NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5401-09T3

LESLIE BROOKS and
DEBORAH HUGHES,

Plaintiffs-Appellants,

v.

FETCH! PET CARE, INC., a
California corporation; and
PAUL MANN,

Defendants-Respondents.

Argued February 28, 2011 - Decided May 13, 2011

Before Judges Reisner and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1122-10.

Glenn A. Montgomery argued the cause for appellants (Montgomery, Chapin & Fetten, P.C., attorneys; Mr. Montgomery, on the briefs).

Daniel P. Simpson argued the cause for respondents (Newman & Simpson, LLP, attorneys; Elliott Joffe, of counsel and on the briefs).

PER CURIAM

Plaintiffs Leslie Brooks and Deborah Hughes appeal from a June 25, 2010 order, pursuant to Rule 4:6-2(e), dismissing their complaint against defendants Fetch! Pet Care, Inc., a California

corporation, and Paul Mann. The basis for dismissal was defendants' successful assertion that the parties' franchise agreement required all disputes to be resolved, not by litigation, but by arbitration in California. For the reasons that follow, we reverse and remand.

In granting defendants' application, the trial court relied upon Supremacy Clause principles requiring enforcement of the provision in accord with the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-16. See U.S. Const. art. VI, cl. 2. We conclude, however, in light of the certifications filed by each plaintiff in opposition to the motion, as well as their allegations of fraud in relation to the franchise agreement negotiations, that the dismissal was premature. We consider the question to be one of law; the legal consequences which flow from such decisions are not entitled to any special deference. Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366 (1995).

Plaintiffs did not allege in their complaint and opposition to defendants' motion to dismiss that the arbitration clause was itself unconscionable. Instead, they argued that their general claims of fraud warranted New Jersey being the venue for resolution of their disputes pursuant to the New Jersey Franchise Practices Act, N.J.S.A. 56:10-1 to -29. While we do not accept this specific contention, we note the circumstances

of this case are analogous to those presented in Allen v. World Inspection Network, 389 N.J. Super. 115 (App. Div. 2006), cert. denied, 194 N.J. 267 (2007).

In Allen, the plaintiff franchisees entered into a contract with the defendant franchisor to acquire a home inspection service. Id. at 119. The agreement called for all disputes to be arbitrated in the State of Washington. Ibid. The trial court enjoined defendant from proceeding to arbitration in that jurisdiction, requiring instead that any arbitration take place in New Jersey, on the grounds that the language in the contract was unconscionable per se. Id. at 118, 121. There was no basis from which the court could have determined that the arbitration clause was unenforceable, other than general equitable principles.

On appeal, although we found the provision certainly fell within the purview of the FAA, the matter was nonetheless remanded for further development of the record as to whether the arbitration clause was unconscionable, a defense to enforcement under the federal statute, or even "whether this was a contract of adhesion or whether it was subject to negotiation." Id. at 118, 129.

In this case, the issue of unconscionability was simply not addressed. No record whatsoever was developed as to whether

"[r]easonable persons seeking a potentially lucrative franchise could conclude that the cost of arbitrating disputes in [another jurisdiction] would be outweighed by the economic advantage of having the franchise." See id. at 123.

Although the trial court recognized the applicable preemption principles, the record is insufficient to determine how to apply them. Therefore, we do find the complaint should be reinstated and the matter remanded for purposes of limited discovery. The question of unconscionability remains, and the parties should be afforded the opportunity to explore the question. Once a record is developed as to, for example, whether this contract was one of adhesion, whether the arbitration clause was unconscionable, or whether plaintiffs made a conscious business decision that the agreement's overall benefits outweighed the detriments of its inclusion of an out-of-state arbitration provision, the matter will then be ripe for decision by way of summary judgment or otherwise. We therefore reverse, reinstate the complaint, and remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.