SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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CURT MELTZER, MELTZER MANAGEMENT SERVICES LLC

Plaintiff,

- v -

KENTUCKY HI TECH GREENHOUSES LLC,KENTUCKY FRESH HARVEST LLC,

Defendant.

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INDEX NO. 652396/2022

MOTION DATE 05/16/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Plaintiffs Curt Meltzer ("Meltzer") and Meltzer Management Services LLC ("MMS") (collectively, "Plaintiffs") filed this motion for summary judgment on their breach of contract and New York Labor Law claims. The court issued an interim order on February 21, 2023 (Interim Order, NYSCEF Doc. No. 61) denying the motion to the extent it also sought reargument and/or renewal of Defendants' motion to dismiss (MS 01). For the following reasons, the court denies Plaintiffs' motion for summary judgment in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

The court refers to the factual background set forth within the January 12, 2023 decision and order granting in part and denying in part Defendants' motion to dismiss (Order on Motion to Dismiss, NYSCEF Doc. No. 34). However, the court provides additional relevant details here.

This case relates to Defendant Kentucky Hi Tech Greenhouses LLC's ("KHTG") and Kentucky Fresh Harvest LLC's ("KFH") alleged failure to pay Plaintiffs compensation that they

owe for services that Meltzer provided as an executive of both companies. KHTG allegedly owns the majority of stock of KFH, an agricultural company that was attempting to build greenhouses in Kentucky (Complaint, NYSCEF Doc. No. 1, ¶¶ 9-10). Pursuant to the Second Amended & Restated Limited Liability Company Operating Agreement for KHTG ("Operating Agreement"), the members of KHTG were Meltzer, William K. Back ("Back"), and ORYM Group, LLC (Operating Agreement, NYSCEF Doc. No. 23). The members of KHTG had the authority under the Operating Agreement to make decisions on the company's behalf as to, among other things, "the borrowing of money and the granting of security interests in the Company's assets" and "the employment of persons, firms or corporations for the operation and management of the Company's business" (*id.*, § 4.3).

Purportedly acting within the scope of this power, the members allegedly executed two separate resolutions in 2018 and 2019 related to compensation owed to Meltzer for work that Meltzer allegedly performed for KHTG between 2015 and 2018. The 2018 Resolutions state the following:

> **RESOLVED FURTHER**, that . . . it is determined that the fair market value of the services provided by Curt Meltzer, on a full-time basis[1], is not less than $200,200.00 per annum; and
>
> **RESOLVED FURTHER**, that it is unanimously agreed that, for the time period October 15, 2015 through October 15, 2016, Curt Meltzer rendered full-time services to the Company, for which he has not to date been compensated, and consequent thereto the Company is indebted to him in the amount of $200,200.00; and
>
> **RESOLVED FURTHER**, that it is unanimously agreed that, for the time period October 16, 2016 through May 15, 2018, Curt Meltzer rendered half-time services to the Company, for which he has not to date been compensated, and consequent thereto the Company is indebted to him in the amount of $141,808.39; and
>
> **RESOLVED FURTHER**, that it is unanimously agreed that, for the time period May 16, 2018 through September 16, 2018, Curt Meltzer rendered full-time services to the

[1] There is a handwritten note stating "from 9/16/18 to date." It is not clear from the face of the document when this note was added or by whom.

> Company, for which he has not been compensated, and consequent thereto the Company is indebted to him in the amount of $66,733.54.

(2018 Resolutions, NYSCEF Doc. No. 52).

Haim Oz ("Oz") signed the 2018 Resolutions on behalf of ORYM Group, LLC. Meltzer and Oz also signed a separate signature page included with the 2018 Resolutions, but the top of the document is cut off, and it is unclear if this page directly follows the prior pages in order. Notably, Back's signature does not appear anywhere in the document, even though the 2018 Resolutions state that "[a]ll members, either in person or telephonically, were present" for the meeting and even though there is a signature line for Back (*see id.*). Back stated in the affidavit attached to Defendants' opposition that he "did not sign the 2018 Resolution" and that he "did not vote and [] didn't know that a vote was being held" (Back Aff., NYSCEF Doc. No. 67, ¶ 19).

