NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4771-11T3

RICHARD ANNUNZIATA,

Plaintiff-Appellant,

v.

GINO PALAZZOLO, PUTNAM AT
TINTON FALLS and GINO & FAMILY,
LLC,

Defendants-Respondents.

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Argued October 30, 2013 – Decided August 13, 2014

Before Judges Grall, Nugent and Accurso.

On appeal from Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. C-125-10.

Geoffrey J. Hill argued the cause for appellant (Law Offices of Steve M. Kalebic, P.C., attorneys; Mr. Kalebic, of counsel and on the briefs).

Edward G. Washburne argued the cause for respondents (McKenna, DuPont, Higgins & Stone, P.C., attorneys; Mr. Washburne, of counsel and on the brief).

PER CURIAM

Plaintiff Richard Annunziata appeals from trial court orders of April 27, 2012, denying his motions to vacate and

freeze an arbitration award and granting defendants Gino Palazzolo, Putnam at Tinton Falls and Gino & Family, LLC's motions to confirm the award and allow disbursement of legal fees from escrow as ordered by the arbitrator. Plaintiff contends that the trial court erred in confirming the award because the arbitrator exceeded the scope of his powers and was biased. Because our review of the record convinces us that these arguments are without merit, we affirm.[1]

The matter has a long and complicated factual and procedural history which is set out at length in the trial court's oral opinion spread across ninety pages of transcript in the record. As we write only for the parties, who are well acquainted with this background, we include only those facts necessary to give context to our decision. Annunziata and Palazzolo, acting through Gino & Family, LLC, were partners in a ninety-eight lot residential real estate development, Putnam at Tinton Falls, which Annunziata acquired at a price of eight million dollars at a bankruptcy auction. Annunziata located the opportunity, but the vast majority of the financing, all but the

[1] We also deny a reserved motion to expand the appendix with a certification from Palazzolo's counsel, prepared at Annunziata's counsel's request, clarifying a remark Palazzolo's counsel made at oral argument before us. There is no basis for expanding the appendix with a certification from counsel about an argument made to the panel.

$130,000 to $160,000 contributed by Annunziata, was provided by Palazzolo and his backers.

Following a dispute that arose between them, Annunziata and Palazzolo signed an Amended and Restated Operating Agreement, which altered their ownership interests, among other things, and an Option Agreement which allowed Annunziata to buy out Palazzolo's share. Instead of continuing as equal partners, the new agreement gave Palazzolo a seventy-five percent interest and Annunziata a twenty-five percent interest in the project. The option allowed Annunziata the ability to purchase Palazzolo's seventy-five percent share during a one-year option period at a price to be calculated pursuant to the formula set out in the Option Agreement.

Following Palazzolo's refusal to honor Annunziata's exercise of the option, Annunziata filed a pro se verified complaint in the Chancery Division demanding specific performance of the parties' original operating agreement or, alternatively, enforcement of the option. Defendants answered and counterclaimed. Annunziata, now represented by counsel, and Palazzolo, likewise represented, thereafter entered into a series of consent orders allowing for the continued functioning of the operating entity and dismissing the matter without prejudice to allow the parties to proceed to arbitration in

accordance with the Option Agreement.[2] Four months later when the parties had yet to proceed to arbitration, the Chancery judge entered another consent order, this time designating the parties' selected arbitrator.

The matter was arbitrated over several months on various hearing dates. The arbitrator issued a written decision on October 24, 2011, which he read to the parties and their counsel on that date. In his decision, the arbitrator noted:

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[2] The arbitration clause included in the Option Agreement provides:

> 5. DISPUTES. Any dispute, claim or controversy arising out of or relating to this Agreement or breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this Agreement to arbitrate, shall be determined by arbitration in the [S]tate of New Jersey, before a sole arbitrator, in accordance with the laws of the State of New Jersey for agreements made in and to be performed in that State. The arbitration shall be administered by tribunal agreed upon by the parties. Judgment on the Award may be entered in any court having jurisdiction. The arbitrator shall, in the Award, allocate all of the costs of the arbitration (and the mediation, if applicable), including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party, against the party who did not prevail. BY AGREEING TO THIS SECTION, THE PARTIES IRREVOCABLY AND VOLUNTARILY WAIVE ANY RIGHT THEY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY DISPUTE.

> At first the issue was limited to the validity of plaintiff's exercise of [the option] and then expanded to include the question of whether plaintiff, Richard Annunziata, had received consideration for his execution of a "restated and amended limited liability agreement" and whether that document can be considered in the calculation of the ultimate purchase price if plaintiff did validly exercise his option. It was anticipated the parties would, following my decision, assess their respective positions concerning resolution of various other parts of the controversy.

The arbitrator decided that Annunziata did not validly exercise the option and that "sufficient consideration exists to bind plaintiff to the second operating agreement as well as the option."

Following the parties' receipt of the arbitrator's decision, they engaged in extensive settlement negotiations for several hours. Eventually, counsel reported to the arbitrator that the matter had been settled. When the arbitrator asked that counsel produce the parties so that they might assent to the terms before him, he learned that Annunziata had left the building.

Just prior to the next scheduled arbitration session on November 22, which the parties apparently left on to deal with attorneys' fees and disbursements from escrow, Annunziata fired

his counsel.[3] Both old and new counsel for Annunziata appeared on November 22. New counsel reported to his adversary and the arbitrator Annunziata's claim that he had never assented to the settlement. Counsel also sought an adjournment of the hearing to allow him to prepare for the next phase of the proceeding. Counsel for Palazzolo objected to any adjournment and advised that Annunziata's counsel's announcement was the first he had heard that the matter was not settled. He then made an oral motion to enforce the settlement.

New counsel for Annunziata objected, arguing that Palazzolo's motion should be made in writing with supporting

[3] We take this portion of the facts in part from an unofficial transcript of the proceedings of November 22, 2012. Although the parties had apparently agreed that there would be no record made of the arbitration proceedings, Annunziata's wife, who was not a party, surreptitiously recorded at least parts of several sessions, including some at which only counsel and the arbitrator were present. While making reference to the proceedings reflected in this transcript, the Chancery judge, rightly in our view, declined to rely on any of these transcripts because of the unreliable manner in which they were recorded. The transcripts, although transcribed by a certified shorthand reporter, are obviously incomplete and no one has certified that they are a true record of the testimony. The parties argued in their briefs their cross-motions on the propriety of including these transcripts within the appendix. We now grant Annunziata's motion allowing them to remain because they were included in the record before the Chancery judge. We rely on the November 22 transcript for the limited purpose of noting the basis for Annunziata's objection to the arbitrator's decision to hold a hearing on whether the parties had entered into a binding settlement and to the extent it refutes other representations he makes regarding the conduct of that arbitration hearing.

affidavits to which he would have the opportunity to respond in kind. The arbitrator declined Annunziata's request for an adjournment and proceeded to hear testimony from Annunziata and his counsel as to whether Annunziata had authorized counsel to advise Palazzolo and the arbitrator that he accepted the terms of the settlement. Annunziata's former counsel testified, over new counsel's objection on the basis of attorney/client privilege, that Annunziata authorized him to accept the settlement. Annunziata denied he had done so.[4] After hearing the evidence, the arbitrator determined that the parties had entered into a binding settlement. He subsequently entered an award effecting the terms of the settlement, which the Chancery judge confirmed in his lengthy oral decision.

Annunziata's chief argument on appeal is that the arbitrator "exceeded his powers and the scope of the arbitration" by conducting "a surprise Harrington[5] type

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[4] Although Annunziata argues in his brief that "his stake in the Putnam at Tinton Falls LLC [was] stripped from him," we note that the dispute as to the settlement was not over the amount Annunziata was to receive. Annunziata confirmed before the arbitrator that he was in agreement with the $900,000 he was to receive for his share. The settlement term Annunziata objected to was that $800,000 of those monies were to be held in escrow pending resolution of an appeal in a related matter then pending before this court, which has since been resolved in his favor.

[5] Harrington v. Harrington, 281 N.J. Super. 39, 46-47 (App. Div.) (holding plenary hearing required to assess party's claim that

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hearing" on a "brand new claim that a 'settlement' had allegedly been reached." We reject this argument. As the unofficial transcript proffered by Annunziata reveals, it was Palazzolo who was surprised by Annunziata's new counsel's announcement that the matter was not settled. New Jersey's Revised Arbitration Act, N.J.S.A. 2A:23B-1 to -32 (RAA), provides that an arbitrator may conduct an arbitration in any manner that the arbitrator considers appropriate, with the goal of disposing of the matter fairly and expeditiously. N.J.S.A. 2A:23B-15a. Annunziata cites no case holding that an arbitrator may not take testimony to determine whether a matter referred to the arbitrator has been settled by oral agreement. Our own research has likewise not revealed such a case.

The arbitration provision agreed to by the parties in the Option Agreement is extraordinarily broad. Annunziata and Palazzolo not only agreed to arbitrate "[a]ny dispute, claim or controversy arising out of or relating to this Agreement or breach, termination, enforcement, interpretation or validity thereof," but also agreed to allow the arbitrator to determine "the scope or applicability of this Agreement to arbitrate," a determination ordinarily within the province of the court. See

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he had not assented to oral settlement), certif. denied, 142 N.J. 455 (1995).

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc., 427 N.J. Super. 45, 59 (App. Div.) (noting that issues of substantive arbitrability, that is, whether the particular grievance is within the scope of the arbitration clause, is generally to be determined by the court), certif. denied, 212 N.J. 460 (2012); N.J.S.A. 2A:23B-6b.[6] Accordingly, Annunziata's claim that the arbitrator was without authority to decide whether the parties' dispute over settlement was within the scope of the controversy they referred for arbitration is belied by the broad authority the parties conferred on the arbitrator by agreement.

Further, at no time did Annunziata ever assert before the arbitrator the position he now takes that the "Harrington type hearing" was beyond the scope of the issues the parties had agreed to arbitrate. As Annunziata's proffered unofficial transcript demonstrates, his objection to the proceeding was limited. Annunziata's counsel contended only that Palazzolo's request to enforce the alleged settlement required a formal motion and the opportunity to respond, not that the issue was one the arbitrator could not decide. The RAA precludes a court

[6] Although N.J.S.A. 2A:23B-6b provides that the court should decide whether a controversy is subject to an agreement to arbitrate, the provision is waivable by agreement pursuant to N.J.S.A. 2A:23B-4a.

from vacating an arbitration award on the ground that there was no agreement to arbitrate if the person urging that position participated in the arbitration proceeding without raising the objection. N.J.S.A. 2A:23B-23a(5). Our case law is in accord. See, e.g., Highgate Dev. Corp. v. Kirsh, 224 N.J. Super. 328, 333 (App. Div. 1988) (noting that party choosing to submit to authority and jurisdiction of an arbitrator "may not disavow that forum upon the return of an unfavorable award"), cited with approval in Wein v. Morris, 194 N.J. 364, 380-84 (2008).

Finally, we note the practical realities of the situation confronting the arbitrator here. Both parties agree, as the arbitrator noted in his written decision, that the arbitrator would first address the issue of Annunziata's exercise of the option before proceeding to consider the facts applicable to the partnership dispute. The arbitrator's commission was thus not exhausted with his written decision. If the matter were not settled, the arbitrator was bound to take testimony in order to resolve the remaining issues referred to him. Accordingly, it was incumbent upon him to ascertain what issues remained in dispute. Under these circumstances, and for the reasons already expressed, we find no error in the arbitrator's decision to take testimony in order to decide whether the parties had agreed to a binding settlement.

Annunziata's remaining points of error do not require any more than brief comment. R. 2:11-3(e)(1)(E). The scope of review of an arbitration award is necessarily narrow in order that the benefits of arbitration as an effective, expedient, and fair means of dispute resolution be preserved. Fawzy v. Fawzy, 199 N.J. 456, 470 (2009). Because the decision to affirm or vacate an arbitration award is a decision of law, our review is de novo. Minkowitz v. Israeli, 433 N.J. Super. 111, 136 (App. Div. 2013).

We reject Annunziata's claim that the arbitrator's conduct of the hearing was in any way improper or provided a basis to reject the award under N.J.S.A. 2A:23B-23a(3). We perceive no prejudice to Annunziata from the arbitrator's decision not to adjourn the hearing. As the Chancery judge noted, Annunziata had already switched counsel several times during the course of the arbitration proceedings requiring adjournment of at least one hearing date. In the unofficial transcript which Annunziata proffers, the arbitrator notes the unfairness of allowing one side to control the proceedings by changing counsel immediately prior to a scheduled hearing.

That transcript further details that the arbitrator was presented with testimony that Annunziata claimed in discussions with his counsel after the October 24, 2011 proceeding that he

had not agreed to settle the case. Both Annunziata and his prior counsel testified that Annunziata later claimed not to have settled the case. The documents Annunziata claims he would have presented to demonstrate his lack of agreement had the hearing been postponed are thus only cumulative of the information already before the arbitrator. Annunziata has presented no evidence that the arbitrator's award enforcing the settlement was otherwise procured through fraud, bias or undue means. His dissatisfaction with the award is insufficient to compel its vacatur. Fawzy, supra, 190 N.J. at 470.

Finally, we reject Annunziata's argument that the Chancery judge should have vacated the arbitrator's written decision that Annunziata failed to effectively exercise the option as not in accord with Supreme Court precedent governing the exercise of options. Annunziata's argument that the arbitrator committed legal error in rendering his decision "without an analysis and consideration of our Supreme Court's decision in Brunswick Hills Racquet Club [, Inc.] v. Route 18 Shopping Center Associates, 182 N.J. 210 (1985)[,]" is not a cognizable basis to set aside the award in the absence of an agreement to expand the scope of judicial review to encompass the claimed errors of law. See Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 358 (1994) (decided under the Arbitration Act, N.J.S.A.

2A:24-1 to -11) (citing Perini v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 548-49 (1992) (Wilentz, C.J., concurring)). We fail to see the applicability of Brunswick Hills in any event in light of Palazzolo's prompt response that Annunziata's purported exercise was not in keeping with the language of the option and inviting Annunziata to reissue his notice of intent. See Brunswick Hills, supra, 182 N.J. at 230-31 (noting that the Court's enforcement there of the implied covenant of good faith and fair dealing was based on the landlord's "demonstrable course of conduct, a series of evasions and delays, that lulled plaintiff into believing it had exercised the lease option properly.").

Annunziata's argument that the arbitration award should be vacated because the business name Gino & Family L.L.C. Limited Liability Company is available on the State's Online Business Entity Filing site is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.