SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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TALENTRISE, INC. F/K/A BORDERLESS EXECUTIVE SEARCH, INC. AN ALERON COMPANY

Plaintiff,

- v -

AKARI THERAPEUTICS, PLC,

Defendant.

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INDEX NO. 157499/2019

MOTION DATE 02/13/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

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

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's cross motion for summary judgment is denied; and it is further

ORDERED that counsel are directed, by NYSCEF, to submit a preliminary conference order in the standard form on September 22, 2020.

DECISION

In this action for breach of contract and account stated, plaintiff Talentrise, Inc., f/k/a Borderless Executive Search, Inc., an Aleron Company, moves for summary judgment on the

complaint. Defendant Akari Therapeutics, LLC cross-moves for summary judgment dismissing the complaint.

For the reasons set forth below, both motions are denied.

Facts

Plaintiff alleges that, in 2017, David Horn Solomon (Solomon), the then-CEO of defendant, contacted plaintiff, and requested plaintiff's services to find a candidate for the Head of Regulatory Affairs position at defendant's company (affidavit of Andrei Costache [NYSCEF Doc No. 9], ¶ 2).

Shortly thereafter, plaintiff sent Solomon a proposal (the Proposal) for the search (Costache aff, ¶ 3; see also Proposal [NYSCEF Doc No. 8]). According to the Proposal, in consideration for the services rendered by plaintiff, defendant would pay 30% of the total cash compensation for the first year of employment of the selected candidate. The Proposal estimated that defendant would be obligated to pay a consulting retainer fee of $87,750.00, which would be adjusted at the end of the assignment. The Proposal stated that the retainer fee would be paid in installments, and the terms of payment were net cash 30 days. The Proposal also stated that "[t]he retainer is due in full at the end of the assignment, whether or not a candidate introduced by Borderless has been hired" (Proposal at 8).

Plaintiff alleges that, on or about December 20, 2017, Solomon verbally agreed to the proposal (Costache aff, ¶ 5). Plaintiff

further alleges that, after defendant's acceptance of the proposal, it launched a search and committed three people to the assignment, who worked actively on the search from December 2017 to June 2018 (id., ¶ 6). Costache alleges that he worked with Solomon and kept him apprised of all the work and progress being made with the search (id., ¶ 7).

In March 2018, plaintiff emailed defendant an invoice for $34,250.00, representing the first installment for the services rendered (see NYSCEF Doc No. 14). Plaintiff also notified defendant that, even though defendant had verbally accepted the proposal, it had yet to e-sign the proposal (Costache aff, ¶ 8; see 3/4/18 email exchanges [NYSCEF Doc No. 13]). Plaintiff alleges that, on March 14, 2018, Stacy Lee (Lee), acting as agent for defendant, informed plaintiff that the proposal would be e-signed by Solomon later that day (Costache aff, ¶ 9; see 3/14/18 email exchanges).

According to plaintiff, it exhausted time and resources on the search, and identified and contacted over 150 potential candidates and sources for the Global Head of Regulatory Affairs role and presented several candidates to defendant for two different positions (Costache aff, ¶¶ 11-14).

At a certain point, there was a management change in defendant, and on June 27, 2018, Clive Richardson (Richardson),

the new and current CEO/COO of defendant, requested that plaintiff put the search on hold (id., ¶ 16).

Plaintiff alleges that it has not been compensated for its services rendered, and that it is currently owed $34,250.00 from defendant, demand for which had been made (id., ¶ 17; see Invoice).

However, defendant sharply disputes plaintiff's version of the events. Defendant admits that, in December 2017, Solomon communicated with Costache about a potential future request for plaintiff to conduct a search for an individual to serve as the Global Head of Regulatory Affairs at defendant (affidavit of Clive S. Richardson [NYSCEF Doc No. 19], ¶ 3), and that on or about December 6, 2017, Costache sent Solomon the Proposal for such a search for his review and consideration (id., ¶ 4). However, defendant alleges that Solomon did not agree to the Proposal as presented (id., ¶ 5). Rather, according to defendant, Solomon was open to Costache voluntarily presenting candidates for this and other potential positions at defendant's company as an incentive for defendant to potentially agree in the future to allow plaintiff to proceed to try and find a permanent placement for defendant (id., ¶ 6). Defendant alleges that it never entered into a contractual agreement of any kind with plaintiff for such services, nor did plaintiff ever place any candidates with defendant (id.).

