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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5

HUI XU (a/k/a Christina Hsu),
d/b/a Excel Consulting of Montreal

Plaintiff,

MOTION DATE: 12/17/09
MOTION SEQ. NO.: 002

-against-

INDEX NO.: 17764/08

HARBREW IMPORTS, LTD.,

Defendant.

The following papers read on this motion (numbered 1-2):

Notice of Motion for Summary Judgment.....1
Affirmation of Catherine May Co.....1(a)
Affidavit of XUI XU a/k/a Christina Hsu.....1(b)
Affirmation in Opposition.....2
Affirmation of Gary S. Fish.....2(a)
Affidavit of Robert Angel.....2(b)

In this action to collect the balance allegedly due for services rendered by plaintiff HUI XU as a consultant and employee of defendant HARBREW IMPORTS, LTD., plaintiff moves for summary judgment pursuant to **CPLR §3212.**

The underlying facts, gleaned from the affidavit of HUI XU sworn to on November 1, 2009 ("Plaintiff's Affidavit"), are undisputed. During the period from January 2, 2006 through November 3, 2006, plaintiff d/b/a Excel Consultation of Montreal was retained as a consultant to provide research, marketing and promotion services to defendant. There was no written contract, but plaintiff asserts, without contradiction, that defendant agreed to pay plaintiff $1,250 per week for her services. Invoices signed and accepted by defendant reflect that basic price (with additional amounts billed for travel). As of November 6, 2006, plaintiff became an employee of defendant, having entered the United States on a work visa sponsored by defendant. She continued providing services at a salary of $1,250 per week or $65,000 per year. Plaintiff resigned from defendant in April 2008.

Plaintiff claims that she was not paid the full amount due for her services, either as a consultant or an employee. Specifically, she claims that she is owed the total sum of $20,550.00 for services rendered, including: (a) $10,550.00, for consulting services, for the period of January 2, 2006 to November 3, 2006; and (b) $10,000.00 in unpaid salary, for the periods of November 6, 2006 to December 31, 2006, and March 24, 2008 to April 4, 2008. Plaintiff is also seeking an additional award pursuant to **New York State Labor Law § 198 (1-a) et seq.**, including "(c) liquidated damages in the amount of $800 pursuant to New York State Labor Law § 198 (1-a) et seq.; (d) reasonable attorneys' fees pursuant to New York State Labor Law § 198 (1-a); damages in the amount of $20,000 representing the amount of double damages under New York State Labor Law §198 (1-c) for being forced to bring this action to recover unlawfully withheld and unpaid wages." [*See* Notice of Motion.]

Defendant does not dispute plaintiff's allegations regarding the nature of the relationship, the time period during which services were provided, or the agreed upon rate of payment for those services. Rather, defendant claims that it is entitled to deductions for certain payments made, and an offset for certain monies expended for plaintiff's benefit, including (i) apartment security deposit, rent and furnishings, (ii) legal fees in connection with obtaining plaintiff's work visa; and (iii) travel expenses, including airline, car rental and hotel charges, in connection with plaintiff's entry into the United States, escorted by defendant's principal. [*See* e-mail message, dated July 31, 2008, from Robert Angel, Controller, to plaintiff's former counsel, attached to Affirmation in Opposition (the "Controller's Message").] Taking into account these deductions and offsets, defendant claims that it owes plaintiff only $4,748. Based upon the discrepancy between this amount and the amount claimed by plaintiff, defendant argues that it has raised issues of fact sufficient to defeat summary judgment.

To prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law. **CPLR §3212; Winegrad v. New York University Medical Center,** 64 N.Y.2d 851, 853. The burden then shifts to the opponent to provide evidence sufficient to establish a genuine issue of material fact. **Zuckerman v. City of New York,** 49 NY2d 557. Summary judgment is not defeated by "mere conclusions, expressions of hope or unsubstantiated allegations or assertions." **Id** at 562. In evaluating the sufficiency of a motion for summary judgment, the evidence submitted by the non-moving party must be accepted as true and a decision on the motion must be made on the version of the facts most favorable to the non-moving party. **Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co.,** 168 AD2d 610.

The Court has examined the evidence presented by both sides and finds substantial, if not complete, agreement with respect to the amounts claimed and paid for plaintiff's services as a consultant. Plaintiff claims, without contradiction, that she provided 44 weeks of services, for a total fee of $55,000. [Plaintiff's affidavit, ¶7] Defendant claims that it paid a total of $33,200 for consulting fees. [Controller's Message, ¶1] Simple arithmetic shows a difference, or balance due, of $11,800. This is consistent with the breakdown of charges and payments claimed by both sides. Plaintiff claims that as of November 3, 2006, when the consultancy period ended, there was an outstanding balance of $24,500, and that "[b]y the end of 2007, the balance of $24,500 for the services performed under the consultancy agreement in 2006 was reduced to $11,800." [Plaintiff's Affidavit, ¶12] *See also* Amended Verified Complaint, dated August 12, 2009, attached to the Motion at Exhibit G ("Complaint"), ¶10] Defendant lists four payments to plaintiff "on account," starting in August 2007, totaling $12,700. [Controller's Message, ¶1] Assuming an outstanding balance of $24,500 at November 3, 2006, which defendant does not refute, the application of the subsequent payments itemized by defendant leaves a balance of $11,800, consistent with the figure reached by plaintiff.

Plaintiff states that she took a week (five Mondays) off from work in 2008 to further reduce the balance to $10,550. [Plaintiff's Affidavit, ¶12; Complaint ¶¶ 8 and 9] Defendant does not refute this statement, which, if anything, serves defendant's interests rather than plaintiff's. Accordingly, the court finds that the remaining balance due on the consulting arrangement is $10,550.

With respect to unpaid salary, there are two periods of time in question. Plaintiff claims that she worked for eight weeks during the period from November 6, 2006 through December 31, 2006, at a rate of $1,250 per week (totaling $10,000), but was paid only $2,500. [Plaintiff's Affidavit ¶10.] Defendant does not contradict either the period of employment or the salary alleged by plaintiff. Further, the list of payments provided by defendant's controller shows only two weeks of payroll payments ($2,500) in 2006, consistent with plaintiff's claim. [Controller's Message, ¶1] Defendant refers to a payment by Islander Imports of one-week's salary in 2006, but neither specifies the time period to which it applies, nor substantiates this payment with documentary or other evidence, nor explains how a payment by Islander Imports could satisfy defendant's salary obligations. [*See* Controller's Message, ¶1] Accordingly, the Court finds that defendant has not raised an issue of fact regarding the claim for unpaid salary for November-December 2006 in the amount of $7,500.

Plaintiff also claims to have worked for two weeks during the period from March 24, 2008 through April 4, 2008, at the same salary rate, for which she was not paid.

Defendant does not dispute this claim, nor submit any evidence that raises an issue of fact. Accordingly, the Court finds that plaintiff is entitled to unpaid salary for March-April 2008 in the amount of $2,500, which, together with the $7,500 owed for 2006, amounts to a total of $10,000.

The Court determines that plaintiff has established her right, as a matter of law, to monies owed for services rendered. The Court finds that plaintiff is owed $10,550 in consulting fees and $10,000 in salary, for a total of $20,550. The only issue raised by defendant is whether or not defendant is entitled to an offset for expenses it incurred connection with the commencement of her employment, including the costs of obtaining a visa, escorting plaintiff to the United States and establishing her residence. It is undisputed that defendant incurred certain expenses of that nature. [*See* Controller's Message, ¶1; *see also* plaintiff's e-mail message dated May 9, 2008 attached to Motion as Exhibit F]. The Controller's message only estimates the amount of expenses, however, and defendant's opposition includes no documentary substantiation. Moreover, there is no evidence that plaintiff ever agreed to, or that defendant expected her to, reimburse defendant for those expenses. Defendant submits no affidavit from its principal, Richard DeCicco, with whom plaintiff communicated on matters concerning her employment. Defendant submits no correspondence evidencing an expectation or agreement with respect to reimbursement. Defendant submits no evidence of any demand for reimbursement made at any time in the two years following plaintiff's relocation. To the contrary, plaintiff's e-mail correspondence to Mr. DeCicco implies that the relocation assistance was given to her as an inducement to accept employment. Mr. DeCicco's e-mail responses do not contradict or deny this. [*See* Motion Exhibit F.] In short, defendant has not met its burden to submit evidence, in admissible form, sufficient to raise an issue of fact regarding its entitlement to an offset.

With respect to plaintiff's claims under the Labor Law, the Court cannot make a determination in plaintiff's favor. Plaintiff has not provided the Court with a memorandum of law or sufficient facts to demonstrate, *prima facie,* that the provisions cited are applicable, or that the procedural pre-requisites, if any, have been met. The Court cannot rely upon the conclusory assertions of counsel, particularly since counsel has incorrectly cited **New York State Labor Law § 198 (1-c)**, a section which does not exist in the consolidated laws published by McKinneys or (on-line) by Westlaw.

Based upon the foregoing, it is

ORDERED, that plaintiff's motion for summary judgment is **granted in part**, to the extent of awarding plaintiff $20,550 for services rendered. Plaintiff may submit immediate judgment for that amount plus interest, on notice to defendant, within 60 days

of entry of this Order. In doing so, plaintiff shall be deemed to have relinquished her Labor Law claims. Alternatively, the award for services rendered may be held in abeyance, and plaintiff may submit a properly supported motion for summary judgment on her Labor Law claims within 60 days of entry of this Order. In the interest of fairness, however, if the Court gives plaintiff an opportunity to cure the deficiencies of her instant motion, it shall also give defendant an opportunity to cure the deficiencies of its opposition, and reconsider the question of an offset for relocation expenses upon proper proof. If plaintiff fails to submit either a judgment or a motion pursuant to the above, within 60 days of entry of this Order or any duly authorized adjournment thereof, the action shall be deemed abandoned, unless good cause for the delay is shown.

This constitutes the Order of the Court.

Dated: February 26, 2010

J.S.C.