NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3908-09T2

LYNDHURST BOARD OF EDUCATION,

Plaintiff-Appellant,

v.

NETWORK BILLING SYSTEMS, LLC,

Defendant-Respondent.

Argued November 29, 2010 - Decided June 15, 2011

Before Judges A.A. Rodríguez, C.L. Miniman and LeWinn.

On appeal from Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-325-09.

Kenneth A. Porro argued the cause for appellant (Wells, Jaworski & Liebman, LLP, attorneys; Mr. Porro, of counsel and on the briefs; Sylvia Hall, on the briefs).

N. Noelle Letcher argued the cause for respondent (Coughlin Duffy, LLP, attorneys; Ms. Letcher, of counsel; Stephen V. Ciurczak, on the brief).

PER CURIAM

In July 2008, the parties entered into a written agreement whereby Network Billing Systems, LLC (NBS) was to provide certain telecommunications and internet services to the

Lyndhurst Board of Education (the Board). The agreement contained an arbitration provision to be invoked "[a]t NBS's sole option" in the event of "any dispute or controversy arising under, out of, in connection with, or in relation to" the agreement. A dispute arose resulting in the Board's refusal to pay NBS for its services. NBS filed a demand for arbitration pursuant to the agreement. The Board filed a complaint in the Chancery Division seeking to invalidate the arbitration provision and to have the matter heard in court. The Board now appeals from the April 23, 2010 order dismissing its complaint pursuant to Rule 4:6-2, granting summary judgment to NBS pursuant to Rule 4:46-1 to -6 and holding the arbitration provision enforceable. We affirm.

The parties' agreement is comprised of the customer service agreement (CSA), which contains the terms and conditions, and the monthly billing statement, which delineates the services to be provided and the monthly charges. The CSA is comprised of two pages and includes the following provision regarding arbitration of disputes:

> At NBS' sole option, any dispute or controversy arising under, out of, in connection with, or in relation to this Agreement and any Amendment thereof, or the breach thereof, shall be determined and settled by arbitration before, at NBS' choice, one (1) to three (3) arbitrators in accordance with the rules of the American

> Arbitration Association, to be conducted in Passaic County, in, and using the laws of, the State of New Jersey. Any award rendered therein shall be final and binding upon each and all of the parties, and judgment may be entered thereon in any court having jurisdiction thereof. Arbitration and Arbitrator(s) fees to be borne by the non-prevailing party. Each party shall bear the cost of its own attorneys' fees, if any, except in such case where the action is taken by NBS for the non-payment of a valid NBS Invoice, in which case Customer shall be responsible for all reasonable attorneys' fees in addition to any award NBS may receive. Customer hereby waives trial by jury in the event of court action.

The Board superintendent, Joseph Abate, signed the CSA at the bottom of page two on July 2, 2008.

The billing statement has two columns, one entitled "Monthly Charge" and the other entitled "Set up/One Time Charge." The latter column is blank. The former lists a total monthly charge of $7748. The statement reflects that the term of the agreement is five years.

The dispute centered on the Board's claim that NBS provided a "faulty" telecommunications system and was "non-responsive" to the Board's request to "cure" the defects in the system. NBS claimed that it "spent significant time troubleshooting" the problems and "ultimately determined that [its] services were operating properly." NBS contended that the Board "never paid . . . for any of the services rendered."

On August 17, 2009, NBS filed a demand for arbitration, seeking $529,470.79 pursuant to the agreement. Two months later, the Board filed its complaint and an order to show cause in Superior Court.

In its complaint, the Board contended that it signed the agreement with NBS under "the pressure of not having its computers running properly," and that it "was never provided with a full contract nor given the opportunity to properly review a full contract and has, to date, never received a countersigned copy." The Board further contended that the agreement was "not enforceable against a public entity, such as a public school district, without formal approval by resolution of the Board of Education." Appended as "Exhibit A" to the Board's complaint is a copy of the CSA signed by Abate on July 2, 2008, and countersigned by NBS's chief executive officer, Jonathan Kaufman, on July 7, 2008.

The Board filed a brief in support of its order to show cause, claiming: (1) the "'contract' . . . contained, as inconspicuously as [NBS] could make it, an arbitration provision which gave [NBS] the sole discretion to bring the matter to arbitration and gave <u>no</u> remedies to [the Board] at all, even in the event of [NBS's] breach"; (2) "[a]s a public entity serving the Lyndhurst schools, [the Board] had little alternative but to

sign the document, in hopes of ensuring uninterrupted phone and internet services"; (3) the agreement "is the epitome of an unconscionable agreement"; and (4) the Board was "not seeking to deprive [NBS] of its ability to seek redress . . . [but was] only seek[ing] a finding that the arbitration provision is unenforceable and that [NBS] should file a [c]omplaint in the Superior Court. . . ."

On January 22, 2010, NBS filed a motion to dismiss the Board's complaint for failure to state a claim, pursuant to Rule 4:6-2, or alternatively for summary judgment per Rule 4:46. Kaufman certified that Abate "was authorized by [the Board] to execute the contract and to bind [the Board] to its terms[,]" and set forth NBS's version of the underlying dispute. Kaufman filed a supplemental certification in response to the Board's opposition to its motion.[1] He asserted that: (1) the "sales and negotiation process between NBS and [the Board] took place over a period of months beginning in or about February 2008"; (2) "[t]o the best of [his] recollection, [the Board] took several months to both consider and negotiate the terms of the single-page [a]greement"; (3) at the Board's request, NBS amended its standard CSA to provide for "renew[al] on a monthly

[1] We have not been provided with the Board's submission opposing NBS's motion to dismiss.

basis at the expiration of the initial term" rather than the "automatic renewal" provided in its standard CSA, thus "indicat[ing] that [the Board] not only carefully reviewed the agreement presented, but also negotiated the [a]greement's terms prior to executing it."

Judge Ellen L. Koblitz heard oral argument on March 5, 2010. The judge reviewed the agreement and noted that Abate "is not an uneducated person signing this and not a person without responsibility." The judge noted further that the arbitration clause was "in the [fourth] paragraph, close to the top" of the first page of the two-page contract.

A colloquy ensued which reflected the possibility of a misunderstanding on Abate's part as to the costs the Board would incur under the agreement. The judge granted the Board's request for an opportunity to obtain a certification from Abate as to whether he believed the total cost of the contract was only approximately $8000 rather than an ongoing monthly charge in that amount for the five-year term of the agreement. Counsel also requested, and received, permission to address whether the enforceability of the agreement was an issue that could be resolved in arbitration.

The Board thereafter submitted a joint certification from Abate and Jeff Perrapato, the Board's Technology Coordinator.

Abate acknowledged receiving "the July 1, 2008 proposal" for telephone and internet service by NBS, adding that "[t]he proposal was simple, the Board . . . would pay $7,746 per month for certain [t]elephone and [i]nternet communications as noted on said proposal." Abate further certified that "[n]either Jeff nor [he] ever received any notice that by signing the [CSA] . . . the Board . . . would be relinquishing, among other things, its right to have any disputes . . . resolved in . . . Superior Court," including any rights to "full discovery, . . . a jury trial and . . . appeal."

Counsel for the Board submitted a certification noting that the Chief Arbitrator (of the three selected by NBS) had stated "the panel will not permit any 'interrogatories' and depositions are subject to opposing counsel's consent which has already been objected to[,]" and, therefore, the Board would have to file a motion seeking the arbitrators' permission to take depositions. Counsel also objected that the Board should not have to pay "some $28,750 in advance fees" to the arbitrators, as the Board simply could not afford to do so. Counsel for the Board also submitted a brief in which he contended that the arbitration clause was unenforceable and the Board would be prejudiced because the arbitrators were not able to resolve questions of law.

Kaufman submitted a certification attaching a series of emails between representatives of the Board and NBS, from February 27 to June 30, 2008, relating to negotiations of the terms of the agreement. Kaufman asserted the documents "show[ed] that [the Board] engaged in many months of communications and negotiations with NBS prior to its execution of the July 2008 [CSA]."

Judge Koblitz heard additional oral argument on April 23, 2010, defining the issue before her as "whether or not the arbitration clause in the contract signed by the parties should be enforced[.]" The judge "agree[d]" with the Board that the arbitration clause was not highlighted in the agreement, but noted that it was "a two[-]page contract, and . . . towards the top it says that it will be settled by arbitration at [NBS's] sole option [by] one to three arbitrators." The judge further noted that NBS had agreed to proceed with one arbitrator, instead of three, thus reducing the cost.

The Board contended that our recent decision in Curtis v. Cellco Partnership, 413 N.J. Super. 26 (App. Div.), certif. denied, 203 N.J. 94 (2010), was dispositive in its favor. The judge distinguished Curtis, for reasons we discuss below, and with which we concur. In granting NBS's motion, the judge stated:

> [G]iven who the parties are to this contract and the expertise that the [Board] has in entering into this contract, and the fact that it's [Abate's] job to read carefully the contract[, t]he fact that the parties did not discuss the arbitration clause with their lengthy negotiations is not surprising to me[;] but it . . . itself does not negate the validity of the arbitration clause, and I think that it was wise, frankly, for the school system to enter into an arbitration clause. I understand they don't see it that way, so I defer to their view of the situation, but it certainly is not a hidden clause which is some additional fee or some kind of scam. It's just a way to resolve a problem which arises, as it did in this case.
>
> So, I think it's absolutely enforceable on the specific facts in this case. . . .
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> We are all . . . concerned about the financial well-being . . . of the school system. Nobody wants to see the schools have to pay money unreasonably, but I don't accept that going to arbitration is necessarily a more costly route for the school system. I hope they do accept whatever economies in arbitration are offered by [NBS], and I find the arbitration clause is enforceable.

The judge determined that defendant's motion should be granted both as a motion to dismiss under Rule 4:6-2 and as a motion for summary judgment, pursuant to Rule 4:46-1 to -6, because she "did consider facts outside of the pleadings."

On appeal[2], the Board contends that the judge erred in (1) holding the arbitration clause enforceable, (2) declining to find the holding in Curtis, supra, dispositive in its favor, and (3) dismissing its complaint with prejudice under Rule 4:6-2.[3] Having reviewed these contentions in light of the record and the controlling legal principles, we conclude they are "without sufficient merit to warrant discussion in a written opinion." R. 2:11-3(e)(1)(E). We affirm substantially for the reasons stated by Judge Koblitz in her oral decision rendered from the bench on April 23, 2010; we are satisfied those reasons are "based on findings of fact which are adequately supported by [the] evidence." R. 2:11-3(e)(1)(A). We add only the following comments.

An agreement to arbitrate "is, at its heart, a creature of contract." Fawzy v. Fawzy, 199 N.J. 456, 469 (2009) (internal quotation omitted). The validity and enforceability of an

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[2] On June 9, 2010, we entered an order denying the Board's motion for a stay of the April 23, 2010 order pending appeal. Motion No. M-5398-09. As of the filing of this opinion, we are not aware of the status of the arbitration proceedings.

[3] The Board also contended in its brief that it has a right to appeal the April 23, 2010 order enforcing the agreement to arbitrate; NBS does not dispute this. We note that R. 2:2-3(a)(1) encompasses orders compelling arbitration within the "final judgments of the Superior Court trial divisions," which are appealable as of right. See Wein v. Morris, 194 N.J. 364, 380 (2008) (an order compelling arbitration "will be deemed final and appealable as of right").

arbitration agreement is governed by State contract law principles. Martindale v. Sandvik, Inc., 173 N.J. 76, 86 (2002). "[M]atters of law are subject to a de novo review." Balsamides v. Protameen Chemicals, Inc., 160 N.J. 352, 372 (1999).

We are satisfied that the judge properly dismissed the Board's complaint. As the judge noted, the Board's reliance on Curtis, supra, is misplaced. Contrary to the Board's assertion, that decision did not set a minimum standard that all arbitration agreements must meet in order to be enforceable.

Curtis involved a dispute between an individual consumer and Verizon Wireless and considered whether the arbitration clause contained in the service contract applied to the consumer's claim under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -106 (CFA). Curtis, supra, 413 N.J. Super. at 30. As the judge here noted, "[h]ere we have a superintendent of schools . . . not [a random consumer] with a cell phone contract[, but s]omebody whose job it is to insure that schools don't sign contracts willy ni[lly]. We have a contract that's been negotiated over a period of months."

Moreover, beyond the factual distinctions between Curtis and the present case, the decision in Curtis focused on whether the contractual language "clearly and unmistakably established"

that the plaintiff's claims under the CFA fell within the scope of the arbitration clause; in that context, the court noted that it had

> little trouble concluding the Agreement contained a valid and binding provision for arbitration of disputes. The arbitration provisions are sufficiently clear, unambiguously worded, satisfactorily distinguished from the other Agreement terms, and drawn in suitably broad language to provide a consumer with reasonable notice of the requirement to arbitrate all possible claims arising under the contract.
>
> [Curtis, supra, 413 N.J. Super. at 33 (citations omitted).]

Plaintiff's reliance upon Curtis is based primarily on language in the decision noting that the arbitration clause at issue there was "satisfactorily distinguished from the other Agreement terms," ibid., in contrast to the arbitration clause at issue here. Judge Koblitz properly disposed of this issue.

We briefly address the Board's contention that the judge erred in dismissing its complaint under R. 4:6-2, "without full discovery and at the very least, a plenary hearing." As noted above, the judge disposed of NBS's motion to dismiss as a motion for summary judgment because she considered certifications and exhibits outside the four corners of the complaint.

Pursuant to R. 4:46-2, a motion for summary judgment may be granted if "the competent evidential materials presented, when

viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). An appellate court applies the same standard as the trial court, deciding first if there was a genuine issue of fact and, if not, whether the lower court's ruling on the law was correct. Walker v. Atl. Chrysler Plymouth, Inc., 216 N.J. Super. 255, 258 (App. Div. 1987).

The Board's complaint sought to void the arbitration clause. Having found that the arbitration clause was enforceable, the judge entered summary judgment against the Board and dismissed the complaint. The judge did not address the underlying merits of the contract dispute and there was no "genuine issue of fact" in dispute precluding resolution of the only issue presented, namely whether the arbitration clause in the agreement is enforceable. As we have already determined that the judge properly found the clause enforceable for the reasons stated in her bench decision, the Board's argument on this point is without merit.

Affirmed.[4]

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[4] NBS filed a motion to strike portions of the Board's appendix. On September 30, 2010, we entered an order reserving disposition (continued)

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

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(continued)
of that motion to the panel considering the appeal. Motion No. M-0165-10. We now grant that motion in part and deny it in part. The following sections of the Board's appendix are stricken as containing documents that were not part of the record below: Pa11-Pa104; Pa111-Pa136; Pa208-Pa220; Pa241-Pa243; Pa258-Pa260; Pa329-Pa334; Pa372-Pa373. The motion to strike is denied with respect to Pa1-Pa4; Pa338-Pa355; and Pa471-Pa476.