NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2311-12T4
A-2337-12T4

BASSEM M. DEMIAN and JEANNE M. DEMIAN, HIS WIFE,

Plaintiffs-Respondents,

v.

M.G.C.C. GROUP, INC., MG GROUP OF COMPANIES,

Defendants-Appellants,

and

GULF INSURANCE COMPANY,

Defendant,

and

THE TRAVELERS INDEMNITY COMPANY, Successor in interest by merger To GULF INSURANCE COMPANY,

Third-Party Plaintiff,

v.

MGA GROUP, INC., MGB GROUP, INC. MGBR GROUP, INC., ARTHUR J. GALLY and ELINOR GALLY,

Third-Party Defendants,

and

M.G.C.C. GROUP, INC.,

Defendant/Third-Party
Plaintiff-Appellant,

v.

JAMES R. IENTILE, INC.,

Third-Party Defendant-
Appellant.

Argued January 13, 2014 - Decided February 5, 2014

Before Judges Parrillo and Harris.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-1634-09.

Kenneth W. Biedzynski argued the cause for appellants M.G.C.C. Group, Inc., and the MG Group of Companies in A-2311-12 (Goldzweig, Green, Eiger & Biedzynski, LLC, attorneys; Mr. Biedzynski, of counsel and on the brief).

Fredric P. Gallin argued the cause for appellant James R. Ientile in A-2337-12 (Methfessel & Werbel, attorneys; Mr. Gallin, of counsel; Christian R. Baillie, on the brief).

Frederick E. Popovitch argued the cause for respondents (Popovitch & Popovitch, LLC, attorneys; Mr. Popovitch and Jeff Thakker, on the brief).

PER CURIAM

In this consolidated appeal, defendants M.G.C.C. Group, Inc. and MG Group of Companies (collectively the MG defendants), together with third-party defendant James R. Ientile, Inc.

(Ientile), appeal from the Law Division's January 11, 2013 order finding that "plaintiffs' disputes in this litigation are arbitrable" and ordering that the matter be referred for arbitration within thirty days. We reverse.

I.

Plaintiffs Bassem M. Demian and Jeanne M. Demian are homeowners who purchased a dwelling built by residential developer and builder M.G.C.C. Group, Inc. in the Ardena Acres at Crystal Creek subdivision in Howell Township pursuant to a January 14, 2003 agreement of sale. Four months earlier, on September 4, 2002, M.G.C.C. Group, Inc. and Ientile entered into a subcontractor contract whereby Ientile was hired to perform the grading work for the Ardena Acres at Crystal Creek development. Ultimately, Ientile performed the grading services on the Demians' homestead, which was completed in September 2004.

The January 14, 2003 agreement for sale neither identifies nor lists the subcontractors hired; the contract simply recognizes M.G.C.C. Group, Inc. as the seller and the Demians as the purchaser. The agreement for sale also contained an arbitration clause in Paragraph 44:

> Buyer[1] hereby agrees that any and all disputes arising out of this Agreement, except for those arising from the Home Warranty or the construction or condition of the Home, shall be resolved by binding arbitration in accordance with the rules and procedures of the American Arbitration Association or its successor (or an equivalent organization selected by Seller). In addition, Buyer agrees that Buyer may not initiate any arbitration proceeding for any claim arising out of the Agreement or the Home Warranty or relating to construction or condition of the Home unless and until Buyer has first given Seller specific written notice . . . and given Seller a reasonable opportunity after such notice to cure any default, including the repair of the Home, in accordance with the Home Warranty. The provisions of Paragraph 44 shall survive the closing of title.

Shortly after taking possession of their new home, the Demians discovered what they believed was defective workmanship, specifically that the land was improperly graded, which resulted in "substantial erosion, flooding, and drainage problems." Based on these defects —— specifically, the grading of the lot —— the Demians filed suit on March 30, 2009, against the MG defendants. The complaint sought remedies for breach of contract and consumer fraud, and lodged a claim against a

[1] As noted, throughout the pre-printed agreement of sale, the Demians are called the purchaser. Only the arbitration clause and Paragraph 21 entitled, "Insulation," use the term "Buyer." We cannot account for the discordance, which we deem inconsequential for purposes of this appeal.

bonding company that provided the MG defendants with a performance bond.

M.G.C.C. Group, Inc. filed a third-party complaint against Ientile, seeking common law and contractual indemnification based upon an indemnity provision in the subcontractor contract. The subcontractor contract does not contain an arbitration clause but it does, however, specifically provide that "[t]o the exten[t] that any dispute arising hereunder, such suit shall be brought in and before the Superior Court of the State of New Jersey, wherein exclusive jurisdiction shall lie."

Plaintiffs' initial complaint demanded a jury, as did their amended complaint, which the Law Division permitted on December 16, 2011. At no time did plaintiffs seek to amend their complaint to assert direct claims against Ientile.

The litigation proceeded uneventfully following the initial exchange of pleadings, although discovery was stayed for approximately four months in early 2010 due to a pending criminal matter involving a representative of the MG defendants. Once restarted, discovery involved extensive interrogatories, all-encompassing document production, and multiple depositions of fact and expert witnesses. The discovery period was extended throughout 2011 and 2012 to accommodate the pretrial preparation of the parties. The last court-ordered discovery expiry was May 31, 2012. On June 15, 2012, the Law Division denied plaintiffs'

motion for a further extension of the discovery period. Notwithstanding this order, the parties continued to exchange expert reports and conducted depositions of expert witnesses.

On October 9, 2012, more than three years into the litigation, plaintiffs' counsel raised the prospect of arbitration for the first time. Almost two months later, on December 4, 2012, after receiving no pact to arbitrate, plaintiffs moved "for an order compelling the arbitration of disputes involving the plaintiffs." The MG defendants and Ientile opposed plaintiffs' motion. Ientile argued that it was not obliged to arbitrate the claims against it because "there is no proof of any contract that Ientile signed compelling it to go to arbitration." The MG defendants resisted arbitration because they claimed that plaintiffs' actions in furtherance of the litigation constituted a waiver of arbitration.

Although oral argument was requested to address plaintiffs' arbitration motion, the Law Division did not permit it.[2]

[2] Given the significance of an order to compel or deny arbitration, Rule 2:2-3(a), a party's request for oral argument of a motion implicating finality should be honored. Denial of oral argument in such a circumstance "deprives litigants of an opportunity to present their case fully to a court." Mackowski v. Mackowski, 317 N.J. Super. 8, 14 (App. Div. 1998). As in Filippone v. Lee, 304 N.J. Super. 301, 306 (App. Div. 1997), there were "no special or unusual circumstance[s] here warranting the court's dispensing with an entirely appropriate request for oral argument of a motion presumptively entitled to argument on request."

Instead, on January 11, 2013, an order directing the parties to arbitration was extemporaneously issued with only the following expository information appended to it:

> Contract calls for arbitration and the courts should enforce an arbitration provision. N.J.S.A. 2A:23B-1 and Hojnowski v. Vans Skate Park, 187 N.J. 323 (2006).

These appeals followed.

II.

In reviewing orders compelling or denying arbitration, appellate courts are mindful of New Jersey's strong preference to enforce arbitration agreements. Hirsch v. Amper Fin. Servs., 215 N.J. 174, 186 (2013); see also Hojnowski v. Vans Skate Park, 187 N.J. 323, 341-42 (2006) (noting New Jersey state and federal preference for enforcing arbitration agreements).

"'An arbitration agreement is a contract and is subject, in general, to the legal rules governing the construction of contracts.'" Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276 (2013) (quoting McKeeby v. Arthur, 7 N.J. 174, 181 (1951)). An interpretation of a contract is ordinarily a legal question for the trial court, Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011), and thus we are not bound by the trial court's application of law to the facts or its evaluation of the legal implications of facts where credibility is not in issue. State v. Barrow, 408 N.J. Super. 509, 516-17 (App. Div. 2009).

"Interpretation of an arbitration clause is a matter of contractual construction that [appellate] court[s] should address de novo." NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 430 (App. Div. 2011) (quoting Coast Auto. Grp., Ltd. v. Withum Smith & Brown, 413 N.J. Super. 363, 369 (App. Div. 2010)).

Because an arbitration agreement is a contract and therefore subject "'to the legal rules governing the construction of contracts[,]' . . . parties may waive their right to arbitrate in certain circumstances." Cole, supra, 215 N.J. at 276 (quoting McKeeby, supra, 7 N.J. at 181).

> 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." Spaeth v. Srinivasan, 403 N.J. Super. 508 (App. Div. 2008). The same principles govern waiver of a right to arbitrate as waiver of any other right. Ibid.
>
> [Ibid.]

A party's waiver must be expressed "clearly, unequivocally, and decisively[,]" and a court's determination as to "whether a party waived a right is a fact-sensitive analysis." Id. at 277 (internal quotation marks and citation omitted).

Generally speaking, "[w]aiver under New Jersey law 'involves the intentional relinquishment of a known right and thus it must be shown that the party charged with the waiver

knew of his or her legal rights and deliberately intended to relinquish them.'" Spaeth, supra, 403 N.J. Super. at 514 (quoting Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276, 291 (1988)). A party may, however, implicitly waive its right to arbitrate. Cole, supra, 215 N.J. at 277.

Waiver of a contractual right to arbitrate is generally found where the party seeking to enforce an agreement to arbitrate has participated in litigation in a manner inconsistent with a bona fide intention to enforce the agreement to arbitrate. Absent litigation conduct that is unequivocally inconsistent with an intent to invoke an agreement to arbitrate —— for example, where the claim is based on delay rather than inconsistency —— a showing of "demonstrable prejudice" is required. Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 150 (App. Div. 2008); cf. Wein v. Morris, 194 N.J. 364, 376 (2008) (finding unequivocal waiver without discussing prejudice where neither the plaintiff nor the defendant referenced arbitration in their original proceeding, both engaged in "five years of court-monitored discovery," and both objected to the court's compelling arbitration); McKeeby, supra, 7 N.J. at 182 (noting that prosecution of a claim amounts to an abandonment and revocation of an agreement to arbitrate); Farese v. McGarry, 237 N.J. Super. 385, 394 (App. Div. 1989) (finding waiver without addressing prejudice where the plaintiff who did

not raise arbitration in his complaint or answer raised the issue days before trial).

In Cole, the Court looked to the principles established in Wein concerning the recognized circumstances that demonstrate waiver of a contractual arbitration right. "Those circumstances include filing a complaint in the Superior Court without referring to a contractual arbitration provision, filing an answer and counterclaim without referring to a contractual arbitration provision, and extensively engaging in discovery." Cole, supra, 215 N.J. at 277.

Cole also concluded that a court, in its assessment of whether a party to an arbitration agreement has waived that forum, must employ a fact-sensitive totality of the circumstances analysis:

> In deciding whether a party to an arbitration agreement waived its right to arbitrate, we concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute. Among other factors, courts should evaluate: (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.
>
> [Id. at 280-81.]

In this analysis, no one factor is dispositive. Id. at 281.

Based upon the record presented in this appeal, the question of waiver is not a close one. Plaintiffs' litigation conduct over the course of forty-four months —— from the complaint's filing on March 30, 2009 until the motion to compel's filing on December 4, 2012 —— is tangibly indicative of waiver. We have been provided with little explanation or reason for the lengthy delay in requesting arbitration. We also are uninformed by plaintiffs as to their change of heart concerning a jury disposition, which they sought twice in the complaint and amended complaint.

The only proffered reason for the deferment is the long-resolved criminal circumstances of one of the MG defendants' representatives. That situation resulted in only a four-month suspension of proceedings in the early stages of the case, and the machinery of litigational discovery was restarted in early May 2010. Nearly twenty-two months later, on March 12, 2012, the matter was scheduled for trial, which subsequently was adjourned after both parties consented to the adjournment to again extend the discovery period. It took another seven months before plaintiffs asked their adversaries to consent to

arbitration. Another two months elapsed before the motion to compel arbitration was filed. This skein of events bespeaks plaintiffs' firm commitment to the litigation process, to the exclusion of other forms of compulsory dispute resolution.

While in the embrace of the Law Division, the parties engaged in extensive discovery. Multiple depositions were conducted, interrogatories answered, and documents and expert reports exchanged. Moreover, the court monitored discovery, deciding numerous motions to compel discovery, ordering several extensions of the discovery deadline, and holding two case management conferences. Parties cannot, on the one hand, take deliberate advantage of the fulsome discovery procedures afforded by the publicly financed dispute resolution mechanism of the courts, and then, on the other hand, eschew that forum in favor of arbitration when it suits a strategic purpose and does not garner the consent of their litigational opponents.

Furthermore, plaintiffs filed their pleadings and jury demands without any reference to arbitration, thereby demonstrating their desire and intent to resolve their dispute in court. Likewise, the MG defendants filed their answer and asserted several affirmative defenses without seeking enforcement of the arbitration clause. As such, the Demians' decision to bring their claim in court, and not invoke the arbitration provision is powerful evidence of their waiver.

Finally, a waiver analysis, in many respects, turns on the resulting prejudice, or lack thereof, suffered by the parties. Prejudice, however, is but one factor in Cole's seven-step approach, and no single factor is dispositive or indispensable. Cole, supra, 215 N.J. at 281. In analyzing the prejudice prong, the Court recognized, "If we define prejudice as 'the inherent unfairness —— in terms of delay, expense, or damage to a party's legal position —— [then prejudice] occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.'" Id. at 282 (internal citation omitted).

Here, when plaintiffs sought to actualize their contractual right to arbitrate, their unilateral sea change would force their rivals to start over in a dissimilar forum governed by different rules, and with a changed trier of fact. Even though the delay in requesting arbitration and the tardy change in course would likely mostly hinder plaintiffs, who would face further delay and cost to resolve their grievances, the same hindrances would be visited upon their objecting foes. "Such conduct undermines the fundamental principles underlying arbitration and is strongly discouraged in our state." Id. at

283. We cannot countenance such playing fast and loose with the court.[3]

Reversed.

[3] Our conclusion that the plaintiffs waived the opportunity to arbitrate their grievances obviates the need to address Ientile's argument that it was never a party to any arbitration agreement and it could not, under any circumstances, be obliged to arbitrate its dispute absent consent. Suffice it to say that on remand, all claims of all parties shall be the subject of either dispositive motions or trial, unless earlier settled.