(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

JESSICA DELLE FAVE, a/k/a

EUNA CHOI,

Plaintiff-Respondent,

v.

THE NEIMAN MARCUS GROUP,

MARVETTE GATTMAN,

Defendants-Appellants.

May 13, 2014

Submitted April 29, 2014 – Decided

Before Judges Ostrer and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6536-13.

Jackson Lewis LLP and Dana G. Weisbrod (Jackson Lewis LLP) of the New York and Georgia bar, admitted pro hac vice, attorneys for appellants (Tara L. Touloumis and Ms. Weisbrod, on the briefs).

Law Offices of Louis A. Zayas, L.L.C., attorneys for respondent (Louis A. Zayas and Christina Vergara, on the brief).

PER CURIAM

Defendants, The Neiman Marcus Group, Inc. (NMG)[1] and Marvette Gattman, a NMG employee, appeal from a November 22, 2013 Law Division order that denied their motion to dismiss plaintiff's employment discrimination complaint, and compel arbitration. Having reviewed defendants' arguments in light of the record and governing principles of law, we reverse.

I.

Plaintiff is a Korean-American female. According to her complaint, NMG hired her in March 2012 as a "senior visual manager" at the Neiman Marcus department store in Short Hills.

Plaintiff was terminated in January 2013. In her August 2013 complaint, plaintiff alleged she was the victim of race-based discrimination, a hostile work environment, and retaliation for various whistle-blowing activities. She asserted claims under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, (Count One); and the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, (Counts Two, Three and Four). Plaintiff also contended she suffered retaliation for filing a workers' compensation claim, (Count Five). See N.J.S.A. 34:15-39.1. Plaintiff claimed that NMG negligently supervised and trained the supervisor responsible for many of the wrongs against her, (Count Six). Plaintiff sought compensatory and punitive damages and demanded a jury trial.

In support of their motion to dismiss in lieu of an answer, defendants rely on a free-standing, thirteen-page, Mandatory Arbitration Agreement (MAA), and the terms of the NMG Associate Handbook (Handbook), which also contained a conspicuous arbitration provision. Defendants assert that plaintiff accepted both the MAA and the Handbook.

The MAA expressly states that it covers "employee claims" based on: (1) "[d]iscrimination or harassment on the basis of race, color, gender . . . national origin, or any other unlawful basis"; (2) "[r]etaliation for filing a protected claim for benefits (such as workers' compensation) or exercising rights under any statute"; and (3) "[a]ny common law tort claim, including, but not limited to, wrongful discharge, malicious prosecution . . . negligence . . . or 'whistleblowing.'" It also provides that "[a]ll other employment-related legal disputes, controversies, or claims arising out of . . . employment or cessation of employment" with NMG were subject to arbitration. The MAA expressly governs claims by NMG against its employees.

The first page of the arbitration agreement explained, in capital and italicized letters, that all employee disputes were subject to mandatory arbitration. The first page stated:

> This agreement for mandatory arbitration is not optional. It is

> mandatory and a condition and term of your employment. If you are an employee on or after July 15, 2007, which is the effective date of this agreement . . . you are deemed to have accepted and agreed to the mandatory arbitration agreement by coming to work after that date. If you accept employment with the company after the effective date, you are deemed to have accepted and agreed to this mandatory arbitration agreement by accepting a job at the company.

The agreement repeated elsewhere that all covered claims were required to be "resolved exclusively through final and binding arbitration." (emphasis omitted).

The MAA required third-party mediation as a pre-condition to arbitration of any dispute.

> No arbitration may be commenced by any party until a mediation is conducted before a neutral mediator appointed by either AAA or JAMS, whichever agency the initiating party may select. The mediator's fee and other association charges for mediation shall be borne by the Company. To initiate mediation, the initiating party must comply with the selected agency's rules. The AAA can be reached by calling 972-702-8222, or reviewing their website at www.adr.org. JAMS can be reached by calling 214-720-6010, or reviewing their website at www.jamsadr.com. The mediation rules of these independent agencies set forth not only what must be included in a Demand for Mediation, but also the procedures that will govern mediation.

To reflect her acceptance, on March 12, 2012, plaintiff signed a separate, one-page document entitled, in bold all-capital lettering: "THE NEIMAN MARCUS GROUP, INC. MANDATORY ARBITRATION AGREEMENT ASSOCIATE ACKNOWLEDGEMENT FORM" (MAA Acknowledgement). The form stated that plaintiff's signature represented her acknowledgement and affirmation that she received and had the chance to review the MAA. She understood it was, in bold type, an "important legal document," which required her "to submit all complaints[,] disputes, and legal claims . . . against the Company" to, in bold type, "binding arbitration." Plaintiff also understood that she and NMG were "waiving the right to a trial by jury or to a trial before a judge," also printed in bold type. Finally, plaintiff understood the MAA was "mandatory" — in bold, and was "a condition and term of [her] employment."[2]

Plaintiff also executed a document entitled, in bold, all-capital letters, "THE NEIMAN MARCUS GROUP, INC. ASSOCIATE ACKNOWLEDGEMENT FORM" (Handbook Acknowledgment). The form stated that plaintiff received and had the opportunity to review the NMG Associate Handbook. By signing the form, plaintiff acknowledged that she:

> [R]eceived and had an opportunity to review The NMG Binding Arbitration Program, which sets forth the terms and conditions of NMG's binding arbitration plan which provides that arbitration is the exclusive means of resolving any and all disputes or claims I or [NMG] may have against each other, arising out of or connected in any way with my employment with NMG, in lieu of a judge or jury trial. [NMG] has advised me that if I accept or continue employment with [NMG], I am deemed to have accepted the Binding Arbitration Program.

The Handbook also includes an explanation of NMG's mandatory four-step, internal and external dispute resolution program, entitled "NMG RESOLUTIONS," in bold, all-capital letters.

The program governs "associates who have workplace disputes." The first two steps involve escalating internal reviews of disputes. The third step involves mediation by neutral third-party mediators "appointed by a neutral, professional mediation association." If mediation fails, then the fourth step provides that dispute resolution must proceed through arbitration.

> Instead of taking a dispute to court – which you and [NMG] may no longer do – you present your claims to a neutral and independent "arbitrator" for final and binding arbitration. Generally, the Arbitration Agreement provides for the appointment of an arbitrator by a completely neutral arbitration association . . . . They will appoint a neutral arbitrator who is always a lawyer and sometimes a former judge. The arbitrator will conduct a "trial" where evidence is heard and witnesses are called.

An additional provision, entitled, "MANDATORY ARBITRATION," also in bold, all-capital lettering, stated: "By entering into or continuing employment with NMG, associates are deemed to have agreed to be bound by the Arbitration Agreement, and waive all rights to a judge or jury trial for all disputes."

Although plaintiff admitted that she "received and signed the arbitration agreement," she asserted in opposition to defendants' motion that she did not do so knowingly and voluntarily, did not understand the ramifications of the agreements, and NMG did not explain them to her. She stated:

> 3. Although I received and signed the arbitration agreement, I was never told what I was signing or what constitutional rights I was giving up. I am not a lawyer and I was not aware of any employee

> rights, such as unlawful discrimination and retaliation.
>
> 4. I was never told by NMG, much less explained, that I was giving up my rights to a jury trial under New Jersey law, or New Jersey Law Against Discrimination and CEPA.
>
> 5. I was never asked to consult a lawyer before I signed the arbitration agreement or encouraged to obtain such legal representation.
>
> 6. During my employment with NMG, I was never given any training regarding what constitutes unlawful discrimination. So I did not know what I was waiving.

Plaintiff also asserted that NMG was not entitled to enforce the right to arbitration because it failed to abide by its own internal dispute resolution procedures. In particular, NMG terminated her before undertaking steps two and three of the internal dispute resolution procedure.

The trial court denied defendants' motion without prejudice. In a brief statement of reasons, the court first converted the motion to one for summary judgment, because defendants relied on materials outside the pleadings, presumably referring to the MAA, the MAA Acknowledgement, the Handbook Acknowledgement, and the Handbook. The court then concluded issues of fact precluded dismissal. "The plaintiff challenges the contract and a knowing waiver of her rights and an agreement to arbitrate. The plaintiff should be given the opportunity through discovery to develop facts."

II.

Defendants argue that plaintiff accepted the MAA and Handbook's mandatory arbitration provisions, and her claims of ignorance are not a basis to avoid their terms. We agree. Therefore, plaintiff may not seek redress in a court of law.

We exercise plenary review of the trial court's decision regarding the applicability and scope of an arbitration agreement. EPIX Holdings Corp. v. Marsh & McLennan Cos., 410 N.J. Super. 453, 472 (App. Div. 2009) (citing Harris v. Green Tree Fin. Corp., 183 F.3d 173, 176 (3d Cir. 1999)), overruled in part on other grounds, Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174 (2013). The issue whether the parties have agreed to arbitrate is a question of law for the court. Bd. of Educ. of Bloomfield v. Bloomfield Educ. Ass'n, 251 N.J. Super. 379, 383 (App. Div. 1990) ("Whether the parties are contractually obligated to arbitrate a particular dispute is a matter for judicial resolution."), aff'd, 126 N.J. 300 (1991); Moreira Constr. Co. v. Twp. of Wayne, 98 N.J. Super. 570, 575 (App. Div.) ("[I]t is inescapably the duty of the judiciary to construe the contract to resolve any disagreement of the parties as to whether they have agreed to arbitrate . . . ."), certif. denied, 51 N.J. 467 (1968).

We also exercise de novo review of the trial court's decision to deny a motion to dismiss under Rule 4:6-2, or for summary judgment under Rule 4:46, applying the same standard as the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (summary judgment); Rezem Family Assocs. v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div.) (motion to dismiss), certif. denied, 208 N.J. 366 (2011). With respect to a summary judgment motion, "the appellate court should first decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct." Henry, supra, 204 N.J. at 330. Regarding a motion to dismiss, we limit our inquiry "'to examining the legal sufficiency of the facts alleged on the face of the complaint.'" Nostrame v.

Santiago, 213 N.J. 109, 127 (2013) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)).[3]

Generally speaking, New Jersey "has recognized arbitration as a favored method for resolving disputes." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001). Public policy "requir[es] a liberal construction of contracts in favor of arbitration." Alamo Rent A Car, Inc. v. Galarza, 306 N.J. Super. 384, 389 (App. Div. 1997). See also Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560, 575 (App. Div. 2007) ("As a general rule, courts have construed broadly worded arbitration clauses to encompass tort, as well as contract claims."). However, mindful of the public policy favoring arbitration, we resolve ambiguity in contract language in favor of arbitration. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 475-76, 109 S. Ct. 1248, 1254, 103 L. Ed.2d 488, 498 (1989) (stating that arbitration agreements must be interpreted after giving "due regard . . . to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration").

At the same time, however, the policy favoring arbitration is "not without limits," and "neither party is entitled to force the other to arbitrate their dispute" unless both parties agreed to do so. Garfinkel, supra, 168 N.J. at 132. "As a matter of 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.'" Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 148-49 (App. Div. 2008) (quoting 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)). We therefore rely on basic contract principles to interpret an arbitration clause. Alamo Rent A Car, supra, 306 N.J. Super. at 390-91. "[T]he FAA specifically permits states to regulate . . . contracts containing arbitration agreements under general contract principles; therefore, an arbitration clause may be invalidated upon such grounds as exist at law or in equity for the revocation of any contract."

Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2002) (internal quotation marks and citation omitted).

Courts examine the specificity of an arbitration clause's language to determine its scope. Thus, an arbitration clause that referred to claims arising out of an employment agreement, but did not expressly refer to statutory claims, was found not to compel arbitration of a claim under the LAD. Garfinkel, supra, 168 N.J. at 134-35. On the other hand, a clause that pertained to "'any action or proceeding relating to [the plaintiff's] employment,'" was broad enough to cover statutory claims. Martindale, supra, 173 N.J. at 96.

Applying these principles, plaintiff's assertion that she did not read or understand what she signed is no defense. "Failing to read a contract does not excuse performance unless fraud or misconduct by the other party prevented one from reading." Gras v. Assocs. First Capital Corp., 346 N.J. Super. 42, 56 (App. Div. 2001) (internal quotation marks and citation omitted), certif. denied, 171 N.J. 445 (2002). See also Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 305 (2010) (stating that "[w]hen a party enters into a signed, written contract, that party is presumed to understand and assent to its terms, unless fraudulent conduct is suspected"); Young v. Prudential Ins. Co. of Am., 297 N.J. Super. 605, 609, 617-18 (App. Div.) (rejecting claim that insurance broker did not knowingly waive jury trial right because he did not have sufficient time to read the agreement and notice the compulsory arbitration provisions), certif. denied, 149 N.J. 408 (1997). Plaintiff does not assert that she was a victim of fraud or duress to support her argument that her approval was not voluntary.

Nor are the MAA and Handbook provisions unconscionable. In Martindale, supra, 173 N.J. at 91-92, the Court rejected an unconscionability claim, and found no basis to withhold enforcement of an arbitration agreement included in an employment application. The court declined to find the applicant was forced to sign without an opportunity for attorney review or discussion, but even if that were the case, the court found no basis to invalidate the agreement

based on its "subject matter and the public interests affected" and rejected the notion that the arbitration agreement was "oppressive or unconscionable." Id. at 91. Plaintiff here does not even claim she was denied the opportunity to seek attorney review; she asserts only that NMG did not encourage her to seek legal advice. Moreover, the operative provisions of the MAA and Handbook are clearly and conspicuously presented.

The scope of the MAA and Handbook expressly encompasses plaintiff's claims. With greater specificity than the agreement enforced in Martindale, supra, the MAA explicitly identifies claims under state discrimination statutes, claims of retaliation for exercising rights under any statute (including workers' compensation claims), and common law tort claims such as negligence. In Leodori v. CIGNA Corp., 175 N.J. 293, 302-03 cert. denied, 540 U.S. 938, 124 S. Ct. 74, 157 L. Ed.2d 250 (2003), the Court held that an arbitration provision that listed "numerous federal statutes by name . . . in addition to 'any other federal, state, or local statute, regulation, or common-law doctrine, regarding employment discrimination, conditions of employment, or termination of employment" covered plaintiff's statutory CEPA claim.

In sum, no genuine issue of fact is created by plaintiff's claims that she signed the agreement without NMG's explanation, advice to consult an attorney, or training regarding her rights. Even if true, those facts fail to provide grounds to avoid the terms of the agreement.

We also discern no merit to plaintiff's argument that defendants' alleged breach of the internal dispute resolution procedures outlined in the Handbook excuses plaintiff's compliance with the arbitration agreement. The issue of breach of the internal dispute resolution procedures is itself subject to dispute resolution as dictated by the MAA.

We recognize that there is authority for the proposition that where parties agree that mediation is a prerequisite to arbitration, the court may not compel arbitration contrary to the parties' agreement. See HIM Portland, LLC v. DeVito Builders, Inc., 317 F.3d 41, 43-44 (1st Cir.

2003) (affirming trial court's denial of motion to compel arbitration where parties agreed that mediation was "a condition precedent to arbitration"); Kemiron Atl., Inc. v. Aguakem Int'l, Inc., 290 F.3d 1287, 1289, 1291 (11th Cir. 2002) (affirming denial of motion to compel arbitration where agreement compelled arbitration "[i]n the event that the dispute cannot be settled through mediation") (emphasis omitted); Lakeland Fire Dist. v. E. Area Gen. Contractors, Inc., 791 N.Y.S.2d 594, (App. Div. 2005) (enforcing provision that required reference of the parties' dispute to an architect as a condition precedent to arbitration). The express terms of the MAA provide, "No arbitration may be commenced by any party until a mediation is conducted before a neutral mediator appointed by either AAA or JAMS, whichever agency the initiating party may select." (emphasis added).

Nonetheless, we are guided by the more general dictate that an arbitrator, not a court, shall decide issues of procedural arbitrability — such as whether a condition precedent to arbitration has been satisfied — as distinct from substantive arbitrability. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84-85, 123 S. Ct. 588, 592, 154 L. Ed.2d 491, 498 (2002) (emphasis omitted) (stating that "time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate" are for the arbitrator to decide); John Wiley & Sons v. Livingston, 376 U.S. 543, 557-59, 84 S. Ct. 909, 918-19, 11 L. Ed.2d 898, 908-10 (1964); Standard Motor Freight, Inc. v. Local Union No. 560, Int'l Bhd. of Teamsters, 49 N.J. 83, 97-98 (1967); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc., 427 N.J. Super. 45, 62 (App. Div.) (stating that "conditions precedent to an obligation to arbitrate" are "strictly reserved to the arbitrators"), certif. denied, 212 N.J. 460 (2012). See also N.J.S.A. 2A:23B-6(c) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.").

Reversed.

[1] NMG states that plaintiff incorrectly omitted "Inc." from its name in the caption of her complaint.

2 We recognize that the MAA states it is governed by the law of Texas and the Federal Arbitration Act, 9 U.S.C.A. §§ 1-16. However, inasmuch as both parties rely on New Jersey law and neither asserts that it conflicts meaningfully with Texas law, we shall apply New Jersey law and the FAA. See P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132, 143 (2008) (stating that demonstration that a conflict of law exists is threshold step in choice of law analysis); Bailey v. Wyeth, Inc., 422 N.J. Super. 343, 355-57 (Law Div. 2008) (refusing to allow a choice-of-law analysis not raised in an answer or by motion until late stage of litigation); Pressler & Verniero, Current N.J. Court Rules, comment 6.1 on R. 4:5-4 (2014) (stating that the party seeking application of the foreign law must demonstrate that the laws of the two jurisdictions differ).

3 We need not address defendants' argument that the trial court erred in converting their dismissal motion into a summary judgment motion. We recognize that a court may consider documents upon which a claim is based in a motion to dismiss, without converting the motion into one for summary judgment. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005); N.J. Citizen Action, Inc. v. Cnty. of Bergen, 391 N.J. Super. 596, 605 (App. Div.) (stating that "consideration of the documents referred to in the complaint . . . does not convert defendants' R. 4:6-2(e) motions into motions for summary judgment"), certif. denied, 192 N.J. 597 (2007). On the other hand, plaintiff did not assert a contract claim, nor ground her claim upon the MAA or Handbook. However, in the final analysis, the issue is not dispositive, as we discuss infra, because plaintiff's factual claims do not create material issues precluding summary judgment.
