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SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY
CIVIL DIVISION
DOCKET NO. L-3339-18

SUSAN L. O'KEEFE,

Plaintiff,

v.

EDMUND OPTICS, INC.,

Defendant.

Argued November 9, 2018 - Decided: November 15, 2018

Louis R. Moffa, Jr. attorney for plaintiff (Montgomery, McCracken, Walker & Rhoads LLP).

Louis R. Lessig, attorney for defendant (Brown and Connery LLP).

THOMAS T. BOOTH, JR., J.S.C.

Before the court is defendant's motion for summary judgment[1]. Defendant asserts that an employment agreement

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[1] Defendant's motion, its first responsive pleading, was originally filed as a motion to dismiss under R. 4:6-2(e) for failure to state a claim upon which relief can be granted. However, at oral argument, both parties agreed that the motion should be treated as one for summary judgment given that the motion required the court to look beyond the plaintiff's complaint, in particular, to examine the employment agreement itself. Both parties conceded that the only material fact, for

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between the parties compels arbitration of this matter. Plaintiff opposes the motion, asserting that the employment agreement which contained the mandatory arbitration provision terminated by its own terms prior to commencement of the action, thereby terminating mandatory arbitration of the dispute.

I. Background

In this action, plaintiff alleges wrongful termination in August 2018 from her high-level executive position with defendant. In September 2018, Plaintiff filed a two count complaint, each count alleging a cause of action under New Jersey's Law Against Discrimination. Count one alleges plaintiff was wrongfully discriminated against based upon her gender, while count two alleges plaintiff was wrongfully discriminated against based upon her age. Following the filing and service of her complaint upon defendant, this motion followed.

The parties agree that plaintiff and defendant entered into a written employment agreement which they jointly executed on February 15, 2013. The agreement contained 19 numbered paragraphs. For purposes of this motion, the two relevant

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purposes of analyzing the matter under R. 4:46-2, was the employment agreement in question, and both parties agreed as to the form and terms of the employment agreement, while disputing the agreement's effect on the question of whether or not the matter should proceed in court or in arbitration.

paragraphs were "1. Term" and "18. Arbitration." They read as follows:

> 1. Term. The term of this Agreement shall be from February 14, 2013 through February 13, 2014. This Agreement shall not automatically renew. After the expiration of this Agreement, Executive may remain in the employ of the Company subject to the terms and conditions of employment the Company deems appropriate in view of its business, operational, and personnel needs at the time. To the extent practicable, such terms and conditions will be generally consistent with the terms and conditions of employment of similarly situated employees - i.e. employees with similar experience, qualifications, and the like. Notwithstanding the provisions in this paragraph, this Agreement may be terminated pursuant to Paragraph 5 below.
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> ...
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> 18. Arbitration. In order to obtain the many benefits of arbitration over court proceedings, including speed of resolution, lower costs and fees and more flexible rules of evidence, all disputes between Executive and the Company (except those relating to unemployment compensation and workers' compensation and except as provided in Paragraph 11 of this Agreement) arising out of Executive's employment or concerning the interpretation or application of this Agreement or its subject matter (including, without limitation, those relating to any claimed violation of any federal, state or local law, regulation or ordinance, such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the United States Constitution, and the New Jersey Constitution) shall be resolved exclusively by binding arbitration in Camden County, New Jersey pursuant to the National Rules for the Resolution of Employment Disputes of the American Arbitration Association, with the prevailing party being awarded its or her reasonable attorney's fees and costs. The parties expressly waive their rights to have any such claims resolved by jury trial.

> Arbitration must be demanded within 360 days of the time when the demanding party knows or should have known of the events giving rise to the claim. The arbitration opinion and award shall be final, binding and enforceable by any court under the Federal Arbitration Act.

Plaintiff's employment with defendant continued beyond February 13, 2014, the termination date of the written contract involved here, and concluded with her termination in August 2018, for which she brings this action.

II. Analysis

Under Rule 4:46-2, summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment order as a matter of law. Here, the parties agree as to the one material fact, i.e. the terms of the written contract. The legal effect of those terms therefore is a matter of law for the court's determination.

In moving for summary judgment, defendant asserts the mandatory arbitration clause survived the automatic non-renewal of the contract, whereas plaintiff disputes the existence of a current, valid written contract with a clause which compels arbitration of the present dispute.

The Federal Arbitration Act (FAA) applies to a "written

provision in…a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction[.]" 9 U.S.C. §2. The FAA and "the nearly identical New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, enunciate federal and state policies favoring arbitration." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 440 (2011)(citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L.Ed. 2d 742 (2011)). Under both the FAA and New Jersey law, arbitration is fundamentally a matter of contract. 9 U.S.C. § 2; NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super 404, 424 (App. Div. 2011)(citing Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)). "[T]he FAA 'permits states to regulate…arbitration agreements under general contract principles,' and a court may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'" Atalese, 219 N.J. at 441 (alternation in original)(quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2002)).

It is true that "An agreement relating to arbitration should thus be read liberally to find arbitrability if reasonably possible," Frumer v. National Home Insurance Company, 420 N.J. Super 7, 13 (App. Div. 2011). However, "[t]hat said, an agreement to arbitrate must be the product of mutual assent,

as determined under customary principals of contract law." NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011). In determining whether a matter should be submitted to arbitration, the court should first evaluate whether a valid agreement to arbitrate exists. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L.Ed. 2d 444 (1985).

Defendant acknowledges that the determinative question is whether the arbitration provision expired on February 13, 2014 with the term of the contract. Deft. Bf. at 8. In support of its argument that the answer to that question is "no," defendant argues that: 1) the mandatory arbitration clause survived the end of the term because plaintiff's continued employment was to be on such terms and conditions as deemed appropriate by defendant, and that it would defy logic to find that defendant would continue plaintiff's employment on terms less favorable to it following the expiration of the written agreement's term, citing to Owens v. Press Pub. Co., 20 N.J. 537 (1956) in support of the proposition that contractual terms can survive the expiration of the agreement where they advance the "manifest reason and spirit of the contract;" and 2) the mandatory arbitration provision is not limited to only disputes between the parties occurring during the term of the written agreement.

In response, plaintiff argues that, because the contract

expired by its own explicit terms, any presumption that the arbitration clause renewed is rebutted under Caffrey v. Bergen County Utilities Authority, 315 N.J. Super. 345, 350 (App. Div. 1998). Without a renewal of the written contract, the plaintiff argues, there is no mandatory arbitration clause applicable to plaintiff. Plaintiff points out that other clauses of the contract, such as the restrictive covenants clause, had survivability provisions extending their enforceability beyond the term of the contract itself, while the arbitration clause did not.

In Owens, the issue involved plaintiffs' entitlement to severance pay provided for under a written contract which had expired by the time of plaintiffs' discharge. There the court found the severance pay was a form of compensation for services rendered by the plaintiffs during the period covered by the agreement. Owens at 546. As such, it was an "earned benefit" that survived the termination of the contract. Id at 548 (citing Hercules Powder Co. v. Brookfield, 189 Va. 531, 53 S.E.2d 804 (Sup. Ct. 1949)).

Defendant's attempt to equate the contractual compensation earned by the plaintiffs during the contractual period in Owens with the survivability of the mandatory arbitration clause in this matter is thus distinguishable and unpersuasive. Indeed, as the court in Owens itself said:

> …it is fundamental in the law of contracts that upon expiration of the period thus prescribed the agreement ceased to exist and its provisions had no *in futuro* force and effect.

Id. at 550.

Equally unpersuasive is defendant's argument that the court should impose arbitration here because it would defy logic that defendant would continue plaintiff's employment on terms which were less favorable to it following expiration of the written agreement. As a venue, this court is no more or less favorable to defendant than an arbitration venue. Even so, if defendant desired to compel arbitration beyond the written contract term, it could have made such provision in the written contract itself, or entered into another written contract with an arbitration clause with plaintiff.

The present factual scenario is no different than had plaintiff left defendant's employ at the end of the written contract's term for some period of time, then returned prior to being terminated in August 2018. In either case, the written contract expired at the conclusion of that contract's express term. There is no doubt the mandatory arbitration clause would be unenforceable against plaintiff in this action if there had been a break in her employment with defendant. No different a result is warranted here, as there is no current written contract between the parties covering the events forming the

basis of plaintiff's complaint. This finding also dispels defendant's other argument that the contractual arbitration term was not limited to plaintiff's employment during the term of the written contract, but rather extends to the entire period of plaintiff's employment with defendant. Without the existence of a valid, current contract, defendant's arguments based upon a clause of an expired contract must fail as well.

Defendant's motion for summary judgment is denied with prejudice.