NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-3711-09T3
A-0360-10T2

CREATIVE WASTE MANAGEMENT, INC.,

Plaintiff-Appellant,

v.

BAY OWNERS ASSOCIATION, INC.,

Defendant-Respondent.

JEFFREY BROSS, WILLIAM LAMB, and DOMINIC BISIRRI,

Plaintiffs-Appellants,

v.

CREATIVE WASTE MANAGEMENT, INC.,

Defendant-Respondent.

Submitted May 31, 2011 - Decided June 17, 2011

Before Judges Lisa and Reisner.

On appeal from Superior Court of New Jersey, Law Division, Camden County L-5718-09 and L-3674-10.

Robert P. Stein (Law Offices of Stein & Troiani), attorney for appellant Creative Waste Management, Inc., in A-3711-09 and respondent in A-0360-10 (Mr. Stein, on the brief).

Levine, Staller, Sklar, Chan, Brown & Donnelley, P.A., attorneys for respondent Bay Owners Association, Inc., in A-3711-09 and appellants Jeffrey Bross, William Lamb and Dominic Bisirri in A-0360-10 (Glenn P. Callahan, of counsel; Therese M. Keeley, on the brief).

PER CURIAM

These two appeals, which we have consolidated for purposes of this opinion, arise from a dispute among the following parties: Creative Waste Management, Inc. ("CWM"), Bay Owners Association, Inc. ("BOA"), and a group of individual waterfront property owners in Stone Harbor ("individual slip owners" or "owners"). In the first appeal, CWM challenges a March 3, 2010 order vacating an arbitration award in its favor against BOA. In the second appeal, the individual slip owners appeal from an August 16, 2010 order denying their application to enjoin a second arbitration which included them as parties. Finding no merit in either appeal, we affirm both orders.

I

In summary, this is what happened. In order to arrange for the dredging of their boat slips, the owners created BOA, a non-profit membership corporation. BOA and the individual owners entered into a Master Agreement ("Agreement") with CWM. Under the terms of that Agreement, dated June 14, 2005, BOA's primary function was "to establish a separate account to hold funds paid in by [the] Slip Owners and to disburse such funds as work

progresses." However, it was clear from the Agreement that BOA would also oversee the dredging operations for the owners. For that purpose, BOA had retained an engineering firm to act as project manager. Prior to CWM commencing work on an owner's slip, the owner was required to pay a total of $2600 into an escrow account, which was to be held by BOA but managed by a separate payment agent, Tracey Heun Brennen & Company. Thus, BOA held advance payment for all of the work to be done, and that money came from the owners. Before entering into the Agreement, the slip owners were required to submit a dredging plan for their individual slips, and any changes to that individual plan required the owner's written consent.

In the Agreement, CWM "acknowledge[d] that BOA is a non-profit corporation without significant assets and therefore will not seek payments from BOA except out of funds in the Escrow Account." However, CWM did not agree not to seek damages from the owners in case of a dispute, and the owners logically would have been the source for any such additional sums to which CWM became entitled. The Agreement contained an arbitration clause requiring "[t]he parties" to resolve "any dispute" through binding arbitration. The Agreement required notices to be either hand delivered or mailed to slip owners at the addresses specified in their individual slip dredging agreements, with

copies to BOA and BOA's engineer. The Agreement was signed by the individual slip owners, as well as by representatives of BOA and CWM.

After a dispute arose[1], CWM filed a construction lien on or about February 6, 2007, against each individual slip owner's property. The slip owners, represented by William Lauth as a representative plaintiff, filed a complaint against CWM in the Law Division. That lawsuit resulted in an October 1, 2007 order invalidating the construction liens and a November 20, 2007 order directing CWM to pay the plaintiffs' counsel fees.

Meanwhile, pursuant to the Agreement, CWM filed an arbitration demand against BOA and the individual slip owners. An arbitration notice dated May 16, 2007, advised the owners that they could "avoid personal participation" in the arbitration by paying their individual proportional share of CWM's damage demand, which totaled about $648,000. The individual owners filed responses and counterclaims. By letter dated April 11, 2008, however, CWM informed the National

[1] The dispute concerned Change Order Number 3 and the "failure" of the confined disposal facility ("CDF") into which the dredge spoils were to be placed. According to its arbitration demand, CWM blamed BOA for the failure of the CDF and asserted that in Change Order Number 3, BOA had agreed to pay CWM for the cost of setting up a "decant system" and for all of the down time CWM incurred by virtue of the CDF failure. The owners contend that they did not authorize BOA to agree to Change Order Number 3.

Arbitration Forum (NAF) that it wanted to withdraw "without prejudice" its arbitration demand against the individual slip owners, after learning that the arbitration association would charge it an administrative fee totaling $35,000. By letter dated April 28, 2008, the owners' attorney objected to that request, pointing out that: (a) his clients had asserted counterclaims, and (b) CWM was claiming damages against BOA that it would eventually try to collect from the owners using estoppel principles. However, CWM was permitted to withdraw the arbitration claim against the owners.

Additional procedural maneuvering preceded the arbitration hearing. Fearing that BOA had insufficient funds to pay a possible arbitration award, CWM sued the trustees of BOA personally in federal court; that action was administratively dismissed pending the outcome of the arbitration. BOA filed a motion to dismiss the arbitration, on the theory that it was only a payment agent for the individual owners. Additionally, in 2009, before the arbitration hearing commenced, several individual slip owners filed a motion to intervene in the arbitration. They supported their application with certifications attesting to their personal stake in the matter, including: BOA had insufficient funds to pay a judgment; their belief that CWM would attempt to collect any arbitration award

from the individual owners personally; and the dispute had already affected their interests when CWM filed a construction lien against their property and then failed to pay the Law Division counsel fee award.

CWM opposed the owners' motion, claiming that it was untimely, and that BOA was representing the owners' interests. CWM represented that "[t]he only party who can be held liable in this arbitration is BOA" although it also conceded that "a determination in this arbitration about the quantum of money damages could operate as against other potentially liable parties in other proceedings under principles of issue preclusion." In other words, CWM made no promises that it would not sue the individual owners and seek to assert collateral estoppel against them with respect to the damages owed. Without citing reasons, the arbitrator denied the owners' intervention motion on July 6, 2009.

After the arbitration hearing took place, the arbitrator issued a decision on September 22, 2009, awarding CWM approximately $500,000 in damages against BOA. CWM filed a complaint in the Law Division seeking to confirm the award, while BOA filed a counterclaim seeking to have the award vacated.

During the oral argument on the applications, Judge Orlando asked CWM's attorney if CWM intended to try to collect the arbitration award from the slip owners. The attorney eventually admitted that CWM would "[m]ost likely" apply to the court to require BOA to assess the owners for the amount of the arbitration award, so that CWM could then collect the award from BOA.[2]

In an oral opinion issued on February 17, 2010, Judge Orlando reasoned that CWM was attempting "to get a judgment against [BOA] and then ultimately enforce it against the slip owners." He held that the slip owners were parties to the Agreement and, under the terms of the Agreement they had the right to participate in the arbitration and were entitled to notice of the arbitration. The judge found that both of those rights were improperly denied when CWM was permitted to dismiss the owners from the arbitration and later when the owners' were not permitted to intervene. The judge concluded that the arbitrator exceeded his authority by denying the slip owners the opportunity to participate in the arbitration.

[2] The attorney later stated that CWM would intend to rely on BOA's good faith in voluntarily asking the slip owners to pay an assessment. However, he would not commit that his client would only seek to enforce the award against BOA.

The judge also concluded that, because the Agreement limited BOA's liability to the funds in its escrow account, the arbitrator exceeded his powers by failing to inquire as to the amount of money in the escrow account and by failing to limit the award against BOA to the amount in the escrow account. He reasoned that the arbitrator "exceeded his authority by rendering an award that's ultimately going to have to be paid by parties who [were] not permitted to participate" in the arbitration. Accordingly, the judge entered a March 3, 2010 order denying CWM's application to confirm the arbitration award, and granting BOA's application to vacate the award.

After the Law Division vacated the award, CWM filed with the NAF a request to re-open the prior arbitration and add claims against the individual slip owners. The slip owners filed a complaint and order to show cause in the Law Division seeking to enjoin the second arbitration, on the grounds that it was barred by the rules of the NAF and by the entire controversy doctrine. In an oral opinion issued on August 4, 2010, Judge Orlando concluded that the owners had not satisfied the criteria for temporary injunctive relief, as set forth in Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982).

The judge observed that there would be no immediate and irreparable harm if he did not enjoin the arbitration. He also

reasoned that it was for the arbitrator to decide, using the NAF's procedural rules, whether to apply the entire controversy doctrine to the second arbitration. He further considered that the law was unclear as to whether the entire controversy doctrine applied "where an arbitrator has at least indirectly declined to join parties that sought to be included in the claim." Therefore, the owners had not established a likelihood of success on the merits of their application. Crowe, supra, 90 N.J. at 132-33.

After Judge Orlando announced his decision, the owners' counsel agreed that since the only relief his clients were seeking was the TRO, the judge should also enter an order dismissing the complaint. Accordingly, Judge Orlando entered an August 16, 2010 order denying the owners' application to enjoin the arbitration and dismissing their complaint.[3]

II

In its appeal, CWM presents the following issues for our consideration:

> POINT I. WHETHER CWM WAS ABLE TO PROCEED TO ARBITRATION ONLY AGAINST THE CORPORATE ENTITY, BOA?

[3] On December 10, 2010, the arbitrator stayed the second arbitration pending the outcome of CWM's appeal from the Law Division order vacating the first arbitration award.

> POINT II. WHETHER ALL PARTIES TO THE ARBITRATION AGREEMENT HAD PROPER NOTICE PURSUANT TO N.J.S.A. 2A:23B-2 AND 2a:23B-9?
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> POINT III. WHETHER THE AWARD OF ARBITRATORS SHOULD HAVE BEEN CONFIRMED PURSUANT TO N.J.S.A. 2A:23B-22?
>
> POINT IV. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY VACATING THE AWARD OF ARBITRATORS PER N.J.S.A. 2A:23B-23?
>
> POINT V. WHETHER THE TRIAL COURT EXCEEDED ITS AUTHORITY BY CONSIDERING FACTS AND EVIDENCE THAT WERE PROPERLY ADJUDICATED BEFORE THE ARBITRATOR?
>
> POINT VI. WHETHER THE TRIAL JUDGE MADE INADEQUATE CONCLUSIONS OF FACTS AND LAW?

We find no merit in any of CWM's appellate contentions, R. 2:11-3(e)(1)(E), and we affirm substantially for the reasons stated by the trial judge. We add the following comments.

The New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, provides the following limited grounds to vacate an arbitration award:

> (1) the award was procured by corruption, fraud, or other undue means;
>
> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
>
> (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15

> of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
>
> (4) an arbitrator exceeded the arbitrator's powers;
>
> (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or
>
> (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.
>
> [N.J.S.A. 2A:23B-23a.]

Section 15 of the Act, N.J.S.A. 2A:23B-15d, provides, in pertinent part, that at an arbitration hearing, "a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing." The clear import of both sections 15 and 23(a) of the Act is that an entity that has a right to participate in an arbitration hearing must be given a fair opportunity to do so.

The right and obligation to participate in arbitration is controlled by the arbitration clause of the parties' agreement. See Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 148-49 (App. Div. 2008). An "arbitrator's powers are limited by

the agreement of the parties and an arbitrator may not exceed the scope of the powers granted to him or her by the parties." Kimm v. Blisset, LLC, 388 N.J. Super. 14, 25 (App. Div. 2006), certif. denied, 189 N.J. 428 (2007). The scope of an arbitration clause is for the court to decide, while the procedures that govern the arbitration are ordinarily to be decided by the arbitrator. Angrisani, supra, 402 N.J. Super. at 148-49. However, the Arbitration Act sets limits on the arbitrator's power to control the procedures at arbitration. Failure to honor those limits provides grounds to vacate an arbitration award. N.J.S.A. 2A:23B-23a.

In its Point I, CWM states the issue as its right "to proceed to Arbitration on its claims against BOA, having dismissed the individual Slip Owners." However, we conclude that this mischaracterizes the issue before the Law Division and on this appeal. The key questions are whether the individual slip owners had a right to participate in the arbitration and, therefore, whether it was error (a) to allow CWM to withdraw its arbitration claim against the owners over their objection, and (b) to later deny the owners' motion to intervene in the arbitration.

We agree with Judge Orlando that the arbitrator and the NAF exceeded their authority by excluding the slip owners from the

arbitration. See N.J.S.A. 2A:23B-23a(4). The owners were parties to the Agreement, which provided that any disputes would be resolved at arbitration. The "dispute" that CWM sought to arbitrate was one that included the owners. Their money funded the escrow account, and despite its disingenuous claim to the contrary, CWM obviously intended to pursue the owners for payment of any arbitration award it obtained against BOA.

The Agreement provided that CWM would not pursue any claim against BOA for any funds beyond those in the escrow account. Yet, CWM did not limit its claim against BOA to the escrow funds, and it intended all along to force the owners to pay its claim. To that end, after it filed for arbitration, CWM sent notices to the slip owners demanding that they each pay their proportionate share of CWM's $648,000 claim. CWM also filed construction liens against the owners' properties. Plainly, CWM believed that its "dispute" was with the owners as well as with BOA. Likewise, the owners believed that they had a "dispute" with BOA, because they filed an answer and counterclaims in the arbitration proceeding. The owners, as signatories to the Agreement and as parties whose interests would be affected by the outcome, had a right to participate in the arbitration.

It is not clear from this record whether the arbitrator or an administrator of the NAF made the initial decision to allow

CWM to withdraw its arbitration demand against the owners, over their objection. However, it makes no difference to the result here. That decision was fundamentally unfair and contrary to the intent and purpose of the Arbitration Act, see N.J.S.A. 2A:23B-15, -23a, and it violated the Agreement whose terms governed the scope of the arbitration. Likewise, the later decision to prevent the owners from intervening violated the arbitration clause of the Agreement, which entitled the owners to arbitrate their "disputes" arising from the Agreement. See Jaworski v. Motor Club of Am. Ins. Co., 182 N.J. Super. 651, 658 (Law Div. 1981) (the arbitrator violated the terms of the insurance contract, which governed the arbitration, by denying defendant's application for joinder of a second insurance company).

Contrary to CWM's appellate argument, the owners were also indispensable or necessary parties to the arbitration. Rule 4:28-1(a) addresses "persons needed for just adjudication" of litigation:

> A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may . . . (i) as a practical matter

> impair or impede the person's ability to protect that interest . . . .

Insofar as the owners claimed that BOA agreed to Change Order Number 3 without their consent, they had a dispute with BOA, and therefore, BOA was not in position to represent their interests in the arbitration. See Saginario v. Attorney Gen., 87 N.J. 480, 493-94 (1981) (a public employee has the right to participate in a labor arbitration where his substantial interest is in conflict with that of the union). The owners were also the source of the funds from which CWM would seek recovery of any arbitration award.

The following observation, although made in the context of a labor grievance, is equally pertinent here: "As important as arbitration is to the settlement of industrial grievances, unless it is a final resolution of the entire controversy and binding upon all the parties in the dispute, it merely serves to fragment rather than to resolve the dispute." Jennings v. M&M Transp. Co., 104 N.J. Super. 265, 278 (Ch. Div. 1969).

III

In their appeal from the order denying their TRO application, the owners contend:

> POINT I. THE TRIAL COURT ERRED IN REFUSING TO ENJOIN CWM'S ATTEMPT TO RE-ARBITRATE ITS CLAIM.

> A. The Trial Court's Decision to Defer to the National Arbitration Forum was Error.
>
> B. The "Amended" Arbitration Claims Against the Slip Owners are Barred Both by the Entire Controversy Doctrine and the NAF Rules.
>
> 1. The entire controversy doctrine bars CWMS from proceeding in arbitration or otherwise on claims arising out of the same transactions and occurrences as the claims considered in the August 2009 arbitration.
>
> 2. The rules of the National Arbitration Forum do not permit an amendment or reopening of the arbitration based upon the allegations of the purported amended complaint.

We agree with Judge Orlando that the owners failed to satisfy the test for temporary injunctive relief under Crowe, supra, 90 N.J. at 132-34. We also conclude that the second arbitration was not barred by the entire controversy doctrine. See R. 4:30A. Contrary to the owners' arguments, that doctrine no longer includes the mandatory joinder of parties, as opposed to issues.

> "[M]andatory party joinder under the entire controversy doctrine has been eliminated, and preclusion of a successive action against a person not a party to the first action has been abrogated except in special situations involving both inexcusable conduct . . . and substantial prejudice to the non-party resulting from the omission from the first suit." New Jersey having abandoned mandatory party joinder, the party invoking the entire controversy doctrine has

> the burden of establishing both inexcusable conduct and substantial prejudice.
>
> [Hobart Bros. Co. v. Nat'l Union Fire Ins. Co., 354 N.J. Super. 229, 242 (App. Div.) (quoting Pressler, Current N.J. Court Rules, Comment 1 on R. 4:30A (2002)), certif. denied, 175 N.J. 170 (2002).]

The slip owners did not demonstrate, or even claim, that they would incur "substantial prejudice" if compelled to participate in the second arbitration. Ibid.

Further, there has been no final determination on the merits of the dispute which gave rise to the first arbitration. See Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 415-16 (1991). The arbitration award was vacated due to procedural errors, i.e., the failure to allow participation by the owners. By analogy, had the dispute been litigated in a trial court rather than at arbitration, the $500,000 award in CWM's favor would have been reversed on appeal and the matter remanded to the trial court for a re-trial in which the owners were permitted to participate.

Finally, the parties agreed to arbitration by the NAF, and construction of that organization's procedural rules is properly left to the arbitrator. See Kalman Floor Co. v. Jos. L. Muscarelle, Inc., 196 N.J. Super. 16, 30 (App. Div. 1984) (recognizing that courts generally hold "that the timeliness of a demand for arbitration and other procedural issues relating to

the conduct of the arbitration proceeding itself are for the arbitrator"), aff'd o.b., 98 N.J. 266 (1985).

Affirmed.