TRIMLINE FINISH CARPENTRY, LLC, Plaintiff/Respondent, vs. STEPHEN T. SCARBOROUGH a/k/a S. TODD SCARBOROUGH, and JOHN DOES (I-X) (Multiple Alternative, Fictitious Entities), Individually, and J/S/A, Defendants/Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket # A-002529-23T2 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CAPE MAY COUNTY DOCKET NO. CPM-L-62-23 Sat Below: Honorable James H. Pickering, J.S.C.

BRIEF AND APPENDIX OF APPELLANTS, STEPHEN T. SCARBOROUGH a/k/a S. TODD SCARBOROUGH

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PRELIMINARY STATEMENT

This appeal arises from the trial court's clearly erroneous determination that Defendant waived his contractual right to have the Parties' dispute submitted to arbitration. More specifically, Defendant, Stephen T. Scarborough, a/k/a Todd Scarborough ("Scarborough"), appeals the trial court's April 15, 2024 Order Denying Arbitration and Staying the Proceeding.

The crux of the Parties' dispute is a contract with a mandatory arbitration provision. In its Complaint alleging breach of contract Plaintiff, Trimline Finish Carpentry, LLC ("Trimline"), heavily relied upon a contract that it alleged had been prepared by Scarborough. Trimline did not annex such a contract to its Complaint, nor did the Complaint indicate that the contract upon which Trimline was so reliant even contained an arbitration requirement. Although Trimline never has taken the position that the arbitration provision is unenforceable, it nonetheless ignored the arbitration requirement in the contract and initiated this litigation without ever having sought to submit the dispute to arbitration. Moreover, during the months following the filing of its Complaint Trimline never actually committed itself to a particular document that it claimed to be the contract at issue until the eve of the discovery end date when, in response to Scarborough's discovery requests, Trimline committed itself to reliance upon a particular contract which, indeed, contained the arbitration provision at issue.

Within two days of Trimline, via its discovery responses, having committed itself to reliance upon a particular contract containing an arbitration provision, Scarborough initiated arbitration by giving the requisite written notice to Trimline. Trimline refused to proceed to arbitration and took the position that Scarborough waived his right to arbitration due to his mere participation in the litigation which Trimline initiated, coupled with the passage of time. Trimline's position in that regard failed to account for the fact that for most of the litigation process Scarborough was a pro se litigant, there was no dispositive motion practice and no trial date had been set.

This matter was brought before the trial court on Scarborough's Motion to Stay Proceedings and Compel Arbitration. The trial court denied that motion. In doing so it failed to make findings of fact and conclusions of law supporting denial of mandatory arbitration. Instead, the trial court determined that Scarborough waived his right to arbitration without providing legally sound reasoning for its decision. The trial court failed to illustrate any law upon which it was relying in support of its decision, failed to make any type of detailed examination of the factors articulated by the Supreme Court with respect to an arbitration waiver analysis, and failed to make any findings of fact related to the motion. Indeed, by its own on-the-record astonishing admission, the trial court judge stated that he did not apply to the facts the legal standards established by

the Supreme Court and for that reason and the reasons discussed below the lower court's decision was a clearly erroneous decision which should be overturned by this Court.

PROCEDURAL HISTORY

On February 14, 2024, Trimline filed a Complaint in the Superior Court of New Jersey, Law Division. Da001 – Da009. In that Complaint Trimline asserted claims sounding in breach of contract (Da003), breach of the implied covenant of good faith and fair dealing (Da004), fraud (Da004 – Da006) and implied contract/unjust enrichment (Da006 – Da007). The contract that Scarborough allegedly breached called for Trimline to install finish wood trim in a new home that Scarborough was constructing. Da002; Da067.

On April 3, 2024, Scarborough filed a pro se Answer, Defenses, and Counterclaim against Trimline. Da010 – Da018. By his Counterclaim, Scarborough alleged that Trimline was overpaid for work performed and demanded return of the overpayment. Da014. Scarborough alleged entitlement to treble damages under the New Jersey Consumer Fraud Act. Da014. He also alleged that Trimline violated the New Jersey Builders Registration Act and the New Jersey Home Improvement Protection Act. Da014.

Trimline filed it Answer to Counterclaim and Defenses on April 26, 2023. Da019 – Da023.

On September 13, 2023, Trimline filed a Motion to Suppress Answer and Dismiss Counterclaim, stating that Scarborough was in default of discovery obligations. Da024 – Da026. Scarborough, continuing to represent himself as

a pro se litigant, opposed the motion with a Certification that he filed on September 28, 2023. Da027 – Da029. In that Certification Scarborough stated that he used good faith and best efforts to comply with discovery obligations. On October 19, 2023, Trimline withdrew its motion. Da030. Thus, no argument was held or decision rendered.

Present counsel for Scarborough was retained and filed a Substitution of Attorney on December 19, 2023. Da031. Thereafter, by Stipulation, the discovery end date was extended to March 28, 2024. Da032. Prior to that discovery end date the Parties exchanged written discovery and one deposition had been conducted. Da045; Da048; Da050 - Da057. As the result of discovery motion practice, by Order dated April 15, 2024, the discovery end date was extended to June 1, 2024. Da034 – Da035.

On March 25, 2024 Counsel for Scarborough filed a Motion to Stay Proceedings and Compel Arbitration. Da041 – Da043. That Motion was opposed by Trimline on April 4, 2024. Oral argument was conducted on April 12, 2024 at the conclusion of which the trial court denied the Motion. T.3-1 – T.24-23. An Order to that effect was signed and filed on April 15, 2024. Da033.

Scarborough timely filed a Notice of Appeal on April 22, 2024, as permitted by Rule 2:2-3(b)(8). Da036.

STATEMENT OF FACTS

As indicated above in the Procedural History, Trimline filed its Complaint against Scarborough on February 14, 2023. Da001 – Da009. Paragraph 5 of that Complaint alleged that "[o]n or about June 8, 2022, Defendant and Plaintiff entered into a subcontractor agreement ("Contract") designating Defendant as the general contractor and Plaintiff as a subcontractor." Da002. Paragraph 6 of the Complaint alleged that "[d]efendant prepared the contract." Da002. Although that paragraph alleged that Scarborough prepared the contract, no contract was annexed to Complaint nor did the Complaint aver that Trimline now was relying on the document that allegedly had been prepared by Scarborough, whether it had been subject to negotiation and revision or whether it even have been executed by the Parties. Additionally, Trimline conveniently omitted from its Complaint any mention of the fact that the contract upon which it then was relying contained a mandatory arbitration provision that was subject to being specifically enforced.

Scarborough represented himself through the course of most of the pretrial discovery period. Da010 – Da018. Present defense counsel undertook representation of Scarborough on December 19, 2023, with the filing of a Substitution of Attorney. Da031. The Parties then stipulated to a 60-day extension of discovery to March 28, 2024 (Da037), whereupon Scarborough

then propounded Supplemental Interrogatories and a Notice to Produce Documents upon Trimline. Da045; Da047 – Da057

The Notice to Produce Documents, at number 16, requested: "Copies of all documents, correspondence, or communication which Plaintiff purports to be a valid and binding contract between Plaintiff and Defendant, or which relate to matters alleged in the Complaint or denials asserted in your Answer to the Counterclaim or pertaining to the issues raised by the claims and by the defenses which have been pled by you." Da056. Trimline's March 11, 2024 response to that request was: "See contract attached hereto, together with text messages as produced, and letter to John Ridgeway, Esquire." Da063. The Notice to Produce Documents, at number 18, requested: "Copy of the June 8, 2022 'subcontractor agreement' referred to in Paragraph 5 of the Complaint." Da056. Trimline's response to that request was: "See attached." Da063.

In response to the Notice to Produce, on March 11, 2024 Trimline produced 636 pages of documents, without specifically correlating the documents to each request. Da045 The only document that Trimline produced which can be considered a contract is a 10-page document entitled "Subcontractor Agreement." Da067 – Da076. By its response to the Notice to Produce, Trimline confirmed that the Subcontractor Agreement, which it produced on March 11, 2024, in fact is the contract to which it was referring in

its Complaint, in fact is the document which defines the Parties' contractual relationship, in fact is the contract which Scarborough allegedly breached, and that Trimline is not relying on any other document or oral agreement.

Section Thirteen of that contract provides:

> The interpretation of this Agreement, including any breach hereof, shall be subject to the laws of the State of New Jersey. Any and all disputes under this Agreement shall be settled by binding arbitration through the use of one arbitrator designated by both parties, and the decision of the arbitrator shall be binding upon the parties. Should either party fail to arbitrate in accordance with the provisions of this paragraph or fail to abide by the award of the arbitrator, either party may specifically enforce this provision and/or the award of the arbitrator in the Superior Court of New Jersey in the particular vicinage in which the Property involved with this agreement is located, and in the event that legal or equitable action becomes necessary, each party shall be responsible to pay its own legal fees and costs associated therewith. Da075

Within two days of receipt of Trimline's responses to the Notice to Produce and examination of the Subcontractor Agreement (Da067 – Da076) that Trimline produced, Scarborough initiated the arbitration process by giving "notice" in a "record" to Trimline's attorneys in the manner specified by the Uniform Arbitration Act, N.J.S.A. 2A:23B-1, et. seq. (the "Arbitration Act"). Da078 – Da080. Trimline's attorneys took the position that Scarborough waived

the right to arbitrate merely by the act of filing responsive pleadings and participating in the litigation that had been brough against him, notwithstanding the fact that failing to do so would have subjected him to default, coupled with the passage of time. Da082.

Scarborough contends that the arbitration requirement of Section Thirteen of the Subcontractor Agreement (Da075) is valid and enforceable, that Scarborough has not waived his right to arbitration, and that this Court should reverse the decision made by the trial court and compel the Parties to mandatory arbitration to be conducted in accordance with the Arbitration Act.

LEGAL ARGUMENT

The Standard of Review in the Superior Court, Appellate Division.

The issue presented by this matter is whether Scarborough waived his right to arbitrate the Parties' contractual dispute.[1] The leading decision on the topic of waiver of a contractual arbitration provision is Cole v. Jersey City Medical Ctr., 215 NJ 265 (2013). In that case the Supreme Court established an analytical framework to be applied when waiver of a contractual arbitration provision is at issue. Resolution of a waiver issue requires a fact-sensitive analysis. In this case, rather than engaging in a meticulous examination of the relevant facts, as required, the trial court engaged in a cursory review of the record and thereafter clearly erred in finding that Scarborough waived his right to arbitration. This appeal now comes before this Court pursuant to Rule 2:2-3(b)(8) which allows an appeal of "orders compelling or denying arbitration, whether the action is dismissed or stayed."

The standard of review in this Court is clear and well-settled. Our Supreme Court has held: "The issue of whether a Party waived its arbitration right is a legal determination subject to de novo review." Cole, 215 NJ at 275. See also Barr v. Bishop Rosen & Co., 442 N.J. Super. 599, 605 (App. Div.

[1] Trimline has not asserted that the arbitration clause in the contract at issue is unenforceable. Therefore, enforceability of the arbitration provision in the Parties' contract is not at issue.

2015) (citing Hirsch v. Amber Fin. Servs., LLC, 215 N.J. 174, 186 (2013)). In Cole the Court further observed: "Nonetheless, the factual findings underlying [a] waiver determination are entitled to deference and subject to review for clear error." Id. Upon engaging in the de novo review process and upon consideration of the legal authorities discussed below, Scarborough contends that the only reasonable conclusion that can be reached is that he has not waived his right to arbitration and it was clear error by the lower court to find otherwise.

I. THE RECORD DOES NOT SUPPORT A FINDING THAT SCARBOROUGH WAIVED HIS RIGHT TO ARBITRATION AND THE TRIAL COURT'S CONTRARY FINDING WAS CLEAR ERROR (Da033; T.3-1 – T.24-23).

As noted in the Statement of Facts, the Parties' contract contained an arbitration provision, the terms of which are clear and unambiguous. The terms of that arbitration provision provided that if either party failed to arbitrate or otherwise abide by the arbitration paragraph, then "either party may specifically enforce" the arbitration provision in the Superior Court. In utter defiance of the very contract that it seeks to enforce, Trimline brought suit against Scarborough without ever having sought to arbitrate the dispute. In failing to specifically enforce the arbitration provision and in finding that Scarborough waived his right to arbitration, not only did the lower court reward Trimline for ignoring the contract that it seeks to enforce, but it penalized Scarborough for participating in a litigation process so as to avoid being in default. The lower

court's decision was contrary to controlling precedent. Moreover, the lower court's decision was not supported by an application of the Supreme Court's controlling decision on the issue of waiver of the right to arbitrate and it completely disregarded this State's clear policy of favoring arbitration over litigation.

Time and again the New Jersey Supreme Court has held that in New Jersey there is a strong public policy favoring arbitration and that all doubts should be resolved in favor of arbitration requiring dismissal of the arbitrable cause of action or issue. See e.g., Alpha Bd. of Ed. v. Alpha Educ. Ass'n, 190 NJ 34, 41 (2006); Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 NJ 479 (1992). In Martindale v. Sandvik, 173 N.J. 76, 92 (2002), the Supreme Court observed that the "affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism of resolving disputes." See also Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2002) ("In New Jersey arbitration also is a favored means of dispute resolution."). The statutory embodiment of that policy is found in the Arbitration Act. N.J.S.A. 2A:23B-1, et. seq. The Arbitration Act "governs all agreements to arbitrate made on or after January 1, 2003" with the exception of certain labor collective bargaining agreements. N.J.S.A. 2A:23B-3. The Arbitration Act provides that an arbitration agreement is considered to be "valid, enforceable and irrevocable except upon a ground

that exists at law or in equity for revocation of a contract." N.J.S.A. 2A:23B-6. Here, Trimline does not assert that the arbitration provision at issue is unenforceable or does not fall within the scope of the Arbitration Act. Rather, Trimline assert that Scarborough waived his right to arbitration due to the passage of time and Scarborough's participation in the litigation that Trimline brought against Scarborough. Thus, as noted at the outset of this Legal Argument, the issue for this Court to resolve is whether Scarborough waived his right to arbitrate the Parties' contractual dispute.

The public policy favoring arbitration over litigation formed the backdrop against which the Supreme Court rendered its decision in Cole, 215 NJ 265 (2013), which, as noted above, is the leading case on the topic of waiver of a contractual arbitration provision.

"Waiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 NJ 169, 177 (2003). In Cole, the Court held that while parties may waive their right to arbitrate in certain circumstances, such a waiver is "never presumed." Cole, 215 NJ at 276. The Supreme Court went on to hold: "An agreement to arbitrate a dispute 'can only be overcome by clear and convincing evidence that the party asserting [arbitration] chose to [litigate] in a different forum.'" Id (emphasis added)(quoting Spaeth v. Srinivasan, 403 NJ Super 508, 514 (App. Div. 2008). The Supreme Court further noted that

determining whether a party has waived their right to arbitration is a fact-sensitive analysis. Cole, 215 NJ at 277. The focus is on the totality of the circumstances. Id at 280. In conducting the analysis, the Supreme Court instructed courts to consider, among others, seven (7) factors, none of which are dispositive. Id at 280-81. Those seven (7) factors are: (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any. Id at 280-81. Upon application of those factors to the facts of this matter, it cannot reasonably be concluded that Scarborough, by clear and convincing evidence, waived his right to arbitration. The lower court's contrary decision was clearly erroneous. The application of the factors articulated in Cole to the facts of this matter is discussed below.

a. The delay in seeking the arbitration request.

In this case there was no delay in seeking arbitration. Trimline asserted that there was a delay on Scarborough's part in initiating arbitration . Da082. The facts clearly demonstrate otherwise.

It is recalled that Trimline's Complaint alleged that the Parties entered into a contract, indicated that it was prepared by Scarborough and quoted a time of the essence provision. No writing purporting to be the contract at issue, however, was annexed to the Complaint. Therefore, from Trimline's Complaint it is not possible to discern whether or not the version of the writing to which the Complaint was referring even contained an arbitration provision. Indeed, it was not until Trimline responded on March 11, 2024 to Scarborough's January 17, 2024 Notice to Produce Documents that Trimline actually committed itself to reliance upon any particular document as the contract to which the Parties are bound. That document contained the arbitration provision at issue. Within two days of Trimline actually committing itself to that particular written document as being the contract to which the Complaint was referring, Scarborough initiated arbitration in the manner provided by the Arbitration Act.

Accordingly, while there was delay subsequent to Scarborough's filing of an Answer, once Trimline committed itself to reliance upon a particular document containing an arbitration provision, there is absolutely no factual support for an assertion that there was delay on the part of Scarborough in

demanding arbitration and initiating the arbitration process in the manner dictated by the Arbitration Act.

b. The filing of any motions, particularly dispositive motions, and their outcomes.

In Cole the Supreme Court observed: "The filing of a dispositive motion is a significant factor in demonstrating a submission to the authority of a court to resolve the dispute." Cole, 215 N.J. at 282. The inverse, of course, would be that the lack of dispositive motion practice would be a significant factor militating against a finding of waiver. In this case, no dispositive motions have been filed.

c. Whether the delay in seeking arbitration was part of the party's litigation strategy.

As noted above, there was no delay on Scarborough's part. Therefore, it cannot be said that there was a delay in seeking arbitration as part of a litigation strategy. To whatever extent there was any delay in seeking to arbitrate the dispute, the delay clearly was not attributable to an identifiable litigation strategy such as was the case in Cole where discovery had been exchanged, dispositive motion practice had occurred, and pretrial submissions to the court had been filed when, on the eve of trial, the arbitration demand was made. Here, there was no identifiable "litigation strategy" during Scarborough's time as a

pro se litigant. Therefore, it cannot be said that the delay in seeking arbitration was part of Scarborough's litigation strategy.

d. The extent of discovery conducted.

As noted above, by Stipulation the discovery end date had been extended to March 28, 2024 and by that time the Parties exchanged written discovery and the deposition of one lay person had been conducted. As the result of motion practice initiated by Trimline, the trial court entered a discovery order that set the discovery end date at June 1, 2024 and provided for the a site inspection, the exchange of supplemental written discovery, the exchange of expert reports and depositions of expert witnesses. The fact that the bulk of discovery has been completed should weigh in favor of arbitration because it obviates the need for an arbitrator to determine the scope and extent of discovery to be conducted which an arbitrator otherwise would have the authority to address pursuant to N.J.S.A. 2A:23B-17c.

e. Whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense or provided other notification of its intent to seek arbitration.

As to this factor, in Cole the Court elaborated: "A court will consider an agreement to arbitrate waived, however, if arbitration is simply asserted in the answer and no other measures are taken to preserve the affirmative defense."

Cole, 215 N.J at 281. Stated differently, if a party raises the defense of the requirement to arbitrate and then does not pursue arbitration, the courts should consider the right as having been waived. Here, Scarborough, as a pro se defendant, did not raise arbitration as an affirmative defense in his Answer, but did, as discussed above, promptly pursue arbitration once Trimline committed itself to reliance on the document that contains the arbitration provision.

f. The proximity of the date on which the party sought arbitration to the date of trial.

As of March 13, 2024 -, i.e., the date when Scarborough initiated arbitration in the manner dictated by the Arbitration Act- no trial date had been scheduled.

g. The resulting prejudice suffered by the other party, if any.

The prejudice to be suffered by Trimline in being ordered to arbitration will be zero. Indeed, Trimline would realize a benefit since arbitration will be a cost-effective, expeditious means of resolving the disputes that the Parties have raised in their pleadings. Additionally, it is noted that this Court has observed that prejudice is not generally shown through "simply wasting a party-opponent's time and money." Spaeth, 403 N.J. Super at 515. Therefore, Trimline cannot be heard to argue that by being compelled to arbitration it will

have wasted time and money with respect to responding to Scarborough's discovery demands or by otherwise having had to participate in the very litigation that it initiated. Moreover, in light the United States Supreme Court's decision in Morgan v. Sundance, Inc., 596 U.S. 411, 142 S. Ct. 1708 (2022), Scarbough urges this Court to place very little emphasis on this particular Cole factor.

In Morgan the U.S. Supreme Court held that prejudice to an opposing party is not to be part of a waiver analysis under the Federal Arbitration Act ("FAA"), 9 U.S.C §§1-16, because the focus when considering waiver under the FAA is on the party holding the right to arbitration and whether that person intentionally relinquished or abandoned a known right. Id at 417-419, 1713-1714. While the FAA was at issue in Morgan, this Court has held that "there is no material difference between the approach to the interpretation of arbitration agreements mandated by the FAA and the approach our courts have taken as a matter of State law even when the FAA does not apply." Angrisani v. Financial Technology Ventures, L.P., 402 N.J. Super. 138, 148 (App. Div. 2008). Therefore, while it may be for the New Jersey Supreme Court to excise prejudice from the seven Cole factors, this Court need not give the prejudice factor the same weight that it gives the remaining six factors and, for the reasons

articulated in Morgan, Scarborough urges this Court to give very little weight to the prejudice factor.

In additional to the analytical framework demanded by Cole as discussed above, it further is recalled that, for most of this litigation, Scarborough was a pro se litigant which makes the Appellate Division's decision Spaeth v. Srinivasan, 403 N.J. Super. 508 (App. Div. 2008) all the more relevant. In Spaeth, much like this case, a pro se defendant was a party to a contract in dispute. Six months after the Complaint was filed, the pro se defendant moved for dismissal of plaintiff's claim due to the arbitration clause. Id. at 512. The trial court denied this request for dismissal, and the pro se defendant appealed. Id. On appeal, the this Court reversed the trial court's ruling, finding that the pro se defendant "did not initiate the subject legal action or choose the judicial forum selected by her adversary." Id. at 516. This Court reasoned that "given Defendant's uncounseled status, we assume the relatively short delay in asserting her right to arbitration was more inadvertent than deliberate, more the result of unfamiliarity with court procedure than planned strategy." Id. This Court then remanded the matter to the trial court for the entry of an order compelling arbitration. Id. at 517.

Much like the circumstances in Spaeth, Scarborough was a pro se litigant and, once having been sued, he should not be presumed to have had the

sophisticated legal knowledge and background to understand and appreciate the effect the arbitration clause or his substantive rights under the Arbitration Act. Scarborough acknowledges that in Tuckey v. Harleysville Ins. Co., 236 N.J. Super. 221 (App. Div. 1989), the Court observed that pro se litigants are required to follow accepted rules of procedure and are presumed to know, and are required to follow, the statutory laws of the State. That said, the Judiciary has recognized that there are instances where layperson, pro se litigants do not fully understand or appreciate substantive rights and has acted accordingly. For instance, in Community Realty Mgt., Inc. for Wrightstown Apartments v. Harris, 155 N.J. 212, 232 (1998), it was evident that pro se tenants-defendants failed to understand various statutory protections afforded to residential tenants facing summary dispossess proceedings and, as a result, the New Jersey Supreme Court directed the Special Civil Part Practice Committee to propose Rule changes designed to protect pro se tenants. Here, once informed by counsel of his right to arbitration, Scarborough immediately and unequivocally sought to dismiss this matter and compel arbitration for efficient resolution.

Furthermore, as noted above, a waiver of the right to arbitration requires clear and convincing evidence that the party intended to seek relief in a different forum. Cole, 215 N.J. at 276. The clear and convincing standard

falls between the familiar civil preponderance of the evidence standard and the criminal beyond reasonable doubt standard. Clear and convincing evidence should produce in the mind of the trier of fact "a firm belief or conviction as to the truth of the allegations sought to be established." In Re Purrazzella, 134 N.J. 228, 240 (1993). Such evidence must be "so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." In Re Seaman, 133 N.J. 67, 74 (1993) (quoting Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162 (App. Div. 1960). Evidence may be uncontroverted, but still fail to rise to the clear and convincing standard. In re Perskie, 207 N.J. 275, 290 (2011). In this case the evidence is clear and convincing that Scarborough did not seek relief in this forum nor, having been sued, did he engage in any course of conduct that clearly and convincingly evidenced a deliberate, intentional relinquishment of a known right to seek arbitration.

Lastly, the analytical framework that the Supreme Court established in Cole requires a meticulous examination of the relevant facts in order to determine whether the totality of the circumstances clearly and convincingly evidence a waiver of the right to arbitration. The trial court utterly failed to engage in that process and admitted as much in open court. In that regard, the trial court stated: "For those reasons, the Court finds even under the Cole and

Spaeth decisions, if I was to consider those seven factors, the Court would deny the motion." T.24-15 – T.24-17 (emphasis added). Clearly, the court failed to abide by the controlling precedent and, for that reason alone, the trial court's decision should be reversed. More importantly, when the facts are closely examined there is no support for a finding that Scarborough deliberately, knowingly and intentionally waived his right to arbitration and the trial court's contrary finding was clearly erroneous. As such, it should be reversed by this Court.

CONCLUSION

For the reasons set forth above, this Court should reverse the April 15, 2024 order of the trial court.

Respectfully Submitted,

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By: *William J. Kaufmann*
William J Kaufmann, Esquire

Dated: August 2, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

TRIMLINE FINISH CARPENTRY LLC, ***Plaintiff/Respondent*,** **v.** **STEPHEN T. SCARBOROUGH,** ***A/K/A* S. TODD SCARBOROUGH,** ***AND* JOHN DOES (I-X),** ***INDIVIDUALLY AND J/S/A,*** ***Defendant/Appellant*.**	**SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION** **DOCKET: A-2529-23T2** **ON APPEAL FROM:** **SUPERIOR COURT OF NEW JERSEY - LAW DIVISION - CAPE MAY COUNTY** **Sat Below:** **Hon. James H. Pickering, J.S.C.** **Docket Below: CPM-L-62-23**

BRIEF AND APPENDIX OF PLAINTIFF/RESPONDENT TRIMLINE FINISH CARPENTRY, LLC IN OPPOSITION TO APPEAL

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PRELIMINARY STATEMENT

The Appellant-Defendant in this matter, S. Todd Scarborough ("Scarborough), is an Ivy League-educated homeowner who acted as the General Contractor during construction of his own Ocean City home, and who shorted Respondent-Plaintiff, Trimline Finish Carpentry LLC ("Trimline") $40,000.00 of the $120,000 worth of wood-trim installed therein.

The parties thereafter proceeded through approximately 400 days of discovery wherein Scarborough consistently denied the **existence** of a contract between the parties, even though in his April 3, 2023 Answer Scarborough admitted that he prepared it.

On March 13, 2024, counsel for Scarborough asserted for the first time that the contract his client admitted to having prepared included an enforceable arbitration provision. This was approximately 400 days after the filing of the Complaint in this matter.

Scarborough still claims he never signed the contract.

Put simply, Counsel for Scarborough is petitioning this Panel to enforce a contract which Scarborough does not acknowledge exists and/or claims he never signed.

Consider the following colloquy between the trial court and counsel for Scarborough during oral argument on the motion to Stay the Proceeding below:

> **THE COURT**: Is it going to be your position at trial, Mr. Kaufmann, that this document is not the contract?
>
> **MR. KAUFMANN**: I doubt it. But I don't know that for sure. I – I think it's going to largely depend on the deposition of his – of—the testimony at depositions. Because it was not – the contract, the document, was not executed by my client… T41, 1-8.

In this appeal, Scarborough seeks to enforce a clause in a document which his attorney doubts is the contract between the parties, and which counsel for Scarborough told the trial court Scarborough did not sign.

If the contract does not exist, or if it does but Scarborough never signed the contract, there is no arbitration clause to be enforced.

As the trial court opined, the motion which is the subject of this appeal borders on silly and frivolous. T21, 13.

PROCEDURAL HISTORY

The Procedural History set forth Scarborough's appellate brief is accurate.

It is noted that Scarborough's Answer of April 3, 2024 includes eight (8) affirmative defenses but no mention of arbitration; and a Certification of No Other Actions in which Scarborough certified, to the best of his knowledge and belief, no other action or arbitration proceeding was contemplated. Da13 and Da011.

STATEMENT OF FACTS

The Complaint in this matter alleges a breach of contract action which arose from an agreement between Trimline Finish Carpentry LLC ("Trimline") and Stephen T. Scarborough a/k/a Todd Scarborough ("Scarborough") pursuant to which Trimline installed wood-trim in Scarborough's new home at 201 Bay Road, Ocean City, New Jersey (the "Property"). Da001.

On or about June 2, 2022, the principal of Trimline engaged in a text message exchange with Scarborough in which the principal of Trimline asked, "Do you want a formal contract" and Scarborough replied "I'll get it to you Wednesday morning. I'm away." On June 16, 2022 Scarborough texted again, stating, "Please forward $10,000 invoice and I'll get check prepared today." and the principal of Trimline replied, "Do you want me to come to your office to sign the contract". Scarborough replied, "Just scan it to me. I'll be on site today to deliver check" Pa005.

Trimline signed a subcontractor contract with Scarborough which is dated the 8th day of June 2022 (the "Contract"). Da067.

In paragraph 6 of his Answer, Scarborough admitted that he prepared the Contract. Da010.

Trimline alleges that it is owed $112,412 for work completed to date but has been paid only $76,187. Da002.

Trimline alleges that Scarborough has refused to pay Trimline the outstanding balance due to Trimline for work it has completed. Da003.

Trimline filed its complaint alleging Breach of Contract, Breach of the Implied Duty of Good Faith and Fair Dealing, Fraud, and Implied Contract/Unjust Enrichment on February 14, 2023. Da001.

Scarborough filed an Answer, Counterclaim and Affirmative Defenses on April 3, 2023. Da010.

Trimline filed its Answer to Counterclaim and Affirmative Defenses on April 26, 2023. Da019.

The parties then engaged in discovery and motion practice, during which Scarborough denied the existence of a contract with Trimline and asserted that he did not sign a contract. Pa041, Pa040, Pa047.

On March 13, 2024, Scarborough's attorney sent a letter to counsel for Trimline asking that the matter proceed to arbitration in accordance with language found exclusively in the June 8, 2022 contract. Da078.

On March 14, 2024, Trimline's attorney took the deposition of Scarborough's construction site supervisor, Michael Joseph Buck ("Mr. Buck"). Pa006.

During his deposition, Mr. Buck was shown a copy of the Contract and was asked if he knew if Mr. Scarborough prepared it. Pa019. Mr. Buck replied "This agreement was prepared by Mr. Scarborough." Pa020.

One week later, Scarborough's Motion to Stay Proceedings was filed. Da041.

LEGAL ARGUMENT

I. DEFENDANT IS EQUITABLY ESTOPPED FROM DEMANDING ARBITRATION.

Before the issue of Scarborough's waiver of the right to compel arbitration of this matter at this late date can be reached, it should be noted that Scarborough is equitably estopped from demanding arbitration as he cannot seek to benefit from a contract to which he has expressly and repeatedly disavowed.

"Equitable estoppel applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted." Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996) citing Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414 (3d. Cir.) cert. denied, 488 U.S. 967 (1988). Since the very inception of this matter, Scarborough has denied the existence of the contract upon which he now seeks to rely.

Trimline's Complaint identifies the Contract as a subcontractor agreement, alleges that Scarborough prepared it, and quotes from it several times. Da001.

In Scarborough's Answer, he denies that he and Trimline entered into a subcontractor agreement, admits that he prepared the Contract but then denies allegations which parrot the provisions clearly set forth in the Contract. Da010.

The allegations in the Complaint which Scarborough denied include the following:

5. On or about June 8, 2022, Defendant and Plaintiff entered into a subcontractor agreement ("Contract") designating Defendant as the general contractor and Plaintiff as a subcontractor. Da002.

7. The Contract provides the Plaintiff agrees to perform work for the Defendant on the Property in consideration for payment from Defendant. Da002.

11. The Contract states: "Time is of the essence for the completion of this Agreement. Subcontractor shall promptly commence the subcontracted work following general Contractor's order to do so." Da002.

The Contract is dated June 8, 2022; it provides that Trimline will perform work for Scarborough at the Property; and, that Trimline is the subcontractor and Scarborough is the general contractor. Da067.The quoted language in allegation number 11 of the Complaint is clearly set forth in the Contract. Scarborough denied allegations 5, 7 and 11 in his Answer. Da010.

The below are Scarborough's September 27, 2023, responses to Plaintiff's Interrogatories regarding the contract Scarborough is now seeking to enforce:

23. Identify by name, address and the nature of the work, all contractors that you retained to perform work that was not within the scope of the contract (sic) the Plaintiff.

ANSWER: Objection. There was no fully executed contract with the plaintiff and a list of subcontractors to be provided.

25. Identify all work which you contracted with the Plaintiff to complete.

ANSWER: The plaintiff wasn't contracted for this project since the "Contract" wasn't fully executed.

27. Identify all work under the contract which you allege the Plaintiff either failed to complete or completed in a defective manner. For each item identified state:
    (a) The name and address of the contractor that was retained to complete or correct;
    (b) The cost to complete or correct the alleged defective work; and
    (c) Any incidental damages caused by the alleged incomplete or defective work.

    ANSWER: Objection. There was no contract with the plaintiff. Pa035.

Additionally, Trimline's Requests for Admissions defines "CONTRACT" as "the Subcontractor Agreement dated June 8, 2022, which identifies S. Todd Scarborough as the 'General Contractor' and trimline Finish Carpentry, LLC as the 'Subcontractor'". Pa045. This definition clearly describes the Contract upon which Scarborough bases his argument in the within matter.

In his responses to these Requests for Admissions, Scarborough denies being in receipt of the Contract, denies that the first sentence of the Contract reads as it objectively does, and that the final sentence of the Contract reads as it objectively does. Pa046-047.

Reading Scarborough's Answer and these discovery responses together, all of which were authored by Scarborough before he was represented, it is clear that before his current counsel decided to demand arbitration, Scarborough consistently denied that he had a contract with Trimline, either because it did not exist or because never signed it. If either of those positions were true, the arbitration clause would be

unenforceable.

Now, Scarborough seeks to enforce a provision in the document to further his goal to stall an adjudication of this matter. The doctrine of equitable estoppel precludes Scarborough from changing his position that there is no contract to a position that there *is* a contract, and that it forms an enforceable basis of his demand for arbitration.

This is not a situation in which Scarborough argued in the alternative. There is no discovery response to the effect that *there was no contract, but if there was Defendant did not breach*. Rather, Scarborough steadfastly denied that there was a contract.

The Panel should not play Scarborough's game. Trimline produced a *physical document* which it identifies as the contract between the parties and avers that it was prepared by Scarborough. Trimline referred to and quoted that document in its Complaint. Scarborough has uniformly denied that the produced document was the contract between the parties. He should not now be permitted to rely on it.

The Court must find that Defendant is equitably estopped from demanding arbitration by the terms of the Contract in this matter, as, to date, Defendant himself has not even acknowledged the Contract's existence.

II. THE TRIAL COURT WAS CORRECT THAT DEFENDANT HAS WAIVED HIS RIGHT TO ARBITRATION.

Cole v. Jersey City Medical Ctrl, 215 N.J. 265 (2013) sets forth the factors

which this Court should consider in determining whether Scarborough has waived his right to arbitrate.

The factors enunciated in Cole are as follows:

(1) the delay in seeking the arbitration request;

(2) the filing of any motions, particularly dispositive motions, and their outcomes;

(3) whether the delay in seeking arbitration was part of the party's litigation strategy;

(4) the extent of the discovery conducted;

(5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration;

(6) the proximity of the date on which the party sought arbitration to the date of trial; and

(7) the resulting prejudice suffered by the other party, if any.

These will be discussed in turn.

(1) The delay in seeking the arbitration request;

Trimline filed the underlying Complaint on February 14, 2023. Da001. Scarborough filed his demand for arbitration more than 400 days thereafter. Da041.

Scarborough's brief overlooks the fact that in response number 6 of his Answer, Scarborough admitted that he prepared the Contract. Da010.

On March 14, 2024, counsel for Trimline took the deposition of Michael Joseph Buck who had a "more or less supervisory role" and "work(ed) with subs and

other contractors (Scarborough) selected.) Pa008.

Further, Mr. Buck testified that the contract was prepared by Mr. Scarborough. Pa054.

As the drafter of the Contract, Scarborough knew or should have known of the arbitration provision well before Trimline provided the document to Scarborough in discovery, yet he waited more than 400 days from the date of the filing of the Complaint to file his motion to stay the litigation.

That is a significant delay.

(2) <u>The filing of any motions, particularly dispositive motions, and their outcomes</u>;

Trimline filed two discovery motions in this matter.

The first discovery motion was filed on September 13, 2023. That Motion was resolved via agreement as negotiated between John Ridgeway, Esquire, on behalf of Scarborough, and Paul Stanton, Esquire, on behalf of Trimline. Mr. Ridgeway had not filed an appearance in this matter, and never did so. Mr. Ridgeway represented to Mr. Stanton that Scarbrough would provide a second amended response to Trimline's Initial Interrogatories if Trimline withdrew the pending motion. Mr. Stanton withdrew the pending motion; however, the promised responses were never provided. Pa049-051.

Trimline filed a second Motion to Compel Discovery on March 18, 2024. That

motion was granted by the trial Court in the same oral argument that spawned this appeal.

Scarborough filed a Motion to Stay the Proceedings to send the matter to arbitration on March 25, 2024, and a cross-motion to Dismiss Trimline's Complaint on April 4, 2024. The Trial Court denied Scarborough's Motion to Stay and Motion to Dismiss on April 10, 2024. Da034.

Although not a Motion, Trimline would again note that Scarborough served Trimline with an Offer of Judgment on March 13, 2024. This is a device specifically intended to apply pressure to parties in the time leading up to trial. It is a testament to how close the Parties were to trial that Scarborough served his demand for binding arbitration in the very same document containing the Offer of Judgment. Pa052.

Substantial effort was made on behalf of Trimline to prepare this matter for trial.

(3) Whether the delay in seeking arbitration was part of the party's litigation strategy;

Until the March 25, 2024 Motion to Stay the Proceeding was filed, Scarborough had pursued a litigation strategy based on the premise that there was no contract between the Parties. This is reflected within his Answer, Interrogatory responses, and responses to Trimline's Request for Admissions.

On March 11, 2024, Trimline provided its responses to Scarborough's

Supplemental Notice to Produce which included a copy of the subject Contract. Db7, Da063.

On March 14, 2024, Mr. Buck, Scarborough's personal friend and the jobsite supervisor for the subject project, was deposed. Scarborough's counsel appeared in person. Mr. Buck unambiguously testified in that hearing upon being presented with the PD: "**This agreement was prepared by Mr. Scarborough**." Pa020.

Scarborough filed a Motion to Compel Arbitration one week later.

Scarborough's strategy to *deny the existence of any contract with Trimline* was rendered untenable by Mr. Buck's testimony. After Mr. Buck's deposition he could no longer deny his knowledge and/or awareness of said contract's existence (a position which itself was inconsistent with the admission in his Answer that he prepared the Contract). The fact that Scarborough sought a new forum within a week of his deception being revealed is telling. It is clear that Scarborough is looking to escape to a new, friendlier forum and, perhaps, a second bite at the apple.

(4) <u>The extent of the discovery conducted</u>;

Scarborough's litigation strategy has been to accept Trimline's discovery responses but refuse to provide good faith responses in return.

Indeed, in his brief counsel for Scarborough has remarked on several occasions on the "636 pages" of documents produced in response to discovery requests, whereas Trimline's counsel just succeeded in its motion to Compel 1)

Scarborough's Second Amended Response to Trimline's Initial Interrogatories, (served upon Scarborough June 16, 2023); 2) Scarborough's First Amended Notice to Produce (served June 16, 2023); and Scarborough's initial response to Trimline's Supplemental Notice to Produce (served October 13, 2023).

The Trial Court has issued an Order regarding the outstanding discovery in this matter. Until the parties have the opportunity to comply with the discovery orders, it is undetermined how much more time and effort will be required to complete discovery.

Although a substantial portion of Scarborough's responses appear to have been provided in bad faith, Scarborough participated in every substantive aspect of litigation but for the trial.

If this matter were sent for arbitration, further delay in an adjudication is likely. Such a delay would be patently unfair to Trimline, particularly in light of Scarborough's late assertion of the arbitration clause he authored.

(5) Whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration;

Scarborough filed an Answer to Trimline's Complaint on April 3, 2023. Da010. Scarborough makes no reference to arbitration, but for his signature under the "Certification of No Other Actions" wherein he certified as follows:

> I certify that this dispute is not the subject of any other action pending in any other court or a **pending arbitration** proceeding to the best of my knowledge and belief. Also, to the best of my knowledge and belief, **no other action or arbitration proceeding is contemplated**…In addition, I recognize my continuing obligation to file and serve on all parties and the court an amended certification if there is a change in the facts stated in this original certification. DA011.

Scarborough did, however, asserts eight (8) affirmative defenses and five (5) counterclaims (none of which reference arbitration). Da013. Scarborough also demanded a jury trial in his Answer, which would not be available in an arbitration. Da011.

Perhaps more importantly, Trimline specifically references the Contract in paragraphs 5, 6, 7, 8, 10, 11, and 13 of the Complaint. The Complaint even quotes the contract:

> 11. **The Contract states**: "Time is of the essence for the completion of this Agreement. Subcontractor shall promptly commence the subcontracted work following General Contractor's order to do so." (emphasis added). Da002.

Trimline's discovery served upon Scarborough similarly quotes from the subject Contract and even defines it within the definition section of Trimline's First Set of Requests for Admissions to Scarborough:

> 14. "CONTRACT" refers to the Subcontractor Agreement dated June 8, 2022 which identifies S. Todd Scarborough as the "General Contractor" and Trimline Finish Carpentry, LLC as the

"Subcontractor". Pa043.

In sum, Scarborough's pleadings make no reference to arbitration whatsoever, despite Trimline emphasizing and highlighting the Contract in its initial pleading.

(6) The proximity of the date on which the party sought arbitration to the date of trial;

No trial date was assigned in this matter as of the date of the motion to compel arbitration, although the discovery period had expired. Regardless, Scarborough waited over 400 days after the Complaint was filed before seeking arbitration.

(7) The resulting prejudice suffered by the other party, if any.

Trimline made every effort to obtain discovery from Scarborough only to be stifled at nearly every turn. Indeed, Trimline is still awaiting the discovery which was the subject of Trimline's Motion to Compel Discovery as well as access to the Property for a site inspection by Trimline's expert.

Trimline's prejudice in this matter flows in part from the dozens of hours wasted seeking the same discovery time after time from Scarborough (which has not been received to date), opposing frivolous motions, and proving the existence of a contract which, by his own admission and according to the testimony of his friend and construction site manager, Scarborough personally drafted.

To allow Scarbrough to compel arbitration at this stage of litigation would be inherently inequitable to Trimline. Instead of simply providing the discovery

responses to which Trimline was entitled, Scarborough stonewalled and filed frivolous motions which drastically extended the length and expense of the subject litigation.

However frustrating and expensive Scarborough's delaying tactics have been, they pale in significance to the prejudice suffered by Trimline in the delay in receiving its day in Court and compensation for the work and materials it invested in the home in which Scarborough currently resides.

Importantly, the Appellate Division's recent decision in Marmo and Sons General Contracting, LLC v. Biagi Farms, LLC, 478 N.J. Super. 593 (App. Div 2024) makes it clear that in performing the Cole analysis, the focus must be predominately on the waiving party. Thus, prejudice is only one of many waiver factors within the totality of circumstances.

Here, the waiving party drafted the arbitration provision and chose not to assert it, opting instead to deny the existence of the contract.

Trimline has expended time and money in its pursuit of fair pay for the job it has performed. It has been stalled and delayed by Scarborough, the party who drafted the contract upon which Trimline relied. Scarborough then denied that the contract existed until he, or his counsel, found the contract to be useful to further delay an adjudication of this matter.

The Cole factors support the finding of a waiver under the facts of this case.

III. DEFENDANT IS NOT ENTITLED TO SPECIAL TREATMENT FOR HIS *PRO SE* STATUS.

"Procedural rules are not abrogated or abridged by plaintiff's *pro se* status." Rosenblum v. Borough of Closter, 285 N.J. Super. 230, 241 (App. Div. 1995).

"Litigants are free to represent themselves if they so choose, but in exercising that choice they must understand that they are required to follow accepted rules of procedure ... to guarantee an orderly process." Tuckey v. Harleysville Ins. Co., 236 N.J. Super. 221, 224 (App. Div. 1989).

Scarborough's *pro se* status until the entry of current counsel should play no role in the Court's decision.

CONCLUSION

For reasons set forth above, the Court should find that Scarborough is estopped from asserting a right to compel arbitration at this point.

Additionally, or in the event the Court declines to base its decision on estoppel principles, the Court should find that Scarborough has not satisfied the Cole factors.

Scarborough prepared the contract, insists that he never signed it, and then relied on it to raise this arbitration claim at the eleventh hour.

This matter is nearly ready for trial. It would be inequitable to compel Trimline to begin another process in another forum to prosecute a claim to be compensated for work performed.

Respectfully submitted,

McCrosson & Stanton, PC
Counsel for Plaintiff,
Trimline Finish Carpentry, LLC

By: *Jonathan F. McCrosson*
Jonathan F. McCrosson, Esquire

Dated September 3, 2024

TRIMLINE FINISH CARPENTRY, LLC, Plaintiff/Respondent, vs. STEPHEN T. SCARBOROUGH a/k/a S. TODD SCARBOROUGH, and JOHN DOES (I-X) (Multiple Alternative, Fictitious Entities), Individually, and J/S/A, Defendants/Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket # A-002529-23T2 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CAPE MAY COUNTY DOCKET NO. CPM-L-62-23 Sat Below: Honorable James H. Pickering, J.S.C.

REPLY BRIEF OF APPELLANT, STEPHEN T. SCARBOROUGH a/k/a S. TODD SCARBOROUGH

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Date of Submission: October 8, 2024

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PRELIMINARY STATEMENT

As reflected in the Parties' initial submissions, Appellant, Stephen T. Scarborough a/k/a S. Todd Scarborough ("Scarborough"), and Defendant, Trimline Finish Carpentry, LLC ("Trimline") generally agree about the facts of this matter and the controlling law. There is, however, a significant difference of opinion as to the meaning and relevance of various facts under the controlling law. As to the application of the controlling law to the facts, Trimline does so in a rigid, mechanical fashion with the focus solely on the actions of Scarborough and without any recognition that the actions of Trimline are relevant as well. Scarborough's analysis, on the other hand, is more nuanced because it considers the totality of the circumstances, as is required by the controlling law, and considers the actions of both Parties in the lead-up to Scarborough's demand that this matter be submitted to arbitration.

The issue presented in this matter is whether Scarborough waived his right to arbitration. A conclusion that Scarborough waived his right to have this contractual dispute submitted to arbitration must be supported by clear and convincing evidence that he knowingly and voluntarily intended to relinquish that right. Our Supreme Court has instructed that various factors be considered in order to determine whether, under the totality of the circumstances, it can be said that there is clear and convincing evidence that a party waived their right

to seek arbitration. If the totality of the circumstances is to be considered, then the actions of the party who allegedly waived a right to arbitration cannot be considered in a vacuum. Rather, the actions of both parties must be considered. Trimline, has not done that. Rather, Trimline's basic position, as argued in its brief, is that Scarborough waived his right to arbitration because, having been sued by Trimline, he participated in the litigation process and then waited too long to demand arbitration. In its brief, Trimline failed to consider the fact that it ignored the mandatory arbitration provision in the very contract that it seeks to enforce and, instead of first demanding arbitration, it simply sued Scarborough. Trimline now seeks to be rewarded for ignoring the contract and utilizing the litigation process to the disadvantage of Scarborough who, for the bulk of this litigation, was a pro se litigant. Those facts, along with others discussed below, are relevant if the totality of the circumstances are examined, as they must be examined. Although such facts were ignored by Trimline in its brief, they are pertinent to a full analysis of this matter. Stated differently, Trimline's rigid, robotic analysis of Scarborough's actions in a vacuum is fatally flawed and when Trimline's actions are incorporated into the analytical matrix, then it becomes evident that Scarborough has not waived his right his right to arbitration meaning that Trimline's argument and the Trial Court's finding to the contrary are clearly erroneous.

In addition to the foregoing, it noted that in its brief Trimline argued that Scarborough is equitably estopped from demanding arbitration. Such an argument should have been raised by a cross-appeal. No such cross-appeal was filed and, therefore, this Court should not consider Trimline's equitable estoppel argument. Should this Court nonetheless considered Trimline's position in that regard, then for the reasons discussed below, this Court should find that the argument is without merit.

PROCEDURAL HISTORY

Scarborough incorporates the Procedural History as set forth in his previously filed brief in support of appeal as if same were fully set forth at length herein.

STATEMENT OF FACTS

Scarborough incorporates the Statement of Facts as set forth in his previously filed brief in support of appeal as if same were fully set forth at length herein.

LEGAL ARGUMENT

I. THE RECORD DOES NOT SUPPORT A FINDING THAT SCARBOROUGH WAIVED HIS RIGHT TO ARBITRATION AND THE TRIAL COURT'S CONTRARY FINDING WAS CLEAR ERROR (Da033; T.3-1 – T.24-23).

The Parties agree that resolution of the issue now before this Court requires an application of the multifactor test described in Cole v. Jersey City Medical Center, 215 N.J. 265, 280-81 (2013). The Parties disagree as to what facts are relevant to that multifactor analysis. As noted above, Trimline takes a tunnel vision approach that considers only what Scarborough did or did not do before demanding arbitration. It is impossible to evaluate the totality of circumstances utilizing such an approach. Therefore, Scarborough contends, an evaluation of the actions of both Parties is required by Cole. Indeed, in its Cole decision, the Supreme Court did not limit an analysis to the familiar seven factors that it enumerated. Rather, the Court noted that the seven factors to be considered are "[a]mong other factors" that the Court should evaluate. Id at 280. Those "other factors," in this case, Scarborough contends, are the actions of Trimline. When Trimline's actions are considered alongside Scarborough's, the inevitable conclusion is Scarborough did not waive his right to have this matter submitted to arbitration.

In both Cole and Marmo and Sons General Contracting, LLC v. Biagi Farms, LLC, 478 N.J. Super. 593 (App. Div. 2024), the Supreme Court and this Court found that the right to arbitration had been waived. The dispositive facts in those two cases contrast with the critical facts in this matter. A comparison will illustrate why the actions of Trimline and other facts that do not necessarily fit neatly withing the seven Cole factors are highly relevant to the analysis in this case.

In Marmo the party that sought arbitration was the party that initiated the litigation. Marmo, 478 N.J. Super. at 598. By contrast, in this case Trimline ignored the arbitration provision in the contract that it seeks to enforce and sued Scarborough. That action by Trimline cannot be ignored nor underestimated particularly since all of the enumerated Cole factors are measured against various aspects of the litigation process. In this case had Trimline simply initiated arbitration as required by the contract that it seeks to enforce rather than suing Scarborough, there would be no litigation process to examine. That is why Scarborough's litigation activity cannot be viewed in isolation from Trimline's action in initiating the litigation in the first place.

In both Cole and Marmo a factor that weighed heavily in favor of waiver was the delay in seeking arbitration. In Cole the party that sought arbitration participated in the lawsuit for twenty-one months before filing a motion to

compel arbitration three days before the scheduled trial date and after extensive discovery had occurred. The Court characterized that delay as "substantial." Cole, 215 at 233. In Marmo the delay was six months which this Court noted was similar to what had been excused in Spaeth v. Srinivasan, 403 N.J. Super. 508, 516 (App. Div. 2008), but further observed that, unlike Spaeth where the party asserting arbitration was a pro se litigant, Marmo, from the outset, was represented by counsel, "who was better equipped to recognize its right to arbitration and act upon it swiftly." Marmo, 478 N.J. Super. at 611. Notwithstanding that fact, this Court still found that the delay did not weigh heavily in favor of waiver. Id. Comparatively speaking, and despite Trimline's assertions regarding delay, this case is most like Spaeth due to the fact that for the eight months following the filing of his Answer Scarborough was a pro se litigant.

The foregoing is not meant to suggest that a pro se litigant is not required to know and follow our rules of procedure and our statutory laws. On the contrary, in his initial submission Scarborough acknowledged the controlling principles relative to pro se litigants as articulated in cases such as Tuckey v. Harleysville Ins. Co., 236 N.J. Super. 221(App. Div. 1989). That said, there is no question that in Spaeth this Court clearly considered the fact that the party seeking arbitration was a pro se litigant. By contrast, in Marmo

the party who sought arbitration was represented by counsel and, therefore, was "better equipped to recognize its right to arbitration and act upon it swiftly" --Marmo, 487 N.J. Super. at 611—and Scarborough contends that the same presumption cannot be made with regard to pro se litigants. In this case, when considering the delay in seeking arbitration, the fact that Scarborough was a pro se litigant for the first eight months is a fact, albeit one that does not necessarily fit within any of seven Cole factors, that should be considered by this Court. This point further can be illustrated by an additional comparison between Marmo and this case.

In Marmo, this Court found that Marmo's pleadings "strongly" weighed as a "factor in favor of waiver." Id at 613. In so finding, this Court paid close attention to Marmo's Rule 4:5-1(b)(2) Certification which stated that no arbitration was pending and that "to the best of its belief" none was contemplated. Id. As previously noted, Marmo's pleadings, including the Rule 4:5-1(b)(2) Certification, were prepared by its attorney. By contrast, in this case Scarborough, as a pro se litigant, chose to file an Answer using the Superior Court's Form A answer found on the Court's website. Da010.

With respect to the Superior Court's Form A that Scarborough used, it includes the required certifications and, as in Marmo, the Rule 4:5-1(b)(2) Certification includes "knowledge and belief" language. Da011. More

specifically, the Form indicates: "I certify that this dispute is not the subject of any other action pending in any other court or a pending arbitration proceeding to the best of my knowledge and belief. Also, to the best of my knowledge and belief, no other action or arbitration proceeding is contemplated." That form Certification concludes with: "In addition, I recognize my continuing obligation to file and serve on all parties and the court an amended certification if there is a change in the facts stated in this original certification." As to that Certification, the Certification Regarding Filing and Service, and the Demand for Trial by Jury, the Form A instructions simply instruct the user to sign them, except for the jury demand. More specifically, the Form A instructions state: "Sign and date the remaining statements on the continuation of *Form A*. **Do not** sign the demand for trial by jury unless you want to have a jury hear your case." Emphasis in original. As to the Rule 4:5-1(b)(2) Certification, the Form A instructions do not instruct the user to alter the Certification if any of the statements therein are inaccurate or need to be modified. While an experienced attorney would know to do that, it is hard to imagine that a pro se litigant would know to do so or would think that they even were permitted to do so. Accordingly, as far as the totality of the facts and circumstances are concerned relative to the pleadings, this case contrasts greatly with the facts of Marmo. While Marmo's Complaint, including the

Rule 4:5-1(b)(2) Certification, which were prepared and filed by its attorney, strongly weighed in favor of waiver, in this case, when all of the facts and circumstances are considered, Scarborough contends that this Court should not view the pleadings as weighing heavily in favor of waiver.

In addition to the foregoing, a final look at the issue of prejudice is appropriate.

In Marmo this Court found that the party opposing Marmo's arbitration request would suffer some slight prejudice because Marmo utilized the litigation process to obtain a significant amount of discovery. More particularly, this Court observed: " . . .Marmo was able to obtain, through the Superior Court discovery process, a substantial and lopsided amount of early discovery from Biagi that it might not have been able to obtain so readily in arbitration. Even though the extent of prejudice to Biagi was arguably modest, it is no completely insignificant." Marmo, 478 N.J. Super. at 615.

The facts of this matter, in terms of the discovery process, do not demonstrate anything even closely resembling what occurred in Marmo. Here, as detailed in the Parties' initial submissions, there was an exchange of discovery. It was by no means significantly "lopsided" in favor of either party as occurred in Marmo. Trimline complains that having had to engage in the discovery process in the litigation that it initiated will equate to prejudice if it

now must proceed to arbitration. Again, Trimline ignores the fact that the prejudice that it claims will be incurred would be nonexistent had it not sued Scarborough in abject disregard to the mandatory arbitration provision in the contract it seeks to enforce. Stated differently, Trimline's assertion that it will suffer prejudice if it is compelled to arbitration is without merit.

A waiver of the right to arbitration is never presumed and a finding of waiver must be supported by clear and convincing evidence that the party seeking arbitration intended to seek relief in a forum other than the arbitration. Cole, 215 N.J. at 276. In this case, when all of the facts of this matter are examined and considered, both those that pertain to Scarborough and those that pertain to Trimline, it cannot reasonably be said that the totality of circumstances support a conclusion by clear and convincing evidence that Scarborough deliberately, knowingly, intentionally, and voluntarily waived his right to arbitration. As such, the lower court's contrary finding was erroneous and should be reversed by this Court.

II. RESPONDENT'S EQUITABLE ESTOPPEL ARGUMENT WAS NOT RAISED BY RESPONDENT BY WAY OF CROSS-APPEAL AND THEREFORE SHOULD NOT BE CONSIDERED OR, IF CONSIDERED, SHOULD BE REJECTED AS LACKING MERIT.
(Briefed, but not argued below)

In its Brief Trimline argues that Scarborough is equitably estopped from demanding arbitration. Pb7. The issue of equitable estoppel was briefed by

the Parties below, but the issued was not specifically argued. The decision below, however, clearly was not premised upon an equitable estoppel argument. In that regard, the trial court expressly stated: "The defendant has waived the right to arbitration at this late date . . ." T.24-18. Therefore, at least by implication, the Court below rejected Trimline's equitable estoppel argument. That being the case, if Trimline wanted for this Court to review the lower court's rejection of its equitable estoppel theory, it should have filed a cross-appeal. No cross-appeal was filed and therefore this Court should not consider Trimline's equitable estoppel argument. To the extent that this Court does consider the equitable estoppel issue, then for the reasons discussed below Trimline's argument should be considered to lack merit.

The thrust of Trimline's argument is that Scarborough is estopped from seeking arbitration because he has asserted that no contract exists. Indeed, in both his Answer and discovery responses, Scarborough has denied that a contract existed. In his defenses, however, Scarborough has taken a seemingly inconsistent position and stated: "Defendant did not breach any contract or agreement with Plaintiff." Da013. What Trimline's argument fails to recognize is that, once sued, the New Jersey Court Rules expressly allow Scarborough to take inconsistent positions.

New Jersey Court Rule 4:5-6 provides:

> A party may set forth 2 or more statements of a claim *or defense* alternatively or hypothetically, either in one count *or defense* or in separate accounts *or defenses*. When 2 or more statements are made in the alternative and one of them, if made independently, would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. As many separate claims *or defenses* as the party has may be stated regardless of their consistency and whether based on legal or equitable grounds or both. All statements shall be made subject to the obligations set forth in R.1:4-8." Emphasis added.

Given the substance of Rule 4:5-6, the fact that Scarborough may have denied the existence of a contract while at the same time taken the position that, if a contract exists, he did not breach it is of no consequence to the present arbitration issue. Under New Jersey's Rules of practice and procedure he is entitled to assert both positions. Therefore, Trimline's argument that Scarborough is estopped from seeking to compel arbitration should be resoundingly rejected as lacking merit.

CONCLUSION

For the reasons set forth both in Scarborough's initial Brief and in this Reply Brief, this Court should reverse the April 15, 2024 order of the trial court.

Respectfully Submitted,

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