The members also purportedly executed the 2019 Resolutions. All three members—Meltzer, Back, and Oz on behalf of ORYM Group, LLC—signed the 2019 Resolutions (2019 Resolutions, NYSCEF Doc. No. 53). The 2019 Resolutions state the following:

> **RESOLVED**, that the financial arrangements between the Company and Curt Meltzer as detailed in the resolutions approved September 25, 2018 (being collectively the "Meltzer Compensation Arrangement") are hereby ratified and affirmed; and
>
> **RESOLVED FURTHER**, that it is confirmed that the Meltzer Compensation Arrangement has been, is and will be in the nature of a bilateral agreement between the Company and Curt Meltzer as an individual; and
>
> **RESOLVED FURTHER**, that the Meltzer Compensation Arrangement was, is and shall be subject to modification only consequent to a written instrument duly executed by the Company and by Curt Meltzer; and
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> **RESOLVED FURTHER**, notwithstanding any provision of any agreement to which the Company may be a party, the Meltzer Compensation Arrangement is not subject to modification, waiver, amendment or termination absent the written consent of Curt Meltzer

(*id.*).

The 2019 Resolutions additionally state that

> "effective the first day of June, 2019, Kentucky Fresh Harvest, LLC did begin compensating Curt Meltzer with payments at an annualized rate of $120,000 per annum, and Meltzer has agreed that these payments, as paid, shall constitute a credit

> against the obligations of the Company under the Meltzer Compensation Arrangement"

(*id.*).

In addition to the alleged deferred compensation, Meltzer also allegedly loaned $70,000 to KFH in September 2021 (Meltzer Aff., NYSCEF Doc. No. 50, ¶ 11). According to Meltzer, while KFH has made payments on the loan, $40,000 remains of the principal plus 8.25% in interest (Meltzer Aff., ¶ 14).[2]

On November 16, 2021, Meltzer emailed his resignation from his roles at KFH (*see* Hill Letter). Carol Hill, Director of KFH, sent a letter in response on November 19, 2021, stating that she would "pay [Meltzer] $50,000.00 in December to reimburse [him] for the loan [he] made to KFH" and that "[i]n March 2022, [she would] start paying [him] $10,000.00 a month on [his] deferred compensation from July 2018-Dec 2020" (*id.*).

On July 12, 2022, Plaintiffs filed the complaint in this action, alleging that they are owed over $900,000.00 in deferred compensation, including interest at the agreed-upon rate of 8%, as well as at least $100,000 in unpaid business expenses and the balance of the loan (Complaint, ¶ 28). The complaint alleged causes of action for breach of contract, unjust enrichment, quantum meruit, promissory estoppel, and violations of New York Labor Law §§ 193/198.

Defendants moved to dismiss the complaint on September 8, 2022 (MS 01). On January 12, 2023, the court issued a decision and order denying the motion to dismiss as to the causes of action for breach of contract and violations of New York Labor Law but granting the motion to

[2] The $70,000 loan does not appear to be formalized in a resolution. Rather, Meltzer's affidavit refers to other documents discussing the purported loan, including a series of text messages between himself and current KFH CFO Julian Gander (*see* Gander-Meltzer Texts, NYSCEF Doc. No. 55) and a letter from Carol Hill stating, "I will pay you $50,000.00 in December to reimburse you for the loan you made to KFH" (Hill Letter, NYSCEF Doc. No. 57).

dismiss the causes of action for unjust enrichment, quantum meruit, and promissory estoppel (Order on Motion to Dismiss, p. 4).

As part of KHTG's February 1, 2023 answer, KHTG asserted counterclaims for breach of contract, breach of implied covenant of good faith and fair dealing, gross negligence, breach of fiduciary duty, and a setoff of damages. KHTG also seeks a declaration that it owes Plaintiffs nothing. The counterclaims allege that the Resolutions relating to Meltzer's compensation lack "basic terms and conditions for an employment agreement," such as a description of Meltzer's title, responsibilities, duration of employment, and benefits (Answer and Counterclaims, NYSCEF Doc. No. 38, ¶ 20). Further, the counterclaims allege that Meltzer committed malpractice and self-dealing in his role and allowed his former business partner, Oz, to engage in a pattern of financial improprieties costing the companies millions of dollars and causing delays (*id.*, ¶¶ 23-30). In particular, KHTG alleges that Meltzer misrepresented that Oz was an international expert in greenhouse construction and operation, convinced an investor to make a $2,000,000 loan to Oz related to the project that Oz ultimately defaulted on, and failed to monitor Oz's progress (*id.*, ¶¶ 25-29). The counterclaims allege that Meltzer breached the Operating Agreement and Resolutions through, among other things, intentionally misrepresenting work performed, self-dealing, misrepresenting the expertise of Oz, failing to monitor Oz, and ultimately failing to alert other KHTG members and partners as to Oz's malfeasance (Answer and Counterclaims, ¶ 44). KHTG's answer also asserts affirmative defenses: that Plaintiffs' claims are barred by fraud; and that Defendant was excused from performance because Plaintiffs violated the terms of the alleged agreement(s) (Answer and Counterclaims, pp. 6-7).

Subsequently, on February 16, 2023, Plaintiffs filed this motion seeking summary judgment on their breach of contract and New York Labor Law claims. The motion additionally

sought leave to reargue and/or renew the motion to dismiss pursuant to CPLR 2221(d) and (e) (Opening Memorandum, NYSCEF Doc. No. 49, pp. 15-16). On February 21, 2023, the court issued an interim order denying the motion to the extent it sought reargument and/or renewal (Interim Order). The court reserved decision on the remainder of the motion.

For the following reasons, the court denies Plaintiffs' motion for summary judgment in its entirety.

DISCUSSION

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212[b]; *Aguilar v City of New York*, 162 AD3d 601, 601 [1st Dept 2018]; *AGFA Photo USA Corp. v Chromazone, Inc.*, 82 AD3d 402, 403 [1st Dept 2011]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form (*see Olan v Farrell Lines*, 64 NY2d 1092, 1093 [1985]; *AGFA Photo USA Corp.*, 82 AD3d at 403; *Branda v MV Public Transp., Inc.*, 139 AD3d 636, 637 [1st Dept 2016]). If the party seeking summary judgment fails to meet their burden, the court must deny summary judgment "regardless of the sufficiency of the opposition papers" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]).

I. Breach of Contract

The court denies Plaintiffs' motion for summary judgment as to the breach of contract cause of action. In order to establish a cause of action for breach of contract, a plaintiff must demonstrate "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Belle Lighting LLC v Artisan Construction Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019] [granting summary judgment to plaintiff on breach of contract

claim]; *see also Great Jones Studios Inc. v Wells*, 190 AD3d 587, 588 [1st Dept 2021] [finding that lower court properly granted plaintiff partial summary judgment on breach of contract claim where plaintiff submitted "undisputed evidence of [] breach"]). However, a court should deny a plaintiff's motion for summary judgment on a breach of contract claim where there are issues of fact as to whether the plaintiff breached the contract themselves (*see Marion Scott Real Estate Inc. v Riverbay Corp.*, 217 AD3d 453, 454 [1st Dept 2023] ["[P]laintiff was not entitled to summary judgment on [breach of contract] cause of action given the outstanding issues with respect to whether plaintiff was in breach of the management agreement at the time of the termination"]; *Avery v WJM Dev. Corp.*, 216 AD3d 887, 889 [2d Dept 2023] [denying plaintiffs' motion for summary judgment as to liability on breach of contract cause of action where "plaintiffs' own submissions raised triable issues of fact" as to whether individual plaintiff breached]).

