AGNIESZKA DRUPKA, Plaintiff, v. EASTERN INTERNATIONAL COLLEGE, BASHIR MOHSEN, JOHN DOES 1-10 (said names being fictitious); and ABC CORPORATIONS 1-10 (said corporations being fictitious), Defendants	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, Docket No. A-000978-24 Civil Action On Appeal From: DOCKET NO.: ESX-L-000475-23 Sat Below: Hon. Mayra V. Tarantino, J.S.C.

BRIEF OF DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

Defendants-Appellants, Eastern International College ("**EIC**" or the "**College**") and Bashir Mohsen ("**Mohsen**") ("EIC" and "Mohsen" together, "**Appellants**") appeal the lower court's November 8, 2024 Order denying Appellants' motion to compel arbitration (the "**Motion**").

The trial court decided to conduct a plenary hearing to determine whether the parties entered into an agreement containing a binding arbitration clause. On November 8, 2024 the hearing was held and three witnesses testified, including Plaintiff-Respondent Agnieszka Drupka ("**Drupka**" or "**Respondent**"), Mohsen and an attorney with Mandelbaum Barrett PC, counsel for Appellants. Shockingly, despite the trial Court ordering the hearing specifically for the purpose of the Court making findings of fact concerning whether there was an enforceable arbitration clause, the trial Court denied the motion to compel "because there were factual disputes."

The court also erred when it failed to place the burden on Drupka to demonstrate the unenforceability of the arbitration clause after Appellants presented a signed agreement containing an enforceable arbitration provision at the hearing. In short, Appellants offered clear and convincing evidence at the hearing that the parties intended and did enter into a binding agreement to arbitrate their claims, and the trial Court should have enforced that agreement.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Mohsen is the founder, President, and Chief Executive Officer of EIC, a college located in Jersey City, New Jersey. Drupka was hired by the College on in or around October 2014. See 19a at ¶3. As a standard practice and condition of employment, each EIC employee is required to sign an employment agreement that contains an arbitration clause and Drupka was no different. See 2T[2] 9:11-21.

I. The Operative Agreement

On or about March 7, 2019, Drupka was promoted to Acting Campus Director for EIC. As part of this promotion, Plaintiff executed an employment agreement of the same date (the "**Operative Agreement**"). Id. 26:3-7. The Operative Agreement contains a broad to arbitration clause that indicates "[a]ny dispute or claim arising out of or relating to Employee's employment or any provision of this Agreement, whether based on contract or tort or otherwise…" is subject to binding arbitration. It also makes clear that the claims subject to binding arbitration include employment claims and that arbitration is in lieu of litigation in court before a jury. 164a at ¶9.

On or about November 18, 2019, Drupka, through her former EIC work email account, sent an email to Brynn Deprey ("**Deprey**"), EIC's then Director of

[1] The within factual statement is based upon the motion papers filed in support of and in opposition to Appellants' motion to compel arbitration, the deposition of Drupka, and the testimony and exhibits presented during the plenary hearing.

[2] 2T refers to the November 8, 2024 Plenary Hearing Transcript, Volume II.

Information Technology. Attached to the email was a zip folder containing various documents. One of the files was a PDF document entitled "Employment contracts-signed" (the "**November 2019 Email**"), comprised of seven fully executed employment contracts all containing virtually the same arbitration clause. One of the seven was the Operative Agreement signed by Drupka and EIC, dated March 17, 2019. Moreover, with regard to a number of the other agreements, Drupka signed them on behalf of the College or signed them as a witness. See 1T[3] at 20:12-25:6. In fact, some of the agreements were signed before, and others after, Drupka had signed her agreement. See 116a, 125a, 134a, 143a, 148a.

Accordingly, there should have been no doubt at the fact-finding hearing discussed below that Drupka was bound by the arbitration clause in the Operative Agreement. Drupka forwarded the zip folder to Deprey specifically for Deprey to include those binding agreements as part of EIC's accreditation process with the State of New Jersey Department of Education ("**NJDOE**") and knowing that the NJDOE would rely upon those agreements when deciding accreditation. Deprey subsequently uploaded these agreements into NJDOE's portal. 2T at 46:3-16.

Section VII paragraph 9 of the Operative Agreement contains an arbitration clause that indicates in bold and ALL CAPS language, that "**ARBITRATION IS MANDATORY"** (Emphasis in Original). 164a at ¶9. So that there could be no

[3] 1T refers to the November 8, 2024 Plenary Hearing Transcript, Volume I.

doubt that all claims and all disputes must be arbitrated, the arbitration clause further provides:

> Any dispute or claim arising out of or relating to Employee's employment or any provision of this Agreement, whether based on contract or tort or otherwise (except for any dispute involving application of the injunctive relief) shall be submitted to arbitration in Hudson County, New Jersey, pursuant to the Employment Dispute Resolution Rules or the Commercial Arbitration Rules, as applicable, of the American Arbitration Association. This Agreement shall be governed by the United States Arbitration Act. An arbitration award rendered pursuant to this Section shall be final and binding on the parties and may be submitted to any court of competent jurisdiction for entry of a judgment thereon. The parties agree that punitive damages may not be awarded in an arbitration proceeding required by this Agreement. The parties shall share equally in the cost of the Arbitrator. Each party shall bear the cost of its own experts, evidence and counsel in such arbitration proceeding; however, the parties further agree that the successful party in any such arbitration shall be entitled to recover its reasonable attorney's fees and costs.
>
> [Ibid].

The arbitration clause provides that arbitration would be conducted in accordance with Employment Dispute Resolution Rules or the Commercial Arbitration Rules, as applicable, of the American Arbitration Association ("**AAA**") and that a reasoned award would be rendered by a single arbitrator. Ibid. In accordance with New Jersey law, the arbitration clause also confirms that Respondent is knowingly waiving the right to a jury trial and is entering into the agreement voluntarily and knowingly, free from duress or coercion. Id. at ¶10.

II. Plaintiff's Complaint and the Motion to Compel Arbitration

On or about April 25, 2022, Plaintiff went on a medical leave under the federal Family and Medical Leave Act (**"FMLA"**). She was out the full twelve (12) weeks under that law but failed to return to work any time thereafter. 20a at ¶5.

On January 19, 2023 Respondent filed a complaint against Appellants (the "Complaint"), asserting Five Counts: discrimination based on gender under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. ("**NJLAD**") (First Count), wrongful termination in retaliation for complaining about discrimination in violation of the NJLAD (Second Count), whistleblowing under the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. ("**CEPA**") (Third Count), a common law wrongful discharge claim in violation of public policy under Pierce v. Ortho Pharmaceutical, 84 N.J. 524 (1997) (a "**Pierce claim**") (Fourth Count) and a claim against John Doe defendants for wrongful termination under the NJLAD (Fifth Count). 7a-16a.

Upon receiving the Complaint, Mohsen went into Drupka's former office to locate her personnel file as she, as part of her job responsibilities, maintained all employees' employment files. 2T at 8:10-14. Mohsen did not find the Operative Agreement. All he found in Drupka's personnel file was what appeared to be an original document that was cobbled together but containing an arbitration clause (the "**Incomplete Agreement**"). Ibid., 25a-34a.

III. The Incomplete Agreement

Similar to the Operative Agreement, the Incomplete Agreement's signature page (found on page 9), was signed on March 7, 2019 by both Mohsen and Drupka and witnessed by both EIC's general counsel George Caceres, Esq. and another EIC employee. 34a.

Upon closer inspection however, the Incomplete Agreement contained several discrepancies that caused Respondent to challenge the authenticity of it. The Incomplete Agreement's text spacing was inconsistent and had two pages numbered 9 (one of which was blank). 25a-34a, generally. Most significantly, the signature page from the Incomplete Agreement is from another document. This is evidenced by the last paragraph of Section VIII of the Incomplete Agreement, found on page 8. The last sentence on page 8, which carries over into page 9 (the signature page), states:

> Should any provision of this Agreement be held by a court of competent jurisdiction to be enforceable only if modified, such holding shall not affect the validity of the remainder of this Agreement, the balance of [**page 9**] agrees to indemnify and hold harmless [EIC] for any actions…
>
> [32a-34a].

The above shows a clear disjoint between pages 8 and 9 of the Incomplete Agreement. Section VIII found on page 8 pertains to governing law, while page 9 pertains to an indemnification provision.

Having located no other agreement signed by Drupka, but knowing that she signed an agreement containing a binding arbitration, Appellants filed a motion to compel arbitration, returnable on May 26, 2024 (and did so promptly to avoid an argument that they acquiesced to proceeding in court. 17a. On September 15, 2024 oral argument was held. Respondent questioned the authenticity of the Incomplete Agreement and the Court ordered a plenary fact-finding hearing to determine the enforceability of the arbitration clause. 389a.

IV. The Discovery of the Operative Agreement

In or around November of 2024, Appellants were able to gain access to Respondent's former EIC email account. A member of EIC's IT Department was able to reset the email account's password and provided it to counsel. Upon receiving the new password, Michael Polychronis, Esq. ("**Polychronis"**), an attorney at Mandelbaum Barrett PC, counsel for Appellants, was able to gain access to Drupka's former EIC email account and review her sent messages. Within the sent messages Polychronis located the November 2019 Email from Drupka to Ms. Deprey, attaching a zip folder containing twenty-three (23) documents, one of which entitled "Employment contracts- signed". As stated above, this document included seven (7) executed employment agreements, one of which was Operative Agreement. Four of these agreements were signed in 2019 and contained virtually identical arbitration provisions found in the Operative Agreement. 1T at 20:12-25:6. Some of these

agreements were signed before the date Drupka signed her agreement and some were dated after. 108a-166a.

Unlike the Incomplete Agreement, the Operative Agreement does not contain discrepancies. Drupka initialed the bottom of each page, the spacing is consistent throughout the document, the pages are correctly numbered, and there are no blank pages. Most significantly, the Operative Agreement signature page (page 9) is identical to the signature page found in the Incomplete Agreement. However, pages 8 and 9 of the Operative Agreement are cohesive. The last paragraph at the bottom of page 8, which carries over to page 9, states:

> Employee represents and warrants that he or she is not a party to or otherwise subject to or bound by the terms of any contract, agreement or understanding that in any manner would limit or otherwise affect Employee's ability to perform the duties and obligations of this At-Will Employment Agreement. Employee [**page 9**] agrees to indemnify and hold harmless Eastern International College for any actions[…]
>
> [165a-166a].

On November 22, 2023, Appellants wrote to Drupka's counsel to inform him that the Operative Agreement was located. A copy of the November 2019 Email, a screenshot of its attachments and the Operative Agreement were attached. The letter also offered to provide Drupka and her counsel the November 2019 email and its attachments in native format for their inspection. 307a-308a. Drupka, however, never requested it. Despite this fully integrated agreement, that was sent by Drupka herself knowing it was being produced to, and would be relied upon by, the NJDOE,

along with other agreements with the same arbitration clause and that were either signed by Drupka on behalf of EIC or as a witness, Respondent maintained her position that she was not bound by any arbitration provision. 167a-168a.

On December 21, 2023, Appellants filed a letter with the trial Court, attaching the November 2019 Email, a screenshot of its attachments, and the Operative Agreement, and advised Judge Tarantino that Appellants located the Operative Agreement and suggested that the plenary hearing was unnecessary. 96a-97a. Thereafter, Appellants sought to depose Drupka but her counsel refused to produce her for her deposition, forcing Appellants to file a motion to compel on the limited topic of whether there is an enforceable agreement to arbitrate Drupka's claims. The motion was granted on April 15, 2024 and Respondent sat for her deposition on May 6, 2024. 387a-388a.

V. Drupka's Deposition

Drupka was uncooperative during her deposition. For example, while Drupka testified that she signed employment documents upon her hire, in October of 2014, 399a, 9:12-23, when asked what documents, she claimed that she could not recall. Further, Drupka refused to answer whether she signed an agreement with an arbitration provision prior to having her own questions answered. 402a, 12:13-25.

Significantly, however, Drupka eventually conceded that she signed an employment agreement with an arbitration provision in early 2019. 403a-404a,

13:15-14:1. Drupka also acknowledged her role as acting campus director. 407a, 17:11-24. She further stated that she doubted the authenticity of every piece of evidence Defendants presented as the "actual" employment agreement. 446a, 56:19-20.

When presented with the Operative Agreement, Drupka claimed the document was fraudulent because the arbitration provision was not "justified right" on the page like the other paragraphs of the Operative Agreement. However, Appellants showed that, just like the Operative Agreement, the other four employment agreements signed by other EIC employees in 2019 had virtually the same arbitration provision and the same unjustified formatting for that same paragraph. 452a, 62:17-17; 457a, 67:1-22; 460a-461a, 70:4-71:8. Importantly, however, Drupka did not dispute sending the November 2019 Email. 464a, 74:13-21.

After providing the deposition transcript to the trial Court for its review, the Court determined that the Plenary Hearing was still necessary to resolve the factual dispute whether the parties had entered into an agreement containing a binding arbitration clause.

VI. The Plenary Hearing

The Plenary Hearing was held on November 8, 2024. Prior to any testimony, Appellants indicated that it was Respondent's burden to demonstrate

that the Operative Agreement was invalid or unenforceable and, therefore, should present its evidence first. Without deciding who bore the burden of proof, the Court had Appellants call their witnesses first.

Appellants' counsel, Polychronis, was first to testify. He described the steps taken to locate the November 2019 email/Operative Agreement in Drupka's former EIC email account. 1T at 20:12-25:6. Respondent attempted to challenge Appellants and the authenticity of the Operative Agreement, by setting forth several baseless theories, all of which implied that Appellants and/or their agents altered the Operative Agreement in some way. Without any basis, Drupka accused Appellants of altering the Operative Agreement, by converting the PDF into a Microsoft Word document, altering the Operative Agreement's arbitration provision, converting this revised document into a PDF again, and then somehow reattaching the document to the November 2019 email. Polychronis indicated that this theory was impossible. The Operative Agreement could not have been altered and then reattached to the original email. It also would not explain why all of the other agreements contained the same arbitration clause. 1T at 35:9-43:15.

Moreover, as set forth in the November 22, 2023 letter, Respondent had the opportunity to inspect both the Operative Agreement and the email it was attached to in native format, to confirm that the documents were unaltered but chose not to. 307a.

Respondent's testimony followed. As noted by the trial Court, Drupka demonstrated selective memory depending on the question asked by Appellants' counsel. 1T at 66:17-25. She presented no evidence that she signed under duress any employment agreement containing an arbitration clause. Notwithstanding, she conceded that she recalled signing an employment agreement that contained an arbitration clause prior to December 19, 2019 and understood the purpose of an arbitration provision. 1T at 50:18-25. The significance of this date is that Drupka presented an email dated December 19, 2019, from Mr. Caceres to Drupka, stating:

> Please take a look at this and see if you find it acceptable. It has the new expanded arbitration clause. The document is dated as being revised today, 12-19-2019 and you should keep it with this caption so that you know how to track it from today forward.
>
> [1T at 50:7-10.]

The email contained an attachment entitled "FULL TIME SALARIED FACULTY GC final rev 12-19-2019.doc". 374a. Drupka did not include this attachment. However, in correspondence to the Court, Defendants provided it with both this email and attachment. Indeed, a cursory review of the document shows that this template employment agreement contains an even more expansive arbitration provision then the one within the Operative Agreement. 381a-383a. Drupka presented this email all while acknowledging that her employment agreement had an arbitration provision with enforceable language, while

maintaining that she had doubts about the Operative Agreement's authenticity. 1T at 51:2-18, 55:7-19.

Drupka submitted this December 2019 Agreement in an attempt to correlate the previous employment agreements prior to December 2019 to the EIC arbitration agreement held unenforceable in Ziner v. Micro Tech Training Center, Inc., Docket No.: HUD-L-004926-19, Trans ID LCV2020784234. 1T at 49:22-50:10. In Ziner, the Court held that the arbitration provision within the employment agreement between those parties was invalid because it did not contain any language indicating that plaintiff was "waiving [his or] her statutory right to seek relief in a court of law…." See Ziner v. Micro Tech Training Center, Inc, Docket No.: HUD-L-004926-19, Trans ID LCV2020784234, at p. 3-4. Around the same time of this ruling, EIC amended its arbitration clause. Irrespective of this, the employment agreement at issue in Ziner is significantly different then the Operative Agreement.

Respondent testified that she also believed that the Operative Agreement was fraudulent because the arbitration provision was not "justified right" on the page like the other paragraphs of the Operative Agreement. 1T at 56:15-22. However, Appellants showed that, just like the Operative Agreement, the other four employment agreements signed by other EIC employees in 2019 had virtually the same arbitration provision and the same unjustified formatting. 1T at 67:2-72:6.

Despite Drupka conceding that she signed an employment agreement with an arbitration clause (1T at 50:21-23), and that both agreements presented to the Court contained an enforceable arbitration policy (see 29a-31a and 163a-165a), the Court found there was a factual dispute. Yet the whole purpose for the hearing was for the Court to understand what occurred, determine credibility and make findings of fact. The Court did none of that and instead treated the hearing as if it was a request for summary judgment. The court denied the motion because there were "too many discrepancies [] to say that… [Respondent] waived her right to a jury trial." 2T at 56:20-25. The Court also improperly placed the burden of proof on Appellants that there was a binding agreement to arbitrate rather than on Drupka to show there was not.

On November 8, 2024, the trial Court entered an Order denying Appellants' motion. On December 6, 2024, Appellants filed a Notice of Appeal of the Order. 3a-6a.

STANDARD OF REVIEW

This Court reviews a trial court decision compelling or denying arbitration de novo. Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 131 (2020). In reviewing such orders, however, courts "are mindful of the strong preference to enforce arbitration agreements, both at the state and federal level." Hirsch v. Amper Financial Services, LLC, 215 N.J. 174, 179 (2013); see also Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001) (recognizing "arbitration as a favored method of resolving disputes").

Under New Jersey law an arbitration agreement is valid, enforceable and irrevocable if it expresses the parties' intent to submit an existing or future controversy to arbitration. N.J.S.A. 2A:23B-6(a). Atalese v. U.S. Legal Servs. Grp., 219 N.J. 430, 444 (2014). Here the Agreement could not be any clearer. It indicates in multiple places that any and all disputes arising out of or related to Plaintiff's employment, whether based on contract, tort or otherwise, would be arbitrable. Therefore, courts apply a presumption favoring arbitration and resolve any doubts in favor of arbitration where such language is used. Griffin, 411 N.J. Super. 518-19; Alfano v. BDO Seidman, LLC, 393 N.J. Super. 560, 575 (App. Div. 2007).

"Because of the favored status afforded to arbitration, '[a]n agreement to arbitrate should be read liberally in favor of arbitration.'" See Curtis v. Cellco P'ship, 413 N.J. Super. 26, 34 (App. Div. 2010); citing Griffin v. Burlington Volkswagen,

Inc., 411 N.J. Super. 515, 518 (App.Div.2010) (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001)).

In determining whether a dispute falls within the scope of an arbitration clause, courts operate under a "'presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" See EPIX Holdings Corp. v. Marsh & McLennan Companies, Inc., 410 N.J. Super. 453, 471 (App. Div. 2009), abrogated by Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174 (2013); citing Caldwell v. KFC Corp., 958 F. Supp. 962, 973 (D.N.J.1997) (citing AT & T Techs. v. Communications Workers, 475 U.S. 643, 650 (1986) (internal citation omitted).

LEGAL ARGUMENT

I. THE TRIAL COURT WAS REQUIRED TO COMPEL ARBITRATION BECAUSE RESPONDENT FAILED TO SET FORTH A SPECIFIC CHALLENGE TO THE OPERATIVE AGREEMENT'S ARBITRATION PROVISION (1a, 1T at 50:18-25, 35:6-25, 35:15-21)

As set forth above, upon a party establishing the existence of an arbitration provision, the challenging party must mount a specific challenge to it. If the challenging party fails to do so, the court must enforce the delegation clause and refer the matter to arbitration. Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 215

(2019) (highlighting that that unless the challenge is specifically to the arbitration clause, the issue of the contract's validity is considered by the arbitrator).

Here, Appellants established that the Operative Agreement was enforceable and consistent with her deposition testimony, that she executed an employment agreement with an arbitration provision prior to December of 2019. 1T at 50:18-25. Her role at this time was Acting Campus Director. 407a, 17:11-24. The Operative Agreement Appellants presented was dually signed by the parties, and with "Campus Director Jersey City" written across the document. The Operative Agreement was signed in or around the same time Drupka testified to (prior to December 2019 (1T at 50:18-25), in the beginning of 2019 (403a-404a, 13:15-14:1)). To authenticate the Operative Agreement, Appellant presented the November 2019 Email, wherein Drupka emailed the Operative Agreement to another EIC employee to be reviewed by the NJDOE. 104a-105a.

Drupka's baseless allegations only concern the Operative Agreement in its entirety, not its arbitration provision.[4] The court was still obligated to enforce the Operative Agreement's arbitration provision and grant the Motion.

[4] Drupka has also attempted to evade the Operative Agreement's enforceable arbitration provision by arguing that the FAA has changed concerning the inability of employers to force employees to arbitrate claims of sexual harassment or sexual assault. Defendants successfully argued that the Drupka's claims accrued prior to the FAA's amendments. 1T at 10:13-12:16.

Alternatively, even if the court had not erred and Drupka's "challenges" are considered, they solely focus on the authenticity of the Operative Agreement, not the arbitration provision specifically. In challenging the Operative Agreement, Drupka baselessly accused that Appellants of altering the Operative Agreement, by converting the PDF into a Microsoft Word document, altering the Operative Agreement's arbitration provision, and somehow reattaching the documents to the November 2019 Email. 1T at 35:6-25, 35:15-21. Respondent also alleged that the Operative Agreement was fraudulent solely because Mohsen had previously submitted the Incorrect Agreement, which he found in Respondent's personnel file that she maintained. Both allegations are outright ludicrous and have no factual basis.

For these reasons, this Court should reverse the trial Court's order denying Appellants' motion because the trial Court both failed to acknowledge the Operative Agreement's arbitration provision and failed to place the burden on Drupka to challenge the arbitration clause.

II. THE TRIAL COURT ERRED WHEN IT FAILED TO MAKE FINDINGS OF FACT CONCERNING THE ENFORCEABILITY OF THE OPERATIVE AGREEMENT AND THE PARTIES' AGREEMENT TO ARBITRATE DESPITE HOLDING A HEARING FROM WHICH IT WAS TO MAKE THOSE FACTUAL FINDINGS (1a, 2T at 56:20-25)

N.J.S.A. 2A:23B-6a provides that when a party files a motion to compel arbitration, and the adverse party opposes the motion, the court shall "shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." The court may also conduct an evidentiary hearing to resolve, as a threshold matter, genuine and material disputes over "whether the parties entered into an enforceable contract." Goffe, 238 N.J. 204; citing Goffe v. Foulke Mgmt. Corp., 454 N.J. Super. 260, 273-274 (App. Div. 2018).

Here, the court did just that. It held an evidentiary hearing to resolve the disputes of material fact but then avoided making those findings related to the enforceability of the Operative Agreement. As set forth below, the facts presented made clear that the parties entered into the Operative Agreement voluntarily and without duress and agreed to arbitrate their disputes.

III. THE TRIAL COURT ERRED BECAUSE IT FOCUSED SOLELY ON THE ORIGINS OF THE INCOMPLETE AGREEMENT WHILE IGNORING VITAL TESTIMONY THAT RECOGNIZED AN ENFORCEABLE ARBITRATION PROVISION (1a, 2T at 56:20-25)

The Court almost exclusively focused on the Incomplete Agreement (that was located in Drupka's office and to which only she controlled) to deny the motion, while ignoring the testimony of Polychronis, Mohsen and Drukpa. Indeed, when Defendants identified this issue to the trial Court, the Court continued to belabor the origins of the Incomplete Agreement. 2T at 51:19-56:8. As previously noted, Mohsen testified that all EIC employees enter into employment agreements containing arbitration provisions. Drupka testified to signing an employment agreement that contained an arbitration clause. Further she did not challenge the authenticity of the November 2019 email. Instead of viewing these facts in favor of compelling arbitration, the trial Court instead repeatedly questioned where the Incomplete Agreement came from.

The overwhelming evidence presented during the hearing, including the Operative Agreement executed by the parties, the email sent by Drupka herself knowing it was being provided to and would be relied upon by a governmental agency, that Drupka signed a number of agreements, both before and after the date she signed her agreement, on behalf of the College containing the same arbitration clause, and also witnessed the signature of others to agreements with the same

arbitration clause, clearly and convincingly proved that the Operative Agreement controlled and that the arbitration clause contained therein was binding on the parties. The testimony presented easily satisfies, and exceeds, the "'presumption of arbitrability" and thus the Operative Agreement's arbitration provision should be enforced.

IV. DESPITE THE CLEAR AND CONSPICUOUS EVIDENCE THAT THE OPERATIVE AGREEMENT CONTAINED AN ENFORCEABLE ARBITRATION CLAUSE, THE TRIAL COURT ERRED WHEN REFUSING TO ORDER ARBITRATION (1a, 2T at 56:20-25)

Upon the showing of clear and conspicuous expression of intent to arbitrate all claims and waive a party's right to a jury trial, an arbitration provision is entitled to enforcement. Goffe, 454 N.J. Super. at 27. Whether a party understood the import of it or did not have it explained to her by the benefitting party is simply inadequate to avoid enforcement of a clear and conspicuous arbitration agreement that both parties signed. Goffe, 238 N.J. 212–13 (2019) citing Borough of West Caldwell v. Borough of Caldwell, 26 N.J. 9, 24-25 (1958) (stating the basic principle that an enforceable contract exists where a written agreement is "sufficiently definite in its terms that the performance to be rendered by each party can be ascertained with reasonable certainty").

Appellants presented the Operative Agreement to the trial Court, which was duly signed by the Parties. Mohsen testified that all employees were required to sign

an employment agreement containing an arbitration clause and Drupka was no different. 2T at 9:11-21. Drupka also testified that she signed such an agreement in early 2019. 403a-404a, 13:15-14:1. In fact, the overwhelming evidence presented at the hearing is that she signed an agreement containing the same arbitration clause as all of the other employees who signed employment agreements (both before and after) the date of the Operative Agreement.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court reverse the trial Court and compel Respondent to arbitrate her claims.

Respectfully submitted,
MANDELBAUM BARRETT PC

Dated: February 11, 2025

By: */s/ Steven I. Adler*
Steven I. Adler

AGNIESZKA DRUPKA,

Plaintiff-Respondent,

vs.

EASTERN INTERNATIONAL COLLEGE,
BASHIR MOHSEN, JOHN DOES 1-10 (said names being fictitious)
And ABC CORPORATIONS 1-10 (said corporations being fictitious)

Defendant-Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000978-24

ON APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:ESSEX COUNTY
DOCKET NO. ESX-L-000475-23

SAT BELOW:
HON. MAYRA V. TARANTINO, J.S.C.

RESPONDENT'S BRIEF

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PRELIMINARY STATEMENT

This is an employment discrimination and retaliation case filed pursuant to the *New Jersey Law Against Discrimination.* The Appellants have appealed the trial court's denial of their motion to dismiss the complaint and compel arbitration. The issue before the trial court was simply whether the Appellants produced a legitimate signed employment agreement with a valid arbitration provision. While this sounds like a straightforward question, the Appellants produced two agreements. The circumstances involved with the Appellant's production of these documents raised significant credibility challenges.

The court permitted limited discovery and on November 8, 2024, conducted a live plenary hearing. After reviewing the evidence, hearing, and importantly observing the witnesses - the court determined there simply was insufficient evidence to conclude there was a legitimate binding agreement. The Court found way too many "*discrepancies*" with the Appellants position, stating with respect to the authenticity of the agreement "*I'm left with a big question mark.*"

A brief understanding of a timeline of these events demonstrates the Appellants credibility problems. The Respondent filed a complaint on January 9, 2023. On May 8, 2023, the Appellants moved to compel arbitration. They attached an arbitration agreement and certified the agreement was the operative agreement properly drafted and signed by all parties.

The document was obviously fake. The Respondent challenged the authenticity of the agreement. The document contained various pages cobbled together to appear as if there was an agreement signed by the Respondent. The attorney who the Appellants' claimed prepared the document certified it was not the original agreement. Rather than reconsidering their position, the Appellants' filed additional papers including a second certification from the Appellant essentially doubling down on their position maintaining the document initially presented was the only legitimate employment agreement.

On September 20, 2023, the trial court conferenced the case and expressed significant doubt concerning the credibility of the purported agreement. In November of 2023, the Appellants then inexplicably came up with a new agreement and a third certification. This *"second agreement"* utilized the same March 7, 2019, signature page as the original document twice certified by the Appellant.

In order to get to the bottom of this, the court ordered a live plenary hearing. At the hearing, the Appellants' provided various contradictory explanations concerning both of these agreements. The court concluded the Appellants' position lacked credibility, and they failed to prove either document was authentic.

The record indicates sufficient factual support for the trial court's decision. This court, therefore, should affirm the trial court and remand this matter back to the Superior Court, Law Division so the matter can proceed on the merits.

PROCEDURAL HISTORY

The Respondent, Agnieszka Drupka, on January 19, 2023, filed a Complaint in Essex County Superior Court. [7a] She alleged the Appellants, Eastern International College, and Bashir Mohsen, unlawfully violated her rights, and terminated her employment. [7a]

The Appellants on or about May 8, 2023, filed a Motion to Dismiss the Respondent's Complaint pursuant to *Court Rule 4:6-2 (17a)*. They claimed the Respondent's complaint should be dismissed because she signed an arbitration agreement. [17a] The Appellants have not filed an Answer to this Complaint.

The Respondent opposed the Appellants' motion. The Respondent's opposition raised several issues including; 1) the Respondent did not sign the agreement provided by the Appellants, 2) *The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. 9 U.S.C. §401.* prohibited enforcement of the arbitration agreement. and 3) sections of the purported arbitration agreement should be voided as violations of public policy. The court decided only the threshold issue of whether there was a signed agreement.

Respondent's opposition included a certification from Drupka and the Appellants' former counsel, George Caceres, Esq. [37a, 90a] The court conducted an initial conference on September 20, 2023.[2T P47:L24-P48:L5;P51:L12-18]

After discussing the issues with the parties, the court ordered a plenary hearing to resolve these issues.[1]

On December 21, 2023, the Appellants supplied the court with a new document and attached a third certification from the Appellant. [93a,96a]

The Appellants filed a motion to compel the deposition of the Respondent. [166a] The Respondent opposed this motion. The Court ordered the limited deposition of the Respondent. [209a] The Appellants' sent a copy of the deposition transcript of the Respondent to the court. [211a, 212a]

The hearing was adjourned on more than one occasion for various reasons. On November 8, 2024, the Court held a plenary hearing.[1T, 2T] The Court heard live testimony from the Respondent, Agnieszka Drupka and the Appellant, Bashir Mohsen. The Court also heard testimony from Michael Polychronis. Esq. Mr. Polychronis is an Associate who works at the law firm retained by the Appellant. The Court also reviewed numerous exhibits presented by the parties. [19a. 24a. 35a. 37a, 112a, 116a, 118a, 64a, 85a, 88a, 90a, 96a, 100a, 104a, 105a, 123a, 132a, 141a, 146a, 155a, 196a, 199a, 212a]

At the conclusion of the hearing, the Court determined there was insufficient evidence presented by the Appellants that a legitimate arbitration agreement existed

[1] The conference was conducted remotely on Zoom. There is no transcript. The conference was referenced by the Trial Judge in the plenary hearing. [2T P48-51]

and therefore denied the Respondent's Motion ordering the matter to proceed to trial. [1a][2T P47:L9-P59:L3] The Appellants appeal from an order of the Superior Court denying their motion to dismiss the Respondent's Complaint and compelling arbitration. [3a]

STATEMENT OF FACTS

This is a motion to dismiss the Respondent's Complaint and compel arbitration. The parties have not exchanged formal discovery. The record consists of the allegation in the Respondents complaint, various documents provided by the parties on the motion, the Respondents' deposition, and the testimony at the hearing.

A. The Facts in Respondent's Complaint

The Respondent was employed by Eastern International College as Campus Director. She was hired on May 16, 2017. She worked at both the Appellants' Jersey City and Bellville, New Jersey campuses. During the time she worked for the Appellants, she had various and changing responsibilities. [7a]

The Appellants are engaged in the business of operating a private educational institution of higher learning, college level, and technical training on their two campuses and provide various online educational opportunities. Bashir Mohsen is the owner and chief executive officer of Eastern International College. He directly managed and supervised the Respondent's employment. He was named an individual defendant in this case. [7a]

The Respondent was a long-time victim of harassment and discrimination directed at her because she was a woman. [7a, 37a, 212a,238a-250a] Respondent alleges the Appellant, Bashir Mohsen, hired numerous women because he viewed them as inferior and believed he could easily boss and harass them based upon their sex or gender which was a routine practice at Eastern International College. [7a, 37a, 212a, 238a-250a]

The harassment directed at the Respondent came in many forms. These included a variety of fear tactics directed at her and other women employees. This included yelling and screaming at her, various threats, and engaging in abusive conduct. She said he stood inches from her face, yelling at her and calling her inappropriate names. [7a 37a, 212a, 238a-250a]

The Respondent, who was a polish immigrant, put up with this behavior for a long time until it finally caused her physical and emotional problems which required her to go out on disability. [212a, 238a-250a] After she went out on disability, her position was advertised, other employees were assigned her job responsibilities, and her employment was terminated. [7a, 37a, 212a, 238a-250a]

B. <u>The Appellants' Motion to Compel Arbitration</u>

The Respondent filed her Complaint in Essex County Superior Court. [7a] The Appellants filed a Motion which included a certification from the individual Appellant, Bashir Mohsen. He claimed the case should be dismissed because the

Respondent signed a binding arbitration agreement. [19a] The Appellant's certification attached what was claimed to be her agreement. [19a,24a] The motion was supported by the initial certification of George Caceres, Esq. [85a]

The Respondent opposed the Appellants motion. She denied the agreement supplied to the court was an authentic agreement. [37a, 38a] When the Respondent challenged the authenticity of the document, Mr. Caceres clarified his position in a second certification. [90a] His second certification makes it clear the document presented to the court was not work he would have done, nor signed off on. [90a,91a-92a]

The Appellants over the years have had a variety of differing employment agreements. [90a,92a] Some of these employment agreements contained arbitration language. In December of 2020, the Appellants had a non-viable version of an arbitration clause successfully challenged in Superior Court in *Zeiner v. Micro Tech Training Center, Inc.* Docket No.: HUD-L-004926-19. Zeiner was president of the college. He was employed by a related entity also owned by the Appellant. This challenge prompted the Appellants to draft an updated version of their employment agreements. This was done in December of 2019. [196a, 199a] [2T P38 L11-13]

The Respondent did sign an employment agreement in March of 2019. [37a,38a] She did not sign either of the agreements produced by the Appellants. [212a, 224a, 228, 232a, 251a-253a, 258a-260a, 272a-276a] [1T P52] She testified

she did not sign any agreement that waived all of her rights to proceed in court. [212a, 224a,228] She testified she did not sign an updated (post-Zeiner) agreement. [212a,232a] The actual employment agreement, including any arbitration provision, has never been produced and was signed prior to the effort to update the arbitration language. [37a, 196a, 199a, 212a 272a–276a]

A review of the initial document submitted by the Appellants objectively raises questions concerning the Appellants' position. [24a-34a] There are eight pages of text in this agreement. Page eight ends in the middle of a sentence, *".... The remainder of this agreement, the balance of..."* The next page (nine) is blank, however, curiously contains what the Appellants allege to be the initials of the Respondent. [24a-34a] For reasons that have never been explained there is a second page nine, which begins in the middle of a sentence, *"...agrees to indemnify and hold harmless ..."* The sentence that is cut off at the bottom of page eight, and the sentence that begins on the second page nine, clearly do not run together. [24a, 33a-34a] Since the second page nine is the signature page, it is fairly easy to come to the conclusion, the signature page Appellant certified was part of this agreement was actually from a different agreement. [24a-34a]

This was such a poor attempt at recreating a document, there were even more obvious problems. The spacing on the first eight pages is double-spaced. [24a-34a] The spacing on the signature page is single spaced. [24a-34a] The margins on the

first eight pages are not justified on the right margin. [24a-34a] The signature page inserted by the Appellant has a justified right margin. [24a, 34a] Mr. Caceres' made it clear he would never allow an employee to sign this document. [90a]

The Respondent's Affidavit states this page comes from a prior agreement signed in 2019, which did not include this arbitration agreement. [37a] The second page nine contains the actual signature and real initials of the Respondent. [24a, 34a] There was no expert handwriting analysis; however, the trial court made their own assessment of the difference in the initials from the second page nine, (the real signature page) and the initials on the first nine pages. They are inconsistent. [24a-34a][2T P48:L2-25]

The problems with the initials, the certification of George Caceres, Esq., the Affidavit of the Respondent, coupled with the other problems with this document, called into question the authenticity of the document and the credibility of Mr. Mohsen's certification to the court. [19a, 24a] The Appellants position was in jeopardy. It was apparent they had presented the court with a false document. [24a]

What happened next was important in the ultimate determination concerning credibility. The Appellant refused to change his position. Mohsen signed a second certification attacking Drupka. "*Plaintiff claims that she did not sign the agreement containing the arbitration clause and that defendants attached a different signature*

page to her Agreement. That is false." [42a] His second certification again attached the initial agreement insisting it was authentic. [24a]

The Court conducted a Zoom conference in chambers with counsel expressing serious doubt concerning the authenticity of the agreement. [2T P47:L24-P48: L5;P51:L12-18] Shortly after the conference, the Appellants completely abandoned their position. They claimed they found a different arbitration agreement signed by the Respondent. [155a] This second agreement; however, curiously contained the same exact signature page attached to a different document. [155a,163]

The second agreement also has various formatting problems and questions concerning its validity. [155a-163a, 212a, 272a-273a] The record contains no coherent explanation for the initial agreement presented to the court, nor the two certifications of Mr. Mohsen. [19a, 42a]

C. The Respondent's Deposition

The court ordered the limited deposition of the Respondent. She denied the second agreement was her employment agreement and provided various examples of inconsistency with that document. [212a,251-253,271a-276a]

The Appellants provided a copy of the Respondent's deposition to the court prior to the hearing. [211a, 212a] The Respondent during the hearing reaffirmed the information supplied to the court in her affidavit and deposition. [1T P60:L 9-18]

During her deposition, the Respondent explained in detail the harassment directed at her in the workplace. *"There were comments of a sexual nature directed at me and there were sexual comments about other female employees."* [212a, 238a-250a] She further explained that the conduct in the workplace made her uncomfortable. [212a, 238a-250a] She explained that she continued to be the subject of harassment even after she went on medical leave. [212a, 238a-250a] She further testified in her deposition she complained about discrimination, sexual harassment, and compliance issues. [212a, 249a-250a]

The harassment included telling other employees in the workplace she was a lesbian. [37a] Mr. Mohsen also made various comments that were demeaning to the Respondent as well as other women in the workplace. [37a, 212a, 238a-250a] He made the specific statement to her, *"God in every religion was male and only men can run the show."* [37a] The harassment continued until the Respondent's last day of work, which was April 8, 2022. [36a, 37a] She testified, even after she went out on disability, she received phone calls from Mohsen at different hours of the day where he simply would hang up the phone. [1T P61:L1-20] This was done to harass and intimidate her. [37a, 212a, 238a-250a]

Respondent specifically denied both documents presented by the Appellants was her actual employment agreement. She explained the initials on certain key pages were not her initials. [212a,251-253,258-260,277a–278a] She further

explained that the formatting of the second agreement presented by the Appellants had other clear errors. [212a, 271a-278a] *"first of all, I notice now reading further that margins everywhere are justified, but in just this one paragraph they are not justified. And when you highlight the page to justify or not, you highlight the whole page, you don't pick and choose one paragraph which does not align with the rest."* [212a, 271a-278a]

She explained both in her deposition and in her court testimony the arbitration language was copied from another document and placed into this agreement. *"I look at the agreement and I was comparing how it's being written down the full margin and everything. Look at arbitration as mandatory, how come it does not look like others? Can you see the difference? Can you see the other paragraph, it does not look the same."* [212a, 273a]

She continued, *"everything, spacing, typeface, everything is different. It looks like it's copy and paste into that. You can examine the document yourself it does not look like that."* [212a, 273a-274a][1T P55:L7-P57:L21]

She explained the formatting of the paragraph that includes arbitration language has a variety of differences from the balance of the document. After this explanation she testified, *"the first thing I noticed, it is happening the same which is happening in the previous agreement. They are copying and pasting into the*

agreement. Keeping the last page the same and tried to tell the court that this is my employment agreement, this is try number two." [212a, 275a]

She also explained in some detail the harassment and discrimination. [212a, 238a-250a] Her testimony in Court on these issues was consistent with her deposition testimony. [1T P51-52, P55-57]

D. The Plenary Hearing

The parties appeared in court on November 8, 2024. There was some colloquy concerning various issues. There was a discussion of the Respondent's position concerning the applicability of the *Amendment to the Federal Arbitration Act* which prohibited enforcement of arbitration agreements in certain cases. The court did not decide this issue. [1T P14]

The Appellants called Michael Polychronis, Esq. He claimed he came up with the idea of reviewing the Respondent's emails to look for a new arbitration agreement. The November 2023, search by Polychronis came a month after the conference and six months after the motion. It was also long after the Appellants' IT Department did a forensic evaluation of the Respondent's computer. [2TP42 L2-13]

The Appellants presented evidence Mr. Polychronis found an email with a folder containing several arbitration agreements including the Respondents. [1T P17-25,P28:L3-P30:L22] The Appellants did not call an IT expert or any other witness to authenticate Mr. Polychronis' discovery. Mr. Polychronis was very

specific in his testimony. He testified that with the assistance of the IT department and Mr. Mohsen on the phone, he went into the Respondent's emails and found the agreement. [1TP19L3-P19L5] He did this remotely from his office. [1T P28:L25-P31:L5]

This was entirely inconsistent with the third certification of the Appellant, Mohsen, who claims "*With the assistance of counsel, I accessed Plaintiff's former EIC email account.*" Appellant then goes on to state, "*after reviewing Plaintiff's 'sent' email folder, I discovered an email dated November 18, 2019.*" [96a-99a]

At the conclusion of the hearing, Appellants' counsel attempted to argue they had an "*outside forensic IT person take an image of her computer*" [2T P50:L6-P12] The court correctly noted that there was no forensic evidence presented only the testimony of Mr. Polychronis, who was not an expert. [2T P50:L6-P58: L16-24]

The Appellant Bashir Mohsen testified at the hearing. During cross examination, the Appellant appears to have become confused with his own varying versions of the truth. Despite the position of counsel in their brief, when the parties appeared in court for a plenary hearing. Mohsen testified that he remembered the original document. [2T P29:L22-P23: L9, P32:L7-10;P34:L1-3]

A review of the cross examination of the Appellant highlights the lack of credibility of the Appellants' position. [2T P19-44] Mohsen claimed the document now purported to be the operative agreement by the Appellants was typed by Drupka

on her computer. *She had it on her computer and she typed it so actually she typed the information."* [2T P25:L19-21] He provided no evidence, nor explanation why it was not discovered by his IT employees.

During questioning, Appellant stated the cobbled together agreement, P6 was the agreement. *Question: You certify to the court that this is the true and correct employment agreement; Am I right?" Answer: "After I seen it, I don't know. This is the true one, I believe. This is---"* [2T P32 L7-10] When asked directly why there were two employment agreements, the Appellant was unable to provide a clear answer. [2T P33 L5-22] [2T P13-P34:L3]

There was also confusion on the part of Mr. Mohsen as to what the Respondent's position was when the agreement was signed. The document that the Appellant's claim was typed by the Respondent, the cobbled together P6, originally has her listed as campus president. It has pen changes and initials changing the president to acting director. No explanation has ever been provided as to why the Respondent would type this agreement and include her incorrect job title. [2T P26: L2; P29:L2]

The court also heard testimony from the Respondent, Agnieszka Drupka. Ms. Drupka testified that she did have an employment agreement but neither of the documents presented in court were the correct document. [1T P52:L17-19] Drupka explained that at the end of 2019, as a result of a lawsuit filed by the former President

Zeiner, there was an effort to update employment agreements to include proper arbitration language. [1T P48-49] Appellant admitted this was true. [2T P38:L11-13]

Drupka agreed the March 7th signature page on the various agreements presented by the Appellants was her signature. She denied, however, that either document was her actual employment agreement. QUESTION: "*Is this the same document that you signed in March of 2029?*" ANSWER: *"No"* [1T 52 L17-19]

She contended the signature page was simply attached to various documents created by the Appellants designed to compel her to proceed to arbitration subsequent to her termination. [1T P51-58] She also provided detailed testimony concerning the second alleged employment agreement which was consistent with her earlier deposition testimony. [1T P55-56] For example, she indicated the initials on page 6 were not her initials. [1T P55-56] She also questioned the authenticity of page 7 as well as her initials on that page. [1T P55]

She then explained to the court, consistent with her deposition, various problems with the document led her to believe this was simply a second cut and paste effort to create a fraudulent document. [1T P55-58, 212a, 276a]

The Respondent also testified at the hearing her personal email was still linked to her work email and as a result she received a series of security alerts indicating someone accessed her former work email. [1T P75-79] The Respondent showed the court and counsel, from her cell phone the security alerts that began on July 25, 2023.

[1T P76-77] These alerts came months before the Appellants claim that found her agreement in an email and only six weeks after the Respondent opposed the Appellant motion to compel.

The trial court had the opportunity to review the evidence and more importantly hear and observe the witnesses and ask questions.

LEGAL ARGUMENT

This is a motion to dismiss the Respondent's Complaint on the pleadings. and compel arbitration. *New Jersey Court Rule 4:6-2* There has been limited discovery and plenary hearing. The Court Rules provide where information is presented outside the pleadings on a dispositive motion, the summary judgment standard should apply. The Respondent's allegations therefore should be viewed in a light most favorable providing all reasonable inferences to the Respondent's claims. *Rule 4:46-2*

POINT I

THE TRIAL COURT CORRECTLY RULED THERE WAS INSUFFICIENT EVIDENCE THAT THE RESPONDENT SIGNED AN ARBITRATION ARGEEMENT (2T P47-P59; 1a)

This appeal challenges the Court's factual conclusions the arbitration agreement, or multiple agreements presented by the Appellants lack credibility. The court rejected the Appellants argument and ruled the agreement lacked the requisite authenticity. [2T P56]

After reviewing the record and hearing the witnesses the Court expressed concerns regarding the credibility of the Appellants' witnesses and the authenticity of various documents presented in court. "*...there's way too many discrepancies for me to say that –you know, without—clearly that Ms. Drupka waived her right to a jury trial, a fundamental right that is made available to all litigants.*" [2T P56:L21-25]

The findings of facts by a trial court having the opportunity to see, hear and question witnesses live in Court, should be given due deference. *Motorworld, Inc. v. Benkendorf*, 228 N.J. 311, 329 (N.J. 2017). The issues in this appeal turned entirely on the factual findings of the trial court. The Courts decision was well supported in the record and therefore should be reviewed pursuant to a deferential standard *D'Agostino v. Maldonado* 216 N.J. 168, 182, 78 A. 3d 527 (2013) *Motorworld, Inc. v. Benkendorf* 228 N.J. 311, 156 A.3d 1061 (N.J. 2017) *State v. K.W.* 214 N.J. 449, 507 (2013).

While the question of whether an individual waives their rights to proceed in court based on the sufficiency of an arbitration agreement are legal questions for the court, factual findings underlying a determination concerning whether there was a valid agreement are questions of fact. *Cole v. Jersey City Medical Center* 215 N.J. 265 at 275 (2013) This case was decided on questions of fact and credibility. One party was right - was truthful - one was not. The court properly indicated the burden

of proof concerning whether there was an authentic agreement on the defense. [2T P49] The Appellants failed to meet this threshold burden. [2T P48-57]

The trial court made this clear, "*And so, I'm left with a big question mark. And with a big question mark, I can't compel the Respondent to submit her claim to arbitration because I don't even get to interpret the language within because the—the agreement itself seems not to be a complete agreement.* [2T P49:L9-14]

Arbitration Agreements are generally governed by contract law. Atalese v. U.S. Legal Services Grp., L.P. 219 N.J. 430 (2014) "*An agreement to arbitrate, like any other contract, must be the product of mutual assent, as determined under customary principals of contract law.*" Atalese, at P442. A contract cannot be enforceable unless there is an agreement or a meeting of the minds of the parties. Skuse v. Pizer 244 N.J. 30 (2020); Martindale v. Sandvik 173 N.J. 76 (2002); Leodori v. CIGNA Corp. 175 N.J. 293 (2003)

An arbitration agreement like any contract is subject to the legal rules governing contracts. Cole v. Jersey City Medical Center 215 N.J. 265 at 275 (2013) Here there was a clear factual dispute as to whether either of the two documents the Appellants represented as valid employment agreements were authentic. These determinations are entitled to due deference and only subject to review if there is clear error. Cole v. Jersey City Medical Center 215 N.J. 265 at 275 (2013) "*We review the trial court's factual findings under a deferential standard: those findings must be*

upheld if they are based on credible evidence in the record." Motorworld, Inc. v. Benkendorf 228 N.J. 311, 329 (N.J. 2017)

Respondent signed an affidavit which directly challenged the credibility of the Appellants' position. [37a] The Respondent was deposed on this issue and testified at the hearing. [212a 1T P47-78] She explained in her certification, deposition, and court testimony the agreement the Appellants presented in their initial motion was total fraud. She also denied signing the second agreement presented to the Court by the Appellants. [37a, 212a, 271a-276a] [1T P47-78] Her testimony has always been consistent. The signature page the Appellants twice attached to two different agreements came from her original agreement which has never been produced. [37a, 212a, 271a-276a, 1T P55-58]

The Appellants never provided clear and credible evidence there was an enforceable agreement between the parties. The New Jersey Supreme Court stated, *"In our view, a valid waiver results only from an explicit, affirmative agreement that unmistakably reflects the employee's assent."* Leodori v. Cigna Corp., 175 N.J. 293, (2003).

The Respondent testified the Appellants attempted to force her to sign the initial false agreement shortly before she went out on disability. She was in the office in April 2022, and was presented with the cobbled together agreement. [1T P55-59] She looked through the agreement and realized that the Appellant was attempting to

get her to sign an agreement prior to terminating her employment, which might limit her rights. She specifically refused to sign the initial cobbled together agreement provided to the Court. [1T P55-59]

The Court in Leodori quoting from *Williston on Contracts* stated, "*When one party, however, presents a contract for signature to another party, the omission of that other party's signature is a significant factor in determining whether the two parties mutually have reached an agreement. Cf. 1 Richard A. Lord, Williston on Contracts §2:3 (4th ed.1990)...*" Leodori v. Cigna Corp. 175 N.J. 293 (N.J. 2003)

What occurred here is simple to understand. When the situation at work deteriorated and the Respondent made complaints of unlawful conduct, the Appellant was concerned Drupka might file a lawsuit. The Appellant realized he did not have an enforceable arbitration agreement. The Appellant then engaged in a sloppy effort to create a new document. He cut and pasted various parts of other agreements together and added additional language. The cobbled together document notably stands out as completely different than any other employment agreements. The title, the headings, and the language are entirely unique. [24a-34a] He tried to get her to sign the agreement. She refused. [1T P55-59] This explains why the old March 7, 2019, signature page was attached as the second page nine. [24a,34a] Even the Appellants now concede this was a fake document. [96a]

The Appellant, however, did not anticipate tenacious opposition. When the Appellant was caught in this obvious falsehood, with the assistance of the IT Department, a second agreement materialized also utilizing the Respondent's March 7, 2019, signature page. Mr. Polychronis then discovered the shiny object left in his path.

Despite Mr. Polychronis' advocacy for the Appellant's position, he conceded he was not an IT expert. [1T P41:L7-9;P42:L6-20-P43:L5-12] He also had no knowledge of the whereabouts of this document from the time Ms. Drupka left her employment until he discovered this email. [1T P40:L7-25,P43:L5-12] The record contains conflicting versions of how the new employment agreement was discovered. Polychronis claims it was his idea, and he found it looking through the Respondents' emails. [1T P17:L15-P19:L25] The third certification of the Appellant claims he found the document. [96a]

There has never been a credible explanation for the sudden discovery of the second agreement. The Appellants' position entirely ignores the fact that they took an earlier position twice certifying and arguing to the court that the cobbled-together document was the original and only employment agreement. The Appellants simply attempt to whitewash this entire sequence of events and ask the court to focus solely on the second agreement, by now branding the second document the *operable*

agreement. A review of Mr. Mohsen's testimony in court fails to clear up any of these issues. The trial court appropriately concluded, *False in one false in all.*

There also has never been a credible explanation of where the cobbled together document came from or why Appellant twice certified its accuracy. The Appellant's story was he found the document when he went into the Respondent's office and there was a green folder which contained the initial agreement. This makes little sense. Why would an obvious fake agreement be in a folder in the Respondents office? Mr. Mohsen testified that the document was stapled together as if to be presented as a single agreement. [2T P21:L8-15] When confronted with these inconsistencies, in court he again stated the original cobbled together document was the actual employment agreement. [2T P25:L6-23,P29:L22-P30:L9]

While counsel for the Appellant has attempted to rehabilitate Mr. Mohsen, he has never provided a credible explanation for the fraudulent document. There was an attempt to blame the Respondent for creating the fake agreement. Why would any employee create for themselves a fake arbitration agreement?

As the court took note, even after there was a forensic evaluation in search of these agreements, none were found or presented to the court. [2T P50:L25-P58:L25] The original word version was never discovered. [2T P50:L25-P58:L25] It was only a year after the Appellants filed suit and after the court expressed serious doubt

concerning the veracity of the Appellants' position, that the new agreement materialized.

The Court saw and heard all of this. While a transcript of a hearing is helpful to understand the basic facts and positions of the parties, there is nothing like seeing and hearing a witness testify live in Court. A witness's evasiveness, confusion, or lack of candor can best be understood by a trained jurist observing the witness in real time. This is why our courts have traditionally deferred to trial judges on questions of credibility.

A review of the questioning of Mr. Mohsen indicates he bounced back and forth between different positions concerning which agreement was the real agreement. What the transcript does not reveal is the hesitation of the witness, lack of eye contact, and other signs that allow an observer to doubt their veracity [2T P49-59] The Court came to the only conclusion it could, that the Appellants' position lacked credibility and that there was insufficient evidence to demonstrate the Respondent signed a binding arbitration authentic agreement. [2T P48-59]

The Appellants seek to deny the Respondent her constitutional right to a jury trial based upon what the trial court concluded was a false document. Without question, the court should assume the Respondent did not sign this arbitration agreement, which is substantiated by all of the evidence in the record and, therefore, deny the defense motion to dismiss this matter and transfer this to arbitration.

The trial court's ruling does not compromise the Appellants' rights to defend themselves. The Respondent still needs to prove her case in Court. The Appellants simply failed to prove that the Respondent knowingly waived her right to a jury trial.

POINT II

THE ENACTMENT OF "*ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021 U.S.C. §401*" RENDERS ANY ARBITRATION CLAUSE IN THIS CASE UNENFORCEABLE (1T P5-P16)

This case presents pursuant to the *Law Against Discrimination*; include unlawful harassment, discrimination, retaliation, and sexual harassment, all based upon the Respondent's gender or sex, as well as wrongful termination and disability discrimination. [7a] The disability being the result of the harassment. [7a] Enforcement of any arbitration agreement for these claims are prohibited by *The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. 9 U.S.C. §401.*

The Appellants' claim, in a footnote on p. 17, this issue was resolved on the merits. This is incorrect. The trial Court did not decide this issue. [1T P7-15] The Respondent opposed the Appellants' motion in part, based upon the 2022 amendment to the *Federal Arbitration Act*. The Respondent filed a brief on this issue.

The Respondent raised this issue at the hearing. The court indicated a preference to resolve the motion based on whether the Appellants' provided a

legitimate signed agreement. The dispositive issue of the 2022 Amendment to the *Federal Arbitration Act* remains unresolved. [1T P7-15] We are briefing this issue in response to the position the Appellant has taken claiming the matter was decided by the court. In addition to the reasons set forth above, the Appellants cannot compel this case to proceed in arbitration.

The *Federal Arbitration Act* was amended effective March 3, 2022, prohibiting the enforcement of mandatory arbitration agreements in cases involving sexual harassment, sexual assault, or related claims. *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. 9 U.S.C. §401.* It applies to this case.

The arbitration agreement the Appellants seek to enforce specifically states its governed by the *Federal Arbitration Act.* [155a,161a] A plain reading of the *Federal Arbitration Act* indicates that the amendment covers any claims that accrued after the effective date of the statute. The amendment to the *Federal Arbitration Act* specifically states it prohibits the enforcement of any prior agreements. Without question, the date of the agreement is not relevant. The applicability is determined solely based upon when the cause of action accrues. *9 U.S.C. §401 (2)* The definition section of this statute makes this point clear.

§401"PREDISPUTE ARBITRATION WAIVER-The term predispute arbitration agreement means any agreement to arbitrate that had not yet arisen at the time of the agreement."

This statute concludes with the clear statement, *"APPLICABILTY. This Act and amendments made by this act, shall apply with respect to any dispute or claim that arises or accrues on or after the enactment of this Act." "Approved March 3, 2022"*

This case directly raises questions of sexual harassment. [7a] The last acts of direct harassment occurred after the effective date of the statue on April 8, 2022. [7a, 36a, 37a] The *FAA*'s prohibition against forcing arbitration applies in this case.

There are no published New Jersey cases directly on the application of this Federal Statute. The issue was discussed by Judge Rose in her concurring opinion in *Ogunyemi v. Garden State Medical Center* 478 N.J. Super. 310,324 (App. Div. 2024)

The Federal courts provide clear guidance that the March 3, 2022, amendment to the *FAA* prohibits the employer enforcing pre-dispute agreements compelling arbitration for claims accruing after the effective date of the statute. *Walters v. Starbucks* 623 F. Supp. 333 (S.D. New York 2022); *Olivieri v. Stifel, Nicholaus & Company, Inc*. 112 F. 4th 74 (4th Cir. 2024); *Famuyide v. Chipotle Mexican Grill, Inc.* 111F.4th 895 (8th Cir. 2024)

The Appellants have not filed an answer in this case. There has been very limited discovery in this case. At this stage of the litigation the Court is not concerned with the ability of the plaintiff to prove the allegations contained in the Complaint. The proper analysis on a motion to dismiss a Complaint would entitle the plaintiff to every reasonable inference of fact required to sustain the Complaint. *Printing Mart v. Sharp Electronics 116 N.J. 739 at 746 (1999); Smith v. SBC Communications Inc. 178 N.J. 265 at 262 (2004).*

The Amendment to the *Federal Arbitration Act* specifically defines sexual harassment as, *"The term sexual harassment dispute means a dispute relating to conduct that is alleged to constitute sexual harassment under Federal, tribal or state law."9 U.S.C. §401(4).* Respondent's complaints of harassment in this case clearly meets the state definition *"of a dispute relating to conduct that is alleged to constitute sexual harassment."* [7a, 37a, 212a,238a-250a]

Sexual harassment is defined broader than quit pro quo harassment or sexual assault. Sexual harassment pursuant to the *New Jersey Law Against Discrimination* can come in several forms. *Model Civil Jury Instruction 2.25; Lehmann v. Toys R Us Inc*. 132 N.J.587 (1983) The record contains ample evidence at this stage of the case supporting Respondent's allegations of sexual harassment and a hostile work environment because she was a woman. [7a, 37a, 212a, 238a-250a]

The plaintiff's Complaint, and the limited facts in the record from her deposition reasonably raise issues of sexual harassment that last occurred after the March 3, 2022, amendment to the *Federal Arbitration Act*. [7a, 37a, 212a, 238a-250a] The amendment prohibits enforcement of any prior arbitration agreements.

The Respondent has two other intricately related claims of discrimination and retaliation based on the Respondent's sex or gender. The Respondent claims she was terminated based on the Appellants' discrimination against her because she was a woman, and in retaliation for her complaining about unlawful workplace harassment due to the fact that she was a woman. [7a] These are all sexual harassment claims under the *Law Against Discrimination* and are directly covered by the recent amendment to the *Federal Arbitration Act*, prohibiting the enforcement of arbitration in claims "*related to sexual harassment*." *9 U.S.C. §401 (4)*. With respect to cases involving sexual harassment, it is now the public policy throughout the United States to not permit an employer to compel enforcement of arbitration agreements. *9 U.S.C. §401(4)*.

CONCLUSION

For these reasons, as well as the Appellants' failure to produce a legitimate agreement, the court should affirm the decision of the trial court.

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