NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2520-11T3

MARJAM SUPPLY CO., INC.,

Plaintiff-Respondent,

v.

COLUMBIA FOREST PRODUCTS CORPORATION, a/k/a COLUMBIA FOREST PRODUCTS, INC.,

Defendant-Appellant,

and

LENOBLE LUMBER CO., INC., AND ALAN FOXMAN,

Defendants.

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Argued November 27, 2012 - Decided December 13, 2012

Before Judges Reisner and Harris.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6532-11.

Joshua A. Zielinski argued the cause for appellant (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Mr. Zielinski, of counsel; Lawrence S. Cutalo, on the brief).

Lawrence J. Sharon argued the cause for respondent (Lebensfeld, Borker, Sussman & Sharon, LLP, attorneys; Mr. Sharon, of counsel; Brett R. Schwartz, on the brief).

PER CURIAM

Defendant Columbia Forest Products Corporation (Columbia) appeals from the January 6, 2012 order of the Law Division denying its motion to dismiss plaintiff Marjam Supply Co., Inc.'s (Marjam) complaint and to compel arbitration. While acknowledging "the national policy favoring arbitration" declared by the Federal Arbitration Act (the FAA), 9 U.S.C.A. §§1 to 3, see Nitro-Lift Technologies, LLC v. Howard, 568 U.S. ___, ___, ___ S. Ct. ___, ___, ___ L. Ed 2d ___, ___ (Nov. 26, 2012) (slip op. at 1), we find no basis to compel arbitration in this case. Hence, we affirm.

I.

We glean the facts from the pleadings and motion record. Marjam is a building materials distributor and supplier. Columbia is reputed to be North America's largest manufacturer of hardwood plywood and hardwood veneer.

Centre Lumber and Plywood Co., Inc. (Centre) was a building materials distributor, which operated in the New York City metropolitan area. Centre qualified as a "Foundation Member" distributor of Columbia products, which required it to purchase most of its domestic hardwood plywood from Columbia.

On March 25, 2011, Marjam acquired Centre's assets, including its vendor and customer lists, good will as a going concern, and inventory of specialty lumber and wood products,

which included a substantial amount of Columbia's products. As part of the acquisition, Marjam hired some of Centre's employees, including defendant Alan Foxman, who was alleged to be Centre's Director of Purchasing and who Columbia purportedly "considered . . . to be, and in fact served as, its 'key customer contact' at Centre and primarily was responsible for Centre's role as a Columbia distributor."

Marjam averred that it purchased Centre's assets principally to acquire Centre's existing Columbia distributorship "within the New York City Metropolitan Area, Long Island, and New Jersey." Four days after Centre was acquired by Marjam, Foxman quit and went to work for defendant LeNoble Lumber Co., Inc. (LeNoble), a competitor within Marjam's newly-acquired market area.

After Marjam and Columbia had been working together buying and selling Columbia's products for about two months,[1] Columbia elevated Marjam to the level of a "Cornerstone Member" distributor. This status was memorialized in a document prepared by Columbia entitled, "Columbia Rewards 2011 Enrollment Agreement" (the Enrollment Agreement). In order to maintain its "Cornerstone Member" status and not fall back to the "Foundation

[1] Between April 1, 2011 and May 20, 2011, Marjam and Columbia participated in eight transactions in the ordinary course of business.

Member" level, Marjam was required to purchase all of its domestic hardwood plywood from Columbia. Among the advantages to Marjam of attaining "Cornerstone Member" status was its ability to earn percentage credits —— called Rewards —— for its purchases from Columbia, which Rewards would be "banked" and then used in the following calendar year to offset the cost of goods purchased by Marjam. If Marjam were to reach certain higher sales levels, it could qualify for Columbia's "Elite Status," which would earn greater percentage credits and larger Rewards.

The Enrollment Agreement was executed by the parties on May 26, 2011. It did not contain a dispute resolution mechanism, an arbitration clause, or a choice of law provision.

Transactions conducted in the ordinary course of business between Columbia and Marjam followed a predictable and routine procedure. Marjam would first request and subsequently obtain a price quotation from Columbia for certain products. If the price were right, Marjam's buyer would then submit a written purchase order to Columbia by facsimile transmission. The purchase order would contain, among other things, the goods' description, quantity, price, expected delivery date, and delivery location.

Columbia's sales representative would then email Marjam's buyer an acknowledgement. The acknowledgement would be reviewed

and if there were any errors, omissions, or discrepancies, Columbia's representative would be alerted. In the absence of any corrective action, Columbia would process and ship the order, and email an invoice —— as an attachment in .pdf format —— to Marjam's accounts payable clerk assigned to the Columbia account.

On page two (or the reverse side) of Columbia's invoices, Columbia set forth its "Terms and Conditions of Sale" (Terms).[2] These Terms included the following provisions:

> 17. Complete Agreement. These Terms and Conditions are the parties' final and complete expression of their agreement regarding the subject hereof. These Terms and Conditions supersede and replace all prior oral and written representations and agreements. To the extent that any of the terms herein differ from Buyer's documents, such documents shall not control and varying terms are hereby rejected.
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> 18. Choice of Law. These Terms and Conditions shall be governed by and construed under the laws of the State of Oregon.

[2] Marjam maintains that the Terms were part of the attachment in only three invoices received from Columbia. Marjam's motion exhibits include the three invoices with the Terms, and the remaining invoices without the Terms. Columbia's motion exhibits contain nine invoices accompanied by the Terms. The motion judge's written opinion acknowledged the disputed number of invoices containing the Terms, but held, "the dispute is not important. The fact that the arbitration clause is not in the Enrollment Agreement is important, since the lawsuit concerns the Enrollment Agreement, not the invoices." We agree that the number of invoices with or without the Terms is not material to the arbitrability of the parties' overarching dispute in this case.

> 19. Arbitration and Attorney Fees. Any and all disputes arising under these Terms and Conditions or arising from any sale of goods by Seller to Buyer, or otherwise, shall be resolved by binding, mandatory arbitration under the authority of the America Arbitration Association. . . . Such arbitration proceeding shall be conducted in Portland, Oregon.

Neither Marjam's purchase order nor Columbia's acknowledgement contained a dispute resolution mechanism, an arbitration clause, or a choice of law provision.

Between April 1, 2011 and June 16, 2011, the parties transacted nine orders, resulting in nine invoices being emailed to Marjam. Only one of the nine transactions occurred after Marjam reached "Cornerstone Member" status. On June 24, 2011, without any prior notice or warning, and without explanation, Columbia terminated Marjam as its distributor within the market area, effective immediately, and appointed LeNoble in Marjam's place.

On August 9, 2011, Marjam commenced this action against Columbia,[3] Foxman, and LeNoble seeking equitable relief, compensatory damages, and punitive damages. The gravamen of Marjam's overall grievance is found in the complaint's

[3] Marjam's complaint pled theories of (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) breach of fiduciary duties, and (4) conspiracy against Columbia.

allegation "that [d]efendants conspired to intentionally, tortiously, and unlawfully cause significant monetary and competitive damage to Marjam." Columbia responded by filing a motion to dismiss and to compel arbitration pursuant to the Terms included in its emailed invoices. Foxman and LeNoble did not participate in the motion, took no position thereon, and have not appeared on appeal.

In its written opinion denying Columbia's motion, the Law Division noted that "the arbitration clause is the last clause in the [Terms], and is written in exceedingly small print." Furthermore, the court "fail[ed] to see why that clause contained in the invoices constituted notice to Marjam that it would be forced to arbitrate with Columbia when it entered into the Enrollment Agreement."

The motion court further declared that the Enrollment Agreement served as "a more important document in terms of the relationship between the parties than the invoices." It held that the Enrollment Agreement and invoices related to different subject matters, or at least there was an "important difference" between the two in the "breadth of the subject matter." The Enrollment Agreement was concerned with "very important matters involving huge amounts of money. Conversely, the invoices concern much smaller amounts of money and much smaller

purchases." Also, the court noted that the Enrollment Agreement "concerns an expected maximum 'period of two years.' The invoices cover a month of sales. Thus, there is a vast difference between the length of time the competing documents cover."

Lastly, after applying New Jersey, not Oregon, law, the court observed that the FAA "is not controlling because the Act would only be relevant to the invoices, and this dispute involves neither the invoices nor the goods involved in the invoices." Accordingly, a memorializing order denying Columbia's twin-headed motion was entered, and this appeal followed.

II.

Columbia asserts that the FAA applies to the present matter, and that the court should compel arbitration. We agree with the first assertion, but not with the second.

> Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, which applies to the contract documents in this case, reflects both "a liberal federal policy favoring arbitration," Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785 (1983), and "the fundamental principle that arbitration is a matter of contract." Rent-A-Center, W., Inc. v. Jackson, 561 U.S. ___, ___, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403, 410 (2010). The United States Supreme Court recently reaffirmed those key principles in

> [AT&T Mobility LLC v. Concepcion, 563 U.S. ___, ___, 131 S. Ct. 1740, 1745 179 L. Ed. 2d 742, 751 (2011)] (quoting these passages from Moses H. Cone and Rent-A-Center).
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> [NAACP of Camden County East v. Foulke Management Corp., 421 N.J. Super. 404, 424 (App. Div.), certif. granted, 209 N.J. 96 (2011).]

State law is not to the contrary. Ibid; see also Frumer v. Nat'l Home Ins. Co., 420 N.J. Super. 7, 13 (App. Div. 2011) ("'New Jersey law comports with its federal counterpart in striving to enforce arbitration agreements.'") (quoting Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254, 257 (App. Div.), certif. denied, 170 N.J. 205 (2001)).

