SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C Justice PART 41

DARRICK ROBINSON

-v-

SYNERGY ALTERNATIVE CAPITAL, LLC, and CHRISTOPHER DALY

INDEX NO. 652043/2020

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered ~~1~~ 57 to 99, were read on this motion to/for dismiss and for summary judgment dismissing claims

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 57-72, 96

Answering Affidavits — Exhibits No(s). 75-94

Replying Affidavits No(s). 99

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

The court denies defendants' motion to dismiss and for summary judgment dismissing plaintiff's claims pursuant to the accompanying decision. C.P.L.R. §§ 3211(a)(5), 3212(b).

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

Dated: 7/12/23

LUCY BILLINGS, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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DARRICK ROBINSON, Index No. 652043/2020

Plaintiff

- against - DECISION AND ORDER

SYNERGY ALTERNATIVE CAPITAL, LLC, and CHRISTOPHER DALY,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

In June 2016, defendant Daly hired plaintiff as the Executive Director of Investor Relations for defendant Synergy Alternative Capital, LLC. Defendants orally agreed to pay plaintiff a $125,000.00 annual salary plus a discretionary bonus for investments that plaintiff procured. Defendants concede that plaintiff procured a $15,000,000.00 capital contribution from nonparty Checkmate Strategic Capital 1, LLC ("Checkmate Investment"), but maintain that Synergy Alternative Capital did not have enough money to award plaintiff a bonus. On or around August 7, 2017, Daly terminated plaintiff's employment.

Plaintiff claims that he entered a second oral agreement with defendants on September 12, 2017, in which they promised a $250,000.00 commission for the Checkmate Investment, to be paid over three years. Defendants maintain that any conversations

about potential commissions after plaintiff's termination concerned only future investments, not a retroactive commission for the Checkmate Investment.

Plaintiff sues Synergy Alternative Capital for breach of an oral agreement, quantum meruit, and unjust enrichment and both defendants for violation of New York Labor Law § 190(1). Defendants move for both dismissal and summary judgment. C.P.L.R. §§ 3211(a)(5), 3212(b). Plaintiff contends that defendants' motion is defective because it lacks a statement of material facts, but this statement is no longer mandatory, and, even if it was, defendants substantially complied through their attorney's affirmation. 22 N.Y.C.R.R. § 202.8-g(a). Defendants' motion initially treated plaintiff's claims as premised on the parties' first oral employment agreement, which is not the basis for plaintiff's claims. This misinterpretation resulted in defendants impermissibly addressing the second oral agreement for the first time in their reply. Therefore the court permitted plaintiff to file a sur-reply to address defendants' change in position. C.P.L.R. 2214(c); Florentine G.O. v. Benoit G., 198 A.D.3d 486, 487 (1st Dep't 2021); Pizarro v. Dennis James Boyle, Inc., 180 A.D.3d 596, 596 (1st Dep't 2020); Indian Harbor Ins. Co. v. Alma Tower, LLC, 165 A.D.3d 549, 550 (1st Dep't 2018). The court now denies defendants' motion for the reasons explained below.

II. BREACH OF AN ORAL AGREEMENT

Defendants move to dismiss plaintiff's claim for breach of an oral agreement pursuant to the statute of frauds. C.P.L.R. § 3211(a)(5). Under New York General Obligations Law § 5-701(1), to be enforceable, any agreement that requires more than one year to perform must be in writing. General Obligations Law § 5-701(10) further mandates a written agreement for "services rendered in negotiating . . . a business opportunity." Defendants contend the second oral agreement is unenforceable because it is not in writing. Plaintiff maintains the second oral agreement falls outside the statute of frauds.

General Obligations Law Section 5-701(1) does not apply to plaintiff's claim for breach of an oral agreement because defendants could have completed performance of the second oral agreement in less than one year. Moshan v. PMB, LLC, 141 A.D.3d 496, 497 (1st Dep't 2016). Although plaintiff extended defendant's payment schedule to over three years, defendants could have paid the $250,000.00 allegedly promised to plaintiff as one payment. Ryan v. Kellogg Partners Institutional Services, 19 N.Y.3d 1, 14 (2012); Basal Trading & Sons Ltd. v. M&G Diamonds, Inc., 212 A.D.3d 551, 552 (1st Dep't 2023).

Regarding the second oral agreement's enforceability under General Obligations Law § 5-701(10), Daly testified at his deposition that "Darrick Robinson's job was to help us build this

business out, and the majority of what he would be doing was going out and soliciting investors . . . ." Aff. of Christopher Daly Ex. D, at 64 (emphasis added). Daly further testified that "[plaintiff] and Jack and like anybody on a startup organization, wore many hats." Id. at 158. Since Daly's testimony suggests that plaintiff's "responsibilities as a salaried [] employee may have transcended those of a 'finder' or 'negotiator' of business opportunities," Moshan v. PMB, LLC, 141 A.D.3d at 497, testimony that is undisputed, at minimum factual questions remain whether plaintiff provided services not covered under the statute. CIP GP 2018, LLC v. Koplewicz, 194 A.D.3d 639, 640 (1st Dep't 2021); Dorfman v. Reffkin, 144 A.D.3d 10, 19 (1st Dep't 2016); Moshan v PMB, LLC, 141 A.D.3d at 497.

Notably, defendants do not move for summary judgment based on the absence of contract formation. To the extent that defendants raised this issue at oral argument, however, plaintiff points to several communications that indicate defendants' assent. On September 13, 2017, plaintiff sent a text message to Daly: "Good talk yesterday. Glad we were able to come to an agreement and move past this. Will forward the new items shortly." Aff. of Darrick Robinson Ex. 7, at 2. Daly responded later that day with "Agreed and ty." Id. Although defendants insist that Daly merely agreed the parties had a "Good talk yesterday," his response also may be interpreted as agreeing the

parties had "come to an agreement." Thus plaintiff raises a factual question whether the parties entered an oral agreement September 12, 2017. Continental Ins. Co. v. Greenwich Ins. Co., 188 A.D.3d 451 (1st Dep't 2020); Kramer v. Greene, 142 A.D.3d 438, 440 (1st Dep't 2016); Sabre Intern. Sec., Ltd. v. Vulcan Capital Mgt., Inc., 95 A.D.3d 434, 438 (1st Dep't 2012).

Moreover, plaintiff emailed Daly September 28, 2017: "Chris, It was great discussing the terms with you and I am looking forward to working closely for Synergy in a consultant capacity. Per our conversation, the consultant agreement covers the structure of the agreed upon compensation total of $375,000.00." Robinson Aff. Ex. 8, at 2. Plaintiff sent another text message to Daly November 3, 2017, which refers to a "consulting agreement that I have with you that pays the remaining 250k as per the email," and to which Daly replied: "let me know if you have a few minutes to discuss." Robinson Aff. Ex. 7, at 2. Plaintiff presented obvious opportunities for Daly to deny or at least question any such consulting agreement, but he did not. Again, Daly's response raises a factual question regarding his assent to a previous agreement. Continental Ins. Co. v. Greenwich Ins. Co., 188 A.D.3d at 451; Kramer v. Greene, 142 A.D.3d at 440; Sabre Intern. Sec., Ltd. v. Vulcan Capital Mgt., Inc., 95 A.D.3d at 438.

Last, defendants contend that plaintiff's claim for breach

of an oral agreement is void as vague, but defendants abandoned this position in their reply. Therefore the court denies defendant's motion to dismiss plaintiff's claim for breach of an oral agreement. C.P.L.R. § 3211(a)(5).

III. *QUANTUM MERUIT* AND UNJUST ENRICHMENT

The court also denies defendants' motion for summary judgment dismissing plaintiff's claims for quantum meruit and unjust enrichment because "there is a bona fide dispute as to the existence" of an oral agreement. Tahari v. Narkis, 216 A.D.3d 557, 557 (1st Dep't 2023); Retail Consulting Services, Inc. v. New TSI Holdings, Inc., 208 A.D.3d 1115, 1117 (1st Dep't 2022); CIP GP 2018, LLC v. Koplewicz, 194 A.D.3d at 640; Kramer v. Greene, 142 A.D.3d 438, 441 (1st Dep't 2016). Although plaintiff's damages for quantum meruit and unjust enrichment are likely nominal since plaintiff was receiving a salary when he procured the Checkmate Investment, only if and when the trier of fact determines that the parties did not enter an enforceable oral agreement, must plaintiff elect one of these alternative remedies, requiring the court to consider whether plaintiff shows the essential element of damages. Kramer v. Greene, 142 A.D.3d at 441-42.

IV. NEW YORK LABOR LAW § 190

Under New York Labor Law § 190(1), "'Wages' means the earnings of an employee for labor or services rendered,

regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." Defendants abandoned their motion to dismiss plaintiff's Labor Law claim against Synergy Alternative Capital in their reply, but maintain that Daly is not individually liable under the Labor Law since defendants paid plaintiff's full salary in accordance with the first oral agreement. Yet Daly's potential liability is premised on whether he was plaintiff's "employer" when defendants promised bonus wages in the second oral agreement. Ryan v. Kellogg Partners Inst. Servs., 19 N.Y.3d at 16; Odigie v. Gateway Sec. Guard Services, Inc., 213 A.D.3d 495, 496 (1st Dep't 2023). ~~York~~ Labor Law § 190(3) defines "Employer" as "any person . . . employing any individual in any occupation, industry, trade, business or service." Since defendants fail to establish that Daly was not plaintiff's employer through any admissible evidence, the court denies defendant's motion for summary judgment on Daly's individual liability. C.P.L.R. § 3212(b).

V. CONCLUSION

For the foregoing reasons, the court denies defendants' motion to dismiss plaintiff's claim against defendants for breach of an oral agreement. C.P.L.R. § 3211(a)(5). The court also denies defendant's motion for summary judgment dismissing plaintiff's claims against defendants for quantum meruit, unjust

enrichment, and violation of Labor Law 190(1). C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: July 12, 2023

LUCY BILLINGS, J.S.C.