SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE LOVE** **PART** **63M**

Justice

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DANIEL SILVERSTEIN,

Plaintiff,

- v -

AZOKBB, LLC, LM CAPITAL SOLUTIONS, LLC

Defendants.

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INDEX NO. 650342/2021

MOTION DATE 10/22/2021

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130

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

Upon the foregoing documents, it is

The following read on plaintiff's motion i) per CPLR 3212(e) granting partial summary judgment in favor of plaintiff on liability only for plaintiff's breach of contract claim against defendants, AZOKBB LLC f/k/a LuxeMark Capital, LLC and LM CAPITAL SOLUTIONS, LLC; and ii) per CPLR 3212(c), ordering an immediate trial on the amount of damages to be conducted.

A summons and complaint were served upon defendants (see NYSCEF Doc. Nos. 3 – 4) with causes of action for i) breach of contract, and ii) declaratory judgment, for the sum of $456,440.94.

A notice of appearance for defendant – LM CAPITAL SOLUTIONS, LLC, was submitted on February 24, 2021. Defendant – AZOKBB, LLC f/k/a Luxemark Capital, LLC cross-moved to extend the time to answer the complaint, which was granted on May 27, 2021

(see NYSCEF Doc. No. 63). Defendants – AZOKBB, LLC, and LM CAPITAL SOLUTIONS, LLC, submitted a Verified Answer on June 10, 2021 (see NYSCEF Doc. No. 66).

Now plaintiff moves for partial summary judgment, motion sequence no. 4.

CPLR § 3212 (b) states that, "the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

"The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact." *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986).

The affidavit of named plaintiff – Daniel A. Silverstein affirms,

> "From 2017 to 2019, I was employed as an independent contractor by Allied Millennial Partners, LLC ("AMP"), an investment management and financial advisory firm. During this period, I led AMP's engagement of LuxeMark Capital, LLC. AMP provided financial advisory services to LuxeMark in 2018 and 2019 to arrange a capital financing transaction. AMP focused its efforts on identifying an investor to acquire a significant equity stake in LuxeMark. In 2018, AMP introduced LuxeMark to CCUR Holdings, Inc. ("CCUR") (see NYSCEF Doc. No. 78 Pars. 3, 5 – 8).

Plaintiff provides the Engagement Agreement between AMP and LuxeMark (see NYSCEF Doc. No. 79), the Letter of Intent and Term Sheet between CCUR and LuxeMark (see NYSCEF Doc. No. 80), two (2) CCUR Current Report on Form 8-K, as filed with the Securities and Exchange Commission ("SEC") (see NYSCEF Doc. Nos. 81 – 82), a Pricing Report from Pine Hill Valuation Services, LLC, which values the contingent consideration provided at closing to be approximately $2,360,000 (see NYSCEF Doc. No. 83), various other submissions (see NYSCEF Doc. Nos. 84 – 92), and the Agreement for Assignment of Owed Advisory Fee for the sum of $456,440 (see NYSCEF Doc. No. 93 Par. D).

A Statement of Material Facts states,

> "On or about June 11, 2018, AMP and LuxeMark executed the Engagement Agreement. The Engagement Agreement provides that AMP agreed to 'serve as a financial advisor to [LuxeMark] in connection with a potential private placement of debt, equity or equity-linked securities (collectively 'Securities') of the Company, including any financing, investment or other joint venture arrangement providing an economic interest in any assets, business or operations of the Company (collectively, a 'Transaction'). The Engagement Agreement provides that LuxeMark, together with 'its parent, its direct and indirect subsidiaries and any other entity formed for the purpose of a private capital financing' agreed to pay AMP a 'cash fee (the 'Advisory Fee') equal to six (6.0%) of the Gross Proceeds of the Securities received from any Potential Investor which has been contacted by AMP.' AMP provided valuable services to LuxeMark under the Engagement Agreement and introduced LuxeMark to CCUR. On or about September 25, 2018, CCUR and LuxeMark signed a non-binding letter of intent agreeing to a proposal for CCUR to acquire 80% of LuxeMark, and to structure the transaction 'in a manner to provide favorable tax treatment to CCUR.' On October 2, 2018, CCUR issued a press release announcing that it had signed a letter of intent to acquire an 80% membership interest in LuxeMark 'for a combination of up to $6 million in cash, and options and stock appreciation rights' and to commit 'up to $10 million of syndication capital under a separate agreement with LuxeMark.' LM Capital made partial payment to AMP in the amount of $72,000, which was attributable to 6% of the cash LuxeMark received at closing. Neither LuxeMark nor LM Capital has paid AMP the remaining Advisory Fee attributable to the equity consideration, contingent consideration, and capital commitment provided to LuxeMark at closing" (see NYSCEF Doc. No. 95 Pars. 6 – 8, 13 – 15, 23, 24).

"Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact." *Zuckerman v City of New York*, 49 NY2d 557 (1980).

The affirmation of defendants affirms,

> "Defendants have previously filed documents showing that the $72,000 fee Luxemark actually paid to AMP is the full fee that was due, and that the fee agreement was clarified and/or modified by the parties at the time of the closing of the asset sale, which modification

> was relied upon by Luxemark – and presumably CCUR – in completing the asset sale. It was agreed upon and accepted, with proper authority, and the Parmigiano and Costimiris affidavits demonstrate that AMP intended to accept that fee and ratified the settling of the fee an manner of computation and payment. [T]he underlying agreement provided that Allied Millennial Partners, AMP would help Defendant sell securities in its business, in return there would be a fee calculated as 6% of the *consideration received by Luxemark* – specifically the consideration for the sale of securities in Luxemark. The total consideration received by Defendants was actually $1.2 Million, and the 6% commission was already paid on that amount (see NYSCEF Doc. No. 96 Par. 13, 23).

Plaintiff submits the affidavit of Robert Costomiris, agent and part owner of [AMP],

> "The agreement speaks for itself: [AMP] was to be paid a commission of 6% on the amount of compensation paid to Luxemark. The details of which are in the consulting agreement with [AMP]. What [AMP] did was locate LM [Capital Solutions, LLC] as purchaser for Luxemark's entire syndication/cash advance business. This is not exactly what was contemplated when the consulting agreement was entered into, but from [AMP]'s point of view, and mine, [AMP] had rendered a valuable service. Luxemark agreed, and this led to the agreement for a 6% commission on the cash payments to Luxemark, which totaled the $72,000 initil (sic) installment that was paid to [AMP]. During the negotiations, it became apparent that there were problems with the commission computation. Luxemark and LM [Capital Solutions, LLC] made it clear that the sale transaction could not go through unless the commission was agreed upon at a fixed amount. I entered into negotiations in this regard, and we agreed that the commission would be based upon 6% of the actual cash paid and received by Luxemark, which was $1.2 Million, and any commission on the 20% stock transfer would be waived. That commission totaling $72,000 was paid to [AMP] and accepted as payment in full of the commission for that transaction (see NYSCEF Doc. No. 17 Pars. 3, 4, 7 – 9).

"To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented." *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 (1968). "Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable." *Forrest v Jewish Guild for*

the Blind, 3 NY3d 295, 315 (2004). On summary judgment, "facts must be viewed in the light most favorable to the non-moving party." *Vega v Restani Constr Corp*, 18 NY3d 499, 503 (2012).

There remain questions of fact on the terms of the contract and whether a contract was breached. One side argues that the contract was fulfilled by the payment of $72,000 while the other side argues that the contract was not fulfilled and $456,440.94 remains due and owing.

Further inquiry remains through disclosure and fulfillment of a Preliminary Conference Request (see NYSCEF Doc. No. 73).

ORDERED that plaintiff's motion i) per CPLR 3212(e), granting partial summary judgment in favor of plaintiff on liability only for plaintiff's breach of contract claim against defendants, AZOKBB LLC f/k/a LuxeMark Capital, LLC and LM CAPITAL SOLUTIONS, LLC is DENIED; and it is further

ORDERED that plaintiff's motion ii) per CPLR 3212(c), ordering an immediate trial on the amount of damages to be conducted, is DENIED.

1/19/2022
DATE

LAURENCE LOVE, 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