SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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GINA MARINELLI,

Plaintiff,

- v -

RPZL, LLC, LISA RICHARDS and MONICA THORNTON

Defendants.

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INDEX NO. 653398/2018

MOTION DATE 8/26/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to, *inter alia*, recover on a promissory note, and for unpaid wages, the defendants, RPZL LLC, Lisa Richards, and Monica Thornton, move for partial summary judgment dismissing the second, third, and fourth causes of action in the complaint. The plaintiff, Gina Marinelli, opposes the motion. The motion is denied.

Richards and her business partner Thornton approached the plaintiff about investing in their company RPZL, which provides hair extensions and hair styling services. The plaintiff alleges that Richards and Thornton misrepresented to her that RPZL had original patent-pending technology on a machine and process that could bond hair extensions to hair without damaging the hair, had secured a natural hair source that could provide RPZL with inexpensive and high-quality natural hair, and was raising additional capital to open up new store locations nation-wide. The plaintiff further alleges that Richards and Thornton promised her a paid role in the company and a spot on RPZL's advisory board in exchange for her investing $100,000.

On December 4, 2014, the plaintiff made a $100,000 investment in RPZL and the parties signed a promissory note for that amount with a maturity date of December 4, 2017. A side letter agreement entered by the parties on December 5, 2014 further provided that (i) the plaintiff would have the sole discretion as to whether the promissory note would convert to an

equity interest or become due in full at maturity, (ii) the plaintiff would act as a consultant for RPZL, (iii) the plaintiff would have a position on RPZL's advisory board, and (iv) in exchange for her role as a consultant the principal would eb increased by 15% to $115,000 and the plaintiff would receive compensation in the form of a 15% payment of the principal amount on each anniversary of the promissory note until the time of its conversion.

Claiming to have never received any payments despite performing work for RPZL, on December 5, 2017, the plaintiff elected to call for the repayment of the promissory note. No payment was made, even after multiple demands. This action ensued.

In her complaint, the plaintiff alleges four causes of action. The first cause of action is against RPZL for breach of contract under the promissory note. The second cause of action is against all defendants for fraudulent misrepresentation based upon, *inter alia*, Richards' and Thornton's claims regarding RPZL's patent-pending technology and natural hair source. The third cause of action is against RPZL for a violation of Labor Law § 198(1-a) based upon RPZL's failure to pay the plaintiff's salary. The fourth cause of action is against all parties for unjust enrichment based upon RPZL's failure to pay the plaintiff any salary or wages. On that cause of action, the plaintiff seeks to recover $55,000 for work performed for RPZL. The defendants answered the complaint offering general denials and affirmative defenses including that the plaintiff was not employed by RPZL. Discovery was conducted and the Note of Issue was filed on November 15, 2019. The instant motion for partial summary judgment ensued.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v

New York University Medical Center, 64 NY2d 851 (1985); O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

In support of their motion, the defendants submit, *inter alia*, the affidavits of Lisa Richards and Monica Thornton, both averring that the plaintiff was aware that (i) RPZL did not have an advisory board in place at the time she entered into the promissory note, but rather hoped to create one, (ii) that there was not any patent-pending technology on a machine and process that could bond hair extensions to hair without damaging the hair, but that RPZL was contracting with a third-party to try and develop this kind of technology, and (iii) RPZL directly manufactures its own hair extensions, and therefore was not seeking any outside hair sources. Richards' affidavit further avers that the plaintiff was never an employee or consultant for RPZL, and therefore no W-2 or 1099 forms were ever issued to her.

To establish entitlement to summary judgment dismissing a cause of action for fraudulent misrepresentation a defendant must demonstrate 1) that they did not make a misrepresentation or a material omission of fact, 2) that they did not know of the falsity of the misrepresentation or omission, 3) that they did not make the misrepresentation or omission for the purpose of inducing the plaintiff to rely upon it, 4) that the plaintiff did not justifiable rely upon it, or 5) that the plaintiff was not injured due to the misrepresentation or omission. See Gomez-Jimenez v New York Law Sch., 103 AD3d 13 (1st Dept. 2012). The defendants contend that the affidavits of Lisa Richards and Monica Thornton demonstrate that the plaintiff was aware that RPZL did not have an advisory board, patent-pending technology, or an outside hair source, and that the defendants never made any representations otherwise. However, in opposition, the plaintiff argues that these affidavits merely offer conclusory denials of her allegations, and thus only create a triable issue of fact as to whether Richards and Thornton made the alleged misrepresentations to the plaintiff. As it is well settled that a verified pleading is the equivalent of a responsive affidavit for the purposes of a motion for summary judgment, (see Travis v Allstate Ins. Co., 280 AD2d 394 [1st Dept. 2001]; CPLR 105[u]) and a triable issue of fact cannot be resolved on conflicting affidavits, the portion of the defendant's motion seeking summary judgment on the second cause of action is denied. See Brunetti v Musallam, 11 AD3d 280 (1st Dept. 2004).

The defendants' submissions are also insufficient to establish their entitlement to summary judgment dismissing the third cause of action for wage violations under Labor Law § 198(1-a). Labor Law § 198(1-a) provides for a private right of action for an employee's unpaid wages arising from an employer's violation of Article 6 of the Labor Law. See Vega v CM & Assocs. Constr. Mgmt., LLC, 175 AD3d 1144 (1st Dept. 2019) To recover, a plaintiff must first demonstrate that he or she is an employee entitled to protections under Article 6, and then demonstrate a violation thereof. See id. "The critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results." Bynog v Cipriani Group, 1 NY3d 193, 198 (2003); see Hernandez v Chefs Diet Delivery, LLC, 81 AD3d 596 (2nd Dept. 2011).

The defendants contend that they are entitled to dismissal of this claim as the affidavits of Lisa Richards and Monica Thornton demonstrate that the plaintiff was never an employee of RPZL. The affidavits aver that the plaintiff was not hired as an employee of RPZL and never received a W-2 or 1099 from the company. However, the plaintiff alleges in both her verified complaint and her affidavit in opposition to the instant motion, that she reported to Richards and Thornton daily, five days a week, from December 2014 to June 2015, and on a weekly basis thereafter. She further claims that she aided the company on legal matters, brand marketing, sourcing clients, creating promotions, performing market research, and assisting with onboarding employees. The plaintiff also submits a number of email chains where either Richards or Thornton discuss with the plaintiff her work for RPZL. These submissions raise a triable issue of fact as to the defendants exercised a sufficient degree of control over the plaintiff, such that she is an employee under the Labor Law. See Bynog v Cipriani Group, supra.

The defendants also fail to establish their entitlement to summary judgment dismissing the plaintiff's fourth cause of action for unjust enrichment. The defendants argue that this equitable claim is precluded by the breach of contract claim, citing the rule that where a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). However, the rule is inapplicable here since the plaintiff's unjust enrichment claim is distinct and independent from her breach of contract claim, the former seeking $55,000 in wages or salary, and the latter seeking payment of $170,000 on

the promissory note. The defendants proffer no other basis for dismissal of the unjust enrichment claim.

Finally, the plaintiff, in her opposition papers, asks the court to grant her summary judgment on her first cause of action, for breach of contract in regard to the promissory note. However, the plaintiff did not timely move for summary judgment, *i.e*. within 60 days of filing the Note of Issue (see CPLR 3212[a]). Even were the application in her opposition papers deemed timely, it would be denied as procedurally improper as there is no Notice of Cross-Motion. See Phoenix Enterprises Ltd. P'ship v Ins. Co. of N. Am., 130 AD2d 406 (1st Dept. 1987); CPLR 2215. Thus, while the plaintiff may ultimately prevail on the breach of contract claim, summary relief cannot be granted.

Accordingly, it is hereby,

ORDERED that the defendants' motion for partial summary judgment dismissing the second, third, and fourth causes of action is denied; and it is further,

ORDERED that the parties are to contact chambers on or before November 13, 2020 to schedule a settlement conference.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

9/23/2020
DATE

CHECK ONE: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

☐ **GRANTED** ☒ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**