

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>COASTWISE PACKET CO.,</b>	)	
	)	
<b>Judgment Creditor</b>	)	
	)	
v.	)	<b>No. 2:12-mc-172-JHR</b>
	)	
<b>BOOTHBAY HARBOR SHIPYARD,</b>	)	
<b>LLC,</b>	)	
	)	
<b>Judgment Debtor</b>	)	

**MEMORANDUM DECISION AND ORDER**

Following a disclosure hearing held before me on October 15, 2012, the parties submitted post-hearing briefs in this action by which the judgment creditor seeks to collect a default judgment it has obtained against the judgment debtor. The creditor seeks a turnover order awarding it \$30,000 from the debtor’s receivables and an order to “hold and answer” against North American Specialty Insurance Company, which is the defendant in a separate action brought by the debtor in this court for defense costs and indemnification concerning a related action in Massachusetts. Coastwise Packet Co.’s Post-Hearing Memorandum (“Creditor’s Memorandum”) (ECF No. 17) at 5-8. For the reasons that follow, I deny the creditor’s request for the turnover order but grant its request for the order to hold and answer.

**I. Background**

Only one witness testified at the disclosure hearing, Eric Graves, president of the debtor. He testified that the only other officer of the debtor is its sole owner, Terry McClinch. Graves is one of four full-time employees of the debtor; there are also two part-time employees who each

work one day per week. A temporary worker and a subcontractor were to finish their work during the week of October 15, 2012.

The debtor has a loan from the Bank of Maine in the amount of \$800,000; it pays rent to Commercial Street Realty, and the rent payment is used as payment on the bank loan, which is not currently in default. The profit and loss statement submitted by the debtor (Creditor's Exh. 9) shows year-to-date income of \$464,014. Graves asked McClinch to loan money to the debtor six times in 2012; McClinch refused to do so twice. The loans were used to meet payroll. Accounts receivable stand at \$70,129. Creditor's Exh. 8. Approximately \$40,000 to \$50,000 of that amount will probably be received by the end of 2012. One payment of \$30,000 was made in 2012, in September, to McClinch on his loans.

The debtor's bank account that had a balance of \$15,100 on September 30, 2012 (Creditor's Exh. 12), had a balance of approximately \$1,000 at the time of the hearing; this is the debtor's payroll account. Its only other bank account (Creditor's Exh. 13) had a balance at the time of the hearing of about \$2,000; this is the operating account. The debtor has no other liquid assets. The debtor has been losing money and not covering its costs since January 2012.

At the close of the hearing, I asked counsel to submit memoranda addressing two issues: whether an order to hold and answer is appropriate under the circumstances of this case and whether a sufficient showing had been made that the debtor could pay over its receivables and bank accounts to the creditor.

## **II. Receivables**

The creditor has modified its position at the close of the hearing, in which it sought an order giving it all of the debtor's liquid assets and all of its receivables. While continuing to assert that it is entitled to such an order, it now seeks to take only the first \$30,000 of the debtor's

current receivables. Creditor's Memorandum at 5. It bases its argument on the language of the applicable Maine statute, which provides, in relevant part:

**1. Turnover order.** When it is shown at a hearing under this chapter that the judgment debtor owns personal property or real property which is not wholly exempt from attachment or execution pursuant to sections 4421 to 4426, the court shall determine the value of the property or interest and the extent to which the property or interest is exempt. Upon request of the judgment creditor, the court shall order the judgment debtor to turn over to the judgment creditor in partial or full satisfaction of the judgment, interest and costs, such items of property which are not in whole or in part exempt and the value of which is determined to be less than or equal to the amount owed on the judgment, interest and costs.

14 M.R.S.A. § 3131. None of the exemptions in 14 M.R.S.A. §§ 4421-4426 appears to apply in this case.

The debtor contends that the accounts receivable "are necessary in their entirety for the continued functioning of the" debtor. Post Disclosure Hearing Brief of Boothbay Harbor Shipyard, LLC ("Debtor's Memorandum") (ECF No. 16) at 3. While the creditor asserts that the applicable statutes do not provide for an exception when the amount of the turnover ordered would put the corporate debtor out of business, the debtor contends that the statutes do not authorize a court to issue a turnover order in an amount "that exceeds the debtor's ability to pay." *Id.* at 4. The debtor does not cite any authority for its position on this issue.

As the creditor points out, Creditor's Memorandum at 5, the applicable Maine disclosure statutes do provide some guidance on this issue. Thus, the disclosure subpoena, which initiates a disclosure proceeding, is issued "for the purpose of determining the ability of the judgment debtor to satisfy the judgment" and must notify the debtor that he "is entitled to be heard on issues concerning his ability to pay the judgment." 14 M.R.S.A. § 3122(1). Also, the disclosure hearing is described as "a hearing to determine [the judgment debtor's] ability to pay the

judgment.” 14 M.R.S.A. § 3125(1). A judgment debtor is defined to include a corporation. 14 M.R.S.A. § 3121(4).

Given these statutory provisions, I conclude that ability to pay the judgment is a necessary consideration in a disclosure proceeding. The evidence presented at the hearing demonstrates convincingly that the debtor in this case is unable to pay the judgment from its current assets. Even were the court to require the debtor to pay over all of its cash and receivables, the judgment would not be satisfied and the debtor would be out of business, unable to generate any more income in order to complete payment of the judgment.

### **III. Recovery from Insurer**

The creditor’s second request, for an order directing the debtor’s insurer to pay over to the creditor any judgment it is ultimately ordered to pay the debtor in the separate action pending in this court, up to the amount of the judgment underlying this action, along with interest and costs, has an initial appeal. The debtor, however, argues that it cannot pay over that money because the terms of its bank loan give the bank a security interest in all of the debtor’s intangible property, which must include any obligation of the insurer to the debtor. It cites Article 9 of the Uniform Commercial Code as the source of a definition of “general intangibles” to include choses in action. Debtor’s Memorandum at 5.

The creditor points out that the statute under which it claims entitlement to any award of damages that will follow upon the partial summary judgment that has already been entered in the debtor’s action against its insurer—for costs of defense in an action in Massachusetts—uses a conditional verb.

Upon a disclosure hearing when it is shown that there is a reasonable likelihood that a 3rd party has possession or control of property in which the judgment debtor may have an interest or that the 3rd party may be indebted to the judgment debtor for other than earnings, the court, upon

request of the judgment creditor, may approve the service on the 3rd party of an order to hold and answer.

14 M.R.S.A. § 3127-A(1). The debtor contends that the insurer “does not as yet have possession or control of actual funds in which the judgment debtor may have an interest, or that it may be indebted to the judgment debtor for.” Debtor’s Memorandum at 6.

I disagree. The court has already entered partial summary judgment in that case in favor of the debtor as to costs of defense. Opinion and Order on Motion for Partial Summary Judgment, *Boothbay Harbor Shipyard, LLC v. North American Specialty Insurance Company*, No. 2:12-cv-5-NT (D. Me.) (ECF No. 40). Counsel for the debtor agreed at the disclosure hearing that those defense costs were between \$340,000 and \$360,000. The fact that the money is not yet in the debtor’s hands is not determinative, nor, contrary to the debtor’s suggestion, is the fact that the insurer still “officially claims” that the amount it owes the debtor “is zero.” Debtor’s Memorandum at 6. By any reasonable interpretation, the insurer now owes the judgment debtor the costs of its defense in the underlying action, even though this “debt” has not been calculated precisely and will not be paid, presumably, until the debtor’s claim for indemnity is resolved and any possible appeals have been resolved as well.

The debtor also argues that 14 M.R.S.A. § 3131, which provides for turnover orders, is not applicable here, *id.*, but the creditor does not appear to rely on that statute to support its request for an order with respect to the insurance proceeds. If the creditor does seek a turnover order for the insurance proceeds under this statute, I agree with the debtor that it does not yet “own” those proceeds, making section 3131 inapplicable.<sup>1</sup>

With respect to the debtor’s assertion that its bank loan has priority over the creditor’s judgment, the creditor argues that this court held in *Vital Basics, Inc. v. Vertrue, Inc.*, 515

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<sup>1</sup> See also *New England Mortgage Servs. Co. v. Petit*, 590 A.2d 1054, 1056 & n.5 (Me. 1991) (holding that section 3131 does not authorize lien on proceeds of tort action; explicitly declining to address section 3127-A).

F.Supp.2d 170 (D. Me. 2008), that a debtor's receivables were subject to a writ of execution on a judgment "so long as the party holding the security interest had not declared a default or taken other action to have the receivables paid directly to the secured party." Creditor's Memorandum at 7. Thus, the creditor reasons, because the bank has not declared a default on the debtor's loan or taken action to have the debtor's income paid directly to the bank, there is no bar to the creditor's recovery from the proceeds of the debtor's case against its insurer. *Id.*

The *Vertrue* case dealt specifically with receivables, 515 F.Supp.2d at 172, 174, but its analysis of Maine law is broad enough to deal with the situation presented in this case. In *Vertrue*, the court said:

The "Maine Code Comment" to section 9-311 of the Uniform Commercial Code (11 M.R.S.A. § 9-311) and the language of that section and 14 M.R.S.A. § 4251, to which the comment refers, convince me that Vital Basics' receivables may be subjected to a writ of execution on a judgment so long as VILP, which holds a secured interest in those receivables, has not declared Vital Basics to be in default or taken action to have those receivables paid directly to VILP.

*Id.* at 174.

In the case at hand, the money due the debtor as a result of its partial summary judgment against its insurer is essentially a receivable, even though the exact amount is not yet known. The debtor's insurer owes a "debt" to the debtor by virtue of the partial summary judgment. *See* 14 M.R.S.A. § 3127-A(1). The debtor has not successfully distinguished the quoted portion of the *Vertrue* opinion. Debtor's Memorandum at 7-8. *See generally* *Northeast Bank of Lewiston & Auburn v. Murphy*, 512 A.2d 344, 345-50 (Me. 1986) (upholding judgment creditor's lien on subsequent proceeds of personal injury lawsuit).

**III. Conclusion**

For the foregoing reasons, Coastwise Packet Company is entitled to an order under 14 M.R.S.A. § 3127-A directing North American Specialty Insurance Company to hold and answer concerning any damages or other monetary award that may be made against it in favor of Boothbay Harbor Shipyard, LLC, in the action pending in this court entitled *Boothbay Harbor Shipyard v. North American Specialty Insurance Company*, No. 2:12-cv-5-NT.

**NOTICE**

*In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.*

*Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.*

Dated this 31<sup>st</sup> day of October, 2012.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge

**Plaintiff**

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COMPANY**

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V.

**Defendant**

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