SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0424-23

WALTER HERRERA,

Plaintiff-Respondent,

v.

PARAMOUNT FREIGHT SYSTEMS, INC., RENAISSANCE TRADING, INC., ROSARIO CONIGLIO, and JAMES PATERNOSTER,

Defendants-Appellants.

Submitted April 15, 2024 – Decided May 24, 2024

Before Judges Sabatino, Chase, and Vinci.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-0901-22.

Law Offices of Michael P. Pasquale, LLC, attorney for appellants (Michael P. Pasquale, of counsel and on the briefs).

Law Offices of Leo B. Dubler, III, LLC, attorney for respondent (Leo B. Dubler, III, on the brief).

PER CURIAM

This appeal concerns issues of waiver of arbitration. Renaissance Trading, Inc. ("Renaissance Trading") Paramount Freight Systems, Inc. ("Paramount Freight"), James Paternoster, and Rosario Coniglio (collectively, the "employers" or "defendants") appeal the trial court's denial of their motion to compel arbitration of claims brought in the Law Division against them by plaintiff Walter Herrera, a former employee. The employers further appeal the denial of their motion for reconsideration of such denial.

The employers assert the trial court erred in finding they waived their contractual right to arbitrate. They further contend the court applied the wrong standard for a reconsideration motion. Plaintiff urges us to affirm the finding of waiver. If, hypothetically, the waiver ruling is not upheld, plaintiff submits the court should then reach his alternative argument that the terms of the arbitration agreement are allegedly unenforceable.

Applying the relevant principles of law to the record de novo, we affirm the waiver ruling. The trial court reasonably concluded the application of the multifactor waiver test of Cole v. Jersey City Medical Center, 215 N.J. 265, 280-81 (2013), weighs against transferring this case to arbitration.

I.

The following summary of the pertinent facts and circumstances will suffice for our purposes. Plaintiff was the supervising truck dispatcher employed successively by Renaissance Trading and thereafter in 2018 by a related company, Paramount Freight. When plaintiff was first hired as a transportation manager in 2016, Renaissance Trading provided him with an employee handbook and allegedly required him to sign it.[1]

The handbook contains a "complaint resolution procedure" instructing employees to first discuss problems with a supervisor, then to escalate the complaint to Human Resources and the company president before "[an employee] may proceed to final and binding arbitration." In relevant part, the handbook provides:

> This arbitration policy covers all claims or controversies arising out of your employment or its termination ("Claims"). It covers claims concerning discipline and discharge, benefits, job bidding, seniority rights, safety rules, and the interpretation or application of any of the provisions of Renaissance Trading's Employee Handbook. It covers claims for wages or other compensation or benefits; claims for

[1] Plaintiff disputes whether he actually signed the handbook, and defendants have retained a handwriting expert to refute that contention. We need not resolve that particular dispute about the authenticity of plaintiff's signature in order to resolve the key issue before us of whether defendants waived their right to arbitration.

breach of any contract or covenant whether express or implied; tort claims; claims for discriminations (including but not limited to race, color, sex, sexual orientation or preference, religion, national origin, age, marital status, handicap or disability, veteran or citizenship status); claims of sexual harassment; claims of retaliation under the Conscientious Employee Protection Act or at common law; and claims for violation of any federal, state, or local government law, statute, regulation, or ordinance. It covers claims you may have against Renaissance Trading and claims Renaissance Trading may have against you.

. . . .

1. A written arbitration demand must be made no later than ninety (90) calendar days after the claim arises or it will be conclusively resolved against the claiming party (unless there is a statute of limitations that may give more time).

2. The arbitrator shall be selected from the American Arbitration Association ('AAA') Employment Dispute Resolution Panel and National Panel of Labor Arbitrators and shall be an attorney experienced in labor relations and employment discrimination matters.

3. Renaissance Trading will pay all of the fees and expenses of the arbitrator(s) and any amount of AAA filing fee over $150. Each party shall arrange and pay for its own witnesses and attorneys, if any.

4. At least sixty (60) days before the arbitration hearing, each party will give the other a brief summary of its claims and defenses, and a list of documents and the names and addresses of witnesses on which it intends to rely and will permit reasonable access to

those documents and individuals. Additional discovery may be available on application to the arbitrator, based on showing of substantial need.

5. The arbitrator shall issue a written award and an opinion explaining the award.

6. The arbitrator shall have the same power to award damages and remedies as a court would have, sitting in the same jurisdiction.

7. This Arbitration Procedure bars litigation in any court by either Renaissance Trading or you of any claim that could be arbitrated under the Procedure. However, you and Renaissance Trading have the right to move in court to compel arbitration or to confirm and enforce an arbitrator's award under this Arbitration Procedure.

In the event that any court determines for any reason that this Arbitration Procedure is not binding, or otherwise allows any litigation regarding a claim covered by this arbitration provision to go forward, Renaissance Trading and you agree that the court proceeding must be commenced no later than six (6) months after the termination of your employment or when the facts arose that are complained of (unless a longer time is provided for by statute or common law); and all rights to a trial by jury in the litigation are expressly waived.

[(Emphases added).]

Attached to the handbook is a page, also allegedly signed by plaintiff, titled "arbitration acknowledgement." Mirroring the handbook's policies and procedures, the acknowledgment provides:

> I have read the provisions in Renaissance Trading's Complaint Resolution Process, including the Arbitration Procedure ("Procedure") and understand, acknowledge, and agree to the following as a condition of my employment or continued employment with Renaissance Trading:
>
> I will submit to the American Arbitration Association ('AAA') for final and binding arbitration under their dispute resolution rules, all claims or controversies arising out of my employment or its termination including but not limited to discipline and discharge; breach of any contract or covenant whether express or implied; torts; discrimination (including but not limited to race, color, sex, sexual orientation or preference, religion, national origin, age, marital status, handicap or disability, veteran or citizenship status); sexual harassment; retaliation under the Conscientious Employee Protection Act or at common law; and for violation of any federal, state, or local government law, statute, regulation or ordinance ("Claims").
>
> . . . .
>
> I must submit my written arbitration demand no later than ninety (90) calendar days after my Claim arises or it will be conclusively resolved against me unless there is a statute [of] limitation[s] that allows more time.
>
> This Procedure bars litigation in any court of any claim that could be arbitrated under the Procedure.

> In the event that any court determines for any reason that the Procedure is not binding or otherwise allows any litigation regarding a Claim, I agree that (a) the court proceeding must be commenced no later than six (6) months after the termination of my employment or when the facts arose that are complained of, unless there is a statute of limitations that allows more time; and (b) I expressly waive all rights to a trial by jury in any such litigation.
>
> [(Emphases added).]

When plaintiff's employer changed in 2018 from Renaissance Trading to Paramount Freight, plaintiff allegedly executed an acknowledgement containing the same language as the acknowledgment he had signed for Renaissance Trading. Plaintiff was promoted to the position of director of transportation in 2020.

Eventually, plaintiff began to have health problems that caused him to miss work. He underwent surgery on February 8, 2021. He returned to work, post-surgery, on February 22, 2021. Defendants terminated him the following day, February 23, 2021.

A year later on February 21, 2022, plaintiff filed a complaint against the employers in the Law Division alleging violations of the anti-retaliation provision of the Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to -50,

and violations of the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 to -14. The complaint included a jury demand.

On May 6, 2022, the employers filed an answer denying the allegations of the complaint. They asserted twenty-two affirmative defenses, including but not limited to unclean hands, statute of frauds, the parol evidence rule, estoppel, damages caused by plaintiff's own conduct, failure of plaintiff to mitigate damages, failure to state a claim, statute of limitations, duress, and other assertions. None of those defenses asserted that the case should have been presented to an arbitrator instead of being filed in court.

Appended to the answer was a Rule 4:5-1(b)(2) certification by the employers' counsel that "this matter in controversy is not the subject of any other action pending in any Court or of a pending arbitration proceeding. Further, no other action or arbitration proceeding is contemplated and no other party should be joined in this action." (Emphasis added).

In August 2022, the trial court ordered the parties to participate in mediation. Seven months later, in March 2023, the mediator returned the case to court without having held a mediation session.

In May 2023, plaintiff moved to strike the employers' answer and suppress their defenses without prejudice for failure to respond to his discovery demands.

On June 16, 2023, the employers cross-moved to compel arbitration and to strike plaintiff's written discovery demands. On June 19, plaintiff filed an opposition accompanied by a personal certification asserting he did not sign the agreements alleged by the employers.

On August 4, 2023, the trial court heard argument on the cross motions. The court denied the motion to compel arbitration in a two-page written order, for reasons stated orally on the record. The court concluded that defendants waived their right to arbitration "by their actions since the filing of their answer to [the] complaint." Among other things, the court noted defendants "should have demanded arbitration early on [and] they participated over the course of 510 days in discovery . . . .'" The court recognized that "although there has been minimal discovery exchanged, all along in review of the emails that have gone between counsel, there's been an indication that discovery would be provided." The court then proceeded to read into the record excerpts from those discovery-related emails.

Continuing with its analysis, the court added:

> This case has been active for 18 months. Arbitration should have been demanded at the outset in a motion to dismiss prior to filing an answer frankly to compel arbitration. But the answer never indicated as an affirmative defense that there was a controlling arbitration agreement that counsel would seek to

> enforce. And indeed [defendants' Rule 4:5-1(b)(2) certification] affirmatively indicated that . . . there is no other action or arbitration proceeding contemplated . . . ."

The employers moved for reconsideration of the court's denial of their application to compel arbitration. Plaintiff filed opposition. After hearing oral argument on the motion, the trial court denied reconsideration in a two-page written order, for reasons orally stated on the record on September 22, 2023.

In this second oral ruling, the court considered a certification from defendants' counsel acknowledging that he had been unaware of the arbitration agreement's existence, and that the delay in moving to compel arbitration was not his clients' fault. Nevertheless, the court again concluded that the "totality of circumstances" weighed in favor of waiver and denied reconsideration.

This appeal by defendants followed. They argue the court misapplied the factors pertinent to waiver of a right to arbitration. Among other things, they contend that plaintiff "caused the majority of the purported delay" before defendants moved to compel arbitration; their answer was contrary in several respects to a finding of waiver; the court applied an incorrect burden of proof on the waiver issue; and the court used the wrong standard in denying reconsideration.

II.

Consistent with case law, we apply a de novo standard of review to the trial court's waiver determination. Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020). Having done so, we conclude the finding of waiver was legally sound under the totality of circumstances presented.

We recognize that 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 -34, codify federal and state policies favoring arbitration in situations where parties have mutually agreed to that process by contract. 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 to "stay any judicial proceeding that involves a claim subject to the arbitration.").

All of that becomes academic, however, when a party to an agreement with an arbitration clause has waived the right to compel such arbitration by its actions and inactions. "Waiver is the voluntary and intentional relinquishment

of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003). Waiver can be explicitly asserted, or it may be inferred from a party's conduct. Ibid.

Our Supreme Court has recognized that parties "may waive their right to arbitrate in certain circumstances," although such waiver is "never presumed." Cole, 215 N.J. at 276. An agreement to arbitrate a dispute can be overcome where there is "clear and convincing evidence that the party asserting [arbitration] chose to [litigate] in a different forum." Ibid. (quoting Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008)).

The Court held in Cole that whether a party has waived its right to arbitration depends "on the totality of the circumstances." Id. at 280-81. Among other factors, Cole instructs courts to consider:

> (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.
>
> [Ibid.]

Cole further instructed that "[n]o one" of these listed factors is "dispositive." Id.

at 281.[2]

Our de novo review of those Cole factors shows that, on balance, they weigh strongly in favor of waiver in the totality of circumstances here.

First, as the motion judge found, the sixteen-month delay between plaintiff's February 2022 filing of the complaint and the employers' June 2023 cross-motion to compel arbitration was extensive. That interval was much longer than the six-month delay the court excused in Spaeth. 403 N.J. Super. at 516. We are mindful that about seven of those months consisted of a period when the case had been referred to a mediator. Yet we also note that the trial court's order referring the case to mediation expressly permitted discovery to proceed concurrently. When the case was returned by the assigned mediator in March 2023, defendants did not promptly move to dismiss the complaint and compel arbitration, but instead waited three more months before taking action in a cross-motion.

Second, no motions were filed before the parties' respective motions in

[2] As we have held in a published opinion issued today, pursuant to the United States Supreme Court's post-Cole opinion in Morgan v. Sundance, Inc., 596 U.S. 411 (2022), the seventh Cole factor of prejudice to the party opposing the motion to compel arbitration must not be treated as a precondition of waiver. See Marmo & Sons Gen. Cont., LLC, v. Biagi Farms, LLC, __ N.J. Super. __, __ (App. Div. 2024).

May and June of 2023, so this factor weighs against waiver.

Third, the factor of litigation strategy is unknown on the record. We accept at face value defense counsel's assurance to the trial court that he personally was unaware of the arbitration provisions within his client's own form handbook and employee acknowledgment. Assuming that is true, the delay in moving to arbitrate conceivably could have been to defendants' advantage by increasing the time expended by plaintiff's counsel in unnecessary court filings and thereby draining plaintiff's resources.

Fourth, the amount of discovery exchanged over nine months, as the trial court found, was not substantial. But, as the trial court also found, that was attributable in part to defendants themselves seeking multiple discovery extensions.

Fifth, the pleadings filed by defendants strongly support the finding of waiver. Defendants asserted more than two dozen affirmative defenses with their answer, none of which mentioned a lack of jurisdiction due to the binding arbitration provisions. More pointedly, their Rule 4:5-1(b)(2) certification explicitly told the court and opposing counsel that no arbitration was contemplated. As we underscored in Marmo, __ N.J. Super. at __, such a serious inaccuracy in a Rule 4:5-1(b)(2) certification has the capacity to waste the

public's judicial resources as well as those of opposing counsel.

The sixth factor, the proximity of a trial date, is not pertinent here as no such date was fixed by the trial court.

Seventh, the non-dispositive factor of prejudice to plaintiff is relatively neutral here, other than our recognition that plaintiff's desire to bring his claims to a disposition on the merits was sidetracked for over a year.

On the whole, these factors are supportive of the trial court's finding of defendants' waiver, under the totality of circumstances. Denial of the motion to compel arbitration at that stage of the lawsuit was justified.

None of the arguments raised in defendants' brief seeking to alter that conclusion are persuasive. The delay in progressing with the lawsuit was not entirely the fault of plaintiff, as defendants also shared substantial responsibility for allowing the discovery clock to tick with little action. The trial court did not manifestly impose an unfair burden on defendants in the waiver analysis and, even if it had, an objective assessment of the Cole factors supports waiver. Defendants' answer, regardless of generic language within several of its affirmative defenses, never stated directly that the case must be referred to arbitration. Finally, the trial court did not misapply its discretion in denying reconsideration, and we discern no important facts or legal arguments that were

overlooked by the court in its original decision. R. 4:42-2(b).

Because we affirm the order denying the motion to compel arbitration, we need not reach plaintiff's alternative arguments concerning the enforceability of defendants' non-negotiable arbitration provisions within the handbook and employee acknowledgement form, or his claim that he did not sign the forms.

All other points raised on appeal lack sufficient merit to be discussed in this opinion. R. 2:11-3(e)(1)(E).

Affirmed.