SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** 05RCP

Justice

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ILAN TAVOR,

Plaintiff,

- v -

391 BROADWAY LLC, GIL BOOSIDAN, and MARTIN HOLLANDER,

Defendants.

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INDEX NO. 651848/2017

TRIAL DECISION AND ORDER

Upon the trial conducted on October 18-19, 2022 and the post-trial memoranda submitted by counsel on December 30, 2022[1], the Court decides as follows:

In his complaint, plaintiff Ilan Tavor asserted claims for: (1) breach of contract or, alternatively, unjust enrichment against defendants 391 Broadway LLC ("391 Broadway") and Gil Boosidan seeking: (a) $905,500.00 for construction services allegedly provided to 391 Broadway and (b) $250,000.00 representing profits from the sale of two buildings in which he held an interest as a member of the limited liability corporations that owned these buildings; (2) tortious interference with this contract as against Martin Hollander seeking damages in the amount of $2,000,000.00; and (3) attorneys' fees.

Evidence at Trial

Plaintiff testified on his case-in-chief that he worked for defendants Boosidan and 391 Broadway from 2010 to 2015 as an in-house consultant on five construction projects, assisting

[1] Defendants note that plaintiff e-filed his post-trial brief on February 27, 2023 and assert that they never received a hard copy of that brief until that date. However, as a hard copy of this brief was timely submitted to the Court by mail, the Court declines to grant defendants' request to reject plaintiff's post-trial brief.

them with construction management and field supervision, as well as assessing possible future projects (NYSCEF Doc. No. 122 [October 18, 2022 Tr. at pp. 13-15]). He further testified that he entered into an agreement with 391 Broadway and Boosidan by email on October 12, 2015 (Id. at pp. 18-19). Plaintiff submitted an email chain commencing with an email from Boosidan to plaintiff dated October 12, 2015, titled "Re: 391 – Summary of our meeting" (the "October 12, 2015 Email"), which provided as follows:

> Agreement dated today between owners of 391 Broadway, NY, NY and Ilan Tavor
>
> The financial arrangement is –
>
> ilan tavor to receive Monthly $17.5k no more reimbursements paid on the 15th, starting Nov. 15
>
> if project last more than 5/31, fee drops to 7.5k starting June. Services can not be terminated by either side.
>
> At TCO (for all residential units) ilan gets a ck dated for two weeks later for $200k (Represent upon checks clearing a buying back ilan tavor s current partnership stake of 4%), plus a payment of $100k, upon passing of the dob construction inspection, this check will be cashed by ilan on the date tco is issued for the residential portion of the project, both $100k and $200k checks/payments are Gurranty d by gil boosidan and it's company.
>
> We will have bi weekly approx. 1 our walkthrough meetings starting end of this month
>
> Attached is an expected schedule
>
> Agreed:
>
> Mr gil boosidan. Mr. Ilan tavor

(Pl. Ex. 1 [sic throughout]).

Plaintiff forwarded this email to Boosidan on October 13, 2015, with the heading "Re; 391 – see below. Let's get this executed this am so we can proceed. Todor aba…Summary of our meeting" (Id.). Plaintiff testified that he understood this email to memorialize an agreement in which he was due $17,500.00 each month—i.e., approximately $200,000.00 each year—until the building at 391 Broadway was sold (NYSCEF Doc. No. 122 [October 18, 2022 Tr. at pp. 61-62]).

Plaintiff's work as a consultant for 391 Broadway ended on or about November 15, 2015 (Id. at p. 126). Plaintiff testified that he, 391 Broadway, and Boosidan subsequently executed a written agreement in which 391 Broadway and Boosidan agreed to pay plaintiff $300,000.00 (as compensation for the work he had performed up until that date) which payment would be made upon the sale of the building located at 391 Broadway, New York, New York but in no event later than August 2018 (the "November 2015 Agreement") (Id. at pp. 25, 44). According to plaintiff, this building was sold in October or November of 2020 (Id. at p. 61).

Plaintiff also testified that the November 2015 Agreement contemplated that, upon its execution, plaintiff was to be given a post-dated check for $300,000.00, which check would be replaced every ninety days until it could be cashed (Id. at pp. 46-47). If this payment was not timely made, interest would accrue at a rate of nine percent per annum (Id. at pp. 51-52). Plaintiff was given two checks pursuant to this agreement but when he attempted to cash them they were "returned unpaid from a closed account" (Id. at pp. 52-53). The cancelled checks were not accepted into evidence by the Court based upon the lack of foundation (Id. at pp. 53-60). Plaintiff testified that he is owed $467,000.00 ($300,000.00 in principal plus accrued interest) under the November 2015 Agreement. (Id. at pp. 52, 62).

Plaintiff then moved to introduce a photocopied document which he maintained was the November 2015 Agreement into evidence. Defendants objected, noting, among other things, that the left-hand margin of the document, which contained several handwritten amendments to the contract, was cut off in this photocopy (Id. at p. 31). During his testimony, plaintiff was unable to establish that this copy was in fact an accurate reproduction of the final November 2015 Agreement between the parties. Specifically, while he testified that the document marked for identification was not an original copy, he was unable to state what had happened to his original signed copy or the circumstances in which he received the copy he attempted to introduce into evidence (Id. at pp. 57-59). In light of the missing terms in the photocopied document and plaintiff's confused and equivocal testimony as to how he had received and stored this document (thereby failing to establish that it satisfied the best evidence rule) this Court denied plaintiff's motion to admit the document into evidence.

Plaintiff testified that when he began working with Boosidan and 391 Broadway, they made a "handshake deal" that he would become a five percent partner in any future projects that he was involved in developing (NYSCEF Doc. No. 123 [October 19, 2023 Trial Transcript at pp. 31-32]). In connection with his testimony, he submitted into evidence certain Schedule K-1 tax forms for 391 Broadway from 2012 through 2017 and for non-party B&H 225 East 82nd Street LLC from 2012 through 2015 which documented that plaintiff had a four percent interest in these entities during those years (Pl. Exs. 5 and 6).

Plaintiff testified that part of the building known as 391 Broadway was sold for a profit of five million dollars (NYSCEF Doc. No. 123 [October 19, 2023 Trial Transcript at p. 24]). He did not submit any documentation to substantiate this number, however. To the contrary, he testified that he had never reviewed the financial books and records of 391 Broadway to determine when

this sale occurred, or the amount of such a sale but had instead made his own calculation of these amounts based on his knowledge of the building's purchase price and 391 Broadway's expenses up to the time he was fired as a consultant (Id. at pp. 34-37). On cross-examination, Tavor effectively conceded that no documents in the record documented the date and price of this sale. Instead, he referred defense counsel to Boosidan for the "real numbers" and averred that he did not "want to get more than I deserve" (Id. at p. 36).

At the conclusion of Tavor's testimony, plaintiff rested. Defendant Hollander then moved for a directed verdict dismissing the tortious interferences claims against him, which motion was granted on the grounds that plaintiff acknowledged that on direct examination Hollander was an owner of 391 Broadway—and therefore could not tortiously interfere with any contract between plaintiff and that entity—as well as plaintiff's concession that he had failed to carry his burden to establish damages on his case in chief (Id. at pp. 47-58). Defendants 391 Broadway and Boosidan also moved for a directed verdict at that time. The Court reserved decision on that motion and these remaining defendants proceeded with their defense and case-in-chief on their counterclaim based upon plaintiff's alleged deficient and defective services provided to defendants.

Gil Boosidan, the managing member of 391 Broadway, testified for defendants that Apollo Electric ("Apollo") performed electrical work at 391 Broadway and Shillco Mechanical Inc. ("Shillco") performed HVAC work in the building but that both entities stopped this work at the behest of Tavor (Id. at pp. 65-68). He further testified that the work already performed by Apollo and Shillco was of such poor quality that the companies hired to complete this work had to re-do all of work already performed by Apollo and Shillco before completing the electrical and HVAC work (Id. at p. 70). Boosidan testified that the total payments made to Apollo and Shillco was $155,000.00 and $238,500.00, respectively (Id. at pp. 87-88, 134), and submitted cancelled checks

documenting these payments (Def. Exs. A, B, and D), as well as a spreadsheet summarizing these payments (Def. Exs. C and E). On cross-examination, Boosidan characterized the October 12, 2015 Email as a summary of his meeting with Tavor in which they outlined the terms of a future agreement (Id. at pp. 103-105).

After defendants rested the Court reserved decision.

DISCUSSION

For the reasons set forth below, plaintiff's complaint is dismissed in its entirety, as plaintiff failed to establish his prima facie case at trial.

Plaintiff failed to meet his burden of proving unjust enrichment or breach of contract against defendants 391 Broadway and Boosidan. As the Court previously determined at trial, plaintiff also failed to establish that defendant Martin Hollander tortiously interfered with his alleged contract with the other defendants (Id. at pp. 57-58). Finally, plaintiff also failed to establish his entitlement to attorneys' fees.

Breach of Contract Claim

Contrary to plaintiff's claim, the October 12, 2015 Email is not a contract. "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (Kolchins v Evolution Markets, Inc., 128 AD3d 47, 59 [1st Dept 2015], affd, 31 NY3d 100 [2018]). Even assuming that this email constituted an offer from 391 Broadway, the email thread does not include any acceptance by plaintiff such that a contract could have been created. The fact that the email states that the terms outlined therein are accepted by both parties is insufficient to do so. In addition, Tavor's reply to Boosidan on October 13, 2015 encouraging him to "get this executed" supports the conclusion that Tavor at all times understood that email to be an agreement to agree. In any event, the terms set

out in this email contemplate payment only after certain conditions are met (i.e., the issuance of a Temporary Certificate of Occupancy and passing a Department of Buildings inspection) rendering it "too incomplete and indefinite to be enforceable, and was merely a non-binding agreement to agree" (Cohen v Cohen, 120 AD3d 1060 [1st Dept 2014] [internal citations omitted]). Plaintiff's reliance, in his post-trial memorandum, on Boosidan's deposition transcript to establish that a contract was created by this email is unavailing—this transcript was not admitted into evidence at trial and cannot be considered now[2].

Neither did plaintiff establish the existence of an implied-in-fact contract through his testimony as to the terms of the November 2015 written agreement. As an initial matter, plaintiff may not now raise this new theory of liability for the first time in post-trial submissions (See e.g., Lubov v Horing & Welikson, P.C., 72 AD3d 752 [2d Dept 2010] ["Supreme Court ... properly declined to consider the plaintiff's new theories of quasi-contract and unjust enrichment, not advanced in his argument supporting his motion to conform the pleadings to the proof, and not raised until his posttrial reply memorandum of law"]; see also Up-Front Indus., Inc. v U.S. Indus., Inc., 97 AD2d 354, 355 [1st Dept 1983], affd, 63 NY2d 1004 [1984] ["it would be unfair to allow post-verdict motions upon theories at odds with the legal course charted all through trial"]). Even ignoring the foregoing, theories of breach of contract and breach of implied-in-fact contract are mutually exclusive (See Bowne of New York, Inc. v Intl. 800 Telecom Corp., 178 AD2d 138, 139 [1st Dept 1991]) and plaintiff's insistence, from the commencement of this action until the conclusion of the trial, that he entered an express agreement with 391 Broadway entirely undercuts his argument that the parties instead created an implied-in-fact contract through their course of conduct.

[2] The Court observes that Boosidan was available to call as a witness on plaintiff's case-in-chief, yet plaintiff elected not to do so.

Plaintiff also failed to establish any breach of contract arising from his purported membership interest in 391 Broadway and B&H 225 East 82nd Street LLC. While the Schedule K-1 tax forms in evidence are relevant to the determination of plaintiff's partnership in these entities, these documents are not, standing alone, dispositive (See Gerzog v Goldfarb, 206 AD3d 554, [1st Dept 2022]; Rakosi v Sidney Rubell Co., LLC, 155 AD3d 564 [1st Dept 2017]). In any event, plaintiff failed to offer any evidence that the real estate assets owned by these entities were sold at a profit, let alone that that any such profit was distributed to all members except himself. Rather, plaintiff's calculation of the amounts due from this sale were, by his own admission, based solely on his assumptions regarding the purchase price and construction costs. None of these assumptions were substantiated with any documentary evidence and his testimony was, therefore, insufficient to establish his damages.

Unjust Enrichment Claim

Plaintiff did not carry his burden on alternative cause of action, for unjust enrichment. In his post-trial memorandum, plaintiff argues that if he failed to establish a breach of contract he has, instead, established that "[d]efendants have been unjustly enriched to the detriment of plaintiff by accepting his services without providing him with payment in the sum of $1,917,000.00." The Court construes this claim as one sounding in quantum meruit rather than unjust enrichment (See e.g., Roey Realty LLC v Jacobowitz, 2022 NY Slip Op 34310[U] [Sup Ct, Kings County 2022] [a claim for unjust enrichment requires that: (1) defendants were enriched; (2) at plaintiff's expense; and (3) that it is against equity and good conscience to permit the defendants to retain the enrichment while a quantum meruit claim involves "the performance of services in good faith, acceptance of services by the person to whom they are rendered, expectation of compensation therefor, and reasonable value of the services rendered"]). Regardless of its construction, however,

plaintiff has failed to meet his burden of proof, inasmuch as he did not offer any evidence as to the specific work he performed for defendants or the reasonable value of such work (beyond referencing the amounts allegedly set forth in the November 2015 Agreement not in evidence) (See Nemeroff v Coby Group, 54 AD3d 649 [1st Dept 2008] [internal citations omitted]; see also Intl. Dev. Inst., Inc. v Westchester Plaza, LLC, 194 AD3d 411, 412-13 [1st Dept 2021] [summary judgment dismissing unjust enrichment claim properly granted where, inter alia, the damages plaintiff sought in connection with this claim were not distinct from plaintiff's breach of contract claim]).

Attorneys' Fees

Finally, plaintiff did not meet his burden of proving his entitlement to attorney's fees. He failed to offer any statutory or contractual provision under which such attorney's fees are recoverable (See e.g., Brathwaite v Francois, 215 AD3d 582 [1st Dept 2023] ["Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule"]). In addition, he failed to submit any testimony or documentary evidence to substantiate that he incurred any actual attorney's fees in connection with this action. Accordingly, plaintiff's claims are dismissed.

Defendants' Counterclaim

Defendants' counterclaim against Tavor for breach of contract based upon Apollo and Shillco's provision of allegedly deficient services is also dismissed. There is nothing in the record beyond Boosidan's hearsay testimony to establish that Apollo and Shillco stopped working due to Tavor or that the work they did perform was substandard.

In light of the foregoing, it is hereby

ORDERED and **ADJUDGED** that plaintiff's complaint and the defendants' counterclaim are hereby dismissed; and it is further

ORDERED that counsel for defendant 391 Broadway LLC shall serve a copy of this decision and order, with notice of entry, upon plaintiff as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within ten days of the date of this decision and order; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "EFiling" page on this court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

DATE: 5/24/2023

HON. JUDY H. KIM, J.S.C.

Check One: ☐ **Case Disposed** ☐ **Non-Final Disposition**

Check if Appropriate: ☐ **Other (Specify** _____ **)**