

**Gilat v Sutton**

2022 NY Slip Op 33576(U)

October 18, 2022

Supreme Court, New York County

Docket Number: Index No. 651038/2022

Judge: Joel M. Cohen

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translations, to establish Gilat's rights to her husband's estate. As is relevant here, the Complaint contends that Gilat passed away in 2015 while owning a 100% interest in Rosh and an 8% interest in the Partnership. (Cplt. ¶¶7-8, 11). The LLC is allegedly the general partner and owns 20% of the Partnership (Cplt. ¶¶9-10). Rosh allegedly owns 10% of the LLC (Cplt. ¶10). Thus, per the Peled Affirmation, the Complaint generally alleges that Gilat owns 8% of the Partnership directly and another 2% vis-à-vis her interest through Rosh and that she is entitled to relief. The following allegations are especially relevant to the disposition of this motion:

- “The Partnership is operated pursuant to a partnership agreement dated September 30, 1992. . .” and “Shimon's Gilat's partnership interest was transferred to his wife, Plaintiff Sara Gilat. . .” (Cplt. ¶¶35-37)
- “The LLC is operated pursuant to an operating agreement dated July 1, 1995. . .” (Cplt. ¶41) and Gilat inherited Rosh from her husband (Cplt. ¶ 12)

However, the corporate documents are not annexed to the Complaint.

On June 7, 2022, Defendants moved to compel arbitration and stay this action (NYSCEF 8) pursuant to CPLR 7503. Defendants' counsel annexes a copy of the Partnership Agreement to his affirmation. That agreement provides, in relevant part:

Any dispute or controversy arising out of or relating to this agreement shall be determined and settled by arbitration held in the City of New York in accordance with the commercial rules of the American Arbitration Association then in effect and judgment upon the award rendered therein may be entered in any Court of competent jurisdiction. The expenses of such arbitration shall be borne equally by the parties to the arbitration, but each party shall pay for and bear the costs of its own experts, evidence and legal counsel.

(NYSCEF 9 ¶5 [Affirmation of Kevin Fritz and Ex. B thereto]). Defendants' counsel also annexes a copy of the LLC's Operating Agreement [NYSCEF 12]. That agreement includes a New York choice of law provision but no arbitration provision. The LLC's Operating

Agreement is signed by Shimon Gilat individually, not on behalf of Rosh (Operating Agreement at 16).

Plaintiffs submit the Affidavit of Orly Gilat (NYSCEF 17 ¶7), which states that Rosh is “a member of the LLC” but offers no documentation to support this contention (or that Orly Gilat is Plaintiff Sara Gilat’s “attorney-in-fact”). Nevertheless, Defendants do not dispute that Rosh is a member of the LLC and argue that because the LLC’s sole purpose is to serve as the general partner of the Partnership, that arbitration of all claims is warranted. (NYSCEF 15 [Defendant’s Memorandum of Law in Support]).

Plaintiffs’ primary argument in opposition is that the Partnership Agreement and Operating Agreement were annexed to an attorney’s affirmation as opposed to a party affidavit. (NYSCEF 18 at 1 [Plaintiff’s Memorandum in Opposition]). Therefore, in reply, Defendants submit the Affidavit of Jacob Sutton (NYSCEF 24-26 [Sutton Affidavit]) that authenticates the Partnership Agreement and Operating Agreement originally submitted through the Fritz Affirmation. Plaintiff also argues that neither Gilat nor Rosh signed the arbitration agreement. (NYSCEF 18 at 4-8).

On reply, Defendants submit documents, including correspondence, indicating that (1) the LLC offered to distribute funds to Rosh but that no W-9 or ACH transfer information was furnished (NYSCEF 20 [Reply Affirmation of Kevin Fritz at Ex. 1]); (2) that the LLC’s books and records were available for inspection (NYSCEF 21 [Reply Affirmation of Kevin Fritz at Ex. 2]); (3) that the Gilat family has taken inconsistent positions on who owns the relevant Partnership interest (NYSCEF 22 [Reply Affirmation of Kevin Fritz at Ex. 3]); and (4) that the Gilat family has provided inconsistent information pertaining to the transfer of interests in the Partnership (NYSCEF 23 [Reply Affirmation of Kevin Fritz at Ex. 4]).

