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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

WORTHY LENDING, LLC,

Plaintiff-Appellant,

—against—

NEW STYLE CONTRACTORS, INC.,

Defendant-Respondent.

CASE NO. 2020-04842

BRIEF FOR DEFENDANT-RESPONDENT

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PRELIMINARY STATEMENT

Defendant-Respondent New Style Contractors, Inc. ("NSC") respectfully submits this Brief in Opposition to the Appeal of Plaintiff-Appellant Worthy Lending, LLC ("Worthy") from the Decision and Order of the Hon. Arlene Bluth dated November 17, 2020 and entered November 18, 2020 (the "Order"), which granted NSC's motion dismissing the Complaint in this action.

The issue on this appeal is straightforward: what rights does Worthy have against its borrower's account debtors having only a security interest in, but not an assignment of, its borrower's accounts receivable? Justice Bluth's Order expressly followed the settled law in this Department, as set forth in this Court's decision in IIG Capital LLC v. Archipelago, L.L.C., 36 A.D.3d 401, 829 N.Y.S.2d 10 (1st Dep't 2007), in holding that a secured party with a security interest is not the same as an assignee for purposes of asserting rights against its borrower's account debtors. Because there is no reason to depart from this Court's own precedent, the Order should be affirmed.

Worthy brought this action against NSC as an account debtor of Checkmate Communications LLC ("Checkmate"), asserting rights as a purported assignee of Checkmate's accounts receivable. However, Worthy admits that it did not actually purchase any accounts of Checkmate, and that its rights derive exclusively from a written agreement which does not contain an express assignment and can only be

construed as a security agreement.

On appeal, Worthy challenges the Order based upon non-binding decisions from other states and the non-binding guidance of the Permanent Editorial Board for the Uniform Commercial Code, none of which alter the precedent of this Court. Worthy also claims that a host of supposed "dangers" would be faced by secured creditors if security interests are not treated like assignments under section 9-406 of the Uniform Commercial Code. However, these "dangers" are illusory because it is within every secured creditor's power to demand and contract for an actual assignment if it wishes to avail itself of section 9-406.

As demonstrated below, Justice Bluth's Order is amply supported by New York law and should be affirmed.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1) Did the Court below correctly grant NSC's motion to dismiss the complaint where Worthy was merely a secured creditor and not an assignee?

Answer: The Supreme Court correctly held that the agreement between Worthy and Checkmate granted a security interest, not an assignment, and that therefore, Worthy did not have the rights of an assignee as against NSC. The Court further correctly held that Worthy could not recover against NSC as a secured party under UCC § 9-607, inasmuch as that section does not impose on third-

parties an independent duty to a secured party.

2) Whether Worthy may invoke the provisions of UCC § 9-406 to hold NSC liable for payments NSC made to Worthy's debtor, Checkmate, rather than to Worthy?

Answer: The Supreme Court correctly held that, absent an actual assignment, Worthy's notice to NSC did not comply with UCC § 9-406, and therefore, NSC could not be held liable under that section.

COUNTER-STATEMENT OF FACTS

NSC is a general contractor engaged in general contracting and construction management for public construction projects in the New York metropolitan area. NSC retained Checkmate as a subcontractor on two public construction projects in New York City.

Worthy alleges having sent NSC a notice purporting to be assignee of Checkmate's accounts receivable, and directing remittances to be made to Worthy [R. - 15]. Checkmate continued to submit invoices to NSC purportedly for payment of trust claims of materialmen under the New York Lien Law (see Point II below), only to seek bankruptcy protection thereafter in the United States Bankruptcy Court for the District of New Jersey (case no. 20-21872-JKS), without paying those claims.

On or about July 27, 2020, Worthy commenced this action against NSC,

asserting the right to collect Checkmate's receivables as assignee. Although nominally commenced under the secured creditor provisions of § 9-607 of the Uniform Commercial Code ("UCC"), the complaint in substance pleaded a right to recovery as assignee of accounts under UCC § 9-406, to collect monies already paid to Checkmate [R - 17]. In putative support of this claim, Worthy attached to its complaint an exhibit entitled "Promissory Note and Security Agreement" dated October 11, 2019 between Plaintiff and Checkmate Communications LLC and Checkmate Communications & Electric, LLC (the "Security Agreement") [R - 20]. However, while the Security Agreement makes references to Checkmate's accounts as collateral security, upon scrutiny the document does not effectuate any assignment of accounts.

On October 19, 2020, NSC moved to dismiss the Complaint [R. – 61], arguing that Worthy's Security Agreement is not a factoring agreement, but a revolving security agreement. NSC further noted that while the agreement authorizes Worthy to send "notices of assignment" to account debtors, nowhere within the four corners of the agreement is there any actual underlying assignment to be found.

In opposition, Worthy did not assert that it was or is an assignee, but argued that its rights as a secured creditor under UCC § 9-607 are coextensive with those of an assignee.

In reply, NSC cited New York authority holding that the rights of a secured creditor are not coextensive with those of an assignee for purposes of UCC § 9-406, to argue that Worthy could not assert double-liability against NSC for payments already made to Checkmate, Worthy's borrower.

The Decision Below

The Court below found that the agreement between Worthy and Checkmate provided Worthy with a security interest, not an assignment [R. - 8]. The Court further noted that the provision under which Worthy brought the action, UCC § 9-607, which governs the rights of secured parties to bring actions, expressly provides that it "does not determine whether an account debtor, bank or other person obligated on collateral owes a duty to a secured party" [R. - 9].

Absent an assignment, the Court held that Worthy's notice to NSC did not comply with UCC § 9-406, and that Worthy could not be said to be exercising the rights of Checkmate with respect to the obligations of the account debtor, NSC [R. – 9]. The Court recognized that that "would be tantamount to creating a duty owed by the account debtor to the secured creditor that was separate and distinct from the duty it owed to the debtor" [R.- 9].

Accordingly, the Court held that Worthy's remedy, if any, is against its debtor Checkmate and that it could not seek recovery against NSC under UCC § 9-607 or § 9-406 [R. -10]. In dismissing the Complaint, the Court reasoned and

summarized as follows:

> To be clear, the Court finds that plaintiff cannot maintain a case where it alleges that defendant should have started paying it despite the fact that it has an ongoing dispute with Checkmate. The question, then, is what happens if plaintiff is not successful against Checkmate. Should defendant be required to pay both plaintiff and Checkmate? The purpose of the UCC is not to facilitate double recovery. As defendant points out, plaintiff can recover from Checkmate, especially if defendant did in fact pay Checkmate.

[R. - 10.]

For the reasons below, the action was properly dismissed, given the absence of an underlying assignment.

ARGUMENT

I

THE LOWER COURT CORRECTLY DISMISSED THE COMPLAINT, AS WORTHY IS NOT AN ACTUAL ASSIGNEE OF CHECKMATE'S ACCOUNTS

There is a critical distinction between a secured creditor's rights under UCC § 9-607 and the rights of an assignee who has actually purchased a debtor's receivables under UCC § 9-406. In the both cases, the secured creditor may demand that its borrower's account debtor pay it directly. However, it is only in the latter instance where, upon proper notice, the borrower's account debtor may be liable to the assignee if it pays the borrower instead.

Thus, section 9–607 of the Uniform Commercial Code allows a secured creditor, *inter alia*, to "enforce the obligations of an account debtor or other person

obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment." NY UCC § 9-607(a).[1] However, as the Court below noted, subsection (e) of this section contains the proviso that "[t]his section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party." NY UCC § 9-607(e). (Emphasis supplied.) In fact, § 9-607 does not impose any direct duty upon an account debtor to a secured party in contrast with an actual assignee. § 9-607(e); J D Factors, LLC v. Reddy Ice Holdings Inc., No. CV 14-06709 DDP FFMX, 2015 WL 630209, at *2 (C.D. Cal. Feb. 12, 2015).

In stark contrast with UCC § 9-607, a creditor invoking UCC § 9-406 must

[1] That subsection, under "Collection and Enforcement by Secured Party," provides, in pertinent part:

(a) Collection and enforcement generally. If so agreed, and in any event after default, a secured party:

(1) may notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party;
(2) may take any proceeds to which the secured party is entitled under Section 9-315;
(3) may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;
(4) if it holds a security interest in a deposit account perfected by control under Section 9-104 (a)(1), may apply the balance of the deposit account to the obligation secured by the deposit account; and
(5) if it holds a security interest in a deposit account perfected by control under Section 9-104 (a)(2) or (3), may instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

necessarily be an assignee, in order to establish direct liability to that creditor. IIG Capital LLC v. Archipelago, L.L.C., 36 A.D.3d at 402, 829 N.Y.S.2d at 11. See also Factor King, LLC v. Hous. Auth. for City of Meriden, No. CV176010391S, 2018 WL 6016838, at *3 (Conn. Super. Ct. Oct. 29, 2018), aff'd sub nom. Factor King, LLC v. Hous. Auth. of City of Meriden, 197 Conn. App. 459, 231 A.3d 1186 (2020), cert. denied, 335 Conn. 927, 234 A.3d 979 (2020); Durham Commercial Capital Corp. v. Select Portfolio Servicing, Inc., No. 3:14-CV-877-J-34PDB, 2016 WL 6071633, at *16 (M.D. Fla. Oct. 17, 2016); Platinum Funding Services, LLC v. Petco Insulation Co., Inc., No. 3:09CV1133 MRK, 2011 WL 1743417, at *9 (D. Conn. May 2, 2011). The effectiveness of a "notice of assignment" cannot exist independent of an actual assignment of an account. Factor King, at *3; Platinum Funding Services, at *9.

In IIG Capital LLC v. Archipelago, L.L.C., this Court confirmed this very distinction. There, a factor actually had a true assignment of accounts receivable as well as a security interest, but its rights as an assignee had not yet ripened. Just as Worthy argues in the instant case, the factor in IIG contended that its status as a secured party was the equivalent of an assignee for purposes of UCC § 9–406. This Court rejected and distinguished much of the same legal precedent relied upon by Worthy herein, stating that: "[w]hile these cases treat assignees and holders of security interests similarly for purposes of holding them subject to defenses

available to the original account debtors, they provide no authority to treat plaintiff's security interest as an assignment for collection purposes under UCC § 9–406." Id.

Decisions from other jurisdictions are in line with the reasoning of IIG. For example, in CapitalPlus Equity, LLC v. Glenn Rieder, Inc., No. 17-CV-639-JPS, 2018 WL 276352 (E.D. Wis. Jan. 3, 2018), the creditor, CapitalPlus, initially asserted rights as a purported assignee of receivables. Faced with a lack of evidence that any sale of accounts was effectuated under its agreement with its direct debtor, CapitalPlus claimed that its security interest gave it rights under UCC § 9–406. The court rejected this argument, ruling that the notice of assignment "would have no force or effect unless the accounts has actually been assigned to it," an issue it deemed "critical." Id. at *4.

In words which apply with equal force and effect to the instant case, the CapitalPlus court stated:

> CapitalPlus does not concede the existence of a triable issue of fact. Instead, it changes its tune: rather than claim the rights of an assignee of the accounts, it now relies on the fact that the agreement gave it a security interest in the accounts, which it says is enforceable to the same degree as an assignment. … What CapitalPlus does not provide, however, is citation to a single legal authority substantiating its claim that its rights as a secured party are coextensive with its rights had it been an assignee. In fact, CapitalPlus first tries to cover up this fatal flaw in its reasoning, blithely citing the same UCC cases it did in its opening brief without acknowledging that they pertain only to assignees of accounts. ... Notably, UCC section 9–406 only forces the account debtor to pay an "assignee," not a holder of a security interest, upon

proper notification. Wis. Stat. § 409.406(1).

Id. at *5 (docket citations omitted).

In Factor King, LLC v. Hous. Auth. for City of Meriden, No. CV176010391S, 2018 WL 6016838, at *2 (Conn. Super. Ct. Oct. 29, 2018), aff'd sub nom. Factor King, LLC v. Hous. Auth. of City of Meriden, 197 Conn. App. 459, 231 A.3d 1186 (2020), cert. denied, 335 Conn. 927, 234 A.3d 979 (2020), a factor sought recovery of monies from an account debtor by serving a purported notice of assignment. Although the factor's agreement with the debtor gave the factor a first priority security interest in accounts, it did not constitute a purchase of receivables, but only granted an option to purchase which had not been exercised. Id. at *1. The court, citing IIG Capital, and CapitalPlus Equity, held that: "[t]he plaintiff's security interest in AEG's accounts did not entitle it to payment as an assignee for purposes of UCC § 9-406." Id. at *4.

On appeal, Worthy makes the same arguments rejected by this Court in IIG, as well as by the courts in CapitalPlus and Factor King. E.g., In re Apex Oil Co., 975 F.2d 1365 (8th Cir. 1992). These cases from other jurisdictions are, of course, of no controlling effect in the First Department, whereas IIG is. The same is true of Worthy's reliance upon UCC PEB Commentary No. 21 (March 11, 2020). PEB commentaries have not been enacted by the legislature and do not have the force of law. Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc., 494 Mich. 543, 560, 837

N.W.2d 244, 254 (2013). While recognized as a useful aid to resolve ambiguities, they are not necessarily representative of legislative intent and cannot be used to contradict the plain language of the statute. Id.; Burk v. Emmick, 637 F.2d 1172, 1176 (8th Cir. 1980); Am. Ins. Co. v. Cuyahoga Cmty. Coll. Dist., 119 Ohio Misc. 2d 118, 122, 774 N.E.2d 802, 805 (2002).

The non-binding centerpiece of Worthy's appeal is First State Bank Nebraska v. MP Nexlevel, LLC, 307 Neb. 198, 948 N.W.2d 708 (2020). In First State Bank, the Nebraska court distinguished IIG by noting that the security interest in IIG was not presently exercisable and concluding that the statement that a secured party is not an assignee was "dicta." 307 Neb. at 214, 948 N.W.2d at 721. To the contrary, the denial of the creditor's alternative claim for relief in the IIG case as a secured creditor is not dicta, but a recognition that UCC § 9–406 actually means what it says in terms of requiring an assignment. IIG, 36 A.D.3d at 404, 829 N.Y.S.2d at 13.

Many of Worthy's cited cases are further distinguishable in that they deal with monies which were not yet paid by an account debtor to the lender's borrower (i.e., not paid to anyone at all). See e.g., Community Bank v. Newmark & Lewis, Inc., 534 F. Supp. 456, 458 (E.D.N.Y. 1982) (account debtor denied having to pay for goods it received, alleging seller orally agreed to supply "free" audio equipment); ImagePoint, Inc. v. JPMorgan Chase Bank, Nat. Ass'n, 27 F. Supp. 3d

494, 498 (S.D.N.Y. 2014) (bank and its borrower jointly sued account debtor for unpaid services rendered to account debtor by bank's borrower); Agri-Best Holdings, LLC v. Atlanta Cattle Exch., Inc., 812 F. Supp. 2d 898, 899 (N.D. Ill. 2011) (same).[2] In these cases, the secured creditor was seeking to enforce its rights prospectively, not retroactively.

Worthy oversimplifies its dispute with Checkmate merely as a unilateral "default" by Checkmate. However, as the Court below recognized, Worthy is seeking to hold NSC retroactively liable for payments made to Checkmate before any declaration of default, therefore bringing the situation within the analysis set forth in ImagePoint, Inc. v. JPMorgan Chase Bank, Nat. Ass'n [R. – 9, 10].[3]

In ImagePoint, the account debtor had not yet paid the secured party's debtor. This was a critical distinction. In fact, the ImagePoint court indicated that a different result is warranted in situations where an account debtor had already

[2] Other cases cited by Worthy are simply inapposite to the issues at hand. E.g. In re Apex Oil Co., 975 F.2d at 1369 (whether the parties' agreement created a security interest or a complete assignment had no bearing on the account debtor's setoff rights); and Garber v. TouchStar Software Corp, No. 2009CV1189, 2011 WL 12526062, at *6 (Colo. Dist. Ct. Nov. 10, 2011) (same with respect to parties' right to invoke jury waiver clause).

[3] Worthy's contention in its brief (p. 27) that "Checkmate has not disputed that Worthy is entitled to payment from New Style (nor could it)," is incorrect; Checkmate did in fact dispute Worthy's right to collect the receivables. Given the broader threshold grounds on which NSC's motion was brought, this contention by Worthy is not otherwise addressed herein, other than not to permit it to go uncontested. Worthy's companion claim, however, that Checkmate has not disputed that "Worthy has a valid assignment of the New Style Accounts (nor could it)", is belied on its face, as noted above, by the uncontroverted lack of an assignment in this case. [R. - 8.]

paid its direct obligee (i.e., the creditor's debtor). The court cited Buckeye Ret. Co., LLC v. Meijer, Inc., No. 279625, 2008 WL 4278038 (Mich. Ct. App. Sept. 18, 2008), as an example of the latter scenario, in which an account debtor continued to pay the debtor because it was not established which party had a right to collect those payments, observing that:

> In situations like Buckeye, where there is a dispute between the secured creditor and the debtor as to who has the right to collect from an account debtor, the secured creditor cannot be said to be 'exercis[ing] the rights of the debtor with respect to the obligation of the account debtor.' See N.Y. U.C.C. § 9–607(a)(3). In other words, to hold that an account debtor is obligated to pay the secured creditor and not the debtor would be tantamount to creating a duty owed by the account debtor to the secured creditor that was separate and distinct from the duty it owed to the debtor. Such a result is barred by the plain language of § 9–607(e), which states that the secured party's right to collect from an account debtor 'does not determine whether an account debtor ... owes a duty to a secured party.'

Id. (emphasis supplied).

The court in ImagePoint noted that the secured party in the case before it was "simply asking the court to enforce the duty that the account creditor already owes to the debtor," not asking "to recognize a duty owed by the account debtor to a secured party … independent from the account debtor's duty to the debtor." Id. In the instant case, Worthy, by contrast, is asking the Court to hold NSC directly liable to Worthy as secured creditor "separate and distinct from" NSC's duty to Checkmate, rendering ImagePoint inapposite [R. – 9].

If Worthy's collateral was diminished by Checkmate's receipt of payment,

arguendo, that is an issue between Worthy and Checkmate. See McCullough v. Goodrich & Pennington Mortg. Fund, Inc., 373 S.C. 43, 53-55, 644 S.E.2d 43, 49-50 (2007) (no independent right of action exists under UCC § 9-607 against a third party for negligent impairment of collateral). Worthy's recourse is against its debtor, Checkmate, not NSC.

Worthy's contention that the Order sets a "dangerous precedent" for commercial activity rings hollow. If it wishes to avail itself of rights as an assignee, Worthy's solution is exceedingly simple: bargain for and actually procure an assignment from its borrowers, rather than bluff as to its rights against account debtors. As the Court noted in Durham Commercial Capital Corp. v. Select Portfolio Servicing, Inc.:

> Although section 9-406(a) of the UCC states that, after receiving notice of an assignment, an 'account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor,' that provision necessarily requires an actual assignment. The effectiveness of a general notice of assignment simply cannot exist independent of an actual assignment of a particular account. Official Comment No. 4 to section 9-406 effectively states as much, albeit in the context of addressing the effectiveness of a notice of assignment when an account debtor has requested proof of the assignment. See N.Y. U.C.C. § 9-406, Official Cmt. 4. Although the Comment concludes that a notice of assignment is effective 'even if the proof [of assignment] is not seasonably forthcoming,' it also observes: 'Of course, if the assignee did not in fact receive an assignment, the account debtor cannot discharge its obligation by paying a putative assignee who is a stranger.' Id. That statement suggests what common sense also dictates—that a notice of assignment obligates an account debtor to pay the purported assignee only to the extent there is an actual, valid assignment from the

> assignor. Cf. Platinum Funding Servs., LLC v. Petco Insulation Co., No. 3:09cv1133 (MRK), 2011 WL 1743417, at *9 (D. Conn. May 2, 2011) ('The language of UCC § 9-406 ... presumes that an 'assignor' has already assigned its right to receive payment from an account debtor to an assignee.... Because the right to receive payments on ... particular invoices was never assigned to Platinum Funding, UCC § 9-406 ... [is] of no help to Platinum Funding's cause' (emphasis in original)).

Durham Commercial Capital Corp., at *16.

Therefore, merely sending a false Notice of Assignment does not create a cause of action in favor of Worthy against NSC. Absent any underlying assignment by Checkmate to Worthy, NSC was not obligated to send any payments to Worthy for the account of Checkmate.

II

IN ANY EVENT, WORTHY IS NOT ENTITLED TO THE MONIES IT CLAIMS, AS THEY CONSTITUTED TRUST ASSETS UNDER THE NEW YORK LIEN LAW

Also raised below, although not a basis of the Court's decision, is the fact that payments made by NSC were intended to flow through Checkmate to second-tier subcontractors hired by Checkmate and therefore constitute trust assets under Article 3-A of the New York Lien Law. Indeed, it has been held that such payments are not payments on an account receivable at all, because they are intended specifically to pay suppliers and other trust fund beneficiaries under the Lien Law. See e.g., Richmond Crane Rigging & Drayage Co. v. Liberty Nat. Bank, 27 Cal. App. 3d 968, 104 Cal. Rptr. 277 (Ct. App. 1972) (funds representing

general contractor's checks which were for balances due to second-level subcontractor and were intended to be payment to third-level subcontractors, did not constitute accounts receivable of second-level subcontractor so as to permit attachment by the bank).

In this case, NSC forwarded the funds to Checkmate for the costs that Checkmate owed to its vendors and subcontractors, funds that by law would have to be paid to those workers before any receivables monies could be payable to Worthy.

Article 3-A of New York's Lien Law creates "trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction." NY Lien Law § 70; Aspro Mech. Contracting, Inc. v. Fleet Bank, N.A., 1 N.Y.3d 324, 328, 773 N.Y.S.2d 735, 737 (2004); Caristo Const. Corp. v. Diners Fin. Corp., 21 N.Y.2d 507, 512, 289 N.Y.S.2d 175, 178 (1968). The primary purpose of article 3–A is "to ensure that "those who have directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor" receive payment for the work actually performed." Id. The trust begins "when any asset thereof comes into existence" (whether or not there is actually a trust beneficiary at the time), and

continues until every trust claim "has been paid or discharged, or until all such assets have been applied for the purposes of the trust. NY Lien Law § 70(3).

Section 72 of the Lien Law provides, in pertinent part, as follows:

> Any transaction by which any trust asset is paid, transferred or applied for any purpose other than a purpose of the trust ... before payment or discharge of all trust claims ... is a diversion of trust assets, whether or not there are trust claims in existence at the time of the transaction, and if the diversion occurs by the voluntary act of the trustee or by his consent such act or consent is a breach of trust….

NY Lien Law § 72.

Therefore, use of any such funds for any purpose other than payment of claims of subcontractors, suppliers, architects, engineers, laborers, and other expenses of construction before payment for discharge of all such trust claims, is an unlawful diversion of trust assets. Aspro Mech. Contracting, 1 N.Y.3d at 329, 773 N.Y.S.2d at 737; Caristo Const. Corp., 21 N.Y.2d at 514, 289 N.Y.S.2d at 180.[4]

As such, any funds received from the projects first had to be applied to satisfy lien law claims before any funds could be paid to Worthy. NY Lien Law § 71(2); New York Nat. Bank v. Primalto Dev. & Const. Co., 270 A.D.2d 22, 23,

[4] While a lender may file a Notice of Lending (Lien Law § 73) or Notice of Assignment (Lien Law § 16) as at least a partial defense against trust diversion claims, there is no evidence that Worthy filed such a notice in this case. Therefore, it would have no basis to assert priority in the funds. Aspro Mech. Contracting, 1 N.Y.3d at 331, 773 N.Y.S.2d at 739 Amer. Blower Corp. v. James Talcott, Inc., 10 N.Y.2d 282, 286, 219 N.Y.S.2d 263, 264-65 (1961); Eljam Mason Supply Inc. v. I. F. Assocs. Corp., 84 A.D.2d 720, 721, 444 N.Y.S.2d 96, 97 (1st Dep't 1981).

703 N.Y.S.2d 480, 480 (1st Dep't 2000) (assignment held unenforceable as an improper diversion of Lien Law article 3–A trust funds, as plaintiff's rights as assignee can be no greater than those of its assignor, the general contractor, whose right to contract funds, if any, was subject to outstanding Lien Law trust obligations).

Indeed, Worthy's theory of the case would present NSC with an untenable situation: (a) expose itself to double-liability from Checkmate's subcontractors providing labor, materials and equipment, by diverting the funds necessary to pay them in order to pay Worthy in violation of statute (and jeopardizing the projects themselves); or (b) face double-liability from Worthy for paying those materialmen the amounts statutorily due them to avoid liability for illegal diversion of trust assets. Thankfully, the law does not impose such an unreasonable predicament on NSC. Inasmuch as the claims of materialmen have statutory priority over Checkmate, so too have they priority over Worthy. Indeed, had NSC so diverted those assets, Worthy itself would have been liable for those trust claims and could not retain those monies as proceeds of Checkmate receivables. Caristo Const. Corp., 21 N.Y.2d at 513, 289 N.Y.S.2d at 179 (lender liable to subcontractors for diverting trust assets pursuant to receivables financing); LeChase Data/Telecom Servs., LLC v. Goebert, 6 N.Y.3d 281, 289, 811 N.Y.S.2d 317, 322 (2006) (same).

Either way, Worthy received the net benefit from NSC's satisfaction of those subcontractor claims. In any event, the dispositive threshold issue on this motion is that Plaintiff's entire action against NSC is predicated on rights that its own documents annexed to its Complaint reveal that it does not have.

Accordingly, the complaint, predicated on purported rights as assignee, was properly dismissed.

CONCLUSION

For all of the foregoing reasons, the lower court Decision and Order dated November 17, 2020, and entered November 18, 2020, should be affirmed in all respects.

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Respectfully submitted,

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