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SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
CHANCERY DIVISION, GE PART
DOCKET NO. BER-C-133-20

Gramkow, Carnevale, Seifert & Co.
Plaintiff,

v.

CPAs4MDs, P.A., Sylvain Syboni, &
MedTax CPAs P.A.
Defendants.

Decided:

Appearances:

Paul Doherty III, attorney for Plaintiff (Hartmann Doherty Rosa Berman & Bulbulia).

Mark Rottenberg, attorney for Defendant (Rottenberg Lipman Rich, P.C.).

The Honorable Edward A, Jerejian, P.J.Ch. Div.

This matter comes before the court by way of motion to compel arbitration, filed September 21, 2020 by Rottenberg Lipman Rich P.C. (Mark Rottenberg, Esq., appearing) attorneys for Defendants CPAs4MDs, P.A., Sylvain Siboni, and MedTax CPAs, P.A. Opposition was filed October 16, 2020 by Hartman Doherty Rosa Berman & Bulbulia LLC (Paul Doherty Esq., appearing) attorneys for Plaintiffs. Defendant's reply submission was filed October 26, 2020. The Court heard oral argument on Friday December 4th.

New Jersey courts have long recognized a strong public policy "favor[ing] 'arbitration as a means of dispute resolution' [that] requires 'liberal construction of contracts in favor of arbitration.'" Bruno v. Mark MaGrann Assoc., 388 N.J. Super. 539, 545 (App. Div. 2006) (internal citations omitted). The affirmative policy of this state, both legislative and judicial, favors arbitration as a mechanism to resolve disputes. Billig v. Buckingham Twoers Condo. Ass'n., 287 N.J. Super. 551, 564 (App. Div. 1996) (stating "litigation ought to be a last resort, not a first one").

The United States Supreme Court has also "long recognized and enforced a liberal federal policy favoring arbitration agreements." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (internal citations omitted). Where a sufficient nexus exists between an agreement and interstate commerce, the Federal Arbitration Act ("FAA") provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause." Perry v. Thomas, 482 U.S. 483, 490 (1987). A written arbitration provision contained in a "contract evidencing a transaction involving commerce . . . shall be 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. § 2. The New Jersey Legislature has codified the same arbitration principles in the New Jersey Arbitration Act. N.J.S.A. §§ 2A:23B-1 to 32.

The New Jersey Arbitration Act (Arbitration Act), N.J.S.A. 2A:23B-1, is similar in nature to the Federal Arbitration Act. The Arbitration Act, in part, 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 preference for arbitration "is not without limits." Garfinkel,, 168 N.J. at 132. A court

must first apply "state contract-law principles . . . [to determine] whether a valid agreement to arbitrate exists." Hojnowski, 187 N.J. at 342. This preliminary question, commonly referred to as arbitrability, underscores the fundamental principle that a party must agree to submit to arbitration. 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)); Guidotti v. Legal Helpers Debt Resolution, L.L.C., 716 F.3d 764, 771 (3d Cir. 2013) (slip op. at 13) (explaining that "a judicial mandate to arbitrate must be predicated upon the parties' consent" (citation omitted)). Notably, the arbitrability analysis is expressly included in the Arbitration Act. See N.J.S.A. 2A:23B-6(b) ("The court shall decide whether an agreement to arbitrate exists . . . .").Hirsch v. Amper Financial Serv., 215 N.J. 714 (2013).

Further, New Jersey case law has borne out 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." E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 195 (3d Cir.2001); Wasserstein v. Kovatch, 261 N.J. Super. 277, 286, 618 A.2d 886 (App. Div.), certif. denied, 133 N.J. 440, 627 A.2d 1145 (1993).

In determining whether an arbitration agreement may be enforced, a New Jersey court's first step is to ask "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." Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 319 (2019) (internal quotations omitted). The New Jersey Supreme Court found in Atalase v. U.S. Legal Services Group, L.P., 219 N.J. 430, (2014)

that "under New Jersey law any contractual waiver-of-rights provision must reflect that the partie[s] ha[ve] agreed clearly and unambiguously to its terms." Such an arbitration clause "in some sufficiently and broad way, must explain that the [party] is giving up their right to bring … claims in court." Id. at 447. The arbitration clause need not contain a particular set of words, rather it need only convey that "arbitration is a waiver of the right to bring suit in a judicial forum." Id. at 444. Following the Atalase decision a host of unpublished opinions sought to interpret whether the Supreme Court meant for the Atalase standard to stand solely for consumer contracts. To wit, the Appellate Division held in Tox Design Group, LLC v. RA Pain Services et al. that "the Atalase standard has not been extended beyond consumer and employment contracts. It does not apply to commercial arbitration agreements between commercial entities." Dkt. No. A-4092-18T-1, N.J. Super. Unpub. 2019 WL 7183687. Conversely, the Appellate Division affirmed a trial court's denial to compel arbitration between limited liability companies because the arbitration agreement "failed to express a clear and unambiguous waiver of the right to sue … [given that] nowhere in the agreements was there a statement that the right to sue was being waived." Estate of Watson v. Piddington Dkt. No. A-0423-19T3 N.J. Super. Unpub. 2020 Lexis 994 at 3-4.

These dueling interpretations, along with multiple others, were seemingly resolved by the Supreme Court's recent holding in Flanzman v. Jenny Craig Inc., stating 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." 244 N.J. 124, 138 (2020) (internal quotations omitted).

In the present matter, Defendant's argue that the Court should dismiss this case pursuant to R. 4:6-2 for lack of jurisdiction over the subject matter and compel arbitration pursuant to Section 10.10 of the parties' agreement; or in the alternative stay this action pending the outcome

of arbitration; and for other such relief that the Court deems just. Plaintiff argue that Defendant's motion to compel arbitration must be denied because the arbitration clause at issue is not enforceable under Atalese and its progeny; and that there is no arbitration agreement at all between Gramkow Carnevale Seifert & Co., LLC ("GCS") and Defendant Medtax CPAs, P.A. ("MedTax"), and thus GCS cannot be compelled to arbitrate its claims against a party with whom it had no arbitration agreement.

Plaintiff relies on Atalese, 219 N.J. 430, and Flanzman v. Jenny Craig, Inc., 244 N.J. 124 to argue that the arbitration provision is unenforceable. (Flanzman 244 N.J. 119 did in fact find the arbitration clause in that case to be enforceable, which Defendant correctly notes in their reply brief. However, Flanzman did in fact reaffirm the holding of Atalese.) The arbitration clause in question reads:

> Any controversy or dispute arising out of or relating to a breach or alleged breach of any provision of this Agreement shall be settled by arbitration in Hackensack, New Jersey, in accordance with the rules of the American Arbitration Association by one arbitrator (either jointly selected by the parties, or if no agreement, then as appointed by the AAA) and judgement upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Agreement ¶ 10.10.[1] A plain reading of this section finds no mention of the fact that such a provision waives the right of the parties to sue in court. This omission runs afoul of Flanzman, where the Supreme Court upheld an arbitration agreement that informed the parties "any and all claims or controversies [between the parties will have] final and binding arbitration will take the

[1] For the first time during oral argument the Court learned that the parties were represented by common counsel when the agreement was drafted and signed. Although not dispositive, this further indicates a lack of clear waiver of the parties' respective rights to bring suit in a court of law, as required by Atalese and its progeny.

place of a jury or other civil trial." 244 N.J. 138. Such simple language is sufficient to compel arbitration, yet no equivalent general waiver of right-to-trial verbiage is found in ¶ 10.10.[2]

The Flanzman Court reaffirmed that Atalase is the standard for determining whether arbitration agreements are enforceable, and that arbitration agreements must state that arbitration "would be very different from a court proceeding." Flanzman v. Jenny Craig, Inc., 244 N.J. 138. The Supreme Court's holding in Flanzman makes no such distinction between commercial and consumer contracts, seemingly clarifying the uncertainty created by the various opinions that came before it. See id.

In addition, although lack of such language is dispositive, and therefore the arbitration clause is unenforceable, the Court nevertheless will address Plaintiff GCS's contention that they cannot be compelled to arbitrate with Defendant MedTax, as MedTax was not a signatory to the arbitration agreement.

As noted above New Jersey courts have long held that non-signatories to an arbitration agreement can neither compel nor be compelled to arbitrate, with an exception "based on the traditional principles of contract and agency law." Wasserstein v. Kovatch, 261 N.J. Super. 277. No such principles of agency and contract law appear here. Rather, Defendant MedTax is a new separate entity and non-signatory to the sale agreement.

[2] The facts in the present matter are roughly the inverse of the facts in Flanzman, 244 N.J. 119 (2020); there the arbitration clause was upheld despite missing information relating to the omission of the process by which an arbiter will be named because a waiver of right to sue was included; here the arbitration clause has information relating to the naming of an arbiter but omits the key waiver of right to sue general language.

As a result, no arbitration agreement, regardless of its enforceability, exists between those two parties. Therefore, Plaintiff GCS could not be compelled to arbitrate its disputes with Defendant MedTax, even assuming arguendo that the arbitration agreement did meet the required language of Flanzman.

Given the lack of a valid enforceable arbitration agreement between Plaintiff GCS and Defendants' CPAs4MDs and Defendant Sylvain Syboni, the lack of any agreement between Defendant MedTax and Plaintiff GCS, and the Supreme Court's decision in Flanzman.

Therefore, Defendants' motion to compel arbitration is denied. An order accompanies this decision.