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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3517-13T2

OMAYMA ARAFA, EMAN EL ESSAWI,
TAREK EL ESSAWI, DR. HISHAM
HABHISH, HOSAMELDIN ARAFA,
ABDELMAKSUD ARAFA, WALAA SAMIR
AMIN SOLTAN, MOAMEN BISHRY ELSHEIKH,
DR. HESHAM AMR, IMAN ABDELHADI, AND
DR. HODA ABDELRAHMAN EL KARAKSY,

Plaintiffs-Appellants,

v.

MOUSTAPHA AHMED AND DAR EL SALAM
IMPORT-EXPORT-TRAVEL, INC.,
d/b/a DAR EL SALAM TRAVEL,

Defendants-Respondents.

Argued February 3, 2015 – Decided September 1, 2015

Before Judges Messano and Hayden.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2167-13.

David C. Roberts argued the cause for the appellants (Norris McLaughlin & Marcus, P.A., attorneys; Mr. Roberts and Andrew D. Linden, on the brief).

Rukhsanah L. Singh argued the cause for the respondents (Connell Foley, LLP, attorneys; (Hector D. Ruiz, of counsel and on the brief; Daniel E. Bonilla, on the brief).

PER CURIAM

Plaintiffs appeal from the March 10, 2014 Law Division order dismissing their civil complaint without prejudice and ordering them to arbitrate their claims. For the reasons that follow, we affirm in part and reverse in part.

The record establishes that at various times throughout the summer of 2012, plaintiffs booked trips through defendant Dar El Salam Import-Export Travel, Inc. (DST), and defendant Moustapha Ahmed, its president, for that fall's Hajj, the religious pilgrimage to Mecca. Seven plaintiffs purchased their trips through a travel agent, Mohammed Mossad.[1] The other three plaintiffs purchased directly through the defendants' website.[2] All plaintiffs attended the Hajj, but were extremely unsatisfied with the accommodations, food, transportation, hospitality services, and religious experiences provided or facilitated by defendants.

On June 7, 2013, plaintiffs filed a civil complaint against defendants alleging common law fraud, violations of the Consumer Fraud Act, breach of contract, breach of fiduciary duty, unjust enrichment, and breach of the implied covenant of good faith and fair dealing. Defendants moved to dismiss the complaint and compel

[1] We will refer to this group of plaintiffs as the "Mossad plaintiffs."
[2] We will refer to this group of plaintiffs as the "Internet plaintiffs."

arbitration. In support, defendants asserted that in order to register for the trip, plaintiffs were required to consent to the 2012 Terms and Conditions document (the T&C). The T&C document,[3] which was effective January 1, 2012, advised purchasers "Please ensure that you read carefully and understand these [T&C] prior to booking." It further provided:

> 9. Mediation and Arbitration of disputes:
>
> Any disputes related to the contract for travel/Hajj pilgrimage between the participant and [defendants] directly or indirectly relating to the Terms & Conditions shall be first submitted to mediation in New York, New York, before a mediator mutually agreed to by the parties. If mediation is not successful, the dispute must be resolved by binding neutral arbitration in New York, New York, as provided by New York law. You are hereby giving up any rights you might possess to have the dispute litigated in a court or jury trial in New York or any other jurisdiction. By purchasing travel services from [defendants], you are: 1) giving up your judicial right to discovery and appeal; 2) you may be compelled to arbitrate under the authority of the New York code of civil procedure; and 3) you acknowledge that your agreement to this arbitration provision is voluntary.
>
> Arbitration under this provision shall . . . be limited to those disputes related solely to the contract for travel or these Terms & Conditions. . . . All parties agree to

[3] As neither party has raised the issue of New York law or jurisdiction in this appeal, we do not address the issue. See State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). Further, neither party relies on New York law or claims that under New York law the result would be different.

> irrevocably waive their respective rights to a jury trial of any cause of action, claim, counterclaim, or cross-complaint in any action or proceeding and/or hearing brought by either party against the other on any matter whatsoever arising out of these Terms & Conditions or any agreement between you and DST.

The T&C further provided that "[i]f you do not agree to these Terms & Conditions, please cancel your booking by written notification to DST (cancellation fees may apply)."

According to defendants, the T&C document was posted "in full on every webpage on DST's website that contained an application form for each travel program[.]" In order to complete an online booking, the user had to acknowledge the T&C by checking a box on the website. Defendants contend that the online application could not be submitted for final registration without the Internet plaintiffs checking this box. However, the Internet plaintiffs denied having to scroll through the T&C and checking an agreement box in order to submit their applications and book the trips. One Internet plaintiff did not recall seeing any terms and conditions and another claimed she was referred to a hyperlink for the T&C, which she did not click on.

Defendant asserts that they gave Mossad the T&C documents to give to plaintiffs, although the record contains no certification from Mossad. The Mossad plaintiffs represented that they received a copy of the T&C by e-mail sometime in September, after they had

already purchased their Hajj trips. While several of the Mossad plaintiffs indicated that they may have received the e-mail from Mossad containing the T&C, they either ignored it or refused to sign it because "it was not in [their] best interest." Others had no recollection of receiving the email or denied that one had been sent.[4]

The trial judge, after hearing oral argument, granted defendants' motion to compel arbitration.[5] The judge determined that there was "a valid agreement to arbitrate" and as such, held that plaintiffs were bound to "submit their claims" to binding arbitration. In support, the court noted that "[t]he matter . . . [was] within the scope of the arbitration clause and there was sufficient notice of the agreement[.]" Further, the court found that plaintiffs never cancelled their trip purchases as required if they disagreed with the T&C. On March 10, 2014, the judge issued an order reflecting his ruling.

On appeal, plaintiffs argue that they never agreed to arbitrate this dispute, which makes the arbitration clause unenforceable. With respect to the Mossad plaintiffs, we agree that the judge erred in compelling them to arbitrate their claims.

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[4] The record does not contain a copy of this email.

[5] Because of this decision, the judge did not reach the part of the motion seeking dismissal for failure to state a claim on counts one, two, four, and five.

However, we agree that the Internet plaintiffs agreed to and were bound by the arbitration clause.

"Orders compelling arbitration are deemed final for purposes of appeal." Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013) (citing R. 2:2-3(a)). We review such orders de novo. See Waskevich v. Herold Law, P.A., 431 N.J. Super. 293, 297 (App. Div. 2013) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995)).

The protection of the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-16, applies whether arbitrability is raised in federal or state court. Ibid. (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 84 (2002)). When reviewing an order to compel arbitration, courts must take into account the strong preference both at the federal level and in New Jersey for enforcing arbitration agreements. Hirsch, supra, 215 N.J. at 186. See Uniform Arbitration Act of 2003, N.J.S.A. 2A:23B-1 to -32 (authorizes courts to recognize and enforce arbitration agreements).

That policy represents two principles: a "'federal policy favoring arbitration'" and that "'arbitration is a matter of contract[.]'" AT&T Mobility LLC v. Concepcion, 563 U.S. __, __, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742, 751 (2011) (citations omitted). The "central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced

according to their terms.'" Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682, 130 S. Ct. 1758, 1773, 176 L. Ed. 2d 605, 622 (2010) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479, 109 S. Ct. 1248, 1255-56, 103 L. Ed. 2d 488, 500 (1989)). Nevertheless, the policy favoring arbitration is "not without limits[,]" Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001), and a party "'cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit.'" Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 148 (App. Div. 2008) (quoting AT&T Techs., Inc. v. Commc'ns. Workers of Am., 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648, 655 (1986)). To be enforceable there must be a meeting of minds as parties are not required "to arbitrate when they have not agreed to do so." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442 (2014) (citations omitted), cert. denied, __ U.S. __, 135 S. Ct. 2804, __ L. Ed. 2d __ (2015).

Thus, two questions arise when evaluating a motion to compel arbitration. The first is whether there is a valid and enforceable agreement to arbitrate disputes. Martindale, supra, 173 N.J. at 86. Courts apply "'state contract-law principles . . . [to determine] whether a valid agreement to arbitrate exists.'" Hirsch, supra, 215 N.J. at 187 (quoting Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006)). To do so, courts examine "the

contractual terms, the surrounding circumstances, and the purpose of the contract." Id. at 188 (citations omitted). The second issue focuses on whether the particular dispute is within the scope of the agreement. See Martindale, supra, 173 N.J. at 92.

With respect to the Mossad plaintiffs, the record shows that Mossad did not send the T&C until after plaintiffs purchased their trips.[6] Thus, at the time they purchased the trips, they did not know about, much less agree to, the arbitration clause. We previously held that a plaintiff was not required to arbitrate her warranty claim because the warranty, which contained an arbitration clause, was sent to the plaintiff's residence more than three years after the transaction. Paul v. Timco, Inc., 356 N.J. Super. 180, 183, 185-86 (App. Div. 2002). Specifically, we determined that the "plaintiff would not be bound by any of [the warranty's] terms that derogated from her rights under the previously executed retail installment contract, unless defendants could show that she agreed to such modified or additional terms."

[6] We reject defendants' suggestion that the mere fact that the T&C was available on the website if one filled out an application to register online shows that the Mossad plaintiffs could have ascertained the T&C. Since they were obtaining their trip through a travel agent, they had no reason to pull up an online application and complete the steps to get to the part that references the T&C. See Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 32 (2d Cir. 2002) (In finding that the arbitration clause was "submerged" on the website, the Court stated that "there is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there.").

Id. at 185-86 (emphasis added). Consequently, we reasoned that without proof of the plaintiff's assent to the new terms, the defendant could not compel arbitration. Ibid.; see also Leodori v. Cigna Corp., 175 N.J. 293, 303 ("[A] valid waiver [of statutory rights] results only from an explicit, affirmative agreement that unmistakably reflects the employee's assent."), cert. denied, 540 U.S. 938, 124 S. Ct. 74, 157 L. Ed. 2d 250 (2003). No plaintiff signed and returned the document and there is no other sign of affirmative agreement to the after-presented T&C. See Atalese, supra, 219 N.J. at 447. (stressing a clear and unambiguous agreement was necessary for surrendering statutory rights to the courts).

We reject defendants' argument that plaintiffs' failure to cancel the booking was a clear and unambiguous agreement to be bound by the arbitration clause. The entire T&C was not part of the original purchase agreement; rather it was a modification of the original agreement, which did not include any requirement to cancel if the purchaser disagreed with future requests of defendants. Of course, parties are free to modify existing agreements as long as both parties clearly assent to the change. Cnty. of Morris v. Fauver, 153 N.J. 80, 99-100 (1998). However, ordinarily when modifying existing agreements, consideration must be provided. Id. at 100. Pursuant to this basic contract principle, consideration is required for an arbitration clause to

be valid. Martindale, supra, 173 N.J. at 87. When Mossad sent plaintiffs the T&C, they had already booked and paid for the trips, thereby creating a contract. The record does not reflect that Mossad offered any additional consideration[7] for them to agree to give up a highly significant individual right, their right to a jury trial. Thus, defendants' unilateral demand in the T&C to cancel the contract if not willing to agree to the contract modification, which was not accepted by plaintiffs, was not binding on them and did not serve as a signal that plaintiffs accepted the arbitration clause.

Moreover, defendants' reliance on Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991), is misplaced. In this admiralty case, the issue was whether the forum selection clause on the ticket of passage was enforceable because it was not the product of negotiation. Id. at 587, 111 S. Ct. at 1524, 113 L. Ed. 2d at 628. The Supreme Court pointedly noted that its opinion did not "address the question whether [plaintiffs] had sufficient notice of the forum clause before entering the contract for passage" as they conceded receiving such notice and that it was "reasonably communicated[.]" Id. at 590, 111 S. Ct. at 1526, 113 L. Ed. 2d at 630. Thus, the Supreme

[7] We note that agreement to perform a pre-existing duty, absent special circumstances not found here, is not consideration. Restatement (Second) of Contracts § 73 (1981).

Court's holding does not support defendants' argument that terms and conditions can be added after the purchase of a ticket, which is binding on the purchaser.

Under Timco and Leodori, the mere receipt of the T&C did not render them enforceable. Rather, to bind the Mossad plaintiffs to the arbitration clause under the T&C, defendants were required to provide proof that plaintiffs assented to these new terms and that additional consideration was provided. Cnty. of Morris, supra, 153 N.J. at 99-100. Defendants have failed to meet their burden. As such, we find that the Mossad plaintiffs were not bound by the arbitration clause in the T&C and the judge erred in requiring them to arbitrate their claims.

Regarding the Internet plaintiffs, we reach a different conclusion as the circumstances were different. We agree that they were required to arbitrate their claims under the T&C.

Because defendants submitted proofs outside of the pleadings, as did plaintiffs in opposition, the motion to dismiss was properly treated as one for summary judgment. Hurwitz v. AHS Hosp. Corp., 438 N.J. Super. 269, 293-94 (App. Div. 2014). Defendants here produced a copy of the online application on its website demonstrating the requirement to signify acceptance of the T&C when purchasing a Hajj trip online. Plaintiffs' only evidence against this is that one plaintiff did not recall seeing the box and the disclaimer and another plaintiff recalled a hyperlink

referring her to the T&C. These vague assertions are insufficient to create a genuine factual dispute. Cortez v. Gindhart, 435 N.J. Super. 589, 606-07 (App. Div. 2014), certif. denied, 220 N.J. 269 (2015); Hammer v. Thomas, 415 N.J. Super. 237, 253 (App. Div. 2010) ("[S]elf-serving base assertions contained in an affidavit submitted in connection with a summary judgment motion and framed in legal language . . . fail to create a genuine issue of fact."), certif. denied, 205 N.J. 100 (2011). Where, as here, the evidence is so one-sided, defendants' evidence must prevail. BOC Grp., Inc. v. Chevron Chem. Co., 359 N.J. Super. 135, 150 (App. Div. 2003).

When bilateral contract terms are posted on a website, the issue is whether the purchaser had fair and forthright notice of the terms before the purchase. See Hoffman v. Supplements Togo Mgmt., LLC, 419 N.J. Super. 596, 607 (App. Div. 2011), certif. granted, certif. dismissed per stipulation, (November 28, 2012). Specht is instructive here. In that case, the Circuit Court noted that "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms . . . [is] essential if electronic bargaining is to have integrity and credibility." Specht, supra, 306 F.3d at 35. The court found that where the arbitration clause was not visible before the purchaser clicked the icon to download the program but was "submerged" elsewhere in the website, the purchaser cannot be said

to have given consent. Id. at 31-32. In contrast, here plaintiffs had to read and consent to the T&C before the purchase was complete. Thus, the Internet plaintiffs had an opportunity to view the T&C and manifest assent by proceeding with the purchase. As they clearly and unambiguously signaled by checking the box and proceeding with the purchase, they had agreed to be bound by the arbitration clause. Consequently, the court did not err in ordering the Internet plaintiffs to arbitrate.

Affirmed in part, reversed in part.