NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-3589-12T4
A-5387-12T4

FRANK IOSSA and FIOSSA TRANSIT SYSTEM, LLC,

Plaintiffs-Respondents,

v.

LOGISTICARE SOLUTIONS, LLC and LINDA DAY,

Defendants-Appellants.

Submitted November 14, 2013 – Decided August 13, 2014

Before Judges Waugh and Nugent.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-857-12.

Ford & Harrison, LLP, attorneys for appellants (Salvador P. Simao, of counsel; Mr. Simao and Joanna S. Rich, on the briefs).

Ronald J. Wronko, attorney for respondents.

PER CURIAM

The central issue in these consolidated appeals is whether an arbitration clause in a contract between plaintiff Fiossa Transit System, LLC, and defendant LogistiCare Solutions, LLC, encompasses claims brought under the New Jersey Law Against

Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The trial judge ruled that the arbitration clause did not cover LAD claims, and he twice denied defendants' motions to dismiss the complaint based on the arbitration clause. Defendants LogistiCare and Linda Day, manager of LogistiCare's New Jersey operations, appeal from the implementing orders. Plaintiffs Fiossa Transit and its managing member, Frank Iossa, oppose the appeal.

The arbitration clause in the LogistiCare – Fiossa Transit contract does not state either expressly or by general reference that it includes claims arising under the LAD. For that reason, it is insufficient to constitute a waiver of plaintiffs' remedies under the LAD. Accordingly, we affirm.

We derive the following facts from the motion record in the trial court. LogistiCare is a business that arranges for non-emergency medical transportation of Medicaid patients. It operates in more than thirty-eight states. The company is a "pure broker," which means that it does not provide direct transportation services with its own vehicles and drivers. Rather, LogistiCare relies entirely on local organizations to transport its customers. Fiossa Transit contracted with LogistiCare to provide such services.

Fiossa Transit signed a "Transportation Agreement" (Agreement) with LogistiCare that included the following clause concerning dispute resolution and arbitration:

> Dispute Resolution and Arbitration. If any claim or controversy arising out of or relating to this Agreement cannot be resolved by the parties in the normal course of business, each party shall designate a member of its senior management to meet in an attempt to resolve the dispute. If the dispute cannot be resolved to the satisfaction of the parties in this manner, the dispute shall be referred for binding arbitration in accordance with the commercial dispute arbitration rules of the American Arbitration Association. Each party shall bear its own costs and expenses and an equal share of the arbitrators' fees and other administrative fees related to the arbitration. Judgment upon an award in arbitration may be entered in any court of competent jurisdiction, or application may be made to such court for a judicial acceptance of the award and enforcement, as the law of the state having jurisdiction may require or allow. The provisions of this Section shall survive the termination of this Agreement.

Fiossa Transit signed the Agreement on July 1, 2009. LogistiCare terminated the Agreement less than a year later, on April 5, 2010. After LogistiCare terminated the Agreement, plaintiffs filed a complaint in which they asserted that defendants had violated N.J.S.A. 10:5-12(l), which prohibits, among other discriminatory acts, the refusal to "contract with, or trade with, . . . or otherwise do business with any other

person on the basis of . . . race . . . [or] national origin." Claiming reverse discrimination, plaintiffs alleged that LogistiCare had discriminated against them based on Iossa's race (Count I) and national original (Count II), and that Day had aided and abetted LogistiCare.

In lieu of filing an answer, defendants moved to dismiss the complaint under Rule 4:6-2(e) for failure to state a claim upon which relief could be granted. Plaintiffs cross-moved to amend the complaint. The court denied defendants' motion and granted plaintiffs' cross-motion.

In accordance with the court orders, plaintiffs filed a first amended complaint and defendants filed an answer in which, among other affirmative defenses, they asserted the contractual arbitration clause.

After the parties engaged in discovery, defendants moved to dismiss the first amended complaint and compel arbitration.[1] In opposition to the motion, Iossa filed a certification averring that he "never agreed on [his] own behalf or on behalf of [his] company to arbitrate any statutory claims or to waive [his] right to a jury trial."

[1] During the initial exchange of discovery, the parties learned that they all had misplaced the executed Transportation Agreement. They later located the executed Agreement.

The court denied the motion. Because the parties had not yet located the contract, and because LogistiCare had attempted to prove the terms of the contract through certifications attesting to the form contract that it generally used, the court agreed with plaintiffs' position that they should be able "to probe the certifications and other matters that are raised by the defendant on the motion through the process of discovery." Defendants appealed from the implementing order. Their arguments concerning the court's decision, for the most part, have been rendered moot by subsequent proceedings.

Defendants located the signed Agreement and renewed their motion to dismiss the complaint and compel arbitration. Following oral argument, the court denied the motion. Framing the dispositive issue as "whether the arbitration provision . . . would result in the LAD claims . . . being referred to mandatory arbitration," the court ruled that plaintiffs' claim "arises out of the allegations that the treatment accorded to the plaintiff by the defendants violated the terms of the LAD." Determining that the arbitration clause at issue "does not approach the language necessary to ensure that the waiver of statutory remedies was knowing and voluntary," the court denied defendants' motion. Defendants appealed from the implementing order.

On appeal, defendants emphasize that arbitration is a favored means of dispute resolution in New Jersey and that broadly worded arbitration clauses, such as the clause at issue here, are both valid and enforceable. They acknowledge our Supreme Court's pronouncements that arbitration clauses in employment contracts, which suggest the parties only intend to arbitrate disputes involving a contract term, a condition of employment, or some other element of the contract itself, are insufficient to require arbitration of statutory claims. They contend, however, that those pronouncements represent "various restrictions on arbitration agreements between employers and employees [that] only apply to arbitration agreements between employers and employees." Defendants argue that there are no compelling reasons to extend the Supreme Court's pronouncements beyond the employer/employee relationship.

Defendants also argue that a broadly worded arbitration agreement between commercial parties need not specifically refer to statutory claims. In addition, they argue that plaintiffs' complaint is based on wrongful termination of the Agreement, which is a controversy arising out of or relating to that contract.

Plaintiffs counter that the arbitration clause does not constitute a clear and unmistakable waiver of the right to a jury trial on their LAD claims. They emphasize that the right to be free from discrimination, protected by the LAD, is separate and distinct from their contractual rights arising out of or relating to the Agreement. They also argue that defendant Day was never a party to the contract with plaintiffs, and therefore cannot invoke its arbitration clause.

In reply, defendants maintain that plaintiffs' claims against Day also belong in arbitration.

Our standard of review is de novo. The parties' dispute involves the interpretation of their Agreement. Interpretation and construction of contracts are matters of law to be decided by the trial court subject to plenary review on appeal. Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 474 (App. Div. 2009).

We begin with the settled principle that parties may agree in a contract to "waive statutory remedies in favor of arbitration." Leodori v. Cigna Corp., 175 N.J. 293, 300 (internal quotation marks omitted), cert. denied, 540 U.S. 938, 124 S. Ct. 74, 157 L. Ed. 2d 250 (2003). Indisputably, arbitration is "favored . . . as a means of resolving disputes." Martindale v. Sandvik, Inc., 173 N.J. 76, 84 (2002). But

"'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 (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)). "'Subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be.'" Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001) (quoting In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 228-29 (1979)).

Our Supreme Court has explained that "'[a] clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue.'" Ibid. (alteration in original) (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)). For that reason, "a party's waiver of statutory rights 'must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.'" Ibid. (quoting Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 78 N.J. 122, 140 (1978)).

In Garfinkel, the arbitration clause in dispute was contained in an employment contract between a doctor and a medical group. The Court held "that because of its ambiguity the language contained in the arbitration clause does not constitute an enforceable waiver of plaintiff's statutory rights under the LAD." Garfinkel, supra, 168 N.J. at 127. The arbitration clause stated: "Except as otherwise expressly set forth in Paragraphs 14 or 15 hereof, any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration . . . in accordance with the rules then obtaining of the American Arbitration Association . . . ." Id. at 128 (emphasis added).

Following Garfinkel, we held that an arbitration clause in an employment contract between a lawyer and a law firm, which required arbitration of "'any controversy, claim, or dispute arising out of or relating to this Agreement, including the construction, interpretation, performance, breach, termination, enforceability, or validity thereof,'" did not apply to plaintiff's LAD claims. Waskevich v. Herold Law, P.A., 431 N.J. Super. 293, 296 (App. Div. 2013) (emphasis added).

As previously noted, the clause at issue in this appeal states: "If any claim or controversy arising out of or relating to this Agreement cannot be resolved by the parties . . . the

dispute shall be referred for binding arbitration in accordance with the commercial dispute arbitration rules of the American Arbitration Association." (emphasis added).

This clause is nearly identical to those in Garfinkel and Waskevich. We previously noted the Supreme Court's holding in Garfinkel that "because of its ambiguity the language contained in the arbitration clause does not constitute an enforceable waiver of plaintiff's statutory rights under the LAD." Garfinkel, supra, 168 N.J. at 127. Defendants have not explained explicitly why the language of the arbitration clause in Garfinkel is ambiguous and therefore insufficient to waive a statutory right, but the nearly identical language in this case is not. Rather, they suggest that Garfinkel represents one of "various restrictions on arbitration agreements between employers and employees [that] only apply to arbitration agreements between employers and employees." We find that argument unpersuasive for several reasons.

First, the language of the arbitration clause in this case is, on its face, either ambiguous as to statutory rights and remedies such as those contained in the LAD, or it is not. The language of the clause is not significantly different, in diction or syntax, from the language of the arbitration clauses in Garfinkel and Waskevich. The Supreme Court held in Garfinkel

that such language is ambiguous as to whether it includes statutory claims such as those brought under the LAD. We reached the same conclusion in Waskevich. Thus, the clause here cannot be distinguished from those in Garfinkel and Waskevich based on its syntax or substance.

Next, we discern no compelling policy reasons for differentiating between the clause here and those in Garfinkel and Waskevich. All three cases involve alleged violations of the LAD. In all three cases, the plaintiffs sought to exercise the right afforded them under the LAD to file suit in the Law Division of the Superior Court. N.J.S.A. 10:5-13. And in all three cases, the plaintiffs sought remedies provided under the LAD.

True, the plaintiffs in Garfinkel and Waskevich asserted claims under N.J.S.A. 10:5-12(a), whereas plaintiffs here are asserting rights under N.J.S.A. 10:5-12(l). "In simple[] terms, [the former section] deals with workplace discrimination, [the latter] addresses refusal to deal." Rubin v. Forest S. Chilton, 3rd, Mem'l Hosp., Inc., 359 N.J. Super. 105, 110 (App. Div. 2003). "The conduct proscribed by N.J.S.A. 10:5-12(l) is exclusively related to non-employee relationships." Id. at 111. Also true, the Court noted in Garfinkel that "the policies that support the LAD and the rights it confers on aggrieved employees

are essential to eradicating discrimination in the workplace." Garfinkel, supra, 168 N.J. at 135. But the Legislature has determined that the policies that support the LAD are also essential to prevent discrimination that results in the refusal to "contract with, or trade with, . . . or otherwise do business with any other person on the basis of the race . . . [or] national origin" of that person, N.J.S.A. 10:5-12(l), the type of discrimination alleged by plaintiffs in this case. Discrimination in both contexts is equally abhorrent. We fail to discern any reason why the identical ambiguous arbitration clause should be deemed insufficient to waive a statutory right conferred by the LAD in the former context, but sufficient to waive the identical statutory right in the latter.

Defendants assert that

> [t]he public policy concerns related to employees, who are almost always wholly reliant on their employers as their sole source of income and are often unrepresented by counsel when entering into arbitration agreements, are not present in the commercial context, where parties derive profit from multiple corporate relationships and are often represented by counsel.

Defendants cite no authority to support their assertion, and provide no reference to the record to support the proposition that plaintiffs in this case either "derive profit from multiple

corporate relationships" or were represented by counsel when they signed the Agreement with LogistiCare.

Moreover, as discussed above, the LAD advances the compelling public policy of eradicating discrimination. In our view, that policy is no less compelling when a company discriminates against an independent contractor based on race, national origin, or another protected class, than when a company discriminates against an employee. Indeed, the Legislature did not restrict its findings to workplace discrimination when it declared "that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin . . . are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State." N.J.S.A. 10:5-3.

Defendants rely on EPIX Holdings Corp. v. Marsh & McLennan Cos., Inc., 410 N.J. Super. 453 (App. Div. 2009), overruled in part by Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174 (2013), and Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560 (App. Div. 2007) to support their contention that limits to certain arbitration clauses respecting employees' rights should not be extended beyond the employment context. The statutory causes of

action in EPIX and Alfano, however, did not involve discrimination claims under the LAD, and therefore neither case presented the need to "strike[] the appropriate balance between fostering the salutary goals of the arbitration system and ensuring that the choice-of-forum provision under the LAD is preserved for the benefit of aggrieved employees." Garfinkel, supra, 168 N.J. at 136. This case, like Garfinkel, presents the need to strike the same balance. As discussed, we perceive no legally significant distinction between an aggrieved employee, and an aggrieved individual such as Iossa.

Defendants' remaining arguments are either moot, or they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.