When a motion to compel arbitration is filed, it "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650, 106 S. Ct. 1415, 1419, 89 L. Ed. 2d 648, 656 (1986). Further, "doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration, over litigation." Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560, 576 (App. Div. 2007).

When a motion to compel arbitration is filed, a court conducts "a two-step inquiry into (1) whether a valid agreement to arbitrate exists and (2) whether the particular dispute falls

within the scope of that agreement." Trippe Mfg. Co. v. Niles Audio Corp., 401 F.3d 529, 532 (3d Cir. 2005). "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). "[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).

The determination as to whether such a duty exists "rests solely on the parties' intentions as set forth in the writing." Martindale v. Sandvik, Inc., 173 N.J. 76, 92 (2002). Accordingly, it is a judicial function to decide whether an agreement to arbitrate exists or whether a controversy is subject to an agreement to arbitrate. See Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 189 N.J. 1, 12-13 (2006), cert. denied, 549 U.S. 1338, 127 S. Ct. 2032, 167 L. Ed. 2d 763 (2007). In so doing, "a 'court may not rewrite a contract to broaden the scope of arbitration[.]'" Garfinkel v. Morristown

Obstetrics & Gynecology Assocs., P.A., 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)).

As the proponent of arbitration, Columbia had the burden to establish the existence of an agreement to arbitrate disputes relating to the Enrollment Agreement with Marjam. In our review, because the issues involve contract interpretation and the application of decisional law to the facts of the case, the standard of review is de novo. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc., 427 N.J. Super. 45, 57 (App. Div.), certif. denied, ___ N.J. ___ (2012). Thus, the "'trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Frumer, supra, 420 N.J. Super. at 13 (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Here, the record convincingly reveals that Marjam never agreed to submit disputes relating to the Enrollment Agreement to arbitration. The scope of the Terms —— including the arbitration clause —— is unambiguous: "These Terms and Conditions are the parties' final and complete expression of their agreement regarding the subject hereof." The "subject

hereof" concerns the particular purchase evidenced by the invoice, nothing more and nothing less. Disputes revolving around such things as the quality and quantity of the identified goods, warranties related thereto, price and payment terms, and delivery issues would indubitably be resolved in an arbitral forum. There is not even a trace of evidence, however, that disputes emanating from the Enrollment Agreement were subject to a similar mechanism for resolution.

Columbia nevertheless urges that because the Terms' arbitration clause itself is so broad and expansive —— "[a]ny and all disputes arising under these Terms and Conditions or arising from any sale of goods by Seller to Buyer, or otherwise, shall be resolved by binding, mandatory arbitration" —— it subsumes the Enrollment Agreement-related claims advanced against Columbia in Marjam's complaint. We disagree.

Columbia contends that Marjam's theories of liability embrace the language of the arbitration clause. Moreover, it suggests that "Marjam's factual allegations of wrongful conduct by Columbia, i.e., its ability, or alleged inability to purchase goods from Columbia, touch matters covered by the sales contracts between the parties." There is no reasonable or logical support for such suggestion in the record. Marjam's factual predicate for its contract and tort claims against

Marjam assert wrongful conduct that arises not from discrete, completed transactions evidenced by invoices, but rather from alleged global conduct that destroyed or hampered Marjam's putative rights under the Enrollment Agreement. The invoices are completely irrelevant to the present dispute between the contract partners.

Columbia specifically insists that the Terms' use of "arising under" language requires arbitration. We disagree that arbitration is mandated, but we agree with Columbia that well-developed principles of contract interpretation support an expansive application of such words. "'[C]ourts have generally read the terms "arising out of" or "relating to" [in] a contract as indicative of an "extremely broad" agreement to arbitrate any dispute relating in any way to the contract.'" Curtis v. Cellco P'ship, 413 N.J. Super. 26, 37-38 (App. Div.) (quoting Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div. 2010)), certif. denied, 203 N.J. 94 (2010).

Nevertheless, it is a far cry from liberally interpreting an arbitration provision to being satisfied that the factual matrix of the parties' dispute actually touches and concerns the Terms' arbitration clause found in the invoices. The factual connection between what the parties will litigate and those invoices (and their embedded Terms) is illusory.

Lastly, we are unwilling to treat the Terms' "otherwise" reference as a bargained-for tractor beam that attracts and pulls into its orbit every controversy imaginable, including those emanating from the Enrollment Agreement. This insubstantial argument, even under the auspices of the FAA's broad spectrum, is insufficient to warrant our jettisoning of the parties' intent. We have positive assurance that the Terms' arbitration clause neither covers nor is applicable to the dispute in this matter.

Affirmed.[4]



[4] In light of this disposition, it is unnecessary to address Columbia's arguments concerning (1) applicable provisions of New Jersey's version of the Uniform Commercial Code, N.J.S.A. 12A:1-101 to 12A:10-106, and (2) choice of law principles.