NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5420-09T4

ALLIANCEBERNSTEIN INVESTMENTS, INC.,

Plaintiff-Appellant,

v.

JEFFREY M. ESCHERT,

Defendant-Respondent.

Argued March 16, 2011 - Decided April 11, 2011

Before Judges R. B. Coleman, Lihotz and J. N. Harris.

On appeal from the Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. C-18-10.

Joseph Baumgarten (Proskauer Rose, LLP) of the New York bar, admitted pro hac vice, argued the cause for appellant (Proskauer Rose, LLP, attorneys; Mr. Baumgarten and Adam M. Lupion, (Proskauer Rose, LLP) of the New York bar, admitted pro hac vice, of counsel; Wanda L. Ellert, on the brief).

Andrew I. Hamelsky argued the cause for respondent (White and Williams, LLP, attorneys; Mr. Hamelsky, on the brief).

PER CURIAM

This is an appeal from a final judgment springing from a summary action pursuant to New Jersey's version of the Revised Uniform Arbitration Act of 2000 ("Uniform Arbitration Act"), N.J.S.A. 2A:23B-1 to -32. Plaintiff AllianceBernstein Investments, Inc. (AllianceBernstein) unsuccessfully sought to enjoin arbitration of claims brought by a former employee, defendant Jeffrey M. Eschert,[1] seeking remedies for alleged breach of contract and tortious conduct committed both during and after Eschert's employment with AllianceBernstein.[2] Because we conclude that at the time Eschert commenced the arbitration proceedings the parties were no longer contract partners to an

[1] It appears that Eschert was technically the employee of Alliance Capital Management L.P., which changed its name to AllianceBernstein L.P. For purposes of this appeal we treat all of the Alliance units as a single entity, as do the parties.

[2] We are struck by the role reversal exhibited in this case, as similarly noted in Alliance Bernstein Investment Research & Management, Inc. v. Schaffran, 445 F.3d 121 (2d Cir. 2006):

> For decades, employers and employees have been litigating the issue of the arbitrability of employment discrimination claims. When the issue first arose, employers sought to require employees to arbitrate and employees resisted, preferring to take their claims to court. In this case, the roles are reversed, as the employer seeks to compel an employee to litigate in court, while the employee prefers to pursue his claims in arbitration.
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> [Id. at 122].

agreement to arbitrate, we reverse and order a permanent stay of the arbitration proceedings. This result will not foreclose Eschert from pursuing remedies in an appropriate judicial forum, and we express no opinion about either the quality of Eschert's claims or the strength of AllianceBernstein's defenses.

I.

In order to understand how the parties found their way into arbitration and then into court, we must briefly outline the turbulent history of troubles between the parties. In so doing, we will rely upon the limited factual record presented in the Chancery Division, together with what we can cobble together from the joint appendix presented by the parties. Our goal is to set the stage to answer the question of where the parties' dispute will be resolved, and not to address the substantive merits of their respective cases. Specifically, the scope and effect of a release between the parties is not material to our threshold determination of the arbitrability of the parties' underlying dispute.

A.

Eschert commenced his employment with AllianceBernstein in 1998. His job ended on December 10, 2003, upon the execution of the parties' Separation Agreement and Release (Separation Agreement), which memorialized, among other things, that

Eschert's last day of work was actually one month earlier, on November 14, 2003.

AllianceBernstein was a member of the National Association of Securities Dealers (NASD).[3] While Eschert was employed at AllianceBernstein, he was deemed a "person associated with a member" within the meaning of the applicable NASD rules and by-laws. When his employment began, Eschert executed a Form U-4, "Uniform Application for Securities Industry Registration or Transfer." The Form U-4 contained a mandatory arbitration clause, which provided:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the [NASD] as may be amended from time to time.

The NASD's Code of Arbitration (the "Code") governed NASD arbitrations. Rule IM-10100(a) provided that when members of the NASD and persons associated with members "fail to submit a dispute for arbitration under the [Code] as required," they engage in "conduct inconsistent with just and equitable principles of trade" and violate the Code. Rule 10101 provided

[3] In July 2007, as approved by the Securities and Exchange Commission, the NASD and its member regulation, enforcement and arbitration functions consolidated and merged into the Financial Industry Regulatory Authority (FINRA). See Littman v. Morgan Stanley Dean Witter, 337 N.J. Super. 134, 138-39 (App. Div. 2001) (discussing NASD arbitration procedures).

that the Code "is prescribed and adopted . . . for the arbitration of any dispute, claim, or controversy . . . arising out of the employment or termination of employment of associated person(s) with any member." Rule 10201(a) set forth the matters for which arbitration was required. It provided, in pertinent part:

> Except as provided in paragraph (b) . . . a dispute, claim, or controversy eligible for submission under the Rule 10100 Series between or among members and/or associated persons . . . or arising out of the employment or termination of employment of such associated person(s) with such member, shall be arbitrated under this Code, at the instance of . . . a member against a person associated with a member or a person associated with a member against a member.

As noted, Eschert's employment with AllianceBernstein ended no later than December 10, 2003, upon the implementation of the parties' Separation Agreement. Pertinent to this appeal is Paragraph 14:

> The Parties acknowledge and agree that this Agreement constitutes the complete agreement between them and that no oral modification of this Agreement is permissible. The parties further acknowledge and agree that this Agreement and the terms contained herein supersedes all previous contracts and agreements between or among the Company, Releasees, Releasees' Agents and Employee, and that all such contracts and agreements shall become null and void upon execution of this Agreement except as expressly provided herein.

On December 9, 2003, one day before the Separation Agreement was executed, but several weeks after Eschert's actual last day on the job, AllianceBernstein reported his resignation to the NASD by submitting a Form U-5, "Uniform Termination Notice for Securities Industry Registration." According to Eschert, allegedly unbeknownst to him at the time, the Form U-5 contained a falsely "checked 'yes' box to internal disclosure question 7B, that reads: 'Currently, is, or at termination was, the individual under internal review for fraud or wrongful taking of property, or violating investment-related statutes, regulations, rules, or industry standards of conduct?'" Eschert claims that the Form U-5 further indicated that the internal review began on August 25, 2003, which he contends falsely linked him to a market timing scandal that was simmering at AllianceBernstein.

In March 2006, more than two years after Eschert's departure from employment, AllianceBernstein is alleged to have filed an amended Form U-5 in which the "prior false language [was] reaffirmed and republished, but Alliance[Bernstein] falsely added a conclusion date to the alleged non-existent Eschert investigation —— claiming that the investigation ended on February 1, 2006." Eschert asserts that the timing of the amended Form U-5 was designed "to link Eschert improperly to

[another individual's] problems at Alliance[Bernstein], an issue Alliance[Bernstein] knows Eschert has never had any involvement in nor responsibility for."

B.

In December 2009, Eschert commenced the instant arbitration with the NASD's successor, the Financial Industry Regulatory Authority (FINRA). Pursuant to FINRA Rule 13200(a), similar to former NASD Rule 10201(a), "members" and "associated persons" must arbitrate disputes. "Member" is defined as "any broker or dealer admitted to membership in FINRA." FINRA Rule 13100(o). An "associated person" is defined as "[a] natural person who is registered or has applied for registration under the Rules of FINRA." Id. at 13100(a) & (r). In addition, "a person formerly associated with a member is a person associated with a member." Id. at 13100(r).[4]

The gravamen of Eschert's claims against AllianceBernstein, according to Eschert's Statement of Claim,[5] "stems from a false

[4] We note that the superseded NASD Code of Arbitration did not contain an analogue to the "formerly associated" provision of FINRA Rule 13000(r).

[5] The Statement of Claim touted theories of liability against AllianceBernstein that include tortious interference with prospective economic advantage, trade libel, "prima facie tort," fraud in the inducement, breach of contract, promissory estoppel, and "equitable relief."

[Form] U-5 published in 2003 and an equally false Amended [Form] U-5 published in 2006." In addition to these two tortious acts of defamation, Eschert claimed that AllianceBernstein breached post-Separation Agreement contracts (1) "to correct the [Form] U-5" and (2) "to belatedly expunge Eschert's [Form] U-5 and Amended [Form] U-5." Lastly, Eschert asserted that "to the extent that AllianceBernstein claims that the claims herein raised were included in the limited release, Eschert now brings this claim for fraud in the inducement." Notably, Eschert did not seek to rescind the Separation Agreement, but instead sought multi-million dollar damages plus a mandatory injunction for the expungement of the 2003 and 2006 Form U-5.

C.

In mid-February 2010, AllianceBernstein initiated this summary action by filing an order to show cause and verified complaint pursuant to the Uniform Arbitration Act, N.J.S.A. 2A:23B-5(a). It sought injunctive and declaratory relief to stay the Eschert-initiated arbitration and to permanently enjoin Eschert from proceeding in the arbitral forum.[6]

[6] AllianceBernstein also included a breach of contract claim seeking the return of $20,923.08, which it paid to Eschert pursuant to the Separation Agreement. We assume that this claim was included in the summary action complaint in obeisance to the entire controversy doctrine. R. 4:30A.

After full briefing and oral argument, the Chancery Division dismissed the complaint and discharged the order to show cause. Its rationale for so proceeding was the following:

> The plaintiff has an adequate remedy at law. The arbitration procedure provides for motions to dismiss. Any argument plaintiff has as to the efficacy of the release can be decided in arbitration.
>
> The Court fails to see any irreparable harm by submitting this matter to arbitration.
>
> . . . .
>
> In this case arbitration is required by the industry. Plaintiff's argument regarding the release can be raised in the arbitration proceeding.

A final order memorializing the court's decision was entered on June 30, 2010.[7] This appeal followed.[8]

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[7] The record reflects that the June 30, 2010 order was preceded by an order dated June 15, 2010, which apparently contained scrivener's errors. We are mindful that AllianceBernstein's notice of appeal only references the superseded June 15, 2010 order. We do not consider the reference to the earlier date in the notice of appeal to affect our jurisdiction to review the later order, as the parties have not raised the issue and have focused their full attention upon the substantive issues regarding arbitrability of Eschert's claims. We shall do likewise.

[8] A subsequent order of the Chancery Division denying AllianceBernstein's application for stay pending appeal was entered on August 6, 2010. We denied a stay by order dated September 30, 2010.

II.

A.

The issue on appeal requires the interpretation of the interplay between two contractual arrangements entered into by the parties. The "'[i]nterpretation and construction of a contract is a matter of law for the court subject to de novo review.'" Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 190 (App. Div.), certif. denied, 196 N.J. 85 (2008) (quoting Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998)). A "'trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560, 573 (App. Div. 2007) (quoting Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995)).

B.

We firmly adhere to the principle that "arbitration is . . . 'favored . . . as a means of resolving disputes[.]'" Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 148 (App. Div. 2008) (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 84 (2002)). "The affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism to resolve disputes." Alfano, supra, 393 N.J. Super. at 575. Our

jurisprudence and public policy favor alternative dispute resolution and are consistent with our view that "[l]itigation ought to be a last resort, not a first one." Billig v. Buckingham Towers Condo. Ass'n, 287 N.J. Super. 551, 564 (App. Div. 1996).

A strong public policy favors arbitration as a means of dispute resolution and "'an agreement to arbitrate should be read liberally in favor of arbitration.'" Angrisani, supra, 402 N.J. Super. at 148 (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)); see also Bruno v. Mark MaGrann Assocs., 388 N.J. Super. 539, 545 (App. Div. 2006) (citing Young v. Prudential Ins. Co. of Am., 297 N.J. Super. 605, 617 (App. Div.), certif. denied, 149 N.J. 408 (1997)). "[D]oubts concerning the scope of arbitrable issues must be resolved in favor of arbitration, over litigation." Alfano, supra, 393 N.J. Super. at 576. "An agreement relating to arbitration should thus be read liberally to find arbitrability if reasonably possible." Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254, 257 (App. Div.), certif. denied, 170 N.J. 205 (2001).

C.

Notwithstanding the foregoing well established principles, we also recognize that under both federal and state law,

"'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648, 655 (1986) (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S. Ct. 1347, 1353, 4 L. Ed. 2d 1409, 1417 (1960)). Therefore, "a 'court may not rewrite a contract to broaden the scope of arbitration[.]'" Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001) (quoting Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc., 240 N.J. Super. 370, 374 (App. Div. 1990)). "[A] party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration[.]" First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945, 115 S. Ct. 1920, 1925, 131 L. Ed. 2d 985, 994 (1995).

D.

As the proponent of arbitration, Eschert had the burden to establish the existence of an agreement to arbitrate between himself and AllianceBernstein. "Although arbitration is traditionally described as a favored remedy, it is, at its heart, a creature of contract." Kimm v. Blisset, LLC, 388 N.J. Super. 14, 25 (App. Div. 2006) (internal citations omitted), certif. denied, 189 N.J. 428 (2007). "[T]he duty to arbitrate

. . . [is] dependent solely on the parties' agreement." Cohen v. Allstate Ins. Co., 231 N.J. Super. 97, 101 (App. Div.), certif. denied, 117 N.J. 87 (1989). The determination as to whether such a duty exists "rests solely on the parties' intentions as set forth in the writing." Martindale, supra, 173 N.J. at 92. Moreover, "an arbitration clause may be modified or superseded." Wein v. Morris, 194 N.J. 364, 376 (2008); McKeeby v. Arthur, 7 N.J. 174, 181-82 (1951).

The tension in this appeal arises from the question of the effect of the parties' Separation Agreement upon the generally-obtaining effect of the Form U-4. This is a different question from the one posed by the Chancery Division. We are not concerned about the consequence of the release provisions of the Separation Agreement at this time, and we cannot consign the question of the parties' intention whether to arbitrate to the arbitration panel itself. This is particularly a judicial function in the first instance. See N.J.S.A. 2A:23B-7(b).

In determining whether a particular dispute is encompassed by an arbitration provision, as in construing any other contractual provision, a court's "goal is to discover the intention of the parties[,]" which requires consideration of the "contractual terms, the surrounding circumstances, and the purpose of the contract." Marchak, supra, 134 N.J. at 282; see

also Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 324, 337-38 (App. Div.), certif. denied, 188 N.J. 353 (2006). In making this determination, ordinary contract principles apply. Singer v. Commodities Corp., 292 N.J. Super. 391, 402 (App. Div. 1996).

E.

We have no hesitation in treating the pre-December 10, 2003 obligation to arbitrate as contractually based. See Young, supra, 297 N.J. Super. at 608 (treating the arbitration provision of a Form U-4 together with the scope of the incorporated arbitration rules of the NASD as a "valid and binding agreement"); cf. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2, 111 S. Ct. 1647, 1651 n.2, 114 L. Ed. 2d 26, 37 n.2 (1991). AllianceBernstein does not suggest otherwise. Our focal point, then, is the effect, if any, of Paragraph 14 of the Separation Agreement, which stated that it "supersedes all previous contracts and agreements between or among the Company, Releasees, Releasees' Agents and Employee, and that all such contracts and agreements shall become null and void upon execution of this Agreement."

AllianceBernstein argues that this contract provision, which has not been challenged by Eschert as unconscionable, separately induced by fraud, or the product of duress, is akin

to the provision terminating arbitration in Borough of Atlantic Highlands v. Eagle Enterprises, Inc., 312 N.J. Super. 188 (App. Div. 1998). We find this contention persuasive, even beyond the plain and unambiguous language of the Separation Agreement that rendered "previous contracts and agreements" between the parties "null and void."

In Borough of Atlantic Highlands we enjoined arbitration in the context of a public contract for the construction of an emergency services building. The original contract provided for the resolution of all disputes as follows: "Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration." Id. at 193. Subsequently, in an effort to crystallize and settle their then-pending disputes,

> the parties sat down and resolved their differences, resulting in the preparation and execution of a "Final Agreement" on June 5, 1997, which reads as follows:
>
> > The Borough of Atlantic Highlands and Eagle Enterprises hereby agree that the $12,500 deduction (credit) in favor of the Borough is in full settlement of any and all claims by either party for damages by reason of delay or late completion of the project. Subject only to the $10,000 retainage being held by the Borough pending the satisfactory completion of certain repair items by Eagle, the parties agree that

> Contract is completed and this Agreement constitutes full and final satisfaction of all claims for compensation and neither party has any further claims for compensation or damages against the other.
>
> [Id. at 191.]

We concluded that by entering into the second agreement, the parties "knowingly canceled and settled-out" their differences, and held "this unambiguous language [could not be interpreted] to mean anything other than that the original construction contract was to be regarded as history." Id. at 193. Accordingly we enjoined the arbitration commenced by the contractor on its change order claim for extra work.

In comparable fashion we conclude that the Separation Agreement abrogated the parties' previous agreement to arbitrate. We do so not on the basis of the release language found in Paragraph 7 of the Separation Agreement, but rather upon the unequivocal nullification and cancellation of all prior "contracts and arrangements" between the parties as found in Paragraph 14.

Eschert's effort to trumpet the arbitration proceedings that were validated in Alliance Bernstein Investment Research & Management, Inc. v. Schaffran, 445 F.3d 121 (2d Cir. 2006) is unavailing. In that case, one of Eschert's co-workers was

permitted to arbitrate a claim that AllianceBernstein had violated § 806(a) of the Sarbanes-Oxley Act, 18 U.S.C.A. § 1514A, by terminating his employment because he was a whistleblower. Id. at 127. What distinguishes Schaffran's situation from Eschert's is the existence of the Separation Agreement. In Schaffran, the Second Circuit only had to examine the parties' relationship through the two-layered lens of a Form U-4 and NASD's Code. In the instant case, we tread upon a materially different decisional landscape due to the existence of the superseding Separation Agreement. Our determination in this case is fully consistent with Schaffran as it vitalizes the agreed-upon intention of the parties.

III.

In summary, we reverse and remand to the Chancery Division for the entry of an order permanently enjoining Eschert from engaging in the instant arbitration. To the extent that such arbitration has been completed, both parties are enjoined from seeking to confirm the award, except upon their mutual consent. The protective breach of contract count filed by AllianceBernstein as part of this summary action is dismissed without prejudice. Eschert shall be permitted to file an appropriate action in a suitable jurisdiction if he still seeks vindication of, and remedies for, his alleged grievances.

Questions concerning the tolling or timing of any applicable limitations period are best addressed in the ultimate forum.

Reversed and remanded in accordance with this opinion. We do not retain jurisdiction.