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SAMUEL S. RAIA, et al., Plaintiffs, v. COHNREZNICK LLP, et al., Defendants.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION – BERGEN COUNTY DOCKET NO. **BER-L-2262-18** Civil Action
SAMUEL S. RAIA, et al., Plaintiffs, v. LOWENSTEIN SANDLER LLP, et al., Defendants.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION – BERGEN COUNTY DOCKET NO. **BER-L-2262-18** Civil Action **OPINION**

Argued: **September 13, 2019**
Decided: **September 23, 2019**

HONORABLE ROBERT C. WILSON, J.S.C.

Gary F. Werner, Esq. and Thomas J. Cotton, Esq. appearing on behalf of plaintiff Samuel S. Raia (from Schenck, Price, Smith & King, LLP).

Philip Touitou, Esq. and Joseph G. Silva, Esq. appearing on behalf of defendant Lowenstein Sandler LLP (from Hinshaw & Culbertson, LLP)

Joan M. Schwab, Esq. and Amy K. Smith, Esq. appearing on behalf of defendant CohnReznick LLP (from Saiber LLC)

FACTUAL BACKGROUND

THIS MATTER arises out of the enforceability of an arbitration clause in an engagement letter by Defendant CohnReznick LLP ("CohnReznick") and its client, Plaintiff Samuel S. Raia's ("Raia"). CohnReznick provided estate planning and related tax advice to all individual plaintiffs, directly or through family members as a result of this engagement. In March 2012, J.H. Cohn LLP, the predecessor entity of CohnReznick LLP, proffered the latest written

engagement agreement to Plaintiff Raia Properties Corporation (now known as Raia Capital Management) which is a family-owned business that manages a portfolio of real estate.

This engagement agreement describes services to be provided by CohnReznick, including assisting with wealth transfer and preservation strategies and minimizing income tax consequences of terminating grantor retained annuity trusts. The engagement lists specific objectives, including "the creation of Dynasty Trusts or other strategies to accomplish family wealth transfer and wealth preservation." CohnReznick as a result of this engagement agreement provided the individual plaintiffs, its services without requiring such individuals to sign or otherwise affirm their written agreement with Raia Properties Corporation. The agreement also contained a New York choice of law provision, although the instant case was filed in New Jersey. The agreement was duly executed by the parties except one minor change by a non-principal of Raia Properties.

CohnReznick provided professional accounting advice to, and for the purported benefit of, all the plaintiffs. This advice was conveyed both via email and verbally to certain plaintiffs and in conjunction with communications from attorneys from Lowenstein Sandler LLP ("Lowenstein Sandler"). The purpose of this was to advise on an estate plan that would benefit all plaintiffs. CohnReznick proferred that "plaintiffs should participate in the creation of a number of dynasty trusts, that defendants should help to facilitate the creation of these trusts, and that certain plaintiffs should convey personally held assets, including interests in real estate, to these dynasty trusts." CohnReznick provided various accounting services, including the preparation and filing of multiple tax returns over the years, to implement the plan.

For the reasons set forth below, defendants CohnReznick's motion is **GRANTED**.

LEGAL STANDARDS

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id.

Under the New Jersey Court Rules, a complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See, NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

An arbitration agreement, like any other agreement, "must be the product of mutual assent, as determined under the customary principles of contract law." Atalese v. U.S. Legal Services Group, 219 N.J. 430, 442 (2012). Specifically, "an effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." Id. Because arbitration involves a waiver of the right to pursue a case in a judicial forum, "courts take

particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." Id. New Jersey courts have repeatedly stated that "[t]he point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." Garfinkel v. Morristown Obstetrics, 168 N.J. 124, 132 (2001) (citing Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)).

In Atalese, the Court stated that "the waiver-of-rights language . . . must be clear and unambiguous – that is, the parties must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum." Atalese, 219 N.J. at 445. An arbitration clause must also convey to the parties that they are giving up their right to bring claims in court or have a jury resolve their dispute in "at least some general and sufficiently broad way." Id. at 444. An arbitration clause that fails to "clearly and unambiguously signal" to the parties that they are surrendering their rights to pursue a judicial remedy renders such an agreement unenforceable. Id. at 447-48.

Although Atalese arose in the consumer context, its principles have been routinely applied in other contexts including the employment agreements. Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 606-07 (App. Div. 2015) (applying the principles of Atalese to an employment contract between a stockbroker and a brokerage firm); Morgan v. Raymours Furniture Co., Inc., 443 N.J. Super. 338 (2016) (Citing to Atalese in determining that the New Jersey Supreme Court has made clear that an employee must "clearly and unambiguously" agree to a waiver of the right to sue).

RULES OF LAW AND DECISION

I. The Arbitration Clause in the Engagement Letter Requires Arbitration of All Claims Asserted by Raia Properties Against CohnReznick

A. Plaintiffs' Claim that the Engagement Letter is Somehow Unenforceable Does Not Defeat the Arbitration Clause

Two questions arise in our evaluation of a motion to compel arbitration. The first is whether there is a valid and enforceable agreement to arbitrate disputes. Martindale v. Sandvik, Inc., 173 N.J. 76, 86 (2001). The second is whether the particular dispute between the parties is covered within the scope of the agreement. See Id. at 92.

"Arbitration [is] a favored method of resolving disputes." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001). Generally, arbitration agreements "should…be read liberally to find arbitrability if reasonably possible." Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254, 257 (App. Div. 2001). An agreement to arbitrate… must be the product of mutual assent…a legally enforceable agreement requires a meeting of the minds. See Atalese v. U.S. Legal Servs. Group, L.P., 219 N.J. 430 (2014). "In evaluating the existence of an agreement to arbitrate, a court 'consider[s] the contractual terms, the surrounding circumstances, and the purpose of the contract.'" Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 188 (2013) (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)).

The March 20, 2012 Engagement Letter was signed by Defendant Ira. S Herman, then a partner of J.H. Cohn, LLP, and is addressed to Plaintiff Raia Properties. Plaintiffs allege the Engagement Letter is unenforceable due to a purportedly unratified change. The sole change to the Engagement Letter was a crossed out line relating to the usage of Raia Properties' name in marketing materials. This change does not make the Engagement Letter unenforceable. The parties performed under the contract and were paid for services rendered under the contract.

There is no evidence that the parties' failed to have a "meeting of the minds" for the purpose of the contract.

Plaintiffs' claim that this change created a counteroffer to the contract. To the extent that this letter is a counteroffer, the law is clear that when there is subsequent performance, a contract will be upheld as written. See (New York) Matter of Brooks v. BDO Seidman LLP, 25 Misc. 3d 445,447, 450 (Sup. Ct., New York Cnty. 2009) (although a client never signed an engagement letter containing an arbitration provision, his funding of attorney's retainer and acceptance of the contract's benefits clearly bespoke the parties' understanding that the client had entered in an effective contract with the attorney; therefore, the client was bound by the arbitration clause); Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp., 74 N.Y.2.d 475, 483 (1989) ("While there must be a manifestation of mutual assent to essential terms, parties also should be held to their promises and courts should not be 'pedantic or meticulous' in interpreting contract expressions."); see also Synnex Corp. v. ADT Sec. Servs., Inc., 394 N.J. Super. 577, 584-86 (App. Div. 2007) (where ADT's sales representative signed a written contractual offer with an exculpatory clause on behalf of ADT, even though the sales representative was not an authorized representative, and Synnex also signed same, the terms of the written contract were enforced where the parties performed under the contract); Corbin on Contracts at § 3.35 ([A] communication that expresses an acceptance of a previous offeror to consummate the contract by an expression of assent to the new conditions and variations.")

This issue of the validity of the Engagement letter is reserved for arbitration and cannot be used to evade arbitration. The Engagement letter is valid and enforceable. The use of Raia Properties' name in marketing material is not an issue and the subsequent performance and

payment under the contract is dispositive as to the validity of the parties' mutual assent to the agreement.

B. The Arbitration Provision in the Engagement Letter is Valid and Enforceable Against Raia Properties Under the Federal Arbitration Act

The Engagement Letter states that "the arbitration shall be governed by the Federal Arbitration Act ["FAA"]." Under the FAA, agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C.A. § 2. The FAA empowers courts to compel the parties to "proceed to arbitration in accordance with the terms of the agreement." Invista, S.a.r.l. v. Rhodia SA, 625 F.3d 75, 87 n.7 (3d Cir. 2010) (quoting 9 U.S.C.A. § 4); Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 330 (2019) ("Under the FAA, state courts may construe arbitration agreements under general contract principles, provided arbitration agreements are treated no differently from other agreements."). The decision as to whether a particular grievance falls within the scope of an arbitration clause is generally reserved for the court. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc., 427 N.J. Super. 45, 59 (App. Div. 2012).

It is well-settled that arbitration is a favored means of dispute resolution and that arbitration agreements are read liberally in favor of arbitration. Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc., 247 F.3d 44, 55 (3d Cir. 2001) ([F]ederal policy favors arbitration and thus a court resolves doubts about the scope of an arbitration agreement in favor of arbitration.") Battaglia v. McKendry, 233 F.3d 720, 725 (3d Cir. 2000) ("[A]n order to arbitrate the particular grievance should not be denied unless it may be said with positive

assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.")

In the instant matter, the Engagement Letter with Raia Properties requires arbitration of "any dispute, controversy, or claim arising out of or relating to this agreement (including disputes regarding the breach, termination, validity or enforceability of this agreement)." The only alteration to the Engagement Letter was a minor edit made by Lawrence Raia Jr. and signed by an employee of Raia Properties concerning the marketing provisions of the Letter. This change does not render the Letter void. A subsidiary provision of a contract should be interpreted as not to be in conflict with the dominant purpose of the contract. Here, the change to the marketing provision of the contract cannot be interpreted as to make the arbitration clause invalid.

C. The Principals of Raia Properties are Bound by the Engagement Letter

Under ordinary contract and agency principles, agents, employees, and representatives who are not signatories to their company's contracts are bound by those contracts, including any arbitration provisions contained therein. Jansen v. Salomon Smith Barney, Inc., 324 N.J. Super. 254, 259-61 (App. Div. 2001); Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, 7 F.3d 1110, 1121 (3d Cir. 1993).

In Wasserstein v. Kovatch, 261 N.J. Super. 277 (App Div. 1993), the Plaintiffs and Guild Contracting Corp. ("Guild") had entered into a construction contract containing an arbitration provision. The plaintiffs filed suit alleging fraud and failure to perform services in a workmanlike manner. The plaintiffs sought to avoid arbitration by naming only the individual principals of Guild rather than Guild itself. 261 N.J. Super. at 281. The plaintiffs argued that

since the individual principals were non-signatories to the arbitration provision, the lawsuit could not go to arbitration. The Appellate Division rejected plaintiff's argument and held that "all claims against the non-signatory defendants stemmed from their actions relating to or arising out of the performances of the contract by Guild. Non-signatories of an arbitration agreement may be bound by the agreement under contract and agency principles." Id. at 285.

In the instant case, the G-1 Plaintiffs (Lawrence A. Raia, Samuel S. Raia, and Joseph S. Raia) are principals of Raia Properties involved in the Raia family business. The non-principal Jr. Owners (Lawrence Jr. and Samuel Jr.) were also involved in the Raia family business and are the owners of Raia Capital Management, the successor corporation. They were all agents of Raia Properties bound to arbitrate the claims arising out of the Defendants' services provided under the Engagement Letter.

D. It is the Function of the Arbitrator to Decide if the Engagement Letter is Enforceable

The validity and enforceability of the Engagement Letter and Tax Return Engagement Letters should be decided by the arbitrators. The Supreme Court has stated that "parties to an arbitration agreement can include a 'delegation clause' providing that the arbitrator, rather than the judge, will decide threshold issues, such as whether they agreed to arbitrate." Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 66, 72 (2010) (under FAA, contract providing arbitrator with exclusive authority to resolve "interpretation, applicability, enforceability or formation" of Agreement, left challenges to validity of the contract to the arbitrator); Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 211 (2019) (recognizing that the Court has "acknowledged the legitimacy

and applicability of the Rent-A-Center holding to delegation provisions in New Jersey arbitration agreements").

In the instant case, the Engagement Letter includes a "delegation clause" which states that "if any dispute, controversy, or claim arising out of or relating to this agreement (including disputes regarding the…validity or enforceability of this agreement) cannot be resolved by mediation…then the dispute, controversy, or clam shall be finally resolved by arbitration…" The arbitration clause makes it clear that issues of validity or enforceability are reserved for the arbitrators.

II. Individual Plaintiffs and Trusts Do Not Have A Cognizable Claim Against the CohnReznick Defendants

A. The Remaining 23 Plaintiffs Do Not Have a Cognizable Claim Against the CohnReznick Defendants.

Raia Properties is the only party to the Engagement Letter. Plaintiffs' complaint does not allege any contact between CohnReznick and any Plaintiff other than Raia Properties. Therefore, every other Plaintiff beside Raia Properties is not a proper party because they are not clients or persons whom CohnReznick knew were intended to rely on its services. No other individual Plaintiffs were signatories to the Engagement Letter with CohnReznick and they are not CohnReznick clients with respect to any claims asserted in this action. Instead, they are third-party non-clients who have no standing to assert a claim.

1. New Jersey Law

Claims for negligence against accountants arising out of their professional services are governed by the New Jersey's Accountant Liability Act, N.J.S.A. 2A:53A-25 ("the Act"), the purpose of which is to "limit accountants' liability to third parties for the accountants' negligent acts… [and to] restore the concept of privity to accountants' liability towards third parties". E. Dickerson & Son, Inc. v. Ernst & Young LLP, 461 N.J. Super. 362, 367 (App. Div. 2003).

The Act provides that:

b. Notwithstanding the provisions of any other law, no accountant shall be liable for damages arising of out…any professional accounting service unless:

(1) The claimant against the accountant was the accountant's client; or

(2) The accountant:

> (a) knew at the time of the engagement by the client, or agreed with the client after the time of the engagement, that the professional accounting service rendered to the client would be made available to the claimant…
>
> (b) knew that the claimant intended to rely upon the professional accounting service in connection with that specified transaction; and
>
> (c) directly expressed to the claimant, by words or conduct, the accountant's understanding of the claimant's intended reliance on the professional accounting service…
>
> N.J.S.A. 2A:53A-25(b).

The Act defines a "client" with standing to sue as "the party directly engaging an accountant to perform a professional accounting service." N.J.S.A. 2A:53A-25(a)(3), The only party who directly engaged CohnReznick for these services is Raia Properties. Only Raia Properties' principals are referenced in the Engagement Letter. Therefore the remaining Plaintiffs fail to satisfy subsection (b)(2) of the Act. The only direct communications occurred

between CohnReznick and Lawrence Jr. and Samuel Jr. who were involved in Raia Properties and were acting in their capacity as agents.

In E. Dickerson & Son, the Court found that "general reliance" on accounting reports was insufficient to find standing to sue and that there was no basis for third-party liability. In Finderne Management Co., Inc. v. Barrett, 355 N.J. Super. 197 (App. Div. 2002), the Court found that Plaintiff's accountant did not owe any duty to defendants as the defendants were not his clients.

2. New York Law

Even if the Engagement Letter is considered under New York choice of law provision, the results remain the same. "New York's law requires a relationship between accountants and third parties approach[ing] that of privity before liability attaches to an accountant's acts of negligence." See Overland Leasing Grp., LLC v. Fist Fin. Corp. Servs., 436 F. App'x 119, 121 (3d Cir. 2011). See also LaSalle National Bank v. Ernst & Young L.L.P., 285 A.D. 2d 101, 105-06, 108 (1st Dept. 2001) (explaining that "pleadings must establish a basis of liability arising from either actual privity of contract between the parties or a relationship so close as to approach that of privity requiring a clearly defined set of circumstances which bespeak a close relationship premised on knowing reliance" and granting motion to dismiss complaint against accounting firm for failure to show privity). The allegations in Plaintiffs' Complaint do not meet this standard.

III. There is No Basis for Limited Discovery

Plaintiffs allege that they are somehow entitled to limited discovery given the possibility that there was some sort contact between CohnReznick personnel and the Raias. Plaintiffs cite RPC 4.2 as justification, which expressly prohibits a lawyer representing a client from communicating with a represented adverse party, rather than with the adverse party's lawyer. However that RPC only applies to attorneys and not agreements entered into directly by the parties, particularly with an accounting firm. Therefore there is no need for limited discovery or an evidentiary hearing.

CONCLUSION

For the aforementioned reasons, defendant CohnReznick's Motion to Dismiss and Compel Arbitration is **GRANTED**.