Such issues of fact arise where the contract fails to provide sufficient detail as to material terms of plaintiff's performance obligations (*see 3B Associates LLC v eCommission Solutions, LLC,* 214 AD3d 526, 526-27 [1st Dept 2023] [finding "factual issues as to whether plaintiffs performed their obligations under the agreement" where the agreement "[did] not specify the type of 'work, efforts and assistance' that [plaintiff] was to perform, or whether the performance obligations were ongoing"]; *see also Kolchins v Evolution Markets, Inc.*, 128 AD3d 47, 61 [1st Dept 2015] ["[A]lthough the parties may intend to enter into a contract, if essential terms are omitted from their agreement, or if some of the terms included are too indefinite, no legally enforceable contract will result."]; *but see Edelman v Poster*, 72 AD3d 182, 185-86 [1st Dept 2010] [reversing lower court's grant of summary judgment to defendant, finding that even though the retainer agreements at issue were missing "material terms," there existed an "objective method for supplying [the] missing term[s]"]).

The court denies Plaintiffs' motion for summary judgment as to liability. First, the Resolutions that form the purported employment agreements are silent as to material terms. While the 2018 Resolutions state that "the fair market value of the services provided by Curt Meltzer, on a full-time basis, is not less than $200,200.00 per annum" and then state the particular amounts the company owes Meltzer for each year (2018 Resolutions), the 2018 Resolutions fail to indicate what Meltzer's title was during these periods or what "services" he performed. Similarly, while the 2019 Resolutions define the 2018 Resolutions as a bilateral compensation agreement between the company and Meltzer and ratifies and affirms the company's obligations (2019 Resolutions), the 2019 Resolutions provide no further detail about what Meltzer actually did to earn compensation. Thus, plaintiffs have not established prima facie entitlement to judgment as a matter of law on the breach of contract claim.

Even if plaintiffs had met their burden, Defendants' submissions raise triable issues of fact. Specifically, Defendants' evidence raises issues of fact relating to whether Meltzer breached any alleged employment agreements, precluding summary judgment on the breach of contract claim. Defendants append numerous affidavits to their opposition that set forth Meltzer's failure to carry out his job functions and his complicity with Oz's fraud. The affidavits suggest that Meltzer failed to complete tasks and generally cost KFH and Hill "tens of millions of dollars due to waste, mismanagement, ineptitude, and self-dealing" (Hill Aff., NYSCEF Doc. No. 66, ¶¶ 34-36, 40; *see also* Back Aff., ¶ 28 [describing that "Meltzer and Oz did not in fact perform any of the services claimed during 2015, 2016, 2017 and most of 2018 as is represented in KHTG 2018 Resolution" but rather they were "working on other identical greenhouse projects"]; Saha Aff., NYSCEF Doc. No. 72, ¶ 11 [stating that "[o]ften times Meltzer was ineffective in his role as he would have an employee begin a project working with a vendor and then in the middle, he would take it over only

to not follow through"]). Further, the affidavits suggest that, rather than advancing the company's greenhouse project, Meltzer was working on other projects while claiming to be a full-time executive at KFH (Sjoholm Aff., NYSCEF Doc. No. 68, ¶¶ 6-7). In particular, the affidavit of John Sjoholm attaches exhibits suggesting that Meltzer was working for a company called CEA Consulting while he was supposedly a full-time executive at KFH (Ex. 1 to Sjoholm Aff.) and that he was involved in a company called Green Ag Technologies LLC, that was working on a greenhouse project in competition with KFH (Exs. 3-4 to Sjoholm Aff.; Sjoholm Aff., ¶ 8). Defendants also suggest that Meltzer was aware of Oz's misrepresentations related to the project and failed to take any action (*see* Sjoholm Aff., ¶ 12 [describing how witnesses told Sjoholm that Meltzer was aware that Oz played no major role in the establishment of a facility in Mexico, as he had represented]) and that Meltzer convinced Hill to loan $2,000,000 to Oz on which Oz defaulted soon thereafter (Sjoholm Aff., ¶ 18). While the court cannot at this stage determine whether or not Meltzer breached any alleged employment agreements or was aware of Oz's alleged fraud, Defendants' submissions are sufficient to raise issues of fact.

Moreover, even if the court were to find that Plaintiffs are entitled to summary judgment on the issue of liability, Plaintiffs would not be entitled to summary judgment as to damages on the contract claim. Plaintiffs seek a total of $945,062.23, comprised of $859,361.54 owed to Meltzer soon after he resigned, as of the end of 2021, along with interest of 8% per annum through the date of the motion. In support of this figure, Plaintiffs cite what they refer to as "[i]nternal business records of the Defendants [which] tracked [Meltzer's] deferred compensation owed, plus interest" (Opening Memorandum, p. 3). A chart that Plaintiffs attach to their motion does refer to a total of "Deferred Comp" plus interest for Curt Meltzer of $790,474.56 (Ex. D to Meltzer Aff., NYSCEF Doc. No. 54). However, the Hill affidavit states that CFO Julian Gander calculated the

total at Meltzer's request, and that the official accounting of KFH and KHTG do not reflect the amounts in the chart (Hill Aff., ¶ 25). Further, it is not clear based on the chart how Meltzer calculated that he was owed a total of $859,361.54 at the time of his resignation, as he stated in his affidavit (Meltzer Aff., ¶ 10). Therefore, Plaintiffs failed to meet their burden on summary judgment as to damages.

II. New York Labor Law §§ 193 and 198

Additionally, the court denies Plaintiffs' motion for summary judgment as to the New York Labor Law claims. Under New York Labor Law § 193,

> "[n]o employer shall make any deduction from the wages of an employee, except deductions which: a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or b. are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer's premises"

(*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 614 [2008]; *see also Gennes v Yellow Book of New York, Inc.*, 23 AD3d 520, 521 [2d Dept 2005]). Further, New York Labor Law § 193 generally protects executives such as Meltzer (*see e.g., Pachter*, 10 NY3d at 616 ["[W]e hold that executives are employees for purposes of Labor Law article 6, except where expressly excluded."]; *Fraiberg v 4Kids Entertainment, Inc.*, 75 AD3d 580, 583 [2d Dept 2010]).

Defendants argue that Plaintiffs cannot recover on the New York Labor Law claims because Meltzer was never an employee, but was rather an independent contractor. In particular, Defendants cite the Court of Appeals' test from *Bynog v Cipriani Group* (1 NY3d 193 [2003]). In *Bynog*, the Court held that the existence of an employer-employee relationship turns on the amount of control that the employer exercised over the employee (*see Bynog*, 1 NY3d at 198-99 [holding that "[f]actors relevant to assessing control include whether the worker (1) worked at his own

convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule"]).

Defendants have established that there are material issues of fact as to Meltzer's employment status. Defendants provide the court with evidence that Meltzer was working on other projects (*i.e.*, "engag[ing] in other employment") at the time that he claims to have been an executive of KFH (*see* Sjoholm Aff., ¶¶ 6-8; Exs. 1, 3, and 4 to Sjoholm Aff.). Defendants provide affidavits suggesting that Meltzer, rather than being on a "fixed schedule," worked at his "own convenience" (*see e.g.,* Hill Aff., ¶ 36 ["He set his own schedule. He set his own hours. He demanded that no one bother him between 1pm/2pm and 4pm because of his daily naps"]; Back Aff., ¶ 31 ["At all times Meltzer worked from his home in New York, took vacations when he wanted to, and had zero supervision, taking daily naps from 1pm to 4pm when no one was to disturb him."]). Therefore, the court cannot grant Plaintiffs' motion for summary judgment on their New York Labor Law claims because there are issues of fact as to whether Meltzer was an employee during the relevant time period.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that Plaintiffs' motion for summary judgment (MS 02) is denied; and it is further

ORDERED that the parties must appear for a pre-trial conference on August 22, 2023, at 3:00 P.M. over Microsoft Teams.

08/10/2023
DATE

MELISSA CRANE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE