

New York County Clerk's Index No. 653406/20  
Appellate Division – First Department Case No. 2020-04842

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# Court of Appeals

STATE OF NEW YORK

—◆◆◆—  
WORTHY LENDING, LLC,

*Plaintiff-Appellant,*

—against—

NEW STYLE CONTRACTORS, INC.,

*Defendant-Respondent.*

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## OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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**Disclosure Statement**  
**Pursuant to N.Y. Court of**  
**Appeals Rules of Practice**  
**§§ 500.22(b)(5) and 500.1(f)**

Pursuant to N.Y. Court of Appeals Rules of Practice §§ 500.22(b)(5) and 500.1(f), counsel for Defendant-Respondent NEW STYLE CONTRACTORS, INC. (“NSC”), certifies that NSC has no corporate parents or subsidiaries, and that the following entity is an affiliate of NSC:

NSC Associates Corp.

Dated: New York, New York  
August 12, 2021

JAFFE & ASHER LLP

By:   
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## PRELIMINARY STATEMENT

Defendant-Respondent New Style Contractors, Inc. (“NSC”) respectfully submits this memorandum in opposition to the motion of Plaintiff-Appellant Worthy Lending, LLC (“Worthy”) for Leave to Appeal the order of the Appellate Division, First Department, dated July 6, 2021 (the “Appellate Division Decision”).

The motion should be denied because the unanimous decision of the Appellate Division, and the decision of the Hon. Arlene Bluth that it affirmed, represent an uncontroversial application of the relevant case law in a simple two-party dispute, which neither conflicts with any prior decisions of this Court nor with any decisions among the departments of the Appellate Division.

The Appellate Division and the Supreme Court both properly held that where, as here, a secured creditor has a dispute with its borrower over the right to collect the borrower’s accounts receivable, the secured creditor cannot impose liability on a third-party account debtor with whom it has no contractual or other relationship to pay amounts that the account debtor has already paid to the borrower.

Both courts’ decisions are based on the express language of § 9-607 of the Uniform Commercial Code (“UCC”), which plainly states that this section confers

no direct, independent recourse between a secured party and a third-party account debtor. The courts also cite the case of Buckeye Ret. Co., LLC v. Meijer, Inc., No. 279625, 2008 WL 4278038 (Mich. Ct. App. Sept. 18, 2008), also cited approvingly by the United States District Court for the Southern District of New York in ImagePoint, Inc. v. JPMorgan Chase Bank, Nat. Ass'n, 27 F. Supp. 3d 494 (S.D.N.Y. 2014), for the proposition that in such cases the secured creditor does not have an independent cause of action against the account debtor. See Appellate Division Decision, p. 2.

Worthy seeks to circumvent this dispositive ruling by arguing that its rights as a secured creditor are coextensive with those of an assignee under § 9-406 of the UCC. However, that argument is contrary to well-established Appellate Division, First Department precedent, in the case of IIG Capital LLC v. Archipelago, L.L.C., 36 A.D.3d 401, 829 N.Y.S.2d 10 (1st Dep't 2007), in which the Appellate Division ruled that a secured creditor is not the equivalent of an assignee for purposes of the account debtor provisions of UCC § 9-406.

Hence, even had there been a need to reach that issue, the Appellate Division's own precedent would have mandated a ruling against Worthy on that issue as well.

Accordingly, leave to appeal should be denied.



## ARGUMENT

Worthy's action sought to collect monies that NSC already paid to Worthy's borrower Checkmate Communications LLC ("Checkmate") by asserting the rights of an assignee of Checkmate's accounts receivable under § 9-406 of the Uniform Commercial Code ("UCC"), even though it is undisputed that Worthy does not have an actual assignment of accounts. Lacking direct standing of its own against Checkmate's account debtor NSC based on its security interest, Worthy purports to invoke §9-406 by way of the secured creditor provisions of § 9-607 of the UCC.

However, as the Appellate Division and Trial Court correctly recognized, UCC § 9-607 confers no direct, independent recourse between a secured party and a third-party account debtor. (See Appellate Division Decision, p. 2.) Section 9-607(e) expressly provides 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.)

As the Appellate Division noted in its Decision:

The motion court properly determined that plaintiff did not have an independent cause of action against defendant pursuant to UCC 9-607. Plaintiff and defendant have no contractual or other relationship or duty to one another. Plaintiff seeks to impose upon defendant a separate obligation to repay plaintiff the same amount it has already paid the nonparty debtor under their contract. Because there was a dispute between plaintiff, the secured creditor, and the nonparty debtor as to who had the right to collect from the defendant, section 9-

607(e) applied (citing *Buckeye Retirement Co., LLC Ltd. V Meijer, Inc.*).

Appellate Division Decision, p. 2.

Accordingly, the Appellate Division correctly held that § 9-607 did not provide Worthy with an independent cause of action against NSC.

Worthy contends that it should nevertheless be treated for purposes of § 9-406 as though it were an assignee, citing some non-binding guidance of the Permanent Editorial Board for the Uniform Commercial Code and isolated decisions in other states, while mischaracterizing the Appellate Division Decision as an “outlier.” See Worthy Memorandum of Law in Support of Motion, p. 9. To the contrary, the Appellate Division Decision is based on well-established law.

In an earlier case from the First Department, IIG Capital LLC v. Archipelago, L.L.C., the Appellate Division held that a secured creditor is not the equivalent of an assignee for purposes of the account debtor provisions of UCC § 9-406.<sup>1</sup> There has been no ruling to the contrary in this or any other Appellate Division in the state.

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<sup>1</sup> This is further in accord with decisions in many other jurisdictions, which hold that an actual assignment is required under UCC § 9-406 to establish direct liability to that creditor. See e.g. 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); CapitalPlus Equity, LLC v. Glenn Rieder, Inc., No. 17-CV-639-JPS, 2018 WL

In fact, many of Worthy's cited cases, not surprisingly, tend to involve unpaid receivables; i.e., accounts in which the account debtor still owes the money to the lender's borrower. See e.g., Community Bank v. Newmark & Lewis, Inc., 534 F. Supp. 456, 458 (E.D.N.Y. 1982) (account debtor had not paid lender's borrower, disputing the obligation to pay for goods it received); ImagePoint, Inc. v. JPMorgan Chase Bank, Nat. Ass'n, 27 F. Supp. 3d at 498 (bank and its borrower jointly sued account debtor for unpaid services rendered by bank's borrower); Agri-Best Holdings, LLC v. Atlanta Cattle Exch., Inc., 812 F. Supp. 2d 898, 899 (N.D. Ill. 2011) (same).

The court in ImagePoint noted that the account debtor in that case had not yet paid the secured party's debtor, and hence the secured party 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." 27 F. Supp. 3d at 506.

The court expressly differentiated the situation from one in which the receivable was paid as directed by the holder of the account, citing Buckeye Ret.

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276352, at \*4 (E.D. Wis. Jan. 3, 2018) 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). New York, therefore, is hardly an "outlier."

Co., LLC v. Meijer, Inc., likewise cited by the Appellate Division in the instant case. ImagePoint, 27 F. Supp. 3d at 506.

By contrast, commentaries of the Permanent Editorial Board for the Uniform Commercial Code, while recognized as a useful aid to resolve ambiguities, do not have the force of law and cannot be used to contradict the plain language of the statute. Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc., 494 Mich. 543, 560, 837 N.W.2d 244, 254 (2013); 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).

In this case, as the Appellate Division and trial court noted, NSC paid Checkmate, its direct obligee, at Checkmate's direction. Following Worthy's reasoning, NSC would unjustly be forced to pay the same receivable a second time, this time to Worthy as Checkmate's secured lender, on the flawed premise that NSC owes a separate obligation to Worthy, contrary to the well-settled authority above.

Worthy's alarmist contentions that the Appellate Division Decision creates "new law" for commercial activity ring hollow. As shown above, the Appellate Division Decision is amply supported by well-settled precedent. If Worthy wishes to have the rights of an assignee, its solution is exceedingly simple: bargain for and procure an actual assignment from its borrower, thereby genuinely succeeding to

its borrower's rights. Even without an assignment, a lender retains all rights and remedies against its own borrower; it simply does not have independent recourse against third parties who are strangers to the lending relationship. There is nothing novel or confusing about that.

In sum, this is a garden-variety two-party dispute, decided in accordance with established precedent, presenting no larger issues for this Court's consideration. Therefore, leave to appeal should be denied.

**CONCLUSION**

For all of the foregoing reasons, the Appellate Division Decision is a straightforward application of existing law, presenting no new or novel issues, and the motion for leave to appeal should be denied in its entirety.

Dated: New York, New York  
August 12, 2021

Respectfully submitted,

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