Defendant admits that, in early 2018, it met with several candidates introduced by plaintiff (see Costache aff, ¶ 13). Defendant further admits that, during the first few months of 2018, including, but not limited to March 18, 2018, Solomon was in communication with Costache, but alleges that it never entered into any verbal or written agreement with plaintiff (Richardson aff, ¶ 7).

Defendant also admits that, in March 2018, Costache sent emails to Solomon and Lee, Solomon's administrative assistant, requesting that Solomon e-sign and thereby accept the Proposal, and that Lee responded to Costache in sum that Solomon would be in the office later that day, and that she would have the Proposal signed by the end of the day (Costache aff, ¶ 10). However, defendant asserts that Lee's indication that Solomon would be in the office later, and that she would have it (i.e., the Proposal) signed by the end of the day, does not commit Solomon to do so.

Defendant submits Lee's affidavit in which she alleges: "I was not an officer of Akari. I did not have the ability to instruct anyone to sign documents or enter into contracts. Likewise, I did not personally have the authority to enter into contractual arrangements such as the Proposal that is at issue in this action. In my email response to Mr. Costache on March 14, 2018, I was simply informing Mr. Costache that Mr. Solomon

would be in the office later that day and I would endeavor to ask him to sign any document that needed to be signed" (Lee aff [NYSCEF Doc No. 20], ¶ 4). Lee further alleges that she was not a party to the verbal discussions between Costache and Solomon, and that thus, she had no way of knowing whether Solomon was willing to sign the Proposal or not (id. ¶ 5).

Richardson, who succeeded Solomon as CEO of defendant, also talked with Costache regarding the Proposal. Richardson alleges that, on or about June 27, 2018, he informed Costache that: (1) defendant never entered into any contractual agreement with plaintiff (verbal or written); (2) the work plaintiff had done over the past few months in introducing candidates was purely voluntary on its part, and was merely an incentive for defendant to potentially agree in the future to allow plaintiff to proceed to try and find a permanent placement for defendant; and (3) defendant did not owe plaintiff any money for those voluntary efforts (Richardson aff, ¶ 9). Richardson further alleges that defendant never signed the Proposal, nor any other related written agreement with plaintiff, and that plaintiff never placed any employee with defendant (Richardson aff, ¶ 6).

Discussion

"'[T]he proponent of a summary judgment motion 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'" (Ayotte v Gervasio, 81 NY2d 1062, 1062 [1993] [citation omitted]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (Sherman v New York State Thruway Auth., 27 NY3d 1019, 1021 [2016]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (Winegrad, 64 NY2d at 853; see also Lesocovich v 180 Madison Ave. Corp., 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; CitiFinancial Co. [DE] v McKinney, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment is a drastic remedy that may be granted only when it is clear that no triable issues of fact exist (Matter of New York City Asbestos Litig., 33 NY3d 20, 25 [2019]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]), and "should not be granted where there is any doubt as to the existence of a triable issue" of fact (American Home Assur. Co. v Amerford Intl. Corp., 200

AD2d 472, 473 [1st Dept 1994]; accord Forrest v Jewish Guild for the Blind, 3 NY3d 295, 314 [2004]).

Moreover, "[i]t is not the court's function on a motion for summary judgment to assess credibility" (Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] is ruling on a motion for summary judgment or for a directed verdict" (Anderson v Liberty Lobby, Inc., 477 US 242, 255 [1986]).

Here, both plaintiff and defendant have failed to establish prima facie entitlement to summary judgment as a matter of law. Plaintiff alleges a breach of contract claim under the theory that the Proposal it provided to defendant is a valid contract under New York law. The common law elements of a cause of action for breach of contract are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010], accord Markov v Katt, 176 AD3d 401, 401-402 [1st Dept 2019]). "'To form a valid contract under New York law, there must be an offer, acceptance, consideration, mutual assent and intent to be bound'" (Register.Com, Inc. v Verio, Inc., 356 F3d 393, 427 [2d Cir 2004] [citation omitted]). Importantly, the existence of an

enforceable and binding contract is necessarily the prerequisite to establishing a claim for breach of contract (Clalit Health Servs. v Israel Humanitarian Found., 385 F Supp 2d 392, 397 [SD NY 2005] [applying New York law]; see e.g. Reid v Ernst & Young Global Ltd., 13 Misc 3d 1242[A], 2005 NY Slip Op 52998[U], *4 [Sup Ct, NY County 2005] [dismissing breach of contract claim "because Reid has failed to demonstrate that the parties entered into a binding contract"]).

Plaintiff has not met its burden in establishing a prima facie case for breach of contract, as it fails to present admissible evidence as to defendant's mutual assent and intent to be bound by the terms of the Proposal or proving the existence of a legally enforceable written or verbal contractual agreement.

First, plaintiff fails to demonstrate the existence of any written agreement between plaintiff and defendant. It is uncontested that the purported written agreement is titled a "Proposal," and that it was never signed by Solomon, nor any other employee of defendant (see generally Costache aff; Richardson aff, ¶ 5).

Although plaintiff contends that it had a verbal agreement with Solomon, defendant's former CEO, plaintiff's only evidence of the purported verbal agreement is a one-sided, self-serving

statement from Costache, an obviously self-interested employee, that such a verbal agreement exists (see Costache aff, ¶¶ 5-6). "On a motion for summary judgment . . . self-serving statements of an interested party which refer to matters exclusively within that party's knowledge create an issue of credibility which should not be decided by the court but should be left for the trier of facts" (Sacher v Long Is. Jewish-Hillside Med. Ctr., 142 AD2d 567, 568 [2d Dept 1988]; accord Mills v Niagara Frontier Transp. Auth., 163 AD3d 1435, 1438 [4th Dept 2018]; Nahar v Gulati, 33 Misc 3d 1233[A], 2011 NY Slip Op 52230[U], *1 [Sup Ct, NY County 2011]). Indeed, "[i]f everything or anything had to be believed in court simply because there is no witness to contradict it, the administration of justice would be a pitiable affair" (Punsky v City of New York, 129 App Div 558, 559 [2d Dept 1908]). Accordingly, Costache's self-serving statement is insufficient to establish plaintiff's "prima facie entitlement to summary judgment as a matter of law" (see e.g. Quiroz v 176 N. Main, LLC, 125 AD3d 628, 631 [2d Dept 2015]).

Likewise, defendant also fails to demonstrate prima facie entitlement to summary judgment dismissing the breach of contract claim. Defendant contends that, because Richardson alleges that neither Solomon or any other employee of defendant, including himself, ever agreed to be bound by the Proposal without formally executing it, under New York law, neither party

is bound by its terms, and neither party may be held liable for any breach of its terms (see defendant's memorandum of law [NYSCEF Doc No. 18], at 7, citing Kolchins v Evolution Markets, Inc., 31 NY3d 100, 107 [2018] ["'if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed'"] [citation omitted]).

However, this argument is supported only by Richardson's equally self-serving affidavit, which, like Costache's affidavit, does nothing more than create an issue of credibility (see Mills, 163 AD3d at 1438, Sacher, 142 AD2d at 568; Nahar v Gulati, 33 Misc 3d 1233[A], 2011 NY Slip Op 52230[U], at *1). Moreover, it is clear that the conflicting affidavits of Richard, Costache and Lee, as well as the fact that Costache had tried unsuccessfully for three months to obtain Solomon's signature, raise triable issues of fact as to whether defendant verbally agreed to the Proposal, and whether plaintiff and defendant entered into a legally enforceable contract.

These issues of fact require denial of the motion (see Staten Is. N.Y. CVS, Inc. v Gordon Retail Dev., LLC, 57 AD3d 760, 763 [2d Dept 2008] ["(t)he Gordon defendants failed to establish their entitlement to judgment as a matter of law in connection with (the breach of contract) cause of action since

their submissions revealed the existence of triable issues of fact with respect to the existence of a valid contract"]; Mega Contr., Inc. v Ins. Corp. of New York, 37 AD3d 669, 669-700 [2d Dept 2007] [court denied motion for summary judgment dismissing breach of contract claim as there were "triable issues of fact regarding the existence of a valid contract"]; Wilmoth v Sander, 259 AD2d 252 [1st Dept 1999] [fact issues regarding existence of alleged oral agreement precluded summary judgment on breach of contract claim]; see also Marks v Macchiarola, 204 AD2d 221, 224 [1st Dept 1994] [same]).

