Psilakis v Arpaia
2013 NY Slip Op 34185(U)
March 22, 2013
Supreme Court, New York County
Docket Number: 650523/2010
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD Justice PART 49

MICHAEL PSILAKIS, individually and, derivatively on behalf of DONATELLA & MICHAEL, LLC and KEFI, LLC,

Plaintiff,

-against-

DONATELLA ARPAIA,

Defendant.

INDEX NO. 650523/2010

MOTION DATE Oct. 25, 2012

MOTION SEQ. NO. 003

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to dismiss and/or compel arbitration.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	38 – 38-6
Answering Affidavits — Exhibits	41 – 41-6
Replying Affidavits	42 – 42-1

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that the motion to dismiss and/or compel arbitration is decided in accordance with the accompanying decision and order.

Dated: March 22, 2013

O. P. Sherwood

O. PETER SHERWOOD, J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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MICHAEL PSILAKIS, individually and derivatively on behalf of DONATELLA & MICHAEL, LLC and KEFI, LLC,

Plaintiff,

–against-

DONATELLA ARPAIA,

Defendant,

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DECISION AND ORDER

Index No. 650523/2010
Mot. Seq. 003

O. PETER SHERWOOD, J.:

This action arises from a dispute over compensation between two well-known restaurateurs, plaintiff Michael Psilakis ("Psilakis") and defendant Donatella Arpaia ("Arpaia"). Before the court is defendant's motion to dismiss the amended complaint, pursuant to CPLR 3211 (a) (1) and (7), and/or to compel arbitration of the second through seventh causes of action, pursuant to CPLR 7503 (a). For the reasons that follow, the first cause of action is dismissed to the extent it is pleaded derivatively, and the second through seventh causes of action are stayed pending arbitration.[1]

BACKGROUND

As this is a motion to dismiss, the facts are taken from the amended complaint and are assumed to be true. Psilakis is a well-recognized chef and restaurateur who, together with Arpaia, a New York based promoter, restaurateur and media personality, operated several restaurants. Arpaia was primarily responsible for handling the front-of-house and business functions of these restaurants, and Psilakis was primarily responsible for the kitchens.

Psilakis and Arpaia are the managing members of Kefi LLC, an eight-member New York limited liability company organized to operate the restaurant Kefi. In addition to Psilakis and Arpaia, Kefi LLC has investors who are non-managing members. It is governed by the terms of an extensive written operating agreement (the "Kefi OA").

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[1]Oral argument on the motion was held on July 28, 2011 and continued on August 3, 2011, but the transcript was not received until October 25, 2012, apparently because it had not been ordered in a timely manner. The rules of Part 49 provide, in pertinent part that "[t]he motion will not be deemed *sub judice* until a transcript is received."

Psilakis and Arpaia are also the sole members of Donatella & Michael, LLC ("D&M LLC"), a New York limited liability company created as a holding company for the purpose of collecting and distributing proceeds and fees from their various joint ventures. D&M LLC does not have a written operating agreement but plaintiff has submitted an unsigned draft term sheet in opposition to the motion to dismiss.

Recognizing the substantial role Psilakis would play in Kefi's management, the parties agreed that he would receive $200,000.00 per year in compensation from D&M LLC as Kefi's general manager, charged with handling all aspects of the menu, kitchen and staff (the "D&M Agreement"). As part of the D&M Agreement, the parties also agreed that Arpaia would handle the front-of-house functions for Kefi, for which she would receive $100,000.00 per year in compensation. Additionally, the parties agreed that Arpaia would handle the financial matters for Kefi (both the restaurant and Kefi LLC) and D&M LLC. The funds used to pay the parties would be derived from the operation of the Kefi restaurant, would be paid into D&M LLC's operating account, and would in turn be paid from D&M LLC's operating account to Psilakis and Arpaia.

Until February 2010,[2] Arpaia arranged for Psilakis to receive his full $200,000.00 per year compensation as Kefi's general manager from D&M LLC's operating account. Psilkais fulfilled his duties and responsibilities as the general manger, and has made Kefi a highly successful enterprise. Arpaia's efforts on behalf of Kefi, on the other hand, were less than negligible. Indeed, Psilakis complained to Arpaia about her non-performance on many occasions.

In early 2010,[3] Psilakis discovered that Arpaia was using Kefi-generated funds to run another restaurant, Anthos, a business in which Psilakis does not retain an interest. Psilakis also learned that Arpaia was exceeding Kefi LLC's $5,000.00 limit on non-unanimous corporate spending and had appropriated restaurant funds for personal use and/or to pay for her individual business expenses. For example, Arpaia secretly withdrew $20,000.00 from Kefi LLC's operating accounts and used the money, among other ways, to pay for her personal lawyer.

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[2]The amended complaint contradicts itself, later stating that this actually occurred in December 2009.

[3]See footnote 2.

In a letter dated December 7, 2009, Psilakis sought to address Arpaia's unauthorized withdrawals from Kefi LLC's accounts. In retaliation, Arpaia unilaterally reduced Psilakis' annual income from D&M LLC for his work at Kefi from $200,000.00 per year to $150,000.00 per year.

Psilakis asserts seven causes of action against Arpaia. The first cause of action alleges breach of the D&M Agreement based on the reduction on annual income.

All causes of action are asserted individually and derivatively on behalf of D&M LLC and/or Kefi LLC. The second cause of action for breach of both D&M LLC and Kefi LLC asserts that Arpaia continues to compensate herself in the amount of $100,000.00 per year, even though she no longer performs front-of-house management services.

The third cause of action for breach of the Kefi OA alleges that Arpaia secretly withdrew $20,000.00 from Kefi LLC's operating accounts to pay for personal expenses, in breach of the Kefi OA's $5,000.00 limit on non-unanimous corporate spending.

The fourth cause of action for breach of fiduciary duty alleges that Arpaia secretly withdrew $20,000.00 from Kefi LLC's accounts without plaintiff's approval, in breach of Arpaia's fiduciary duties as co-manager of both D&M LLC and Kefi LLC. Additionally, the complaint avers that Arpaia withdrew $100,000.00 per year since 2008 from D&M LLC's accounts as compensation for front-of-house management services that she never provided.

The fifth cause of action for a declaratory judgment alleges that Arpaia's withdrawal of $20,000.00 from Kefi LLC's accounts violated the Kefi OA. Plaintiff seeks a declaration that Arpaia shall no longer be a manager of Kefi LLC.

The sixth cause of action for conversion asserts that Arpaia took possession of discrete and segregated funds, documents and accounts belonging to Kefi LLC and D&M LLC to the exclusion of plaintiff, as the entities' co-manager.

The seventh cause of action for an accounting alleges that Arpaia exercised control over Kefi LLC's bank account and accounts receivables, as well as amounts collected, received and held by D&M LLC, and has denied plaintiff access to relevant financial records and other documents bearing upon their business, despite the fact that he is a co-manager of the entities. Plaintiff seeks an independent accounting of the books, records, invoices, and transactions undertaken by defendant.

DISCUSSION

A. CPLR 3211 (a) (1) Standard

To succeed on a motion to dismiss, pursuant to CPLR 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [1st Dept 2006]). A motion to dismiss pursuant to CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]" (*McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]).

CPLR 3211 (a) (1) does not explicitly define "documentary evidence." "As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, "the contents of which are 'essentially undeniable'" (*id.* at 84-85).

B. CPLR 3211 (a) (7) Standard

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). Indeed, "[s]o liberal is the standard under these provisions that the test is simply whether the proponent of

the pleading has a cause of action, not even whether he has stated one" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998] [internal quotation marks omitted]).

While affidavits may be considered on a motion to dismiss for failure to state a cause of action, unless the motion is converted to a 3212 motion for summary judgment the court will not consider them for the purpose of determining whether there is evidentiary support for properly pleaded claims, but, instead, will accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 "*unless* they 'establish conclusively that [plaintiff] has no cause of action" (*Lawrence v Miller*, 11 NY3d 588, 595 [2008], citing *Rovello v Orofino Realty Co.*, 40 NY2d at 636). In this posture, the lack of an affidavit by someone with knowledge of the facts will not necessarily serve as a basis for denial of a motion to dismiss.

C. Motion to Dismiss the First Cause of Action for Breach of the D&M Agreement

Defendant moves to dismiss the first cause of action for breach of the D&M Agrement, pursuant to CPLR 3211 (a) (7), to the extent it is pleaded derivatively on behalf of D&M LLC. Arpaia argues for dismissal on two grounds. First, defendant argues that plaintiff has failed to satisfy the demand requirement. Second, defendant contends that plaintiff does not allege that D&M LLC suffered any injury, and thus plaintiff cannot proceed derivatively on behalf of D&M LLC. Defendant's arguments are addressed in turn.

"[M]embers of a limited liability company (LLC) may bring derivative suits on the LLC's behalf, even though there are no provisions governing such suits in the Limited Liability Company Law" (*Tzolis v Wolff*, 10 NY3d 100, 102 [2008]). In order to proceed derivatively on behalf of a limited liability company, a plaintiff must first make a pre-suit demand upon the controlling members of the LLC or demonstrate that to make such a demand would be futile (*see Segal v Cooper*, 49 AD3d 467, 468 [1st Dept 2008]). The complaint must set forth with particularity the plaintiff's efforts to secure the initiation of the lawsuit by the LLC's controlling members, or the reasons for not making such an effort (*see id.*; *see also* Business Corporation Law § 626 [c]; Partnership Law § 115-a [3]).

In this case, Psilakis did not make a pre-suit demand upon the controlling members of D&M LLC (the controlling members of which are himself and Arpaia). Instead, Psilakis contends that to

make such a demand would have been futile. Psilakis failed, however, to plead demand futility in his amended complaint. In his memorandum of law in opposition to the motion to dismiss and/or compel arbitration, plaintiff requests leave to further amend the complaint in order to plead demand futility. It is notable that plaintiff pleaded demand futility in his original complaint, but deleted it from his amended complaint. In any event, the court need not address whether to grant plaintiff leave to further amend his complaint, because as described below, plaintiff has not alleged any injury suffered by D&M LLC.

As a second basis for dismissal, Arpaia argues that D&M LLC was not injured by her alleged breach of the D&M Agreement, and accordingly Psilakis cannot maintain a derivative claim on behalf of D&M LLC. In order to maintain a derivative claim on behalf of an LLC, the plaintiff must identify some wrong done to the LLC (*cf. Zletz v Wetanson*, 209 AD2d 337, 338 [1st Dept 1994] [dismissing derivative claims because "no indication . . . that any wrong was done to the corporations"]). Psilakis has not identified any injury suffered by D&M LLC. The dispute concerns how D&M LLC divided its funds between Psilakis and Arpaia. Even if, as Psilakis alleges in his amended complaint, Arpaia reduced his compensation from $200,000.00 to $150,000.00, D&M LLC has not suffered an identifiable injury. It is Psilakis alone who allegedly suffered damages.

Moreover, the first cause of action must be dismissed to the extent it is pleaded derivatively, because plaintiff has improperly intermingled an individual claim with a derivative claim. Under corporate and partnership law, intermingling of individual and derivative claims is not permitted within the same cause of action (*see Baliotti v Walkes*, 134 AD2d 554, 555 [2d Dept 1987]). Although no appellate court has addressed this issue in the context of LLCs, presumably because the Court of Appeals only recently held that a derivative claim may be brought on behalf of an LLC (*Tzolis*, 10 NY3d at 100), at least two Justices of this court have held that derivative claims on behalf of an LLC may not be intermingled within the same cause of action as individual claims (*Waxman Real Estate LLC v Sacks*, 32 Misc 3d 1241(A), 2011 WL 4031522, at *5 [Sup Ct, NY County, Sept 7, 2011, Fried, J.]; *Greenberg v Falco Constr. Corp.*, 29 Misc 3d 1202(A), 2010 WL 3781279, at *3 [Sup Ct, Kings County, Sept 29, 2010, Demarest, J.]). This court agrees.

Accordingly, the first cause of action is dismissed to the extent it is pleaded derivatively on behalf of D&M LLC, and continues to the extent it is pleaded individually.

D. Motion to Compel Arbitration of the Second Through Seventh Causes of Action

Pursuant to CPLR 7503 (a), defendant moves to compel arbitration of the second through seventh causes of action. Arpaia argues that section 8.01(e) of the Kefi OA mandates arbitration of these claims. That section provides, in relevant part:

> If a Managing Member materially defaults under this Agreement and fails to cure such default within 10 business days after receipt of notice of such default in reasonable detail, any Member may institute an arbitration in New York, NY before the American Arbitration Association ("AAA") on an expedited basis pursuant to the rules of the AAA to determine whether the allegedly defaulting Managing Member indeed committed a material default hereunder that was not cured during such cure period. In such arbitration, a single arbitrator shall within 10 days of such arbitration make such determination. If the arbitrator so determines that the allegedly defaulting Managing Member indeed committed a material default hereunder that was not cured during such cure period, then the non-defaulting Managing Member may remove the defaulting Managing Member, but the arbitrator may not award costs or any amount of damages of any kind. . . . Such determination shall be final and binding on the parties hereto, and judgment thereon may be entered in any court in New York, NY having jurisdiction thereon. . . . The parties will share equally in payment of the arbitrator's fees and arbitration expenses . . . (recognizing that each side bears its own . . . attorneys' fees and other expenses to the same extent as if the matter were being heard in court)."

(Hecker Aff. Ex. B). Defendant contends that since the second through seventh causes of action all involve alleged defaults of the Kefi OA, section 8.01(e) requires arbitration of these claims.

Plaintiff served Arpaia with a written notice of material default on December 7, 2009 (Hecker Aff. Ex. C). The letter states that Arpaia secretly withdrew $20,000.00 of Kefi funds, in violation of section 8.01(d) of the Kefi OA. The letter notes that the Kefi OA "provides that in the event of a managing member's *material default*, the matter is to be submitted to arbitration; this is to occur only after the defaulting party is given an opportunity to *cure*" (*id.* [emphasis in original]). Despite service of the written notice of material default and defendant's alleged failure to cure, plaintiff did not institute an arbitration. Instead, he brought this action.

Plaintiff opposes the motion to compel arbitration on several grounds: (1) the second cause of action arises under the D&M Agreement and not the Kefi OA, and is thus not subject to arbitration; (2) the Kefi OA expressly precludes arbitration of the third, fourth, sixth and seventh causes of action; and (3) the arbitration clause is not mandatory, but rather is merely permissive. Plaintiff admits that the fifth cause of action is subject to arbitration, but contends that since the

claims are "inextricably bound together," they should be tried in this forum (*see Steigerwald v Dean Witter Reynolds*, 84 AD2d 905, 906 [1st Dept 1981]). This argument is rendered academic, because as discussed below, the second through seventh causes of action are subject to mandatory arbitration.

"It is well settled that a party cannot be compelled to submit to arbitration unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute" (*Gerling Global Reins. Corp. v Home Ins. Co.*, 302 AD2d 118, 123 [1st Dept 2002], quoting *Matter of American Centennial Ins. Co. v Williams*, 233 AD2d 320, 320 [2d Dept 1996] [internal quotation marks omitted]). As the party seeking arbitration, Arpaia has the burden of demonstrating "a clear and unequivocal agreement to arbitrate" Psilakis' claims (*Gerling Global Reins. Corp.*, 302 AD2d at 118 [citation and internal quotation marks omitted]).

Turning to plaintiff's first argument in opposition to the motion to compel arbitration, Psilakis argues that the second cause of action arises under the D&M Agreement and not the Kefi OA. Since the D&M Agreement does not contain an arbitration clause, plaintiff contends that the second cause of action is not subject to arbitration. As previously described, the second cause of action essentially alleges that defendant has breached the D&M Agreement by continuing to pay herself $100,000.00 per year for front-of-house management services at Kefi, despite no longer providing those services. However, Arpaia's obligation to perform front-of-house services for Kefi arises directly from section 8 of the Kefi OA. Section 8.01(b) of the Kefi OA provides that "[s]olely Arpaia shall be responsible for front-of-house dining room functions, including the hiring, supervision and termination of employees performing such functions. Back-office employees, accountants, and other outside professionals shall be hired by Arpaia, subject to Psilakis's approval, which approval shall not be unreasonably withheld, and shall be supervised by Arpaia." Furthermore, section 8.01(c) of the Kefi OA provides, in relevant part, "Arpaia shall supervise all dining room managers and personnel . . ." (Hecker Aff. Ex. B). Accordingly, Arpaia's failure to provide front-of-house services, as required by section 8 of the Kefi OA, could constitute a material default under the Kefi OA. The second clause of action is thus subject to the Kefi OA's arbitration clause.

Plaintiff next argues that the Kefi OA expressly precludes arbitration of the third, fourth,

sixth and seventh causes of action.[4] Specifically, plaintiff contends that the presence of a choice of forum clause in the Kefi OA renders these causes of action not subject to mandatory arbitration. Section 21.07 of the Kefi OA provides:

> "This Agreement shall be governed under the laws of the State of New York applicable to contracts executed and wholly performed in New York State and without reference to its choice of law provisions. The parties hereto waive trial by jury to the extent permitted by law. The parties hereto irrevocably consent to the jurisdiction of the federal and state courts sitting in the State of New York, with venue in any action or proceeding to lie in the State, City and County of New York"

(Hecker Aff. Ex. B). Furthermore, section 21.10 of the Kefi OA provides:

> "Except as otherwise set forth in this Agreement, in any action or proceeding brought by the Company or a Member against the Company, a Managing Member or other Member in connection with a dispute arising out of the provisions of this Agreement, the prevailing party shall be entitled to recover the costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) incurred by the prevailing party in connection with such action or proceeding"

(Hecker Aff. Ex. B). Thus while attorneys' fees and expenses are recoverable in an action or proceeding, they are not available in an arbitration (*compare* Kefi OA Section 21.10 *with* Kefi OA Section 8.01[e]).

Plaintiff contends that the Kefi OA contains two dispute resolution mechanisms — one general (the choice of forum clause) and one specific (the arbitration clause). Citing the U.S. Court of Appeals for the Second Circuit's decision in *Katz v Feinberg* (290 F3d 95 [2d Cir 2002]), Psilakis argues that where a contract provides for one general and one specific dispute resolution mechanism, "the forum prescribed for specific areas is the appropriate forum for the resolution of issues falling within such areas and all other issues should be resolved in accordance with the more general mechanism" (Psilakis Mem. of Law in Opp. at 15). Psilakis contends that the Kefi OA's arbitration clause is a specific dispute resolution mechanism because it does not encompass claims for damages. Indeed, the arbitration clause states that "the arbitrator may not award costs or any amount of damages of any kind" (Kefi OA section 8.01[e]). Psilakis argues that the arbitration clause "is

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[4]Although plaintiff does not make this argument with respect to the second cause of action, the court's reasoning is equally applicable to that claim.

expressly limited in scope to *defaults* in performance by the managing members and consequent removal" (Psilakis Mem of Law in Opp. at 16). For the resolution of other claims which seek damages, such as breach of contract, breach of fiduciary duty and conversion, plaintiff argues that the more general dispute resolution mechanism — the choice of forum clause — governs, and the claims should thus be heard in this court.

In *Katz*, the contract at issue was a purchase agreement governing the sale of the plaintiff's one-half interest in a company to the defendant. The purchase agreement contained two key provisions: "[t]he first ... provision assigns determination of the 'Final Share Purchase Price,' ... to the company's ... accountants and specified that '[t]he determination by the Company Accountants of the final purchase price of the Shares ... shall be final and binding on Seller and Buyer and shall not be subject to any appeal, arbitration, proceeding, adjustment or review of any nature whatsoever'" (*Katz*, 290 F3d at 96). "The second [provision] assigns all disputes under the agreement to arbitration in New York, New York under the rules of the American Arbitration Association" (*id.*) "When the company accountants returned a valuation substantially lower than expected, [the plaintiff] sought to have the accountants' determination declared invalid by an arbitration panel pursuant to the general arbitration clause" (*id.*) The arbitration panel modified the accountants' determination, the plaintiff sought approval of the award by the U.S. District Court for the Southern District of New York, and the defendant cross-moved for vacatur of the award (*id.*) The District Court vacated the arbitration award, holding that the "Purchase Agreement committed review of the valuation determination to the Company Accountants, not the arbitration panel," and that the arbitration panel had thus "exceeded its authority under the [Purchase] Agreement" (*id.*) The Second Circuit affirmed, "not[ing] the importance of the dominance of specific over general arbitration provisions" (*id.*)

The *Katz* court "noted that under normal circumstances, when an agreement includes two dispute resolution provisions, one specific (a valuation provision) and one general (a broad arbitration clause), the specific provision will govern those claims that fall within it" (*id.* at 97). The court held that since the "Purchase Agreement includes both a specific provision . . . assigning determination of the Final Share Purchase Price to the Company Accountants, and a generally worded arbitration provision . . . assigning all claims arising from the agreement to an arbitrator,"

"the more specific assignment should govern" (*id.* at 98). The court also noted that the valuation provision specifically excluded the accountants' determination from "any . . . *arbitration* . . . whatsoever" (*id.* [internal quotation marks omitted]).

The purchase agreement in *Katz* is distinguishable from the Kefi OA. Whereas the specific valuation provision in *Katz* explicitly excludes certain types of disputes from arbitration, the Kefi OA's arbitration clause, which plaintiff contends is a specific dispute resolution mechanism, does not contain such limiting wording. Rather, the Kefi OA arbitration clause merely limits the parties' available *remedies* in arbitration to removal of the offending manager. Furthermore, the presence of the choice of forum clause does not serve to render the arbitration clause applicable only to disputes where a party is seeking removal of a managing member. The Kefi OA's arbitration clause encompasses all disputes involving an alleged material default of the Kefi OA by a managing member.

At oral argument, plaintiff argued, for the first time, that the arbitration provision contained in section 8.01(e) of the Kefi OA is not mandatory and is instead merely permissive. The court adjourned the oral argument and directed the parties to submit additional letter briefs addressed to this issue. Because the plaintiff raised this argument for the first time at oral argument and in a supplemental letter brief, the argument is waived (*see Schirmer v Athena-Liberty Lofts, LP*, 48 AD3d 223 [1st Dept 2008] [argument improperly raised for first time in reply papers]). In any event, the argument is without merit.

In *Triangle Equities Inc. v Listokin* (13 AD3d 269 [1st Dept 2004]), the Appellate Division, First Department considered an arbitration clause which provided that "[a]ll disputes between the parties concerning the interpretation or enforcement of any rights or obligations under this Agreement . . . may be resolved by final and binding arbitration pursuant to the Voluntary Arbitration Rules of the American Arbitration Association" (*id.* at 269-270 [internal quotation marks omitted]). There, the plaintiff argued that the word "may" rendered the arbitration clause permissive, and that it could choose to litigate rather than arbitrate its claim. The court rejected the plaintiff's argument, holding that "[a]ny choice implicit in the word 'may' would not be between arbitration and litigation but between arbitration and abandonment of the claim; to hold otherwise would be to treat the arbitration agreement as a 'useless gesture'" (*id.* at 270, citing *Local 771, I.A.T.S.E., AFL-*

CIO v RKO Gen., Inc., WOR Div., 546 F2d 1107, 1116 [2d Cir 1977]).

Similarly, here, to allow Psilakis to litigate the second through seventh causes of action would render the Kefi OA's arbitration clause a "useless gesture." The second through seventh causes of action plainly allege material defaults of the Kefi OA. That plaintiff is seeking damages (with the exception of the fifth cause of action) is of no moment. The arbitration clause merely limits the parties' available remedies for material defaults. Any alleged material default of the Kefi OA by a managing member must be submitted to arbitration, regardless of the remedy the party alleging the default is seeking. Any potential claims that arise under the Kefi OA which do not involve material defaults by a managing member, of which there are none asserted in this action, may be heard in this forum pursuant to the Kefi OA's choice of forum clause.

For the foregoing reasons, the second through seventh causes of action must be submitted to arbitration. Since the court has determined that the second through seventh causes of action must be stayed pending arbitration, it need not discuss defendant's arguments that the second through seventh causes of action should be dismissed on the merits.

Accordingly, it is hereby

ORDERED that the branch of defendant's motion seeking to dismiss the amended complaint is GRANTED in part, and the first cause of action is dismissed to the extent it is pleaded derivatively; and it is further

ORDERED that the branch of defendant's motion seeking to compel arbitration of the second through seventh causes of action is GRANTED; and it is further

ORDERED that plaintiff, Michael Psilakis, shall arbitrate the second, third, fourth, fifth, sixth and seventh causes of action against defendant, Donatella Arpaia, in accordance with the Kefi LLC Operating Agreement; and it is further

ORDERED that the second, third, fourth, fifth, sixth and seventh causes of action are hereby stayed; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration; and it is further

ORDERED that the parties shall appear for a status conference on April 10, 2013 at 9:30 a.m. in Part 49, Room 252, 60 Centre Street. The parties should be prepared to discuss a discovery

schedule for the first cause of action.

This constitutes the decision and order of the court.

DATED: March 22, 2013

ENTER,

O. PETER SHERWOOD
J.S.C.