" because the documents made clear that "Defendants and Peck are compelled to appear and attend

on a date and location certain to testify and give evidence" (*id.* at 15); a failure to include witness fee is not fatal to the subpoena at the time of service, "so long as the witnesses are ultimately paid the fee," and Plaintiffs are willing to pay when the non-parties comply with the subpoenas. Plaintiffs argue that the allegation of improper service must be rejected because Defendants and the non-parties "failed to raise any objections to service until more than five months after service, even though responses were due more than four months ago as a result of the [November 2, 2020 Order], and [were] due again more than six weeks ago by the [January 2021 Order]" (Plf. Reply at 20-21).

Next, replying to the objections that the subpoenas are overbroad, unduly burdensome and seek discovery of non-parties, Plaintiffs contend that these "objections are without merit" and that Defendants failed to provide a "sufficient legal basis to justify quashing the post-judgment discovery Plaintiffs served" (Plf. Reply at 17 – 19). Plaintiffs also assert that the subpoenas are not overbroad because they seek information from October 1, 2014 to the present, which is within the relevant time period of the underlying transaction in this litigation. Plaintiffs also contend that while Defendants request that the subpoenas be limited as an alternative to quashing them, Defendants do not explain how the subpoenas should be limited and therefore, the subpoenas should not be limited (Plf. Reply at 20).

Defendants' argument that the subpoenas should be quashed is unavailing. "CPLR 5223 compels disclosure of all matter relevant to the satisfaction of the judgment, and sets forth a generous standard which permits the creditor a broad range of inquiry through either the judgment debtor or any third person with knowledge of the debtor's property" (*Gryphon Domestic VI, LLC v GBR Info. Services*, 29 AD3d 392 [1st Dept 2006] [internal quotation marks omitted]). Further "[a] judgment creditor is entitled to discovery from either the judgment debtor

or a third party in order to determine whether the judgment debtor concealed any assets or transferred any assets so as to defraud the judgment creditor or improperly prevented the collection of the underlying judgment" (*George v Victoria Albi, Inc.*, 148 AD3d 1120, 1121 [2nd Dept 2017] [internal quotation marks omitted]). "[A]n application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry" (*id.* [internal quotation marks and citations omitted]). "It is the burden of the party seeking to quash a subpoena to conclusively establish that it lacks information to assist the judgment creditor in obtaining satisfaction of the judgment" (*id.*).

Defendants request that the subpoenas be quashed or limited pursuant to CPLR 2304 which states in relevant part that "[a] motion to quash, fix conditions or modify a subpoena shall be made promptly . . ." Defendants arguments to quash are different from the arguments they made in their prior motions to quash (*see* mot seq nos 18 and 19). Because these arguments were not made in their prior motions to quash they are now untimely and deemed waived; Defendants "ought not [ ] be permitted a second bite at the apple" (*Nash v Port Authority of NY & NJ*, 131 AD3d 164, 166 - 167 [1st Dept 2015] [observing courts "generally do not reward litigants for failing to assert arguments in a timely fashion – with few exceptions, claims not promptly advanced are deemed waived or forfeited . . .])"

Based on the foregoing and the record, Plaintiffs have established by clear and convincing evidence that: (1) the January 2021 order was a lawful order clearly expressing an unequivocal mandate that was in effect; (2) Defendants, Peck and Doran disobeyed the order and the subpoenas; (3) Defendants, Peck and Doran had knowledge of the January 2021 order and

the subpoenas served upon them; and (4) prejudice to Plaintiffs in that they are unable to obtain the information they need to collect on their judgment.

Accordingly, Defendants, Peck and Doran are in civil contempt for failing to comply with post-judgment subpoenas and January 2021 court order because their actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of Plaintiffs (*Clinton Corner HDFC v Lavergne*, 279 AD2d 339, 341 [1st Dept 2001] [holding that such findings must be made for civil contempt]).

In light of this civil contempt determination, the court is required to impose a penalty that is remedial in nature and effect and that is the least possible exercise of the court's power to achieve the proposed end, compliance with its orders (*McCain v Dinkins*, 84 NY2d 216, 229 [1994]). An appropriate penalty under the circumstances is for Defendants, Peck and Doran to pay Plaintiff's costs, expenses and attorneys' fees incurred in connection with bringing their contempt order to show cause and in responding to Defendants' Cross Motion (*Clinton Corner HDFC*, 279 AD2d at 341).

