NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3161-11T2

ANTHONY L. GATTA,

Plaintiff-Respondent,

v.

JOSEPH L. GATTA, and
JOSEPH GATTA & SONS, INC.,

Defendants-Appellants.

Argued September 24, 2012 - Decided October 26, 2012

Before Judges Graves, Espinosa, and Guadagno.

On appeal from the Superior Court of New Jersey, Chancery Division, Camden County, Docket No. C-126-09.

Douglas F. Johnson argued the cause for appellants (Earp Cohn P.C., attorneys; Mr. Johnson and Charles P. Montgomery, on the brief).

Paul R. Melletz argued the cause for respondent (Begelman, Orlow & Melletz, attorneys; Daniel S. Orlow, on the brief).

PER CURIAM

Defendants Joseph L. Gatta and Joseph Gatta & Sons, Inc. (JG&S), appeal from an order of the Chancery Division entered

January 20, 2012, denying their motion to compel arbitration. For the reasons that follow, we reverse.

JG&S is a closely-held, family-owned company, incorporated and headquartered in Pennsylvania. Joseph Gatta is president of JG&S and his brother, Anthony; his father, Kenneth; and Katherine DeBellis are shareholders.

In February 1996, the four shareholders[1] entered into a Shareholders' Agreement (Agreement) with the primary purpose of ensuring that the family would remain in control of the corporation. The Agreement set terms restricting the shareholders' right to sell their shares of the corporation. If a shareholder received a bona fide offer to purchase his shares, the corporation and the other shareholders would have the first option to purchase those shares at the price of the bona fide offer.

The Agreement also provided that certain actions by a shareholder would be considered an offer to sell their shares. This "deemed offer" provision was designed to address the shareholders' concern that "the interests of the Corporation and its Shareholders would be seriously affected by any voluntary or involuntary sale or disposition of a Shareholder's Shares by any

[1] Since the Agreement was signed, additional family members have acquired shares.

legal or equitable proceedings against or concerning such Shareholder, or attempted transfer of Shares by a Shareholder without compliance with the terms of this Agreement." If a shareholder triggered the deemed offer provision, the corporation had the right to repurchase that shareholder's shares at seventy percent of book value.

Two of the "trigger provisions" are relevant to this appeal. Section C(1)(h) of the Agreement provides that the following will be considered a deemed offer event:

> Any Shareholder voluntarily or involuntarily attempts to sell, assign, transfer, give, bequeath, devise, donate or otherwise dispose of by operation of law or otherwise, any or all of the Shares that may now or hereafter be held or owned by that Shareholder except as expressly permitted by this Agreement[.]

Section C(1)(g) provides another event that will be considered a deemed offer:

> There is instituted by or against a Shareholder any other form of legal proceeding or process by which any of the Shares of such Shareholder may be sold either voluntarily or involuntarily, by operation of law or otherwise[.]

Also of significance to this appeal, the Agreement contains an arbitration clause which provides:

> All claims, demands, disputes, controversies, differences or misunderstandings between or among the parties hereto or any other persons bound

> hereby arising out of or by virtue of this Agreement shall be submitted to and determined by arbitration.

If an arbitration award is made, the Agreement prohibits the award of punitive damages. The Agreement provides that it is "governed by and construed and enforced in accordance with the laws of the Commonwealth of Pennsylvania."

Plaintiff was terminated from the corporation in 1996, but continued to receive a salary and benefits. In 2004, the company ceased paying his salary but continued to pay his benefits until March 2010.

After being terminated, plaintiff decided to sell his shares and sought access to the corporation's books and records to determine their value. On May 22, 2009, plaintiff's counsel sent a letter to Joseph Gatta stating in part:

> I represent your brother, Anthony. He has requested on numerous occasions for you to purchase his interest in the business and to produce the books and records for his inspection so that a fair and reasonable price be determined for his shares. He has been willing to arrange for a suitable payment plan so as to avoid placing a cash flow burden on you. Unfortunately, his requests have for 5 years been ignored.

In the letter, plaintiff also sought continuation of the benefits he had been receiving since his termination, including "health insurance, car payment and car insurance" along with a

"good faith payment" of $500 per week "until a final agreement is reached."

Plaintiff's initial complaint, filed in September 2009, sought access to JG&S's books and records, pursuant to N.J.S.A. 14A:5-28(4) of the New Jersey Business Corporation Act. On March 30, 2009, the trial court ordered discovery of certain corporate records.

