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SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-00941-12T3

GLEND A UNGER,

Plaintiff-Respondent,

v.

JONATHAN RUBIN and SMITH

FARGO, LLC,

Defendants-Appellants,

and

MARK ENGEL, RYE OAKS, LLC,

BERNARD RUBIN, OVADI MALCHI, and

PLYMOUTH PARK TAX SERVICES, LLC,

Defendants.

May 8, 2014

Argued September 11, 2013 –
Decided

Before Judges Grall, Nugent and
Accurso.

On appeal from the Superior
Court of New Jersey, Chancery
Division, General Equity Part, Ocean
County, Docket No. C-75-11

Joseph L. Mooney, III, argued the
cause for appellants.

Paul V. Fernicola argued the cause
for respondent (Paul V. Fernicola &
Associates, LLC, attorneys; Mr.
Fernicola, of counsel and on the
brief; Robert E. Moore, on the brief).

PER CURIAM

The main question presented in this appeal involves the scope of an arbitration agreement. Plaintiff Glenda Unger and defendants Jonathan Rubin and Smith Fargo, LLC, agreed to arbitrate their dispute over ownership of land in Lakewood, New Jersey, before a Rabbinical Court in Monsey, New York. The Monsey Rabbinical Court ruled that a Lakewood Rabbinical Court that had previously addressed the parties' dispute had continuing jurisdiction to render a final decision. In this appeal from Chancery Division orders confirming the Lakewood Rabbinical Court's award, defendants contend that they did not agree to arbitrate the case before the Lakewood Rabbinical Court, that the Monsey Rabbinical Court had no authority to

refer the matter to the Lakewood Rabbinical Court, and that the Chancery Division erred by ruling to the contrary. We disagree and therefore affirm.

I.

The parties' dispute involves two lots in Block 538 on the tax map of the Township of Lakewood (the Property). Plaintiff and defendant Smith Fargo, LLC (the LLC), whose managing members are defendants Jonathan Rubin and Mark Engel, both claim to have purchased the Property from Parcher H. Smith.

Plaintiff was first in time, contracting with Smith in May 2002 to purchase the Property for \$185,000. After signing the contract, plaintiff paid more than \$68,000 towards the purchase price and also paid real estate taxes in excess of \$35,000. Smith, however, refused to convey the Property. During the ensuing two years, plaintiff filed an action in the Chancery Division to compel specific performance, and filed various applications to compel specific performance in bankruptcy proceedings that Smith had commenced. Plaintiff was unsuccessful.

While Smith's bankruptcy proceedings continued, Engel contracted to purchase the Property from Smith in October 2004 for \$500,000.00, subject to the bankruptcy court's approval.¹ The bankruptcy court gave its approval on December 8, 2004. Two days earlier, however, on December 6, 2004, plaintiff, Engel, and Rubin had been summoned before Rabbi Gavriel Finkel of the Lakewood Rabbinical Court, or Beth Din. That meeting was the first of the events that culminated in the arbitration award that is the subject of this appeal.

Following the meeting, Rabbi Finkel issued this written directive:

Moshe [Mark] Engel should not pursue his contract in court until the court decides the validity of Glenda Unger's contract. Only after that is decided should Moshe Engel pursue his.

Despite the Lakewood Rabbinical Court's directive, in January 2005 the LLC purchased the Property from Smith for \$500,000.00. Five days later, in a handwritten decision dated January 23, 2005, Rabbi Finkel declared that plaintiff and Engel had gone before him concerning their dispute and had agreed to and signed a "psak" to his decision, which read:

1. Mark Engel as Rye Oaks may purchase the [P]roperty from Mr. Smith.

2. However, he should be aware that if Glenda Unger prevails in the case against Parcher Smith and the court finds her contract was valid and Parcher Smith breached said contract, then Mark Engel must sell the [P]roperty to Glenda Unger for her contract price. If the court decides that her contract is valid but not the price, then Mark Engel can sell it to Glenda for the price he paid.

3. If Mark Engel decides not to take the risk and not buy the [P]roperty, Glenda Unger can buy it. However, she must pay to Mark Engel any money he has forwarded to Parcher Smith and now stands to lose by not closing.

NOTE: This decision is not meant to interfere in any way with the proceedings of the court system. It is merely an answer to a query by said parties as to the religious law pertaining to their case.

Rabbi Finkel's decision would become a central issue at a later arbitration before the Monsey Rabbinical Court.

In several clarifications, amendments, and supplements to his original decision, issued over the next ten months, Rabbi Finkel determined that defendant Rubin was bound by his decision because Rubin had signed the parties' arbitration agreements. The Rabbi also wrote in a clarification: "Both sides should understand they can't pursue the 'validity question' with endless appeals. The Beth Din will decide, when the court has ruled, and thus bring the matter to a close."

In August 2005 the parties met again with Rabbi Finkel, who thereafter issued a written decision in which he stated that his previous decisions and clarifications remained in force and were binding on the parties; that "[t]he meaning of the term valid contract means valid and enforceable on its own merits"; and that the Lakewood Rabbinical Court's preference was for the civil courts to decide the validity of the contract between plaintiff and Smith.

Following additional motion practice in bankruptcy court, Rabbi Finkel issued this ruling on October 16, 2005:

After carefully analyzing all aspects of this case, it is the opinion of the Rabbinical Court that Mark Engel and Jonathan Rubin a/k/a Rye Oaks transfer and assign all of their rights and interests to said Property to Glenda Unger on the same terms, conditions and price, which they have with Parcher Smith. This is effective immediately. The Rabbinical Court will decide at a later date whether Engel and Rubin are required to reimburse Unger for her legal fees incurred in this matter.

Plaintiff filed an action in the Chancery Division to confirm Rabbi Finkel's arbitration award. Following a plenary hearing, the court issued a written opinion on July 19, 2007, denying her application. Noting that courts disfavor bifurcation of disputes between judicial resolution and

arbitration, the court determined that "the arbitration in this case does not act as an alternative dispute resolution mechanism, but rather a supplement to the litigation in the Bankruptcy Court and this court since Rabbi Finkel relies on the civil courts to determine the validity of plaintiff Unger's contract."

The court concluded that the Lakewood Rabbinical Court's decision issued by Rabbi Finkel on January 23, 2005, was not an award, and that the supplements and clarifications Rabbi Finkel wrote after January 23, 2005, were invalid under the New Jersey Arbitration Act (NJAA), N.J.S.A. 2A:23B-1 to -32. The court concluded that "the rights of . . . plaintiff and defendants with respect to their contracts for the purchase from Parcher Smith of . . . [the Property] have been fully adjudicated in the Bankruptcy proceedings which took jurisdiction over this matter."

The parties did not appeal the Chancery Division's July 2007 decision. Yet, despite that decision, and despite the bankruptcy court having approved the sale of the Property from Smith to Engel, plaintiff, Rubin, and the LLC subsequently entered into a "Contract of Arbitration" to resolve their dispute.

There is little information in the record about what happened between the Chancery Division's July 19, 2007 decision and June 2, 2008, when the parties signed their Contract of Arbitration. Plaintiff, defendant Rubin, the LLC, and defendant Rubin as attorney-in-fact for Mark Engel, signed the arbitration contract. The contract provides in pertinent part:

We the undersigned hereby
affirm that we have accepted the
following Rabbinical Judges, Rabbi
Rav Shlomo Zalman Kaufman

as Borer for the Plaintiff, Rabbi
Rav Ruvain Alt as Borer for the
Defendants, and Rabbi Leib
Landesman as the Sholish, to form
an expert Rabbinical Court to

adjudicate all disputes between us, including, but not limited to, the Halachic validity of all decisions and interpretations previously issued by Rabbi Gavriel Finkel [of Lakewood, New Jersey] regarding . . . [the Property]; compliance issues pertaining to the above; adjudication by the current Bais Din of the abovementioned Property; and all related matters; according to the Court's interpretation of what the Halachah would allow in this case. The facts of the case will be determined by the Court's perception. The decision of the Rabbinical Court will be based on majority opinion

We obligate ourselves to carry out their decision without change or delay. We understand that in the eventuality that the Bais Din feels that one party is not cooperating in the presentation of the case in any way, the Bais Din reserves the right to do whatever it deems necessary in order to issue a verdict regardless, and to issue a verdict. The right of appeal is limited to presentation of new arguments or new evidence before this court and not before any other forum, rabbinical or secular.

We also obligate ourselves that if one party goes to another Court (Rabbinical or Civil) to dispute the findings of this Rabbinical Court, that party shall pay all legal costs of both sides of that action regardless of the outcome of that action. Notwithstanding the above, we waive any legal or *halachic* rights we may have to go to another court (Rabbinical or Civil); we understand that it is forbidden by Jewish law

and by our signatures to go to another court (Rabbinical or Civil).

This document shall be legally binding as an arbitration agreement in any Court, whether Rabbinical or Civil. The final judgment may be entered in Civil Courts of NY State or any civil court of competent jurisdiction.

....

Both parties accept that its signature (below) places the signer under the jurisdiction of this Rabbinical Court.

....

Only the Bais Din's interpretation of this contract of arbitration or the verdict will be considered valid. Additionally, the Bais Din is empowered to amend, add, change and issue interim decisions at its discretion.

With our own free will and with total awareness, we bind ourselves with a binding commitment to accept all the above stipulations after having had the opportunity of consulting with attorneys and rabbinical counsel.

[(first alteration in original)
(emphasis added).]

Following three days of hearings, the Monsey Rabbinical Court issued its decision. The decision began by recounting that plaintiff, defendants, and Engel

appeared before this Bais Din ([R]abbinical [C]ourt) regarding all issues concerning the Halachic validity and or any decisions and interpretations previously issued by Rabbi Gavriel Finkel . . . regarding . . . [the Property]; compliance issues pertaining to the above; adjudication by the current Bais Din of the aforementioned [P]roperty; and all . . . matters[.]

The award further recites that "[t]he parties hav[e] warranted and represented to each other and to the Rabbinic Court, that each of them fully understand[s] the Rabbinic contract of arbitration, and their rights and obligations incumbent upon each of them[.]" The award concludes:

The Bais Din accepts the Plaintiff's position that Rabbi Gavriel Finkel of Lakewood, New Jersey, the original arbitrator voluntarily chosen by both parties, has viable and continuous jurisdiction on all matters regarding this case. Therefore, if he so decides that both parties must return to him for completion, clarification and resolution of all related issues, they are obligated to comply.

However, in the event that Rabbi Finkel will decide on any aspect of this case that he lacks jurisdiction, or the ability to rule, this Bais Din then retains jurisdiction over those matters.

Three months later, on August 3, 2009, Rabbi Finkel issued a decision that stated:

1. Smith Fargo, LLC (Jonathan Rubin and Mark Engel) must sell . . . [the Property] to Glenda Unger for the price they paid, \$500,000.

This sale must be done immediately. Seller has 30 days to deliver unencumbered title and deed with closing to take place within 60-90 days thereafter.

2. Jonathan Rubin and Mark Engel are responsible to pay Glenda Unger in the amount of \$171,830 for legal fees.

Thereafter, on April 8, 2010, Rabbi Finkel wrote to plaintiff and granted her permission to enforce the August 3, 2009 decision in a civil court.

On April 29, 2011, plaintiff filed a "Verified Complaint for Order to Show Cause and Temporary Restraints" seeking an order "[c]onfirming the arbitration award dated August 3, 2009 by the Rabbinical Court of Lakewood in favor of [plaintiff]"; compelling Rubin, Engel, and the LLC to sell the Property to plaintiff for \$500,000; restraining defendants from selling, transferring, or encumbering the property; and other relief.

Rubin filed an opposing certification. He "freely admit[ted] that [he] entered into the agreement to arbitrate before the Monsey Court." He asserted that the "award" of the Monsey Rabbinical Court could not be confirmed "because, simply, no award was made." He also pointed out that plaintiff was not seeking to enforce the Monsey award, but rather the Lakewood award.

Rubin further asserted that at no time after agreeing to arbitrate in Monsey did he agree to arbitrate in front of the Lakewood Rabbinical Court. In fact, he stated that he "never appeared before Rabbi Finkel after the proceedings in Monsey and [he] ha[d] no basis for knowing how it is that Rabbi Finkel assessed approximately \$170,000.00 in legal fees against [him] without notice to [him] or [his] participation."

On June 10, 2011, the Chancery Division heard oral argument on plaintiff's order to show cause, and made a partial decision. The court found "that the parties . . . agreed to arbitrate the matter before the [B]ais [D]in in Monsey." The court further concluded that the Monsey Rabbinical Court's determination "included referring the matter back to Rabbi Finkel which I am satisfied was within their authority." However, because the court found it could not resolve the parties' dispute over whether Rabbi Finkel satisfied the procedural requirements of the Monsey Rabbinical Court, the Chancery Division gave Rubin "the opportunity to petition the Monsey [C]ourt for clarification as to whether or not what occurred with Rabbi Finkel was permitted in accordance with their referral."

The Chancery Division also ordered that if Rubin failed to petition the Monsey Rabbinical Court within thirty days, Rabbi Finkel's decision would be final and defendants would be deemed to have waived their right to challenge Rabbi Finkel's decision. The court reiterated that the Monsey Rabbinical Court had the authority to refer the matter back to Rabbi Finkel: "That's clearly within the parameters of [the parties'] agreement[.]"

Rubin filed an appeal from the June 10, 2011 order implementing the Chancery Division's decision. In his notice of appeal, he misstated that all issues as to all parties before the trial court had been disposed of. We subsequently granted plaintiff's motion to dismiss the appeal as interlocutory.

In August 2011, plaintiff filed a motion for entry of final judgment confirming the arbitration award. In support of that motion, plaintiff's attorney certified that Rubin had not petitioned the Monsey Rabbinical Court within the time directed by the Chancery Division. Counsel attached a letter from one of the members of the Monsey Rabbinical Court stating that, though it had "requested on a number of occasions that all the parties appear for a hearing, and Rabbi Finkel and [plaintiff] did indeed relay their readiness to appear, . . . Mr. Rubin has not complied." Alleging that Rubin "clearly intended to frustrate the purpose of the [Chancery Division] Order," and had violated the order, counsel requested that the court enter a final judgment confirming the arbitration award.

Rubin opposed the motion, filing a certification in his individual capacity and also in his capacity as a principal of the LLC. He claimed "that at no time after the matter was referred back to Rabbi Finkel by the Monsey Rabbinical Court did Rabbi Finkel require me or give me notice to appear for a hearing concerning the matters before him, including the assessment of attorney fees."

Although Rubin did not appear at any hearing before Rabbi Finkel, he nevertheless "note[d]" that no evidence concerning attorney's fees was presented at the hearing before the Monsey Rabbinical Court. He attached to his certification a copy of a July 7, 2011 facsimile to the Rabbis of the Monsey Rabbinical Court requesting that it "determine if Rabbi Finkel was in compliance with the May 18th, Psak of this Bes Din when he issued his August 3rd, 2009 verdict with out [sic] ever speaking or notifying me."

Rubin also claimed that the letters from the court concerning his refusal to cooperate were sent by one member only and were based on hearsay. He alleged, among other things, that the Monsey Rabbinical Court would not hear his petition unless he agreed to withdraw his appeal, which at the time was pending before us. Rubin represented in his certification that he would not withdraw his appeal, but was willing to appear before the Monsey Rabbinical Court

under protest "[i]f the Monsey Rabbinical Court will give me a number of alternative dates (3-5) to appear with sufficient advance notice[.]" Rubin further asserted that he would protest the Monsey Rabbinical Court's practice of permitting Rabbi Finkel to testify without Rubin being present.

In response, plaintiff's attorney submitted letters, signed by the members of the Monsey Rabbinical Court stating that "if Mr. Rubin is willing to presently appear at this Bais Din within the context of the original arbitration contract, the Bais Din would schedule a date for a hearing, convenient for all parties, to hear the contested issues between the parties." Rubin filed a reply certification emphasizing that none of the Rabbis had denied saying that they would not hear the matter unless he withdrew his appeal. He disputed some of the issues in the letters signed by the Rabbis.

Specifically, Rubin denied an allegation that he refused to appear unless the court changed the format of the hearing. Rather, he said, in response to a question from one of the Rabbis as to whether Rubin would appear if the court did not change its format, that he "would make that decision after the tribunal made its determination as to the format of the proceedings."

The Chancery Division action concluded on August 24, 2012, when the court entered a final judgment against Rubin, Engel, and the LLC confirming the August 3, 2009 award of Rabbi Finkel and requiring the LLC to deliver unencumbered title to plaintiff within thirty days. The court further ordered that Rubin and Engel were responsible to pay plaintiff legal fees in the amount of \$171,830. The following month defendants filed an application to alter the judgment or stay it pending appeal. The court denied defendants' application. Rubin and the LLC filed this appeal.

Defendants present the following points for our consideration.

POINT I

THE AWARD ENTERED BY THE LAKEWOOD RABBINICAL COURT ON AUGUST 3, 2009 MAY NOT BE CONFIRMED UNDER THE ARBITRATION ACT BECAUSE THERE WAS NO AGREEMENT TO ARBITRATE BEFORE THE LAKEWOOD RABBINICAL COURT.

POINT II

THE "AWARD" ENTERED BY THE MONSEY RABBINICAL COURT ON MAY 18, 2009, COMPELLING THE DEFENDANTS TO ARBITRATE THEIR DISPUTE BEFORE THE LAKEWOOD RABBINICAL COURT WAS NEVER CONFIRMED AND AS SUCH IS UNENFORCEABLE. THEREFORE THE DEFENDANTS WERE UNDER NO OBLIGATION TO ARBITRATE THEIR DISPUTE BEFORE THE LAKEWOOD RABBINICAL COURT THUS RENDERING THE AWARD OF THE LAKEWOOD RABBINICAL COURT A NULLITY.

POINT III

THE AWARD ENTERED BY THE MONSEY RABBINICAL COURT IS INVALID AS IT RESTS ON A THEIR [sic] DETERMINATION THAT AN AGREEMENT TO ARBITRATE BEFORE THE LAKEWOOD RABBINICAL COURT EXISTS.

POINT IV

THE "AWARD" OF THE
MONSEY RABBINICAL COURT IS
INVALID AS AN "AWARD"
COMPELLING THE PARTIES TO
ARBITRATE THEIR DISPUTE
BEFORE THE LAKEWOOD
RABBINICAL COURT AND AS
SUCH ANY AWARD ENTERED BY
THE LAKEWOOD RABBINICAL
COURT IS INVALID.

POINT V

THE "AWARD" OF THE
MONSEY RABBINICAL COURT
MAY NOT BE CONFIRMED
BECAUSE OF VIOLATION OF
N.J.S.A. 2A:23B-15 AS PROVIDED
IN N.J.S.A. 2A:23B-23a.(3).

POINT VI

THE AWARD OF THE
LAKEWOOD RABBINICAL COURT
MAY NOT BE CONFIRMED
BECAUSE OF VIOLATION OF
N.J.S.A. 2A:23B-15 AS PROVIDED
IN N.J.S.A. 2A:23B-23a.(3).

Defendants agree that "it is uncontroverted that the parties entered into a written agreement to arbitrate their dispute before the Monsey Rabbinical Court." They do not dispute that their agreement is governed by the NJAA, which "governs all agreements to arbitrate made on or after

January 1, 2003," with certain exceptions inapplicable here. N.J.S.A. 2A:23B-3(a). Defendants contend in their first and third points, however, that they did not agree to arbitrate before the Lakewood Rabbinical Court. They argue that because the NJAA applies only to a controversy that is subject to an agreement to arbitrate, and because there was no agreement to arbitrate before the Lakewood Rabbinical Court, the NJAA does not apply to their dispute with plaintiff. Consequently, the Chancery Division "confirmed the award entered in the Lakewood Rabbinical Court in the absence of an agreement to arbitrate the dispute before the Lakewood Rabbinical Court and thus committed error."

Plaintiff responds that defendants agreed to arbitrate their dispute before the Monsey Rabbinical Court and that the scope of that agreement included the question of whether the Lakewood Rabbinical Court had viable and continuous jurisdiction on all matters.

Under the NJAA, "[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." N.J.S.A. 2A:23B-6(b). If the parties acknowledge that an agreement to arbitrate exists, or if the court determines that such a clause exists, the "court then must evaluate whether the particular claims at issue fall within the clause's scope." Hirsch v. Amper Financial Servs., LLC, 215 N.J. 174, 188 (2013). The "court must look to the language of the arbitration clause to establish its boundaries." Ibid.

Here, the parties agreed to submit to the Monsey Rabbinical Court "all disputes" between them, "including, but not limited to, the Halachic validity of all decisions and interpretations previously issued by Rabbi Gavriel Finkel [of Lakewood, New Jersey] regarding . . . [the Property]." (first alteration in original). The parties also agreed to arbitrate "compliance issues pertaining to the above." That language could hardly have been clearer. Unger, Rubin, and the LLC, by signing the agreement, agreed to have the Monsey Rabbinical Court determine the "Halachic validity" of Rabbi Gavriel Finkel's decision. The Monsey Rabbinical Court did exactly

what the "Contract of Arbitration" required the three rabbis to do. They determined that Rabbi Finkel's decisions were valid.

Defendants assert that the arbitration award is invalid because they never agreed to arbitrate before the Rabbinical Court of Lakewood. They did agree, however, to arbitrate before the Monsey Rabbinical Court and, as part of that arbitration, have the Monsey Rabbinical Court determine the validity of the Lakewood Rabbinical Court's previous rulings concerning the parties' obligations with respect to the Property.

Defendants' remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following comments. Defendants' remaining arguments could have been resolved on an adequate factual record had Rubin timely petitioned the Monsey Rabbinical Court as directed by the trial court, and participated in good faith in the additional Rabbinical proceedings. The record supports the conclusion that Rubin did not proceed in good faith, but rather frustrated those proceedings and did what he could to continue to prolong the dispute over the Property. The trial court did not abuse its discretion when it ordered Rubin to petition the Monsey Rabbinical Court within thirty days. Nor did the trial court abuse its discretion when it determined, implicitly and explicitly, that Rubin had not complied with its order.

Affirmed.

¹ Although the record is not entirely clear, it appears that Engel was a member of defendant Rye Oaks, LLC, when he entered into the agreement to purchase the Property from Smith.

We infer from the proceedings before the Rabbinical Courts that Rye Oaks may have been the purchaser in the contract involving Smith and Engel. The parties have not included the agreement between Smith and Engel in the record. Smith later sold the Property to Smith Fargo, LLC.

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