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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1954-22**

NECHAMA SZIMONOWITZ,

Plaintiff-Appellant,

v.

TRAVELSCAPE, LLC, d/b/a  
TRAVELOCITY.COM,

Defendant-Respondent.

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Argued March 12, 2024 – Decided June 5, 2024

Before Judges Enright and Paganelli.

On appeal from the Superior Court of New Jersey, Law  
Division, Ocean County, Docket No. L-2779-22.

Mark Jensen argued the cause for appellant (Kim Law  
Firm, LLC, attorneys; Yongmoon Kim, Philip D. Stern  
and Mark Jensen, on the briefs).

Vincent Passarelli argued the cause for respondent  
(Cozen O'Connor, attorneys; Vincent Passarelli, on the  
brief).

PER CURIAM

Plaintiff Nechama Szimonowitz appeals from two January 23, 2023 orders, one of which denied her motion to transfer her case from the Special Civil Part to the Law Division, and the second which granted a motion to compel arbitration filed by defendant Travelscape LLC (Travelscape). We affirm both orders.

## I.

Defendant is a third-party intermediary doing business as Travelocity.com. When defendant provides travel services to its customers, it is required to follow the terms and conditions—including cancellation policies—set by the vendors issuing tickets and reservations to their customers.

In June 2021, plaintiff utilized defendant's services to purchase eight non-refundable and non-transferable Turkish Airlines tickets for round trip flights to and from Tel Aviv, Israel. The cost for the tickets totaled \$4,761.19.

Before plaintiff could complete her transaction on defendant's website, she was required to agree to defendant's written "Terms of Use." The Terms of Use included a "Disputes; Arbitration" section which stated, in part:

You and Travelocity agree that any and all [c]laims will be resolved by binding arbitration, rather than in court, except that you and we may assert [c]laims on an individual basis in small claims court if they qualify. This includes any [c]laims you assert against us, our subsidiaries, travel suppliers[,] or any companies

offering products or services through us (which are beneficiaries of this arbitration agreement). This also includes any [c]laims that arose before you accepted these Terms of Use, regardless of whether prior versions of the Terms of Use require arbitration.

There is no judge or jury in arbitration, and court review of an arbitration award is limited. However, an arbitrator can award on an individual basis the same damages and relief as a court (including statutory damages, attorneys' fees[, and costs). The arbitrator must follow and enforce these Terms of Use.

Arbitrations will be conducted by the American Arbitration Association (AAA) under its rules, including the AAA consumer rules. . . .

Any and all proceedings to resolve [c]laims will be conducted only on an individual basis . . . . The arbitrator will have authority to decide issues as to the scope of this arbitration agreement and the arbitrability of [c]laims. If for any reason a [c]laim proceeds in court rather than in arbitration, you and we each waive any right to a jury trial.

In September 2021, plaintiff called one of defendant's representatives to both cancel her non-refundable and non-transferable tickets from Turkish Airlines and reschedule her trip, due to changes in international visa requirements resulting from COVID-19. According to plaintiff, instead of providing a refund directly to her for the Turkish Airlines tickets, the representative told her that she "would receive a credit for the purchase price of the tickets to be retroactively applied to her new booking with El Al Israel

Airlines." Plaintiff also contends that after she gave the representative her credit card information, the representative "ma[de] an unauthorized purchase of roundtrip tickets on El Al Airlines" for her, but "failed to apply [her] refund credit towards the purchase and refused to issue a refund for the purchase price of the Turkish Airlines tickets."

Thereafter, plaintiff lodged a complaint against defendant with the Better Business Bureau (BBB). In March 2022, she also filed a Special Civil Part complaint against defendant, seeking damages in the sum of \$4,761.19,<sup>1</sup> the price she paid for the Turkish Airlines tickets. In July 2022, defendant filed an answer to the complaint, alleging "Turkish Airlines [wa]s responsible for issuing refunds and credits to [p]laintiff, not Travelocity.com," and that "Travelocity.com [wa]s a third-party intermediary and [wa]s required to adhere to the terms and conditions, including cancellation policies, of the individual airlines." Further, defendant asserted "[p]laintiff agreed to abide by Turkish Airlines' specific rules and restrictions as stated in Travelocity.com's Terms of Use, which were provided to [p]laintiff prior to the completion of [her]

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<sup>1</sup> Rule 6:1-2(a)(1) states, "[c]ivil actions (exclusive of professional malpractice, probate, and matters cognizable in the Family Part of the Chancery Division or Tax Court) seeking legal relief when the amount in controversy does not exceed \$20,000" are cognizable in the Special Civil Part.

booking." These Terms of Use included the previously referenced arbitration section of the parties' agreement.

One day after defendant's answer was filed, plaintiff served a subpoena on defendant to secure a recording of the September 2021 telephone call she had with defendant's representative when she canceled her Turkish Airline flights. Defendant informed plaintiff the recording no longer existed because it "expired pursuant to the retention policies of a third-party vendor application."

In September 2022, plaintiff moved to amend her complaint to include claims for violations of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20,<sup>2</sup> and negligent destruction of evidence. Anticipating her damages might exceed the monetary limits of the Special Civil Part, plaintiff also filed a motion to transfer her case to the Law Division. The trial court denied the motion to transfer, but in December 2022, it granted plaintiff's motion to amend the complaint. In the interim, Turkish Airlines issued plaintiff a full refund for the tickets she canceled.

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<sup>2</sup> "[T]o state a CFA claim, a plaintiff must allege 'three elements: (1) unlawful conduct . . . ;(2) an ascertainable loss . . . ;and (3) a causal relationship between the defendant['s] unlawful conduct and the plaintiff[']s ascertainable loss.'" Int'l Union of Operating Eng'rs Loc. No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 389 (2007) (omissions in original) (quoting N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div. 2003)).

In January 2023, defendant filed an answer to the amended complaint. One of the affirmative defenses advanced in its answer was that "[p]laintiff failed to satisfy all conditions precedent required under the Terms of Use." Another affirmative defense asserted in defendant's amended answer read: "[t]he rights and obligations of Travelscape are defined and controlled by the Terms of Use. . . . Travelscape asserts each and every defense available to it under the Terms of Use and all such terms, conditions, and other provisions of the Terms of Use are incorporated herein." (Emphasis added). Defendant's amended answer further stated plaintiff was "made whole by a full refund from Turkish Airlines."

Also in January 2023, after plaintiff renewed her motion to transfer the case to the Law Division, defendant filed a cross-motion to compel arbitration. In support of the cross-motion, defendant's attorney submitted a certification stating he had "personal knowledge of the facts set forth" in his certification as he was "the attorney primarily responsible for handling this matter on behalf of Travelscape." Counsel certified that before plaintiff bought her airline tickets from Turkish Airlines, she

was required to agree to [defendant's] Terms of Use . . . . [and b]y agreeing to the Terms of Use, [she] also agreed that: "any and all [c]laims w[ould] be resolved by binding arbitration, rather than in court,

except that [she] and [defendant] m[ight] assert [c]laims on an individual basis in small claims court if [the claims] qualif[ied]."

On January 23, 2023, the trial court entered an order denying plaintiff's motion to transfer and a second order granting defendant's cross-motion to compel arbitration. In a written opinion accompanying the orders, the judge initially noted that an arbitration agreement is generally valid and enforceable, and "the enforceability of an internet consumer contract often turns on whether the agreement is characterized as a 'scrollwrap,' 'sign-in wrap,' 'clickwrap,' or 'browsewrap'[—]or a hybrid version of these electronic contract types." After recognizing "an electronic communication may be a clear and effective method of communicating proposed contract terms," the judge stated, "[t]he pertinent inquiry is whether the user was provided with reasonable notice of the applicable terms[ of the parties' contract,] based on the design and layout of the website."

Turning to the facts of this case, the judge found plaintiff bought airline tickets from defendant and "[a]s part of the purchase . . . was required to click a dialog box agreeing to [d]efendant's '[T]erms of [U]se.'" He also concluded the Terms of Use "provided [that p]laintiff agree[d] that 'any and all [c]laims w[ould] be resolved by binding arbitration, rather than in court, except that [the

parties could] assert [c]laims on an individual basis in small claims court if they qualif[ied]."

Additionally, the judge concluded "[p]laintiff was required to agree to the '[T]erms of [U]se' before purchasing the airline ticket[s] via [d]efendant's forum," and because she "had the option to either click to agree and continue with the purchase or not move forward with the purchase," she received "sufficient notice of the arbitration agreement." Moreover, he found that "[c]onsidering the scope of the agreement," the parties' "dispute f[ell] within the scope of the terms."

## II.

On appeal, plaintiff raises the following arguments: (1) defendant "failed to submit adequate evidence of the arbitration agreement"; and (2) defendant "waived its purported ability to compel arbitration." These arguments fail.

We review a trial court's order granting or denying a motion to compel arbitration de novo because the validity of an arbitration agreement presents a question of law. Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020); see also Perez v. Sky Zone LLC, 472 N.J. Super. 240, 247 (App. Div. 2022). Similarly, "[t]he issue of whether a party waived its arbitration right is a legal determination subject to de novo review." Cole v. Jersey City Med. Ctr., 215 N.J. 265, 275



(2013) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). "Nonetheless, the factual findings underlying the waiver determination are entitled to deference and are subject to review for clear error." Ibid. (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 483-84 (1974)).

"Because of the favored status afforded to arbitration, '[a]n agreement to arbitrate should be read liberally in favor of arbitration.'" Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001) (alteration in original) (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)); see also Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013). "That favored status, however, is not without limits." Garfinkel, 168 N.J. at 132.

"An arbitration agreement must be the result of the parties' mutual assent, according to customary principles of state contract law," Skuse, 244 N.J. at 48, and "there must be a meeting of the minds for an agreement to exist before enforcement is considered," Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 319 (2019). Additionally, "[a]n arbitration provision is not enforceable unless the consumer has reasonable notice of its existence." Wollen v. Gulf Stream Restoration & Cleaning, LLC, 468 N.J. Super. 483, 498 (App.

Div. 2021). "But a party may not claim lack of notice of the terms of an arbitration provision for failure to read it." Santana v. SmileDirectClub, LLC, 475 N.J. Super. 279, 286 (App. Div. 2023). "[A]s a general rule, one who does not choose to read a contract before signing it cannot later relieve [themselves] of its burdens." Skuse, 244 N.J. at 54 (quoting Riverside Chiropractic Grp. v. Mercury Ins. Co., 404 N.J. Super. 228, 238 (App. Div. 2008)).

When reviewing a motion to compel arbitration, a trial court undertakes a two-prong inquiry: (1) whether there is a valid and enforceable agreement to arbitrate disputes; and (2) whether the dispute falls within the scope of the agreement. Martindale v. Sandvik, Inc., 173 N.J. 76, 86-87, 92 (2002). "Under state law, 'if parties agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract.'" Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 135 (2020) (quoting Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992)).

New Jersey courts have recognized the validity of consumer web-based contracts "for decades." Wollen, 468 N.J. Super. at 495. As we recently confirmed in Santana, and the motion judge here noted, "[t]he enforceability of an internet consumer contract often turns on whether the agreement is characterized as a 'scrollwrap,' 'sign-in wrap,' 'clickwrap,' or 'browsewrap' [—] or

a hybrid version of these electronic contract types." 475 N.J. Super. at 286 (quoting Wollen, 468 N.J. Super. at 495-96). Clickwrap agreements are "routinely enforced by the courts" because "[b]y requiring a physical manifestation of assent, a user is said to be put on inquiry notice of the terms assented to." Id. at 288-89 (alteration in original) (first quoting Skuse, 244 N.J. at 55 n.2, then quoting Applebaum v. Lyft, Inc., 263 F. Supp. 3d 454, 465 (S.D.N.Y. 2017)).

Although "parties may waive their right to arbitrate in certain circumstances," "[w]aiver is never presumed." Cole, 215 N.J. at 276. "Any assessment of whether a party to an arbitration agreement has waived that remedy must focus on the totality of the circumstances." Id. at 280. As our Supreme Court instructed in Cole, the following factors, among others, are relevant to a court's assessment of waiver:

(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. No one factor is dispositive.

[Id. at 280-81 (emphasis added).]

Governed by these standards, we are persuaded the judge correctly found plaintiff entered into an enforceable agreement to arbitrate the parties' dispute, given that she agreed to abide by defendant's Terms of Use before she bought the Turkish Airlines tickets. We also are convinced defendant did not waive its right to compel arbitration of plaintiff's claims.

Here, plaintiff instituted suit against defendant in the Special Civil Part. Defendant then filed an answer, stating "[p]laintiff agreed to abide by . . . [defendant's] Terms of Use" when she "purchased non-refundable airline tickets from Turkish Airlines" using defendant as "a third-party intermediary." As noted, included in those terms was an agreement that the parties would resolve "any and all [c]laims . . . by binding arbitration, rather than in court."

Additionally, after plaintiff filed an amended complaint, defendant filed an amended answer, asserting various affirmative defenses, including the defense that defendant's "rights and obligations . . . [we]re defined and controlled by the Terms of Use," and defendant "assert[ed] each and every defense available to it under the Terms of Use." Again, the Terms of Use included a provision for the parties to arbitrate "any and all [c]laims."

Moreover, after plaintiff renewed her application to transfer the case to the Law Division, defendant promptly cross-moved to compel arbitration pursuant to the Terms of Use. By this point, no trial date had been scheduled. Given these facts, we reject plaintiff's contentions that defendant's litigation conduct was inconsistent with its reserved right to arbitrate the parties' dispute and that defendant waived its right to arbitrate plaintiff's claims.

We also decline to conclude plaintiff suffered prejudice due to defendant's litigation conduct, considering she was the party who initiated this action in the first instance, notwithstanding the fact she had reasonable notice of the Terms of Use and agreed to arbitrate claims arising from her purchase of the Turkish Airlines tickets before she completed the transaction. Thus, we discern no error in the judge finding the arbitration agreement was enforceable and the parties' dispute fell within the scope of their agreement.

Finally, we reject plaintiff's contention that the certification submitted by defendant's counsel in support of defendant's cross-motion to compel arbitration was inadmissible. Pursuant to Rule 1:6-6, "[i]f a motion is based on facts not appearing of record or not judicially noticeable, the court may hear it on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify." Here,


defendant's counsel filed a certification in opposition to plaintiff's motion to transfer the case to the Law Division and in support of defendant's motion to compel arbitration. In the first paragraph of counsel's certification, he specifically stated he "ha[d] personal knowledge of the facts set forth" in the certification, and that he was "the attorney primarily responsible for handling this matter on behalf of Travelscape."

Additionally, counsel certified that "Travelscape ha[d] no control over the terms and conditions or refund policies of Turkish Airlines." Counsel stated that "[p]rior to purchasing the airline tickets from Turkish Airlines, [p]laintiff was required to agree to Travelscape's Terms of Use" and that once she did so, she "agreed that: 'any and all [c]laims w[ould] be resolved by binding arbitration, rather than in court, except that [the parties could] assert [c]laims on an individual basis in small claims court if they qualif[ied].'" Despite plaintiff's argument to the contrary, there is no evidence in the record that counsel's certified statements were not based on his personal knowledge. Therefore, we are satisfied the judge properly accepted counsel's certification in support of defendant's motion to compel arbitration agreement.

To the extent we have not addressed plaintiff's remaining arguments, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION