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| **GCM Prime LLC v Keizer Mist Operations, LLC** |
| 2025 NY Slip Op 35519(U) |
| January 31, 2025 |
| Supreme Court, Westchester County |
| Docket Number: Index No. 73747/2024 |
| Judge: Gretchen Walsh |
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION
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GCM PRIME LLC,

Plaintiff,

- against -

KEIZER MIST OPERATIONS, LLC,
DOYLE ENTERPRISES, LLC, KEIZER MIST, LLC,
EAGLE EYE HOLDINGS, INC.,
EAGLE EYE INVESTMENTS INC.,
EAGLE EYE MANAGEMENT, INC.,
PACIFIC HOLDINGS INVESTMENT LLC,
TRANSITION BUSINESS SERVICES, INC.,
VICTORIA LYNN DOYLE, KELLY COLLEEN DOYLE
and DANIEL PATRICK EPPING,

Defendants.

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Index No. 73747/2024
Motion Seq. No. 1
Motion Date: 12/13/2024

WALSH, J.

The following e-filed documents, listed in NYSCEF under document numbers 2-14, were read on this motion by GCM Prime LLC ("GCM" or "Plaintiff") for an order pursuant to CPLR 3213 granting summary judgment against Keizer Mist Operations, LLC ("Keizer Operations"), Doyle Enterprises, LLC ("Doyle"), Keizer Mist, LLC ("Keizer", and, together with Keizer Operations and Doyle collectively, the "Sellers"), Eagle Eye Holdings, Inc. ("EE Holdings"), Eagle Eye Investments Inc. ("EE Investments"), Eagle Eye Management, Inc. ("EE Management"), Pacific Holdings Investment LLC ("Pacific"), Transition Business Services, Inc. ("TBS"), Victoria Lynn Doyle ("Victoria"), Kelly Colleen Doyle ("Kelly") and Daniel Patrick Epping ("Epping", and, together with EE Holdings, EE Investments, EE Management, Pacific, TBS, Victoria and Kelly, "Performance Guarantors" and, together with Sellers collectively, "Defendants").

Defendants have failed to submit opposition to the motion despite having been served with same. Upon the foregoing papers and for the reasons stated herein, Plaintiff's motion shall be granted.

## PROCEDURAL HISTORY

This action, which arises from a dispute concerning allegations of, inter alia, breach of contract in the context of a written agreement for the purchase and sale of certain future receivables, was commenced by Plaintiff's filing of the Summons and Notice of Motion for Summary Judgment in Lieu of Complaint on October 21, 2024 (NYSCEF Doc. Nos. 1-2).

## PLAINTIFF'S MOTION SUMMARY JUDGMENT IN LIEU OF COMPLAINT

Pursuant to CPLR 3213, Plaintiff moves for summary judgment in lieu of complaint. With their motion, Plaintiff submits: (1) an affirmation of Richard Gipstein dated October 21, 2024 (NYSCEF Doc. No 3 [the "Gipstein Aff."]), and its attached exhibits (NYSCEF Doc. Nos. 4-6); (2) an affirmation of Bryan C. Bryks, Esq. dated October 21, 2024 (NYSCEF Doc. No. 7)[1], and its attached exhibits (NYSCEF Doc. Nos. 4, 5); and (3) a memorandum of law (NYSCEF Doc. No. 10 [the "GCM Mem."]).

### *A. Forward Revenue Purchase Agreements*

Gipstein, in his position as the principal of Plaintiff, alleges through the Gipstein affirmation that on or around April 25, 2024, Plaintiff and Defendants entered into a Forward Revenue Purchase Agreement, along with schedules, amendments, addenda, and other related documents ("FRPA 1") pursuant to which Sellers sold $166,875 of future receivables ("Purchased Amount 1") to Plaintiff for an agreed-upon price of $125,000 (Gipstein Aff. at ¶ 19). Sellers authorized weekly ACH remittances provided to Plaintiff in the amount of $4,181.88 every week, until Purchased Amount 1 plus certain contractual fees were provided to GCM pursuant to FRPA 1, and Sellers agreed that their duties and obligations thereto would be secured by Performance Guarantors' guaranty of Sellers' performance thereunder ("Performance Guaranty 1") (*id.*).

Gipstein next asserts that on or around April 25, 2024, Plaintiff and Defendants entered into a Forward Revenue Purchase Agreement, along with schedules, amendments, addenda, and other related documents ("FRPA 2") pursuant to which Sellers sold $33,375 of future receivables ("Purchased Amount 2") to Plaintiff for an agreed-upon price of $25,000 (*id.* at ¶ 20). Sellers authorized weekly ACH remittances provided to Plaintiff in the amount of $844.38 every week, until Purchased Amount 2 plus certain contractual fees was provided to GCM pursuant to FRPA 2, and Sellers agreed that their duties and obligations thereto would be secured by Performance Guarantors' guaranty of Sellers' performance thereunder ("Performance Guaranty 2") (*id.*).

Gipstein last asserts that on or around June 6, 2024, Plaintiff and Defendants entered into a Forward Revenue Purchase Agreement, along with schedules, amendments, addenda, and other related documents ("FRPA 3", together with FRPA 1 and FRPA 2 the "FRPAs") pursuant to which Sellers sold $53,400 of future receivables ("Purchased Amount 3") to Plaintiff for an agreed-upon price of $40,000 (*id.* at ¶ 21). Sellers authorized weekly ACH remittances provided to Plaintiff in the amount of $1,345 every week, until Purchased Amount 3 plus certain contractual

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[1] The Purpose of the Bryks affirmation is to repeat the factual assertions set forth in the Gipstein affirmation, as well as provide justification for jurisdiction and venue in the present action.

fees was provided to GCM pursuant to FRPA 3, and Sellers agreed that their duties and obligations thereto would be secured by Performance Guarantors' guaranty of Sellers' performance thereunder ("Performance Guaranty 3," together with Performance Guaranty 1 and Performance Guaranty 2, the "Performance Guaranties") (*id.*).

***B. The Defaults, Settlement Agreement, and Subsequent Default***

Gipstein asserts that Sellers defaulted (the "Sellers' Default") under the FRPAs on or about August 13, 2024 (*id.* at ¶ 22). Gipstein states that, as a result of the Sellers' Default, the Performance Guarantors were obligated, yet failed, to perform the obligations of the Sellers under the FRPAS, thus they themselves defaulted under the FRPAs (the "Guarantors' Default," together with the Sellers' Default, the "Initial Defaults") (*id.* at ¶ 23). Plaintiff claims, as a result of the Initial Defaults, Plaintiff is entitled to exercise its rights under the FRPAs "as a secured creditor pursuant to the UCC, [through] [enforcing] remedies of default against Defendants, and [the recovery of] all amounts due along with all enforcement costs, expenses and default interest" (*id.*).

Gipstein alleges that the Plaintiff and Defendants entered into a Settlement Agreement on or about August 21, 2024 (NYSCEF Doc. No. 4 [the "Settlement Agreement"]). Gipstein states that pursuant to the Settlement Agreement

> (a) Defendants admitted the occurrence of the Initial Defaults; (b) Defendants agreed that the amount due to GCM as of that date was $279,094.66, plus interest at the rate of 16% per annum (the "Amount Due"); (c) Defendants agreed to pay to GCM the settlement amount of $207,000 (the "Settlement Amount") through making weekly payments in the amounts set forth therein; (d) Defendants agreed that, upon the occurrence of an Event of Default (as defined therein), the Amount Due (not the Settlement Amount), plus interest thereupon at the rate of sixteen (16%) percent per annum, less any payments made under the Settlement Agreement, would be immediately due and payable to GCM from Defendants; (e) Defendants agreed that GCM would be entitled to exercise any and all of its rights, powers, and/or remedies available to it pursuant to the FRPAs and/or the Settlement Agreement; and, (f) GCM agreed that as long as Defendants made timely payments in full of the Settlement Amount, it would accept the Settlement Amount in full and final settlement and satisfaction of Defendants' obligations pursuant to the FRPAs. (*id.* at ¶ 24).

Gipstein asserts that the Defendants defaulted under the Settlement Agreement on or about September 13, 2024, as a result of their failure to make the requisite payments due to GCM on that date (the "Settlement Default") (*id.* at ¶ 25).

Gipstein claims that as a result of the Settlement Default and as of December 13, 2024 (the date the instant motion was filed), "there is now due to GCM the sum of $291,664.09, representing: (a) the Amount Due ($279,094.66); (b) less the sums received pursuant to the Settlement Agreement ($1,500); and[;] (c) interest thereupon at the contractual rate of sixteen (16%) percent per annum ($12,569.43)" (*id.* at ¶ 26). Gipstein asserts that the Plaintiff is due "pre-judgment interest at the per diem rate of $122.34 from December 14, 2024 until the date of entry of judgment and costs and disbursements as taxed by the Clerk" (*id.*).

**DISCUSSION**

CPLR 3213 allows an action based upon an instrument for the payment of money only to be commenced with a motion for summary judgment, rather than a complaint. This procedure is intended to provide a speedy and effective means for resolving a presumptively meritorious claim. (*see, e.g., Banco Popular N.A. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]). The proponent of a CPLR 3213 motion establishes a prima facie entitlement to judgment by offering proof, in evidentiary form, of the instrument for payment of money in question and of the failure of the defendant to pay in accordance with the terms of the instrument. If this showing is made, the burden then shifts to the defendant(s) to come forward with evidentiary facts demonstrating the existence of a material issue of fact which would defeat a motion for summary judgment (*see, e.g., Fleet Bank v. M & Z Handwear, Inc.*, 308 AD2d 507 [2d Dept 2003]; *Moezina v Baroukhian*, 247 AD2d 452 [2d Dept 1998]; *DeVito v Benjamin*, 243 AD2d 600 [2d Dept 1997]; *Alicanto v Woolverton*, 142 AD2d 703 [2d Dept 1988], *lv denied* 73 NY2d 702 [1988]; *accord Banco Popular,* 1 NY3d at 383; *Mastro v Carroll*, 296 AD2d 802 [3d Dept 2002]). In order to qualify for CPLR 3213 treatment it is "incumbent upon the [movant] to show that the accounts stated, on which [the] action is based, [is] for the payment of money only" (*Interman Indus. Prods., Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 154 [1975] [internal quotations omitted]). "An instrument qualifies for CPLR 3213 treatment 'if a prima facie case would be made out by the instrument and a failure to make the payment called for by its terms'" (*Furniture Consultants, Inc. v Verde Demountable Partitions, LLC*, 64 Misc 3d 1235[A] at *1 [Sup Ct, Suffolk County 2019], *quoting Interman Indus. Prods, Ltd.*, 37 NY2d at 155). "An instrument is considered to be for the payment of money only if it contains an unconditional promise to pay a sum certain over a stated period of time" (*Lawrence v Kennedy*, 95 AD3d 955, 957 [2d Dept 2012]). "Settlement agreements can properly be considered as instruments for the payment of money by a party seeking summary judgment in lieu of complaint" (*Furniture Consultants, Inc.* 64 Misc 3d 1235[A] at *2, *citing Krape v PDK Labs, Inc.*, 34 AD3d 751 [2d Dept 2006]; *J.D. Structures, Inc. v Waldbaum,* 282 AD2d 434 [2d Dept 2001]; *Nemiroff v Sullivan*, 2012 NY Slip Op 31492[U] [Sup Ct, Nassau County 2012]).

Here, Plaintiff has met its prima facie burden by: (1) demonstrating that Defendants were served via Federal Express overnight delivery with the Summons, Notice of Motion for Summary Judgment in Lieu of Complaint, and the supporting papers thereto (NYSCEF Doc Nos. 14); (2) establishing the existence of the Settlement Agreement, which is an instrument for the payment of money only (NYSCEF Doc. No. 4); and (3) establishing Defendant's failure to make the requisite payment due (NYSCEF Doc. No. 5; *see also Alessina v El Gauchito II, Corp.*, 220 AD3d 645, 647 [2d Dept 2023], *lv to appeal denied*, 41 NY3d 958 [2024] ["plaintiffs established, prima facie, that the defendants failed to make the payment required by the settlement agreement, which was an 'instrument for the payment of money only' within the meaning of CPLR 3213"]; *Kays v Antzoulatos*, 211 AD3d 925, 926 [2d Dept 2022] [holding that plaintiff satisfied its prima facie burden on its CPLR 3213 motion for summary judgment in lieu of complaint by establishing the existence of an "agreement . . . (which constituted) an 'instrument for the payment of money only' within the meaning of CPLR 3213"]; *Buckley v Nicklous*, 210 AD3d 575, 576 [1st Dept 2022] [motion to vacate default judgment denied where "[t]he clear terms of the settlement agreement establish that defendants had a singular obligation to pay plaintiff money, and defendants do not contend that plaintiff failed to meet any of the contingencies in the agreement, or deny that they are in default of the agreement"]).

With respect to the second showing (i.e. Plaintiff's establishment of the existence of the underlying instrument), there can be no dispute the Settlement Agreement constitutes "an instrument for the payment of money only" as set forth in CPLR 3213. The Settlement Agreement includes an unambiguous promise by Defendant to pay Plaintiff: (1) twelve weekly installments of $1,500.00 per week from September 6, 2024 through November 22, 2024; and (2) forty-two weekly payments of $4,500 per week from November 29, 2024 through September 12, 2025 (NYSCEF Doc. No. 1; *see Alessina*, 220 AD3d 645; *see also J.D. Structures, Inc.* 282 AD2d at 436 ["The appellant established that the respondents failed to make the payments required by the settlement agreement, which is an instrument for the payment of money only. Accordingly, it is appropriate in this case to grant summary judgment pursuant to CPLR 3213"]).

## CONCLUSION

Accordingly, for the reasons stated and based upon the papers aforesaid, it is hereby

ORDERED that the motion by Plaintiff for an order granting it summary judgment in lieu of complaint is granted to the extent that Plaintiff is awarded summary judgment against Defendants in the principal amount of $277,594.66 ($279,094.66 - $1,500), together with: (1) interest at a rate of 16% per annum from August 13, 2024 to the date of the entry of the judgment (to be calculated by the Clerk of the Court); (2) its costs and disbursements as reflected in a bill of costs (to be taxed by the Clerk of the Court); and it is further

ORDERED that counsel for Plaintiff shall serve by overnight mail a copy of this Decision and Order upon Defendants, with notice of entry, by not later than February 5, 2025 and shall provide proof of service by not later than February 20, 2025.

ORDERED that counsel for Plaintiff shall, by February 14, 2025 serve and file a proposed judgment, with the amounts to be awarded for interest, attorneys' fees, costs and disbursements left blank, noticed for settlement before this Court (and not the Clerk of the Court) on February 21, 2025 (**no appearances required**), together with a bill of costs.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 31, 2025

ENTER:

Gretchen Walsh

Hon. Gretchen Walsh, J.S.C.

**APPEARANCES**

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