Plaintiff then filed amended complaints in April and August 2010. The second amended complaint included a count seeking relief as an oppressed minority shareholder pursuant to N.J.S.A. 14A:12-7, and a derivative action on behalf of the corporation, claiming a breach of fiduciary duty and substantial damage to the corporation.

In January 2012, after much delay and extended discovery, defendants moved to compel arbitration pursuant to the Agreement. In denying the motion, the court found that the dispute did not fall within the Agreement's arbitration provision:

> It is clear that arbitration was intended to be reserved for disputes and misunderstandings which arose out of the terms and substance of the shareholders agreement. Mere facts or occurrences related to the agreement were not intended to be bound by the arbitration clause.

Defendants appealed, arguing the dispute was within the scope of the arbitration provision of the Agreement. Plaintiff maintains that his claim did not arise out of the Agreement and is not subject to arbitration. He also claims that defendants' excessive delay amounts to an implied waiver of the right to seek arbitration and, as a result, arbitration is now barred by equitable estoppel.

The trial judge recognized that "the agreement requires that it be governed by, constrained by, construed, and enforced in accordance with Pennsylvania law."

Applying Pennsylvania law, we note that the courts there, as a matter of public policy, strongly favor the settlement of disputes by arbitration. Langston v. Nat'l Media Corp., 420 Pa. Super. 611, 615-16 (1992). "When parties agree to arbitration in a clear and unmistakable manner, the court will make every reasonable effort to favor such agreements." DiLucente Corporation v. Pennsylvania Roofing Co., Inc., 440 Pa. Super. 450, 456-57 (1995), allocatur denied, 542 Pa. 647 (1995).

The issue of whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide. Emlenton Area Municipal Authority v. Miles, 378 Pa. Super. 303, 307 (1988), allocatur denied, 522 Pa. 613 (1989) (citing Utica Mutual Insurance Company v. Contrisciane, 504 Pa.

328, 334 (1984)). Because the construction and interpretation of contracts is a question of law, the trial court's conclusion as to whether the parties have agreed to arbitrate is subject to de novo review. Emlenton supra, 378 Pa. Super. at 307.

The trial judge cited the Pennsylvania case of Messa v. State Farm Ins. Co., 433 Pa. Super. 594 (1994), in support of her conclusion that this action did not arise out of or by virtue of the Agreement. That reliance is misplaced. In Messa, the trial court denied a petition for the appointment of an arbitrator on the basis that the underlying claim was barred by the statute of limitations. Id. at 599-600. The appellate court reversed, holding that where a valid arbitration agreement exists and the claim is within the scope of the agreement, the controversy must be submitted to arbitration and the arbitrator should rule on the parties' claims and defenses. Ibid. The Messa court held that the judicial inquiry should be limited to questions of (1) whether an agreement to arbitrate was entered into, and (2) whether the dispute involved comes within the ambit of the arbitration provision. Id. at 597 (citations omitted). Once it has been determined that an agreement to arbitrate exists and that the dispute falls within the arbitration provision, the trial court must order the parties to proceed with arbitration. Rocca v. Pennsylvania General Ins.

Co., 358 Pa. Super. 67, 70 (1986), allocatur denied, 517 Pa. 594 (1987).

Applying these principles to the facts before us, which are not in dispute, we note the Agreement is valid and binding and mandates arbitration to resolve "[a]ll claims, demands, disputes, controversies, differences or misunderstandings between or among the parties hereto or any other persons bound hereby arising out of or by virtue of this agreement . . . ." Thus, the only contested issue is whether plaintiff's claim arises out of the Agreement.

The genesis of this litigation was plaintiff's unsuccessful attempts to sell his shares. In the letter of May 22, 2009, plaintiff's counsel confirms that plaintiff "has requested on numerous occasions for [Joseph] to purchase his interest in the business." This confirms that plaintiff had offered his shares for sale in the past. The proposal in the letter, offering "to arrange for a suitable payment plan so as to avoid placing a cash flow burden on you," can only be interpreted as a present offer by plaintiff to sell his shares. Either proposal qualifies as a "deemed offer event" under Section C(1)(h) of the Agreement, which grants the corporation and the other shareholders the option to purchase a shareholder's shares whenever those shares are offered for sale.

In addition, Section C(1)(g) provides that the filing of this action by plaintiff is also considered a "deemed offer event." It might be argued that plaintiff's first complaint, where he sought only discovery of corporate records, was not "a proceeding or process by which any of the Shares of such Shareholder may be sold." See Marks v. E. Franks Hopkins, Inc., 2003 Phila. Ct. Com. Pl. LEXIS 51 (Pa. C.P. 2003) (action brought pursuant to 15 Pa. Cons. Stat. Ann. §1508 to inspect corporate books and records did not trigger arbitration clause). However, the second amended complaint, where plaintiff sought "the appointment of the [sic] a custodian or a provisional director for the Corporation until there is a sale of the Corporation stock pursuant to N.J.S.A. 14A:12-7," falls squarely within this provision.

The motion judge concluded that the "purchase option" had not been triggered but made no findings in support of this conclusion. The judge recognized that plaintiff's "cause of action is to require the corporation to purchase the shareholders' shares if his cause of action as an oppressed minority shareholder is successful," but seemed to conclude that the filing of the second amended complaint, which added the oppressed minority shareholder and derivative causes, precluded arbitration:

> While plaintiff's second amended complaint may relate to the shareholders agreement it was filed under the Business Corporation Act and cannot be compelled to arbitration.

We disagree.

Pennsylvania's Uniform Arbitration Act provides:

> A written agreement to subject any existing controversy to arbitration or a provision in a written agreement to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity relating to the validity, enforceability or revocation of any contract.
>
> [42 Pa. Cons. Stat. Ann. §7303 (2012).]

Appellants cite several Pennsylvania cases holding that arbitration clauses are to be broadly construed. Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276 (1997); Emlenton, supra, at 307; Pittsburgh Logistics Sys., Inc. v. Prof'l Transp. & Logistics, Inc., 2002 PA Super. 227 (Pa. Super. 2002). Plaintiff argues that these cases are distinguishable, as they involve broad clauses covering disputes "arising out of or relating to" an agreement, while the clause in the Agreement is more restrictive, covering only disputes "arising out of or by virtue of this Agreement." Plaintiff cites Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458 (9th Cir. 1983), as authority that the phrase "arising hereunder" is intended to cover a much narrower range of disputes than the

phrase "arising out of or relating to." The continued vitality of the holding in Mediterranean Enterprises has been questioned by several federal courts.

In S.A. Mineracao Da Trindade-Samitri v. Utah Int'l, Inc., 745 F.2d 190 (2nd Cir. 1984), the Second Circuit found that a contract that provided for arbitration of "'any question or dispute arising or occurring under' the agreement" covered claims of fraudulent inducement. Id. at 194.

The Third Circuit has also rejected the reasoning of Mediterranean Enterprises. In Battaglia v. McKendry, 233 F.3d 720 (3rd Cir. 2000), the Third Circuit considered whether an arbitration provision stating "any controversy [that] arises hereunder" applied to a counterclaim that the agreement was the product of duress. Id. at 724. The court found that the provision was not limited to disputes involving the interpretation and performance of the settlement agreement, but also covered disputes regarding the formation of the agreement.

We find that even under the more restrictive "arising out of" language of the Agreement, the arbitration provision applies to plaintiff's claim. The purpose of the Agreement is to control and restrict the ability of shareholders to sell or dispose of their shares. Because plaintiff's clear intent in

bringing his action was to compel the sale of his corporate shares, this action "arose under" the Agreement.

Plaintiff also claims that defendants' delay of eighteen months from the filing of the second amended complaint before moving for arbitration should be considered an implied waiver of any right to compel arbitration and that the doctrine of equitable estoppel should be applied to deny defendant's motion. As the only issue properly before us is defendants' petition to compel arbitration, our review is confined to the narrow issue of whether that motion was properly denied. See Shadduck v. Kaclik Inc., 713 A.2d 635 (Pa. Super. 1998) (where appellant's preliminary objections to compel arbitration were denied, appellate review is limited to that portion of the court's order which denied the motion to compel arbitration; the other issues are not ripe for review); see also, Messa, supra, (when presented with a petition to compel arbitration, the trial court is limited to determining whether an agreement to arbitrate exists and if the dispute falls within the provision; the court is not free to examine the merits of the underlying claims or defenses).

Reversed and remanded for entry of an order granting defendants' petition to compel arbitration. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION