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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5535-16T1

BRIAN GRIFFOUL and ANANIS GRIFFOUL,

Plaintiffs-Respondents,

v.

NRG RESIDENTIAL SOLAR SOLUTIONS, LLC d/b/a NRG HOME SOLAR and NRG ENERGY, INC.,

Defendants-Appellants.

Argued April 24, 2018 – Decided May 4, 2018

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-1503-17.

Thomas J. O'Leary argued the cause for appellants (Connell Foley, LLP, attorneys; Thomas J. O'Leary, of counsel and on the briefs; Patricia A. Lee, on the briefs).

Arthur M. Owens argued the cause for respondents (Lum, Drasco & Positan, LLC, attorneys; Arthur M. Owens, on the brief).

PER CURIAM

Defendants NRG Residential Solar Solutions d/b/a NRG Home Solar and NRG Energy, Inc. appeal from a July 14, 2017 order, which denied their motion to compel arbitration. We reverse.

Plaintiffs, residents of Elmwood Park and class representatives Brian and Ananis Griffoul, and NRG Residential entered into solar power system leases. The lease agreements required NRG Residential to install solar systems on plaintiffs' respective properties, which would provide electricity to their homes, and also be interconnected with the utility's electrical transmission grid. In consideration, plaintiffs each made a down payment of $51.55 followed by 239 monthly lease payments for a total of $16,453.96.

Plaintiffs filed a class action complaint against defendants alleging violations of the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, and the Truth-in-Consumer Contract Warranty and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to -18. Plaintiffs allege the lease agreement contained six provisions that violated consumer rights: "¶ 4.2 Access Rights;" "¶ 10.2 Remedies;" "¶ 11.3 Indemnity;" "¶ 11.5 No Consequential Damages;" "¶ 11.4 Limitation of Liability;" and "¶ 12.4 Statute of Limitations." They also alleged "[d]efendants . . . made specific and direct representations . . . that customers . . . could expect

decreased monthly energy bills and would obtain certain benefits by way of their receipt of solar renewable energy credits."

Defendants moved to compel arbitration pursuant to a provision in the parties' lease agreement, which stated:

> Unless prohibited by State law, any dispute, disagreement or claim between you and NRG RSS arising out of or in connection with this Lease, or the Solar System, which cannot be amicably resolved by the parties shall be submitted to final and binding arbitration in a location that is a convenient distance from the Property for you, in accordance with Commercial Arbitration Rules of the American Arbitration Association including the Supplementary Procedures for Consumer-Related Disputes, if applicable (the "AAA Commercial Rules"), except as provided in Section 12.7. This agreement to arbitrate is governed by the Federal Arbitration Act. While a dispute, disagreement or claim is being resolved under this Section . . . both parties shall continue to perform their obligations under this Lease. The arbitration shall be conducted by one arbitrator appointed in accordance with the AAA Commercial Rules. YOU AND NRG RSS AGREE THAT BY ENTERING INTO THIS LEASE, YOU AND WE ARE WAIVING THE RIGHT TO A JURY TRIAL. IN ADDITION, EACH PARTY MAY BRING CLAIMS AGAINST THE OTHER PARTY ONLY IN ITS INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. OTHER RIGHTS THAT YOU OR NRG RSS WOULD HAVE IN COURT MAY ALSO NOT BE AVAILABLE TO YOU.

The agreement also provided:

> Unless prohibited by State law, the parties agree that the award of the arbitrator (the "ARBITRARION AWARD"): (i) shall be conclusive, final, and binding upon all parties; and (ii)

> shall be the sole and exclusive remedy between the parties regarding any and all claims and counterclaims presented to the arbitrator. The judgment on the Arbitration Award may be entered in any appropriate court as necessary to pursue judgment.

NRG Energy also moved to dismiss count one of the complaint without prejudice for failure to plead a CFA claim with particularity as required by Rule 4:5-8(a). NRG Energy moved to dismiss count two of the complaint with prejudice arguing a TCCWNA claim could not be asserted against it because it was not a party to the lease agreement.

The motion judge denied defendants' motions. The judge found the arbitration clause in the lease agreement invalid, and denied the motion to compel arbitration. The judge ruled the arbitration clause failed to state plaintiff's statutory claims were subject to arbitration. The judge found the class action waiver unclear and contradicted the arbitration clause. The judge also denied NRG Energy's motion to dismiss, and its subsequent motion for reconsideration of the denial of the motion to dismiss. This appeal followed.

I.

We begin by reciting our standard of review. The validity of an arbitration agreement is a question of law; therefore, we review the trial court's order denying NRG Residential's motion

to compel arbitration de novo. Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 605 (App. Div. 2015) (citing Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013)); see Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 445-46 (2014) ("Our review of a contract, generally, is de novo, and therefore we owe no special deference to the trial court's . . . interpretation. Our approach in construing an arbitration provision of a contract is governed by the same de novo standard of review." (citations omitted)).

Defendants argue the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-14, preempted the motion judge's invalidation of the arbitration clause and required the arbitration agreement to be enforced according to its terms. Defendants argue there is no requirement for an agreement to reference a specific statute in order to encompass statutory claims. Defendants argue the arbitration agreement is enforceable pursuant to Atalese and Martindale v. Sandvik, Inc., 173 N.J. 76 (2002). They assert both cases required the court to consider the parties' intent in interpreting an arbitration agreement, which the motion judge failed to do here. Defendants also argue NRG Energy should have been dismissed because it is not a party to the contract, and the motion judge should have stayed the proceedings pending appeal. We address these arguments in turn.

II.

The parties dispute whether the FAA applies. Although defendants contend it does, plaintiffs argue the New Jersey Arbitration Act (NJAA), N.J.S.A. 2A:23B-1 to -32, controls.

An arbitration agreement reflects the parties' intention to adhere to an orderly process of alternative dispute resolution. Ortho Pharm. Corp. v. Amgen, Inc., 882 F.2d 806, 812 (3d Cir. 1989). The FAA is implicated when

> [a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> [9 U.S.C. § 2.]

In order for the FAA to apply, the contract containing the arbitration provision must "evidence[] a transaction involving commerce . . . ." Ibid.; see also Goodwin v. Elkins & Co., 730 F.2d 99, 108-09 (3d Cir. 1984); Gras v. Assocs. First Capital Corp., 346 N.J. Super. 42, 47 (App. Div. 2001). The United States Supreme Court has held the FAA's definition of contracts "involving commerce" should be construed broadly to "extend[] the Act's reach to the limits of the Congress' Commerce Clause power[.]" Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995); see also

Allen v. World Inspection Network Int'l, Inc., 389 N.J. Super. 115, 126 (App. Div. 2006).

A nexus to interstate commerce is found when citizens of different states engage in the performance of contractual obligations in one of those states because such a contract necessitates interstate travel of both personnel and payments. See Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 292 (3d Cir. 2001); see also Crawford v. W. Jersey Health Sys., 847 F. Supp. 1232, 1240 (D.N.J. 1994).

Here, plaintiffs are New Jersey residents and NRG Residential is a Delaware limited liability company, with headquarters located in Houston, Texas. The lease agreement required plaintiffs to: (1) mail their down payments to NRG Residential's Houston address; (2) set up monthly payments by submitting a voided check to NRG Residential's accounts in Houston; (3) direct their claims to the Houston office; and (4) maintain a persistent internet connection through which NRG Residential could monitor the solar system and provide plaintiffs with a performance guarantee. Furthermore, the agreement provided "the [s]olar system [would be] interconnected with the utility's electrical transmission grid."

In New York v. FERC, the United States Supreme Court stated:

> [U]nlike the local power networks of the past, electricity is now delivered over three major networks, or "grids" in the continental United

> States. Two of these grids - the "Eastern Interconnect" and the "Western Interconnect" - are connected to each other. It is only in Hawaii and Alaska and on the "Texas Interconnect" - which covers most of that State - that electricity is distributed entirely within a single State. In the rest of the country, <u>any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce</u>.
>
> [535 U.S. 1, 17 (2002) (emphasis added).]

Here, the lease agreement clearly manifested a form of interstate commerce. Therefore, it was governed by the FAA, notwithstanding the filing of the action in state court. <u>Alfano v. BDO Seidman, LLP</u>, 393 N.J. Super. 560, 574 (App. Div. 2007); <u>see also</u> <u>Hojnowski v. Vans Skate Park</u>, 187 N.J. 323, 341-42 (2006); <u>Liberty Mut. Ins. Co. v. Open MRI of Morris & Essex, L.P.</u>, 356 N.J. Super. 567, 581-82 (Law Div. 2002).

Regardless, we need not further address whether the FAA preempts the NJAA because the policies animating each statute share the same aims. Indeed, the <u>Atalese</u> Court stated "[t]he [FAA] and the nearly identical [NJAA] enunciate federal and state policies favoring arbitration" as a mechanism of resolving disputes that otherwise would be litigated. <u>Atalese</u>, 219 N.J. at 440 (citations omitted).

Arbitration is fundamentally a matter of contract. <u>NAACP of Camden Cty. E. v. Foulke Mgmt. Corp.</u>, 421 N.J. Super. 404, 424

(App. Div. 2011). However, "[a]rbitration's favored status does not mean that every arbitration clause, however phrased, will be enforceable." Atalese, 219 N.J. at 441. "An agreement to arbitrate 'must be the product of mutual assent, as determined under customary principles of contract law.'" Barr, 442 N.J. Super. at 605-06 (quoting Atalese, 219 N.J. at 442).

"Mutual assent requires that the parties understand the terms of their agreement," and where the "agreement includes a waiver of a party's right to pursue a case in a judicial forum, 'clarity is required.'" Id. at 606 (quoting Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 37 (App. Div. 2010)). "[T]he waiver 'must be clearly and unmistakably established,' and 'should clearly state its purpose,' . . . [a]nd the parties must have full knowledge of the legal rights they intend to surrender." Ibid. (citations omitted).

The FAA permits states to invalidate arbitration clauses "upon such grounds as exist at law or in equity for the revocation of any contract." Atalese, 219 N.J. at 441 (quoting 9 U.S.C. § 2). An arbitration agreement that fails to clearly and unambiguously signal to parties that they are surrendering their right to pursue a judicial remedy renders such an agreement unenforceable. Ibid. "An arbitration provision - like any comparable contractual provision that provides for the

surrendering of a constitutional or statutory right - must be sufficiently clear to a reasonable consumer." Id. at 436.

Here, the motion judge concluded "[l]ike the arbitration provision in Atalese, the [l]ease [a]greement lack[ed] an explanation that [plaintiffs were waiving their] right to seek relief in court for breach of [their] statutory rights, specifically violations of the CFA and TCCWNA." The judge explained the "[l]ease [a]greement does not encompass [plaintiffs'] statutory consumer claims under the CFA and TCCWNA, as the [l]ease [a]greement fails to mention that [plaintiffs were] agreeing to submit [their] statutory causes of action to binding arbitration."

We disagree the arbitration clause here can be likened to the one in Atalese. The arbitration clause in Atalese read as follows:

> Arbitration: In the event of any claim or dispute between Client and the USLSG related to this Agreement or related to any performance of any services related to this Agreement, the claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request on the other party. The parties shall agree on a single arbitrator to resolve the dispute. The matter may be arbitrated either by the Judicial Arbitration Mediation Service or American Arbitration Association, as mutually agreed upon by the parties or selected by the party filing the claim. The arbitration shall be conducted in either the county in which Client resides, or the closest metropolitan county. Any decision of the

> arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction. The conduct of the arbitration shall be subject to the then current rules of the arbitration service. The costs of arbitration, excluding legal fees, will be split equally or be born[e] by the losing party, as determined by the arbitrator. The parties shall bear their own legal fees.
>
> [219 N.J. at 437.]

In Atalese the Court held:

> Consumers can choose to pursue arbitration and waive their right to sue in court, but should know that they are making that choice. An arbitration clause, like any contractual clause providing for the waiver of a constitutional or statutory right, must state its purpose clearly and unambiguously. In choosing arbitration, consumers must have a basic understanding that they are giving up their right to seek relief in a judicial forum.
>
> . . . .
>
> The 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 435-36.]

Here, the arbitration clause announced "any dispute, disagreement or claim between you and NRG [Residential] arising out of or in connection with this [l]ease or [s]olar system" would be subject to arbitration. The agreement also clearly stated the parties were "WAIVING THE RIGHT TO A JURY TRIAL." The lease

agreement further provided arbitration would be the "sole and exclusive remedy between the parties regarding any and all claims and counterclaims presented to the arbitrator." We are satisfied this wording clearly and unambiguously signaled plaintiffs could not pursue their claims in court.

Indeed, the arbitration clause language here is similar to language the Supreme Court upheld in Martindale v. Sandvik, Inc., 173 N.J. 76 (2002). In Martindale a plaintiff challenged arbitration language contained in her employment agreement, which stated:

> AS A CONDITION OF MY EMPLOYMENT, I AGREE TO WAIVE MY RIGHT TO A JURY TRIAL IN ANY ACTION OR PROCEEDING RELATED TO MY EMPLOYMENT WITH SANDVIK.
>
> I UNDERSTAND THAT I AM WAIVING MY RIGHT TO A JURY TRIAL VOLUNTARILY AND KNOWINGLY, AND FREE FROM DURESS OR COERCION.
>
> I UNDERSTAND THAT I HAVE A RIGHT TO CONSULT WITH A PERSON OF MY CHOOSING, INCLUDING AN ATTORNEY, BEFORE SIGNING THIS DOCUMENT.
>
> I AGREE THAT ALL DISPUTES RELATING TO MY EMPLOYMENT WITH SANDVIK OR TERMINATION THEREOF SHALL BE DECIDED BY AN ARBITRATOR THROUGH THE LABOR RELATIONS SECTION OF THE AMERICAN ARBITRATION ASSOCIATION.
>
> [Id. at 81-82.]

The Martindale court concluded:

> In the circumstances of this case, the language in the arbitration agreement not only

> was clear and unambiguous, it was also sufficiently broad to encompass reasonably plaintiff's statutory causes of action. The arbitration agreement provides that plaintiff agreed to waive her right to a jury trial "in any action or proceeding relating to my employment with Sandvik" and that "all disputes relating to my employment with Sandvik or termination thereof" shall be subject to arbitration. . . . [T]he arbitration provision here does not contain any limiting references. Its wording provided plaintiff with sufficient notice at the time she signed the agreement that all claims relating to employment with and termination from Sandvik would be resolved through arbitration. It also addressed specifically a waiver of the right to a jury trial, augmenting the notice to all parties to the agreement that claims involving jury trials would be resolved instead through arbitration. . . . Compelling arbitration under these circumstances is fair and equitable.
>
> [Id. at 96.]

The arbitration clause here bears the same characteristics as the agreement in Martindale. It clearly and unambiguously waived plaintiffs' rights to a jury trial. It clearly and unambiguously required arbitration of all disputes between the parties. As in Martindale, we hold compelling arbitration under these circumstances is fair and equitable.

NRG residential also challenges the motion judge's finding the class action waiver of the arbitration clause of the lease agreement was invalid. NRG residential argues the class action

waiver is clear, and the FAA mandates plaintiffs to arbitrate their claims on an individual basis. We agree.

The motion judge found the class action waiver provision in the lease agreement was "invalid due to its lack of consistency and clarity, which is required in these provisions." The judge also found the class action waiver contradictory to the arbitration provision because it allowed plaintiffs to bring actions individually. The judge also explained:

> given that 'purported' is used to modify the allegedly waived right to a class action, it is unclear whether [plaintiffs are] being instructed that class action claims can only be brought through the courts, or that the preclusive effect of this provision only applies to reputed class claims and not meritorious class claims.

As we noted, the arbitration clause of the lease agreement clearly and unambiguously waived plaintiff's right to a proceeding in court. Having done so, the clause then defined the capacity in which claims could be brought in arbitration and clearly limited those claims to individual claims, thereby barring a class action in arbitration.

Furthermore, the arbitration clause's usage of the word "purported" preceding the class action waiver did not signal an invitation to assert only meritorious class action claims in arbitration. Indeed, "[t]he 'purport' of an instrument means the

substance of it as it appears on the face of the instrument[.]" What is PURPORT?, Black's Law Dictionary, https://thelawdictionary.org/purport/ (last visited Apr. 6, 2018). Therefore, that the arbitration clause identified "purported" class actions as having been waived was not a qualitative assessment of the merits of the class action claim, but rather language crafted broadly enough to exclude from arbitration those claims that appeared to be class action based.

For these reasons, we uphold the arbitration clause provisions of the lease agreement. The motion judge's order denying the motion to compel arbitration is reversed.

III.

Finally, we decline to address NRG Energy's argument relating to the denial of its motion to dismiss it as a party from the case. We also do not address defendants' request for a stay.

Pursuant to Rule 2:2-3(a)(1), an appeal as of right may be taken only from a final order. A final order must "dispose of all claims against all parties." S.N. Golden Estates, Inc. v. Cont'l Cas. Co., 317 N.J. Super. 82, 87 (App. Div. 1998). Rule 2:2-3(a)(3) treats limited categories of orders, which do not dispose of all claims against all parties as final, including orders denying arbitration. Ibid. However,

> [a]lthough the Rule [2:2-3(a)(3)] permits an appeal as of right of "any order either compelling . . . or denying arbitration," it does not follow that other aspects of the order unrelated to the arbitrability determination, or other interlocutory orders entered in the action, are also appealable as of right. To the contrary, even when an interlocutory order is appealable as of right or is before [this court] by leave, some other interlocutory order in the case does not become appealable as of right and is reviewable only in the exercise of [this court's] sole discretion.
>
> [Barr, 442 N.J. Super. at 605.]

Accordingly, the only issue before us is whether plaintiffs were required to arbitrate their claims against defendant. NRG Energy's motion to dismiss is not reviewable as of right in this appeal and should be addressed in arbitration.

We also do not address defendants' request for a stay. The record lacks evidence defendants sought a stay from the motion judge. Rule 2:9-5(b) mandates the stay application first be made to the trial court before such relief is sought from us. Furthermore, "[w]e consider an issue moot when 'the decision sought in a matter, when rendered, can have no practical effect on the existing controversy.'" State v. Davila, 443 N.J. Super. 577, 584 (App. Div. 2016) (quoting Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 258 (App. Div. 2006)). As the claim will now be

handled through arbitration, defendant's request for a stay is moot.

Reversed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION