NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2070-13T4

ELIZABETH A. COMANDO,
individually and derivatively
on behalf of 10 CENTRE DRIVE, LLC,

Plaintiff-Appellant,

v.

MARY F. NUGIEL[1] and RCP MANAGEMENT
COMPANY,

Defendants-Respondents,

and

PRIDE CONSTRUCTION SERVICES, LLC,[2]

Defendant.

Argued April 8, 2014 - Decided May 22, 2014

Before Judges Sapp-Peterson and Lihotz.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5130-13.

---

[1] The record also includes references to defendant Nugiel's former name, Mary Faith Radcliffe. She married on September 9, 2011.

[2] Defendant Pride Construction Services was dismissed from the litigation and is not participating in this appeal.

Kevin J. O'Connor argued the cause for appellant (Peckar & Abramson, P.C., attorneys; Mr. O'Connor, on the brief).

Robert Jay Feinberg argued the cause for respondents (Giordano, Halleran & Ciesla, P.C., attorneys; David C. Roberts, Michael T. Strouse and Elyse J. Feldman, on the brief).

PER CURIAM

Plaintiff Elizabeth Comando, individually, and derivatively on behalf of 10 Centre Drive, LLC (Centre LLC) appeals from a November 22, 2012 order denying her motion to compel arbitration regarding the sale of the major asset owned by Centre LLC, a commercial office building. She also appeals from a December 20, 2013 order denying her request for reconsideration. Pursuant to Rule 2:2-3(a)(3), the order denying her motion to compel arbitration is deemed a final order and appealable as of right. See also GMAC v. Pittella, 205 N.J. 572, 587 (2011).

Following our review, we conclude the provision in Centre LLC member's operating agreement compels an arbitration-type dispute resolution procedure of the sale of corporate assets. We also conclude the trial judge erred (1) in finding Comando waived the alternative dispute resolution provisions in the operating agreement by filing this action, and (2) in determining a sale of the realty was prohibited by another contractual provision. Accordingly, we reverse that portion of

the Law Division order denying Comando's motion to compel arbitration and remand to oversee commencement of an arbitration proceeding consistent with the terms of the parties' agreement, as discussed in our opinion.

These facts are found in the motion record. Defendant Mary F. Nugiel was the President and an owner of defendant RCP Management Company (RCP), which specialized in the management of community organizations, with its headquarters in Princeton. In 2004, Nugiel, on behalf of RCP, offered to hire Comando as RCP's Vice President of Operations, which she accepted. Comando's compensation included one-third of the net profits from "the North Region," generally the New York metropolitan area. These payments would be distributed quarterly, after the release of financial information.

Also, Comando understood she would be granted the opportunity to acquire an ownership interest in RCP; however, she maintains Nugiel explained there was a five-year stock restriction impeding the current sale of RCP stock. The parties entered into a Client Purchase Option Covenant, setting forth the terms upon which Comando could purchase the North Region portfolio in the event she or RCP terminated her employment.

In 2009, Comando was promoted to Senior Vice President of RCP. Later, on April 29, 2011, Comando was named a "Principal"

of RCP. RCP sent a formal announcement of Comando's newly designated status to all clients and industry professionals.

Comando and Nugiel agreed to purchase an office building located at 10 Centre Drive in Monroe (the property), which would serve as RCP's new headquarters. On July 7, 2011, Comando and Nugiel equally contributed the $110,000 down payment toward the $2.2 million purchase price and the remaining sum was financed by a twenty-year, $1,500,000 mortgage loan and a $350,000 bridge loan, obtained through TD Bank, N.A. (TD Bank). The building was owned by a recently formed realty holding company, Centre LLC, and RCP executed a twenty-year lease, paying a monthly rent of $15,829.33. Comando and Nugiel held equal interests in Centre LLC. Centre LLC executed a mortgage secured by the property and assigned RCP's lease and rents generated therefrom to TD Bank. Additionally, RCP executed an entity guarantee and Comando and Nugiel executed personal guarantees of the loans. To obtain a lower interest rate on this debt obligation, Centre LLC and TD Bank agreed to an interest rate swap agreement (swap agreement), which applied to the first five years of the loan.

Comando and Nugiel also executed an operating agreement for Centre LLC. Section 5.5 of the operating agreement addressed the circumstance of a members' deadlock on management decisions (deadlock provision), which stated:

> In the event the [m]embers are unable, for any reason, to agree regarding any matter or decision requiring the approval of a majority or more of the [m]embers, (a "[d]eadlock"), then the [m]embers shall mutually agree upon an individual with appropriate expertise to cast a vote to break any [d]eadlock (the "[r]eferee"). The [r]eferee shall be appointed by the [m]embers within three (3) days after the date of the [d]eadlock. The [r]eferee will make such inquiry into the [d]eadlock as it, in its sole discretion, deem appropriate. The [m]embers may agree on any rules to govern such inquiry, and in the absence of an agreement, the rules of the American Arbitration Association shall apply. Within five (5) days after the date of the appointment of the [r]eferee, the [r]eferee shall present a written decision regarding the resolution of the [d]eadlock to the [m]embers which shall be final and binding upon the [m]embers. The [r]eferee shall have the authority to decide all matters presented to it. In the event either [m]ember fails or refuses to act in accordance with the [r]eferee's decision for any reason, then the other [m]ember may seek all remedies permitted under the law in order to enforce the decision. The [c]ompany shall pay the fees and reasonable out-of-pocket expenses of the [r]eferee. Except as otherwise set forth herein with respect to [r]eferee expenses to be paid by the [c]ompany, each [m]ember shall be responsible for their own costs and expenses association with the resolution of any [d]eadlock hereunder.

Difficulties and disagreements arose between Comando and Nugiel regarding RCP's finances, Nugiel's absence from the office, and accounting problems resulting from changes Nugiel instituted. By January 2013, the two reached an impasse over

RCP's ongoing operations. In February 2013, Nugiel informed Comando she desired to sell RCP to a third-party. Comando replied, expressing her desire to exercise her right to purchase RCP, which Nugiel rejected. Comando resigned on April 1, 2013. Beginning in June 2013, Comando urged the sale of the property, a request Nugiel has refused.

Comando initiated this action, filing an eleven count complaint on July 2, 2013. Included among the numerous claims against Nugiel and RCP are an assertion of Comando's de facto ownership interest in RCP and breach of contract, as well as a claim Nugiel wrongly diverted corporate profits for her sole benefit and committed fraud.[3] Nugiel filed a counterclaim, alleging Comando overbilled clients to inflate her salary and percentage of profits, Comando revealed RCP's confidential information to her new employer, and if Comando is found to be a shareholder of RCP, she breached her fiduciary duty to the corporation and fellow shareholder, Nugiel.

[3] The complaint specifically alleges: breach of fiduciary duty (count one); specific performance, recession and constructive trust (count two); breach of de facto partnership (count three); breach of contract (count four); fraud (count five); breach of the covenant of good faith and fair dealing (count six); promissory estoppel (count seven); violations of New Jersey Wage and Hour Law, (count eight); minority shareholder oppression, (count nine); and federal and state securities violations (counts ten and eleven).

On October 17, 2013, Comando sent a written demand to Nugiel, invoking the deadlock provision of the operating agreement and expressing a desire to appoint "a referee to resolve all arbitral disputes articulated in the verified complaint[.]" Thereafter, she filed a motion to compel arbitration.[4] It is noted that paragraph 5.4(b)(ii) of the operating agreement stated "the approval of [m]embers holding, in the aggregate, a majority of the outstanding [m]embership [i]nterest" is required to effectuate:

> The sale or disposition of all or substantially all of the assets of the [c]ompany as part of a single transaction or plan so long as that disposition is not in violation of or a cause of default under any other agreement to which the [c]ompany may be bound, provided, however that the affirmative vote of the [m]embers shall not be required with respect to any sale or disposition of the [c]ompany's assets in the ordinary course of the [c]ompany's business[.]

Nugiel opposed the motion to compel arbitration, suggesting Comando's choice to litigate amounted to a waiver of any arbitration provision. The trial court agreed and denied Comando's motion, as well as her subsequent motion for reconsideration.

---

[4] The motion also sought to disqualify counsel for Nugiel. We have omitted references to this issue in our opinion because the question is the subject of a separate appeal, pending under No. A-2403-13.

Comando's appeal challenges the order denying application of the deadlock provision to address the parties' disputes in an arbitral forum. Comando argues the deadlock provision serves as an enforceable arbitration provision; the sale of the subject property is within the scope of the deadlock provision; and she did not waive her right to arbitrate. On these issues, she maintains the motion judge erred as a matter of law.

Initially, we consider the scope of Comando's challenge, a matter the parties disputed at argument before us. Comando suggests her request to apply the deadlock provision is directed solely to the sale of Centre LLC's realty, that is, the property at 10 Centre Drive. She agrees the claims in her complaint are not subject to arbitration. Defendants challenge this notion, presumably relying on Comando's October 2013 letter seeking arbitration, which did not limit review to the single issue of selling the property. Rather, the letter and comments made during oral argument urging Comando's claims "are intertwined," lead defendants to believe Comando generally wants to arbitrate all disputes. Also, although conceding a sale of the realty falls within the deadlock provision, they argue Comando had not shown a deadlock existed, or alternatively, Comando's pursuit of litigation acted as a waiver of the provisions set forth in the deadlock provision. Finally, defendants maintain a sale would

trigger the obligation to pay a penalty set forth in the swap agreement, which they characterize as a violation or default. Applying paragraph 5.4(b)(ii), defendants contend Comando's attempt to arbitrate is premature.

We confine our consideration to whether the deadlock provision applies to the disagreement between Comando and Nugiel about whether to sell the assets of Centre LLC. This encompasses Comando's argument that arbitration is mandated and defendants' assertion that the clause is inapplicable to these facts.

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). This State's 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) (citations omitted). Mindful of this public policy, we resolve possible ambiguity in the contract language in favor of requiring arbitration. Volt Info. Scis., Inc. v. Bd. of Trs. of the 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 agreement 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"). In our review, we rely on "basic contract principles" to interpret an arbitration clause, closely examining the contractual language used by the parties. Alamo Rent A Car, supra, 306 N.J. Super. at 390-91. "Moreover, in determining the scope of an arbitration agreement, a court must 'focus on the factual allegations in the complaint rather than the legal causes of action asserted.'" EPIX Holdings Corp. v. Marsh & McLennan Cos., Inc., 410 N.J. Super. 453, 472-73 (App. Div. 2009) (quoting Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987)).

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)). The burden of persuasion "to establish the existence of an agreement to arbitrate" rests on the proponent of arbitration.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc., 427 N.J. Super. 45, 59 (App. Div.), certif. denied, 212 N.J. 460 (2012).

Finally, our review of the trial court's decision regarding the applicability and scope of an arbitration agreement is plenary. EPIX Holdings Corp., supra, at 472 (citing Harris v. Green Tree Fin. Corp., 183 F.3d 173, 176 (3d Cir. 1999)). We need not defer to the judge's legal determinations. See Waskevich v. Herold Law, P.A., 431 N.J. Super. 293, 297 (App. Div. 2013) ("[T]he trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.") (citations and internal quotation marks omitted).

Comando recites the unambiguous language of the deadlock provision and maintains arbitration of the dispute at hand is required. Defendants, however, misstate Comando's position by asserting the deadlock provision "is not a binding agreement that claims be submitted to AAA arbitration."

In his review of the issue, the judge stated "[t]here is no arbitration provision in the [Centre LLC] operating agreement on which [Comando] can rely." Later, in an order entered following reconsideration designed to clarify his prior order, the judge restated his reasons for denying Comando's motion, "one of which

being that there was no enforceable arbitration provision in the applicable agreement at all." The judge also determined Comando's demand for arbitration was premature as there was no meeting at which an issue was deadlocked. Clarifying this point, the judge stated "at the time of [p]laintiff's motion to compel arbitration, a meeting to discuss the immediate sale of the real property was impermissible under the provisions of the LLC operating agreement." Finally, he determined Comando waived her rights under the deadlock provision when she filed suit. We conclude each of these determinations was erroneous.

The deadlock provision of the operating agreement requires the appointment of a single arbitrator, termed a referee, who will decide the deadlocked issue. The referee's decision must be issued in writing and "shall be final and binding upon the members." The process will unfold based upon consensual rules but "in the absence of an agreement, the rules of the American Arbitration Association shall apply."

Although the deadlock provision does not use the term "arbitration," without question the provision requires a specific form of alternate dispute resolution when members are deadlocked on any "matter or decision requiring the approval of a majority or more of the [m]embers[.]" We have determined "clauses of this type have consistently been held to be

tantamount to an arbitration clause." Gothic Const. Grp., Inc. v. Port Auth. Trans-Hudson Corp., 312 N.J. Super. 1, 8 (App. Div. 1998).[5] Viewed in this light, we easily conclude the deadlock provision of the member's operating agreement serves as the equivalent of a valid, binding arbitration agreement, requiring appointment of a "mutually" agreed upon referee "with appropriate expertise" as the single arbitrator to resolve the deadlocked issue. See Gothic, supra, 312 N.J. Super. at 9. The use of an AAA arbitrator is not mandated, but if the parties cannot agree, the AAA rules govern the proceedings. Defendants' argument to read the clause as not requiring arbitration, which the judge accepted, cannot be upheld.

We also conclude the sale of Centre LLC's property represents a sale of substantially all the corporation's assets.

---

[5] In Gothic, we held the following contractual provision was tantamount to arbitration:

> To resolve all disputes and to prevent litigation the parties to this Contract authorize the Chief Engineer to decide all questions of any nature whatsoever arising out of, under, or in connection with, or in any way related to or on account of, this Contract . . . and his decision shall be conclusive, final and binding on the parties[.]
>
> [Id. at 6 (emphasis in original).]

Such a matter requires majority approval of the members pursuant to paragraph 5.4(b)(ii) of the operating agreement. In the event of disagreement, the issue falls directly within the scope of the deadlock provision.

We also find disingenuous, Nugiel's assertion there is no proven deadlock on this issue. To the contrary, Nugiel's actions unmistakably reflect her refusal to sell the property. Logic suggests if Nugiel desired to mitigate the losses alleged to be mounting, she would have assented to the sale of the realty. By asserting the subject matter (i.e., the immediate sale of the building) was not a "valid purpose" for a member's meeting, or alternatively in arguing there is a need for a formal meeting to allow her to state her position before a deadlock can be declared, Nugiel's conduct suggests tactics designed to achieve delay and exalt form over substance. Comando clearly expressed her desire to sell and Nugiel, coyly, has not responded directly to the demand. The demur effectively amounts to a rejection of Comando's request to liquidate Centre LLC. Accordingly, we conclude the issue has ripened into a deadlock.[6]

[6] We are keenly aware Comando's demand that Norris McLaughlin & Marcus, P.A., discontinue its representation of Nugiel and RCP because it suffers from a conflict has invaded Nugiel's responses on this issue. In their communications, the animosity (continued)

We next discuss the related determination by the judge that the "sale of the property is prohibited for the next two and [one-]half years under the terms of the operating agreement[.]" Upon reflection, the judge corrected this factual error in the order issued denying Commando's motion for reconsideration.

Comando suggests the court should not have reached the merits because it is an issue to be considered only by the referee. Alternatively, she asserts fees payable on prepayment under the swap agreement do not constitute "a violation" of the mortgage terms. Rather, the parties agree to pay these fees to TD Bank for any "loss" the ban suffered if the loan is satisfied within the first five years.

Nugiel disagrees and asserts the early termination clause constitutes a "violation" of the swap agreement and the fees, now estimated at $60,000, pose a significant financial burden to Centre LLC. We infer from the judge's comment he accepted Nugiel's position, and concluded the sale of the property fell outside the scope of the deadlock provision during the five-year term of the swap agreement. We disagree.

(continued)
between counsel is palpable. Nevertheless, Nugiel has had ample opportunity to communicate a desire to proceed with the sale, but had never squarely given a response; at best she has hedged, hinting she might consider the matter.

We briefly summarize the contractual terms affecting this matter. First, the operating agreement's deadlock provision covers "any matter or decision requiring the approval of a majority or more of the [m]embers." Second, the operating agreement also delineates any sale of the corporation's assets requires majority approval and may not be undertaken if it is "in violation of or a cause of default under any other agreement to which the [c]ompany may be bound." Finally, Section 6(e) of the swap agreement provides for payments due on early termination of the loan, a term defined in Section 5(b) to include repayment of all amounts owed under the loan agreement. The swap agreement explains the fees due upon early termination to mitigate the lender's "loss," defined in Section 12.[7] We find the "swap breakage fee" was a negotiated term of the loan

[7] A lender's loss is defined as:

> [A]n amount that party reasonably determines in good faith to be its total losses and costs (or gain, in which case expressed as a negative number) in connection with this [a]greement or that [t]erminated [t]ransaction . . . including any loss of bargain, cost of funding or, at the election of such party without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining or reestablishing any hedge or related tradition position (or any gain resulting from any of them).

transaction. Moreover, the parties contemplated early satisfaction of the debt, and the payments "due on early termination of the loan." We fail to understand a conclusion that a negotiated term somehow represents a violation of the mortgage agreement. Significantly, the term is part of the deal the parties struck and its application is neither inviolate nor a default.

Considering all of these documents, we conclude a disagreement between Centre LLC's members - Comando and Nugiel - over whether to sell the corporate asset is a deadlock, which triggers the deadlock provision. The fact that a sale would result in prepayment of the mortgage debt is neither a "violation of [n]or a cause of default under any other agreement to which the [c]ompany may be bound," including the mortgage or swap agreement. The judge's decision to the contrary must be set aside.

The judge also concluded Comando waived her right to arbitrate "by commencing and prosecuting this litigation[,]" stating: "When one plainly chooses to litigate rather than arbitrate it amounts to a waiver of arbitration." We reject this proposition.

Generally, "[t]here is a presumption against waiver of an arbitration agreement[.]" Spaeth v. Srinivasan, 403 N.J. Super.

508, 514 (App. Div. 2008) (citation omitted). Determination of whether there is a waiver of an arbitration agreement is a legal one, requiring our plenary review. Cole v. Jersey City Med. Ctr., 215 N.J. 265, 275 (2013).

Our determination of whether Comando waived the right to arbitrate is aided by the Supreme Court's recent review of the principles guiding such a determination in Cole. We recite these legal principles.

A party's waiver must be expressed "clearly, unequivocally, and decisively." Id. at 277 (citation and internal quotation mark omitted). Also, a party may be found to have implicitly waived the right to arbitrate if "the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." Ibid. (citation and internal quotation marks omitted). In either case, a court's determination as to whether a party waived a right to arbitrate requires "a fact-sensitive analysis." Ibid. (citation omitted).

When examining whether a party has waived the right to arbitrate, the court "must focus on the totality of the circumstances[,]" concentrating the analysis on "the party's litigation conduct" to discern "if it is consistent with its reserved right to arbitrate the dispute." Id. at 280.

> Waiver is never presumed. An agreement to arbitrate a dispute can only be overcome by

> clear and convincing evidence that the party asserting it chose to seek relief in a different forum. [Supra]. The same principles govern waiver of a right to arbitrate as waiver of any other right.
>
> [Id. at 286. (citation and internal quotation marks omitted).]

"There is no single test for the type of conduct that may waive arbitration rights." Spaeth, supra, 403 N.J. Super. at 514. These factors should be evaluated when undertaking the necessary factual analysis:

> (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any. No one factor is dispositive.
>
> [Cole, supra, 215 N.J. at 280-81.]

We turn to the trial court's findings underlying the waiver determination in this case. Initially, we reject the contention Comando waived arbitration by "voluntarily commencing this action." See Wasserstein v. Kovatch, 261 N.J. Super. 277, 290 (App. Div.) ("The mere filing of a complaint or an answer to the

complaint is not a waiver of arbitration. . . . The court has the power, any time before judgment, to refer the dispute to arbitration.") (citations omitted), certif. denied, 133 N.J. 440 (1993). Although Comando's initiation of the action can be considered, it is not dispositive.

Assessing the Cole factors, we note Comando's request to sell Centre LLC's property was first made by letter dated October 17, 2013, and the motion to compel arbitration followed within the week, a little more than three months after the complaint was filed. The arbitration request occurred early in the case and preceded defendants' answer to the complaint.

We also reject the notion, proffered by Nugiel, that this was a change in Comando's strategy. In fact, close review of the complaint shows it is directed to defendants' actions and inactions in respect to RCP, not Centre LLC. Our review discerns disposition of Centre LLC was not pled. However, the issue arose between the same parties to the litigation and is a consequence flowing from the RCP dispute.

The only motion filed prior to the series of motions accompanying the arbitration request was defendants' application to dismiss. Notably, that motion was denied.[8]

Some discovery was conducted, yet we fail to find "prolonged litigation, without a demand for arbitration or assertion of a right to arbitrate[.]" Hudik-Ross, Inc. v. 1350 Palisade Ave. Corp., 131 N.J. Super. 159, 167 (App. Div. 1974). More specifically, both parties propounded a request for admissions and defendants sent a demand for documents. Of note, responses to these requests were neither due nor made before the arbitration motion was filed. Defendants' choice to proceed with discovery requests pending disposition of the motion cannot buttress a claim that "significant discovery" had been undertaken. Also, the discovery was primarily directed to RCP, not Centre LLC. Therefore, the discovery's utility remains and defendants suffered no prejudice. The underlying litigation was neither active nor prolonged. Frankly, characterizing the discovery as "substantial" is an unfounded generalization. Viewed against this factual backdrop, we conclude Comando has

[8] In his opinion, the judge references a motion to quash a subpoena; however, the record contains no information regarding this application.

not waived her right to arbitrate the sale of Centre LLC's assets.

In summary, for the reasons discussed in our opinion, we reverse the judge's decisions and vacate the provision of the November 22, 2012 and December 20, 2013 orders denying Comando's motion to compel arbitration of the sale of Centre LLC's assets, as provided under by the deadlock provision of the members' operating agreement. We remand the matter to the trial court to enter an order compelling the procedure agreed to by the parties and, as necessary, to supervise the matter until the appointment of a referee. The remaining matters set forth in Comando's complaint and defendants' counterclaim shall proceed before the Law Division.

Reversed and remanded.