NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2802-12T3

GERALD CLARK,

Plaintiff-Appellant,

v.

KEEFE BARTELS CLARK, LLC, a New Jersey limited liability company, KEEFE BARTELS, LLC, a New Jersey limited liability company, JOHN E. KEEFE, JR., PATRICK J. BARTELS, CRAIG H. LIVINGSTON, and LIVINGSTON SIEGEL DIMARZIO BAPTISTA, LLP, a New Jersey limited liability partnership,

Defendants-Respondents.

Argued January 14, 2014 – Decided April 2, 2014

Before Judges Alvarez, Ostrer and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-8065-12.

Charles P. Kelly argued the cause for appellant (Kelly Law, P.C., and Clark Law Firm, P.C., attorneys; Mr. Kelly, Sarah K. Delahant, and William S. Peck, of counsel and on the briefs).

Robert Mahoney argued the cause for respondents Keefe Bartels LLC, John E. Keefe, Jr., and Patrick J. Bartels (Norris McLaughlin & Marcus, P.A., attorneys; Mr.

Mahoney and Bradford W. Muller, of counsel and on the brief).

Craig H. Livingston argued the cause for respondents Craig H. Livingston and Livingston Siegel DiMarzio Baptista, LLP (Muscio and Kaplan, LLC, and Livingston DiMarzio Baptista, attorneys; Robin Bernstein and Michael Muscio, of counsel and on the brief).

PER CURIAM

Plaintiff Gerald Clark appeals from a January 11, 2013 Law Division order dismissing without prejudice, pursuant to Rule 4:6-2(e), his complaint against defendants Keefe Bartels Clark, LLC, John E. Keefe, Jr., Patrick J. Bartels, Craig H. Livingston, and Livingston Siegel DiMarzio Baptista, LLP (LSDB). All disputes were thus sent to arbitration. All the parties are attorneys or law firms. The January 11 order was clarified on April 19 when the court ordered that arbitration be conducted by only one arbitrator, not three. We affirm, except that we reverse the court's ruling with regard to the number of arbitrators.

Keefe, Bartels, and plaintiff practiced together in a firm known as Keefe Bartels Clark, LLC (KBC). The operating agreement (OA), dated December 28, 2007, provided:

> In the event that any dispute or disagreement arises between or among any of the parties [] with respect to allocation of [KBC]'s profits or losses, distributions, compensation, withdrawal from [KBC],

> resignation from [KBC], benefits related to death or disability, successorship or dissolution, the part[ies] shall submit such dispute or disagreement to final and binding arbitration before a mutually agreeable retired judge of the New Jersey state or federal courts [], provided, however, that prior to the submission to binding Arbitration, the complaining party first provide written notice to the Management Committee setting forth in reasonable detail the precise nature of the dispute or disagreement. Upon receiving said notice the Management Committee shall call a special meeting of all of the Members at which time an attempt to resolve the dispute or disagreement by mutual agreement will be made. Thereafter, if the dispute remains the Arbitrator shall issue a reasoned written decision together with his award Judgment . . . .

When plaintiff left the firm,[1] on June 30, 2010, he signed a settlement agreement (SA). It stated:

> The parties agree that any disputes as to the breach of [the SA] shall be resolved by arbitration. If any claim of breach is alleged by either party, the party claiming such breach must notify the other in writing and allow 5 days notice so as to allow a cure, if any. If there is no resolution, the complaining party must name an arbitrator. The defending party must name its arbitrator within 5 days thereafter. A neutral arbitrator will be selected by the two chosen arbitrators and a hearing convened within a reasonable period of time.

[1] On separating from KBC, Clark formed a new practice, Clark Law Firm (CLF).

A few months before the SA was signed, on March 26, 2010, LSDB signed a referral agreement with KBC that specified:

> Any dispute in connection with this agreement shall be resolved in New Jersey, according to New Jersey law and through a three member panel binding arbitration under the applicable rules of the American Arbitration Association. Each party shall pick one arbitrator and those two shall pick a neutral.

Paragraph 8 of the SA entered into by plaintiff and defendants stated:

> [A]ny client referred to KBC prior to [June 30, 2010] by [] Livingston shall be deemed a client of KB, regardless of when the client becomes an active matter, with the exception of the [S.W.] matter. CLF will be responsible for paying the referral fee on the [S.W.] matter directly to Livingston.

