

**Firmenich Inc. v TPR Holdings LLC**

2020 NY Slip Op 33087(U)

September 18, 2020

Supreme Court, New York County

Docket Number: 652751/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14**

*Justice*

-----X

FIRMENICH INCORPORATED  
Plaintiff,

- v -

TPR HOLDINGS LLC,  
Defendant.

-----X

INDEX NO. 652751/2020  
MOTION DATE N/A  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

The motion for summary judgment in lieu of complaint is granted.

**Background**

Plaintiff brings this case to enforce a settlement agreement. It claims that in February 2016, the parties entered into a settlement agreement and defendant delivered a promissory note for \$1,450,000 plus interest. The note required that defendant was to pay plaintiff according to a schedule set forth in the note. Plaintiff claims that there were numerous issues with defendant's payments and, eventually, defendant stopped making payments after March 2019. Plaintiff contends it sent defendant a notice of default dated July 31, 2019 after defendant failed to make the April, May, June and July 2019 payments. It asserts that under the terms of the note, it can commence this action after a default and appropriate notice to defendant. Plaintiff contends that \$320,175 is due.

In opposition, defendant claims that the note references the settlement agreement and that agreement imposes obligations on plaintiff, which renders the use of summary judgment in lieu

of complaint inapplicable. It claims that plaintiff must establish other elements besides simply nonpayment before it can recover. Defendant also points out that the affidavit of facts is not accompanied by a certificate of conformity (the affidavit is from someone in Pennsylvania) and its should not be considered by the Court.

Defendant also claims that the emergence of the Covid-19 pandemic has rendered performance under the settlement agreement objectively impossible and frustrates the purpose of the agreement. It concludes that it “faithfully performed its obligations under the Settlement Agreement. By plaintiff’s own admission, Defendant has nearly completed all of its obligations under the Settlement Agreement. However, the cataclysmic shutdown of commerce arising from the COVID-19 emergency (which was entirely unforeseeable and unforeseen) rendered the performance of the supply obligations of the parties under the Settlement Agreement objectively impossible” (NYSCEF Doc. No. 13, ¶ 13).

In reply, plaintiff acknowledges that it failed to attach a certificate of conformity and asks the Court to accept the filing it submitted in reply *nunc pro tunc*. Plaintiff points out that defendant does not dispute it entered into the note or that it failed to meet its obligations under the note. It argues that the note is clearly a legally enforceable instrument for the payment of money only. Plaintiff also concludes that the nonpayment began long before the pandemic began.

### **Discussion**

“When an action is based upon an instrument for the payment of money only ... the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. A note qualifies as such an instrument for this purpose, provided the plaintiff can establish a prima facie case via proof of the note and a failure to make

the payments called for by its terms. It does not qualify if outside proof is needed, other than simple proof of nonpayment or a similarly de minimis deviation from the face of the document” (*Bonds Fin., Inc. v Kestrel Tech., LLC*, 48 AD3d 230, 231, 850 NYS2d 429 [1st Dept 2008] [internal quotations and citations omitted]).

Here, a review of the promissory note reveals that it is an instrument for the payment of money only (i.e. the payment of \$1,450,000 in certain installments) (NYSCEF Doc. No. 19). There is nothing in the document to suggest that it imposed any obligations on plaintiff except for the requirement that plaintiff provide written notice to defendant if there was a default. But that only required plaintiff to comply with a procedure to collect the money; it does not remove the note from the auspices of CPLR 3213. The reference to the settlement agreement that was the basis of the promissory note is besides the point. That document memorialized that the dispute concerning a preferred supplier agreement was being resolved for \$1.45 million and that defendant was to pay that amount. There is no issue of fact regarding whether this case involves an instrument for the payment of money only. Defendant does not dispute that it failed to make payments or that plaintiff failed to abide by the notice provisions contained in the note.

The Court, in its discretion, will accept the certificate of conformity submitted in reply. This does not compel denial of the motion because plaintiff did not raise new arguments in reply; it merely corrected an oversight in its moving papers.

With respect to defendant’s claims about impossibility and frustration of purpose, the Court wholly rejects those arguments. This Court can look at a calendar; the alleged nonpayments started in April 2019. The pandemic did not start causing business disruption in the United States until 2020. Although there will likely be many cases exploring how the pandemic might affect disputes over contracts and promissory notes, this is not such a case. In

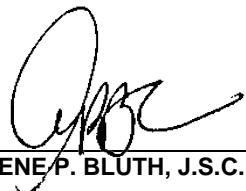
fact, it is patently absurd that defendant would disingenuously cite to a pandemic that has caused so much harm around the world as a defense to a default that occurred last year. The pandemic is not a catch-all defense to disputes that began last year.

Accordingly, it is hereby

ORDERED that the motion for summary judgment in lieu of complaint is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$320,175.00 plus interest at the contractual rate of six percent from March 24, 2019 until the date the judgment is entered and then at the statutory rate along with costs and disbursements after presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable attorneys' fees is severed and there shall be a hearing to determine the reasonable amount due to plaintiff.

9/18/2020  
DATE

  
ARLENE P. BLUTH, J.S.C.

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