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| <b>GCAP Holdings v Gelbinovich</b>                                                                                                                                                                                             |
| 2021 NY Slip Op 32641(U)                                                                                                                                                                                                       |
| December 9, 2021                                                                                                                                                                                                               |
| Supreme Court, Kings County                                                                                                                                                                                                    |
| Docket Number: Index No. 504920/2021                                                                                                                                                                                           |
| Judge: Peter P. Sweeney                                                                                                                                                                                                        |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 73

Index No.: 504920/2021  
Motion Date: 10-04-21  
Mot. Seq. No.: 2

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GCAP HOLDINGS,

Plaintiff(s),

-against-

DECISION/ORDER

DANIEL GELBINOVICH and  
G.L. MANAGEMENT GROUP, INC.,

Defendant(s).

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Upon the following e-filed documents, listed by NYSCEF as item numbers 1-6, 8, 22-24, 28, 33-42, the motion is decided as follows:

This is an action for breach of a factoring contract, to recover monies on a dishonored check, and for an award of damages. Plaintiff GCAP HOLDINGS moves pre-answer for an order i) pursuant to CPLR §§ 3211[a][1] and [a][7], dismissing with prejudice the counterclaims set forth by defendant G.L. Management Group, Inc. (“GLM”) as against GCap; and (ii) granting GCap such other and further relief as this Court deems just and proper. Defendant opposes the motion.

The first counterclaim alleges violation of UCC § 9-509[a]. The second counterclaim alleges frivolous conduct under 22 NYCRR § 130-1.1[a]. Plaintiff argues: 1) that the first counterclaim under NY UCC Art 9 must be dismissed because GCAP had authorization to file the UCC-1 financing statement; 2) Under contract principles, the Revenue Based Factoring Agreement dated November 3, 2020 (herinafter “RBF Agreement”) and security agreement are enforceable; 3) GCAP’s conduct is not sanctionable under 22 NYCRR 130-1.1.

In opposition, defendant DANIEL GELBINOVICH argues that as the shareholder and officer of GLM (identified in the Agreement filed under NYSCEF Doc No. 2 as “Merchant”), he did not intend to provide plaintiff with a security interest in GLM’s assets in connection with the

RBF Agreement. He did not give plaintiff permission to file a UCC-1 Financing Statement with respect to any assets owned by GLM. He did not agree to pay interest, other costs or fees or provide a security interest. Nor did he provide a confession of judgment or a personal guarantee. The RBF Agreement was merely a method to divest GCap of its interests in other businesses in which defendant maintains an interest. The parties never agreed to terms beyond that simple goal.

THE RBF Agreement provides in part:

#### MERCHANT AGREEMENT TERMS AND CONDITIONS

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#### **IX. PROTECTIONS AGAINST DEFAULT**

The following Protections 1 through 7 may be invoked by GCap, immediately and without notice to Merchant in the event (a) Merchant changes its arrangements with Processor/Bank in any way that is adverse to GCap; (b) Merchant . . . permits any event to occur that could cause diversion of any of Merchant's transactions to another account . . . .

The following Protections 1 through 7 may be invoked by GCap, immediately and without notice to Merchant . . . . 1. **Protection 1.** The full uncollected Purchase Amount plus all fees due under this Agreement and the attached Security Agreement become due and payable in full immediately 2. **Protection 2.** GCap may enforce the provisions of the Personal Guarantee of Performance against the Guarantor. 3. **Protection 3.** Merchant shall, upon execution of this Agreement, deliver to GCap an executed Confession of Judgment in favor of GCap in the amount of the Purchase Amount stated in the Agreement. Upon breach of any provision in this paragraph Agreement, GCap may enter that Confession of Judgment as a judgment with the Clerk of the Court and execute thereon. 4. **Protection 4.** GCap may enforce its security interest in the Collateral identified in this Agreement hereof.

(See NYSCEF Doc No. 2, pgs. 6-7)

On the eighth page of the agreement it states:

#### Security Interest

To secure Merchant's payment and performance obligations to GCap under the Merchant Agreement (the "Factoring Agreement"), Merchant hereby grants to GCap Holdings LLC a security interest in (a) all

accounts, as those terms are defined in Article 9 of the Uniform Commercial Code (the "UCC"), now or hereafter owned or acquired by Merchant; and (b) all proceeds, as that term is defined in Article 9 of the UCC.

Remedies

Upon any Event of Default, GCap may pursue any remedy available at law (including those available under the provisions of the UCC), or in equity to collect, enforce, or satisfy any obligations then owing, whether by acceleration or otherwise.

(See NYSCEF Doc No. 2, pg 8).

Under CPLR 3211[a][1], dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v. Martinez*, 84 N.Y.2d at 88, 614 N.Y.S.2d 972, 638 N.E.2d 511). Here, the documentary proof submitted does not eliminate all triable issues of fact on the counterclaims. The initials “G.B.” were placed next to the section of the agreement titled “GCAP HOLDINGS LLC - PERSONAL GUARANTEE”. However, the space for Daniel Gelbinovich’s signature at the end of the section of the agreement titled “OWNER/GUARANTOR #1” was left blank. The page of the agreement discussing a security interest under Art 9 of the UCC was not crossed out. The page did not provide space for defendant’s initials or signature.

On a motion to dismiss pursuant to CPLR 3211[a][7], “the standard is whether the pleading states a cause of action” (*Sokol v. Leader*, 74 A.D.3d 1180, 1180–1181, 904 N.Y.S.2d 153), and, [i]n considering such a motion, the court must accept the facts as alleged as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (id. at 1181, 904 N.Y.S.2d 153 [internal quotation marks omitted]; see *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511). When the moving party submits evidentiary material in support of his or her motion, “the criterion then becomes ‘whether the proponent of the pleading has a cause of

action, not whether he [or she] has stated one' ” (*Sokol v. Leader*, 74 A.D.3d at 1181–1182, 904 N.Y.S.2d 153, quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17). Plaintiff has shown he has a cause of action to recover under the contract. A significant dispute exists regarding alleged facts. Thus the motion under CPLR 3211[a][7] must be denied (see *Sokol v. Leader*, 74 A.D.3d at 1182, 904 N.Y.S.2d 153, quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d at 275, 401 N.Y.S.2d 182, 372 N.E.2d 17).

Accordingly, it is hereby

ORDERED, plaintiff’s motion to dismiss the counterclaims is DENIED in its entirety.

This constitutes the decision and order of this court.

Dated: December 9, 2021



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020