Levine's Cross Motion to Quash, Impose Sanctions and Opposition to Plaintiffs' Contempt Motion

Levine, Defendants' former counsel, seeks in his cross motion an order (1) imposing sanctions on Plaintiffs' counsel and (2) quashing or modifying the information subpoenas served by Plaintiffs' counsel on him (Levine Cross Motion; NYSCEF Doc. No. 494). In his affirmation in support of his Cross Motion, Levine also opposes Plaintiffs' motion seeking to hold him in contempt of court (Levine Affirmation; NYSCEF Doc. No. 495). As a preliminary matter, Levine argues that Plaintiffs' motion should be denied because (i) an application to hold a non-party, such as himself in contempt, must be brought in a separate proceeding under CPLR Article

4; (ii) he has fully complied with the January 2021 Order; and (iii) he has properly responded to the information subpoena (Levine Affirmation, ¶ 2). He further argues that he did not violate section 753 (a) of the Judiciary Law because "there is no evidence, let alone clear and convincing evidence, [that he] acted in contempt of anything," and that in compliance with the January 2021 Order, he timely responded to the information subpoena "with information and objections" (*id.*, ¶¶ 47-52).

In reply to Levine's Cross Motion (Plaintiffs Reply; NYSCEF Doc. No. 527), Plaintiffs contend that a special proceeding is not required in seeking sanctions against Levine because (1) CPLR 5251 provides, in part, that a refusal or willful neglect of "any person" to obey a subpoena or an order granted shall be punishable by a contempt of court; (2) CPLR 5224 (a) (iv) provides that a failure to comply with an information subpoena shall be governed by CPLR 2308, "except that such motion shall be made in the court that issued the underlying judgment;" (3) CPLR 2308 provides that if a person fails to comply with a subpoena which is not returnable to the court, the subpoena's issuer may move the court to compel compliance, and "if the court finds that the subpoena was authorized, it shall order compliance;" (4) the court is authorized under CPLR 5251 and Judiciary Law § 756 "to punish Levine for failing to comply with the information subpoena;" and (5) the court "specifically directed service in the signed Order to Show Cause," dated March 1, 2021, with respect to the manner of service of the instant motion (Plaintiffs Reply at 21-24; referencing Notice of Entry of the Order to Show Cause [NYSCEF Doc. No. 518], and noting that under CPLR 403 (d), "the court may grant an order to show cause to be served, in lieu of a notice of petition at a time and in a manner specified").

In *Kozel v Kozel*, the Court held that "since [the nonparty] was properly served with the contempt motion and had knowledge of the terms of the subject order of which she was in

violation, the court was empowered to find her in contempt without plaintiff commencing a special proceeding" (161 AD3d 699, 700 [1st Dept 2018], *leave to appeal dismissed*, 32 NY3d 1221 [2019]). In *Kozel* the order to show cause seeking to hold the non-party in contempt directed that she be personally served with the contempt motion (id.) In support of its determination the Court in *Kozel* cites *Citibank, N.A. v Anthony Lincoln-Mercury, Inc.*, wherein the Court held that "[t]he [trial] court had the power to punish [the nonparty who was the defendant corporations' president] for contempt, regardless of whether he was a party to the underlying action or not, as long as he had been personally served and had knowledge of the terms of the restraining order" (86 AD2d 828, 829 [1st Dept 1982]).

Here, because Levine was not personally served with Plaintiffs' contempt motion, the court lacks personal jurisdiction over him. Accordingly, that branch of Plaintiffs' order to show cause seeking to hold non-party Levine in civil contempt will be denied.

As to Levine's Cross Motion to quash or modify the information subpoena, Levine argues that the information subpoena should be restricted because (a) it seeks information about payments he received years ago, and that such information is "irrelevant to the enforcement of the judgment;" (b) Plaintiffs' counsel "had no reasons to believe" that he had "information about the judgment debtors' assets" other than what they "already knew or could have obtained from the public record" (*id.*, ¶¶ 3 & 58). Levine further argues that sanctions should be imposed on Plaintiffs' counsel because they seek to have him held in contempt "based on patently false accusations," as they are trying to "perpetrate a fraud on the Court by claiming not [to] have documents and information that are actually in their possession" because Plaintiffs persisted with their contempt motion after being informed that he properly responded to the information subpoena and because the contempt motion was brought to harass him (*id.*, ¶¶ 4 & 64 - 66).

Plaintiffs respond that the information subpoena is proper in scope and seeks relevant information (NYSCEF Doc. No. 527; Plf. Brief at 24).

The information subpoena asks about monies received by Levine from Defendants or anyone else on behalf of Defendants, the Employment Identification Numbers for defendants, any assets and real or personal property belonging to Defendants, individuals or entities that may owe money to Defendants, and any accounts held by Defendants. These questions are not "utterly irrelevant" to Plaintiffs' endeavor to collect on their judgment (*Ledonne v Orsid Rlty. Corp.*, 83 AD3d 598, 599 [1st Dept 2011]). Accordingly, Levine has not met his burden of showing that the information subpoena served on him by Plaintiffs should be quashed or modified and his request asking for same and for sanctions will be denied.

Defendants' Motion to Quash or Limit Subpoenas

Defendants move pursuant to CPLR 2304 and 3101 (a) for an order quashing or limiting Plaintiffs' subpoenas served upon non-parties Bank of America (BOA) and Wells Fargo Bank (Wells Fargo) (collectively the bank subpoenas) (MS # 21,NYSCEF Doc. No. 528 & Press Affirmation, ¶ 1, NYSCEF Doc. No. 529). Defendants assert that the Amended Subpoena Duces Tecum served upon Wells Fargo and the Subpoena Duces Tecum served upon BOA were not served in compliance with CPLR 2303 and 2304 because Plaintiffs have not filed an affidavit of service for the subpoenas; that they lacked the required notice pursuant to CPLR 3101 (a) (4); and that the subpoenas improperly seek documents and information not only of the judgment debtors, but also of "any affiliates of the judgment debtors or their affiliated entities" (*id.*, ¶¶ 2-3).

In opposition Plaintiffs note that as an initial matter, this is Defendants' third motion to quash since September 2020 (prior motion sequence numbers 18 and 19 were filed in October

2020) (Plf. Opp. at 1, NYSCEF Doc. No. 532). Plaintiffs aver that Defendants are "improperly directing" two non-party banks (BOA and Wells Fargo) not to comply with Plaintiffs' issued subpoenas, in violation of this court's January 2021 Order which directed that "post-judgment discovery may continue," and that Defendants' are attempting to further delay this action by engaging in duplicative motion practice. (*id.* at 1-3). On the merits, Plaintiffs contend that CPLR 2303 (which states in part that a "subpoena requiring attendance or a subpoena duces tecum shall be served in the same manner as summons") has no application to the bank subpoenas because these are post-judgment subpoenas, while CPLR 2303 (a) applies to prejudgment subpoenas (*id.* at 4) Plaintiffs also contend that to the extent service of the bank subpoenas was defective, "such defect has now been cured" (Plf. Opp. at 5-6). Concerning Defendants' CPLR 3101 (a) (4) failure to provide adequate notice argument, Plaintiffs argue that none of the cases relied on by Defendants concern judgment collection. Finally, Plaintiffs argue that the subpoenas are not rendered overly broad because they seek information concerning Defendants' affiliates.

Defendants procedural arguments concerning the bank subpoenas confuse prejudgment and post judgment procedural requirements. For example, CPLR 2303 relied upon by Defendants applies to service of prejudgment subpoenas not to service of post-judgment subpoenas like the ones at issue here which are governed by CPLR 5224 (*Standard Chartered Bank v Gosaibi*, 2014 NY Misc LEXIS 87, *8 [NY Co SC 2014]). In any event, Defendants have not shown any prejudice arising from the procedural defects they raise and any purported defects were cured (Plf. Opp. At 5-6 and Spannhake Affirmation in support of Plaintiffs' Opposition, NYSCEF Doc. No. 533, ¶ 12).

Defendants again confuse prejudgment and post judgment procedural requirements by citing to CPLR 3101 (a) (4) which states, in part, that "[t]here shall be full disclosure of all

matter material and necessary in the *prosecution or defense* of an action . . . upon notice stating the circumstances and reasons such disclosure is sought or required" (emphasis provided). The bank subpoenas at issue here are governed by CPLR 5223 which provides in pertinent part that "*[a]t any time before a judgment is satisfied or vacated*, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena which shall specify all the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount due thereon . . ." (emphasis provided). Here, the subpoenas served on the banks were not in support of the prosecution of this action but rather they were served seeking matters relevant to the satisfaction of the judgment. Since the bank subpoenas specify the parties to this action, the date and amount of the judgment, the remaining amount due on the judgment and court in which the judgment was entered, the banks received all the notice Plaintiffs were required to provide pursuant to CPLR 5223 (Wells Fargo subpoena, NYSCEF Doc. No. 530; BOA subpoena NYSCEF Doc. No. 531).

Finally, Plaintiffs' bank subpoenas are not rendered overly broad because they seek information concerning Defendants' affiliates.

"CPLR 5223 compels disclosure of all matter relevant to the satisfaction of the judgment, and sets forth a generous standard which permits the creditor a broad range of inquiry through either the judgment debtor or any third person with knowledge of the debtor's property" (*Gryphon Domestic VI, LLC v GBR Info. Services*, 29 AD3d 392 [1st Dept 2006] [internal quotation marks omitted]). Further "[a] judgment creditor is entitled to discovery from either the judgment debtor or a third party in order to determine whether the judgment debtor concealed any assets or transferred any assets so as to defraud the judgment creditor or improperly prevented the collection of the underlying judgment" (*George v Victoria Albi, Inc.*, 148 AD3d

1120, 1121 [2nd Dept 2017] [internal quotation marks omitted]). "[A]n application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry" (*id.* [internal quotation marks and citations omitted]). "It is the burden of the party seeking to quash a subpoena to conclusively establish that it lacks information to assist the judgment creditor in obtaining satisfaction of the judgment" (*id.*).

Defendants have failed to conclusively establish that it is inevitable or obvious that inquiry into Defendants' affiliates will fail to uncover any legitimate information or that this inquiry is utterly irrelevant to whether Defendants transferred assets so as to prevent Plaintiffs' from collecting on their judgment (*George v Victoria Albi, Inc.*, 148 AD3d at 1121). The First Department's decision in *Carlyle, LLC v Beekman Garage, LLC*, heavily relied upon by Defendants, does not change this conclusion (157 AD3d 509 [1st Dept 2018]). In *Carlyle* the First Department's held *inter alia* that "plaintiff improperly sought information related to the assets and operations of the non-judgment-debtors it subpoenaed" (*id.*, quoting *Carlyle*, 157 AD3d at 510). Here, Plaintiffs are not seeking information related to the assets of nonparty/nonjudgment-debtors but rather affiliates, if any, of Defendants. This information will assist Plaintiffs in determining "whether the [Defendants] concealed any assets or transferred any assets so as to defraud [Plaintiffs] the judgment creditor or improperly prevented the collection of the underlying judgment" (*George*, 148 AD3d at 1121).

Accordingly, Defendants' motion to quash, limit or modify the subpoenas served on Wells Fargo and BOA will be denied.

Conclusion

For all of the foregoing reasons, it is hereby

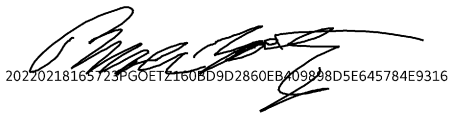
ORDERED that, the motion of ABL Advisor, LLC, Louis Forster and Lantern Endowment Partners, L.P. (Plaintiffs) seeking to hold Patriot Credit Company LLC and Bluefin Capital Partners LLC (Defendants), along with non-parties Ian Peck (Peck), Terrence Doran (Doran) and Peter Levine (Levine) in contempt of court for failure to respond to post-judgment and enforcement subpoenas and this court's order dated January 13, 2021 (motion sequence number 20), the motion is granted in favor of Plaintiffs as against Defendants, Peck and Doran only to the extent of awarding attorneys' fees and costs incurred by Plaintiffs in prosecuting this motion and in responding to Defendants' cross motion and denied as against Levine; and it is further

ORDERED that within twenty days of entry of this order, Plaintiffs shall submit the amount of attorneys' fees and costs incurred by Plaintiffs in prosecuting their contempt motion and in responding to Defendants' cross motion; within fifteen days thereafter Defendants, Peck and Doran are to submit any objections to the fees and costs sought by Plaintiffs; submissions shall be via NYSCEF and email to vzolotar@nycourts.gov; and it is further

ORDERED that Defendants' cross motion to Plaintiffs' motion sequence number 20, which seeks leave of court to reargue their prior motion to vacate default judgment and summary judgment and for a protective order quashing or otherwise limiting the subpoenas issued by Plaintiffs to Defendants (as well as to Peck and Doran), is denied; and it is further

ORDERED that Levine's cross motion to Plaintiff's motion sequence number 20, which seeks to restrict the use of the information subpoena served by Plaintiffs upon him and requests that sanctions be imposed against Plaintiffs' counsel is denied; and it is further

ORDERED that, Defendants' motion (motion sequence number 21) to quash or limit post-judgment and enforcement subpoenas issued by Plaintiffs to non-parties Bank of America and Wells Fargo is denied.



2/18/2022
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE