

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

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Index No.: 653460/2021

2008 FAMILY TRUST, SAM ABRAHAM TRUSTEE,

Plaintiff,

- against -

391 BROWDWAY LLC, EREZ ITZHAKI, GIL

BOOSIDAN and PRO NATIONAL TITLE

AGENCY.

Defendants.

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS

MOTION TO DISMISS THE COMPLAINT

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted by Defendants 391 Broadway LLC, Gil Boosidan and Erez Itzhaki (“Defendants”) in support of their application for an order dismissing the complaint, and this action in its entirety, pursuant to: (i) CPLR 3211(a)(1)-a defense is founded upon documentary evidence (ii) CPLR 3211(a)(7) for failure to state a cause of action; On or about May 26, 2021, Plaintiff commenced a lawsuit in the Supreme Court of the State of New York, County of New York, bearing Index No. 653460/2020, against 391 Broadway LLC, Erez Itzhaki and Gil Boosidan to recover the sums allegedly due and owned by 391 Broadway LLC (Exhibit A). Rarely will this Court see a complaint so utterly lacking in merit or a litigant less deserving of relief than this one. All of Plaintiff’s claims must be dismissed on a number of grounds, each of which separately and independently mandates the dismissal of the complaint. The complaint must be dismissed simply by virtue of the fact that plaintiff has no factual and legal basis for her complaint and undeniably sued numerous parties in a hope that something will catch.

ARGUMENT

STANDARD ON A MOTION TO DISMISS

No citation is needed for the proposition that, on a motion to dismiss a pleading, the allegations thereof are to be accepted as true and the Court is not permitted to resolve questions of fact arising out of those allegations. However, the Court is not bound by conclusions or by inherently incredible allegations. See Goldman v. Metro Life Ins. Co., 5 N.Y.3d 561, 807 N.Y.S.2d 583 (2005); Leon v. Martinez, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); Gertler v. Goodgold, 107 A.D.2d 481, 487 N.Y.S.2d 565 (1st Dept. 1985); Roberts v. Pollack, 92 A.D.2d 440, 461 N.Y.S.2d 272 (1st Dept. 1983). A party opposing a motion to dismiss a pleading may not merely raise a “shadowy semblance of an issue”, but, instead, must demonstrate the existence of significant and bona fide disputed issues. Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Ben Strauss Industries, Inc. v. City of New York, 90 A.D.2d 751, 456, N.Y.S.2d 5 (1st Dept. 1982); Fender v. Prescott, 101 A.D.2d 418, 476 N.Y.S.2d 128 (1st Dept. 1984), aff’d, 64 N.Y.2d 1077 (1985). The Court of Appeals has recognized that a defendant can succeed on a CPLR 3211 motion supported by extrinsic evidence, if the “affidavits establish conclusively that plaintiff has no cause of action.” Rovello v. Orofino Realty Co. Inc., 404 N.Y.2d 633,636, 389 N.Y.S.2d 314, 316 (1976); see also, Richbell Info. Servs. v. Jupiter Partners, L.P., 309 A.D.2d 288, 765 N.Y.S.2d 575, 577 (1st Dept. 2003). Judged by these familiar standards, the complaint must be dismissed in its entirety.

POINT I**THE DOCUMENTARY EVIDENCE DOES NOT SUPPORT THE CLAIMS ALLEGED
and ESTABLISH AS A MATTER OF LAW.**

A cause of action must also be dismissed pursuant to CPLR 3211(a)(1) where the documentary evidence does not support the claims alleged or establishes a defense as a matter of law. CPLR § 3211(a)(1); see *Kliebert v. McKoan*, 228 A.D.2d 232 (1st Dept. 1996). Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference.” *Biondi v. Beekman Hill House Apartment, Corp.*, 257 A.D.2d 76, 81 (App. Div. 1999) (internal citations omitted). Applying the foregoing standards, both the extrinsic evidence and the controlling case law negate each and every claim alleged by Plaintiff, and the Complaint should be dismissed in its entirety.

All Plaintiff provides in this litigation is an illegible copy of an Operating Agreement, which is signed only by its three members and Neiman’s affirmation. Plaintiff does not provide of the affidavit of Sam Abraham, who acted behalf of the Plaintiff. In fact, Sam Abraham is the plaintiff. Mr. Neiman’s affirmation itself (“Neiman”) (653460/2020 at NYSCEF Doc. No. 5) contains no information to demonstrate the basis of his knowledge of any of the documents that Plaintiff attaches to his Complaint. All Neiman says that he received this copy from his clients. Neiman does not affirm and explain how such documents are authentic and undeniable. See *Integrated Constr. Servs., Inc*, A.D.3D. at 1163. His Verification is based on the files he has received from his client and his Affirmation is based solely on his personal information and belief. Nothing Concrete. Mr. Neiman does not even bother to attach the affidavit of the Manager of the Plaintiff. As this Court knows, Mr. Neiman does not serve as a witness on this

matter. Plaintiff in its Verified Complaint alleges that on or about March 6, 2013, he 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 and in return receive a 2% equity ownership share in 391 Broadway LLC (Ex A at 3:7-10). Plaintiff attaches a copy of a draft of an Operating Agreement as Exhibit A to his Complaint. He claims that this copy is an authentic copy of the executed Operating Agreement of Defendant 391 Broadway LLC (Exhibit B). Section 14.1 of the so-called Operating Agreement goes as the following: “This Agreement contains the entire agreement of the parties concerning the subject matter hereof and supersedes any and all prior agreements oral or written among the parties hereto concerning the subject matter hereof, which prior agreements are hereby canceled. This Agreement may not be changed, modified, amended, discharged, abandoned or terminated orally, but only by an agreement in writing, signed by all of the Members” (Ex B at 14:19-24). It is clear that the Operating Agreement and its amendments must be executed by all members. The copy that was submitted by Plaintiff was signed by only 3 members out of the allegedly 14 members of Defendant 391 Broadway LLC. Nevertheless, Plaintiff have never provided a legible copy of the Operating Agreement with the signature of all the members of Defendant 391 Broadway LLC. He also did not provide a shred of evidence that the other members are indeed investors of 391 Broadway LLC. Furthermore, Section 417 (c) of the New York Limited Liability Law of the State requires that an operating agreement may be entered into before, at the time of or within ninety days after the filing of the Article of Organization. The Article of Organization of Defendant 391 Broadway LLC was filed with the New York Department of State on August 31, 2012 (Exhibit C). Plaintiff alleges that the Operating Agreement of Defendant 391 Broadway LLC became effective on March 6, 2013, more than six (6) months after the Article of Organization of Defendant 391 Broadway LLC was filed with the Division OF Corporation of the State of New York. Plaintiff will probably argue that he had no

knowledge of this and that all the LLC documents were all prepared by the Defendants, in the same manner that Ms. Sterman testified (Ex D at P2-1:2). Nevertheless, this is not correct. As Exhibit E demonstrates, Mr. Abraham was the one who drafted the operating agreement, composed its schedules, its member list, composed the capital contribution schedule, reviewed with counsel and many more. In Addition, Ms. Sterman also testified that Sam Abraham received the Operating Agreement from the Defendants (Ex D at P1-8). Nevertheless, her assertions are not the truth. As Exhibit E demonstrates, Sam Abraham was the one who drafted the operating agreement, composed its schedules, its member list, composed the capital contribution schedule, reviewed with counsel and many more. He also was the one to send it to Defendant Boosidan in contradiction to Ms. Sterman's testimony. Through date, Plaintiff have not produced a legible copy of the fully executed copy of the Operating Agreement of Defendant 391 Broadway LLC.

POINT II

A Motion to Dismiss pursuant to CPLR § 3211(a)(7) should be granted if the pleading fails to state a cause of action, such as where the facts alleged do not fit within any cognizable legal theory. See *Bomser v. Moyle*, 89 A.D.2d 202, 203 (1st Dept. 1982). “[I]n considering a motion to dismiss brought pursuant to CPLR 3211(a)(7), the court must presume the facts pleaded to be true and must accord them every favorable inference. However, factual allegations which fail to state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to such consideration.” *Leder v. Spiegel*, 31 A.D.3d 266, 267 (1st Dept. 2006) (internal citations omitted). The issue, therefore, is whether, from the “four corners” of the Complaint, “factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *511 W. 232nd Owners Corp. v. Jennifer Realty*, 98 N.Y.2d 144, 152 (2002).

Sam Abraham testifies that he was recruited to assist KGNewYork LLC (KGNewYork LLC is an entity that is owned by Defendants Gil Boosidan and Erez Itzhaki) to raise a funds for their real estate projects development in New York City (Ex F at 11:22-25). He also testifies that he worked about a year at KG, a division of Itzhaki Properties ((Ex F at 9:23-25) and stopped working there through 2013 (Ex F at 11:22-25). During February 2013, Sam Abraham approached Defendant Boosidan and ask to invest in the 391 Broadway project. He also intended to raise the additional funds that were needed for the completion of the development of the project. He was also responsible to finalize the investment documents. As Exhibit F demonstrates, Mr. Abraham was the one who drafted the operating agreement, composed its schedules, its member list, and its capital contribution schedule. He also reviewed the operating agreement with counsel. Nevertheless, Sam Abraham have never raised funds other than himself and another one of his family members, Ms. Sterman. They were the only two individuals that executed the operating

agreement. As explained above through date, Plaintiff have never provided a legible copy of the fully executed Operating Agreement of Defendant 391 Broadway LLC.

On or about October 1 2013, Itzhaki Properties (an entity in the control of Defendants Itzhaki and Boosidan) were contacted by 314 East 86th St. LLC, the owner at time of the property located at 314 East 86th St., New York, NY. 314 East 86th St. LLC engaged Itzhaki Properties to sell the property. He wanted to conduct the sale quietly, off-market, not advertising it to the general public. The seller did not list their property with any other Broker. He provided Itzhaki Properties with all the information from which they generated a “set-up” to provide to potential purchasers of the building. It was agreed that if a party being shown this set-up by Itzhaki Properties ended up purchasing the building, then Itzhaki Properties would be entitled to collect a commission, in an amount equals to 5% of the sales price. On or about October 22, 2013, while Sam Abraham was working at KGNewYork LLC, he approached Edan Cohen, a real estate agent at Itzhaki Properties and asked him to provide him the details of the listed above referenced property for a potential buyer. Then-after, Edan asked Daniel Martin, Defendant Itzhaki’s personal assistant, to email Sam Abraham the unique set up that was generated by Itzhaki Properties (See Exhibit I). On or about the same time, Sam Abraham met Steve Makowsky, one of the owners of Rockford Holdings Group (Ex F at 12:5-25). Pursuant to Sam Abraham’s testimony, Steve Makowsky had the property in his sights, and his brother-in-law made an introduction to see if they could work together on the property (Ex F at 13:3-6). Then-after, Sam Abraham and Steve Makowsky initiated conversations with regards to future corporation with Lee Kuzi with regards to the same property. Lee Kuzi was the in-house internal designer of Itzhaki Properties and just as Sam, she sat in the office of Itzhaki Properties with the rest of their team. On November 13, 2013, Sam Abraham asked Defendant Gil Boosidan to provide him with unique construction budget model that was prepared by Itzhaki Properties, which he received (Exhibit I). On or about

December 4, 2013, Rockford Holdings Group entered into agreement to purchase the above referenced property from 314 East 86th St. LLC in consideration of \$6,260,000. Apparently and in contradiction to Sam Abraham's testimony (Ex F, P17:5-17) and his partner's testimony (152853/2014, NYSCEF Doc No. 174 at P.17:11-21) who testified that there was a broker, but they could not remember his name, there was no broker on the Contract of Sale (Exhibit J). Per Sam Abraham, both he and Steve Makowsky invested capital to make the deposit to the property, in fact they were equal partners (Ex F at 13:15-16). When asked if he was aware that Itzhaki Properties was trying to sell the same property at the time that he partnered with Steve Makowsky, he testified that he does not even know when Itzhaki Properties got involved, but he remembers that there was some discussion about it. He testified that he is sure that Steve Makowsky was involved months before Itzhaki got any kind of mandate or got any decision to market the property and that he is not sure how that worked out (Ex F at 13:19-14:16). Further, when asked if he was aware that Itzhaki Properties was marketing this property, he testified that he learned that Itzhaki Properties was also trying to sell when he was already been involved with this project that Steve introduced him to. This is simply a lie. On or about January 13, 2014 Itzhaki Properties' counsel sent a Notice Letter to Sam Abraham and his partners to inform them that Itzhaki Properties is entitled to a commission in an amount equal to 5% of the sales price (Exhibit K is a copy of the Notice Letter dated January 13, 2014). Sam Abraham testifies that his and his partners' intent was to raise the necessary capital to close the purchase of the building, and then raise enough funds to build and convert the property into a luxury building (Ex F at 18-13:20). Per Sam Abraham, Steve Makowsky worked mostly on raising the debt and he worked on attempting to raise equity investors for the project (Ex F at 19:1-5). As part of the efforts to raise the capital, Sam Abraham and Steve Makowsky composed a presentation to prospect investors. As demonstrated in Exhibit L, the source of most of the slides in the Rockland's investor presentation is the propriety

information and materials that were created and owned by Itzhaki Properties, including but limited to the property set-up, financial model and budget. Not that they used the same models and templates they even kept the same colors!. Ultimately, Sam Abraham and Steve Makowsky were not able to secure the necessary financing to close the purchase and had to assign their contract to 361 Holdings, LLC (Ex F at 22-1:4). On or about February 14, 2014, 361 Holdings, LLC closed the purchase of the property with the same purchase price (See Exhibit M). Therefore, Sam Abraham owes 5% of the sale price (\$6,260,000) in brokerage commission which equals to \$313,000. He is also liable for the damages that he inflicted on Defendants Itzhaki and Boosidan due to the misappropriation of their trade secrets, unjust enrichment, breach of Confidentiality and Non-Compete Agreement.

During November 2016, several phone calls took place between Defendant Boosidan and Sam Abraham where they tried to settle their differences. On November 28, 2016 and after several discussions Sam Abraham, Sam Abrahams withdrew his buyout notice and wrote Defendant Boosidan the following: “Gil, I had a chance to discuss the options with Dalit and Harris and they decided that they prefer a letter instead of rescinding the previous one. So they drafted it and we signed it. I attached a scanned pdf version with our signatures. If you are OK with it, please have it signed by both you and Erez and send it back. The letter is pretty clean so I suspect there won't be any issues, but if you do have any issue or question about it, just let me know and we will discuss. Thanks, Sam” (Exhibit N). Then-after, Defendant Boosidan and Sam Abraham have another attempt to resolve this matter. Ultimately, it was the agreed between Defendant Boosidan and Sam Abraham that Defendants Boosidan and Itzhaki will be entitled to offset any amount owed to Sam Abraham and his investors by any amount of brokerage fees that Sam Abraham and his partners owes Itzhaki Properties, an agreement which they have breached. On December 8, 2016, Defendant Boosidan wrote Sam Abraham the following: “This is to confirm our investment

agreement. Accordingly, on any sale or any other exit of the property known as 391 Broadway, you will receive the greater of your investment plus an annual return of 10 % from the date of investment through the exit and your pro rate share of distribution. Sam Abraham replied, on the same date, as the following: Thanks Gil. Hopefully, this will get done and sold in the near future. Best, Sam”. (Exhibit O). Therefore, as of date Plaintiff owes Defendants approximately \$130,000.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court grant its motion to dismiss in its entirety and dismiss all of the causes of action in the Complaint with prejudice, together with such other and further relief as this Court deems just and proper.

Dated: Queens, New York
June 28, 2021

/s/ Ran Daniel

By: Ran Daniel, Esq.
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VIA NYSCEF AND ELECTRONIC-MAIL ONLY