NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5936-13T4

NICHOLAS J. FILIPPIS,

Plaintiff-Appellant,

v.

ERICSSON, INC., TELCORDIA
TECHNOLOGIES, INC.,

Defendants-Respondents,

and

LORETTA GRAFF and JIM MCDEVITT,

Defendants.

Argued March 10, 2015 – Decided September 8, 2015

Before Judges Messano, Hayden and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-7031-13.

Steven D. Cahn argued the cause for appellant (Cahn & Parra, LLC, attorneys; Mr. Cahn, on the brief).

Francis X. Dee argued the cause for respondents (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Mr. Dee, of counsel and on the brief; Emily A. DePhoure, on the brief).

PER CURIAM

Plaintiff, Nicholas Filippis, appeals from the June 20, 2014 Law Division order compelling him to arbitrate his claim against defendant Ericsson, Inc. for failure to hire him due to his age. The order was based on a 2007 arbitration agreement he signed with his former employer, defendant Telcordia Technologies, Inc. (Telcordia). The court found that the arbitration agreement covered Ericsson as successor to Telcordia and contained no language limiting the scope of the agreement or excluding failure to hire claims. Further, the court determined that arbitration was the appropriate forum for plaintiff's failure to hire claim as he was relying on the same facts and seeking the same relief as his wrongful termination claim against Telcordia, which plaintiff conceded he agreed to arbitrate.

The operative facts here are essentially undisputed. Plaintiff worked for Telcordia and its predecessors from 1978 until January 2007 when he was terminated as part of a force adjustment. Telcordia rehired him in December 2007. As part of his re-employment, plaintiff signed several documents and agreements, including a separate two-page document entitled "Mutual Agreement to Arbitrate Claims" (the Agreement), agreeing to arbitrate all claims against Telcordia. The Agreement provided in pertinent part:

> Telcordia and the undersigned ("Employee") have entered into this Mutual Agreement to Arbitrate claims (the "Agreement") in order to

establish and gain the benefits of a timely, impartial and cost-effective dispute resolution procedure. Any reference in the Agreement to Telcordia will also be a reference to all subsidiaries and affiliated corporations, all benefit plans, the benefit plans' administrators, fiduciaries, affiliates, and the successors and assigns of any of them.

. . .

1. Claims Covered by the Agreement

Telcordia and Employee will settle by arbitration all statutory, contractual and/or common law claims or controversies ("claims") that Telcordia may have against Employee, or that Employee may have against Telcordia or any of its officers, directors, employees or agents in their capacity as such or otherwise. Claims subject to arbitration include (i) claims for discrimination (including, but not limited to, age, disability, marital status, medical condition, national origin, race, retaliation, sex, sexual harassment or sexual orientation); (ii) claims for breach of any contract or covenant (express or implied); (iii) claims for violation of any federal, state or other governmental law, statute, regulation or ordinance; and (iv) tort claims (including, but not limited to, negligent or intentional injury, defamation and termination of employment in violation of public policy). . . .

2. Claims not Covered by the Agreement

This agreement, however, will not apply to (i) claims by Employee for workers' compensation or unemployment insurance . . .; (ii) claims which even in the absence of the Agreement could not have been litigated in court or before any administrative proceeding . . .; and (iii) claims by Telcordia for injunctive and/or other equitable relief . . . .

> . . . .
>
> 6. Exclusive Remedy
>
> Employee understands that Employee is waiving the right to seek remedies in court, including the right to a jury trial.

The Agreement also contained an acknowledgment that the employee has:

> CAREFULLY READ THE AGREEMENT AND UNDERSTANDS ITS TERMS. EMPLOYEE AGREES THAT ALL UNDERSTANDINGS AND AGREEMENTS BETWEEN TELCORDIA AND EMPLOYEE RELATING TO THE SUBJECTS COVERED IN THE AGREEMENT ARE CONTAINED IN ITS AGREEMENT. EMPLOYEE HAS VOLUNTARILY ENTERED INTO THE AGREEMENT WITHOUT RELIANCE ON ANY PROVISION OR REPRESENTATION BY TELCORDIA OTHER THAN THOSE CONTAINED IN THE AGREEMENT AND HAS HAD AN OPPORTUNITY TO CONSULT WITH LEGAL COUNSEL, TO THE EXTENT DESIRED, BEFORE EXECUTING THE AGREEMENT.

In January 2012, Ericsson purchased Telcordia. In November 2012, Ericsson sent plaintiff a letter explaining that as part of the "alignment of Telcordia into Ericsson's U.S. legal structure," it was offering a transfer of his position into Ericsson, effective January 1, 2013. Plaintiff signed the conditional transfer agreement with Ericsson, which was to become effective only if plaintiff remained employed with Telcordia as of January 1, 2013. The Ericsson agreement did not contain an arbitration agreement.

In December 2012, Telcordia announced a force reduction, and plaintiff, who was fifty-six years old at the time, was terminated from his position as senior project manager as part of the

reduction on December 28, 2012. Consequently, the Ericsson transfer agreement never went into effect.

After his termination by Telcordia, plaintiff searched for a new position, applying to Ericsson as well as other technology companies. Between February and June 2013, plaintiff submitted applications for six open positions at Ericsson, which he claims "involved the same department and many of the same job skills and requirements . . . [he] had done for many years." According to plaintiff, he was not selected for any of these positions, "despite his qualifications and his prior years of service with the predecessor entity, Telcordia."

Plaintiff filed a civil complaint on November 1, 2013, alleging that Telcordia and Ericsson wrongfully terminated him due to his age and that Ericsson refused to hire him for the same reason in violation of the New Jersey Law Against Discrimination (the LAD), N.J.S.A. 10:5-1 to -42. For both the termination and failure to rehire counts, plaintiff requested reinstatement, back wages and damages. Instead of filing answers, Ericsson and Telcordia filed a motion to dismiss and compel arbitration based on the 2007 Telcordia Agreement.

After hearing oral argument, the trial court dismissed plaintiff's complaint without prejudice and ordered him to arbitrate, concluding that the Agreement covered all of plaintiff's claims. The court found that the Agreement contained

"clear and unequivocal terms which reflect[ed] an understanding by the parties of the types of claims governed by the agreement[,]" and that there was no language limiting its scope. In addition, the court reasoned that "[p]laintiff's failure to rehire claim is inextricably intertwined with his age discrimination claims and relies on the same operative facts . . . [and] seeks the same relief for both . . . claims[.]"

Plaintiff filed a motion for reconsideration of that portion of the order dismissing his claim against Ericsson, which the court denied. This appeal followed.

On appeal, plaintiff argues that the court erred in compelling him to arbitrate his failure to hire claim against Ericsson.[1] He contends that the court should have bifurcated his claims as there was no valid agreement to arbitrate between him and Ericsson. Moreover, he asserts that Ericsson cannot use the Telcordia Agreement to compel arbitration as he was terminated prior to Ericsson assuming control of Telcordia and his claim against Ericsson arose out of events that took place after he was terminated and thus was no longer an employee of Telcordia.

We begin with a review of the applicable legal principles that guide our analysis. "Orders compelling arbitration are deemed

[1] Plaintiff conceded that his wrongful termination claim against Telcordia was covered by the Agreement and is subject to arbitration.

final for purposes of appeal." Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013). See also R. 2:2-3(a). The determination of whether to compel or deny arbitration is reviewed de novo. Hirsch, supra, 215 N.J. at 186. When reviewing an order to compel arbitration, courts must take into account the strong preference both at the federal and state level for enforcing arbitration agreements. Ibid. (citing Hojnowski v. Vans Skate Park, 187 N.J. 323, 341-42 (2006)).

The protection of the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-16, reflects two principles. AT&T Mobility LLC v. Concepcion, __ U.S. __, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742, 751 (2011). First, it reflects a "'federal policy favoring arbitration[.]'" Ibid. (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785 (1983)). New Jersey law similarly expresses a public policy in favor of arbitration agreements. See N.J.S.A. 2A:23B-1 to -32 (the New Jersey Arbitration Act); see also Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 440 (2014), cert. denied, 135 S. Ct. 2804 (2015). Second, the FAA reflects the principle "'that arbitration is a matter of contract[.]'" AT&T Mobility, supra, 131 S. Ct. at 1745, 179 L. Ed. 2d at 751 (quoting Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403, 410 (2010)). Thus, "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).

Since arbitration agreements are treated as contracts, the general rule is that only contractual parties are required to arbitrate disputes pursuant to the agreement. See Livadas v. Bradshaw, 512 U.S. 107, 127, 114 S. Ct. 2068, 2080, 129 L. Ed. 2d 93, 112 (1994) ("[E]nforcement [of an arbitration agreement] turns exclusively on the fact that the contracting parties consented to any arbitration at all."); see also Century Indem. Co. v. Certain Underwriters at Lloyd's, London, 584 F.3d 513, 526-27 (3d Cir. 2009). There are several exceptions wherein a non-signatory may compel or may be compelled to arbitrate a dispute notwithstanding the fact that it did not sign the arbitration agreement. See generally Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254, 259-60 (App. Div.), certif. denied, 170 N.J. 205 (2001). The exceptions are rooted in contract and agency law and include: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; (5) equitable estoppel/third-party beneficiary; and (6) assignment/succession. See Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631, 129 S. Ct. 1896, 1902, 173 L. Ed. 2d 832, 840 (2009).

When reviewing a motion to compel arbitration, the court applies a two-prong inquiry: (1) whether there is a valid and

enforceable agreement to arbitrate disputes and (2) whether the dispute falls within the scope of the agreement. Martindale v. Sandvik, Inc., 173 N.J. 76, 86, 92 (2002). Notwithstanding the strong preference in favor of arbitration, courts rely on and give deference to contract law principles when determining whether a valid arbitration agreement exists. See AT&T Mobility, supra, 131 S. Ct. at 1745, 179 L. Ed. 2d at 751 ("[C]ourts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms[.]") (citations omitted); see also Hirsch, supra, 215 N.J. at 196 ("[A]lthough we are sensitive to the preference for resolving ambiguities in arbitration clauses in favor of compelling arbitration, that preference only applies when an agreement exists between the parties to arbitrate their disputes.") (internal citations omitted).

Generally, arbitration agreements "should . . . be read liberally to find arbitrability if reasonably possible." Jansen, supra, 342 N.J. Super. at 257. A court must resolve all doubts related to the scope of the agreement "in favor of arbitration." Id. at 258. Courts operate under "'a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" Waskevich v. Herold Law, P.A.,

431 N.J. Super. 293, 298 (App Div. 2013) (quoting EPIX Holdings Corp. v. Marsh & McLennan Cos., 410 N.J. Super. 453, 471 (App. Div. 2009), overruled on other grounds, Hirsch, supra, 215 N.J. at 193); see also Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 5 n.2 (1st Cir. 2012) (The "presumption of arbitrability applies only to the scope of an arbitration agreement, not its validity, and thus it is utilized only where an arbitration agreement is 'validly formed and enforceable' under state law, but 'ambiguous about whether it covers the dispute at hand.'") (quoting Granite Rock Co. v. Int'l Brotherhood of Teamsters, 561 U.S. 287, 301, 130 S. Ct. 2847, 2858, 177 L. Ed. 2d 567, 580 (2010)). Nevertheless, the "favored status [of arbitration] . . . is not without limits[,]" particularly where the issue is whether the parties have agreed to arbitrate that claim. Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001).

In applying contract principles, New Jersey courts have "consider[ed] the contractual terms, the surrounding circumstances, and the purpose of the contract." Hirsch, supra, 215 N.J. at 188 (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)). The goal is to "honor the parties' intentions as set forth in the language of their arbitration agreement." Quigley v. KMPG Peat Marwick, LLP, 330 N.J. Super. 252, 270 (App. Div.), certif. denied, 165 N.J. 527 (2000). Consequently, where a party seeks to enforce an arbitration

agreement, courts have required that the language of the agreement must be clear and unambiguous. See Atalese, supra, 219 N.J. at 443. Where an arbitration agreement is ambiguous, courts have construed such language "against the interest of the party that drafted it." Quigley, supra, 330 N.J. Super. at 271. See Caldwell v. KFC Corp., 958 F. Supp. 962, 974 (D.N.J. 1997) (declining to expansively interpret an ambiguous arbitration agreement in favor of the drafter).

Guided by these principles, we turn to the Agreement at hand, which states that "[a]ny reference in the Agreement to Telcordia will also be a reference to all subsidiaries and affiliated corporations, all benefit plans, the benefit plans' administrators, fiduciaries, affiliates, and the successors and assigns of any of them." Plaintiff acknowledges that Ericsson is a successor to Telcordia. Arbitration clauses have been held to be enforceable against a successor company if the agreement is clear and unambiguous. See Dawson v. Rent-A-Center Inc., 490 Fed. App'x 727, 729 (6th Cir. 2012) (finding that "under the plain meaning of the term[,]" the defendant qualified as a successor under the arbitration agreement, which defined Rent-Way as "Rent-Way, Inc., its present and future parents, subsidiaries, affiliates, successors and assigns . . . ."); see also Citigroup Global Mkts., Inc. v. Braswell, 57 So. 3d 638, 642-43 (Miss Ct.

App. 2011) (concluding that the arbitration agreement was unambiguous).

In this case, plaintiff does not contest that he agreed to arbitrate with Telcordia or that Ericsson is a successor of Telcordia. Instead, plaintiff claims that the failure to hire claim by a successor employer is not within the scope of the agreement because he never was employed by Ericsson. "A court must look to the language of the arbitration clause to establish its boundaries. Importantly, a court may not rewrite a contract to broaden the scope of arbitration." Hirsch, supra, 215 N.J. at 188 (quotation marks and citations omitted). Arbitrability of a particular claim "depends not upon the characterization of the claim, but upon the relationship of the claim to the subject matter of the arbitration clause." Wasserstein v. Kovatch, 261 N.J. Super. 277, 286 (App. Div.) (quotation marks and citations omitted), certif. denied, 133 N.J. 440 (1993).

The express words in the Agreement make the entire agreement apply to any successor of Telcordia. The Agreement defines the scope of disputes covered as "all statutory, contractual and/or common law claims or controversies" including age discrimination claims, breach of contract, "claims for violation of any federal state or governmental law" and tort claims. Notably, the Agreement does not limit the covered disputes to employment-related claims. Failure to hire disputes were not listed under the specific

disputes not covered. Nor does the Agreement contain any time limitation restricting coverage of its terms to disputes arising during employment. Rather, the sole limitation on requesting arbitration is that a demand for arbitration must be made "within the time period permitted by the applicable statute of limitations for the type of claim asserted."

We concur with the trial judge's interpretation of the plain meaning of the Agreement. The Agreement is both extremely broad and yet specific enough to include disputes between plaintiff and Telcordia's successor on claims concerning age discrimination. Plaintiff's argument that the Agreement ended at the termination of employment requires us to add terms limiting the time period of the Agreement simply not contained in the document itself. To do this would require us to ignore the clear expression of the coverage and scope of the contract.

A Third Circuit case cited by defendants, Varallo v. Elkins Park Hosp., 63 Fed. App'x 601 (3d Cir. 2003), while not directly on point and not binding on this court, is instructive here. There, while the plaintiff was on medical leave, her position was eliminated and the employer failed to rehire her in another position, allegedly for the same reasons that her position was eliminated. Id. at 602. The District Court held that the arbitration agreement covered her wrongful termination claim but not her failure to rehire claim because it occurred after she was

terminated. Id. at 603. The Circuit Court reversed, finding that the plaintiff bound herself to submit to "any and all claims and disputes that are related in any way to [her] employment[,]" which in this instance the Circuit Court deemed included both pre-termination and post-employment claims, since they were factually intertwined. Id. at 604. The Circuit Court pointed out that in her pleadings, the plaintiff linked the defendants' discriminatory intent in eliminating her position with the failure to rehire her. Ibid. The Circuit Court concluded, "We simply cannot say with the 'positive assurance' that we require before a motion to compel arbitration can be denied that the agreement here 'is not susceptible of an interpretation' that covers the failure to rehire claim." Ibid. (citing Medtronic Ave, Inc. v. Advanced Cardiovascular Sys., Inc., 247 F3d 44, 55 (3d Cir. 2001)).

Here, Plaintiff claimed that he should have been hired by Ericsson because he was familiar with the company based on his prior work experience. In his brief, he explicitly argues that he applied to the same department with the same management where he formerly worked and believed that he was not considered for the position due to his age, which was the same reason he believed the same management terminated him from Telcordia. For relief for the failure to hire claim, he seeks reinstatement, presumably to his former position but with Ericsson.

We are satisfied that the Agreement is sufficiently clear and unambiguous here that it covers Ericsson as a successor of Telcordia, it covers all age discrimination claims, it is not listed as an excepted claim, there is no time limitation, and the plaintiff's claims under both termination and failure to hire are factually intertwined. Consequently, we cannot say with positive assurance that the arbitration clause is "not susceptible of an interpretation that covers the asserted dispute." Waskevich, supra, 431 N.J. Super. at 298.

Affirmed.