SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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SARA GILAT, ROSH, INC.,

Plaintiffs,

- v -

JACOB SUTTON, 44-45 REALTY ASSOCIATES L.P., 44 G.P. LLC

Defendants.

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INDEX NO. 651038/2022

MOTION DATE 11/30/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 40, 41, 42, 43, 44, 45

were read on this motion for LEAVE TO REARGUE and RENEW.

Plaintiff Rosh, Inc. ("Rosh") moves pursuant to CPLR 2221(d) and (e) for leave to reargue and renew the Court's October 18, 2022 Order ("Order" [NYSCEF 28]). The Order compelled arbitration of Plaintiffs Sarah Gilat ("Gilat") and Rosh's (together "Plaintiffs") claims. Rosh also moves pursuant to CPLR 603 to sever Gilat's arbitrable claims against 44-45 Realty Associates, L.P. (the "Partnership") so Rosh may litigate its claims.

Rosh's motion is DENIED.

A. Plaintiffs' Motion for Leave to Reargue is Denied

Under CPLR 2221(d), "[a] motion for leave to reargue … shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion." However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally

asserted" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Failure by the movant to identify any overlooked or misapprehended facts or misapprehension of the law requires that the motion be denied (*Mazinov v Rella*, 79 AD3d 979, 980 [2d Dept 2010] [collecting cases]).

Rosh challenges the Order's determination that Rosh's claims against the LLC and Sutton are subject to arbitration (Moving Brief at 2 [NYSCEF 36]). Rosh argues that the Order lacks "an expressed rational as to why" it compelled arbitration which "puts Rosh at a disadvantage, trying to argue against the unexplained" (*Id.* at 4). Rosh's contentions are without merit.

Defendants argued in support of their motion to compel arbitration that Rosh was equitably estopped from challenging that the Partnership Agreement's arbitration clause applied to Rosh under a direct benefit theory (Moving Brief at 4-5 [NYSCEF 15], Reply Brief at 5-6 [NYSCEF 27]). All of Plaintiffs' claims assert that payments and information are required from the Partnership. Rosh argued in opposition that equitable estoppel did not apply, primarily because it did not sign the Partnership Agreement (Opposition Brief at 4-6 [NYSCEF 18]). Nevertheless, the Court agreed with Defendants' position "that arbitration of all claims is warranted" (*Gilat* at *2). In reaching that conclusion, the Court did not overlook or misapprehend Rosh's arguments or any facts or law in the Order.

B. Plaintiffs' Motion for Leave to Renew is Denied

CPLR 2221(e) provides, "[a] motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination' (CPLR 2221[e][2]) and 'shall contain reasonable justification for the failure to present such facts on the prior motion' (CPLR 2221[e][3])" (*Chernysheva v Pinchuck*, 57 AD3d 936, 937 [2d Dept 2008] [evidence submitted did not contain new facts that would later the prior determination]).

"Although a motion for leave to renew generally must be based on newly-discovered facts, this requirement is a flexible one, and a court has the discretion to grant renewal upon facts known to the movant at the time of the original motion, provided that the movant offers a reasonable justification for the failure to submit the additional facts on the original motion" (*Matter of Allstate Ins. Co. v Liberty Mut. Ins.*, 58 AD3d 727, 728 [2d Dept 2009] [collecting cases]).

Rosh argues that certain of the LLC's corporate documents from 2019 and 2021 (before this case started) establish that the LLC was, for a brief period, not the general partner of the Partnership. However, "plaintiffs made no effort to justify their failure to raise those facts earlier, as required under CPLR 2221(e)(3), and do not explain how those facts would change the court's prior determination based on its view of the applicable law" (*Alekna v 207-217 W. 110 Portfolio Owner LLC*, 2023 NY Slip Op 00178 [1st Dept Jan. 17, 2023]).

Rosh's arguments in support of renewal are without merit. *First,* Rosh's contention that the Partnership and LLC Agreements should not have been considered (Moving Brief at 9-10 [NYSCEF 36]) was addressed in the Order (*Gilat* *2). *Second,* all of Rosh's claims ultimately implicate the Partnership and support arbitration of this dispute. *Finally*, the Order provides that "clauses like the one at issue require threshold issues of arbitrability to be determined by the arbitrator" and does not preclude Rosh from raising any challenges to the scope of the arbitration to the arbitrator, once appointed (*Gilat* at *5-6).

In light of the foregoing, severance in not appropriate.

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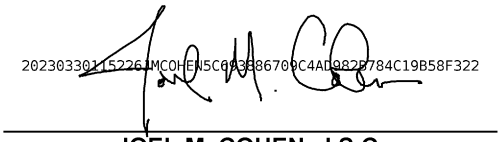
Accordingly, it is

ORDERED that Plaintiffs' motion for leave to reargue, leave to renew, and to sever is **DENIED**.

This constitutes the decision and order of the Court.



3/30/2023
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE