SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0388-23

OCEAN FIREPROOFING, LLC,

Plaintiff-Respondent,

v.

23RD STREET URBAN RENEWAL
JOF AAI III, LLC,

Defendant,

and

CENTURION CONSTRUCTION, INC.,

Defendant-Appellant.

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Submitted April 8, 2024 – Decided May 24, 2024

Before Judges Sabatino, Marczyk, and Vinci.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-1791-22.

Harold P. Cook, III, Esq. & Associates, attorneys for appellant (Harold P. Cook, III, on the briefs).

Jonathan Fleisher, attorney for appellant.

PER CURIAM

This appeal concerns whether the trial court erred in denying defendant's motion to compel arbitration of a commercial dispute. For the reasons that follow, we reverse and remand for the entry of an order dismissing the complaint and compelling arbitration.

We briefly summarize the pertinent circumstances. Plaintiff Ocean Fireproofing LLC ("Ocean Fireproofing") was hired as a subcontractor by defendant Centurion Construction, Inc. ("Centurion")[1] to fireproof a new storage facility in Bayonne. The parties executed a "Letter of Intent" ("LOI") dated July 7, 2021, providing that Ocean Fireproofing would apply treatment to the facility for $164,000.

I.

Relevant to the arbitrability of disputes, the LOI provides:

> All disputes arising from subcontractor's work including statutory claims and claims arising from personal injuries will be resolved at Centurion's sole election by arbitration governed by the New Jersey Arbitration Act, N.J.S.A. § 2A:23B-1, et seq., before a retired New Jersey Superior Court Judge of Centurion's choosing. By consenting to arbitration of disputes, subcontractor understands that it is giving up the right

[1] The co-defendant listed in the caption, which is the owner of the project site, has no involvement in the issues before us.

> to a trial in court, either with or without a jury, including with regard to any statutory claims. This [LOI] can be terminated for convenience at Centurion's discretion.
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> [(Emphasis added).]

Centurion thereafter presented Ocean Fireproofing with a draft of a more formal contract, entitled a "Subcontract Agreement," on October 8, 2021. The proposed Subcontract Agreement specifies various means to resolve disputes between the parties in three inter-related provisions, entitled "Mediation," "Binding Dispute Resolution," and "Arbitration." They provide, in relevant part:

> § 6.1 MEDIATION
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> § 6.1.1 Any claim arising out of or related to this Subcontract, except those waived in this Subcontract, shall be subject to mediation before a retired Superior Court Judge in Bergen or Passaic County, New Jersey chosen by the Contractor in its sole discretion. Mediation under this section is a condition precedent to binding dispute resolution. This provision requires mediation as a condition precedent to the filing of a lien as well.
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> . . . .
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> § 6.2 BINDING DISPUTE RESOLUTION
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> For any claim subject to, but not resolved by mediation pursuant to the procedures of Section 6.1, the method of binding dispute resolution shall be litigation in the

Superior Court of New Jersey or Arbitration, at Contractor's sole election. Subcontractor acknowledges that Contractor may have business reasons to elect to arbitrate or litigate, including being subject to arbitration or litigation by virtue of other contracts with regard to the Project, and agrees to abide by Contractor's election in this regard. If arbitration is elected, it will be performed by a retired Superior Court Judge in Bergen or Passaic County, New Jersey, to be chosen by the Contractor in his sole election. Place of Arbitration shall be in Bergen County or Passaic County, New Jersey.

§ 6.3 ARBITRATION

§ 6.3.1 If arbitration is elected by Contractor, a demand for arbitration shall be made in writing, delivered to the other party to the Subcontract, and served on the person or entity administering the arbitration, Subcontractor hereby agrees that any and all disputes with Contractor, whether statutory, contractual, or otherwise, including but not limited to claims arising from personal injuries and/or illness ("Claims") are subject to binding arbitration as set forth in this Agreement. Subcontractor understands that the rules governing arbitration are different than those in court, and that by consenting to arbitration of disputes, it is giving up the right to a trial in court, either with or without a jury, including with regard to all statutory claims, including and not limited to claims raised under any New Jersey statute.

. . . .

§ 6.3.6 This agreement to arbitrate and any other written agreement to arbitrate with an additional person or persons referred to herein shall be specifically enforceable under applicable law in any court having

> jurisdiction thereof. The 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. Subcontractor waives any right it may have had to appeal from any arbitration award, order, judgment, and/or ruling.
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> [(Emphases added).]

Ocean Fireproofing responded to Centurion that same day by proposing several revisions to the draft Subcontract Agreement. None of those revisions concerned the dispute resolution provisions. Ocean Fireproofing signed its revised version of the agreement and sent it to Centurion via email on October 8, 2021.

Centurion balked at several of the revisions. A series of emails between the parties ensued, but the parties failed to agree upon a final version of the Subcontract Agreement. As Centurion's president summarized the contract negotiations in an October 14 email to Ocean Fireproofing:

> I sent you a contract, you marked it up. I marked up your mark up and you sent your original markup back signed. I will dig up my review of your markup and email it to you once I find it. With regard to needing it worked out, I agree, however you are covered under your LOI and have been permitted to work, bill and have been paid under it. We will get this resolved, I am sure. . . .
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> [(Emphasis added).]

After this impasse, the parties never mutually executed a final Subcontract Agreement. Nevertheless, Ocean Fireproofing performed some work on the project and billed Centurion for its services. Disputes arose about the work, and Centurion did not pay Ocean Fireproofing in full for the billed amounts.

On January 25, 2022, Ocean Fireproofing filed a construction lien for $55,080 to secure amounts unpaid by Centurion. Centurion challenged the validity of the lien through a verified complaint and a series of three orders to show cause, which it filed in succession in the Law Division in Hudson County on March 24, 2022, May 17, 2022, and May 25, 2022.

Centurion's verified complaint consisted of three counts: (1) a claim that Ocean Fireproofing wrongfully filed its construction lien claim; (2) breach of contract by Ocean Fireproofing in failing to complete its work under the LOI; and (3) breach of the implied covenant of good faith and fair dealing. Centurion included with its Hudson County pleadings a certification under Rule 4:5-1(b)(2), stating that "the matter in controversy is not the subject of any other action or arbitration proceeding, now or contemplated . . . ."

The orders to show cause were, respectively: (1) denied without prejudice subject to re-filing with sufficient proofs; (2) denied without prejudice subject to re-filing with compliance with Rule 1:6-4 by providing courtesy copies of

motion documents; and (3) ultimately granted in part to modify the lien amount from $55,080 to $49,480. The trial court thereupon closed the Hudson County case on September 6, 2022. It did not reach the merits of Centurion's additional claims for breach of contract and breach of the covenant of good faith and fair dealing.

On August 16, 2022, Ocean Fireproofing filed a complaint in the Law Division in Ocean County against Centurion and the co-defendant property owner, alleging (1) breach of contract; (2) breach of implied contract; (3) breach of covenant of good faith and fair dealing; (4) unjust enrichment; (5) quantum meruit; (6) violation of the New Jersey Prompt Payment Act ("PPA"), N.J.S.A. 2A:30A-1 to -2; and (7) foreclosure of a construction lien. The complaint was accompanied by a certification under Rule 4:5-1(b)(2), attesting that the dispute is not the subject of any other pending or contemplated arbitration proceeding, except for the construction lien enforcement matter. The lien matter eventually was resolved through a stipulation of dismissal of count seven (the lien count) filed by the parties in December 2022.

On January 18, 2023, Centurion moved, in lieu of answer to Ocean Fireproofing's complaint, to compel mediation and arbitration of the dispute. The trial court, on March 31, ordered mediation and adjourned the motion to

compel arbitration until June 9. The parties participated in an unsuccessful mediation before a retired judge, and on August 9, 2023, Centurion renewed its motion to compel arbitration.

On August 25, 2023, the trial court denied Centurion's motion to compel arbitration, with the following brief written statement of reasons:

> Denied for the reasons stated in opposition. There was no formal contract executed between the parties only a [LOI] which contained broad language without sufficient detail regarding arbitration. In addition, the moving party filed three prior actions in Superior Court.

This interlocutory appeal by Centurion ensued. Its overarching argument is that the trial court misapplied the legal standards for compelling arbitration. Centurion asserts the LOI sufficiently delineated the terms of arbitration. It further asserts that its orders to show cause in Hudson County, which primarily contested Ocean Fireproofing's lien, did not eliminate its ability to invoke the LOI's arbitration clause in defending Ocean Fireproofing's separate suit. Further, Centurion argues that it did not waive its right to arbitrate under the multifactor test of Cole v. Jersey City Medical Center, 215 N.J. 265, 280-81 (2013). See also Marmo & Sons Gen. Cont., LLC v. Biagi Farms, LLC, __ N.J. Super. __ (App. Div. 2024) (construing and applying the Cole factors).

II.

We review de novo the trial court's denial of Centurion's motion to compel arbitration. Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020). In doing so, we apply several principles of law pertinent to the arbitration process.

A.

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, and the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -36, codify federal and state policies favoring arbitration. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 440-41 (2014). The FAA permits state courts to consider state principles of contract formation to determine whether the parties agreed to arbitrate. Ibid. To enable parties who have agreed to arbitrate to do so, litigants may move to compel the enforcement of an arbitration agreement. N.J.S.A. 2A:23B-7 (directing trial courts granting such motions "shall stay any judicial proceeding that involves a claim subject to the arbitration.")

As the United States Supreme Court has observed, "arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T Techs. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986) (quoting United Steelworkers of Am. v. Warrior

& Gulf Navigation Co., 363 U.S. 574, 582 (1960)). In that regard, the FAA requires that, "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," the trial court must "direct[] the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (emphasis added).

Courts first determine whether the parties actually agreed to arbitrate before compelling them to the alternative forum. In Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 399 (1967), the plaintiff argued that an arbitration clause should not be enforced because the plaintiff had been fraudulently induced into signing the contract. The Supreme Court held that, if a claim of fraudulent inducement specifically concerned the making of the agreement to arbitrate, the courts retained jurisdiction. Id. at 403-04. However, challenges to the contract as a whole are ordinarily to be resolved in arbitration. Ibid. See also Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (stating that "a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator"); Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 72 (2010) (holding that, absent a specific challenge to the arbitration clause, courts should "leav[e] any challenge to the validity of the [a]greement as a whole for the arbitrator").

Here, we are satisfied that the mutually executed LOI, which we have quoted above, sufficiently details the terms of binding arbitration that can be invoked "at Centurion's sole election." The arbitration provision covers "[a]ll disputes arising from [the] subcontractor's [Ocean Fireproofing's] work." We reject plaintiff's contention that this is a narrower clause than the language set forth in the proposed Subcontract Agreement, the latter which was never executed.

Regardless of any differences between the documents, the scope of the LOI provision is clearly broad enough to encompass the present dispute over the quality of work that plaintiff provided at the job site. There is no evidence in the emails in the record, or otherwise, that Ocean Fireproofing was fraudulently induced to agree to the arbitration language. The counteroffer it made to revise the draft Subcontract Agreement had nothing to do with the LOI's preexisting mutual agreement to arbitrate. We therefore part company with the trial court in its finding that the "broad language" of the LOI's arbitration clause was insufficiently detailed.

B.

Next, we also part company with the trial court's finding that Centurion should be deprived of its right to arbitrate because it had filed "three prior

actions in Superior Court." That is a reference to the now-concluded Hudson County litigation, which centered upon the amount of Ocean Fireproofing's lien.

Because this is a commercial lien case, Centurion had to contest the lien in a Superior Court action rather than before a Construction Lien Law ("CLL") arbitrator. The plain language of the CLL contemplates only one method of discharging overstated liens: "Any party in interest may proceed to discharge a lien claim on the ground that it is without factual basis by filing an order to show cause . . . ." N.J.S.A. 2A:44A-30(c).

> A judge of the Superior Court may, upon good cause being shown, . . . order the lien claim discharged on the return date of the order to show cause. The county clerk shall thereupon . . . note on the record thereof 'discharged by certificate' or 'discharged by court order,' . . . and any lien foreclosure action shall be dismissed with prejudice.
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> [N.J.S.A. 2A:44A-30(b).]

Further support for the distinction between the right to enforce a lien and traditional contractual remedies is provided by the CLL's statement that "Nothing in this act shall be construed to limit the right of any claimant from pursuing any other remedy provided by law." N.J.S.A. 2A:44A-3.

In Orefice v. ADR, 315 N.J. Super. 493, 497-98 (App. Div. 1998), we deemed this language pertinent in holding that lien claims supplement, but do

not replace, traditional contract claims. In addition to N.J.S.A. 2A:44A-3, we relied on the CLL's limitation on the amount of a lien to the contract price, so claims for lost profits are not included. Id. at 498. Thus, there is no merit to Ocean Fireproofing's contention that Centurion waived its right to arbitrate the merits of the parties' contractual and other disputes by filing orders to show cause in Hudson County.

The propriety of Centurion contesting the imposition of the commercial lien in court rather than in arbitration is further supported by the structure of the CLL. The Supreme Court has observed that the CLL "must be read sensibly and consistent with the law's overall intent to permit contractors to file liens and thus protect the value of the work they have provided." Thomas Grp., Inc. v. Wharton Senior Citizen Hous., Inc., 163 N.J. 507, 517 (2000). "[T]he Legislature enacted separate and distinct provisions in the CLL for residential and commercial projects" "[t]o accommodate [distinct stability] interests in the residential context." Schadrack v. K.P. Burke Builder, LLC, 407 N.J. Super. 153, 162 (App. Div. 2009). To that end, if "work is performed under a residential construction contract, the lien claimant must do more under the CLL to ensure that the lien is properly filed and perfected." Id. at 163 (emphasis added). Specifically, a residential lien claimant must engage in arbitration to establish

the validity of the lien, whereas commercial lien claimants are subject to no such burden. Id. at 163-64, see also N.J.S.A. 2A:44A-21(b)(3). Only after arbitration may residential lien claimants record their lien with the county clerk. N.J.S.A. 2A:44-6. Further, the arbitration result is subject to review in the Law Division "[i]f either the lien claimant or the owner . . . is aggrieved by the arbitrator's determination." N.J.S.A. 2A:44A-21(b)(10).

In contrast, commercial liens are not subject to arbitration under the CLL and may only be modified by the Law Division "upon good cause being shown." N.J.S.A. 2A:44A-30(b). A pre-suit arbitration is inconsistent with the abbreviated CLL procedures applicable to commercial liens.

We recognize that Centurion's verified complaint in the Hudson County case included additional claims for breach of contract and quasi-contract beyond the first count challenging the lien. Even so, the Hudson County case was quickly decided without an adjudication of the merits of the parties' overall disputes. We discern no reason to allow that lien-focused case to nullify Centurion's right to arbitration under the LOI.

C.

Lastly, we turn to whether Centurion waived its right to arbitrate under the multifactor test of Cole. 215 N.J. at 280-81. In Cole, the Supreme Court of

New Jersey enumerated the following seven factors that courts should consider, in the "totality of the circumstances," when assessing such alleged waivers:

> (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any.
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> [Ibid.]

As Cole further instructed, "[n]o one factor is dispositive." Id. at 281. Applying these factors de novo, we conclude they weigh, on balance, against waiver and in favor of granting Centurion's motion to compel.

First, the record does not show that Centurion unduly delayed in filing its pre-answer motion to compel arbitration. The five-month interval between Ocean Fireproofing's filing of its complaint in August 2022 and Centurion's motion in January 2023 was not protracted. This period is far shorter than the twenty-one-month delay the Supreme Court deemed excessive in Cole. We are aware that we found waivers in Spaeth v. Srinivasan, 403 N.J. Super. 508 (App. Div. 2008), and in Marmo, __ N.J. Super. __, both involving about six-month

intervals, but those cases both involved other strong grounds supportive of waiver not present here.

Second, no motion practice occurred here in the Ocean County lawsuit, other than Centurion's pre-answer motion to compel alternative dispute resolution methods such as mediation and, if that failed, arbitration. The motion did not bespeak an intention by Centurion to litigate this case in the Law Division.

Third, there is no indication that Centurion pursued a "litigation strategy" to eschew litigation. As we noted above, it had no choice under the CLL to contest the commercial lien amounts in a forum other than the Superior Court.

Fourth, Centurion neither sought nor received any discovery, which was in its early stages. See R. 4:24-1.

Fifth, Centurion filed no pleadings in this Ocean County case inconsistent with its right to pursue arbitration. In fact, it has not yet even filed an answer. We are cognizant that Centurion did certify with its Hudson County complaint that arbitration was not contemplated, but that was true with respect to the CLL lien issues that were at the heart of that case. Centurion's inclusion of the additional counts in the Hudson case, which were never adjudicated, has little bearing on the waiver issues before us concerning the Ocean County case.

Sixth, unlike the situation in Cole, no trial date was fixed.

Lastly and seventh, there was little, if any, demonstrable prejudice that would be inflicted upon Ocean Fireproofing by the transfer of this case in its very early stages to arbitration, even assuming, as we held today in Marmo, that prejudice remains a non-dispositive factor in the wake of the Supreme Court's opinion in Morgan v. Sundance, Inc., 596 U.S. 411 (2022). __ N.J. Super. at __.

On balance, the totality of the circumstances manifestly weighs against waiver. We accordingly reverse the trial court's ruling and remand for the entry of an order compelling arbitration under the terms specified in the LOI.

Reversed and remanded.