

TKS Realty LLC v 391 Broadway LLC

2020 NY Slip Op 32230(U)

July 7, 2020

Supreme Court, New York County

Docket Number: 655517/2019

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

TKS REALTY LLC,

Plaintiff,

- v -

391 BROADWAY LLC, EREZ ITZHAKI, GIL BOOSIDAN,

Defendants.

-----X

INDEX NO. 655517/2019
MOTION DATE 03/13/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion for SUMMARY JUDGMENT.

Upon the forgoing documents, plaintiff's motion for summary judgment is granted, and defendants' cross-motion for summary judgment is denied.

Background

In this breach of contract action, plaintiff TKS Realty LLC ("TKS") seeks to recover monetary damages resulting from an alleged breach of the terms of a Limited Liability Company Agreement ("the Agreement") by defendants 391 Broadway LLC ("391 Broadway"), Erez Itzhaki ("Itzhaki"), and Gil Boosidan ("Boosidan"; collectively with 391 Broadway and Itzhaki, "Defendants").

The facts, simply stated, are as follows. On March 6, 2013, TKS entered into the Agreement with 391 Broadway whereby TKS agreed to invest the sum of \$100,000 in return for 2% equity ownership interest in 391 Broadway. Pursuant to Section 8.2(c) of the Agreement, TKS, as a minority member of 391 Broadway, had the option to offer its 2% ownership interest for sale to 391 Broadway. The subject contractual provision also states that Itzhaki and Boosidan were guaranteeing 391 Broadway's obligation to buy out a minority member, although they dispute whether that provision is binding. The complaint alleges that on or about March 11, 2016, TKS duly notified Defendants of its desire to exercise the buyout option. However, according to TKS, Defendants never made the required payout.

On September 23, 2019, TKS commenced the instant action under a breach of contract theory, seeking judgment against all Defendants in the amount of \$186,014, plus interest at the rate of 10% per annum, compounded annually, plus attorney's fees, costs and disbursements. The complaint alleges causes of action for breach of contract against 391 Broadway (first cause of action) and breach of guaranty against Itzhaki and Boosidan (second cause of action). Defendants, in their answer, denied the material allegations of the complaint and asserted three counter-claims against TKS: for misappropriation of trade secrets and confidential information

(first counter-claim); unjust enrichment (second counter-claim); and breach of confidentiality and a non-compete agreement (third counter-claim). Essentially, Defendants allege that TKS and TKS's alleged agent, Sam Abraham ("Abraham"), engaged in misconduct by way of stealing and misappropriating Defendants' trade secrets, work product, and other confidential information, allegedly damaging Defendants in an amount of not less than \$250,000. TKS's reply denies these allegations.

TKS now moves, pursuant to CPLR 3213, for summary judgment in its favor on both of its causes of action, in the amount of \$194,871, plus \$1,624 per month in interest from March 6, 2020, plus attorney's fees and costs. In support of its motion TKS points to the terms of the Agreement and attaches a letter dated March 10, 2016 wherein TKS requested to exercise its buyout option. TKS argues that there are no questions of material fact that preclude granting summary judgment because TKS followed the terms of the Agreement.

Defendants oppose the motion and cross-move for summary judgment. Defendants argue that Itzhaki and Boosidan cannot be found personally liable because, inter alia, they did not execute a separate personal guaranty. Defendants also argue that the complaint must be dismissed, pursuant to CPLR 3013 and 3211(a)(7), due to TKS's failure to state a cause of action and its failure to include any evidence extrinsic to the complaint. Additionally, Defendants contend that TKS's motion must be denied as the language of Section 8.2(c) of the Agreement is vague and therefore not enforceable. Lastly, Defendants argue TKS must lose this fight as TKS engaged in the misappropriation of confidential information.

The Agreement

Section 8.2(c) of the Agreement states, in pertinent part:

Any Minority Member may at any time after the Put Option Trigger Date, offer their interest for sale to the LLC. Such offer shall be made in writing to the LLC. The LLC upon receipt of such offer must purchase said interest within 90 days at the Buyout Price. The return shall be calculated on a per annum basis starting from the day when the member first paid their membership interest to the day which the payoff is paid. The LLC's obligation under this buyout option is personally guaranteed (jointly and severally) by Erez Itzhaki and Gil Boosidan.

For clarification, the Agreement defines "Minority Member" as any investors other than Itzhaki, Boosidan, and Marty Hollander; "Put Option Trigger Date" as the earlier of the day in which the first floor premises are either leased or sold or 4/1/15; and "Buyout Price" as the price which the member paid for their share plus 10% return, calculated annually.

Discussion

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact, and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d 1062 (1993). Once the movant's initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact

requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) (“The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment”).

TKS demonstrated its entitlement to summary judgment as a matter of law on both of its causes of action against Defendants to recover the sum of \$100,000, plus 10% interest thereon from March 6, 2013 (day when TKS first paid their membership interest), compounded annually, plus costs and disbursements, by submitting, inter alia, the pleadings; the Agreement; the March 10, 2016 buyout notice letter to Defendants; and the affidavit of Dalit Sterman, managing member of TKS. TKS’s submissions establish that the required written notice was provided and the buy out never paid.

Furthermore, Defendants have failed to submit any evidentiary proof sufficient to create any material issue of fact in opposition, and the various affirmative defenses and counter-claims that Defendants plead either are not a defense or they do not have admissible factual support. See Zuckerman v City of New York, 49 NY2d at 562.

Although Defendants allege that TKS misappropriated confidential information, Defendants fail to provide any evidence showing that Abraham was TKS’s agent or that Abraham, let alone TKS, actually engaged in the alleged misconduct. This Court notes that Boosidan’s affidavit in support of Defendants’ cross motion states “[u]pon information and belief, Mr. Sam Abraham stole the transaction’s information, financial models and other information and used it for his and the plaintiff’s gain.” The statement “upon information and belief” without any evidentiary support is insufficient to create a material issue of fact. *Id.*

This Court finds the Agreement unambiguous; it clearly states that any minority member may, after a certain time, offer their interest to 391 Broadway, and 391 Broadway in return *must* purchase said interest within a specific amount of time at a specific price. The Agreement is also clear that Itzhaki and Boosidan agreed to personally guarantee 391 Broadway’s obligation under the buyout option. Defendants argue that the individual defendants cannot be personally liable without evidence of a separately executed personal guarantee signed by Itzhaki and Boosidan in their personal capacity. This Court finds such an argument unavailing; Itzhaki and Boosidan signed the Agreement in their individual capacity as investors in 391 Broadway. Defendants also argue that they cannot be liable because there was no separate consideration given; however, as evidenced by the affidavit of Sterman, there was consideration – TKS’s investing \$100,000 into 391 Broadway. Furthermore, Sterman attests to the fact that if not for Itzhaki and Boosidan’s personal guaranty, TKS would not have invested in 391 Broadway.

The Court has considered Defendants’ remaining arguments and finds them to be unavailing and/or non-dispositive.

As for TKS’s request for attorney’s fees, this Court declines to grant such request, as TKS has set forth no legal basis for said relief.

Conclusion

Thus, for the reasons set forth herein, TKS’s motion for summary judgment is granted, and Defendants’ cross-motion for summary judgment is denied. The Clerk is hereby directed to enter judgment in favor of plaintiff TKS Realty LLC and against Defendants 391 Broadway LLC, Erez Itzhaki, and Gil Boosidan, jointly and severally, in the sum of \$100,000, plus 10% interest thereon from March 6, 2013 (the day when TKS first paid their membership interest), compounded annually, plus costs and disbursements.



7/7/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN