Toporovsky v Toporovsky
2026 NY Slip Op 31339(U)
March 3, 2026
Supreme Court, Bronx County
Docket Number: Index No. 817070/25E
Judge: Fidel E. Gomez
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PART 32

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

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JUANA TOPOROVSKY,

Plaintiff(s),

- against -

ARIE TOPOROVSKY, ASHER TOPOROVSKY, ESTHER TOPOROVSKY, ARTHUR COURT REALTY MGT. CORP, ARIE TOPOROVSKY, ASHER TOPOROVSKY, AND ESTHER TOPOROVSKY AS EXECUTORS OF THE ESTATE OF RINALDO TOPOROVSKY, VAN COURTLANDT ASSETS LLC AND JOHN GOJCAJ,

Defendant(s).

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Index No. **817070/25E**

Hon. **FIDEL E. GOMEZ**
Justice

The following papers numbered 1 to 6, Read on the motion noticed on 9/22/25, and duly submitted as no. 3 on the Motion Calendar of 11/3/25

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Proposed Order		
Filed Papers -		
Memorandum of Law	4-	

Defendants ARIE TOPOROVSKY, ASHER TOPOROVSKY, ESTHER TOPOROVSKY, ARTHUR COURT REALTY MGT. CORP, ARIE TOPOROVSKY, ASHER TOPOROVSKY, AND ESTHER TOPOROVSKY AS EXECUTORS OF THE ESTATE OF RINALDO TOPOROVSKY, and VAN COURTLANDT ASSETS LLC's motion motion seeking, *inter alia*, an order compelling arbitration is decided in accordance with the Decision and Order annexed hereto

Dated: 3/3/26

Hon. **FIDEL E. GOMEZ, JSC**

☐ CASE DISPOSED **X** NON-FINAL DISPOSITION

MOTION/CROSS-MOTION IS: **X** GRANTED

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT
☐ REFEREE APPOINTMENT ☐ NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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JUANA TOPOROVSKY,

Plaintiff(s),

- against -

ARIE TOPOROVSKY, ASHER TOPOROVSKY, ESTHER TOPOROVSKY, ARTHUR COURT REALTY MGT. CORP, ARIE TOPOROVSKY, ASHER TOPOROVSKY, AND ESTHER TOPOROVSKY AS EXECUTORS OF THE ESTATE OF RINALDO TOPOROVSKY, VAN COURTLANDT ASSETS LLC AND JOHN GOJCAJ,

Defendant(s).

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DECISION AND ORDER

Index No: 817070/25E

In this action for, *inter alia*, declaratory judgment, defendants ARIE TOPOROVSKY (Arie), ASHER TOPOROVSKY (Asher), ESTHER TOPOROVSKY (Esther) ARTHUR COURT REALTY MGT. CORP (Arthur), ARIE TOPOROVSKY, ASHER TOPOROVSKY, and ESTHER TOPOROVSKY AS Executors OF THE ESTATE OF RINALDO TOPOROVSKY (ERT), and VAN COURTLANDT ASSETS LLC (Van Courtland) move seeking an order, *inter alia*, pursuant to CPLR § 7503(a) compelling plaintiff to arbitrate the claims against Arthur, ERT, and Van Courtland. Saliently, moving defendants contend that pursuant to Van Courtland's Operating Agreement, on which this action is premised, all disputes arising therefrom and between plaintiff Van Courtland, ERT, and Arthur, must be resolved by arbitration. Plaintiff opposes the instant motion, asserting, *inter alia*, that inasmuch as the claims asserted against Arie,

Asher, and Esther are not premised on Van Courtland's Operating Agreement arbitration is inappropriate.

For the reasons that follow hereinafter, moving defendants' motion is granted, in part, on default and without opposition[1].

The instant action is for equitable accounting, declaratory judgment, and permanent injunction. The amended complaint, filed on December 2, 2025, alleges that in 1999, Van Courtland was formed for the purposes of, *inter alia*, acquiring and owning real property located at 155-165 Mosholu Parkway North and 171 East Mosholu Parkway North, Bronx, NY (the properties). Initially, Van Courtland's members were nonparty O.T. Company L.P. (OT), its general partner Arthur, and nonparty 2863 Morris Avenue LLC (2863). Plaintiff and her brother, deceased nonparty Rinaldo Toporovsky (Rinaldo), were the beneficial owners of Van Courtland's original members and plaintiff provided the hard money funding to purchase OT and 2863's assets. In 2007, plaintiff, Arthur and Rinaldo acquired all interest in Van Courtland and, at the time, plaintiff

[1] This Court's Part Rules state, *inter alia*, that

> [c]ourtesy hard copies of all motion papers, including opposition and reply papers ("Working Copies"), shall be submitted to Chambers by mail, with proof of e-filing, no later than the return date of the motion. Working Copies of exhibits are not necessary. E-filed motions that are submitted without Working Copies shall be denied without prejudice

(Part 32 - Commercial Division Rules at Section VI[B], which can be found at https://www.nycourts.gov/LegacyPDFS/COURTS/comdiv/bronx/Judge%20Gomez's%20Part%20Rules.pdf). Here, while the Court received working copies of movants' motion papers it did not receive plaintiff's papers in opposition. Thus, the opposition was not considered.

owned 30% of the membership interest in Van Courtland, Rinaldo owned 62.5% of the membership interest in Van Courtland, and Arthur owned 7.5% of the membership interest in Van Courtland. As of 2022, per Van Courtland's tax returns, Rinaldo owned 69% of the membership interest in Van Courtland, Esther owned 1% and Arthur no longer owned any membership interest in Van Courtland. In 2025, Rinaldo passed away and his estate now owns 69% of the membership interest in Van Courtland. Since Rinaldo's passing, Arie and Asher, Rinaldo's children and plaintiff's nephews, have been acting as Van Courtland's managers, and they also control Arthur. Esther, Rinaldo's wife, and Arie and Asher's mother, and Arie and Asher are the executors of ERT. Pursuant to Van Courtland's Operating Agreement (1) transfers of a member's membership interest in Van Courtland to anyone other than a member's immediate family is prohibited unless other members are offered an opportunity to purchase the same; (2) Van Courtland's manager is required to prepare and distribute an operational budget to all members and must also prepare and distribute a balance sheet and a statement of profit/loss for Van Courtland; and (3) pursuant to Section 6, requires, *inter alia*, that if the properties are to be sold, members holding the majority of Van Courtland's shares must notify all other members of the intent to sell the properties in writing, and if all members cannot agree on a sale price, requires the retention of an appraiser, and upon determination of the value of

the properties, any member other than those desiring to sell the properties must be given an opportunity to purchase the properties. In recent years, plaintiff has been denied access to information regarding Van Courtland, the properties have been neglected and, Van Courtland has been the subject of at least one federal law suit, wherein a contractor sued it for $850,000. In 2017, Van Courtland obtained a loan for $9.8 million and, per a mortgage, pledged the properties as collateral. A portion of the foregoing loan was used to pay a then existing mortgage and, thereafter, Van Courtland was left with $4.2 million. Although plaintiff received $600,000 from the foregoing sum, this amount represented less than her proportionate share. Rinaldo, Arie, and Asher have never accounted for how the rest of the remaining funds, totaling $2 million, were used. In 2024, despite having at least $1 million in cash, Rinaldo, Asher, and Arie ceased making payments on the aforementioned loan. In 2024, Rinaldo, Asher, and Arie began to take steps to sell the properties. They contacted brokers, and appraisals of the properties valued them at between $10-14 million. On July 2025, Arie, on behalf of Van Courtland, executed a contract to sell the properties to defendant JOHN GOJCAJ (Gojcaj) for $8.5 million, with a closing date 90 days therefrom. Plaintiff was never apprised of the intent to sell the properties in writing, as required by the Operating Agreement, nor was she provided with any of the appraisals. The prime motivation for the foregoing sale is

to discharge ERT's obligation as guarantor for Van Courtland's loan. Based on the foregoing, plaintiff interposes three causes of action. The first cause of action is for equitable accounting, wherein it is alleged that Rinaldo, Arthur, Asher, and Arie, as Van Courtland's majority members, owe plaintiff a fiduciary duty and that because they control Van Courtland, they are required to equitably account for how Van Courtland's funds and resources have been used. The second cause of action is for declaratory judgment, wherein it is alleged that because, in executing the agreement to sell the properties to Gojcaj, Asher and Arie failed to, *inter alia*, notify plaintiff in writing when they decided to sell the properties, they violated the Operating Agreement, such that the Court should declare that the agreement to sell the properties is void. The last cause of action is for permanent injunction, wherein it is alleged in contracting to sell the properties to Gojcaj, Asher and Arie failed to comply with the Operating Agreement, such that they should be permanently enjoined from selling the properties to Gojcaj.

On January 12, 2026, this Court issued a Decision and Order denying an application by the moving defendants seeking to cancel the notice of pendency filed in this action.

MOTION TO DISMISS

Applicable Law

It is well settled that because "[a]n amended pleading, when served, takes the place of the original pleading" (*100 Hudson Tenants Corp. v Laber*, 98 AD2d 692, 692 [1st Dept 1983]; *Branower & Son v Waldes*, 173 AD 676, 678 [1st Dept 1916] ["After the complaint had been thus formally amended and served it superseded the original complaint and became the only complaint in the case."]), when a motion to dismiss is directed at a pleading that is amended during the pendency of the motion, it must be denied as moot (*Cobblestone Holdings LLC v 41 Fifth Owners Corp.*, 237 AD3d 603, 603 [1st Dept 2024] ["The second amended complaint (SAC), filed after the denial of defendant's motion to dismiss the original complaint, renders defendant's appeal moot, as the SAC substantively altered the existing cause of action."]; *Aetna Life Ins. Co. v Appalachian Asset Mgt. Corp.*, 110 AD3d 32, 39 [1st Dept 2013] ["an appeal taken from a denial of a dismissal motion may be moot when that complaint has been superseded by an amended complaint."]; *100 Hudson Tenants Corp.* at 692 ["Subsequent to the denial of defendant-appellant's motion to dismiss, the plaintiff served a second amended complaint, and a motion has been made by the defendant to dismiss the second amended complaint, and this motion is presently pending before Special Term."]).

Notwithstanding the foregoing, a motion to dismiss a pleading

is not rendered moot if the subsequent pleading "does not substantively alter the existing causes of action" (*Aetna Life Ins. Co.* at 39; [1st Dept 2013]; *Bennett v City of New York*, 65 AD2d 731, 731 [1st Dept 1978] ["After the order on appeal was made, plaintiff pursuant to its terms, served a second amended complaint. That pleading, not before us, supersedes the pleading attacked on appellants' motion. In view of the service of the second amended complaint, we dismiss this appeal as moot."]; *Anthony J. Demarco, Jr., P.C. v Bay Ridge Car World, Ltd.*, 169 AD2d 808, 809 [2d Dept 1991] ["Subsequent to the filing of the notice of appeal, the plaintiff served an amended complaint of which we take judicial notice. The amended complaint adds new parties and alleges a third cause of action for "revocation" against the defendant Bay Ridge Car World, Ltd. However, it does not substantively alter the existing causes of action to recover damages for fraud and deceptive business practices under General Business Law § 349 (h). Therefore, we reject the plaintiff's contention that service of the amended complaint rendered this appeal moot, since the rights of the parties will be directly affected by the outcome of this appeal."]).

Discussion

Moving defendants' motion seeking dismissal of the complaint is denied as moot. Significantly, on November 26, 2025, plaintiff filed the amended complaint, discussed above, which asserted an

additional cause of action for equitable accounting against Arie, Asher, and ERT.

As noted above, because "[a]n amended pleading, when served, takes the place of the original pleading" (*100 Hudson Tenants Corp.* at 692; *Branower & Son* at 678), unless such pleading "does not substantively alter the existing causes of action" (*Aetna Life Ins. Co.* at 39; *Bennett* at731; A*nthony J. Demarco, Jr., P.C.* at 809), when a motion to dismiss is directed at a pleading that is amended during the pendency of the motion, it must be denied as moot (*Cobblestone Holdings LLC* at 603; *Aetna Life Ins. Co.* at 39; *100 Hudson Tenants Corp.* at 692).

Here, the instant motion must be denied because the application seeks to dismiss the original complaint and not the amended complaint, which interposes a new cause of action for equitable accounting in addition the causes of action for declaratory judgment and permanent injunction pleaded in the original complaint. Indeed, movants' motion is entirely premised on the causes of action premised on Van Courtland's Operating Agreement such that the amended complaint, insofar as it alleges a new cause of action purportedly unrelated thereto substantially alters the original complaint.

MOTION TO COMPEL ARBITRATION

Standard of Review

Pursuant to CPLR § 7503(a), a party can seek leave from a

court to compel arbitration. Significantly,

> [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.

Arbitration is borne from an agreement between the parties, allows them to substitute a different method to adjudicate the disputes between them, and allows them to choose the forum in which to resolve such disputes (*Siegel v Lewis*, 40 NY2d 687, 688-89 [1976] ["[C]ommercial arbitration is a creature of contract. Parties, by agreement, may substitute a different method for the adjudication of their disputes than those which would otherwise be available to them in public courts of law."]; *Cross & Brown Co. v Nelson*, 4 AD2d 501, 502 [1st Dept 1957] ["Arbitration is a method of adjudication of differences which parties, by consent, substitute for the usual processes provided by law."]). Indeed, it is well settled that in New York, "[a]rbitration is a favored

method of dispute resolution . . . and New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 93 [1991] [internal quotation marks omitted]; *see Weinrott v Carp*, 32 NY2d 190, 199 [1973]). Significantly, in this state the jurisprudence vest arbitrators with broad authority to resolve the disputes before them, "unfettered by formal rules of law or the constraints of the traditional litigation model" (*Matter of 166 Mamaroneck Ave. Corp.* at 93; *see Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 308 [1984]). Indeed, limited only by the provisions in the agreement itself,

> an arbitrator is not bound by principles of substantive law or by rules of evidence. He may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement, even though the award exceeds the remedy requested by the parties

(*Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 308 [1984]; *see Sprinzen v Nomberg*, 46 NY2d 623, 631 [1979]). As the Court of Appeals noted, "[p]arties who agree to refer contract disputes to arbitration must recognize that arbitrators may do justice and the award may well reflect the spirit rather than the letter of the agreement" *Local Div. 1179, Amalgamated Tr. Union, AFL-CIO v Green Bus Lines, Inc.*, 50 NY2d 1007, 1009 [1980] [internal quotation

marks omitted]).

Accordingly, an arbitrator's award cannot be judicially vacated merely because the arbitrator misconstrues the facts or misapplies the law (*Silverman v Benmor Coats, Inc.* at 308; *Local Div. 1179, Amalgamated Tr. Union, AFL-CIO v Green Bus Lines, Inc.*, 50 NY2d 1007, 1009 [1980]). Instead, an arbitrator's award may not be set aside by a court "unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power" (*Silverman* at 308; *Sprinzen* at 631; see *Rochester City School Dist. v Rochester Teachers Ass'n*, 41 NY2d 578, 582 [1977]).

Before a party can be compelled to arbitrate a dispute, however, it must be established, with evidence, that the parties have expressly agreed to arbitrate their dispute (*Matter of Waldron v Goddess*, 61 NY2d 181, 183 [1984]; *Schubtex, Inc. v Allen Snyder, Inc.*, 49 NY2d 1, 6 [1979]; *Koob v IDS Fin. Services, Inc.*, 213 AD2d 26, 30 [1st Dept 1995]; *Edgewater Growth Capital Partners, L.P. v Greenstar N. Am. Holdings, Inc.*, 69 AD3d 439, 439 [1st Dept 2010] ["In deciding an application to compel arbitration pursuant to CPLR 7503 (a), the court is required to first make a determination whether the parties have entered into a valid arbitration agreement and, if so, whether the issue sought to be submitted to arbitration falls within the scope of that agreement" (internal quotation marks omitted).]; *Matter of Helmsley (Wien)*, 173 AD2d 280, 281 [1st Dept

1991]; *Robert Stigwood Org., Ltd. v Atl. Rec. Corp.*, 83 AD2d 123, 126 [1st Dept 1981]). As such, the agreement requiring arbitration must be clear, explicit, and unequivocal (*Matter of Waldron* at 183; *Acting Supt. of Schools of Liverpool Cent. School Dist. v United Liverpool Faculty Ass'n*, 42 NY2d 509, 512 [1977]; *Pharmacia & Upjohn Co. v Elan Pharm., Inc.*, 10 AD3d 331, 333 [1st Dept 2004]; *Robert Stigwood Org., Ltd.* at 126). This is particularly true in commercial transactions, because as noted above,

> by agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent. Thus, because of the nature of arbitration, where a party forfeits the right to a trial, often before a jury, in a judicial forum bound by legal precedent and the rules of evidence, the decisions of which are subject to broad appellate review, an agreement to arbitrate may not be implied or depend upon subtlety for its existence

(*M.I.F. Sec. Co. v R.C. Stamm & Co.*, 94 AD2d 211, 212-213 [1st Dept 1983], *affd*, 60 NY2d 936 [1983] [internal citations and quotation marks omitted]).

Additionally, compulsory arbitration requires that the dispute between the parties fall within the scope of the agreement which mandates arbitration (*Rockland County v Primiano Const. Co., Inc.*, 51 NY2d 1, 7 [1980] ["The parties are entitled first to a judicial determination whether there was a valid agreement to arbitrate . .

. and that the particular claim sought to be arbitrated comes within the scope of their agreement."]; *Edgewater Growth Capital Partners, L.P.* at 439 ["In deciding an application to compel arbitration pursuant to CPLR 7503 (a), the court is required to first make a determination whether the parties have entered into a valid arbitration agreement and, if so, whether the issue sought to be submitted to arbitration falls within the scope of that agreement."]; *Koob* at 30 [same]).

For purposes of determining whether the parties have agreed to arbitration and if the issues between them fall within the ambit of the agreement, "courts generally should apply ordinary state-law principles that govern the formation of contracts" (*Revis v Schwartz*, 192 AD3d 127, 134 [2d Dept 2020], *affd*, 38 NY3d 939 [2022] [internal quotation marks omitted]; *see Strongbow Consulting Group LLC v PricewaterhouseCoopers LLP*, 195 AD3d 532, 532 [1st Dept 2021], *lv to appeal dismissed in part, denied in part*, 38 NY3d 997 [2022]; *Kent Waterfront Assoc., LLC v Natl. Union Fire Ins. Co. of Pittsburgh, Pa*, 216 AD3d 785, 787 [2d Dept 2023]; *J.J.'s Mae, Inc. v H. Warshow & Sons, Inc.*, 277 AD2d 128, 128 [1st Dept 2000]). Thus, a clause in an agreement stating that "[a]ny and all controversies arising out of or relating to this contract, or any modification, breach or cancellation thereof, shall be settled by arbitration" has been held to require arbitration (*Lory Fabrics, Inc. v Dress Rehearsal, Inc.*, 78 AD2d 262, 263 [1st Dept 1980]; *see*

MCC Dev. Corp. v Perla, 81 AD3d 474, 474 [1st Dept 2011] [Court dismissed action for foreclosure of a mechanic's lien, breach of contract, and unjust enrichment, holding that they arose out of the contract between the parties because the initiation of that action prior to engaging in mediation and/or arbitration violated the agreement, which required that "[a]ny Claim arising out of or related to the Contract . . . shall, after initial decision by the Architect . . . be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings."]).

Notwithstanding the foregoing, when an agreement expressly confers the power to resolve arbitrability to the arbitrator, an action should be referred to arbitration irrespective of whether there are questions about whether the claims made are arbitrable (*Flowcon, Inc. v Andiva LLC*, 200 AD3d 411, 412 [1st Dept 2021] ["The AAA's Construction Industry Arbitration Rules provide that the arbitration tribunal shall rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement. Thus, the threshold issue of the arbitrability of Flowcon's claims alleging nonpayment is one for the arbitrator, not the courts, particularly given the parties' broad arbitration clause."]; *Revis* at 12 ["When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. Under such circumstances and

without more, a court possesses no authority to decide the arbitrability issue."]; *Skyline Steel, LLC v PilePro LLC*, 139 AD3d 646, 646-47 [1st Dept 2016] ["Both the arbitration clause and the JAMS rule incorporated therein confer on the arbitrators the power to resolve arbitrability. These provisions, governing the specific issue, take precedence over the arbitration clause's generic incorporation of the 'New York statutes governing arbitration.'" The issues of whether the parties manifested an intent that the arbitration clause survive termination of the settlement agreement containing it and whether the agreement was induced by fraud are also to be resolved by the arbitrators" (internal citations and quotation marks omitted).]; *Arbitration of Certain Controversies Between Gramercy Advisors LLC v J.A. Green Dev. Corp.*, 134 AD3d 652, 653 [1st Dept 2015] ["Supreme Court correctly declined to address respondents' arbitrability defenses. The arbitration provision at issue applies to any controversy or claim arising out of or relating to any interpretation, breach or dispute concerning the contract, and explicitly incorporates the rules of the American Arbitration Association, which provide for the arbitrator to determine arbitrability" (internal quotation marks omitted).]; *Life Receivables Tr. v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 495-96 [1st Dept 2009], *affd*, 14 NY3d 850 [2010] ["The arbitration agreement at issue requires that '[a]ll disputes and differences arising under or in connection with this [contract] . . . be

referred to arbitration under the American Arbitration Association Rules.' The AAA rules authorize the arbitration tribunal to rule on its own jurisdiction, including objections with respect to the existence, scope or validity of the arbitration agreement. Although the question of arbitrability is generally an issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules, which provide that '[t]he tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement,' and employs language referring 'all disputes' to arbitration, courts will 'leave the question of arbitrability to the arbitrators'. Thus, the motion court was correct in finding that the scope and validity of the arbitration agreement, necessarily including issues of arbitrability, are for the arbitration tribunal to determine" (internal citations omitted).]).

When an agreement to arbitrate expressly and unequivocally encompasses the subject matter of the dispute before the court, then a motion to compel arbitration should be granted (*Avery v Avery*, 81 AD2d 849, 851 [2d Dept 1981] ["Turning to the agreement at hand, it is clear from its language that the parties expressly and unequivocally agreed to arbitrate the matter of the modification of the amount of child support payable by the defendant, and there is little reason to doubt that the question of

arrears is also encompassed within their broad agreement to arbitrate "any dispute or misunderstanding arising out of, or in connection with this agreement."]).

When a motion to compel arbitration is granted, CPLR § 7503(a) requires the stay of the existing plenary action from which the order to arbitrate arises. Indeed "where arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where the determination of issues in arbitration may well dispose of nonarbitrable matters" (*Lake Harbor Advisors, LLC v Settlement Services Arbitration and Mediation, Inc.*, 175 AD3d 479, 480 [2d Dept 2019]; *Weiss v Nath*, 97 AD3d 661, 663 [2d Dept 2012]). Additionally, CPLR § 2201 states that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." To that end, it is well settled that "a court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources." (*In re Tenenbaum*, 81 AD3d 738, 739 [2d Dept 2011]; *Zonghetti v Jeromack*, 150 AD2d 561, 562 [2d Dept 1989]).

Contract Law

It has long been held that absent a violation of law or some transgression of public policy, people are free to enter into

contracts, making whatever agreement they wish, no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company, Inc.*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). It is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing (*Vermont Teddy Bear Co., Inc.* at 475). This approach serves to preserve "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses

[and] infirmity of memory" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

The proscription against judicial rewriting of contracts is particularly important in real property transactions, where commercial certainty is paramount, and where the agreement was negotiated at arm's length between sophisticated, counseled business people (*Vermont Teddy Bear Co., Inc.* at 475). Specifically, in real estate transactions, parties to the sale of real property, like signatories of any agreement, are free to tailor their contract to meet their particular needs and to include or exclude those provisions which they choose. Absent some indicia of fraud or other circumstances warranting equitable intervention, it is the duty of a court to enforce rather than reform the bargain struck (*Grace v Nappa*, 46 NY2d 560, 565 [1979]).

In the absence of fraud or other wrongful act, a party who signs a written contract is presumed to know and have assented to the contents therein (*Pimpinello v Swift & Co.*, 253 NY 159, 162 [1930]; *Metzger v Aetna Ins. Co.*, 227 NY 411, 416 [1920]; *Renee Knitwear Corp. v ADT Sec. Sys.*, 277 AD2d 215, 216 [2d Dept 2000]; *Barclays Bank of New York, N.A. v Sokol*, 128 AD2d 492, 493 [2d Dept 1987]; *Slater v Fid. & Cas. Co. of N.Y.*, 277 AD 79, 81 [1st Dept 1950]). In discussing this long-standing rule the court in *Metzger* stated that

> [i]t has often been held that when a party to a written contract accepts it as

> a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms. This rule is as applicable to insurance contracts as to contracts of any kind.

(*Metzger* at 416 [internal citations omitted]).

Provided a writing is clear and complete, evidence outside its four corners "as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *see Greenfield* at 569 ; *Mercury Bay Boating Club Inc. v San Diego Yacht Club*, 76 NY2d 256, 269-270 [1990]; *Judnick Realty Corp. v 32 W. 32nd St. Corp.*, 61 NY2d 819, 822 [1984]). Whether a contract is ambiguous is a matter of law for the court to decide (*W.W.W. Assoc., Inc.* at 162; *Greenfield* at 169; *Van Wagner Adv. Corp. v S & M Enterprises*, 67 NY2d 186, 191 [1986]). A contract is unambiguous if the language it uses has "definite and precise meaning, unattended by danger of misconception in purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield* at 569; *see Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 [1978]). Hence, if the contract is

not reasonably susceptible to multiple meanings, it is unambiguous and the court is not free to alter it, even if such alteration reflects personal notions of fairness and equity (*id.* at 569-570). Notably, it is well settled that silence, or the omission of terms within a contract are not tantamount to ambiguity (*Greenfield* at 573; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). Instead, the question of whether an ambiguity exists must be determined from the face of an agreement without regard to extrinsic evidence (*Greenfield* at 569-570), and an unambiguous contract or a provision contained therein should be given its plain and ordinary meaning (*Rosalie Estates, Inc. v RCO International, Inc.*, 227 AD2d 335, 336 [1st Dept 1996]).

Notably, while the parol evidence rule forbids proof of extrinsic evidence to contradict or vary the terms of a written instrument, it has no application in a suit brought where there are claims of fraud in the execution of an agreement or to rescind a contract on the ground of fraud (*Sabo v Delman*, 3 NY2d 155, 161 [1957]; *Adams v Gillig*, 199 NY 314, 319 [1910]; *Berger-Vespa v Rondack Bldg. Inspectors Inc.*, 293 AD2d 838, 840 [3d Dept 2002]).

Discussion

Moving defendants' application seeking to compel arbitration of the claims in this action by plaintiff against, Van Courtland, ERT, and Arthur is granted. Significantly, Van Courtland's Operating Agreement unequivocally requires that all disputes

arising from the Operating Agreement be resolved by arbitration and, here, the causes of action for declaratory judgment and permanent injunction are premised on whether Van Courtland, ERT, and Arthur violated the foregoing agreement.

In support of the instant motion, to the extent relevant, moving defendants submit Van Courtland's Operating Agreement. The agreement evinces that OT and 2638 initially owned the properties and that Van Courtland was formed "for the purpose of acquiring, owning, managing and disposing of" said properties. Upon the execution agreement, OT and 2638 were Van Courtland's sole members and, per the Operating Agreement, upon its execution "they delivered a Deed transferring their respective interests in" the properties to Van Courtland. Pursuant to Section 6 governing the sale of the properties,

> [u]pon written request sent by Registered or Certified Mail by any one or more of the Members holding a cumulative interest of at least 51 percent to the other, the property shall be sold. If within one (1) month after the mailing of such notice the Members cannot agree in writing concerning the price upon which the property shall be sold, the price shall be determined by an appraisal to be made by a qualified appraiser in the County in which the property is located. Should the Member desiring such sale and the others be unable to agree on an appraiser, each shall name one appraiser, and two so named shall make such appraisal. Should both appraisers be unable to agree on a price within one (1) month after their appointment, they shall name a third appraiser, whereupon the three appraisers

> shall make an appraisal and the determination of two out of the three shall be binding upon the Members. Should the two appraisers be unable to agree upon a third appraiser, application for appointment of such third appraiser shall be made to the Supreme Court in. the County in which the property is located. Upon the establishment of the price by agreement of the Members or by appraisal, the Members shall use their best efforts to sell the property with due dispatch. The Members agree to sign any document or instrument necessary to consummate a sale at the minimum price fixed by the appraiser or such greater price as may have been obtained, if any, and on other commercially reasonable terms. The Member or Members other than the one desiring to sell shall have the opportunity to purchase provided they sign a contract to do so at a price at least equal to such minimum price prior to any third party entering into negotiations for such a contract.

Per Section 10, "[t]he Manager shall have the right and power to conduct all of the business involved in the purchase, ownership, management and sale of the Company and any of its assets." Section 11 imposing a duty to properly manage Van Courtland states that "[t]he Manager shall devote such time as may be necessary for the proper management of the Company." Section 17 required that the manager maintain "full and accurate records and books of account of the Company's business," which "[u]pon reasonable request," would be made available to any member. Section 25 is an arbitration clause which states that

> [a]ny dispute or controversy arising under, out of, in connection with or in

> relation to this Agreement and any amendments thereto, or any breach thereof or in connection with the termination of this Agreement, shall be determined and settled by arbitration in New York pursuant to the rules then obtaining of the American Arbitration Association. Any award rendered therein shall be final and binding on each and all of the Members and judgment may be entered thereon in any court of competent jurisdiction.

The Operating Agreement was initially executed by Rinaldo on behalf of OT and 2638 Van Courtland, the former named as General Partner and owning a 60% interest in Van Courtland while the latter was the Managing Member, owning 40% interest in Van Courtland. Per a "Restated Operating Agreement of Van Courtland Assets LLC" appended to the Operating Agreement and dated August 2007, OT and 2683 conveyed all interest in Van Courtland to Arthur, who owned 7.5% interest in Van Courtland, Rinaldo, who owned 62.5% interest in Van Courtland, and plaintiff, who owned 30% interest in Van Courtland.

Based on he foregoing moving defendants motion seeking to compel arbitration is granted.

As noted above, pursuant to CPLR § 7503(a), a party can seek leave from a court to compel arbitration when it is "aggrieved by the failure of another to arbitrate" (*id.*). Furthermore, when the foregoing application is granted, the court shall issue an order staying "a pending or subsequent action, or so much of it as is referable to arbitration."

Before a party can be compelled to arbitrate a dispute,

however, it must be established, with evidence, that the parties have expressly agreed to arbitrate their dispute (*Matter of Waldron* at 183; *Schubtex, Inc.* at 6; *Edgewater Growth Capital Partners, L.P.* at 439; *Koob* at 30; *Matter of Helmsley (Wien)* at 281; *Robert Stigwood Org., Ltd.* at 126). As such, the agreement requiring arbitration must be clear, explicit, and unequivocal (*Matter of Waldron* at 183; *Acting Supt. of Schools of Liverpool Cent. School Dist.* at 512; *Pharmacia & Upjohn Co.* at 333; *Robert Stigwood Org., Ltd.* at 126). Compulsory arbitration is warranted when the dispute between the parties falls within the scope of the relevant arbitration agreement (*Rockland County* at 7; *Edgewater Growth Capital Partners, L.P.* at 439; *Koob* at 30) and such determination is made by employing "ordinary state-law principles that govern the formation of contracts" (*Revis* at 134; *see Strongbow Consulting Group LLC* at 532; *Kent Waterfront Assoc., LLC* at 787; *J.J.'s Mae, Inc.* at 128).

In order to enforce an agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms contained therein (*Greenfield* at 569). It is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc.* at 475. Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced

according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing (*Vermont Teddy Bear Co., Inc.* at 475). This approach serves to preserve "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace* at 548).

When an agreement to arbitrate expressly and unequivocally encompasses the subject matter of the dispute before the court, then a motion to compel arbitration should be granted (*Avery* at 851).

Here, a review of the amended complaint evinces that the causes of action for declaratory judgment and permanent injunction are entirely premised on whether Van Courtland, ERT, and Arthur have abided by Van Courtland's Operating agreement. To be sure, the second cause of action is for declaratory judgment, wherein it is alleged that because, in executing the agreement to sell the properties to Gojcaj, Asher and Arie[2] failed to, *inter alia*, notify

[2] Notably, while the allegations in the complaint are also asserted against Arie and Asher, as managers, it is worth noting that moving defendants assert that "[u]pon Rinaldo's passing, his assets passed to his Estate . . . Rinaldo's Estate has not been settled. This means that as of today, Arie, Esther, and I hold no direct interest in the Company and, accordingly, cannot be liable for breach of the Company's

plaintiff in writing when they decided to sell the properties, they violated the Operating Agreement, such that the Court should declare that the agreement to sell the properties is void. Thus, this cause of action is premised on Section 6 of the agreement, which requires, *inter alia*, that "the Member or Members other than the one desiring to sell shall have the opportunity to purchase provided they sign a contract to do so at a price at least equal to such minimum price prior to any third party entering into negotiations for such a contract." Similarly, the third cause of action is for permanent injunction, wherein it is alleged in contracting to sell the properties to Gojcaj, without first offering to have plaintiff purchase them, Arie, Asher and ERT failed to comply with the Operating Agreement, such that they should be permanently enjoined from selling the properties to Gojcaj. This last cause of action, is, of course, likewise premised on Section 6 of the Operating Agreement, since it seeks to prevent the sale of the properties for a violation of section 6 of the Operating Agreement.

Operating Agreement" (NY St Cts Elec Filing [NYSCEF] Doc No. 18 at 2 [Affirmation of Asher Toporovsky]). Indeed, per Section 15 of the Operating Agreement "[n]o Member shall transfer all or any part of his interest in the company before offering the same to the other in proportion to the others' ownership except that the Members may· among themselves and to members of their immediate family (spouses and issue) transfer all or any part of their interest to any or all of the others or to any entity in which said Member retains beneficial ownership without such prior consent or offer· being required; provided, however, that upon the death of any Member, his or her interest may be devised or bequeathed by Will, but not otherwise." Thus, here, it appears that it is moving defendants' position that only ERT, Arthur, and Van Courtland are currently bound by the agreement.

Given the foregoing and Section 25 of the operating agreement, which requires arbitration of "[a]ny dispute or controversy arising under, out of, in connection with or in relation to this Agreement and any amendments thereto, or any breach thereof or in connection with the termination of this Agreement," it is clear that the Operating agreement requires the arbitration of all the claims plaintiff asserts in her complaint arising from the Operating Agreement. Indeed, the language of section 25 is clear and unequivocal.

Thus, movants' motion to compel arbitration is granted and this action must be stayed pending the outcome of such arbitration.

Notably, arbitration is not precluded because there may exist claims not subject to arbitration or because this action has parties not bound by the arbitration agreement. Indeed, "where arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where the determination of issues in arbitration may well dispose of nonarbitrable matters" (*Lake Harbor Advisors, LLC* at 480; *Weiss* at 663). Indeed, here, while it is clear that Gojcaj is not a party to the Operating Agreement and, thus, not bound by it so as to give rise by him to a breach thereof, arbitration will nevertheless determine whether Van Courtland had a right to enter in a contract to sell him the properties, and will determine the declaratory judgment and

permanent injunction claims against him.

Additionally, the Court notes that the first cause of action is directed at Asher, Arie, and ERT, and is premised upon an obligation imposed upon Rinaldo, Arthur, Asher, and Arie, as Van Courtland's majority members, to equitably account[3] for how Van Courtland's funds and resources have been used. The foregoing, while denominated as a claim for common law equitable accounting, is also an obligation that is part and parcel of the duties imposed by Section 10 of the Operating Agreement, which requires that the "[t]he Manager shall have the right and power to conduct all of the

[3] The elements of a cause of action for equitable accounting are "a fiduciary or confidential relationship, money entrusted to the respondent imposing the burden of an accounting, the absence of a legal remedy, and in some cases a demand and refusal" (*Ardalan v Safaie*, 239 AD3d 1433, 1434-1435 [4th Dept 2025] [internal quotation marks omitted]; *Metro. Bank & Tr. Co. v Lopez*, 189 AD3d 443, 446 [1st Dept 2020]; *Matter of In re Mary XX.*, 33 AD3d 1066, 1068 [3d Dept 2006]). Notably, a quasi contract cause of action only exists in the absence of a valid contract governing the very same events being asserted in a quasi contract cause of action (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]). Stated differently, where a party sues in tort, solely to enforcer a contract, a tort claim is barred (*Encore Lake Grove Homeowners Ass'n, Inc. v Cashin Assoc., P.C.*, 111 AD3d 881, 883 [2d Dept 2013] ["A court enforcing a contractual obligation will ordinarily impose a contractual duty only on the promisor in favor of the promisee and any intended third-party beneficiaries. Thus where a party is merely seeking to enforce its bargain, a tort claim will not lie"] [internal citation and quotation marks omitted].). As such, although only persuasive authority, some courts hold that, where as here, "an equitable accounting claim cannot coexist with a breach of contract claim covering the same subject matter and, thus, must be dismissed" (*Curtis v Berutti*, 77 Misc 3d 327, 434 [Sup Ct 2022]; *CBI Capital LLC v Mullen*, 2020 WL 4016018, at *7 [SDNY July 16, 2020] [An equitable accounting claim cannot coexist with a breach of contract claim covering the same subject matter" (internal quotation marks omitted).]; *Ellington Credit Fund, Ltd. v Select Portfolio Servicing, Inc.*, 837 F Supp 2d 162, 207 [SDNY 2011] ["Even if Plaintiffs sufficiently demonstrated that they were in a fiduciary relationship with SPS and M & T, an equitable accounting claim cannot coexist with a breach of contract claim covering the same subject matter."]). Thus, if, in fact, Sections 10, 11, and 17 of the Operating Agreement mandate, *inter alia*, that the defendants keep accurate books and properly manage Van Courtland, and an accounting can be said to arise therefrom, such claim may be duplicative of the declaratory judgment claim which, although not denominated as sone for breach of contract, is, in fact, premised on a breach of the Operating Agreement.

business involved in the purchase, ownership, management and sale of the Company and any of its assets," Section 11, imposing a duty upon the manager to properly manage Van Courtland, and Section 17, requiring that the manager maintain "full and accurate records and books of account of the Company's business," which "[u]pon reasonable request," would be made available to any member. Indeed the foregoing is buttressed by the allegations in the complaint, namely that

> Rinaldo and subsequently Asher and Arie when they acted as Manager for the Company owed a fiduciary duty to Juana as a minority member of the Company to discharge their duties in good faith . . . The Majority Members used their control of the Company to deny Juana and those acting on her behalf access to information . . . Arie and Asher, and to the extent he remained involved in running the business Rinaldo, mismanaged the Company to such an extent that a successful company in a strong cash position is now being sued for nearly a million dollars, purportedly cannot service its debts, and has failed to maintain its only assets.

Thus, to the extent that it is alleged that Arie, Rinaldo (now ERT), and Asher breached the duty owed to plaintiff, such duties are also governed by Van Courtland's Operating Agreement. Accordingly, this claim falls within the ambit of the Section 25 of the Operating Agreement mandating compulsory arbitration. Indeed, even if it does not, since the arbitration clause requires arbitration pursuant to the Rules of the American Arbitration

Association, it is for the arbitrator to determine which claims are subject to arbitration(Rule R-7 of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, available at https://www.adr.org/media/qielmf0g/2025_commercialrules_web.pdf [last accessed February 17, 2026] ["The 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, without any need to refer such matters first to a court."]; *Arbitration of Certain Controversies Between Gramercy Advisors LLC* at 653 ["Supreme Court correctly declined to address respondents' arbitrability defenses. The arbitration provision at issue applies to any controversy or claim arising out of or relating to any interpretation, breach or dispute concerning the contract, and explicitly incorporates the rules of the American Arbitration Association, which provide for the arbitrator to determine arbitrability" (internal quotation marks omitted).]; *Life Receivables Tr.* at 495-96 ["The arbitration agreement at issue requires that '[a]ll disputes and differences arising under or in connection with this [contract] . . . be referred to arbitration under the American Arbitration Association Rules.' The AAA rules authorize the arbitration tribunal to rule on its own jurisdiction, including objections with respect to the existence, scope or

validity of the arbitration agreement. Although the question of arbitrability is generally an issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules, which provide that '[t]he tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement,' and employs language referring 'all disputes' to arbitration, courts will 'leave the question of arbitrability to the arbitrators.' Thus, the motion court was correct in finding that the scope and validity of the arbitration agreement, necessarily including issues of arbitrability, are for the arbitration tribunal to determine" (internal citations omitted).]). It is hereby

ORDERED that all defendants except Gojcaj, submit all claims asserted by plaintiff in the amended complaint to binding arbitration within thirty (30) days of service of this Decision and Order upon plaintiff with Notice of Entry. It is further

ORDERED that this action be hereby stayed until the completion of arbitration. It is further

ORDERED that defendants serve a copy of this Decision and Order with Notice of Entry upon plaintiff within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : 3/3/26

HON. FIDEL E. GOMEZ, JSC