SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART** **42**

Justice

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ROTH AND ASSOCIATES EAST, INC.

Plaintiff,

- v -

DANIEL KIM,

Defendant.

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INDEX NO. 653893/2019

MOTION DATE 11/15/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

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

In this action stating claims sounding in breach of contract, *quantum meruit*, and unjust enrichment, and seeking to recover attorney's fees, the plaintiff, which self-describes as a "talent management company," seeks to recover as a commission 15% of the earnings of the defendant, an actor and former client of the plaintiff, for work the defendant performed in productions after the defendant terminated the plaintiff as his manager. The defendant now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint in its entirety. The plaintiff opposes the motion. The motion is granted.

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of his motion, the defendant submits, *inter alia*, the original May 1, 2012, contract between the parties; the second contract between the parties dated May 1, 2014; a series of written agreements between Showtime Pictures Development Company and the defendant engaging the defendant in the role of Ben Kim in the television series "Billions" over the course of six seasons, between 2015 and 2021; email correspondence between the parties;

the plaintiff's itemization of commissions paid to it by the defendant between 2015 and 2019; the deposition transcript of the plaintiff's principal, Wayne Scherzer; and an affidavit of the defendant. In opposition to the defendant's motion, the plaintiff submits a brief affidavit of Wayne Scherzer and an attorney's affirmation.

The defendant's submissions establish that the plaintiff, a single-person talent representative, took the defendant on as a client in or about 2010 or 2011, when the defendant was 23 years old, after meeting the defendant at a Manhattan restaurant where the defendant was then employed. The parties entered into a written agreement for a term of one year, beginning May 1, 2012, whereby the plaintiff agreed to promote and advance the defendant's acting career in exchange for a 15% commission on the defendant's earnings, with certain exceptions. The initial one-year term (the initial term) was subject to a single, automatic one-year extension. After the expiration of the term of the contract, the defendant was to continue to pay the plaintiff a commission for up to three additional years on contracts, commitments, and agreements pertaining to "projects begun and[/]or completed by [the defendant], or result[ing] from efforts of [the plaintiff] on behalf of [the defendant]" during the initial term or extension.

In August 2014, after the expiration of the parties' first contract, the parties executed a second, substantively identical contract for a term commencing on May 1, 2014. On January 28, 2015, the defendant was cast in the series premiere of Billions. The defendant worked on Billions for its first three seasons pursuant to contracts negotiated by the plaintiff on the defendant's behalf, notwithstanding that the term of the parties' second contract expired on April 30, 2016. The contracts were for single episodes and provided for no guarantee of future work or screen credit as a guest star. On June 11, 2018, the defendant terminated the plaintiff's representation. Shortly thereafter, the defendant's new representation negotiated a new contract for the defendant's performance in season four of Billions with significantly better terms, including superior compensation, a guaranteed minimum of 12 episodes, and "guest star" credit. The defendant continued paying the plaintiff a commission, including all income and residuals received for seasons one through three of Billions, through May 2019.

To successfully prosecute a cause of action to recover damages for breach of contract, the plaintiff is required to establish (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). Here, the defendant demonstrates that he did not breach the terms of any written or implied agreement with the plaintiff. The latest written contract between the parties provided that the defendant was to pay the plaintiff a commission for up to three years after *the expiration of the initial term and automatic extension*. In contrast, nowhere in the written contracts or elsewhere did the parties agree that the defendant's obligation was to endure for three years after the plaintiff's *termination* from its management role. Accordingly, the defendant's obligations ceased on or about April 30, 2019. Since the plaintiff does not identify any payments the defendant failed to make through that date, its breach of contract claim fails.

Moreover, even if the court were to credit the plaintiff's strained argument in opposition that the parties' course of conduct indicated an intent to extend the initial term beyond what was allowable in the written instrument, there is still no triable issue as to the defendant's liability. The defendant's submissions establish that the work the defendant performed on Billions after June 11, 2018, was done exclusively pursuant to contracts negotiated by new management. Thus, the defendant's earnings for his work on later seasons of Billions were not paid under an agreement pertaining to a project he began during any extended term or resulting from the plaintiff's efforts prior to the expiration of such term, within the meaning of the parties' agreement.

The plaintiff's conclusory assertions to the contrary do not create a triable issue of fact in the face of the clear language of the contract. Additionally, the plaintiff's proposed reading is at odds with the parties' reasonable expectations insofar as it would unfairly subject the defendant to duplicative payment obligations towards both his former and current manager, even though only one negotiated the work arrangement. See, e.g., Peter Lampack Agency, Inc. v Grimes, 93 AD3d 430, 430-31 (1st Dept. 2012) (rejecting as unreasonable an interpretation of a literary agency contract that would permit the agent to recover commission on all future extensions of a book contract, even though the agent had no role in negotiating such extensions, because "[t]his would be an absurd result"). In light of the foregoing, the plaintiff's breach of contract claim is dismissed.

As to the plaintiff's quasi-contract claims, in order to prevail the plaintiff is required to demonstrate that (i) the defendant was enriched, (ii) at the plaintiff's expense, and (iii) "it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered." Paramount Film Distrib. Corp. v State, 30 NY2d 415, 421 (1972) (citations omitted). However, as a general rule, where a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment or *quantum meruit*. 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); Steven Pevner, Inc. v Ensler, 309 AD2d 722 (1st Dept. 2003). The plaintiff's claims sounding in unjust enrichment and *quantum meruit* are duplicative of the plaintiff's breach of contract claim and subject to dismissal for that reason. Additionally, the plaintiff, who ceased working for the defendant in 2018, identifies no benefit it bestowed upon the defendant for which it was not duly compensated.

Finally, the plaintiff's cause of action seeking attorney's fees is subject to dismissal in light of the dismissal of all of its substantive causes of action as well as the absence of any contractual or statutory provision entitling the plaintiff to such fees.

Since dismissal of the complaint is warranted on the above facts, the court does not reach the defendant's arguments related to the plaintiff's proper licensure.

Accordingly, it is

ORDERED that the defendant's motion pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

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

3/28/2022
DATE

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION		
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐	REFERENCE