SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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JASON OWEN,

Plaintiff,

- v -

ARRAY US, INC.,MARTIN TOHA

Defendants.

INDEX NO. 651471/2022

MOTION DATE 09/13/2024

MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 275, 276, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 412, 413, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 527, 531

were read on this motion for SUMMARY JUDGMENT.

Array US, Inc. ("Array") moves for summary judgment on Plaintiff Jason Owen's claims of breach of contract, unjust enrichment, and quantum meruit. For the reasons described below, the motion is **denied**.

Statement of Relevant Facts

Martin Toha co-founded Array, a Delaware company with its principal place of business in New York County (NYSCEF 21 ¶ 37; NYSCEF 430 ¶ 9), which develops financial tools used in digital banking applications (NYSCEF 527 ¶ 2). Array was previously known as Credmo, Inc. ("Credmo") (NYSCEF 430 ¶ 6). Credmo was initially part of Pentius, Inc. ("Pentius"), but became a separate and distinct entity in 2019 (NYSCEF 527 ¶ 2). On December 12, 2019, Owen

executed the Credmo Agreement, which was set to terminate on June 12, 2020, under which he was to receive $20,000.00 per month in exchange for performing services for Credmo (NYSCEF 430 ¶ 7). Credmo changed its name to Array on June 3, 2020 (*id.* ¶ 9).

Owen alleges that he had a telephone conversation with Toha on September 9, 2020 (NYSCEF 527 ¶ 10). He alleges that, during the call, he and Toha agreed that Owen would join Array as "Chief Strategy Officer" ("CSO") in exchange for a $300,000 annual salary plus benefits plus "5% of Array's common stock, above a valuation in excess of $100 million" (the "Alleged Oral Agreement") (*id.* ¶¶ 11-12). Toha disputes this characterization of the call.

On October 12, 2020, Owen signed an employment contract with Pentius (because, he understood, Array was not yet ready to on-board employees) for the position of General Manager (the "Pentius Agreement") (*id.* ¶¶ 18-19; NYSCEF 430 ¶ 67). The Pentius Agreement was freely assignable (*id.* ¶ 23). The employment was retroactive to October 1, 2020 (NYSCEF 527 ¶¶ 18-19). The Pentius Agreement was governed by Florida law (NYSCEF 220 ¶ 15[i]).

On November 28, 2020, Array sent Owen a letter regarding his employment for the position of CSO (the "Array Letter") (NYSCEF 430 ¶ 72). Under that proposal, Owen would be paid "5769.23 US Dollars Per Week," but there was no mention of an equity stake (*id.* ¶ 73). Owen did not sign the Array Letter (*id.* ¶¶ 74-75).

Also on November 28, 2020, Pentius and Array executed an Assignment and Assumption Agreement (the "Assignment"), under which Pentius "irrevocably, absolutely and unconditionally assign[ed], transfer[red], convey[ed] and deliver[ed] to the Assignee . . . all of [Pentius's] right, title and interest . . under the Employment Agreements," which included Owen's agreement with Pentius (NYSCEF 223; *see also* NYSCEF 527 ¶ 26).

The Pentius Agreement provided that could not be "modified or terminated orally, and no modification . . . shall be binding unless in writing and signed by the parties hereto" (NYSCEF 220 ¶ 15[c]). While Owen claims Pentius did not assign the Pentius Agreement to Array, the Assignment and Assumption Agreement shows that Jason Owen is listed among the included employees (NYSCEF 223).

In or around June 2021, the parties were negotiating Owen's continued role and compensation (NYSCEF 430 ¶ 82). As of July 2021, Owen and Array had not come to terms on the Array Letter (*id.* ¶¶ 81). On August 30, 2021, Toha signed off on an offer package under which Owen would receive $300,000 base salary "plus 25-35bps and a 50% target bonus based on KPIs" and "[p]ossible extra equity component if he drives $10M ARR direct" (*id.* ¶ 85). Owen did not agree to this package (*id.* ¶ 86).

On September 14, 2021, Array sent Owen a revised offer letter (the "Revised Array Letter"), providing for a start date of September 17, 2021, with $300,000 annual salary and "40,650 shares of Series A common stock option, and 25% of the option shares vesting after twelve months of continuous service" (*id.* ¶ 88). The Revised Array letter contained a hold-harmless clause, requiring Owen to release "any outstanding claims [he] may hold against" Array (*id.*). Owen rejected the Revised Array Letter and sent an email through counsel asserting that Array had reneged on the Alleged Oral Agreement (*id.* ¶¶ 89-90).

On October 22, 2021, Array issued a Series B Stock Purchase Agreement ("Series B Agreement"), in which it represented that Owen served as its CSO but that he was then "employed by Pentius and is not party to an agreement regarding confidentiality and proprietary information with" Array (*id.* ¶ 91).

Standard

A motion for summary judgment "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" (CPLR 3212 [b]). The moving party must make a prima facie showing that it is entitled to a judgment as a matter of law (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]). "If the moving party fails to meet this initial burden, summary judgment must be denied 'regardless of the sufficiency of the opposing papers'" (*id.* [citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). However, if the moving party makes this showing, the burden shifts to the opposing party "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 320, 324 [1986]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

Discussion

Owen has three remaining claims in this case: (a) breach of the Alleged Oral Agreement for stock options; (b) unjust enrichment, and (c) quantum meruit (*see* NYSCEF 93 [sustaining, at the motion to dismiss phase, only those three claims]).

A. Choice of Law

Initially, the parties raise certain choice of law questions. Array asserts that either Florida and/or Delaware law applies, while Owen asserts that New York law applies.

Under "New York conflict of laws principles," a Court first must "determine whether there is an actual conflict" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 200 [1st Dept 2013]). "To find that there is an 'actual conflict,' the laws in question must provide different

substantive rules in each jurisdiction that are 'relevant' to the issue at hand and have a 'significant *possible* effect on the outcome of the trial'" (*id.*).

Under the internal affairs doctrine, "'claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation'" (*Ezrasons, Inc. v Rudd*, 217 AD3d 406, 406 [1st Dept 2023]), which in the case of Array is Delaware. Under that doctrine, the Court finds that the question of whether Array has validly issued share rights or options to Owen is governed by Delaware law. Under the Delaware General Corporate Law (DGCL) Section 157 in effect at the time of the operative events in this case,[1] "rights or options entitling the holders thereof to acquire from the corporation any shares of its capital stock … such rights to be evidenced by or in such instrument or instruments as shall be approved by the board of directors" (Del Code Ann TI 8 § 157 [2015]). However, DGCL § 205 provides for a court to exercise its equitable powers to rectify a "defective corporate act" (Del Code Ann TI 8 § 205).

As to the elements of Owen's three substantive claims (breach of contract, unjust enrichment, and quantum meruit), the Court concludes that there is no material difference between New York and Delaware law. Accordingly, the Court will focus on New York law with respect to Owen's claims. To the extent the Court is required to construe the Pentius Agreement, Florida law will apply.

[1] DGCL § 157 was amended in 2022 to remove the writing requirement. Delaware courts strongly disfavor "'[r]etrospective operation'" of statutes (*Seavitt v N-Able, Inc.*, 321 A3d 516, 556-57 [Del Ch Ct 2024]). There is no clear basis to apply the amendment retroactively to conduct occurring in 2020, and Plaintiff states none. Therefore, the Court does not apply the 2022 amendment to DGCL § 157 in this case.

B. Breach of Contract

In order to prove a breach of contract, a plaintiff must show (1) the existence of a contract, (2) that plaintiff performed its obligations under the contract, (3) that defendant breached the contract, and (4) the defendant's breach caused damages (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022]). An oral agreement is enforceable when the terms are "clear and definite" and "the conduct of the parties evinces a mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Kramer v Greene*, 142 AD3d 438, 439 [1st Dept 2016]).

Array has not carried its burden to show it is entitled to judgment as a matter of law on his claims. Owen has raised material disputes of fact that preclude a grant of summary judgment.

At its core, the breach of contract claim is a case of he-said, he-said. Owen alleges that an oral agreement was reached with respect to his employment for Array in September 2020. Array acknowledges that a conversation took place around that time, but disputes Owen's characterization that the parties reached a binding agreement with respect to a stock grant (*see* NYSCEF 527 ¶ 7). There are, in addition, disputed questions as to whether the terms of the Alleged Oral Agreement are sufficiently definite to constitute a binding agreement. Given that more than two months elapsed between the Alleged Oral Agreement and the Assignment of the Pentius Agreement to Array, and all parties apparently acknowledge that Owen in fact started working for Array around the time he signed the Pentius Agreement, there is a genuine dispute of material fact as to whether Owen had a separate agreement with Array under which he was operating while also working for Pentius. Factual disputes also prevent reaching a definitive conclusion as to whether Toha's purported oral agreement to issue stock to Owen complies with

Delaware law. Finally, there are disputed issues with respect to damages, with a range of views of how (and as of when) to calculate the purported "5% of a valuation over $100 million."

C. Quasi-contract Claims

"[I]n order to sustain an unjust enrichment claim, '[a] plaintiff must show that (1) the other party was enriched, (2) at [the plaintiff's] expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*E.J. Brooks Co. v Cambridge Security Seals*, 31 NY3d 441, 455 [2018]). Further, "'to establish a claim in quantum meruit, a claimant must establish (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services'" (*Caribbean Direct, Inc. v Dubset, LLC*, 100 AD3d 510, 511 [1st Dept 2012]).

Again, Array has failed to show entitlement to judgment as a matter of law. Owen is entitled to maintain his quasi-contract claims given that Array continues to contest the existence of the contract. "[W]here there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi-contract as well as breach of contract" (*Kramer*, 142 AD3d at 441-42). Although Array presents the Pentius Agreement as controlling the relationship at issue, that itself raises questions of fact that cannot be determined on this motion.

In addition, the fact that Owen was compensated for his work is not dispositive. He does not complain of failure to pay his salary. He complains, instead, of a failure to make good on a purportedly promised stock interest as part of his employment. Therefore, the quasi-contract claims survive summary judgment as well.

D. Purported Spoliation

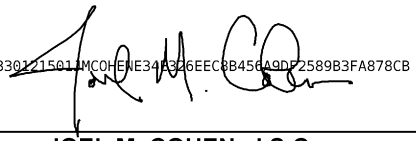
Owen also argues that Array spoliated evidence, but there is not sufficient evidence in the record to reach that conclusion. Moreover, even if there were a sufficient record, no sanctions could issue in the absence of a motion made by Owen.

Accordingly, it is

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

ORDERED that the parties appear for an initial pre-trial conference to discuss scheduling and logistics on **April 21, 2025, at 11:00 a.m.**

This constitutes the Decision and Order of the Court.



3/30/2025
DATE

JOEL M. COHEN, 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