SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3755-22

SHIP TO SHORE
COUNSELING, P.C.,

Plaintiff-Respondent,

v.

NEURONETICS, INC. and
MARIO LEONE,

Defendants-Appellants.

Submitted February 28, 2024 – Decided May 24, 2024

Before Judges Currier and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-0209-23.

Ballard Spahr, LLP, attorneys for appellants (William Patrick Reiley, on the briefs).

Kelly Law, PC, attorneys for respondent (Bradley Alan Latino, on the brief).

PER CURIAM

In this matter arising out of a commercial contract, defendants appeal from the June 30, 2023 order denying their motion to compel arbitration. The parties' contract contained a "Dispute Resolution" clause requiring nonbinding mediation, followed by binding arbitration, of any dispute arising out of the contract but did not include waiver-specific language or language that explained the differences between mediation, arbitration, and access to a court.

The trial court acknowledged the commercial context but determined nevertheless that the heightened waiver standards articulated under Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 442-45 (2014), and Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A., 168 N.J. 124, 134-36 (2001), were applicable. The court found plaintiff was not a sophisticated party and was not represented by counsel when it entered into the contract. Therefore, the court denied defendants' motion to compel arbitration. We reverse and remand for limited discovery regarding the mutual assent necessary to enforce an arbitration agreement.

Plaintiff Ship to Shore Counseling, P.C. is a mental health services practice owned and operated by registered nurse practitioner Christine

Possemato.[1] Defendant Neuronetics, Inc. is a medical technology company. Defendant Mario Leone was Neuronetic's sales manager involved in this transaction.

In January 2022, plaintiff negotiated an agreement with defendants for the purchase of defendants' NeuroStar Advanced Therapy System—a form of transcranial magnetic stimulation (TMS) used to treat major depressive disorder. The treatment is administered to a patient while sitting in a special chair. The parties signed a Master Sales Agreement stating the following terms:

> This Master Sales Agreement includes this Sales Order and the NeuroStar Advanced Therapy for Mental Health Standard Terms and Conditions of Sale accessible at http://www.neurostar.com/tc (the "Terms and Conditions"), which are incorporated herein in their entirety by reference and together with this Sales Order constitute the entire agreement and supersede all previous agreements, whether oral or written, between the parties with respect to the purchase and sale of Products after the date hereof.
>
> [X] Customer expressly acknowledges receipt of access to the Terms and Conditions and that Customer has read and understood the Terms and Conditions of Sale and agreed to be bound by them prior to signing below. Customer further expressly understands and agrees that all follow-on orders placed with Neuronetics will be subject to Neuronetics' then-existing Terms and

[1] Possemato had a business partner, Steven Padula, an Advance Practice Nurse, at the time of the contract's execution. Possemato represented in her brief that Padula had since left the practice.

> Conditions of Sale . . . which Customer agrees to be bound by.

The contract was signed by Padula.

The NeuroStar Advanced Therapy for Mental Health Standard Terms and Conditions of Sale includes the following terms:

> 14. APPLICABLE LAW; DISPUTE RESOLUTION; ATTORNEYS' FEES
>
> (a) Applicable Law. The laws of the Commonwealth of Pennsylvania govern this Agreement, without regard to conflict of laws principles or any other principles that would result in the application of a different body of law.[2]
>
> (b) Dispute Resolution. Any case, controversy or claim arising out of or relating to this Agreement, including its breach and/or interpretation, shall be exclusively resolved (i) first by non-binding mediation for at least one day and no more than two days in Chester County, Pennsylvania before a mutually agreed mediator and (ii) if the case, controversy or claim is not resolved by such mediation, then binding arbitration to occur in Chester County, Pennsylvania under the auspices of the American Arbitration Association under its . . . then-current Commercial Arbitration Rules ("Rules") before one arbitrator appointed in accordance with such Rules and utilizing such limited and expedited discovery as the Rules may provide for and the arbiter may deem appropriate. It is the intent of the Parties that any disputes subject to this Section 14(b) shall be resolved as promptly, efficiently and expeditiously as possible and the Rules shall be applied to accomplish these

[2] Neither party raised any issue regarding the choice of law on appeal.

> objectives. Notwithstanding the foregoing dispute resolution process, neither party shall be precluded, at any time, from seeking injunctive relief in any court of law to compel arbitration or to preserve the status quo. The arbitrator shall issue a written report to the parties, detailing the basis of any arbitration award. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction.
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> [(boldface omitted).]

In January 2023, plaintiff filed a complaint alleging that defendants made three material misrepresentations to plaintiff during their negotiations: that insurance claims for TMS prescribed by a nurse practitioner would be reimbursed, the reimbursement would be at the same rate given to psychiatrists, and "two other New Jersey practices . . . were already billing insurance carriers for TMS . . . administered without a psychiatrist's involvement." Plaintiff alleged these misrepresentations violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -227, and common law fraud, and that defendants were unjustly enriched. Plaintiff sought compensatory, consequential, punitive, and treble damages, along with attorney's fees, interest, and costs.

Defendants moved to compel arbitration and stay the proceedings. Defendants argued that the broad arbitration clause was executed by two sophisticated parties, and the heightened standards regarding a waiver required under Atalese and Garfinkel did not apply to commercial contracts.

Plaintiff disputed it assented to a waiver of its access to a court, and contended the parties were not equal sophisticated entities. Therefore, the contract had to comply with Atalese and Garfinkel requirements for a waiver.

In an oral decision issued on June 30, 2023, the trial court found it was undisputed that the parties entered the agreement voluntarily, the arbitration clause in the agreement did "not explain[] that . . . arbitration is a waiver of the right to bring [a law]suit in a judicial forum," nor did it "explain the difference between arbitration and a court of law," and that plaintiff was not a sophisticated consumer.

The court distinguished the agreement at issue from the contract presented in County of Passaic v. Horizon Healthcare Services, Inc., 474 N.J. Super. 498 (App. Div. 2023), appeal dismissed, No. 087989 (Nov. 8, 2023), finding there was no evidence plaintiff was represented by counsel during the negotiations, or that the parties had a longstanding relationship. The court also found that under Garfinkel, a "waiver of statutory rights must be clearly and [un]mistakenly established[,] and contractual language alleg[ing] to constitute a waiver will not be read expansively." Accordingly, the court found that the lack of a waiver invalidated the arbitration clause. The court denied defendants' motion in an order issued the same date.

On appeal, defendants contend the express waiver requirement expressed under Atalese and Garfinkel does not apply to commercial contracts. And, even if it is applicable, plaintiff did not meet its burden to establish it did not assent to the waiver.

Our review of a trial court's order granting or denying a motion to compel arbitration is de novo because the validity of an arbitration agreement presents a question of law. Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 131 (2020); Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019). "[A] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

New Jersey has a long-standing policy favoring arbitration as a means of dispute resolution. See Flanzman, 244 N.J. at 133 ("Like the federal policy expressed by Congress in the FAA,[3] 'the affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism of resolving disputes.'" (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 92

[3] FAA refers to the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

(2002))). "Although 'arbitration [is] a favored method for resolving disputes . . . [t]hat favored status . . . is not without limits.'" Gayles by Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 23 (App. Div. 2021) (alterations in original) (quoting Garfinkel, 168 N.J. at 131-32).

Essentially, defendants seek a bright line rule that the express waiver of the right to bring a claim in court requirement is only applicable to employment and consumer contracts and not to agreements between business entities. But our Supreme Court has not drawn that line and the scant record in this case does not persuade us to do so either.

"An arbitration agreement must be the result of the parties' mutual assent, according to customary principles of state contract law." Skuse v. Pfizer, Inc., 244 N.J. 30, 48 (2020) (citing Atalese, 219 N.J. at 442).

> When a New Jersey court is "called on to enforce an arbitration agreement, [its] initial inquiry must be—just as it is for any other contract—whether the agreement to arbitrate all, or any portion, of a dispute is 'the product of mutual assent, as determined under customary principles of contract law.'"
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> [Flanzman, 244 N.J. at 137 (alteration in original) (quoting Kernahan, 236 N.J. at 319)].

"Thus, 'there must be a meeting of the minds for an agreement to exist before enforcement is considered.'" Skuse, 244 N.J. at 48 (quoting Kernahan, 236 N.J.

at 319). This governing principle is paramount—whether the contract involves a consumer or a business entity.

Defendants rely on County of Passaic to support their argument that the waiver requirement is not applicable here. In that case, we affirmed the trial court's ruling that Atalese's express waiver requirement was inapplicable, because the parties to the contract—a county and a health benefit plan manager—were "sophisticated and possess[ed] relatively equal bargaining power." 474 N.J. Super. at 502. We noted "[t]he parties . . . were represented by [legal] counsel at all relevant stages of the[] negotiations and" contract formation over the course of seventeen years, and they knew the difference between "seek[ing] relief in a court of law and being relegated to arbitration." Id. at 504.

Specifically, we stated the county was "not—as in Atalese and other authorities—an employee or consumer lacking sufficient bargaining power." Id. at 501. We concluded "that an express waiver of the right to seek relief in a court of law to the degree required by Atalese is unnecessary when parties to a commercial contract are sophisticated and possess comparatively equal bargaining power." Id. at 504.

Our decision in County of Passaic continued to stress the tenets of mutual assent—sophistication and unequal bargaining power—even in the commercial context. The trial court here properly considered those principles and found that plaintiff was not a sophisticated party, there was "no evidence of a long[-]standing relationship" between the parties and "more importantly there[] [was] no evidence that . . . plaintiff was represented by an attorney."

But there was no evidence in the meager record to support those findings. The record before the trial consisted only of a complaint—in which plaintiff alleged it negotiated the sale of the product with defendants, the Master Sales Agreement, and the Terms and Conditions of Sale. Plaintiff did not submit a certification regarding its principals' business experience, the extent of the negotiations, or any other information which could permit the court to determine plaintiff's level of business sophistication or acumen, whether it was represented by counsel, or the parties' bargaining power.

Plaintiff was a professional corporation with two partners. Certainly, such an entity can be a sophisticated party. See Grandvue Manor, LLC v. Cornerstone Contracting Corp., 471 N.J. Super. 135, 139-40, 146 (App. Div. 2022) (holding a limited liability corporation established by two individuals as a vehicle to build a luxury home was a sophisticated party).

We reiterate our courts have not yet established a bright-line rule preventing business entities from invalidating an arbitration clause based on a lack of assent simply because the contract is executed by business entities. Assent is a threshold issue when determining the validity of an arbitration clause. Knight v. Vivint Solar Dev., LLC, 465 N.J. Super. 416, 427 (App. Div. 2020) ("[W]e conclude there exist questions of fact concerning the mutuality of assent to the arbitration provision, which is necessary to bind both parties to arbitration."). Here, the record is not sufficient to determine the threshold issue of whether plaintiff assented to the arbitration clause.

Therefore, under these circumstances we are constrained to reverse the order denying the motion to compel arbitration and remand for the parties to conduct limited discovery narrowed to the issue of whether there was assent to the waiver of litigation in a court of law.

Contrary to defendants' assertion raised on appeal, it is their burden to demonstrate assent. As we stated in Midland Funding LLC v. Bordeaux, 447 N.J. Super. 330, 336 (App. Div. 2016):

> [T]he party seeking to enforce [an] alleged contractual provision . . . has the burden to prove, by a preponderance of the evidence, that [the non-seeking party] assented to it. Moreover, because the arbitration clause constitutes a waiver of [the non-seeking party's] constitutional right to adjudicate this dispute in a court

> of law, [the seeking party] must prove that [the non-seeking party] had full knowledge of [its] legal rights and intended to surrender those rights.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.