

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

ABRAHAM 2008 FAMILY TRUST, SAM
ABRAHAM, TRUSTEE,

INDEX NO. 653460/2021

Plaintiff,

vs.

391 BROAWAY LLC, EREZ ITZHAKI,
GIL BOOSIDAN and PRO NATIONAL
TITLE AGENCY,

Defendants.

**PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' NOTICE OF
MOTION TO DISMISS**

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LEGAL ARGUMENT

Defendants have moved to dismiss the complaint under CPLR3211 (a)(1) and 3211 (a)(7) neither of which have any merit whatsoever. The Appellate Division has held that a motion to dismiss under 3211 (a)(1) will only be granted "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law". M & E 73-75, LLC v. 57 Fusion LLC, 189 A.D.3d 1, 128 N.Y.S.3d 200 (N.Y. App. Div. 2020) at 189 A.D. 6. Here, defendants have not provided a single document which would come close to standards set forth in M & E 73-75, LLC.


It appears that defendants are somehow arguing that the subject operating agreement (contract) provided with the complaint is somehow defective on its face. The claim rests in part because the only signatures on plaintiff's copy is that of the plaintiff and the individual defendants. The contract is still valid as between the plaintiff and defendants as there was a majority of the ownership of 391 Broadway LLC that signed as is indicated in the agreement. The two individual defendants, Boosidan and Itzhaki, each owned 25% and the plaintiff owned 2%. Furthermore, the contract has been ratified and adhered to from its inception as is indicated in the attachments to Sam Abraham's affidavit. Not a single case is cited in support of the defendants' position that the lack of every members signature somehow makes the agreement a nullity because not a single case exists for that proposition. Defendants also claim that because the agreement was purportedly signed more than 90 days after the filing of the articles of organizations that somehow makes the agreement null and void. Again, not a single case is cited for that proposition because not a single case holds such ridiculous nonsense.

Defendants next argument is that pursuant to 3211(a)(7) plaintiff has failed to state a cause of action upon which relief can be granted. To wit, the defendants argue that the complaint contains no factual allegations which support the complaint. Defendants ignore paragraph 7 of the complaint which states “On or about March 6, 2013 plaintiff entered into an Operating Agreement with defendants concerning an investment plaintiff was making in the defendant 391 Broadway LLC where plaintiff was to invest \$100,000.00 and in return receive a 2% equity ownership share in 391 Broadway LLC.” As well as paragraph 8 which states “In addition, per the Operating Agreement plaintiff had the right to exercise a put option and receive the investment with an additional 10% per annum return (from the date of investment) by notifying the defendant of their desire to so exercise.” Paragraph 10 states “Per the terms of the Operating Agreement, plaintiff was to receive said funds within ninety (90) days of exercising its put option”. Paragraph 11 states “To date plaintiff has yet to receive the funds it is entitled to under the Operating Agreement” and paragraph 12 of the complaint which states “As of September 6, 2019 the amount due is \$225,076 (includes interest through August 2021) with interest accruing at 10% per annum.” All of the aforementioned statements allege facts not conclusionary statements alluded to by the defendant. Each and every one of them support a breach of contract claim against 391 Broadway LLC and by virtue of their personal guaranty, Gil Boosidan and Erez Itzahki.

CONCLUSION

The motion should be denied.

Dated: August 2, 2021
Jamaica Estates, NY



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