At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of July, 2013

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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LEAH GURARY, individually and as a member of ETERNITY DIAMONDS ONLINE LLC, and ETERNITY DIAMONDS ONLINE LLC,

Plaintiffs,

- against -

YONAH RENDLER and ETERNITY BY YONI INC.,

Defendants.

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DECISION & ORDER

Index No. 502107/12

The following papers read on this motion:	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed/ Memoranda of Law	5-10, 25-26, 60-67
Opposing Affidavits (Affirmations)/Memoranda of Law	54-57, 68-96, 97-102

Upon the foregoing papers, Yonah Rendler (Rendler) and Eternity By Yoni, Inc. (EBY) (collectively, defendants) cross-move, pursuant to CPLR 3211 (a) (1), (3), (7) and (10) for an order dismissing the action.[1] Plaintiff Leah Gurary (Leah) moves, individually and as a member of Eternity Diamonds Online, LLC ("EDO"), pursuant to CPLR 7503 (b), to stay arbitration

[1] This cross motion (designated motion sequence 2) was a cross motion to plaintiffs' preliminary injunction motion (motion sequence 1) which this court's January 16, 2013 decision and order granted.

(motion sequence 4), and defendants cross-move, pursuant to CPLR 3025 (b), CPLR 1001 (b) and CPLR 1003, for an order amending the caption and, pursuant to CPLR 7503 (a), for an order to compel arbitration (motion sequence 5).

Background and Procedural History

Leah and Rendler formed EDO to conduct internet marketing and sales of jewelry manufactured and designed by Leah's wholesale jewelry company, Classique Creations. EDO's Operating Agreement specified, at paragraph 18, that "[a]ny and all controversy or claim arising out of or relating to this Agreement shall be submitted for binding arbitration to Ephraim Pikarski ("Arbitrator") and not to any court, tribunal or the like except upon written permission of the Arbitrator." The paragraph also provides that the arbitrator may arbitrate the dispute himself or may request two additional people to arbitrate with him, or that in the event the arbitrator is unable or unwilling to arbitrate the controversy, that he may designate a substitute arbitrator, or if he fails to do so, that the parties will submit the controversy to the Beth Din "Zabla" to resolve the dispute.

Plaintiffs claim that Leah invested approximately $300,000 in EDO while Rendler made no capital contribution and received his membership interest in EDO as consideration for his work managing EDO's day-to-day operations. Rendler, sometime after the agreement (the complaint specifies no dates), ceased working for EDO and allegedly converted approximately $1,000,000 worth of EDO's sample rings, jewelry images and EDO's customer lists in order to create EBY, a competing on-line business in apparent violation of a non-compete provision set forth in the LLC agreement between Leah and Rendler.

Rendler contends that Leah conspired with her husband and son to destroy EDO so that their own competing business, operated through the website Ocappi.com, could thrive and improperly

acquire EDO's sales.

It is undisputed that, prior to the commencement of this action, the parties engaged in arbitration before Ephraim Pikarski on at least two (and possibly three) occasions. The parties dispute the outcomes of these proceedings. Plaintiffs contend that at the first session, Pikarski orally declared that the partners must "divorce" and the dispute be settled with one party offering to purchase the other party's rights in the LLC and the other party selling or matching the bid. According to plaintiffs, Rendler objected to this ruling and declared that the arbitrator was biased in favor of Mordechai Gurary ("Mordechai"), Leah's husband and an agent of EDO, and intimidated by Mordechai. Plaintiffs claim that at the second session, Pikarski orally ruled that Rendler was no longer an EDO employee and that Leah was entitled to hire another person to run the company. Rendler, according to plaintiffs, did not abide by this decision and appropriated EDO's property to form a competing business.

Conversely, Rendler claims that he was willing to follow the buyout ruling, but that Leah never made an offer and that Mordechai requested placing responsibility for Leah's $300,000 investment on Rendler. The arbitrator, according to Rendler, refused that request as outrageous. Rendler further states that the arbitrator ruled, at the second arbitration session, that Mordechai could hire someone to perform Rendler's job, provided a competent person could be found at a $45,000 salary, otherwise Rendler was to continue to be employed at $75,000 annually. Finally, Rendler alleges that Mordechai demanded, during a third arbitration session, that EDO be dissolved but that the arbitrator refused to make such a ruling. The record contains no written rulings by the arbitrator

nor are there any minutes from the arbitration hearings.[2]

Leah then commenced this suit by filing a summons and complaint along with an order to show cause seeking a temporary restraining order and a preliminary injunction against defendants. The motion sought to enjoin defendants from using the sample rings or images of the rings for advertising purposes and from conducting or participating in any business which competes with EDO. The motion further requested the return of the sample rings. The temporary restraining order was initially denied for failure to give notice (*see* December 19, 2012 tr at 18), but was later granted on December 19, 2012 both orally (*id.* at 25) and in writing (*see* December 19, 2012 Short Form Order [NYSCEF Document 23]).

Defendants, before arguments on the preliminary injunction motion, cross-moved, pursuant to CPLR 3211 a (1), (3), (7) and (10) to dismiss the action because the operating agreement provided that Mordechai, and not Leah, was a 50% EDO member and therefore Leah had no standing to maintain the action. Leah responded by moving to file an amended complaint (motion sequence 3), noting that an unsigned, inaccurate version of the LLC agreement had accompanied the original complaint. The amended complaint replaced the unsigned LLC agreement with a corrected version designating Leah as a 50% EDO member.[3]

The court, after hearing oral arguments on the preliminary injunction motion granted the injunction. Defendants noted during the argument that they had served a notice to arbitrate.

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[2] At the January 16, 2013, oral argument, plaintiffs indicated that they had produced Pikarski by subpoena and that he was willing to testify. However, as no motion to compel or to stay arbitration was before the Court at that time, it declined to call Pikarski on the record.

[3] This court's December 19, 2012 order denied the amendment motion as moot and explained that as no answer had been interposed there was no need for leave to amend the complaint.

However, the court stated that it would not opine on the issue of arbitration as there was no motion before it to compel or stay arbitration. Leah subsequently moved to stay arbitration, and defendants cross-moved to compel arbitration.

Discussion

Motion to Dismiss

Defendants premised their motion to dismiss the action on essentially one argument: Leah as a non-member of the LLC lacked the capacity to sue and therefore the action could not proceed without Mordechai as a party. However, Leah remedied this error by filing an amended complaint which showed her 50% EDO ownership interest, which is apparently not disputed. Defendants, in their further support of the motion, opted to continue the pending motion to dismiss against the amended complaint, citing *Toikach v Basmanov* (31 Misc 3d 615 [Sup Ct, Kings County 2011]). Leah counters that it is impermissible for defendants to continue the motion because the amended complaint cured all the defects alleged in the motion to dismiss. Leah also notes that defendants, in their further support affirmation, make completely new arguments for dismissing the action that their initial supporting papers omitted.

Sholom & Zuckerbrot Realty Corp. v Coldwell Banker Commercial Group (138 Misc 2d 799 [Sup Ct, Queens County 1988]) sets forth a rule allowing for a dispositive motion to continue after an amended complaint. In that case, the court opined that the traditional rule that a motion must be denied as moot when an amended pleading supercedes the pleading upon which the motion was based "only invites additional motion practice" and that a "better rule is one which allows the moving party the option of withdrawing its motion or pressing it with regard to the amended pleading" (*id.* at 801). The Appellate Division, First Department, adopted this "better rule" in *Sage*

Realty Corp. v Proskauer Rose (251 AD2d 35, 38 [1998]), and the Appellate Division, Second Department, in *Livadiotakis v Tzitzikalakis* (302 AD2d 369, 369 [2003] *citing Sage* 251 AD2d at 38) also embraced this rule where the motion to dismiss is addressed to the merits.

Here, the amended complaint significantly differs from the original complaint, and the *Sholom* rule does not apply in "those situations where the amendments make a significant change in the nature of the action" (*Sholom*, 138 Misc 2d at 801). More significantly, defendants raised entirely new arguments in their further support affirmation, unrelated to the grounds set forth in the original motion, which were cured in the amended complaint. However, plaintiffs' objection is meritless as the new grounds raised for dismissal could be raised by a new motion addressed to the amended complaint.

In further support of their motion to dismiss addressed to the amended complaint, defendants, citing this court's decision in *Wallace v Perret* (28 Misc 3d 1023 [Sup Ct, Kings County 2010]), argue that the complaint impermissibly co-mingles individual and derivative claims in the same causes of action. While, "there is no prohibition against individual suits brought by members based upon that member's own rights" *(RCGLV Maspeth LLC v Maspeth Props. L.L.C.*, 26 Misc 3d 1241[A], 2010 NY Slip Op 50503[U], *4 [Sup Ct, Kings County 2010]), defendants are correct that plaintiffs have impermissibly comingled and confused the individual rights of Leah and the derivative claims of the LLC in the same causes of action, requiring dismissal of the amended complaint. Moreover, the causes of action for conversion, promissory estoppel and unjust enrichment must be dismissed where, as here, a written contract exists (*see Grossman v New York Life*, 90 AD3d 990 [2d Dept 2011]). However, further amendment of the complaint is unwarranted in light of the Court's order herein compelling arbitration.

Motions to Compel and Stay Arbitration

Plaintiffs move to stay arbitration, and Rendler moves to compel it. As a threshold matter, Rendler argues that Leah's motion to stay is untimely pursuant to CPLR 7503(c) as plaintiffs moved to stay arbitration on January 22, 2013,[4] more than twenty days from December 26, 2012, when Rendler served the notice of intent to arbitrate. In response, plaintiffs claim that Rendler's service was defective because he served the notice by certified mail, with return receipt, and not by overnight mail by a commercial carrier, as required by paragraph 20(b) of the Operating Agreement.

While CPLR 7503(c) provides that service of the notice of intention to arbitrate "shall be served in the same manner as a summons or by registered or certified mail, return receipt requested," parties may contract to select a different method of service *(see Matter of Knickerbocker Ins. Co.*, 28 NY2d 57, 64 [1971] ("It is old law that arbitration agreements may provide for methods of service other than in common-law form appropriate to litigation."). The consequence of improper service under 7503(c) is to toll the time period by which the other party must apply to stay arbitration (*see Matter of Initial Trends*, 58 NY2d 896 [1983]). Moreover, when service of an arbitration notice is effected by mail, the time to apply for a stay begins to run upon receipt of the notice (*see Knickerbocker*, 28 NY2d at 64; *Matter of Andy Floors, Inc.* 202 Ad2d 938, 939 [3d Dept 1994]).

Render submits an affirmation from his attorney, stating that the arbitration notice was mailed by certified mail, return receipt requested, on December 26, 2012, and affixes return receipts signed by Leah Gurary on behalf of herself and EDO. However, these receipts do not indicate the date of delivery. The Court received a letter from plaintiffs' counsel dated January 4, 2013,

[4] Plaintiffs filed a motion to stay arbitration on January 22, 2013, then filed a corrected motion on January 24, 2013.

referencing the notice, implicitly acknowledging that plaintiffs had received it. As there is no evidence that plaintiffs received the letter before January 4, the application filed January 22 (and corrected January 24) is timely, and the Court may consider the merit's of plaintiffs' application. Moreover, although Rendler did not strictly comply with the method of service set forth in the Operating Agreement, in light of plaintiffs' undisputed receipt of the notice, and because the defective service resulted in tolling the deadline by which plaintiffs had to apply to stay arbitration, "[a] stay of arbitration on the ground that demand was ineffectual is . . . improper in a case such as this where [plaintiffs] obviously had actual notice of the demand to arbitrate and an opportunity, via this proceeding to stay arbitration, to judicially review its threshold objections to arbitrability" (*Andy Floors*, 202 AD2d at 939).

On a motion to compel or stay arbitration, a court should determine "the threshold issues of the existence of a valid agreement to arbitrate, that the party seeking arbitration has complied with the agreement, and that the claim sought to be arbitrated would not be time-barred were it asserted in state court" (*Shah v Monpat Constr., Inc.*, 65 AD3d 541 [2d Dept 2009]). No statute of limitations issues have been raised, and, as discussed above, Rendler submitted a notice of intention to arbitrate that plaintiffs received. Moreover, no party disputes the validity of the arbitration provision in the Operating Agreement. Indeed, the parties have already submitted to arbitration on multiple occasions.

Plaintiffs' main objection to arbitration is their contention that because Rendler previously refused to follow Pikarski's oral directives, he has "waived" his rights to arbitration provided by the Operating Agreement, and further arbitration would be futile. Neither party submits an affidavit from Pikarski, but, instead, the parties rely solely on self-serving affidavits to describe the events of the

arbitration proceedings. Without competent evidence, the Court cannot determine whether an award was rendered by Pikarski, the substance of the award (if any), or whether Rendler has complied with it. Accordingly, plaintiffs have not met their burden to show that continued arbitration would be futile or even that Rendler has failed to comply with prior awards issued by the arbitrator.[5]

The Operating Agreement unequivocally requires resolution of disputes by arbitration before Pikarski, not the courts, unless expressly approved in writing by Pikarski, which consent parties to not allege has been given. Pikarski remains available and willing to arbitrate. Accordingly, the appropriate forum in which to resolve their disputes is the arbitration procedure to which the parties contractually bound themselves to follow *(see Adelphi Enterprises, Inc. V Mirpa, Inc.*, 33 AD2d 1019, 1019 [2d Dept 1970]("A court does not have the power to allow an action at law upon a contract to proceed when the parties have provided by the contract that the exclusive remedy for any dispute that may arise thereunder is settlement by an arbitration proceeding."). This conclusion is consistent with New York State's strong policy of encouraging the resolution of disputes by arbitration (*see Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 49 [1997]).

Accordingly, plaintiffs' motion to stay arbitration is denied, and defendants' motion to compel arbitration is granted. Defendants' motion to amend the caption to include Mordechai Gurary as a party is denied, as Mordechai is not a member of EDO and not a party to the Operating Agreement.

Plaintiffs argue that, even in the event this Court compels arbitration, the claims against EBY

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[5] Plaintiffs' argument that Rendler has waived its right to compel arbitration because of his participation in the judicial forum is unpersuasive in light of the fact that plaintiffs themselves have previously engaged in arbitration proceedings and have thus waived their right to contest the arbitrability of the subject matter (*see Allstate Ins. Co. v Khait*, 225 AD2d 551 [2d Dept 1996]).

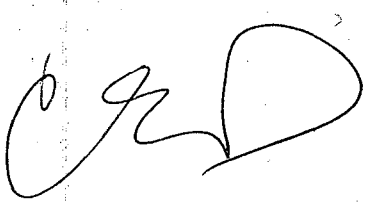
should proceed, as it was not a party to the arbitration agreement. In their complaint, plaintiffs assert causes of action against EBY for, among others, breach of fiduciary duty, conversion, unfair competition, and trademark infringement under both the Lanham Act and New York's General Business Law. As EBY was not a party to the Operating Agreement, plaintiffs cannot be compelled to arbitrate their disputes with it (*see Shah v Monapt Constr., Inc.*, 65 AD3d 5741 [2d Dept 2009]. However, as resolution of the disputes with Rendler would, in many instances, resolve the issues surrounding the claims against EBY, this action is stayed as to that defendant, pending arbitration between the parties.

Pending the resolution of the dispute at arbitration and the confirmation of an arbitration award, the injunction set forth in this Court's January 16, 2013, Order shall remain in full force, as any arbitration award in plaintiffs' favor would be ineffectual without the continuation of the injunctive relief (*see* CPLR 7502(c); *K.W.F. Realty Corp. v Kaufman*, 16 AD3d 688 [2d Dept 2005]).

The case is stayed pending arbitration as to all other matters.

Conclusion

Plaintiff's motion to stay arbitration is denied, and defendants' motion to compel arbitration is granted. Leah Gurary and Yonah Rendler are directed to forthwith proceed to arbitration in accordance with the terms of the Operating Agreement. Pending the resolution of the dispute at arbitration and the confirmation or vacatur of an arbitrator's award, the injunctive relief granted by this Court's Order of January 16, 2013, remains in full force, and the action against defendant EDY is stayed.



HON. CAROLYN E. DEMAREST
J.S.C.