

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0150-22**

GISELLE AGUILAR,

Plaintiff-Appellant,

v.

**PAYLESS AUTO WHOLESALE
and LES AGBOH,**

Defendants-Respondents.

Submitted April 26, 2023 – Decided June 23, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-2800-21.

Lewis G. Adler and Perlman-DePetris Consumer Law, attorneys for appellant (Lewis G. Adler, Lee M. Perlman, and Paul DePetris, on the briefs).

Pearce Law, LLC, attorneys for respondents (William R. Fenwick, on the brief).

PER CURIAM

In this matter arising out of plaintiff's purchase of a vehicle from defendants, plaintiff appeals from the August 29, 2022 order compelling arbitration. We affirm.

The contract plaintiff signed for the purchase of the vehicle included an arbitration agreement (the agreement), stating: "At [plaintiff's] or [defendants'] election, any [c]laims between [plaintiff] and [defendants] that arise out of or relate to the [t]ransaction[] are to be decided by neutral, binding [a]rbitration." The agreement advised the party initiating arbitration "may choose" the American Arbitration Association (AAA) or the National Arbitration Forum (NAF) to administer the proceedings under their respective rules. The arbitrator had to be a lawyer or a former judge. The agreement stipulated the Federal Arbitration Act (FAA) "governs [the agreement], and not any state law concerning [a]rbitration."

After plaintiff experienced mechanical issues with the vehicle, she filed a demand for arbitration with AAA. In response, AAA sent a letter to the parties stating:

Prior to the filing of this arbitration, [defendants] failed to comply with the AAA's policies regarding consumer claims. Accordingly, we must decline to administer this claim and any other claims between [defendants] and its consumers at this time. . . .

Accordingly we have administratively closed our file. According to R-1(d) of the Consumer Rules, should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.

Plaintiff then filed a complaint in the Law Division in September 2021, alleging multiple counts against defendants. On September 29, 2021, defendants informed plaintiff they were electing arbitration under the agreement. Plaintiff's counsel replied that the demand for arbitration was untimely.

Thereafter, defendants moved to dismiss the complaint under Rule 4:6-2(e), asserting the failure to state a claim and that the Law Division lacked jurisdiction. Although defendants conceded there was an issue regarding its standing with AAA, the agreement did not mandate AAA as the sole arbitration forum. NAF was also named in the agreement as an arbitration forum and remained available to conduct the proceedings.

On August 29, 2022, the court issued an order compelling arbitration and staying plaintiff's complaint. The order stated that AAA's decision to decline to arbitrate the dispute "did not render the . . . [a]greement void and did not waive [defendants'] right to arbitrate the dispute at issue." The court ordered the parties to agree to a neutral arbitrator; if they could not agree, the court would appoint one.

On appeal, plaintiff does not dispute the validity of the agreement or that the parties were required to submit all claims to an arbitration forum for resolution. She instead contends the court erred in compelling arbitration because defendants were aware that AAA would not accept a demand for arbitration to which defendants were a party. Plaintiff thus asserts defendants materially breached the agreement by not maintaining good standing with AAA, not informing plaintiff of the issue before she filed her complaint, and by not responding to the arbitration demand.

"We apply a de novo standard of review when determining the enforceability of contracts, including arbitration agreements." Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207 (2019) (citing Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013)); see also Cerciello v. Salerno Duane, Inc., 473 N.J. Super. 249, 257 (App. Div. 2022). "We exercise plenary review over the legal determinations that support an order to compel arbitration but remain 'mindful of the strong preference to enforce arbitration agreements.'" Roach v. BM Motoring, LLC, 228 N.J. 163, 177 (2017) (quoting Hirsch, 215 N.J. at 186).

The FAA provides:

If any suit or proceeding be brought in any . . . court[]
. . . upon any issue referable to arbitration under an
agreement in writing for such arbitration, the court in
which such suit is pending, upon being satisfied that the

issue involved . . . is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

[9 U.S.C. § 3; Goffe, 238 N.J. at 208.]

Similarly, "[s]ection four of the FAA requires courts to compel arbitration 'in accordance with the terms of the agreement,' assuming that the 'making of the arbitration agreement' is not in issue." Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 317 (2019) (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011)); Goffe, 238 N.J. at 208 (quoting 9 U.S.C. § 4) ("section four provides a federal remedy for a party 'aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration'").

A determination of whether a party materially breaches an arbitration agreement "must be made on a case-by-case basis after considering the agreement's terms and the conduct of the parties." Cerciello, 473 N.J. Super. at 258 (quoting Roach, 228 N.J. at 181). In Roach, our Supreme Court addressed the issue of whether a failure to pay arbitration fees constituted a material breach of the parties' arbitration agreements. 228 N.J. at 175-81. The Court determined the defendants' failure to advance the required arbitration fees, resulting in AAA

dismissing the complaint, "deprive[d] [the] [plaintiffs] of the benefit of the agreement[s]" and amounted to a material breach because the knowing omissions "[went] to the essence of" the agreements. Id. at 166-68, 178-80 (quoting Ross Sys. v. Linden Dari-Delite, Inc., 35 N.J. 329, 341 (1961)). To prevent a "perverse incentive scheme" where a defendant could ignore demands for arbitration in the hope the claimant would abandon the claim, the Court held the defendants could not demand arbitration. Id. at 180-81 (quoting Brown v. Dillard's, Inc., 430 F.3d 1004, 1012 (9th Cir. 2005)).

However, the Court limited its holding, explaining

[W]e establish no bright-line rule. The determination of whether refusal or failure to respond to a written arbitration demand within a reasonable time period constitutes a material breach of an arbitration agreement that precludes enforcement by the breaching party must be made on a case-by-case basis after considering the agreement's terms and the conduct of the parties.

[Id. at 181.]

We can easily distinguish Roach from the circumstances present here. In Roach, the agreements between the plaintiffs and the defendants required any arbitration proceeding to be conducted "in accordance with the rules" of AAA. Id. at 166. There was no reference to any other forum. See id. at 166-68. Here, the agreement provided a choice of forums for both parties: AAA or NAF.

Plaintiff could have initially chosen NAF or any other arbitration organization as a forum. The agreement did not mandate the use of the two listed forums or any other entity. It only required the arbitrator be a lawyer or a former judge. Therefore, defendants' failure to maintain good standing with AAA did not deprive plaintiff of the benefit of the agreement because the agreement expressly provided an alternate avenue for resolution of her claims.

Moreover, upon receipt of the arbitration demand, AAA advised plaintiff it would not administer the proceedings. Therefore, there was no unreasonable delay and plaintiff had the opportunity to file her demand with NAF or another organization or former judge or lawyer.

Under the agreement, plaintiff was required to submit her demand for arbitration of her claims with another arbitral forum or eligible individual after AAA declined to administer the demand. As a result, the court correctly compelled arbitration and stayed the complaint.

Plaintiff further asserts that even if defendants did not materially breach the arbitration agreement, they waived any right to arbitration by failing to file the required fees and in not filing an arbitration demand.

A waiver is "the intentional relinquishment or abandonment of a known right." Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1713 (2022) (citation

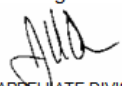
omitted); Knorr v. Smeal, 178 N.J. 169, 177 (2003) ("Waiver is the voluntary and intentional relinquishment of a known right.").

Plaintiff initiated these proceedings by filing a demand for arbitration with AAA. As a result, defendants did not need to assert their arbitration rights at that time. Because AAA did not accept the case for arbitration, defendants were not asked and were not obligated to pay any fees in this case. AAA declined to administer plaintiff's arbitration demand because defendants had not complied with its rules regarding fees in a different action with a different complainant. Defendants' actions in a separate case cannot be construed to be a clear, unequivocal, and decisive waiver of its arbitration rights in this matter.

In addition, when plaintiff filed her complaint in the Law Division, defendants responded by serving a demand for arbitration. When plaintiff would not withdraw her complaint, defendants moved to dismiss. There was no delay in or waiver of its assertion of its rights.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION