SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54
Justice

Index Number : 650841/2013
GEM HOLDCO, LLC
vs.
CHANGING WORLD TECHNOLOGIES,
SEQUENCE NUMBER : 010
PREL INJUNCTION/TEMP REST ORDER

INDEX NO.
MOTION DATE 2/13/15
MOTION SEQ. NO.

The following papers, numbered 1 to ____, were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | **No(s).** 267-276
Answering Affidavits — Exhibits | **No(s).** 283-311
Replying Affidavits | **No(s).**

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/18/15

SHIRLEY WERNER KORNREICH J.S.C. , J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SHIRLEY WERNER KORNREICH
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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GEM HOLDCO, LLC and GEM VENTURES, LTD.,

Index No: 650841/2013

Plaintiffs,

DECISION & ORDER

-against-

CHANGING WORLD TECHNOLOGIES, L.P, CWT CANADA II LIMITED PARTNERSHIP, RESOURCE RECOVERY CORPORATION, JEAN NOELTING, RIDGELINE ENERGY SERVICES, INC., DENNIS DANZIK, DOUGLAS JOHNSON, and KELLY SLEDZ,

Defendants.

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CWT CANADA II LIMITED PARTNERSHIP, RESOURCE RECOVERY CORPORATION, and JEAN NOELTING,

Third-Party Plaintiffs,

-against-

CHRISTOPHER BROWN, EDWARD TOBIN, RES MANAGEMENT, INC., ELIZABETH DANZIK, and DEJA II, LLC,

Third-Party Defendants.

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SHIRLEY WERNER KORNREICH, J.:

The court assumes familiarity with the allegations in and procedural history of this action, which are set forth in the court's numerous prior decisions. *See* Dkt. 120, 201, & 280.

The instant motion is brought by order to show cause by CWT Canada II Limited Partnership (CWT Canada), Resource Recovery Corporation, and Jean Noelting (collectively, the CWT Parties) against Ridgeline Energy Services, Inc. (Ridgeline), a Canadian company whose principal place of business is Arizona, and Dennis Danzik (collectively, the Ridgeline

Parties), Ridgeline's Chief Executive Officer, who resides in Wyoming and conducts business in Arizona. The CWT Parties ask for a preliminary injunction and an attachment restraining Ridgeline and Danzik from alienating $3,175,967, funds which allegedly correspond to tax credits owed under the Unit Purchase Agreement dated March 11, 2013 (the UPA). *See* Dkt. 271 at 29. The Ridgeline Parties oppose the motion. The court issued a temporary restraining order (TRO) on December 4, 2014. *See* Dkt. 276. After oral argument on January 29, 2015, the court reserved on the motion and continued the TRO. *See* Dkt. 356 (1/29/15 Tr. at 21). For the reasons that follow, the CWT Parties' motion is granted.

Plaintiffs have settled with the Ridgeline Parties. Thus, the original controversy, which centered upon plaintiffs' subscription payments, no longer drives this litigation. The parties currently are briefing motions that will determine which, if any, of the allegations between the CWT Parties and the Ridgeline Parties will proceed in this court and if the new counterclaims asserted against plaintiffs are viable. *See* Motion Seq. Nos. 12 & 13. The main issue is whether the UPA's forum selection clause, which requires all litigation arising under the UPA to be litigated in Canada, precludes the parties from continuing some or all of the action in this court. Jurisdictional defenses also are asserted. While the court will not decide these issue in this application, it must make an assessment of the likelihood of success on the merits in order to resolve the instant injunction motion. Though the parties should not take this decision as implying any indication of the merit (or lack thereof) of the arguments made in the briefing on Motions 12 and 13 filed to date, the record on this motion supports issuing an order of attachment in the amount of $3,175,967.

Pursuant to CPLR 6301, "[i]njunctive relief may only be awarded if the movant makes a clear showing of a probability of success on the merits, a danger of irreparable injury in the

absence of an injunction, and that the balancing of the equities weighs in its favor." *Goldstone v Grade Terrace Apt. Corp.*, 110 AD3d 101, 104-05 (1st Dept 2013), citing *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839 (2005), accord *Doe v Axelrod*, 73 NY2d 748 (1988). Though injunctive relief is not ordinarily awarded when the claim asserted is "compensable in money and capable of calculation" [*see Schottenstein v Windsor Tov, LLC*, 85 AD3d 546, 547 (1st Dept 2011), citing *Credit Index, L.L.C. v Riskwise Int'l L.L.C.*, 282 AD2d 246, 247 (1st Dept 2001)], "an exception to this rule exists where the monies at issue are identifiable proceeds that are supposed to be held for the party seeking injunctive relief." *AQ Asset Mgmt. LLC v Levine*, 111 AD3d 245, 259 (1st Dept 2013), citing *Amity Loans, Inc. v Sterling Nat't Bank & Trust Co. of N.Y.*, 177 AD2d 277, 279 (1st Dept 1991).

Likewise, pursuant to CPLR 6201, an order of attachment should not be issued without the movant demonstrating a likelihood of success on the merits. *See VisionChina Media Inc. v S'holder Representative Servs., LLC*, 109 AD3d 49, 59 (1st Dept 2013); *see Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 310-11 (2010):

> By means of attachment, a creditor effects the prejudgment seizure of a debtor's property, to be held by the sheriff, [, actually or constructively,] so as to apply the property to the creditor's judgment if the creditor should prevail in court. Attachment simply keeps the debtor away from his property or, at least, the free use thereof; it does not transfer the property to the creditor. It is frequently used when the creditor suspects that the debtor is secreting property or removing it from New York and/or when the creditor is unable to serve the debtor, despite diligent efforts, even though the debtor would be within the personal jurisdiction of a New York court.

(citations omitted).

CPLR 6201 specifically provides that an attachment may be granted where a plaintiff "would be entitled, in whole or in part ... to a money judgment against one or more defendants" who are nondomiciliaries or foreign corporations residing outside New York or if the defendant

disposes of property with intent to frustrate a judgment that might be rendered in plaintiff's favor. *See VisionChina*, 109 AD3d 60 ("[i]n addition to establishing that a defendant subject to the court's personal jurisdiction meets the statutory requirements for an attachment, the party seeking attachment must demonstrate an identifiable risk that the defendant will not be able to satisfy the judgment."). Whether to grant a motion for an order of attachment rests within the discretion of the court." *Id.* at 59.

It is unclear if Danzik is attempting to transfer assets to a new company to evade the Ridgeline Parties' creditors' claims or if he is forming a new corporate entity for the purpose of raising additional capital. However, Danzik is a nondomiciliary and Ridgeline is a foreign corporation. Moreover, there is no question of fact that the $3,175,967 in tax credits do not belong to the Ridgeline Parties. The money either belongs to the CWT Parties or the federal government.[1] *See* Dkt. 271 at 39 (UPA § 2.3, providing that 100% of the tax credits must be remitted to the CWT Parties at closing). No matter Ridgeline's liquidity needs, it is not entitled to use this money because, regardless of the outcome of this litigation, Ridgeline will not keep the money. Indeed, Ridgeline's admitted lack of liquidity demonstrates the need to restrain the tax credit funds to ensure that the Ridgeline Parties will be able to satisfy a judgment. This concern is valid, no matter the forum in which the UPA claims are adjudicated. Accordingly, it is

[1] Even if the Ridgeline Parties' fraudulent inducement claim is precluded by lack of reasonable reliance or the "as is" clause in the UPA (§ 3.6), there may well be issues about the legality of Changing World Technologies, L.P.'s (the Company) receipt of tax credits if, as Danzik sets forth in his affidavit, the prior owners of the Company (the CWT Parties) did indeed falsify testing records. These concerns may raise the issue of whether the Company should return the tax credit funds to the federal government (since the Company may be liable if the credits were wrongfully obtained) and, if that is the case, the CWT Parties may not be entitled to receive the tax credit funds from the Ridgeline Parties.

ORDERED that the motion by CWT Canada II Limited Partnership, Resource Recovery Corporation, and Jean Noelting for a preliminary injunction and an attachment is granted against Ridgeline Energy Services, Inc. (Ridgeline) and Dennis Danzik to the following extent: (1) within 5 days of the entry of this order on the NYSCEF system, Danzik must cause Ridgeline to place $3,175,967 into a segregated bank account (not to be used for any other purpose) where such funds are to remain until a further order of this court directs otherwise; (2) upon doing so, Danzik must e-file an affidavit of compliance that attaches a bank record demonstrating such compliance (the account number may be redacted in the e-filed document, but shall not be redacted in the copy provided to the CWT Parties); and (3) every month, Danzik's counsel must email Jeffrey M. Eilender, counsel for the CWT Parties, a pdf of a monthly statement for such bank account.

Dated: March 18, 2015

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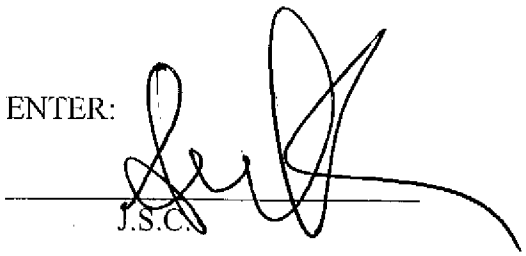

J.S.C.