## DISCUSSION

### A. The Court Has Considered the Partnership Agreement and Operating Agreement

Plaintiff's contention that that the Court may not rely upon the Partnership Agreement and Operating Agreement because they were introduced, in the first instance, through the affirmation of counsel is unpersuasive. The Complaint itself asserts that the Partnership is governed by the Partnership Agreement and the LLC by the Operating Agreement.

Moreover, "[t]he affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e. g., documents, transcripts." (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). In any event, the Sutton Affidavit submitted on reply addresses an issue raised by Plaintiffs in opposition and serves to independently authenticate the Partnership Agreement and Operating Agreement that Defendants' attorney submitted with the moving papers (*Cent. Mortg. Co. v Jahnsen*, 150 AD3d 661, 664 [2d Dept 2017]). The Court discerns no prejudice to Plaintiffs in considering the corporate documents absent any dispute as to their authenticity.

### B. The Court Compels Arbitration Under the Terms of the Partnership Agreement

CPLR 7502(a) provides that a motion to compel arbitration may be "made by motion in a pending action." CPLR 7503(a) provides:

A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or

so much of it as is referable to arbitration.

Gilat argues that she cannot be compelled to arbitrate because Defendants cannot simultaneously claim she is not a partner while enforcing the Partnership Agreement's against her. This contention is at odds with Gilat's first cause of action for breach of the Partnership Agreement and fourteenth cause of action for a declaration that she is a partner, which necessarily implicates the Partnership Agreement. (Cplt. ¶¶ 34-39, 101-104).<sup>1</sup> Gilat does not challenge that her husband, Shimon, entered the Partnership Agreement and that she seeks to enforce rights under that agreement. Thus, the Court must enforce the arbitration provision. (*Sisters of St. John the Baptist, Providence Rest Convent v Phillips R. Geraghty Constructor, Inc.*, 67 NY2d 997, 998 [1986]).

The Partnership Agreement was signed by Shimon Gilat and notarized on October 27, 1992. The Partnership Agreement includes a broad arbitration provision incorporating "the commercial rules of the American Arbitration Association then in effect." AAA Commercial Rule R-7(a) presently in effect provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." The First Department has held that clauses like the one at issue require threshold issues of arbitrability to

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<sup>1</sup> The Complaint's fourteen causes of action are: (1) Breach of the Partnership Agreement; (2) Breach of the LLC Agreement; (3) Unjust Enrichment against the Partnership; (4) Conversion against the LLC; (5) breach of Fiduciary Duty against the LLC vis-à-vis Rosh; (6) Breach of Fiduciary Duty against Sutton vis-à-vis Rosh; (7) Breach of Fiduciary Duty against the LLC vis-à-vis Gilat; (8) Breach of Fiduciary Duty against Sutton vis-à-vis Gilat; (9) Aiding and Abetting Breach of Fiduciary Duty against Sutton; (10) equitable accounting against the LLC and Sutton vis-à-vis Rosh; (11) equitable accounting against the LLC and Sutton vis-à-vis Gilat; (12) Books and Records inspection against the LLC vis-a-vis Rosh; (13) Books and Records inspection against the LLC vis-a-vis Gilat; (14) Declaratory Judgment that Gilat is a partner of the Partnership.

be determined by the arbitrator (*Fritschler v Draper Mgt., LLC*, 203 AD3d 623 [1st Dept 2022] [collecting cases]).

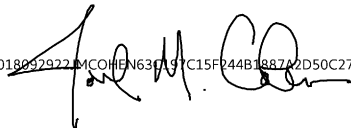
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Accordingly, it is

**ORDERED** that Defendants’ motion to compel arbitration is **GRANTED** and this matter is stayed pending arbitration pursuant to CPLR 7503(a); it is further

**ORDERED** that the parties advise the Court of any order in the arbitration affecting this case as well as when the arbitration is completed or if this dispute is otherwise resolved.

The foregoing constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

10/18/2022  
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DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE