

**Tavor v 391 Broadway LLC**

2020 NY Slip Op 35606(U)

August 26, 2020

Supreme Court, New York County

Docket Number: Index No. 651848/2017

Judge: Nancy M. Bannon

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

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

*Justice*

-----X

ILAN TAVOR,  
Plaintiff,

- v -

391 BROADWAY LLC, GIL BOOSIDAN and  
MARTIN HOLLANDER

Defendants.

-----X

INDEX NO. 651848/2017  
MOTION DATE 08/05/2020  
MOTION SEQ. NO. 005

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 64, 65, 66, 67, 68, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

In this breach of contract action, the plaintiff, Ilan Tavor, a construction contractor and purported "4% owner, partner and member" of defendant 391 Broadway LLC, seeks, *inter alia*, to recover \$300,000 for construction services allegedly provided to 391 Broadway LLC at that premises. For his claim, he relies upon an agreement dated November 30, 2015, by which 391 Broadway LLC agreed that it owes \$300,000 to the plaintiff and defendant Gil Boosidan, a member of the LLC, agreed to guaranty the payment of that amount, upon sale of the building. Another provision states that if the building was not sold by August 18, 2016, the LLC would pay plaintiff within 45 days or on the date of any refinancing, according to other terms. The agreement also states that it shall constitute a "promissory note" as to defendant Boosidan, but the word "unconditional" is crossed out. Written into the margin of the printed agreement is a provision that would release all parties from all claims, including claims of ownership, against each other upon payment to the plaintiff of \$300,000. Another provision states that the agreement would not effect the plaintiff's ownership share of another property at 225 East 82<sup>nd</sup> Street. Some payment provisions are covered with a large X.

In his complaint, the plaintiff also seeks an additional \$605,500 in regard to other projects under theories of breach of contract and unjust enrichment, attorney's fees and \$2,000,000 in damages on a claim for tortious interference as against defendant Martin Hollander, also a member of 391 Broadway LLC. The defendants answered the complaint, asserting several affirmative defenses, including unclean hands, and a counterclaim for breach of contract seeking \$500,000. Essentially, the defendants contend that the underlying "construction manager" contracts with the plaintiff, entered sometime in 2013 or 2014, were invalid because the plaintiff was not properly licensed to do that type of work, and that he performed defective work, delayed completion of the project and caused the defendants to incur additional costs for finishing and/or remedying the work he performed.

On February 20, 2020, the plaintiff filed the instant motion pursuant to CPLR 3212 seeking partial summary judgment on its first cause of action, breach of contract, in the sum of \$300,000, and severance of the remaining claims. By an order dated May 8, 2020, the court granted the defendants an extension of time to May 22, 2020, to oppose the plaintiff's motion for partial summary judgment (MOT SEQ 005). No opposition was filed. By letter dated May 22, 2020, counsel for the defendants requested additional time, to June 30, 2020, to oppose the motion, alleging that he was unable to file any earlier due to a COVID-19 illness and office closures. The plaintiff opposed the application by letter filed July 7, 2020, noting that no opposition papers had yet been filed.

By an order dated July 9, 2009, the court granted the defendants' application for additional time to the extent that they were to file any opposition on or before July 20, 2020, or it would be deemed waived. The plaintiff was permitted to file any reply on or before July 31, 2020, and the motion was to be marked submitted on papers on August 5, 2020. The defendants failed to timely file by July 20, 2020. On July 22, 2020, they filed opposition papers and cross-moved pursuant to CPLR 3211(a)(7) and CPLR 3212(b) to dismiss the breach of contract cause of action. The plaintiff replied. Since the defendants' two-day delay was *de*

*minimus* in light of the ongoing COVID-19 health crisis and allegations by counsel that he fell ill for a few days starting on July 18, 2020, and since the plaintiff had an opportunity to reply, the court will consider the defendants' submission, but only as opposition papers.

The motion and cross-motion are denied.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New York, *supra*; O'Halloran v City of New York, 78 AD3d 536 [1<sup>st</sup> Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, *supra*; O'Halloran v City of New York, *supra*; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2<sup>nd</sup> Dept. 2013). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1<sup>st</sup> Dept. 1990) *quoting Nesbitt v Nimmich*, 34 AD2d 958, 959 (2<sup>nd</sup> Dept. 1970). While there is no dispute that the parties entered an agreement dated November 30, 2015, and that the defendants agreed to pay the plaintiff \$300,000, the terms and conditions of the payment are not, as the plaintiff argues, as "plain and clear" on its face as an ordinary promissory note. The plaintiff's submissions otherwise fail to establish entitlement to summary judgment in his favor in the first instance on that portion of the first cause of action. Indeed, the additional documents provided by the plaintiff and certain allegations in the complaint and in the plaintiff's own affidavit appear to make the terms of the agreement and the parties' intent less, not more, clear.

Even assuming the plaintiff had met his burden, the defendants' submissions raise triable issues as to the precise terms agreed upon by the parties and the payments made and currently owed. In his affirmation, counsel argues that the plaintiff failed to meet his burden in the first instance, and sets forth additional facts, which defendant Gil Boosidan verifies in his own affidavit. Notably, no deposition transcripts are submitted by the parties, the plaintiff merely claims they were not necessary to meet his burden on this motion.

Finally, even if the cross-motion were deemed timely, it would be denied as without merit. While the plaintiff is not entitled to summary judgment pursuant to CPLR 3212, he has alleged enough facts in regard to the breach of contract cause of action to withstand a motion to dismiss pursuant to CPLR 3211(a)(7).

Accordingly, it is

ORDERED that the plaintiff's motion for partial summary judgment is denied, and it is further

ORDERED that the defendant's cross-motion to dismiss is denied, and it is further

ORDERED that any request for relief not expressly addressed herein is denied, and it is further

ORDERED that the parties shall contact the court on or before October 30, 2020, to schedule a settlement conference.

This constitutes the Decision and Order of the court.

  
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NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

8/26/2020  
DATE

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"/>	GRANTED IN PART		
		<input type="checkbox"/>	DENIED		