SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 654072/2015
YUN CAPITAL, LLC
vs.
JUDGE, JR., MARTIN
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/17/18
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 17, 34-65
Answering Affidavits — Exhibits _____ No(s). 66
Replying Affidavits _____ No(s). 96

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

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

Dated: 5/23/18

SHIRLEY WERNER KORNREICH, 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 54

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YUN CAPITAL, LLC,

Index No.: 654072/2015

Plaintiff,

DECISION & ORDER

-against-

MARTIN JUDGE, JR. and THE JUDGE GROUP, INC.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

Plaintiff Yun Capital, LLC moves, pursuant to CPLR 3212, for partial summary judgment against defendants Martin Judge, Jr. (Judge) and The Judge Group Inc. (Group). Seq. 001. Defendants oppose and move for summary judgment against plaintiff. Seq. 002. Plaintiff opposes. The parties' motions are denied for the reasons stated below.

I. Factual Background & Procedural History

Unless otherwise indicated, the following facts are undisputed.[1]

Plaintiff, an LLC wholly owned and controlled by Jung Yun, "provides business, investment banking and financial consulting services." Dkt. 36 at 4. Group, a Delaware corporation, is a global IT staffing firm run by Judge. Judge owns a minority interest in Group. Judge, who also owned an arena football team in Philadelphia, became interested in forming an arena football league in China. He sought to do so through Ganlan Media International (GMI),

[1] *See* Dkt. 22 (stipulation of undisputed facts). References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing system (NYSCEF).

an entity owned by both Judge and Group.[2] To start a football league in China, government approval is required. Defendants had not yet obtained approval from the Chinese government by the end of January 2014.

Yun and Judge met at the Super Bowl on February 1, 2014. "Judge stated that he was looking to raise money for arena football in China," and Yun and Judge discussed the possibility of Yun helping him do so. *See* Dkt. 22 at 2. Three weeks later, in a letter agreement dated February 22, 2014, plaintiff and Group (and one of its subsidiaries) agreed that plaintiff would exclusively, for one year with the possibility of renewal, provide advisory services in connection with Group's efforts to obtain financing for its Chinese football league in exchange for commissions based on funds raised. *See* Dkt. 25 (the Letter Agreement). The Letter Agreement is not the subject of this action.[3] Rather, as discussed below, an alleged separate oral agreement between plaintiff and defendants is in contention.

According to Yun:

> In May 2014, Judge requested that [plaintiff]—specifically, myself and consultant Dixon Chen—travel with him to China to meet with the Chinese Rugby Football Association ("CFRA"). Yun Capital joined a meeting with Judge and representatives from GMI with CFRA Chairman Li. After that meeting, Judge and GMI President David Wu fought regarding what Judge saw as Wu's mismanagement of operations of GMI in China. Wu and others within GMI had been delaying pursuit of the necessary license from the Chinese government that would allow Judge and [Group] to establish the arena football league, while still accepting Judge and [Group's] operational funds. Following that argument, Judge, on behalf of [Group] and its subsidiaries, **agreed with [plaintiff]** that the latter would assume the management of GMI in order to obtain the necessary licensure. [Plaintiff] would provide services from May 5, 2014 until approximately December 1, 2014. Judge, on behalf of [Group], **agreed to pay [plaintiff]** $1.2 million for that May-December 2014 time period, in addition to any expenses

[2] Through a complicated corporate structure, the specifics of which are irrelevant to this motion, GMI is a subsidiary of Group. *See* Dkt. 22 at 1-2.

[3] Plaintiff obtained two term sheets, both of which were rejected by Group. *See* Dkt. 34 at 2.

> incurred and a $300,000 bonus when the teams played the first professional game. This **agreement** was **separate** and unrelated to the [Letter Agreement], which was contingent on [Group] accepting an offer. Based upon **reasonably relying** upon the word of Judge—a self-made millionaire with international holdings and assets—that he would honor these terms, **I relocated to China from May through December 2014**. **Dixon Chen similarly relocated, through February 2015**. Judge transmitted a memorandum to all GMI employees naming me as "the new CEO and Mr. Chen as co-president, in charge of legal, financial, and marketing."

Dkt. 34 at 2 (emphasis added; some paragraph breaks, numbering, and citations omitted); *see* Dkt. 50 (5/25/14 memo by Judge, naming Yun "CEO of GMI").

Yun claims that plaintiff and its staff performed over 16,000 hours of work for Judge and [Group] managing GMI and setting up the league." *See* Dkt. 34 at 3.[4] "As a result of [plaintiff's] efforts and contacts, the Chinese government ultimately issued the license for Judge and [Group] to establish the Chinese Arena Football League in July 2014." *Id.* at 3-4. Thus, in less than half a year, plaintiff obtained the required regulatory approval for the league Judge wanted to form in China. Yun avers that "[a]fter obtaining the license, I drafted and sent to Judge a proposed agreement outlining the terms that we had discussed." *Id.* at 4, citing Dkt. 31 (proposed consulting agreement providing for $1.2 million in compensation plus $300,000 bonus on the date the first football game is held in 2015). The $1.2 million amount is consistent with the alleged oral agreement discussed above.

The emails in the record between Yun and Judge indicate they negotiated the terms of this consulting agreement during the summer of 2014. Notably, in emails sent on July 7, 2014, Judge told Yun that she had "done a great job" and was fine with the $1.2 million, but not the

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[4] Yun details the work in his affidavit, which included, *inter alia*, accounting, budgeting, human resources, and investment banking services. *See* Dkt. 34 at 6-15. Plaintiff's consultant, Chen, also submitted an affidavit detailing his services. *See* Dkt. 35. Defendants have not refuted the provision of these services, which surely were not gratuitous.

$300,000 bonus. *See* Dkt. 51. Later that month, Judge said he would sign the agreement, but that Group could not be a party. *See* Dkt. 52. After Yun expressed concern that GMI did not have the money to pay her, Judge said he would personally guaranty payment. *See id.* However, the parties never executed the agreement.

Later that year, plaintiff submitted to Judge a $1 million invoice dated December 5, 2014. *See* Dkt. 58.[5] In a December 12, 2014 email, Judge, on behalf of Group, said he would pay the invoice by "mid to end of January." *See* Dkt. 59. He did not. Yun followed up on February 3, 2015, and Judge responded, saying that he was offering $500,000 in 30 days, but only if he raised money. *See* Dkt. 60. Yun sent the following response on February 19, 2015:

> I think this is quite unfair. You needed help in China, and Dixon and I gave up our lives in NY to move to China to help you execute and deliver for your business. And per our agreement, we completed our part of the deal for you in December and you agreed to pay us in January. I think it is only fair that you keep to your promise. If you are unable to make the full payment, please try and make a 50% payment, so that we know you are good for the promise.

Id. Judge did not pay.

Yun followed up on April 1, 2015. *See* Dkt. 61. Judge responded on April 2, stating that while AFK (an LLC owned 59.5% by Judge) did not have the money, it would "by June." *See id.* On April 3, Yun thanked him, but reiterated that she has been waiting six months to get paid and requested a good faith $200,000 partial payment. *See id.* Judge still did not pay.

On December 8, 2015, plaintiff commenced this action by filing a complaint with two causes of action: (1) breach of an oral agreement for the payment for $1.2 million, on which only $200,000 was paid; and, in the alternative, (2) quantum meruit. *See* Dkt. 1. Defendants filed an

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[5] Yun claims the invoice was in the amount of $1.2 million, but the invoice clearly was only for $1 million. *Compare* Dkt. 34 at 5, *with* Dkt. 58 at 1. However, according to plaintiff, Judge paid $200,000 of plaintiff's expenses, which perhaps explains this differential. *See* Dkt. 34 at 5.

answer on February 10, 2016. *See* Dkt. 6. After the completion of discovery, plaintiff filed a Note of Issue on August 23, 2017. *See* Dkt. 15. The parties filed the instant motions for summary judgment on October 23, 2017, and the court reserved on the motions after oral argument. *See* Dkt. 97 (3/20/18 Tr.)

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

There are material questions of fact regarding the alleged oral agreement. The court rejects defendants' contention that the Letter Agreement governs, as that agreement, by its terms,

only concerns plaintiff's efforts to raise money for the Chinese football venture. It does not address the myriad services provided by Yun when she moved to China to become GMI's CEO.[6] Based on plaintiff's allegation that the parties agreed plaintiff would be paid $1.2 million for these services (which are extensively detailed in plaintiff's affidavits), and the apparent recognition of such an agreement by Judge in his emails, defendants have not disproven the existence of the alleged oral agreement. *See Vega v Restani Const. Corp.*, 18 NY3d 499, 503 (2012) (facts must be viewed in light most favorable to party opposing summary judgment).

Nonetheless, there are questions of fact as to whether both Judge and Group are parties to that alleged agreement. While Judge claims he did not want Group to be a party to the proposed written consulting agreement, he took that position months **after** plaintiff was performing its work in China. That plaintiff initially inserted Group as a proposed counterparty in the agreement suggests the parties understood Group to be part of their agreement.

Moreover, Judge's July 7, 2014 email in which he agrees to personally be liable for plaintiff's fees raises a question of fact as to whether he was a party to the alleged oral agreement. To the extent Judge relies on the statue of frauds, that reliance is misplaced. While an agreement to guaranty the debt of another must be in writing,[7] plaintiff alleges that Judge personally agreed to be a party to the alleged oral agreement. But even if Judge were only

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[6] There is no reason to assume that since GMI received the benefit of plaintiff's services, that Judge and Group did not agree to pay for plaintiff's services. GMI apparently was cash poor, and Judge and Group benefited from plaintiff's services due to their indirect ownership interest in GMI. A jury could find it reasonable that Judge and Group would agree to pay plaintiff to provide services to GMI.

[7] General Obligations Law § 5-701(a)(2); *see Midland Steel Warehouse Corp. v Godinger Silver Art Ltd.*, 276 AD2d 341, 343 (1st Dept 2000).

considered a guarantor, his emails qualify as writings which "satisfy the requirements of the statute of frauds." *Josephberg v Crede Capital Group, LLC*, 140 AD3d 629 (1st Dept 2016).

Alternatively, plaintiff is entitled to proceed with its quantum meruit claim. *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 439 (1st Dept 2014), quoting *Zuccarini v Ziff-Davis Media, Inc.*, 306 AD2d 404, 405 (2d Dept 2003) ("Where, as here, there is a bona fide dispute as to the existence of a contract … a plaintiff may proceed upon a theory of quasi contract as well as contract, and will not be required to elect his or her remedies"); *see Kramer v Greene*, 142 AD3d 438, 441 (1st Dept 2016) (same); *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 528 (1st Dept 2014) ("the rule for a writing establishing quantum meruit claims is less exacting, requiring only that the writing 'evidenced the fact of plaintiff's employment [by defendant] to render the alleged services.'") (citation omitted). That the parties previously entered into the Letter Agreement does not bar plaintiff's quantum meruit claim. The scope of services governed by the Letter Agreement (raising capital) is different from those governed by the alleged oral agreement (Yun serving as CEO and plaintiff's 16,000 hours of work running the company). Defendants do not cite authority for the proposition that the existence of a prior written agreement governing a *different* subject matter bars a claim in quasi contract for *different* work. *See Clark-Fitzpatrick, Inc. v Long Island R.R Co.*, 70 NY2d 382, 388 (1987) ("The existence of a valid and enforceable written contract governing a **particular subject matter** ordinarily precludes recovery in quasi contract for events arising out of the **same subject matter**.") (emphasis added). If the finder of fact concludes that there was no oral agreement, plaintiff may seek to prove the value of its work and recover accordingly. That said, since defendants dispute the scope and reasonableness of the invoiced work, plaintiff is not entitled to summary judgment on this claim. Accordingly, it is

ORDERED that the parties' motions for summary judgment are denied; and it is further

ORDERED that a telephone conference will be held on June 25, 2018 at 3:00 pm.

Dated: May 23, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C