Plaintiff also moves for summary judgment on its second cause of action for an account stated. Plaintiff argues that, even if the court finds that there was no enforceable contract, it "has established its prima facie case for an account stated, which Defendant has not rebuffed" (plaintiff's reply affirmation [NYSCEF Doc No. 21], ¶ 33).

"An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other" (Chisholm-Ryder Co. v Sommer & Sommer, 70 AD2d 429, 431 [4th Dept 1979]). "An agreement may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time because the party receiving the

account is bound to examine the statement and object to it, if objection there be. Silence is deemed acquiescence and warrants enforcement of the implied agreement to pay" (id.; see Morrison Cohen Singer & Weinstein, LLP v Waters, 13 AD3d 51, 52 [1st Dept 2004]).

Plaintiff contends that it is entitled to summary judgment on its account stated claim because defendant received the invoice, and never objected to it (see Rosenberg Selsman Rosenzweig & Co., LLP v Slutsker, 278 AD2d 145, 145 [1st Dept 2000] ["having received and retained the invoice without objection for a reasonable time, defendant's silence gave rise to an actionable account stated"]).

However, "the rule that an account which has been rendered and to which no objection has been made within a reasonable time should be regarded as admitted by the party charged as prima facie correct assumes that there exists some indebtedness owing between the parties or an express agreement between the parties to treat the statement as an account stated" (Gurney, Becker & Bourne v Benderson Dev. Co., 47 NY2d 995, 996 [1979] [emphasis in original]). "[A]n account stated cannot be made the instrument to create liability when none exists" (id.; accord DL Marble & Granite Inc. v Madison Park Owner, LLC, 105 AD3d 479, 479 [1st Dept 2013]). "Thus, '[w]here either no account has been presented or there is any dispute regarding the correctness

of the account, the cause of action fails'" (Seneca Pipe & Paving Co., Inc. v South Seneca Cent. Sch. Dist., 83 AD3d 1540, 1541-1542 [4th Dept 2011] [citation omitted]; see e.g. Cohen Bros. Realty Corp. v Mapes, 181 AD3d 401, 405 [1st Dept 2020] ["if plaintiffs are able to prove that the purchase orders were invalid, the account stated claim will fail"]).

Here, plaintiff fails to establish a prima facie cause of action for an account stated as it fails to submit any evidence that there was an express agreement between the parties to treat the invoice as an account stated (see Gurney, 47 NY2d at 996). Moreover, "'[w]hether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible'" (Schwerzmann & Wise, P.C. v Town of Hounsfield [appeal No. 2], 126 AD3d 1483, 1484 [4th Dept 2015] [citation omitted]).

Defendant's contentions that there was no verbal or written agreement between the parties, that plaintiff's work on its behalf was purely voluntary, and merely an incentive for defendant to potentially agree in the future to allow plaintiff to find a permanent placement for defendant, and that defendant did not owe plaintiff any money for those voluntary efforts (see

Richardson aff, ¶ 9), raise issues of fact as to whether there exists some indebtedness owing between the parties.

Accordingly, plaintiff's motion for summary judgment on the account stated cause of action fails (see Redemption Plus LLC v Advantage Entertainment Serv. Corp., 168 AD3d 1010, 1012 [2d Dept 2019] [triable issue of fact as to account stated claim required denial of plaintiff's motion for summary judgment]; Commissioners of State Ins. Fund v Uncle Jack's Steakhouse Inc., 60 Misc 3d 1221[A], 2018 NY Slip Op 51189[U], *2 [Sup Ct, NY County 2018] ["Defendant has sufficiently raised an issue of fact as to whether an account stated existed"]).

The court has considered the remaining arguments and finds them to be without merit.

8/12/2020
DATE

DEBRA A. JAMES, 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