NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2448-14T2

JOHN S. PATTERSON and STELLA PATTERSON, Individually and as Joint Tenants,

Plaintiffs-Respondents,

v.

LADENBURG THALMANN & CO. INC.,

Defendant-Appellant.

Submitted September 24, 2015 – Decided February 4, 2016

Before Judges Ostrer and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-1435-14.

Sallah Astarita & Cox, LLC, attorneys for appellant (Mark J. Astarita and Michael D. Handelsman, on the briefs).

DeVita & Associates, and Timothy J. Dennin of the New York bar, admitted pro hac vice, attorneys for respondents (Richard Daniel De Vita and Mr. Dennin, on the brief).

PER CURIAM

Defendant Ladenburg Thalmann & Co., Inc. (Ladenburg) appeals from a December 19, 2014, order denying, without prejudice, its motion to compel arbitration and stay proceedings.

Plaintiffs John S. and Stella C. Patterson filed their complaint in May 2014 alleging breach of contract, conversion, fraud, and related causes of action arising out of their dealings with Mark C. Hotton while he was a broker at Ladenburg and Ladenburg Capital Management, Inc., from 1997 to 2005. Plaintiffs alleged that in July 2013, Hotton pleaded guilty in federal court to a "massive multi-million dollar money laundering scheme spanning a period of 17 years," which included the time he worked at Ladenburg. Plaintiffs alleged Hotton's misdeeds continued after he left Ladenburg for Oppenheimer Co., Inc. Plaintiffs contended they discovered irregularities in their Oppenheimer accounts, which led to an arbitration and subsequent confidential settlement with Oppenheimer. Disclosures made in that arbitration, and plaintiffs' subsequent investigation, led to their discovery of Hotton's fraudulent conduct while at Ladenburg. Plaintiffs' action sought to hold Ladenburg responsible for its former broker's alleged wrongdoing.

In lieu of an answer, Ladenburg filed a motion to dismiss on statute of limitations and laches grounds. Plaintiffs opposed the motion, arguing, among other things, the limitations period was tolled by the discovery rule. On October 24, 2014, the court denied the motion without prejudice.

The next month, Ladenburg filed its answer asserting as an affirmative defense that plaintiffs' claims were subject to binding arbitration. Ladenburg also filed a motion to compel arbitration and stay plaintiffs' action.

In support of its motion, Ladenburg provided two affidavits of Robert Mateicka, Ladenburg's chief compliance officer. The purpose of the affidavits was to present evidence of an arbitration contract. However, both affidavits were based on "information and belief" as well as personal knowledge. Mateicka stated in each, "I am fully familiar with the facts set forth herein from my own personal experience [and] knowledge, except for those which are stated upon information and belief. As to those statements, I believe them to be true based on my review of the documents and records related to this matter."

Attached to Mateicka's first affidavit was what he described as "a copy of the brokerage account application which was being used by Ladenburg during the relevant time period." The application was fifteen pages long; the fields were not filled in. Page one contained the following instruction: "Before signing the Brokerage Account Application, please carefully read the Brokerage Account Customer Agreement. All account holders must sign their name." Page seven, the signature page, contained this acknowledgment:

> I represent that I have read the terms and conditions governing this account and agree to be bound by such terms and conditions as currently in effect and as may be amended from time to time. This account is governed by a pre-dispute arbitration agreement which appears on page 15.
>
> I acknowledge receipt of the pre-dispute arbitration agreement.

Page seven is followed by several pages of fields to be completed by the customer.

A section titled, "Brokerage Account Pre-Dispute Arbitration Agreement" appears on page fifteen. There is no separate signature line on page fifteen. The arbitration clause states, in all caps:

> Brokerage Account Pre-Dispute Arbitration Agreement
>
> I am aware of the following:
>
> (A) Arbitration is final and binding on the parties.
>
> (B) The parties are waiving their right to seek remedies in court, including the right to jury trial.
>
> (C) Pre-arbitration discovery is generally more limited than and different from court proceedings.
>
> (D) The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

> (E) The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.
>
> I agree that all controversies that may arise between us concerning any order or transaction, or the continuation, performance or breach of this or any other agreement between us, whether entered into before, on, or after the date this account is opened, shall be determined by arbitration before a panel of independent arbitrators set up by either the New York Stock Exchange, Inc., or National Association of Securities Dealers, Inc., as I may designate. If I do not notify you in writing within five (5) days after I receive from you a written demand for arbitration, then I authorize you to make such a designation on my behalf. I understand that judgment upon any arbitration award may be entered in any court of competent jurisdiction.
>
> [(Emphasis added).]

The second attachment to Mateicka's first affidavit was a page seven signature page executed by plaintiffs on April 28, 2005. This page is identical to the page seven in the blank application described above, including the acknowledgment of receipt of the "pre-dispute arbitration agreement which appears on page 15." Plaintiffs' signed signature page identifies an account number ending with 7722. Mateicka's affidavit alleged the signature page was included in plaintiffs' brokerage account application for that account.

Plaintiffs opposed Ladenburg's arbitration motion, arguing the contract Ladenburg presented was incomplete since only plaintiffs' signature page was presented, and not the rest of the actual application. Plaintiffs noted that the forms were dated in 2004, which could not have been used for accounts plaintiffs opened in 2002 and 2003. Several pages in the blank application attached to Mateicka's affidavit bear the date "02/04" at the bottom of the page. Plaintiffs also argued the arbitration language was ambiguous, and that Ladenburg had waived its right to invoke the arbitration provision by first filing a motion to dismiss.

However, plaintiffs did not present any certification denying that they signed the page seven that Mateicka presented. They also did not deny that when they signed page seven, they received the entire Customer Agreement, which included the arbitration agreement on page fifteen.

In Mateicka's second affidavit, he explained that Ladenburg's standard practice was to open a new account only after a completed brokerage account application (which would include the arbitration agreement) was submitted. He also stated Ladenburg's standard practice is to "only retain portions of new brokerage account applications and pre-dispute arbitration agreements, including the signature page." He

asserted Ladenburg is required by "17 C.F.R. 240-17a-4(a)" to retain only certain portions of account applications, including the signature page, for "a period of six years." See 17 C.F.R. § 240.17a-4(a) (requiring certain records to be "preserve[d] for a period of not less than six years"). Mateicka attached "Plaintiffs' account verification forms" from 2003, which referred to four different account numbers. One account number appears to match the nine-figure account number on the signature page plaintiffs signed on April 28, 2005.

The trial judge denied without prejudice Ladenburg's motion to compel arbitration. The court relied on Ladenburg's failure to present a complete copy of the actual agreement plaintiffs signed. The court noted that the signed page seven was the only document that identified plaintiffs as contracting parties. The court agreed this signed page matched the page seven of the blank application. Ladenburg's counsel had apparently agreed, in response to the judge's request, to submit a copy of the full agreement plaintiffs signed. The judge, in his decision, noted the full agreement had not yet been submitted.

The court also rejected plaintiffs' argument that the arbitration language was confusing or ambiguous. However, the court was unprepared to conclude that the arbitration agreement plaintiffs allegedly signed in 2005 "relate[d] back" to prior

years' agreements. Finally, the court declined to decide plaintiffs' claim that Ladenburg waived its right to seek arbitration.

This appeal followed. Ladenburg argues the parties entered into a valid and unambiguous arbitration agreement. Ladenburg notes that plaintiffs submitted no competent evidence to dispute Mateicka's assertion that they signed an agreement containing the arbitration clause on page fifteen.

We exercise plenary review of the trial court's decision regarding the existence and applicability of an arbitration agreement. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013); Bd. of Educ. of Bloomfield v. Bloomfield Educ. Ass'n, 251 N.J. Super. 379, 383 (App. Div. 1990), aff'd, 126 N.J. 300 (1991); Moreira Constr. Co. v. Twp. of Wayne, 98 N.J. Super. 570, 575 (App. Div.), certif. denied, 51 N.J. 467 (1968).

Whether an arbitration agreement was formed is determined under general contract principles. Leodori v. CIGNA Corp., 175 N.J. 293, 302, cert. denied, 540 U.S. 938, 124 S. Ct. 74, 157 L. Ed. 2d 250 (2003). A court may not "subject an arbitration agreement to more burdensome requirements than those governing the formation of other contracts." Ibid. We consider "the contractual terms, the surrounding circumstances, and the

purpose of the contract." Hirsch, supra, 215 N.J. at 188 (internal quotation marks and citation omitted).

In interpreting an arbitration agreement, we are mindful that arbitration is considered "a favored method for resolving disputes." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001). At the same time, the policy favoring arbitration is "not without limits," and "neither party is entitled to force the other to arbitrate their dispute" unless both parties agreed to do so. Id. at 132. "[T]he [Federal Arbitration Act] specifically permits states to regulate . . . contracts containing arbitration agreements under general contract principles . . . ." Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2002) (internal quotation marks and citation omitted).

We agree that Ladenburg failed to present sufficient, competent evidence of an arbitration agreement with plaintiffs. However, we reach that conclusion for different reasons than those expressed by the trial court.[1] Ladenburg relied on an affidavit by Mateicka that purported to be both based on personal knowledge and "upon information and belief," without

[1] See State v. Heisler, 422 N.J. Super. 399, 416 (App. Div. 2011) (stating an appellate court is "free to affirm the trial court's decision on grounds different from those relied upon by the trial court").

distinguishing between the two. This fails to comply with Rule 1:6-6, which governs the presentation of evidence on motions. The Rule requires affidavits supporting motions to be based "on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify." See also Jacobs v. Walt Disney World, Co., 309 N.J. Super. 443, 454 (App. Div. 1998) (factual assertions based merely upon "information and belief" are inadequate); Lippmann v. Hydro-Space Tech., Inc., 77 N.J. Super. 497, 504 (App. Div. 1962) (verification "to the best of the knowledge and belief of [the] deponent" is defective).

Had Mateicka's "affidavit" complied with the Rule, Ladenburg would have presented sufficient evidence of a binding agreement to arbitrate. Plaintiffs signed page seven, acknowledging their "account is governed by a pre-dispute arbitration agreement which appears on page 15" and that they had received the arbitration agreement. Plaintiffs did not provide a certification or any other evidence showing that they did not execute the fifteen-page agreement that Ladenburg submitted in blank form. As noted above, plaintiffs' signed page seven is identical to page seven of the fifteen-page agreement.

We recognize that the proponent of an arbitration agreement bears the burden to prove its existence. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc., 427 N.J. Super. 45, 59 (App. Div.), certif. denied, 212 N.J. 460 (2012). However, Ladenburg was not required to produce the complete original document that plaintiffs signed in order to prove the contents of their agreement. See N.J.R.E. 1004 ("The original is not required and other evidence of the contents of a writing . . . is admissible if . . . [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith"). Plaintiffs signed page seven, which expressly incorporated the arbitration agreement on page fifteen. Competent uncontradicted testimony that Ladenburg would not have accepted plaintiffs' account agreement without the other pages would be persuasive evidence of the contents of the entire agreement. Further, plaintiffs signed the representation on page seven, which states, "I have read, understood and agreed to the terms set forth in the Customer Agreement herein." The Customer Agreement includes the arbitration provision on page fifteen.

It is immaterial that the arbitration clause appeared on a different page of the agreement than the page plaintiffs signed. Contracting parties "may agree to arbitrate their disputes by

referring generally to an arbitration policy contained in a separate writing, provided that the policy itself clearly reflects . . . [a] knowing and voluntary waiver of rights." Leodori, supra, 175 N.J. at 307. In sum, but for Ladenburg's failure to comply with Rule 1:6-6, Ladenburg would have established the existence of the arbitration agreement, given plaintiffs' lack of evidence to the contrary. If Ladenburg lays a proper foundation for plaintiffs' signed page seven and the complete fifteen-page agreement, no other documents will be needed to meet its burden.

We also conclude the arbitration clause in the Customer Agreement is unambiguous. In particular, the clause governs not just disputes arising out of the account expressly identified in the agreement, but also those arising out of "any other agreement between us, whether entered into before, on, or after the date this account is opened." Plaintiffs' arguments to the contrary lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

We affirm the order denying without prejudice Ladenburg's motion to compel arbitration.