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| <b>Misopoulos v Lovebug Nutrition, Inc.</b>                                                                                                                                                                                    |
| 2020 NY Slip Op 33500(U)                                                                                                                                                                                                       |
| October 21, 2020                                                                                                                                                                                                               |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 653279/2019                                                                                                                                                                                                     |
| Judge: Carol R. Edmead                                                                                                                                                                                                         |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

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

**PRESENT: HON. CAROL R. EDMOND PART IAS MOTION 35EFM**

*Justice*

-----X

IOANNIS MISOPOULOS,

Plaintiff,

- v -

LOVEBUG NUTRITION, INC., ASHLEY HARRIS,  
BENJAMIN HARRIS

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 141, 143, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is

ORDERED that the motion by defendants' Love Bug Nutrition, Inc., Ashley Harris and Benjamin Harris, pursuant to CPLR 3212 (motion seq. 002, for an order granting summary judgment on its counterclaims is denied; and it is further

ADJUDGED AND DECLARED that the motion by defendants pursuant to CPLR 3212, for a judgment declaring the Proposed Settlement Agreement valid and enforceable between plaintiff and defendants, and that under the settlement agreement, plaintiff released defendants from all claims he may have had against any and all defendants, is denied; and it is further

ORDERED that the motion by defendants for an order granting attorneys' fees is denied without prejudice to renew after discovery; and it is further

ORDERED that defendants' request for a stay of discovery is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

## MEMORANDUM DECISION

Defendants move for an order pursuant to CPLR 3212, granting summary judgment on their first counterclaim for a declaratory judgment finding, inter alia, that an April 5, 2018 email is a valid and enforceable agreement (the Proposed Settlement Agreement); and on their second counterclaim for breach of the Proposed Settlement Agreement and attorneys' fees as provided for therein (motion seq. 002). Defendants also move for an order dismissing plaintiff's complaint and for a stay of discovery proceedings pending the determination of the instant motion. The motion is decided as set forth below.

## BACKGROUND FACTS

This is a commercial contract action seeking, among other things, a declaratory judgment enforcing the Proposed Settlement Agreement. Plaintiff, Ioannis Misopoulos, a former director of defendant, LoveBug Nutrition, Inc., (LoveBug) previously filed an action against defendants in the United States District Court for the Southern District of New York, case number 18-cv-869 (SDNY action), for among other things, breach of a board of director agreement (Director Agreement) and breach of fiduciary duty against the individual defendants, Ashley Harris and Benjamin Harris (NYSCEF Doc. No. 130, SDNY action). On March 15, 2018, the SDNY action was dismissed, sua sponte, by the federal court for lack of subject matter jurisdiction (NYSCEF Doc. No. 131, SDNY order dated 3/14/18).

Rather than immediately filing an action in state court, the parties, through counsel, began settlement negotiations via email. On April 5, 2018, in an email between counsel, the parties appeared to have reached a settlement. Approximately one year later, plaintiff commenced the instant action, alleging claims set forth in the SDNY action, as well as a claim for breach of the alleged settlement agreement.

Defendants now move for summary judgment dismissing plaintiff's complaint on the grounds that the parties settled all claims and material terms in the April 5, 2018 email (NYSCEF Doc. No. 126, April 5, 2018 email). The terms set forth in the April 5, 2018 email included an agreement that required defendants to pay plaintiff \$37,500.00 in attorneys' fees, plus \$15,000.00 in compensation in equal installments over six months, and transfer 3% of defendants' stock referenced in the Director Agreement to plaintiff. Furthermore, counsel for the parties indicated in the April 5, 2018 email that plaintiff would formally resign from any and all offices of defendant, Love Bug, and that the parties would negotiate and then execute mutual general releases, a confidentiality clause and a prevailing party attorneys' fees provision, all of which would be set forth in a formal written settlement agreement. Moreover, defendants' allege that plaintiff, in a subsequent email dated August 9, 2018, confirmed that the April 5, 2018 email constituted an enforceable settlement agreement. Plaintiff opposes the motion arguing that triable issues of fact exist which preclude summary judgment, specifically that the April 5, 2018 email did not contain all material terms and that defendants never acknowledged, signed or performed the alleged settlement agreement.

### DISCUSSION

Plaintiff moves for an order, pursuant to CPLR 3212, granting it summary judgment on the grounds that no legal or factual issues exist which require a trial of this action.

Summary judgment should only be granted where there are no triable issues of fact (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The focus for the court is on issue finding, not issue determining (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). "[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.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*). Once the movant has demonstrated a prima facie showing of entitlement to judgment, “the burden shifts to the party opposing the motion ...to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “The proponent of a summary judgment motion must make a prima facie showing of entitlement of judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [citations omitted]” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853 [1985]).

CPLR 2104 states, in pertinent part, that “[a]n agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.” Moreover, “to be enforceable, a settlement agreement must set forth all material terms, and there must be a clear mutual accord between the parties.” (*Teixeira v Woodhaven Ctr. of Care*, 173 AD3d 1108, 1109 [2d Dept 2019], quoting *Martin v Harrington*, 139 AD3d 1017 [2d Dept 2016] [other citation omitted]). “An email that merely confirms a purported settlement is not necessarily sufficient to bring the purported settlement into the scope of CPLR 2104” (*id.*).

“[W]here an email message contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature, such an email message may be deemed a subscribed writing within the meaning of CPLR 2104 so as to constitute an enforceable agreement”

(*id.*, quoting *Forcelli v Gelco Corp.*, 109 AD3d 244, 251 [2d Dept 2013]).

As in *Teixeira*, “contrary to [the parties’] contention, the email exchange between counsel did not evidence a clear mutual accord, as the language used by counsel [for both sides], is followed by a discussion of further occurrences necessary to finalize the agreement” (*Teixeira*, 173 AD3d at 1109). Defense counsel provided a written draft of the settlement, however, plaintiff responded with objections and edits. The parties continued to dispute numerous terms, including shares of and the valuation of stock. While defendants argue that subsequent negotiation of immaterial terms do not affect the enforceability of a settlement agreement (*IDT Corp. v Tyco Group, S.A.R.L.*, 54 AD3d 273 [1<sup>st</sup> Dept 2008]), in the instant case, issues of fact exist as to whether all material terms were not only addressed in the April 5, 2018 email, but were agreed to by counsel for the parties. Moreover, defendants have failed to establish that the April 5, 2018 email constituted a legally enforceable agreement, and that the parties executed general releases that included a covenant precluding the instant lawsuit.

Plaintiff has raised a material issue of fact as to whether the parties had a meeting of the minds in the April 5, 2018 email. Accordingly, that branch of defendants’ motion for summary judgment on their counterclaims seeking a declaratory judgment that the April 5, 2018 email is a valid and enforceable agreement and for breach of the Proposed Settlement Agreement is denied. Defendants’ motion for an order granting attorneys’ fees as provided for in the Proposed Settlement Agreement is denied without prejudice to be renewed after the completion of discovery, and the motion for an order dismissing the complaint is denied. Defendants’ motion for an order staying discovery in this action was denied on the record during oral argument (NYSCEF Doc. No. 162, tr of oral argument dated 2/4/20), and the court so-ordered a stipulation on August 5,

2020 setting forth a discovery schedule (NYSCEF Doc. No. 169, so-ordered stipulation dated 8/5/20).

### CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by defendants' Love Bug Nutrition, Inc., Ashley Harris and Benjamin Harris, pursuant to CPLR 3212 (motion seq. 002, for an order granting summary judgment on its counterclaims is denied; and it is further

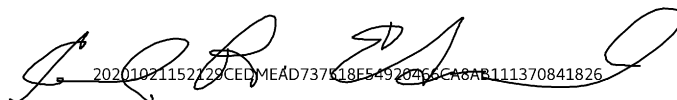
ADJUDGED AND DECLARED that the motion by defendants pursuant to CPLR 3212, for a judgment declaring the Proposed Settlement Agreement valid and enforceable between plaintiff and defendants, and that under the settlement agreement, plaintiff released defendants from all claims he may have had against any and all defendants, is denied; and it is further

ORDERED that the motion by defendants for an order granting attorneys' fees is denied without prejudice to renew after discovery; and it is further

ORDERED that defendants' request for a stay of discovery is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



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10/21/2020

DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

☒

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: