SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1907-15T1

COLUMBUS CIRCLE NJ LLC,

Plaintiff-Appellant,

v.

ISLAND CONSTRUCTION CO., LLC,

Defendant-Respondent.

Argued January 24, 2017 – Decided March 13, 2017

Before Judges Leone and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Cape May County, Docket No. L-501-15.

Brian A. Pelloni argued the cause for appellant (Hornstine & Pelloni, LLC, attorneys; Mr. Pelloni, on the brief).

Daniella Gordon argued the cause for respondent (The Gordon Law Firm, attorneys; Ms. Gordon, on the brief).

PER CURIAM

Plaintiff Columbus Circle NJ LLC (the LLC) appeals the trial court's December 11, 2015 decision. The court granted defendant Island Construction Co., LLC's motion to dismiss pursuant to Rule

4:6-2(a) for lack of subject matter jurisdiction and to compel arbitration pursuant to N.J.S.A. 2A:23B-7. We affirm.

I.

Unless otherwise indicated, the following facts are alleged in the LLC's amended complaint or undisputed. The LLC is a limited liability corporation registered in New Jersey. The parties entered into a contract for defendant to construct a $1.96-million-dollar, 10,000-square-foot home in Avalon on bayfront property owned by the LLC. The sole member of the LLC is David Kovacs, who signed the contract on its behalf.

The LLC's owners representative was the Dayhill Group. On January 30, 2014, the owners representative e-mailed the parties its initial draft of the contract. The draft contract utilized a "Standard Form of Agreement Between Owner and Contractor" created by the American Institute of Architects (AIA), denoted AIA Form A101-2007 (Agreement), supplemented with the AIA's "General Conditions of the Contract," denoted AIA Form A201-2007 (General Conditions).[1]

[1] The contract is referred to in the LLC's complaint. In any event, "[t]he trial court appropriately considered, with respect to the motion to dismiss for lack of subject matter jurisdiction under Rule 4:6-2(a), matters outside the pleadings," and could do so "without converting that specific application to a summary judgment motion." Hoffman v. Supplements Togo Mgmt., LLC, 419 N.J. Super. 596, 611 n.7 (App. Div. 2011), certif. granted, 209

The draft Agreement's Section 13.2, entitled "BINDING DISPUTE RESOLUTION," gave the parties the choice of "the method of binding dispute resolution" for claims not resolved by mediation. The LLC's owners representative highlighted and marked an "X" on the choice "Arbitration pursuant to Section 15.4 of AIA Document A201-2007," rather than the choice "Litigation in a court of competent jurisdiction."

On February 13, 2014, Kovacs informed the parties his personal attorney reviewed and commented on the initial draft. The next day, Kovacs forwarded a revised draft to the parties, specifically highlighting changes he and his attorney made. He asked the parties to respond with any specific changes they wanted before he asked his attorney to produce the final contract. After defendant made its changes to the contract, the contract was provided to Kovacs and his attorney for signature. After further review, the contract was executed on February 20, 2014.

During construction, disagreements arose between the parties regarding the cost of the project. Both parties terminated the contract by letters dated February 19, 2015. The LLC's letter demanded mediation of the dispute pursuant to Section 15.3.1. On

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N.J. 231 (2012), appeal voluntarily dismissed, No. 068416 (Nov. 26, 2012).

July 29, 2015, defendant filed a demand for arbitration with the American Arbitration Association.

On October 23, 2015, the LLC filed a complaint in the Law Division. Defendant filed its motion to dismiss, and the LLC responded.[2] After hearing argument, the trial court granted defendant's motion. Based on the contract provisions, the court found "plaintiff understood the method chosen to be arbitration as opposed to litigation and agreed to the same by executing the Contract." The LLC appeals.

II.

We must hew to our standard of review. "Whether subject matter jurisdiction exists presents a purely legal issue, which we review de novo." Santiago v. N.Y & N.J. Port Auth., 429 N.J. Super. 150, 156 (App. Div. 2012) (citation omitted), certif. denied, 214 N.J. 175 (2013). "Because the trial judge summarily granted defendant's motion to compel arbitration, . . . our review of that determination is de novo[.]" Kleine v. Emeritus at Emerson, 445 N.J. Super. 545, 548 (App. Div. 2016). "Our approach in construing an arbitration provision of a contract is governed

[2] Kovacs certified that the contract did not "indicate[] that I was waiving my right to file suit against the Defendants in Court, nor did I believe that to be the case. It was my understanding that both parties would have to agree to mediation or arbitration in order for that method to be used."

by the same de novo standard of review." Atalese v. U.S. Legal Servs. Grp, L.P., 219 N.J. 430, 446 (2014), cert. denied, ___ U.S. ___, 135 S. Ct. 2804, 192 L. Ed. 2d 847 (2015).

III.

The strong "public policy of this State favors arbitration as a means of settling disputes that otherwise would be litigated in a court." Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 556 (2015); accord Hojnowski v. Vans Skate Park, 187 N.J. 323, 343 (2006). The Federal Arbitration Act, 9 U.S.C.A. §§ 1–16, "expresses a national policy favoring arbitration," Morgan v. Sanford Brown Inst., 225 N.J. 289, 304 (2016), and requires courts to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms," AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742, 751 (2011) (citation omitted). The New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -22, follows these same principles. Leodori v. CIGNA Corp., 175 N.J. 293, 302 (citation omitted), cert. denied, 540 U.S. 938, 124 S. Ct. 74, 157 L. Ed. 2d 250 (2003).

"An agreement to arbitrate, like any other contract, 'must be the product of mutual assent, as determined under customary principles of contract law.'" Atalese, supra, 219 N.J. at 442 (citation omitted). "Mutual assent requires that the parties have

an understanding of the terms to which they have agreed." Ibid. "This requirement of a 'consensual understanding' about the rights of access to the courts that are waived in the agreement has led our courts to hold that clarity is required." Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 37 (App. Div. 2010) (citation omitted).

"'By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court.'" Atalese, supra, 219 N.J. at 442 (citation omitted). However, "an average member of the public may not know — without some explanatory comment — that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." Ibid.

Here, Section 13.2 of the Agreement expressly instructed the parties to choose whether their "method of binding dispute resolution" would be "Arbitration" or "Litigation in a court of competent jurisdiction."[3] Moreover, the section advised if the

[3] The provision read:

> § 13.2 BINDING DISPUTE RESOLUTION
>
> For any Claim subject to, but not resolved by mediation pursuant to Section 15.3 of AIA Document A201-2007, the method of binding dispute resolution shall be as follows:

parties failed to select or agree on "a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction." Thus, when the LLC chose "Arbitration," it did so with full knowledge "that arbitration is a substitute for the right to have [its] claim adjudicated in a court." Ibid.

The contract made clear the consequences of the LLC's choice in Section 15.4 of the General Conditions, entitled "ARBITRATION." Section 15.4.1 provided:

> If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association, in accordance with its Construction Industry Arbitration Rules.

> *(Check the appropriate box. If the Owner and Contractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.)*
>
> X Arbitration pursuant to Section 15.4 of AIA Document A201-2007
>
> [ ] Litigation in a court of competent jurisdiction
>
> [ ] Other *(Specify)*

Furthermore, Section 15.4.2 emphasized "[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." Section 15.4.3 indicated "[t]he foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof."[4]

Unlike the plaintiff in Atalese, neither the LLC nor Kovacs was "an average member of the public." Ibid. Kovacs was sophisticated enough to operate in the form of an LLC, to hire an owners representative, and to engage in a two-million-dollar transaction. He negotiated and changed the terms of the contract with the advice of counsel, who reviewed and altered the contract before Kovacs signed it on behalf of the LLC. See Van Duren v. Rzasa-Ormes, 394 N.J. Super. 254, 257 (App. Div. 2007) (enforcing an arbitration agreement "between two sophisticated business parties, each represented by counsel"), aff'd o.b., 195 N.J. 230 (2008).

[4] Defendant represents that the AIA arbitration provisions are the most widely used arbitration provisions in the construction industry.

The LLC claims the contract was prepared by a third party, but in fact the AIA forms were selected by the LLC's own owners representative. This was not "a consumer contract of adhesion where [one party] . . . possessed superior bargaining power and was the more sophisticated party." Delta Funding Corp. v. Harris, 189 N.J. 28, 40 (2006). Rather, it was a negotiated agreement between sophisticated business entities where the LLC, its owners representative, Kovacs, and his attorney selected the contract forms, altered them, and made the choice of arbitration.

The LLC and Kovacs provided further evidence of their sophistication and understanding of the contract when they invoked mediation. Like arbitration, mediation is a form of non-judicial dispute resolution. The contract made clear mediation is the precursor and precondition for arbitration, discussed mediation in the same provisions as arbitration (Section 13.2 of the Agreement and Sections 15.3 and 15.4 of the General Conditions), and provided that mediation, like arbitration, would be conducted by the American Arbitration Association.

Nonetheless, the LLC incorrectly claims this case resembles Atalese. In Atalese, supra, a consumer seeking debt relief entered into a contract containing an arbitration provision which "made no mention that plaintiff waived her right to seek relief in court." 219 N.J. at 435, 437. The Court held "[t]he absence of

any language in the arbitration provision that plaintiff was waiving her statutory right to seek relief in a court of law renders the provision unenforceable." Id. at 436. Here, the contract made clear the LLC was choosing arbitration rather than seeking relief in court.

The Court "emphasize[d] that no prescribed set of words must be included in an arbitration clause to accomplish a waiver of rights." Id. at 447. "Whatever words" are chosen, "they must be clear and unambiguous that a consumer is choosing to arbitrate disputes rather than have them resolved in a court of law." Ibid. "[T]he parties must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum." Id. at 445. Here, the contract informed the parties there was a distinction between resolving a dispute in arbitration and in court, and the LLC chose arbitration rather than court.

"In Atalese, the Court provided several examples of language sufficient to meet these expectations." Barr v. Bishop Rosen & Co., 442 N.J. Super. 599, 606 (App. Div. 2015), certif. denied, 224 N.J. 244 (2016). The Supreme Court noted our Griffin decision "upheld an arbitration clause, which expressed that '[b]y agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding,

to settle their disputes.'" Atalese, supra, 219 N.J. at 445 (quoting Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div. 2010)). Like the arbitration clause approved in Griffin and Atalese, the arbitration provision here made clear the parties were choosing to use arbitration to solve their disputes rather than a court action.

The Court also cited another example, where the arbitration clause stated "the plaintiff agreed 'to waive [her] right to a jury trial,'" and a third example where the arbitration clause stated: "'Instead of suing in court, we each agree to settle disputes . . . only by arbitration,'" where "'[t]here's no judge or jury.'" Id. at 444-45 (citations omitted). The Court stated an arbitration "clause, at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." Id. at 447.

The LLC seizes on this last phrase and argues an arbitration clause must explain a plaintiff is giving up the right to bring claims in court and have a jury resolve a dispute. However, the Court stated a clause "must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." Ibid. (emphasis added). The Court approved both Griffin's reference to the right to bring claims in court and

other examples referring to the right to have a jury. Id. at 444-46. The Court stated Griffin and the other examples "show that, without difficulty and in different ways, the point can be made that by choosing arbitration one gives up the 'time-honored right to sue.'" Id. at 445. Here, the contract made that point.

Atalese simply requires a contract "to explain in some minimal way that arbitration is a substitute for a consumer's right to pursue relief in a court of law." Morgan, supra, 225 N.J. at 294. In Morgan, the plaintiffs — students — complained "they did not know that the arbitration provision denied them their right of access to a judicial forum and to a jury trial." Id. at 300-01. The Court noted the provision did not "explain that arbitration is a substitute for bringing a claim before a court or jury." Id. at 306 (emphasis added); see id. at 311-12 ("judge or jury"). The Court reiterated that "[n]o magical language is required to accomplish a waiver of rights in an arbitration agreement" and again cited the arbitration clause in Griffin, which did not mention a jury. Id. at 309.

The Court in Morgan ultimately ruled the school's provision "suffers from the same flaw found in the arbitration provision in Atalese — it does not explain in some broad or general way that arbitration is a substitute for the right to seek relief in our court system." Id. at 307-08. The Court invalidated the

arbitration agreement because it did not explain "that plaintiffs are waiving their right to seek relief in court" and that plaintiffs are "giving up the right to pursue relief in a judicial forum." Id. at 309-10 (citing Atalese, supra, 219 N.J. at 446).

Thus, we reject the LLC's claim that the contract's arbitration provisions clearly advising that the parties are giving up their right to pursue relief in court are invalid because they did not also advise about one of the component rights involved in seeking relief in court, namely a jury trial. Neither the LLC nor Kovacs claims to be ignorant that waiver of the right to seek relief in court would waive that component right.

We do not denigrate the importance of the right to a jury trial, which both Morgan and Atalese noted "is guaranteed by the New Jersey Constitution." Id. at 308; accord Atalese, supra, 219 N.J. at 447 n.1. Nonetheless, those cases held an arbitration clause was sufficient if it advised the parties they were waiving the fundamental right to seek relief in court, without requiring it advise them of all the component rights encompassed in that waiver. To require advice on all component rights encompassed in a waiver of seeking relief in court would render arbitration clauses either too complex and hard to understand, or too easy to invalidate, in contravention of the strong policy favoring arbitration. See Jaworski v. Ernst & Young U.S. LLP, 441 N.J.

Super. 464, 480-81 (App. Div.) (upholding an arbitration clause which said the parties would not "'be able to sue in court'" and rejecting plaintiffs' argument that the "the arbitration agreement must inform the parties of (1) the number of jurors, (2) the parties' rights to choose the jurors, (3) how many jurors would have to agree on a verdict, and (4) who will decide the dispute instead of the jurors"), certif. denied, 223 N.J. 406 (2015).[5]

The LLC also cites Atalese's comment that the arbitration provision there "d[id] not explain what arbitration is, nor does it indicate how arbitration is different from a proceeding in a court of law." Atalese, supra, 219 N.J. at 446. Here, the arbitration provisions explained that arbitration was a method of binding dispute resolution, that it could involve one or more arbitrators, that the arbitration award "shall be final," and that the award could be entered and enforced in a court. Cf. Barr, supra, 442 N.J. Super. at 607-08 (finding inadequate an arbitration clause which did not advise that arbitration was binding or final). Moreover, unlike the provisions in Atalese, supra, 219 N.J. at

[5] In a case where we rejected a plaintiff's appeal of the dismissal of her complaint based on an arbitration provision, we later denied counsel fees because the complaint was not frivolous "[i]n light of the holding in Atalese" that "a knowing waiver of constitutional rights to a jury trial must be explicit in order to enforce the arbitration clause," Taqayun v. AmeriChoice of N.J., Inc., 446 N.J. Super. 570, 576, 579 (App. Div. 2016). As noted above, Atalese did not so hold.

437, the arbitration provision here specified it was conducted under an identified set of rules, namely the AIA Construction Industry Arbitration Rules, which sophisticated parties such as the LLC, its owners representative, Kovacs, and his attorney could consult if they needed further details. Indeed, they do not even claim they, who understood and invoked mediation, were unaware what arbitration is or how it differs from a court proceeding.

The LLC argues its sophistication and Kovacs's assistance of counsel must be ignored under Marchak v. Claridge Commons, Inc., 134 N.J. 275 (1993), and Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A., 168 N.J. 124 (2001). The LLC's argument is misplaced. The Court in Marchak stated the plaintiff's representation by counsel avoided the problem of "inequality of bargaining power between the parties," but it reversed because of "something more fundamental: the agreement simply does not state that the buyer elects arbitration as the sole remedy." Marchak, supra, 134 N.J. at 282-83.

Similarly, in Garfinkel, supra, the Court ruled a statutory claim was not waived by an arbitration clause because it was "silent in respect of plaintiff's statutory remedies." 168 N.J. at 135. The Court found the clause's failure to encompass the claim was not offset by plaintiff being a doctor. "Irrespective of plaintiff's status or the quality of his counsel, the Court

must be convinced that he actually intended to waive his statutory rights. An unambiguous writing is essential to such a determination." Id. at 135-36.

In Dispenziere v. Kushner Cos., 438 N.J. Super. 11, 18, 20 (App. Div. 2014), we invalidated an arbitration provision that failed to inform the "plaintiffs that they were waiving their right to seek relief in a court of law." As in Marchak and Garfinkel, we rejected the argument "that the presence of counsel during the real estate transaction suffices to cure the inadequacy of the contractual arbitration provision." Id. at 20.

Here, unlike Marchak, Garfinkel, and Dispenziere, the arbitration provisions were not inadequate, because they clearly informed the LLC it was making the choice to waive litigation in court in favor or arbitration. In determining whether the LLC and Kovacs understood their choice, it was obviously relevant that they were sophisticated and represented by counsel and an owners representative. Compare Martindale v. Sandvik, Inc., 173 N.J. 76, 97 (2002) (upholding an arbitration clause where the "[p]laintiff was an educated businesswoman experienced in the field of human resources"), with Rodriguez v. Raymours Furniture Co., Inc., 225 N.J. 343, 366 (2016) (distinguishing Martindale because Martindale "was a human resources officer, a more sophisticated employee than [Rodriguez], an applicant for an entry-level position"). Here,

in this two-million-dollar transaction, we see "no reason these obviously sophisticated parties should not be bound by the [arbitration] covenants into which they freely and voluntarily entered." McMahon v. City of Newark, 195 N.J. 526, 546 (2008).

"[A]n agreement to arbitrate should be read liberally in favor of arbitration." Garfinkel, supra, 168 N.J. at 132 (quoting Marchak, supra, 134 N.J. at 282); accord Griffin, supra, 411 N.J. Super. at 518. Thus, the trial court correctly determined that this case was distinguishable from Atalese and that the arbitration provisions were enforceable. The court properly found "the plain language" of the arbitration provisions was clear, particularly to the LLC and Kovacs, sophisticated parties who had the assistance of counsel and the benefit of an owners representative during negotiations.

IV.

Finally, the LLC contends defendant did not give proper notice of its claim to the Initial Decision Maker. The LLC cites Section 15.2.1 of the General Conditions, which required notice of claims be given to the Initial Decision Maker before mediation. However, the LLC itself demanded mediation and went through mediation without protest. Moreover, although the Agreement specified the Initial Decision Maker was the owners representative, then the Dayhill Group, the LLC's February 20, 2015 letter terminating the

contract also announced the termination of the Dayhill Group and the naming of Kovacs as the Initial Decision Maker. Thus, the demand for arbitration properly named Kovacs as the LLC's owners representative. In any event, by addressing the demand to the LLC, defendant satisfied Section 15.4 of the General Conditions, which required the demand for arbitration be "delivered to the other party to the Contract."

Thus, we affirm the trial court's rejection of the LLC's attempts to escape the arbitration provisions it selected in its negotiated contract.

Affirmed. The trial court's stay of arbitration is dissolved.