

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR ENGORON PART 37

Justice

INDEX NO. 653460/2021
MOTION DATE 07/21/2021
MOTION SEQ. NO. 002

ABRAHAM 2008 FAMILY TRUST, SAM ABRAHAM TRUSTEE,

Plaintiff,

- v -

391 BROADWAY LLC, EREZ ITZHAKI, GIL BOOSIDAN, PRO NATIONAL TITLE AGENCY,

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to DISMISS

Upon the foregoing documents, it is hereby ordered that defendants' motion to dismiss is denied.

On May 26, 2021, plaintiff commenced the instant action seeking to recover money due to it under an operating agreement that defendants allegedly breached.

Defendants' now move to dismiss, pursuant to CPLR 3211(a)(1) and (7). In support, defendants argue that: (1) the copy of the operating agreement plaintiff provided is only signed by three of the 14 members of defendant 391 Broadway LLC and therefore unenforceable; (2) the operating agreement was entered into more than six months after 391 Broadway LLC filed its Articles of Organization and is therefore invalid under § 417(c) of New York Limited Liability Law; and (3) plaintiff's pleadings are not particularized enough to sustain its causes of action.

The law on the dismissal of a complaint pursuant to CPLR 3211 is clear and well-settled. Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dep't 2013) ("[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"). Dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, supra, 84 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

As an initial matter, despite defendants' assertions, plaintiff has not pleaded causes of action rooted in fraud so as to trigger the enhanced pleading requirements of CPLR 3016(b); plaintiff asserts two causes of action: one for breach of contract and one for breach of an accompanying guarantee.

Further, defendants' argument that the complaint must be dismissed at this juncture because plaintiff failed to include a copy of the agreement signed by all 14 members in unpersuasive. Plaintiff produced a copy of the operating agreement that was in its possession, and plaintiff is entitled to discovery to see what other copies might exist.

Finally, the Court finds defendants' argument that the agreement is invalid under § 417(c) of New York Limited Liability Law unavailing. While the fact that the operating agreement was executed more than six months after the filing of Articles of Organization may have other legal implications, this clearly would not invalidate an otherwise enforceable contract.

Thus, for the reasons stated herein, defendants' motion to dismiss is hereby denied, and the parties are directed to participate in a remote preliminary conference on October 19, 2021. The parties will receive further instructions via email from Part 37's Clerk.



10/5/2021  
DATE

ARTHUR ENGORON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	