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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. *Justice* PART 8

Index Number : 107859/2009
KRUTIANSKY, ROBERTO
VS.
HUMES, WILLEM
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 107859/09
MOTION DATE 11/23/10
MOTION SEQ. NO. 004
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE ...
WITH THE ATTACHED MEMORANDUM DECISION

Dated: 3/1/11

HON. JOAN M. KENNEY J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if ~~appropriate~~: ☒ DO NOT POST ☐ REFERENCE

☒ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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ROBERTO KRUTIANSKY,

Plaintiff,

- against -

WILLEM HUMES, GREYLOCK CAPITAL ASSOCIATES, LLC, GREYLOCK CAPITAL ADVISERS, LLC, and GREYLOCK CAPITAL MANAGEMENT, LLC,

Defendants.

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DECISION AND ORDER
Index: 107859/09
Cal.:11/23/10
Mot. Seq. No.: 004

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment:

Papers	**Numbered**
Notice of Motion, Affirmation, Exhibits and Memo in Support	1-11
Affirmation in Opposition, Exhibits and Memo in Opposition	12-18
Reply Affirmation, Exhibits & Memorandum.	19-22

Appearances

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In this breach of contract action, defendants Greylock Capital Associates, LLC, Greylock Capital Advisers, LLC, and Greylock Capital Management, LLC. (collectively, Greylock) and defendant Willem Humes (Humes), seek an order, pursuant to CPLR 3212, dismissing the complaint.

FACTUAL BACKGROUND

Plaintiff Robert Krutiansky seeks damages against defendants Greylock and Greylock's President, Humes, for a breach of an oral agreement. In his complaint, plaintiff claims he is entitled to a bonus of $702,962.00 for the second half of 2007 (first cause of action) and a bonus of $350,000.00 for 2008 (second cause of action) based on an oral agreement between plaintiff and defendants (*see* Ex. "1" attached to notice of motion). Defendants answered the complaint. Following plaintiff's filing of his Note of Issue on October 1, 2010, defendants interpose the instant motion seeking dismissal of the complaint.

It is undisputed that plaintiff was hired as an at-will employee for Greylock (*see* Ex "4"

attached to notice of motion; Roberto Krutiansky Deposition Transcript, pp. 23-24, LL: 17-16). Plaintiff received a fixed salary and was also eligible for two forms of incentive compensation referred to by the parties as either a "Bonus" and "Profit Sharing" (collectively, bonus).

On December 12, 2007, Greylock issued a bonus to plaintiff in the amount of $156,453.00 for the first half of 2007 (Ex. "9" attached to notice of motion). This bonus was accompanied by a letter, dated December 12, 2007 (the 2007 bonus letter), which states in pertinent part:

> "Earlier this year, the founders decided to set up a profit sharing pool for the employees of Greylock in recognition of the importance of the contribution of all the members of the team to the success of the Firm.
>
> The enclosed check represents your share of the pool for the first six months of 2007. We thank you for your hard work and look forward to growing the business, and therefore, the profit sharing pool in 2008" (Ex. 9 attached to notice of motion).

At his deposition dated July 22, 2010, plaintiff testified that Humes personally assured that plaintiff would be paid better than ever in the form of a bonus for the latter half of 2007 (*id* at 133, LL:7-10). However, plaintiff agreed that Humes's statements were "non-commital" (*id* at 132, LL: 14-16). Plaintiff further testified that the determination of the bonus amount to be paid to an employee was left to the discretion of Humes (*id* at 41, LL: 5-8). Plaintiff added that there was "no clear transparent formula" in making determinations about bonus amounts (*id* at 46-47, LL: 27-9), and that he viewed such determinations as "arbitrary" (*id* at 40-41, LL: 22-8).

In opposing the instant motion, plaintiff attaches an affirmation from his attorney, a memorandum of law in opposition to the instant motion (opposition memo), segments of plaintiff's deposition transcript, and a document reflecting the percentage of "compensation" plaintiff was to be awarded as a bonus for the latter half of 2007 (the percentage sheet).

The percentage sheet, dated October 30, 2007, states in pertinent part:

> "**COMPENSATION**
>
> Following a meeting between [Mr. Humes], Peter Stiler, Fran Rodilosso and me, it was unanimously agreed to recommend that, subject to your approval, the following payments be made:-
>
> | | |
> |---|---|
> | Ravin Gupta | 5% |
> | Alberto Piedrahita | 4% |
> | Michael Malcolmsom | 3.5% |
> | [Plaintiff] | 3% |
> | Michael Morrill | 3% |

Bruce Hart	2%
Tom Elwood	1%
Dolinda Meeker	1.5%
Leisa Little	1%
Sadis Sequeira	0.5%
CJ Bak	0.5%"

(*see* Ex. 2 attached to opposition papers).

Plaintiff does not specify to whom the "me" or "your" refers to in the percentage sheet. When asked where plaintiff obtained the percentage sheet, he testified that he found the percentage sheet on a computer, and nothing more at his deposition (Ex. 1 attached to Reply Affirmation, Krutiansky Tr., p. 94, LL: 5-7). Although plaintiff assumed that the percentage sheet referred to the latter of half of 2007 (Krutiansky Tr. p. 95, LL: 21-23) and that the percentage sheet was "official" as it contains the signature of Humes and four other Greylock employees (*see id* at 95, LL: 4-5; p. 95, LL: 16-25), Humes testified at his July 23, 2010 deposition that the percentage sheet actually reflected the bonus payments for the first six months of 2007 rather than any decision to pay bonuses for the latter half of 2007 (*see* Ex. 2 attached to Reply Affirmation, Willem Humes Deposition Transcript, pp. 178-179, LL: 23-9).

To further prove that he was promised a bonus for the latter half of 2007, plaintiff attaches emails allegedly sent in September 2008 by two Greylock employees known as "Rudy Amoresano" and "Ajata Mediratta" (Amoresano emails) (Ex. "1" attached to opposition papers). It is not clear to his Court whether or not plaintiff, at his deposition, testified as to what employment positions these individuals held at Greylock or how he obtained copies of these emails. A complete copy of plaintiff's entire deposition was not provided to this Court. The first email, sent by "Rudy Amoresano" to "Ajata Mediratta", states in pertinent part:

> "3) If we disbursed to [Mr. Humes], others in the firm are 'partially entitled to theirs'. I say partially as there is no contract with them but there is precedent and there is a clear intention to continue with the allocation." (*See* Ex. 1 attached to opposition papers).

Ajata Mediratta allegedly responded by an email, dated September 29, 2008, that "the balance of the fund will be allocated to the GP and employees, however to the extent that we are oversubscribed from a GP perspective, we intend to prioritize GP allocations based on strategic

benefits to the fund" (*see id*).

Plaintiff also attaches a statement which plaintiff asserts is Greylock's 2007 "allocation of income" (income allocation statement) (Ex. "3" attached to opposition papers). According to the income allocation statement, the "Balance Payable on May 2008" to the "STAFF" is $1,288,763.04.

Neither party attaches a full transcript of either plaintiff's or Humes's deposition testimony. The parties also do not explain how or when plaintiff's employment ended with Greylock.

ARGUMENTS

Defendants contend that this matter should be dismissed because: 1) the 2007 bonus letter and statements made by Humes to plaintiff conclusively shows that no promises or enforceable agreements were made to plaintiff concerning his entitlement to a bonus for the latter half of 2007; 2) an agreement, if any, purportedly made between defendants and plaintiff to issue a bonus was too indefinite to be an enforceable agreement; 3) this Court should disregard the percentage sheet, income allocation statement, and Amoresano emails because they are unauthenticated and inadmissible; 4) there is no triable issue of fact even in view of these documents; and 5) plaintiff has abandoned his second cause of action for a 2008 bonus by failing to oppose or dispute defendants' argument to dismiss same.

Plaintiff argues that summary judgment dismissing the complaint should be denied because: 1) the percentage sheet, income allocation statement, the Amoresano emails, Humes' assurances that plaintiff would be paid a bonus for the latter part of 2007, and the 2007 bonus letter itself, raise triable issues of fact as to the existence of an oral agreement to pay plaintiff a bonus for the latter half of 2007; 2) the Amoresano emails demonstrate defendants' belief that since Humes was issued a bonus for the latter half of 2007, plaintiff is similarly entitled to his; 3) plaintiff was entitled to a percentage of the "Balance Payable on May 2008" from the income allocation statement since it is undisputed that he was part of the "STAFF"; and 4) further discovery is warranted because defendants have information in their control which may preclude dismissal of this action.

DISCUSSION

On a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The party opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate an acceptable excuse for his failure to meet the requirement of tender in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Although it is not this Court's role to pass upon issues of credibility on a summary judgment motion (*see Mirchel v. RMJ Securities Corp.*, 205 AD2d 388, 390 [1st Dept 1994]), "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*see Zuckerman*, 49 NY2d at 562). Indeed, "a shadowy semblance of an issue is, like conjecture, surmise, or suspicion, insufficient to defeat a motion for summary judgment" (*see Brecher v Mutual Life Ins. Co. of New York*, 120 AD2d 423, 426 [1st Dept 1986]).

As a general rule, an employee has no enforceable right to payment under a discretionary compensation or bonus plan (*Gruber v J.W.E. Silk, Inc.*, 52 AD3d 339, 340 [1st Dept 2008]). Although employees in this State may enforce an initial agreement to pay an annual bonus where such bonus constitutes "an integral part of plaintiff's compensation package" (*see Mirchel*, 205 AD2d at 389), when there is no written agreement between the parties, the plaintiff must establish that the parties, by their words and/or conduct, mutually assented to the terms of an agreement where such terms were sufficiently definite (*see Charles Hyman, Inc. v Olsen Indus., Inc.*, 227 AD2d 270, 275 [1st Dept 1996]). Sufficient definiteness is required so that a court can ascertain the agreement's terms for the purpose of determining whether it has been breached and avoid an imposition of contractual obligation under circumstances where intent to conclude a binding agreement is not present (*Allied Sheet Metal Works, Inc. v Kerby Saunders, Inc.*, 206 AD2d 166, 169-170 [1st Dept 1994]). Therefore, an objective test is applied to determine the issue of whether the parties gave their assent to be bound by such an agreement (*see TAJ Intern. Corp. v Edward G. Bashian & Sons,*

Inc., 251 AD2d 98, 100 [1st Dept 1998]).

With respect to plaintiff's second cause of action for a bonus in 2008, plaintiff did not address defendants' argument that the parties never entered into an agreement to award plaintiff a 2008 bonus. As such, plaintiff's second cause of action is hereby dismissed, without written opposition.

With respect to plaintiff's first cause of action seeking a bonus for the second half of 2007, defendants make a *prima facie* showing that the parties did not have an oral agreement to issue a bonus to plaintiff for the latter half of 2007. Namely, plaintiff agreed at his deposition that Hume's promises of a bonus were "non-commital" and that said bonus was left to the complete discretion of the defendants including *inter alia* Humes. Indeed, plaintiff's recollection that he would be "paid at some point" and that it would be"better than ever" were nothing more than "expressions of defendants' intention to somehow reward plaintiff but [not a commitment] to a specific arrangement" (*see Ross v. F.E.I., Inc.*, 150 AD2d 228, [1st Dept 1989] [defendant's alleged promise that a payment package "will be there for [plaintiff]" in return for defendant's usage of plaintiff's invention deemed insufficient to establish an oral contract]). Plaintiff's own testimony clearly demonstrates that the terms, such as the condition precedent, if any, to plaintiff's entitlement of the bonus, timing of payment, and the actual amount of the bonus, were indefinite (*see Hecht v Helmsley-Spear*, Inc., 65 AD3d 951, 951 [1st Dept 2009]). Indeed, plaintiff admits that he had only an inkling as to how such "arbitrary" bonus amounts were calculated (*see* Ex. "5" attached to notice of motion; Krutiansky Tr., p., 194, LL: 8-16).

Plaintiff fails to raise a genuine disputed fact in the form of admissible evidence in opposition to the instant motion. Specifically, plaintiff relies on the 2007 bonus letter, percentage sheet, income allocation statement, and Amoresano emails to support his claim of entitlement to a bonus for the second half of 2007. Such reliance by plaintiff is misplaced. The language in the 2007 bonus letter only mentions "growing the bonus pool in 2008" without the slightest reference to a bonus pool for the latter half of 2007. As noted above, plaintiff's second cause of action claiming an entitlement to a 2008 bonus is dismissed.

Although an attorney affirmation alone may be sufficient to oppose summary judgment when the argument is based on documentary evidence, in this case an affidavit from someone with personal knowledge of the facts was essential to defeating the within motion application to dismiss the complaint (*Dillman v Internote USA Inc.*, 150 AD2d 223, 223 [1st Dept 1989]). Notably, a proper foundation for the documents upon which plaintiff relies, including the percentage sheet, income allocation statement, and Amoresano emails, have not been established and therefore are inadmissible for purposes of defeating the instant summary judgment motion (*see Rue v Stokes*, 191 AD2d 245, 246 [1st Dept 1993]). Again, having failed to submit a complete copy of plaintiff's deposition transcript, there is no way for the Court to conclude that a proper foundation was ever presented on the admissibility of these documents.

Even if this Court were to consider said documents, plaintiff only proffered a "shadowy semblance of an issue" to support his claim of entitlement to a bonus for the latter half of 2007. Outside of presumptions and speculations, plaintiff admits in his deposition that he knows nothing about the percentage sheet. Moreover, plaintiff's unsupported assertions with regard to the income allocation statement cannot raise a triable issue of fact (*Grullon v City of New York*, 297 AD2d 263-64 [1st Dept 2002]). With respect to the Amoresano emails, neither party has identified either Mr. Amoresano or Mr. Mediratta's work title within Greylock or their authority to enter into binding agreements on behalf of Greylock. The Amoresano emails, dated in 2008 (and this Court is left guessing as to when plaintiff's employment actually ended), make no mention of a bonus for 2007 or even, of plaintiff himself.

Finally, since plaintiff attested in his Certificate of Readiness that "[d]iscovery proceedings now known to be necessary are completed" and that "there are no outstanding requests for discovery", this Court finds plaintiff's argument for further discovery to be without merit (*see also Melcher v City of New York*, 38 AD3d 376, 377 [1st Dept 2007]).

Accordingly, it is

ORDERED that defendants Greylock Capital Associates, LLC, Greylock Capital Advisers, LLC, and Greylock Capital Management, LLC. and Willem Humes's motion for summary judgment

is granted in its entirety; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of Greylock Capital Associates, LLC, Greylock Capital Advisers, LLC, and Greylock Capital Management, LLC. and Willem Humes and against plaintiff, Roberto Krutiansky, dismissing the complaint..

Dated: March 1, 2011

E N T E R

Hon. Joan M. Kenney
J.S.C.