The referral fee in dispute regards a client we identify as S.W. Livingston had referred S.W. to KBC.

Because plaintiff disputes the legitimacy of the SA, he also disputes his obligation to pay Livingston the referral fee. When Livingston learned, sometime in October 2012, that the S.W. matter had been resolved, he wrote to plaintiff demanding payment. On November 2, 2012, Livingston invoked his right to arbitrate under the agreement with KBC, as no payment was forthcoming. Livingston's referral fee, and Clark's obligation to pay it, are included in the matters the trial judge referred to arbitration, all of which were stayed pending appeal.

In rendering his January 11, 2013 decision, the judge relied on the principle that arbitration "is a highly favored dispute resolution method under New Jersey law." As he observed, the OA and the SA "contained valid and unambiguous arbitration clauses that are enforceable," encompassing even claims plaintiff labelled "statutory." Furthermore, the court found the line of cases plaintiff cited in support of an exception to such provisions inapposite, not supporting the proposition for which they were being advanced because they applied to employment conflicts.

The OA called for one arbitrator. The SA and the agreement between Livingston and KBC call for three. In his April clarification, the judge stated: "Just so the record is clear, okay, all matters are dismissed. And they all are going to go, including the Livingston matter, [] in front of the same arbitrator."

In support of his appeal, plaintiff raises a host of points of error:

> I. MOTION TO DISMISS LEGAL STANDARD.
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> II. IN GRANTING THE PRE-ANSWER MOTION TO DISMISS AND COMPELLING BINDING ARBITRATION BASED UPON THE JUNE, 2010 AGREEMENT, THE LAW DIVISION ERRED IN BRUSHING ASIDE APPELLANT'S WELL-PLEADED CLAIMS OF FRAUD, MISREPRESENTATION, DURESS AND [RESCISSION] AND DENIED HIM OF THE OPPORTUNITY TO PROVE ENTITLEMENT

TO HIS 30% SHARE OF THE ASSETS OF KEEFE, BARTELS & CLARK, LLC.

A. Fraudulent Inducement, Misrepresentation and Rescission.

B. Economic and Client Interests Duress Resulting in an Untenable Restriction on the Practice of Law.

C. Material Breach Justifying Rescission.

III. THE COURT ERRED IN DISMISSING THE CASE WITH PREJUDICE AND COMPELLING BINDING ARBITRATION.

A. Standard of Review.

B. A Party Can Be Forced to Arbitrate Only Those Issues it Specifically and Unambiguously Has Agreed to Submit to Arbitration; Any Waiver of a Statutory Right must Be "Clearly and Unmistakably" Established.

C. The December 2007 Operating Agreement Is Highly Ambiguous and Otherwise Does Not Compel Arbitration of Clark's Statutory Claims.

D. The Lower Court Ignored that the June 2010 Agreement Limits Compulsory Arbitration To, "any disputes as to the breach of this Agreement," and Instead Engrafted Critical "any disputes" Language.

E. The Lower Court's Reliance upon the Unpublished Decision of Edenbaum v. Addiego-Moore Is Misplaced.

F. The Lower Court Further Erred in Compelling Arbitration of Clark's Claims, "To the Same Single Arbitrator" When the Very Agreement it Relied upon

in Making That Decision Calls for a Three Member Panel.

Rather than addressing each contention separately, we explain the reasons we consider the court's decision to order the parties to arbitration to have been correct. We conclude, however, that only the disputes regarding the OA should be resolved by one arbitrator.

I

Rule 4:6-2(e) authorizes the dismissal of complaints where a plaintiff "fail[s] to state a claim upon which relief can be granted." We review such orders applying the same standard as the trial court. Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002). We search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (internal quotation marks omitted).

Our standard of review as to the applicability and scope of an arbitration agreement is also plenary. EPIX Holdings Corp. v. Marsh & McLennan Cos., 410 N.J. Super. 453, 472 (App. Div. 2009), overruled in part on other grounds, Hirsch v. Amper Fin. Servs., 215 N.J. 174, 193 (2013).

Questions regarding the construction of contracts containing arbitration clauses are resolved in favor of arbitration as a means of dispute resolution, see id. at 471, as the judge correctly noted. We construe "arbitration clauses to encompass tort, as well as contract claims." Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560, 575 (App. Div. 2007). Phrases such as "arising under" and "arising out of" are given broad construction. EPIX Holdings Corp., supra, 410 N.J. Super. at 472.

The arbitration language in the OA and the SA essentially covers the same subjects plaintiff raises in his complaint. The very heart of the dispute includes plaintiff's claim of loss of profits, and dissatisfaction with firm distributions and compensation, generally, financial losses generated from the operation and ultimate dissolution of the firm. Plaintiff contends that he was treated wrongfully during the course of his professional association with Keefe and Bartels and that their conduct towards him was unfair even during the negotiation and eventual execution of the SA. The language calling for arbitration is clear and unmistakable.

In addition to the fact plaintiff is an attorney, Article 35 of the OA states:

> Independent Counsel
>
> Each of the Members further acknowledges that he or she has been advised of his or her right to obtain independent counsel and has had the opportunity to consult with independent counsel. Each party hereto has independently reviewed and evaluated all of the terms and conditions of this Agreement and represents that he or she has entered into this Agreement based upon his or her independent judgment, knowledge and expertise. This Agreement has been executed voluntarily, recognizing the fact that each party's interest herein is or may be adverse to each other party's interest. Notwithstanding the foregoing, each party has independently determined that it is in his or her best interest to execute this Agreement.

We presume plaintiff understood the option of retaining counsel to represent him, review the agreement, or otherwise guide him in the decision-making process. In fact, nothing in the record establishes that he did not do so.

Furthermore, Clark does not allege that the arbitration clauses themselves, if considered separately from the balance of the agreement, were procured by fraud. See Lederman v. Prudential Life Ins. Co. of Am., 385 N.J. Super. 324, 338 (App. Div.), certif. denied, 188 N.J. 353 (2006). "[A]bsent a claim of fraud directed at the arbitration clause itself, a claim of fraud in the inducement of the contract is a matter for the arbitrators." Van Syoc v. Walter, 259 N.J. Super. 337, 339 (App. Div. 1992), certif. denied, 133 N.J. 430 (1993).

We construe the terms of an agreement to accord them "their plain and ordinary meaning." See M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002). Hence the trial judge's conclusion that the plain language of both the OA and the SA clearly made all of plaintiff's claims arbitrable is unassailable. Plaintiff has simply failed to refute the "presumption of arbitrability." See EPIX Holdings Corp., supra, 410 N.J. Super. at 471 (internal quotation marks omitted).

Turning to plaintiff's assertion that his statutory claims are exempt from arbitration, the precedent upon which he relies is inapplicable. Nor does mere citation to N.J.S.A. 42:2B explain how or why the statute exempts arbitration as a form of dispute resolution.

Returning to the cases cited by plaintiff, they relate to an employee's rights against an employer. Although plaintiff was an employee of KBC, he was also a founding member and equity stakeholder of at least fifteen percent. The types of employees who successfully challenged arbitration clauses in the precedent plaintiff cited include an in-house attorney at an insurance company, Leodori v. Cigna Corp., 175 N.J. 293, 295-96, cert. denied, 540 U.S. 938, 124 S. Ct. 74, 157 L. Ed. 2d 250 (2003), and a physician employed by a medical practice who was never permitted to purchase an equity interest, Garfinkel v.

Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 127-28 (2001). In this case, the arbitration clauses were entered into by owners of the business, standing on equal footing. Furthermore, plaintiff's claims do not arise under the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, under which arbitration clauses are often narrowly interpreted. Alfano, supra, 393 N.J. Super. at 576.

Hence we conclude that the arbitration clause found in the OA encompasses plaintiff's statutory claims. That language refers to conflicts regarding "successorship or dissolution," precisely the type of conflicts alleged in the complaint that plaintiff attempts to characterize as statutory.

In sum, all the causes of action alleged in Clark's complaint fall within the plain language of the OA's arbitration clause. His claims related to the SA similarly fall within the arbitration clause.

II

Clark contends that the trial court improperly directed that his claims be arbitrated by a single individual rather than the three-person panel called for in the SA and the fee referral agreement. Both specified that a three-member panel, subject to the rules of the American Arbitration Association, would act. Accordingly, we reverse the judge's ruling with regard to the

number of arbitrators who will address the disputes related to those documents.

Affirmed in part, reversed in part.

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

CLERK OF THE APPELLATE DIVISION