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IN THE MATTER OF THE ESTATE OF SAMUEL P. HEKEMIAN, DECEASED

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
PROBATE PART
DOCKET No. P-479-21

OPINION

Argued: December 3, 2021

Decided: February 7, 2022

Appearances: Tanya M. Mascarich, Esq., James B. Garland, Esq., & William J. Metcalf, Esq. (Coughlin Midlidge & Garland, LLP, attorneys) for Plaintiff;

Lawrence T. Neher, Esq. & Eric A. Carosia, Esq. (Berkowitz, Lichtstein, Kuritsky, Giasullo, & Gross, LLC, attorneys) for Defendants.

HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter comes before the Court by way of Order to Show Cause filed by Tanya M. Mascarich, Esq., attorney for Plaintiff Richard E. Hekemian ("Plaintiff"), seeking relief against Defendants Peter S. Hekemian ("Peter") and Edward G. Imperatore ("Imperatore") (collectively, "Defendants") in their capacities as Co-Executors of the Estate of Samuel P. Hekemian ("the Estate"), by way of summary action, filed on September 27, 2021 through a Verified Complaint. Co-Defendants, through their attorneys Lawrence T. Neher, Esq. and Eric A. Carosia, Esq. filed a Motion to Compel Arbitration on November 1, 2021 in response to Plaintiff's Verified

Complaint seeking to (i) dismiss Plaintiff's Verified Complaint with prejudice for lack of subject matter jurisdiction and (ii) direct Plaintiff to pursue his claims by way of binding arbitration. Plaintiff opposed the motion through a formal brief filed November 5, 2021. Co-Defendants filed a letter brief in reply to Plaintiff's opposition on November 24, 2021. The Court heard argument on the Motion to Compel Arbitration on December 3, 2021.

BACKGROUND

Samuel P. Hekemian ("Decedent") died on August 21, 2018. Pl. Compl. ¶ 4. The Decedent's surviving immediate family members are his wife Sandra Hekemian and their four sons: Plaintiff Richard, Defendant Peter, Jeffrey Hekemian, and Mark Hekemian. Pl. Compl. ¶ 5.

Prior to his death, Decedent created a Last Will and Testament ("LWT") dated August 27, 2002. Pl. Compl. ¶ 4. The terms of the LWT name Defendant Peter and Co-Defendant Imperatore (a longtime friend, family advisor, and attorney) as Co-Executors and Co-Trustees ("Co-Executors"). Pl. Compl. ¶ 11.

Pursuant to the terms of the LWT several trusts were to be created: (a) a Credit Shelter Trust, (b) a Generation Skipping Marital Trust, and (c) a Residuary Martial Trust (collectively, "Trusts"). Pl. Compl. ¶ 12-15. The LWT also contains a comprehensive arbitration clause. See Defs. Br. at 1. Article Seventeenth of the LWT states:

> "SEVENTEENTH: Any dispute regarding the interpretation this Will and the trusts created hereunder, or arising out of administration by the executors and/or others acting hereunder in a fiduciary or other capacity, shall be submitted for settlement by arbitration, in the following manner: (A) Any interested party may initiate arbitration by giving written notice by certified mail to the executors and/or trustees of the intention to arbitrate the dispute. Such notice shall explain the nature of the dispute and any remedy or remedies sought. If the party initiating such arbitration and the executors and/or trustees shall be unable to agree upon a single arbitrator within sixty (60) days of the mailing of the notice to arbitrate, each of them may designate his or her own arbitrator (with the executors and/or trustees to designate one and only one arbitrator for the executors and/or trustees, collectively), none of whom shall be an interested

party hereunder. All such designated arbitrators shall then meet and decide upon a single, mutually acceptable arbitrator to resolve the dispute serving as sole arbitrator thereof. (B) The arbitrator shall decide the dispute by applying the substantive law of the State of New Jersey. Procedures for the arbitration shall be established by agreement of the interested parties, or in the absence of such an agreement by the arbitrator. The decision of the arbitrator shall be final and binding upon all interested parties and shall not be appealable to any court of law. Costs of the arbitration shall be paid from such trust, or assessed against the parties as may be determined by the arbitrator, as part of the decision. (C) Arbitration shall be the exclusive remedy for resolving disputes concerning this Will and the trusts created hereunder, including but not limited to the administration of the Will and such trusts; provided, however, that an interested party may bring an action at law or equity to enforce any decision and/or award of an arbitrator hereunder." See Pl. Compl. at Ex. A.

The Co-Executors probated the LWT on September 13, 2018 with the Surrogate of Bergen County. Defs. Br. at 3. The provisions of the LWT have not been challenged. Id. After the LWT was probated, Plaintiff requested "an early distribution, or a loan, or combination of two, from the Trusts." Pl. Compl. ¶ 24. Plaintiff's request was denied. Pl. Compl. ¶ 25. Plaintiff subsequently filed this action to enforce his rights as a "beneficiary of the Estate Trusts" and compel a "full accounting of the Estate and Trusts established pursuant to Decedent's Will." Pl. Compl. ¶ 36.

Defendants contend that Plaintiff disregarded the Decedent's intent as set forth in Article Seventeenth of the LWT that any relief sought be addressed by way of binding arbitration. Defs. Br. at 4. Defendants argue that Plaintiff has demonstrated an acceptance of the terms of the LWT, and therefore is bound by its terms, including binding arbitration, by (i) failing to challenge the validity of the LWT and Trusts, (ii) seeking to receive the benefits of the LWT, and (iii) seeking an accounting in his capacity as a beneficiary under the LWT and Trusts. Id.

Nonetheless, the ultimate issue in this case is whether a will can contain an arbitration clause.

Plaintiffs argue that an arbitration provision in a will has no legal effect in New Jersey, and therefore the Article Seventeenth provision in Decedent's LWT is not enforceable.

Defendants argue that the arbitration provision in Decedent's LWT is demonstrative of donative intent and that Decedent explicitly desired that any disputes regarding his LWT be resolved via arbitration.

ANALYSIS

The affirmative policy of the state of New Jersey favors arbitration as a mechanism for resolving disputes. See Billing v. Buckingham Towers Condo. Ass'n, 287 N.J. Super. 551, 564 (App. Div. 1996) ("litigation ought to be a last resort, not a first one").

Additionally, there is ample case law in this state that discusses New Jersey's "strong public policy . . . favoring arbitration . . ." See Marchak v. Claridge Commons, Inc., 134, N.J. 275, 281 (1993) ("arbitration is a favored form of relief"); see also Alamo Rent a Car, Inc. v. Galarza, 306 N.J. Super 384, 389 (App. Div. 1997); Hojnowski v. Vans State Park, 187 N.J. 323, 342 (2006) ("arbitration is a favored means of dispute resolution"); Bruno v. Mark MaGrann Assoc., 388 N.J. Super 539, 545 (App. Div. 2006) (noting New Jersey courts have long recognized a strong public policy favoring arbitration); Hirsch v. Amper Fin. Servs. LLC, 215 N.J. 174, 186 (2013) (noting courts "are mindful of the strong preference to enforce arbitration agreements, both at the state and federal level").

Moreover, a hallmark principle that guides probate matters in New Jersey is that a decedent's intentions are to be honored and effectuated. N.J.S.A. 3B:3-33.1 ("the intention of a testator as expressed in his will controls the legal effects of his dispositions").

Therefore, Defendants argue that because of (1) New Jersey's strong public policy preference for arbitration and (2) the fact that the Decedent in the instant case inserted an arbitration clause in his will evidencing donative intent, this Court must find Decedent's arbitration clause enforceable to compel this dispute to arbitration.

With respect to the preference for arbitration, Defendants argue that the Decedent anticipated the possibility that disputes might arise during the administration of his LWT and Trusts, and that Article Seventeenth is a purposefully crafted procedure which states arbitration is the mechanism for resolving disputes regarding Decedent's Estate. Specifically, Defendants point to the language in Article Seventeenth of Decedent's LWT that "arbitration shall be the *exclusive remedy* for resolving disputes concerning [the] will." See Pl. Compl. at Ex. A (emphasis added).

Furthermore, Defendants argue that Decedent intended to have disputes concerning his Estate resolved via arbitration. In this regard, Defendants cite the law of other jurisdictions, such as Texas, to attempt to convince this Court that an arbitration provision in a testamentary instrument must be found enforceable in New Jersey. More specifically, Defendants cite the Supreme Court of Texas case Rachal v. Reitz to substantiate their claim despite acknowledging that "there is no authority in New Jersey which directly addresses the enforceability of a testamentary instrument's arbitration clause against a beneficiary thereunder." See Rachal v. Reitz, 403 S.W.3d 840 (2013).

Rachal, which found that arbitration provisions in testamentary instruments are enforceable in Texas, holds that there are two key reasons for why this must be the case. First, the Texas Supreme Court found that under direct benefits estoppel, if a beneficiary seeks to obtain benefits from or otherwise enforce the testamentary instrument, then the beneficiary is bound by its terms. Second, under donative intent principles, the decedent's right to require beneficiaries to submit to arbitration must be upheld by the courts to validate the decedent's intent.

In Rachal, a trustee was sued by a trust beneficiary for failing to account to the

beneficiary. Id. at 847. The trust instrument contained a mandatory arbitration provision, and the trustee sought to compel arbitration based on this provision. Id. at 842. The Texas Appellate Court denied the request, stating that binding arbitration must be the product of an enforceable contract between the parties which did not exist in the trust context. Id. at 843. However, the Texas Supreme Court reversed the lower court and ruled that the arbitration provision was valid. Id. at 842.

In reaching its decision, the Texas Supreme Court argued several points.

First, the Court argued that, in Rachal, the decedent's intent was to resolve disputes via arbitration, and Texas courts "endeavor to enforce trusts according to the settlor's intent." Id. at 844.

Second, the Texas Supreme Court found that a contract was not necessary for an arbitration clause to be valid, only an "agreement" was. Id. at 845. As part of its analysis on this issue, the Court said that under direct benefits estoppel, a non-signatory to an arbitration agreement can be found to have assented to the arbitration provision when the "party has obtained or is seeking substantial benefits under an agreement" Id.

The Court further explained that since a beneficiary is free to challenge a trust or disclaim their interest, the beneficiary "may opt out of the arrangement proposed by the settlor," but a beneficiary who attempts to enforce rights that would not exist without the trust manifests his or her assent to the trust's terms, including arbitration clauses. Id. at 847. Thus, the Court found that the trust arbitration provision in Rachal was enforceable against the beneficiary who "sought the benefits granted to him under the trust and sued to enforce the provisions of the trust." Id.

In addition to Rachal, Defendants argue that even though New Jersey courts have not directly addressed the issue of direct benefits estoppel as applied in Rachal, New Jersey has

compelled a non-signatory to arbitrate when the non-signatory "engaged in conduct, either intentional or under circumstances that induced reliance, and that [the parties seeking to compel arbitration] acted or changed their position to their detriment." See Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 189 (2013) (quoting Knorr v. Smeal, 178 N.J. 169, 178 (2003)).

In other words, Defendants argue that detrimental reliance may be found where a non-signatory has embraced the agreement or has, or sought to obtain, benefits flowing from it. See E.I DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F.3d 187, 200 (2001) ("[i]n the arbitration context, the doctrine [of equitable estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.").

Thus, Defendants maintain that the equitable estoppel doctrine "prevents a non-signatory from 'cherry picking' the provisions of a contract that it will benefit from and ignoring other provisions that don't benefit it or that it would prefer not to be governed by (such as an arbitration clause)." See Facta Health, Inc. v. Pharmadent, LLC, 2020 WL 5957619, at *3 (D.N.J. Oct, 8, 2020).

Applying the above case law to the facts in the instant case, Defendants argue that Plaintiff's claim here is grounded in his efforts to obtain benefits under the LWT and Trusts. They cite the fact that Plaintiff, on September 10, 2020, wrote Defendants "I hereby formally request a distribution from the Credit Shelter Trust and/or loan from the Credit Shelter Trust, Generational-Skipping Marital Trust and/or Residual Martial Trust." See Pl. Compl. at Ex. B.

Additionally, Defendants point to the fact Plaintiff made numerous statements which show he sought to avail himself of the benefits under the LWT and Trusts. See Pl. Compl. ¶ 23-

28 (noting that Plaintiff requested distributions from the Decedent's Estate). Defendants also note that Plaintiff is a beneficiary/contingent remainder beneficiary under the LWT and Trusts. Pl. Compl. ¶ 36.

Since Plaintiff never disclaimed his interest in the LWT and Trusts, Defendants contest the fact that Plaintiff is seeking a formal accounting. They believe that to allow Plaintiff to pursue a beneficial interest under the LWT and Trusts, "yet repudiate the Decedent's arbitration requirement," would "create the type of unfairness and injustice that the doctrine of equitable estoppel was precisely designed to prevent." See Facta, supra, 2020 WL 5957619, at 3* (D.N.J. Oct. 8, 2020).

On the other hand, Plaintiff argues that if this Court is to consider whether an arbitration clause in a will is binding on the beneficiaries of that will, it would be considering a matter of first impression. No court in New Jersey has addressed the issue of whether an arbitration clause in a will is valid or enforceable, and the legislature has not enacted any statute permitting arbitration clauses in wills and trusts.

In countering Defendants' claims, Plaintiff states that Rachal has no precedential value to a New Jersey court. Additionally, Plaintiff argues that the Rachal case involved an *inter vivos* trust, not a will, and therefore the facts of Rachal do not apply to the instant case. Plaintiff further argues that in Rachal, the beneficiary received benefits from the trust, whereas Plaintiff here has received no such benefits.

Moreover, Plaintiff counters Defendants' contentions regarding arbitration being a favored method of resolution in New Jersey. See Kimm v. Blisset, LLC, 388 N.J. Super. 14, 25 (App. Div. 2006) ("Although arbitration is traditionally described as a favored remedy, it is, at its heart, a creature of contract."); see also Atalese v. U.S. Legal Services Group, L.P., 219 N.J.

430, 442 (2014) (noting that parties may not be compelled "to arbitrate when they have not agreed to do so" (quoting Volt Information Sciences v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478 (1989)).

Plaintiff argues that arbitration is a remedy of a contractual nature, and that mutual assent is a necessary prerequisite for enforcement of an arbitration agreement. Plaintiff states that there can be no mutual assent to arbitrate when parties have not agreed to do so. See Atalese, 219 N.J. at 442. Plaintiff believes that there is no mutual assent present in the instant case because the Decedent's will represents a statement of one individual's testamentary intent, rather than a reflection of consensual agreement between parties.

Furthermore, Plaintiff believes Defendant cannot prevail on an estoppel theory because they have failed to establish Plaintiff engaged in conduct that induced their reliance such that they acted or changed their position to their detriment. Plaintiff points out Defendants' argument that when a non-signatory to an agreement has obtained benefits from such an agreement, detrimental reliance is satisfied such that the non-signatory can be compelled to arbitrate pursuant to the provision in the agreement. However, Plaintiff reiterates that he has not received any benefits under Decedent's will, and therefore, cannot be said to have met the detrimental reliance standard.

Lastly, Plaintiff argues he is only seeking an accounting. Plaintiff points to Article Sixteenth of the LWT which states that a fiduciary "may submit the account to a court for approval and settlement." See Pl. Compl. at Ex. A. Plaintiff reads Article Sixteenth to provide a mechanism for an accounting that beneficiaries can approve without the need for judicial intervention.

In assessing the various arguments raised by both parties, comparison can be drawn to

that of an *in terrorem* clause. An *in terrorem* clause provides that a contestant forfeits any gift made to him in the event a contest or challenge is instituted against the will. See Michael R. Griffinger, et al., N.J. Estate & Trust Litigation, § 5-5:3.9a, at 257 (2021 ed.). An *in terrorem* clause is designed to compel compliance with the testator's wishes through fear. Id. In 1977, the New Jersey legislature, via statute, rendered *in terrorem* clauses unenforceable. Id.

The case of Haynes v. First Nat'l State Bank is instructive for how *in terrorem* clauses are interpreted in New Jersey. See Haynes v. First Nat'l State Bank, 87 N.J. 163 (1981). In Haynes, the New Jersey Supreme Court ruled that *in terrorem* clauses would not be enforced where there is probable cause to challenge the instrument. Id. at 189. Neither the judiciary nor the legislature has defined "probable cause" in the context of a will contest, but the Restatement of Property (Second) states that "a contestant's good faith belief is not enough if there was no reasonable basis for it." See Restatement (Second) Property (Donative Transfers), ¶ 9.1 comment j (1981). Thus, probable cause to bring a challenge to a will exists if a reasonable person, based on the evidence, could conclude that there is a substantial likelihood that the will challenge would be successful. See Griffinger, et al., § 5-5:3.9c, at 261.

Here, the Plaintiff has grounds to challenge the administration of the Estate. Plaintiff is a beneficiary of the Estate and the Trusts. Pl. Compl. ¶ 36. Further, Plaintiff is not asserting that the LWT is invalid, does not challenge the probate of the will, does not contest the appointment of the Defendants as Co-Executors, and is not asking for a distribution from the Estate. Plaintiff's only motivation in this action is to seek an accounting.

In his submissions, Plaintiff has shown evidence that since the time Defendants were appointed Co-Executors of the Estate and Co-Trustees of the Trusts, Plaintiff has received minimal information about the administration of the Estate. Pl. Compl. ¶ 32-34 (noting Plaintiff

has no information as to the current status of the Estate or Trusts and that Defendants have denied Plaintiff's requests for information). By failing to keep Plaintiff apprised of the affairs of the Estate, Plaintiff has elected his statutory right to receive an accounting under N.J.S.A. 3B:17-2.[1]

Therefore, Defendants' contentions that Plaintiff is making a claim for benefits under the LWT by filing this action, and that therefore Plaintiff assents to the LWT's arbitration provision, is inapposite. Plaintiff has yet to receive any benefits from the Estate. Thus, Plaintiff filed an Order to Show Cause to seek an accounting because he is not receiving information at to the status of the Estate.

Next, in addressing the ultimate issue, the Article Seventeenth arbitration provision found in Decedent's LWT is unenforceable.

The New Jersey Arbitration Act ("Arbitration Act"), N.J.S.A. §§2A:23B-1 to 32, provides "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable, except upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B-6(a). However, the favored status of arbitration "is not without limits." See Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001).

Importantly, a court in New Jersey must first apply "state contract-law principles . . . [to determine] whether a valid agreement to arbitrate exists." See Hojnowksi, 187 N.J. at 342.

As Plaintiff correctly points out, in determining whether an arbitration agreement is enforceable, a New Jersey Court's initial inquiry must be "whether the agreement to arbitrate all,

[1] N.J.S.A. 3B:17-2 ("[a] personal representative may settle his account or be required to settle his account in the Superior Court. Unless for special cause shown, he shall not be required to account until after the expiration of 1 year after his appointment."). Plaintiff notes that Defendants have not asserted that the requisite waiting period has not expired or that Plaintiff is not entitled to an accounting.

or any portion of a dispute is the product of mutual assent, as determined under customary principles of contract law." Kernahan v. Home Warranty Adm'r of Fla. Inc., 236 N.J. 301, 319 (2019) (internal quotations omitted).

Here, there is a lack of mutual assent regarding the Article Seventeenth arbitration clause. The LWT is a statement of testamentary intent, not an instrument that reflects a consensual understanding between parties. In short, a will is not a contract, nor is it an agreement as defined in Rachal.

No court in New Jersey has ruled that a will is an agreement between the testator and their beneficiaries for the purposes of arbitration provisions because there lacks a consensual understanding between parties in the will context where only one party has expressed an intent to arbitrate. See In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 228 (1979) ("[i]n the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute.").

Therefore, on basic contract principles, the lack of mutual assent to the provision renders the provision unenforceable and Plaintiff cannot be compelled to arbitrate.

However, of perhaps greater consequence, and even assuming the LWT was found to constitute an agreement or a contract, the Article Seventeenth arbitration provision fails to apprise Plaintiff of his right to sue, and Plaintiff has no opportunity to expressly waive this right.

Underlying arbitrability is the fundamental principle that a party must agree to submit to arbitration. See Garfinkel, 168 N.J. at 132 ("The 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." (internal quotation marks omitted)).

New Jersey case law is clear that for an arbitration clause to be valid, there must be a

clear waiver of the right to sue.

In Atalese, the New Jersey Supreme Court stated that "[a]n arbitration clause, like any contractual clause providing for the waiver of a constitutional or statutory right, must state its purpose *clearly and unambiguously*." Atalese, 219 N.J. at 430 (emphasis added). Moreover, an arbitration clause "at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court." Id. at 447; see also Kleine v. Emeritus of Emerson, 445 N.J. Super. 545, 550 (App. Div. 2016) (emphasizing the language from Atalese that "it is well established that the party from whom an arbitration clause has been extracted must "clearly and unambiguously" agree to a waiver of the right to sue.").

Additionally, the New Jersey Supreme Court recently affirmed the Atalese interpretation of enforceability when it held that an enforceable arbitration agreement "clearly and unmistakably informs the parties that . . . final and binding arbitration will take the place of a jury or other civil trial." Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 137-38 (2020).

Applying the foregoing to the instant case, the Article Seventeenth provision in Decedent's LWT does not allow Plaintiff to avail himself to the court process. A litigant's right to avail themselves to the court process is so important that any court scrutinizing an arbitration clause in an agreement must determine that any party subject to the arbitration clause is apprised of their rights.

Lastly, Defendants' argument that detrimental reliance is found where a non-signatory has embraced the agreement or sought to obtain benefits flowing from it is misguided.

New Jersey case law is guided by the principle that unless both parties are signatories to the agreement, one party may not compel the other party to arbitrate unless the benefits of the underlying arbitration agreement have extended to the non-signatory party "based on the

traditional principles of contract and agency law." See E.I DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F.3d 187, 200 (3d Cir. 2001); Wasserstein v. Kovatch, 261 N.J. Super. 277, 286, 618 A.2d 886 (App. Div.), certify. Denied, 133 N.J. 440, 627 A.2d 1145 (1993).

Applied to the instant case, Plaintiff cannot be compelled to arbitrate because (1) the will is not a contract between two parties in the traditional sense and (2) the benefits of the will have not extended to the Plaintiff based on the "traditional principles of contract and agency law." Plaintiff has not agreed to arbitrate disputes concerning the LWT because the LWT is not a contract or an agreement of consensual understanding between two parties.

As a result, there is no arbitration agreement that exists between Plaintiff and Defendants. Therefore, Plaintiff cannot be compelled to arbitration.

Thus, for the foregoing reasons, Defendants' Motion to Compel Arbitration is denied. An Order accompanies this decision.