SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5291-14T4

26 FLAVORS, LLC,

Plaintiff,

v.

TWO RIVERS COFFEE, LLC,
d/b/a BROOKYLN BEAN,

Defendant/Third-Party
Plaintiff-Respondent,

v.

EMIL FRIEDMAN,

Third-Party
Defendant-Appellant.

Argued April 6, 2017 - Decided September 12, 2017

Before Judges Hoffman, O'Connor and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. C-0007-15.

Paul H. Schafhauser argued the cause for appellant (Chiesa, Shahinian & Giantomasi, PC, attorneys; Mr. Schafhauser and Michelle M. Sekowski, on the brief).

Hillel I. Parness argued the cause for respondent (Parness Law Firm, PLLC, attorneys; Mr. Parness, on the brief).

PER CURIAM

Third-party defendant Emil Friedman appeals from a provision in a May 15, 2015 order granting defendant/third-party plaintiff Two Rivers Coffee, LLC leave to file a third-party complaint against him.[1] Friedman also appeals from those provisions of a June 30, 2015 order permitting defendant to retain counsel and to pay for its attorney's fees. After reviewing the record and applicable legal principles, we conclude the provisions in the orders under review are moot.

I

Both plaintiff and defendant sell coffee products. At the time in question, they were bound by a non-compete agreement. Significantly, Friedman is a member of both plaintiff and defendant. Specifically, he is the only member of plaintiff and one of four members of defendant.

In any event, suspecting defendant was competing against it in violation of their agreement, in January 2015, plaintiff filed a complaint and order to show cause (OTSC) seeking defendant be temporarily restrained from engaging in the conduct

[1] For the balance of the opinion, we refer to defendant/third-party plaintiff Two Rivers Coffee, LLC as "defendant," and third-party defendant as "Friedman."

that allegedly violated the non-compete agreement. Thereafter, one of defendant's members asked Friedman to authorize defendant to retain counsel, so defendant could defend itself against plaintiff's OTSC; Friedman refused.

Mayer Koenig, Eugene Schreiber, and Steven Schreiber (the three members) are three of the four members of defendant. Fearing defendant's profits would suffer if plaintiff prevailed on its OTSC, the three members pooled $20,000 of their own money and hired counsel to represent defendant. Nine days after defendant filed a response to the OTSC, plaintiff filed a voluntary dismissal, purportedly pursuant to R. 4:37-1(a). Thereafter, in accordance with the non-compete agreement, plaintiff initiated arbitration proceedings on the question whether defendant had violated such agreement.

Defendant then filed two motions seeking various relief in connection with the OTSC. Among other things, defendant sought leave to file a third-party complaint against Friedman; authorization, albeit after the fact, to retain counsel to defend itself against the OTSC; permission to reimburse the three members for the monies they spent to retain counsel, as well as to pay any other fees and costs it incurred to defend itself against the OTSC.

On May 15, 2015, the court entered an order granting defendant's motion for leave to file a third-party complaint against Friedman. Although Friedman opposed the motion on the ground the case had been dismissed, precluding the filing of a third-party complaint, the court found plaintiff had not been authorized under R. 4:37-1(a) to voluntarily dismiss its complaint.[2] The court determined defendant's response to the OTSC the equivalent of an answer, which prohibited plaintiff from dismissing the complaint without a court order. See Pressler & Verniero, Current N.J. Court Rules, comment 1.1 on R. 4:37-1 (2017)(citing In re Estate of Horowitz, 220 N.J. Super. 300, 302 (Law Div. 1987)) (holding "[i]t is clearly too late to seek to voluntarily dismiss a matter without court order after the court has taken the merits under advisement.").

On June 30, 2015, the court granted defendant's motion to: (1) prohibit Friedman from participating in defendant's decision

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[2] This rule provides in pertinent part:

> an action may be dismissed by the plaintiff without court order by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs; or by filing a stipulation of dismissal specifying the claim or claims being dismissed, signed by all parties who have appeared in the action.

to retain counsel; (2) authorize defendant to reimburse the three members for the monies they used from personal funds to retain counsel on defendant's behalf; and (3) authorize defendant to retain and pay counsel for the fees defendant incurred in connection with the OTSC. In its oral decision, the court made it clear it granted the above relief only with respect to the OTSC and not for any other proceeding, including the arbitration hearing.

Friedman had argued the court did not have jurisdiction to grant this relief, contending defendant had to seek such relief from an arbitration panel. The court determined paragraph 11.2 of defendant's operating agreement, which bound all four members, enabled the court to consider and grant the relief. Paragraph 11.2 states in relevant part:

> All disputes with respect to any claim for indemnification and all other disputes and controversies between the parties hereto arising out of or in connection with this Operating Agreement shall be submitted to a Beth Din arbitration in accordance with Orthodox Jewish religion. . . . An award rendered by Beth Din pursuant to this Agreement shall be final and binding on all parties to the proceeding. . . . Except as set forth below, the parties stipulate that the provisions of this paragraph shall be a complete defense to any suit, action or proceeding instituted in any federal, state, or local court or before any administrative tribunal with respect to any controversy or dispute arising out of this Agreement. The

> arbitration provisions hereof shall, with respect to such controversy or dispute, survive the termination or expiration of this Agreement. Notwithstanding anything herein to the contrary, any party may seek from a court any provisional remedy that may be necessary to protect any rights or property from such party pending the establishment of the arbitral tribunal or its determination of the merits of the controversy.
>
> [Emphasis added].

Relying on this language, the court noted that, although the members agreed disputes among them were to be submitted to arbitration, the operating agreement provided a party could seek a provisional remedy from the court if necessary to protect its rights or property because an arbitration panel had not yet been established or, if established, a party could not wait for the panel's decision on the merits. The court regarded the relief defendant sought to be a provisional remedy because plaintiff had sought provisional relief in the form of an OTSC. It found the relief defendant requested necessary because:

> [I]t would have been a breach of the members' fiduciary duty not to hire counsel [and] let [defendant] default with nothing. . . . I think that would have been a breach of fiduciary duty to the [defendant] company.
>
> So, it is my view that it was incumbent upon somebody to retain counsel to at least make an appearance in connection with the provisional remedy sought. . . .

> And it is my view [a provisional remedy] . . . applies to the retention of counsel, and the payment of counsel fees, in defense of a provisional remedy.

The court also relied upon paragraph 6.1.2 of the operating agreement, which provides all "decisions and documents relating to the day-to-day management and operation of [defendant] shall be made and executed by a [m]ajority in [i]nterest of the [m]embers." The court determined decisions about litigation were those that fell into the latter category. The court stated,

> [E]ven if [Friedman] protests the defense, [he] was outvoted. Because it's a per capita vote. So, it was completely, in my view, appropriate for the three members to, in fact, retain counsel to defend against a provisional remedy. . . .
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> And, as I've previously stated, I think it would have been a breach of fiduciary duty to allow [defendant] to go undefended and default in this action. And, in fact, the three members, on the per capita vote, properly retained counsel.

II

On appeal, Friedman asserts the following arguments for our consideration:

> POINT I: THE TRIAL COURT ERRED IN ALLOWING THE FILING OF A "THIRD-PARTY COMPLAINT" AGAINST MR. FRIEDMAN IN A MATTER THAT HAD ALREADY BEEN DISMISSED BY 26 FLAVORS.

POINT II: THE TRIAL COURT ERRED IN GRANTING THE MINORITY MEMBERS LEAVE TO FILE A FUTILE AND PREJUDICIAL THIRD-PARTY COMPLAINT AGAINST MR. FRIEDMAN.

POINT III: THE TRIAL COURT ERRED IN SUMMARILY DECIDING THIS MATTER WHEN (I) THE MINORITY MEMBERS' MOTION WAS NOT SUPPORTED BY COMPETENT EVIDENCE; (II) THE TRIAL COURT DISREGARDED COMPETENT EVIDENCE SUBMITTED THROUGH MR. FRIEDMAN'S CERTIFICATION; AND (III) MATERIAL ISSUES OF FACT REMAINED IN ANY EVENT.

POINT IV: THE TRIAL COURT ERRED IN DETERMINING THAT THE THIRD-PARTY CLAIMS WERE NOT PREJUDICIAL TO MR. FRIEDMAN'S BARGAINED-FOR RIGHTS.

POINT V: THE TRIAL COURT ERRED IN HOLDING THAT THE THIRD-PARTY CLAIMS WERE NOT SUBJECT TO THE ARBITRATION PROVISIONS CONTAINED IN DEFENDANT'S OPERATING AGREEMENT.

a. There is a strong presumption in favor of arbitration and thus any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration.

b. The third-party complaint was filed in connection with the 26 Flavors lawsuit commenced under the non-compete agreement - not regarding any dispute under [defendant's] operating agreement.

c. The application for reimbursement of retainer fees was not a "provisional remedy."

d. Even assuming that the application for reimbursement of retainer fees could constitute a "provisional remedy," there was no

pending action under the non-compete agreement.

POINT VI: THE TRIAL COURT ERRED IN FAILING TO COMPEL THE MINORITY MEMBERS OF [DEFENDANT] TO PARTICIPATE IN THE ARBITRATION THAT MR. FRIEDMAN COMMENCED IN ACCORDANCE WITH THE ARBITRATION PROVISIONS OF [DEFENDANT'S] OPERATING AGREEMENT.

POINT VII: THE TRIAL COURT ERRED IN DEEMING UNCONTROVERTED EVIDENCE OF THE MINORITY MEMBERS' UNCLEAN HANDS TO BE IRRELEVANT.

POINT VIII: THE TRIAL COURT ERRED IN FAILING TO REQUIRE THE MINORITY MEMBERS TO SUBMIT AN AFFIDAVIT OF SERVICES.

POINT IX: ANY FURTHER PROCEEDINGS INVOLVING MR. FRIEDMAN SHOULD BE ADJUDICATED BY A DIFFERENT JUDGE.

There is a strong public policy presumption in favor of arbitration. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc., 427 N.J. Super. 45, 57-58 (App. Div. 2012), certif. denied, 212 N.J. 460 (2012). If there is a valid and enforceable agreement to arbitrate disputes and the particular dispute between the parties falls within the scope of the agreement, the agreement must be enforced. Martindale v. Sandvik, Inc., 173 N.J. 76, 86, 92 (2002). Moreover, where the terms of a contract are clear and unambiguous, the court must enforce them, Watson v. City of E. Orange, 175 N.J. 442, 447 (2003) (Long, J., dissenting), and give the words "their plain, ordinary meaning." Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J.

251, 270 (2008) (quoting Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001)).

Here, the terms of paragraph 11.2 of defendant's operating agreement are clear and unambiguous. Disputes must be submitted to arbitration, unless a party's right or property requires protection in the form of a provisional remedy before an arbitration panel can be established, or such party cannot wait for a panel's decision on the merits the panel has been tasked to decide.

In our view, there were no facts justifying the court intervene and determine defendant was authorized, without the unanimous consent of all members, to hire counsel to defend it against plaintiff's OTSC, pay its counsel's fees, and reimburse the three members for the money they spent to hire counsel. There was no evidence defendant's rights or property were in need of a provisional remedy before an arbitration panel could act. We fully understand defendant's desire to obtain counsel to represent it, pay counsel fees from its funds, and reimburse those members who paid for its debts. But given defendant was in fact represented during the short period of time plaintiff pursued its OTSC, and there was no urgency in reimbursing the three members, resort to the court for a remedy was unnecessary.

However, although we disagree with the trial court paragraph 11.2 of the operating agreement enabled it to intervene and order the subject relief under these facts, we concur paragraph 6.1.2 of the operating agreement permits a majority of defendant's members to make decisions relating to the day-to-day management and operation of defendant, which includes retaining and paying for an attorney. Therefore, the three members did not need a court's or arbitration panel's approval to retain an attorney to protect defendant's interests, pay counsel with company funds, or reimburse its members for paying defendant's counsel fees. The subject provisions in the two court orders under review are essentially superfluous, providing relief where none was needed. However, to the extent these provisions reflect the court's interpretation of paragraph 6.1.2, we affirm.

We have considered Friedman's remaining arguments and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). Friedman's argument the court erred by failing to compel the three members to participate in arbitration is not before us.

Affirmed.