SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0159-22

MIDLAND CREDIT MANAGEMENT, INC., CURRENT ASSIGNEE [CREDIT ONE BANK, N.A., ORIGINAL CREDITOR],

Plaintiff-Respondent,

v.

MATTHEW NONGRUM,

Defendant-Appellant.

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Argued June 20, 2023 – Decided October 18, 2023

Before Judges Accurso and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1757-22.

Mark Jenson argued the cause for appellant (Kim Law Firm, LLC and Scott C. Borison (Borison Firm LLC) of the Maryland, District of Columbia and California bars, admitted pro hac vice, attorneys; Youngmoon Kim, Hasan Siddiqui and Scott C. Borison, on the briefs).

Han Sheng Beh argued the cause for respondent (Hinshaw & Culbertson LLP, attorneys; Han Sheng Beh, on the brief).

PER CURIAM

Defendant Matthew Nongrum appeals from a Law Division order granting plaintiff Midland Credit Management, Inc.'s motion to compel arbitration of their dispute over defendant's $794.04 credit card debt.

Nongrum concedes his cardholder agreement with Credit One Bank, N.A. contained a valid and enforceable arbitration clause when he entered into the agreement. He contends, however, that the entire cardholder agreement, including the arbitration clause, has "become void" under the New Jersey Consumer Finance Licensing Act, N.J.S.A. 17:11C-1 to 17:11C-49, because Midland, itself licensed under the Act, only took an assignment of that cardholder agreement after it passed through the hands of two unlicensed entities.

As Nongrum does not dispute the validity of the arbitration clause, but only whether Midland can enforce the cardholder agreement, resolution of that question — and its flipside, that is whether the debt's assignment history renders the cardholder agreement void and unenforceable — are solely questions for an arbitrator. See Goffe v. Foulke Management Corp., 238 N.J.

191, 195 (2019) (holding "consistent with clear rulings from the United States Supreme Court that bind state and federal courts on how challenges such as [this] should proceed," courts may not resolve "threshold issues about overall contract validity . . . when the arbitration agreement itself is not specifically challenged"); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 70 (2010) ("[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate."). Thus, we affirm the order compelling Nongrum to arbitrate his claims against Midland.

We sketch the facts as they were presented to the trial court. Credit One issued Nongrum a credit card in 2016. Nongrum ceased making payments in March 2018, leaving a balance due. That balance was charged off near the end of that year.

Credit One claims that after it originates a credit card account, it retains an ongoing relationship with the cardholder and services the account but "automatically" assigns all receivables arising out of it to a related entity, MHC Receivables LLC, which in turn transfers them to another related entity, Credit One Bank FNBM, LLC, "as they arise." When an account is charged off, Credit One bundles the account with other charged-off accounts and

assigns them to MHC, as apparently occurred here. Then MHC and FNBM each separately assign their "part" of a cardholder's account to a third entity, thereby allowing it to receive the cardholder's entire account. Nongrum's account was apparently acquired by Sherman Originator III LLC in that fashion. Shortly thereafter, Sherman sold Nongrum's entire charged-off credit card account to plaintiff Midland.

Midland sued Nongrum in the Special Civil Part to recover the unpaid credit card debt. Nongrum answered and filed a putative class action counterclaim alleging the assignment from Credit One to MHC and MHC's assignment to Sherman were both "void as a matter of law" as neither entity was "properly licensed" under the New Jersey Consumer Finance Licensing Act. Nongrum claimed Midland "unlawfully purchased" Nongrum's debt and sued on a void cardholder agreement. Nongrum's class claims included injunctive relief as well as damages for breach of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -227, the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 to 1692p and unjust enrichment.

The case was transferred to the Law Division on Nongrum's motion pursuant to Rule 6:4-1(c) (addressing transfer when a counterclaim exceeds the monetary limit of the Special Civil Part). Midland filed a motion to compel

arbitration in lieu of answer to the counterclaim, which the court granted, finding the Federal Arbitration Act, 9 U.S.C. §§ 1 to 16, compelled arbitration. See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006) (holding in accord with Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance" regardless of "whether the challenge at issue would have rendered the contract void or voidable"). The judge stayed the Law Division action pending the outcome of arbitration. See 9 U.S.C. § 3.

Nongrum appeals, arguing the trial court erred in shifting the burden to him to "disprove arbitrability" when the burden to "establish arbitrability from the contract" was on Midland. He further argues "there are gaps in the record" that should prevent Midland from prevailing on its "motion to compel arbitration as a matter of law" under a summary judgment standard, requiring further discovery. He also contends that should "facts remain in dispute regarding arbitrability, the issue of arbitrability should be decided by a jury." Our review of the record convinces us that none of these arguments is of sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Because the enforceability of an arbitration agreement is a question of law, Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 446 (2014), our review is de novo. Goffe, 238 N.J. at 207.

The first sentence of Nongrum's brief states "[t]he enforcement of an arbitration provision in a contract depends on the validity of the underlying contract." That is an incorrect statement of the law. As Justice Scalia explained in Buckeye, "the Prima Paint rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void." 546 U.S. at 448.

The question presented in Buckeye was "whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality," id. at 442, in essence, the same issue presented here. The Court found the answer to that question was derived from three well-established propositions.

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.
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> [Id. at 445-46.]

In rejecting the Florida Supreme Court's view that its state's "public policy and contract law prohibit[ed] breathing life into a potentially illegal contract by enforcing the included arbitration clause of the void contract," Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860, 864 (2005), the Court held that because the plaintiff, Cardegna, "challenge[d] the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court." Buckeye, 546 U.S. at 446.

The answer is the same here. Nongrum does not challenge the arbitration clause contained in his cardholder agreement, indeed, he never averts to its terms in his briefs. His claim is that "[r]egardless of the text of the arbitration provision," Midland cannot enforce the debt based on the assignment it took from Sherman, an unlicensed entity, because the Consumer Finance Licensing Act voids contracts, like Nongrum's cardholder agreement, based on collection efforts by a person engaged in business as a consumer lender "without first obtaining a license" under the Act. See N.J.S.A. 17:11C-33 and 11C-3. We express no view on the merits of Nongrum's claim because he agreed in that cardholder agreement that an arbitrator, and not a court, would decide the issue.

Specifically, the arbitration clause included in Nongrum's cardholder agreement, besides providing that claims relating directly to any successor of Credit One "based on any theory of law, any contract, statute, regulation, . . . common law . . . or any other legal or equitable ground (including any claim for injunctive or declaratory relief)" are arbitrable, even more importantly, provides that "disputes about the application, enforceability or interpretation of the Card Agreement as a whole are subject to arbitration and are for the arbitrator to decide."[1]

Just as in Buckeye, because Nongrum's challenge is to the enforceability of the agreement, not specifically to its arbitration clause, that clause is enforceable apart from the remainder of the contract, meaning Nongrum's claim that the cardholder agreement is void for illegality must be decided by an arbitrator. See 546 U.S. at 446.

Affirmed.

[1] The cardholder agreement further provides that "[c]laims made as part of a class action, private attorney general action or other representative action are subject to arbitration but must be arbitrated on an individual basis." The United States Supreme Court has deemed such class-arbitration waivers "enforceable under the Federal Arbitration Act." Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231, 233 (2013).