624 Art Holdings, LLC v Berry-Hill Galleries, Inc.
2012 NY Slip Op 33479(U)
June 7, 2012
Sup Ct, NY County
Docket Number: 650045/2011
Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 650045/2011
624 ART HOLDINGS, LLC
vs
BERRY-HILL GALLERIES, INC.
Sequence Number : 001
STAY PROCEEDINGS

INDEX NO. 650045/11
MOTION DATE 5/13/11
MOTION SEQ. NO. 001
MOTION CAL. NO.

motion to/for compel arbitration/stay

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	5 - 10
Answering Affidavits — Exhibits	11 - 20
Replying Affidavits	21

and transcript of argument received 5/13/11

Cross-Motion: ☒ Yes ☐ No
for leave to amend Complaint

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 7/7/12

SHIRLEY WERNER KORNREICH J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

☒ STAY

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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624 ART HOLDINGS, LLC,

Plaintiff,

Index No.: 650045/2011

-against-

DECISION and ORDER

BERRY-HILL GALLERIES, INC., JAMES HILL, FREDERICK D. HILL, R.H. BLUESTEIN & COMPANY, and John Does 1-5,

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

This action for damages, replevin and constructive trust arises from Berry-Hill Galleries, Inc. (Berry-Hill)'s and the Hill defendants' alleged conversion and fraudulent conveyance of artworks owned by plaintiff 624 Art Holdings LLC (624). Berry-Hill and James Hill (James) now move to compel arbitration between them and 624 and to stay the litigation in this court as against Frederick Hill (Frederick) and R.H. Bluestein & Company (Bluestein). (Mot. Seq. 001). 624 opposes arbitration and seeks, by way of cross-motion, leave to file an amended complaint, which is not opposed. Frederick opposes arbitration and has filed an Answer to the Complaint with Affirmative Defenses and Cross-Claims against James for common law indemnification and contribution. Alternatively, Frederick seeks a stay of the litigation against him pending arbitration. Bluestein did not respond to either the motion or the cross-motion, and it has filed a motion to dismiss the complaint, which is pending.

I. Background

The following facts appear undisputed. James and Frederick owned Berry-Hill and were officers of the corporation. Berry-Hill declared bankruptcy under Chapter 11 in 2005 and

emerged from bankruptcy in 2006 with a debtor-in-possession financing loan of $21 Million. Default on loan payments resulted in an order of seizure by the Southern District of New York as to certain artwork in Berry-Hill's possession.[1]

A. Complaint

The January 7, 2011 complaint alleges the following. In March 2004, 624 and Berry-Hill entered into an agreement (Agreement) whereby Berry-Hill would administer artworks owned by and acquired for 624. 624 would retain title to the artworks, and transfer of any artwork from Berry-Hill's New York gallery would require a written acknowledgment by the transferee of 624's ownership and a tender of that writing to 624. Moreover, any sale of artwork by Berry-Hill was to occur by transfer of title from 624 to the buyer. All sales proceeds were to be transmitted to 624. The Agreement represented that James and Frederick were the exclusive owners of Berry-Hill.

Among the 624 artworks in possession of Berry-Hill were: George Bellows' "Jersey Woods", George Iness' "Approaching Storm", Worthington Whittredge's "Beach Scene, Newport", Charles Sheeler's "Meta-Mold", and Edmund Tarbell's "Mrs. Tarbell at Evening". 624 filed UCC-1 and UCC-3 statements for each of these works.

In March 2010, 624 learned that the Sheeler, Whittredge and Tarbell works had been moved from the New York gallery. On March 31, 2010, 624 gave notice to defendants of their alleged breach of the Agreement and demanded that the works be restored to the gallery. 624 further learned that the Whittredge painting had been transferred by James and Frederick from the Berry-Hill gallery to defendant Bluestein's gallery in Michigan, some time in 2008. 624 received

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[1]Neither the Order of Seizure nor evidence identifying the seized artwork were submitted to the court.

no money for the painting. The complaint alleges that Bluestein took the painting without proper title, failing to reasonably assess its provenance.

The complaint also alleges that in or about March 2010, James and Frederick had transferred the Sheeler painting to an individual named Michael Altman in exchange for cash and another work of art known as "Skating Scene" by the artist M-F. Regis Gignoux. 624 neither received notice of the exchange or consideration for the painting. Additionally, the complaint alleges that James and Frederick had traded the Tarbell painting for a painting of far less worth and some cash. On July 14, 2010, 624 demanded the return of the Sheeler work and the money paid for the counterfeit painting. Finally, the complaint alleges that James and Frederick caused Berry-Hill to sell the Iness work, a counterfeit painting, to 624 for $190,000.

The following causes of action are claimed: breach of contract against Berry-Hill (first cause of action); replevin against Berry-Hill, James and Frederick (second cause of action); replevin against Bluestein (third cause of action); conversion against Berry-Hill, James and Frederick (fourth cause of action); tortious interference with contract against James and Frederick (fifth cause of action); fraud against James and Frederick (sixth cause of action); fraudulent conveyance against all of the defendants (seventh cause of action); and constructive trust against James, Frederick and Berry-Hill (eighth cause of action). The complaint seeks damages on the first through sixth causes of action, the voiding of the conveyances under the seventh cause of action; a constructive trust of all property derived from the improper conduct on the eighth cause of action, and costs, attorney fees and interest on all of the causes of action.

B. Frederick's Answer, Defenses and Cross-Claims

Frederick denies the allegations against him. Specifically, as a second affirmative defense, Frederick alleges that Berry-Hill was formed in 1956 as a family-owned gallery specializing in American art. He joined the business in 1972 as a shareholder and director. He contends that in March 2008, he discussed a buy-out with James and ceased participating in the business. On August 19, 2009, Frederick redeemed his shares in Berry-Hill and resigned as an officer and director. Frederick claims that 624 and Bluestein were clients brought to Berry-Hill by James, that James controlled the gallery's dealings with them and that when he redeemed his shares in Berry-Hill, he agreed not to solicit these entities as clients. Also, Frederick alleges that he did not participate in the sale or transfer of the 624 paintings and never had custody or control of them.

Frederick asserts as other defenses, *inter alia*, the statute of limitations and failure to plead fraud with particularity. Moreover, he alleges cross-claims against James and Berry-Hill for common-law indemnification and against all defendants for common law contribution. His affirmative defenses do not include the right to arbitrate. At argument on the motion and cross-motion, Frederick's counsel stated his client's position that he was not a signatory and, therefore, not bound by the Art Agreement. Transcript, pg. 25, 4/5/11 Argument.

C. Agreements

As evidence in support of the motion to compel arbitration, Berry-Hill and James submit unsigned copies of two agreements: (1) Art Administration Agreement (Art Agreement); and (2) Limited Liability Operating Agreement of 624 Art Holdings, LLC (Operating Agreement). The parties do not dispute that the agreements, in fact, were executed. 624 submits an affidavit of Owen S. Littman, General Counsel of Ramius LLC, a managing member of plaintiff, attached to which is an unsigned and undated Guaranty by Berry-Hill in favor of 624.

The Art Agreement between Berry-Hill and 624 was entered into on March 18, 2004. On the same day, 624 was formed and an Operating Agreement was entered into by Berry-Hill and the Ramius Members, which collectively refers to individuals, partnerships and corporations listed on Schedule I annexed to the Operating Agreement.[2] The Ramius Members were affiliated with the Ramius Capital Group, LLC, a Delaware investment management firm named as the managing member of 624. Operating Agreement, pp. 1, 4. The Operating Agreement stated its purpose as "setting forth the mutual obligations of the members," as well as the governance of 624. *Id.* at p. 1.

1. Operating Agreement

624 was formed as a Delaware LLC to purchase and sell artwork, with its principal place of business in New York. *Id.* at §§ 2.1, 2.2, 2.5. The Operating Agreement disclaims that it is a partnership or joint venture for any purpose other than taxes. *Id.* at § 2.6. Under the Operating Agreement, the Ramius Members were obligated to make capital contributions to 624; Berry-Hill was not so obligated. *Id.* at §4.1. The Art Agreement is attached to the Operating Agreement as Exhibit A and is defined in Article I, §1.1 as: "[T]he agreement . . . under which [624] retained the services of [Berry-Hill] to, among other things, serve as art administrator and to manage, buy and sell Artwork on behalf of [624]."

Other key provisions of the Operating Agreement include:

> Section 10.5 Arbitration. Any dispute or controversy arising under or in connection with this Agreement shall be resolved by confidential binding

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[2]The words "EXECUTION COPY" appear on the top of the first page of each agreement, but the agreements are unsigned. The parties do not dispute that the agreements were in fact executed or that the submitted copies were in fact the parties' operative agreements.

arbitration which shall be conducted before a panel of three (3) arbitrators in New York, New York . . . in accordance with the Rules of the American Arbitration Association . . ..

Section 4.5 Prior Purchases. It is acknowledged that prior to the execution of this Agreement [Berry-Hill] purchase[d] [] Artwork on behalf of [624] and that simultaneously or as soon as reasonably practical after the execution of this Agreement title to this Artwork will be transferred to [624] and the Members acknowledge that such Artwork is owned by [624]. Schedule D contains a list of the Artwork referred to in this Section 4.5.[3]

Section 7.6 Berry-Hill Indemnification. [Berry-Hill] shall indemnify each of [624], the Manager, the Ramius Members and all their Affiliates from any Damages or losses they incur as a result of (I) the violation by [Berry-Hill] of the provisions of the Management Agreement or this Agreement, (ii) the purchase of any Artwork by [624] that is subject to claims by third parties, (iii) the purchase of any Artwork by [624] if title to such Artwork does not properly pass to [624], (iv) the purchase of any Artwork by [624] that is not authentic . . . or (vi) the collection of amounts under any [Berry-Hill] guarantee. . . ..

Section 7.7 Security Interest. In the event of a default or breach of this Agreement or the Art Administration Agreement, [Berry-Hill] agrees to assist [624] in obtaining with respect to its assets all the rights of a secured party under the Uniform Commercial Code.

Section 9.1 Dissolution. Subject to the provisions of applicable law, [624] shall be dissolved upon the first of the following events to occur: . . .

(d) The expiration of the term of [624] as provided in Section 2.4; or

(e) At the option of the Manager upon the occurrence of a Triggering Event.

Section 2.4 Term. The term of [624] commenced on March 18, 2004 and shall continue until March 18, 2009 unless it is extended by all the Members or [624] is dissolved earlier . . ..

Section 1.1 Certain Defined Terms. .

"Triggering Event" means any of the following: . . . (iii) adjudication of bankruptcy, entering into proceedings for reorganization . . . applying to any court for protection from its creditors, or having [Berry-Hill's] interest in [624] seized by a judgment creditor . . ..

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[3]A listed painting by Edmund Tarbell named *Mrs. Tarbell at Evening* is alleged in the Complaint to have been traded by James and Frederick without plaintiff's consent "and for a painting of far less face-value . . .." Complaint ¶28.

> Section 9.3 Continuing Liabilities and Other Obligations. Except as otherwise expressly provided herein, no reconstitution, dissolution, liquidation or termination of [624] shall relieve, release or otherwise discharge any Member, or any of that Member's successors, assigns, heirs or legal representatives, from any previous breach or default of, any obligation or other liability theretofore incurred or accrued under, any provision of this Agreement or applicable law, and any and all liabilities, claims, demands or causes of action arising from any such breaches, defaults, obligations and liabilities shall survive any such reconstitution, dissolution, liquidation or termination.
>
> Section 10.4 Governing Law. This Agreement shall be governed by, interpreted and enforced in accordance with the laws of the State of Delaware . . ..

2. Art Agreement [4]

Paragraph 1 of the Art Agreement incorporates the definitions of terms used in the Operating Agreement "as amended" to define terms not otherwise defined in the Art Agreement.[5]

Like the Operating Agreement, the Art Agreement contains an Arbitration Clause:

> 24. Arbitration. Except as provided in Section 23, any dispute or controversy arising under or in connection with this Agreement shall be resolved by confidential binding arbitration which shall be conducted before a panel of three (3) arbitrators in New York, New York . . . in accordance with the Rules of the American Arbitration Association . . ..

The exception provided in Section 23 was for Injunctive Relief:

> [B]ecause of the difficulty of measuring economic losses to [624] as a result of a violation or breach of this Agreement, and because of the immediate and irreparable damage that could be caused to [624] as a result of such violation or

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[4]Also like the Operating Agreement, the Art Agreement's term would expire as of March 18, 2009 unless terminated earlier by specified events. The language suggests that the term would be automatically renewed for one-year increments if no termination had occurred prior to March 18, 2009, but there is additional language linking renewal of the Art Agreement to renewal of the Operating Agreement, which language will require interpretation by the court or the arbitrator. The parties have not referred to or submitted evidence of renewal or dissolution.

[5]The unsigned Operating Agreement is not identified by its terms or by the parties as being an "amended" version.

> breach . . . the provisions of this agreement may be specifically enforced by [624] against [Berry-Hill] through injunctions, restraining orders and other orders of equitable relief issued by a court of competent jurisdiction . . ..

Under the terms of the Art Agreement, Berry-Hill was designated as the Art Administrator "to oversee and administer the acquisition, display, preservation and sale of Artwork acquired by" 624 and was recognized as acting "as agent on behalf of " 624. Art Agreement at ¶ 1. The parties' rights and obligations were spelled out in detail: 624 would retain title to all of its paintings until they were sold pursuant to the terms of the Agreement (*Id.* at § 15); in the event Berry-Hill planned to move any of 624's art work from its New York City gallery, it would first procure and tender to 624 an advance acknowledgment, signed by the person or entity that would take custody of the work, that 624 was its sole owner (*Id.* at § 5); upon Berry-Hill's sale of 624's artwork, all of the proceeds were to be deposited or electronically transmitted directly into a bank account "in the name of [624] at a bank designated by [624]"(*Id.* at § 10); Berry-Hill would grant 624 a security interest in 624's Artwork and any proceeds thereof until the sale of the Artwork by Berry-Hill (*id.* at § 8 (a)); at least three business days before 624 would be required to fund a purchase of Artwork, Berry-Hill would send 624 (or its attorney or designee) the information necessary to secure a UCC Financing Statement and 624 would not be required to fund unless Berry-Hill complied (*id.* at § 8 (b)); and 624 would release its security interest immediately upon the sale of the Artwork. *Id.*

The Art Agreement also provided that: Berry-Hill would procure insurance for the Artwork (*id.* at §§, 2(j), 7); Berry-Hill would indemnify 624 and the Ramius Members and their affiliates for, among other things, damages or losses resulting from its purchase of Artwork that is not authentic, other violations of the Art Agreement or the Operating Agreement by Berry-Hill, and acts of gross negligence or willful misconduct (*id.* at § 17); Berry-Hill was prohibited from selling 624's Artwork "on a deferred payment basis unless [Berry-Hill] provide[d] a written

guaranty to [624] . . . in which [Berry-Hill] guarantee[d] the full payment of the purchase price to [624] and in no event w[ould] the deferred payment extend more than 24 months past the date of sale." (*id.* at § 4(f)); and Berry Hill was owned (of record as well as beneficially) by James Hill and Frederick D. Hill, who in aggregate would continue to own 50% of Berry-Hill. *id.* at § 12. Berry-Hill also acknowledged that it had a fiduciary duty to 624. *id.* at § 2 (n). The Art Agreement was to be governed by the laws of New York State. *Id.* at § 26.

3. The Guaranty

Owen Littman, the General Counsel of Ramius LLC, attests in paragraph 5 of his affidavit that "[t]he [Art] Agreement specifically provides that all sales of the Plaintiff's artworks are to be subject to the form of guaranty appended thereto," which provides that claims brought for non-payment must be brought in this court. Subsection (f) of paragraph 4 of the Art Agreement required a written guaranty from Berry-Hill if the sale of 624's artwork was "on a deferred payment basis." That same section refers to a form guaranty attached "as Exhibit A." No exhibit is attached to the copy of the Art Agreement submitted in support of the motion to compel.

A document titled "GUARANTY" with the words "Exhibit A" above the title is attached to Littman's Affidavit. Blank spaces appear in the document for the insertion of dates, there are bracketed directions to "INSERT NAME OF PURCHASER . . . AMOUNT . . . [and] PURCHASE PRICE," and the document is unsigned. Paragraph 9 provides that Berry-Hill and 624 agree to submit actions "arising out of or relating to this Guaranty or the transactions contemplated hereby" to New York State or Federal Courts. Counsel for Berry-Hill stated at the argument that he did not know the whereabouts of signed copies of the form guaranty or the other

agreements. Unlike their acknowledgment that the Art and Operating Agreements were signed, the parties dispute whether a guaranty was signed.

D. Proposed Amended Complaint

624 seeks to correct the description in the original Complaint of Bluestein as an art gallery and to replace it with an allegation, on information and belief, that Bluestein is an investment company. 624 also seeks to add allegations regarding Berry-Hill's 2005 bankruptcy and to add a Ninth Cause of Action against Berry-Hill for Breach of Guaranty.

Allegations regarding the bankruptcy and post-bankruptcy include, *inter alia*, that "upon information and belief": in a series of lawsuits precipitating the bankruptcy, creditors "had accused the Hills of secretly bidding on works that their gallery either owned or had a direct financial interest in for the purpose of inflating the value of their paintings so as to be able to sell a partial interest in the works at escalated prices" (¶23); in 2006 Berry-Hill obtained $21 Million in "debtor-in-possession financing" and emerged from bankruptcy (¶24); by February 2010, Berry Hill defaulted on its loan and its secured lender took legal action to restrain the company's transfer of art work securing its debt; and the United States District Court for the Southern District of New York granted the bank's motion for an order of seizure of certain of the paintings in Berry Hill's custody, "having found that it defaulted on its loan and had 'secretly sold 223 works of art.'" (¶25)

There is no substantive change in allegations that: the Hills caused Berry-Hill to violate the Art Agreement; that their conduct in arranging for Berry -Hill to sell or exchange Artwork owned by 624, was tortious; and that the Hills defrauded 624 by purchasing a counterfeit painting.

At the argument on the motion, 624's counsel suggested that the Art Agreement had been discharged in bankruptcy. Frederick's counsel countered that the agreement did not appear on the Bankruptcy Court's Docket Sheet. No supporting evidence was submitted by the parties.

II. Discussion

A. Motion to Compel Arbitration

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steel Workers of America v Warrior & Gulf Navigation Co.,* 363 US 574, 582 (1960); *see also County of Sullivan v Edward L. Nezeleck, Inc.*, 42 NY2d 123, 128 (1977) (noting fundamental principle that arbitration is grounded in agreement of parties). Moreover, "[w]here there is no substantial question whether a valid agreement [to arbitrate] was made . . . the court shall direct the parties to arbitrate." CPLR 7503(a). The burden of showing that the dispute is arbitrable is upon the party seeking arbitration. *Layton Blumenthal Inc v Jack Wasserman Co.,* 280 AD 135 (1st Dept 1952).

Here, Berry-Hill and James argue that all of plaintiff's causes of action arise from or are connected to the Art and Operating Agreements, both of which include an arbitration clause. They further contend that the tort claims are integrally linked to arbitrable disputes and, therefore, also should be submitted to arbitration.

Plaintiff, in opposition, argues that all but one of the causes of action seek equitable relief, which is carved out of the arbitration clause. It then contends that Frederick waived Berry-Hill's right to arbitrate by filing an answer to the Complaint. In addition, plaintiff asserts that even if the claim for breach of contract is arbitrable, because all the claims are "bound together", they should all be resolved by this court. Finally, it argues that James has no standing to invoke the arbitration clause in the Operating Agreement and the demand for punitive damages removes the dispute from arbitration because such damages cannot be awarded in arbitration.

To begin, the court finds that Frederick has not waived arbitration on behalf of Berry-Hill. Although waiver of arbitration can be inferred from a party's choice to litigate arbitrable claims in a judicial forum, such waiver must be in a manner "clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration." *Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 (2007). 624 has not shown that Frederick's choice of the judicial forum is inconsistent with Berry-Hill's choice of arbitration. Frederick answered the Complaint, but he did so in response to the tort claims filed against him as an individual. Although he acknowledged the Art Agreement, nothing in his papers remotely suggests that his choice of the judicial forum was made on the corporation's behalf, either expressly or impliedly.[6] Rather, he asserted that he no longer is an owner or officer of Berry-Hill and, thus, did not have the authority to waive Berry-Hill's rights. Hence, Frederick's filing of an Answer was not inconsistent with Berry-Hill's invocation of its right to arbitrate.

Furthermore, the fact that the Art and Operating Agreements submitted to the court are not signed, is of no avail. Both 624 and Berry-Hill do not dispute the Agreements' validity. *See Matter of Helen Whiting, Inc.* (*Trojan Textile Corp.*), 307 NY 360, 368 (1954) ("while a contract to arbitrate future controversies must be in writing, it need not be signed so long as there is other proof that the parties actually agreed on it"); *Metropolitan Arts & Antiques Pavilion v Rogers Marvel Architects*, 287 AD2d 372, 372 (1st Dept 2001) ("no requirement that a written agreement to arbitrate be signed . . . as long as there is an express, unequivocal agreement to arbitrate"); *Getlan v Josephthal & Co.*, 91 AD2d 971, 972 (2d Dept 1983) ("no requirement that an agreement to arbitrate future disputes be signed").

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[6]624's argument that Frederick waive arbitration as to Berry-Hill is inconsistent with the position that its tort claims against him are not covered by the arbitration clause. Frederick is not named in the breach of contract claim.

Nor are 624's remaining arguments persuasive. 624 claims that James (and Frederick) have no standing to move for arbitration . Also, 624 disputes arbitrability by relying on the carve-out provision of paragraph 23 of the Art Agreement and by characterizing its tort claims as separate from the contract claim arising from the Agreements. And, it argues that its claim for punitive damages is not arbitrable.

First, the court finds that although Frederick waived arbitration by answering the complaint, James properly invoked the arbitration clauses in the Art and Operating Agreements. James, as an officer of Berry-Hill, derived a right to arbitrate from the Agreements binding Berry-Hill, at least as to "any dispute or controversy arising under or in connection with [these Agreements]." *See Hirschfeld Prods. v Mirvish*, 218 AD2d 567 (1st Dept 1995) 772) (finding corporate officer had standing to invoke arbitration clause in agreement he did not sign). The *Hirschfeld* court explained,

> It is settled law that a corporation, while having an independent legal existence, can only operate through the actions of its officers and directors (*Commission on Ecumenical Mission & Relations of United Presbyt. Church v Roger Gray, Ltd.*, 27 NY2d 457, 463). . . . The attempt to distinguish officers and directors from the corporation they represent for the purposes of evading an arbitration provision is contrary to the established policy of this State. . . . Similarly, in *Roby v Corporation of Lloyd's* (996 F2d 1353, 1360 [2d Cir], *cert denied* 510 US 945), the Federal Circuit Court held that an arbitration clause may be enforced by and against officers and agents of the corporate entity. . . . In short, the courts will not permit a party to elevate form over substance to avoid an otherwise valid arbitration agreement governing the dispute.

(Citations omitted.)

Additionally, the court agrees with movants that "all of plaintiff's causes of action arise from or are in connection with the Art Agreement and Operating Agreement, both of which include an arbitration clause." The obligation to arbitrate "extends not only to the type of disputes

expressly specified in the arbitration clause, but also to any disputes that were contemplated to be covered." *Fletcher v Kidder, Peabody & Co.*, 81 NY2d 623 (1993); *See Oldroyd v. Elmira Savings Bank*, 134 F.3d 72 (2d Cir 1998).

Determination of the tort claims will require adjudication of issues concerning title, possession and ownership of the artwork and proceeds, which will require reference to the terms and definitions of the agreements. *See Fletcher*, *Id.* The arbitration clause at issue here is a typical, broad arbitration clause; by its terms, it applies to "any dispute or controversy arising under or in connection with this agreement." This language appears in both the Art and Operating Agreements. The Language is sufficiently broad to encompass 624's claims that: James defrauded 624 into purchasing counterfeit artwork; James and Berry-Hill converted, fraudulently exchanged or sold 624's artwork and failed to remit the proceeds to 624; and James tortiously interfered with the Art Agreement.

Clauses in both agreements pertain directly to these claims, including, *inter alia,* the Art Agreement's provisions that: 624 would retain title to all of its paintings until they were sold pursuant to the terms of the Agreement; proceeds from sales would be deposited directly into 624's bank account; 624 would be given a security interest in the artwork Berry-Hill purchased on its behalf; and Berry-Hill would indemnify 624 and its members for the purchase of any counterfeit art. The Operating Agreement included similar indemnification and security provisions. "Once it appears that there is . . . a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract, the court's inquiry is ended." *Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 (1975).

The carve-out clause of the Art Agreement does not change the arbitrability of the instant claims. Paragraph 23 of the Art Agreement carves out injunctions, restraining orders and other

equitable remedies to enforce the "provisions of this agreement" and thereby avoid "immediate and irreparable damage" resulting from a violation of the agreement "for which [624] might not have another adequate remedy." The carve-out provision is contained only in the Art Agreement and not in the Operating Agreement and is a common clause provided in agreements containing arbitration provisions, permitting emergency injunctive relief pending arbitration. Were the clause anything but a means for avoiding "immediate and irreparable damage", both Agreements would contain the clause. Indeed, were the court to determine that the carve-out clause overrides arbitration, it would defeat the broad arbitration clause, a result which would render the arbitration clause meaningless. *See Brooke Grp. v JCH Syndicate 488*, 87 NY2d 530, 533 (1996) ("when interpreting a contract, the entire contract must be considered so as to give each part meaning"); *County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 (1994)(contract should not be interpreted so that provision is rendered meaningless). Moreover, even were the court to give credence to plaintiff's argument regarding the carve-out clause, the Operating Agreement has no such clause and would still require arbitration.

Additionally, the remedies 624 cites, replevin and constructive trust, are not included in the carve-out. Replevin has traditionally been an "adequate and appropriate legal remedy." *Smith v Scott*, 294 AD2d 11, 17 (2d Dept 2002); *see Boyle v Kelley*, 42 NY2d 88, 91 (1977) (reversing summary judgment to plaintiff where notice of claim required because replevin claim legal); *James Benjamin, Inc. v Trump CPS, LLC*, 289 AD2d 113 (1st Dept 2001) (reinstating plaintiff's jury demand where claim for replevin joined with damages claim for conversion). The too, 624's claim for a constructive trust is not the same as a request for emergency relief, the type of relief

contemplated by the carve-out. This is essentially a contract action, and determination of the contract issues will likely adequately redress the plaintiff's rights.

Finally, 624 claims that its request for an award of punitive damages in its Sixth Cause of Action for Fraud against the Hills is not arbitrable under New York law. 624 cites as support the New York Court of appeals decision in *Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 357-358 (1976). Yet, the Supreme Court's 1995 decision in *Mastrobuono v Shearson Lehman Hutton, Inc.* implicitly preempted the *Garrity* rule. 514 US 52, 60 (1995) (finding FAA allows arbitrators to award punitive damages). Courts since have relied on *Mastrobuono* in finding that under the Commercial Arbitration Rules of the AAA, an arbitrator may award punitive damages unless the parties explicitly exclude them. *See e.g. Kidder, Peabody & Co. v Fisch,* 241 AD2d 522 (2d Dept), *app den* 91 NY2d 803 (1997) (finding arbitrator can award punitive damages and discussing law). The Art and Operating Agreements explicitly exclude punitive damages from any arbitration award.[7]

In sum, the motion to compel arbitration should be granted as to claims against Berry- Hill and James Hill, except for the claim for punitive damages against James Hill. The punitive damage claim and all other remaining claims against Frederick Hill and Bluestein should be stayed pending completion of the arbitration proceedings. To the extent there are any non-arbitrable claims intertwined with the arbitrable claims and to the extent that parties not subject to arbitration are involved, the court will stay the judicial proceedings pending completion of the arbitration. *See e.g. County Glass & Metal Installers, Inc v Pavarini McGovern, LLC*, 65 AD3d 940 (1st Dept 2009) (affirming grant of motion to stay). The First Department's *County Glass* decision applies here, since " the determination of issues in arbitration may well dispose of

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[7]The parties agreed to the application of New York law in the Art Agreement, but the Operating Agreement makes Delaware law controlling.

nonarbitrable matters." *Id.* That is, the arbitration could resolve material facts underlying claims against Frederick and Bluestein, including, *inter alia,* whether 624's Artwork was transferred or sold without its knowledge, who was responsible, if proceeds from transfers were retained or remitted to 624, if the Artwork sold to 624 is counterfeit, and who has title to transferred Artwork. The arbitrators could also determine whether the tort claims are collateral to the agreements or should be dismissed as duplicative.

B. Cross-Motion to Amend the Complaint

Although the cross-motion is not opposed, the court denies it as to the addition of a Ninth Cause of Action for Breach of Guaranty. Motions for leave to amend under CPLR 3025 should be freely granted, but leave to amend is properly denied where the proposed claim "plainly lacks merit." *Thomas Crimmins Contracting Co. v. New York*, 74 N.Y.2d 166, 170 (1989) (affirming lower court denial of leave to amend answer to add affirmative defense).

624 represents that the unsigned Guaranty was "to apply to all sales of [624's] art work." However, the Art Agreement refers only once to a guaranty and provides that the guaranty would be required only in the event that Berry -Hill wished to enter into a deferred payment plan, which was otherwise prohibited under the agreement. ¶4(f). A form guaranty was annexed to the Art Agreement, to be used for such purpose. The document submitted to the court is a form guaranty. Not only is it unsigned, but it contains blanks where substantive information as to the purchaser, the artwork, the amount, the date, and the period and terms of the deferred payment plan were to be inserted. The proposed claim does not allege any details establishing that a deferred payment plan was agreed to by Berry-Hill and a related guaranty executed by the parties, and the incomplete and unsigned form of guaranty does not provide the missing detail. Unlike the other

agreements, defendants dispute the existence of an executed guaranty. The unsigned and partially blank form is not sufficient to support a claim for breach of guaranty. Accordingly, it is hereby

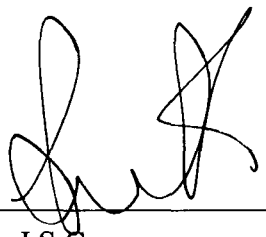
ORDERED that the cross-motion by plaintiff to file an amended complaint is granted in part, without opposition, and denied as to the proposed Ninth Cause of Action; and it is further

ORDERED that the motion to compel arbitration is granted and the Causes of Action in the Amended Complaint against defendants Berry-Hill Gallery, Inc. and James Hill, except the claim for punitive damages against James Hill, are referred to binding arbitration before a panel of three (3) arbitrators in New York, New York in accordance with the Rules of the American Arbitration Association; and it is further

ORDERED that the claim for punitive damages against James Hill, the Causes of Action against defendants Frederick D. Hill and R.H. Bluestein and Company and John Does 1-5, and the Cross-Claims by defendant Frederick D. Hill against defendant James Hill, are stayed pending completion of the arbitration proceedings and further order of the court; and it is further

ORDERED that on completion of the arbitration proceedings, plaintiff may file a motion before this court to lift the stay and may seek further amendment of the complaint as necessitated by the Arbitration Award, but failure to file said motion within thirty days of the arbitration award's issuance by the arbitration panel, will result in the immediate dismissal of the Amended Complaint with prejudice.

Enter,



Dated: June 7, 2012

J.S.C.