NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5147-09T1

JOSEPH BLUMERT,

Plaintiff-Appellant,

v.

WELLS FARGO AND CO., WELLS FARGO FINANCIAL, GINO CAMMAROTA and LAURA PRINZO,

Defendants-Respondents.

Submitted May 3, 2011 - Decided August 15, 2011

Before Judges Espinosa and Skillman.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-3495-09.

The Bell Law Group, P.C., attorneys for appellant (Joseph J. Bell and Brian C. Laskiewicz, on the briefs).

Fisher & Phillips, LLP, attorneys for respondents (Rosemary S. Gousman, of counsel; Catherine J. Smith, on the brief).

PER CURIAM

Plaintiff Joseph Blumert appeals from an order that dismissed his complaint and compelled arbitration of his claims against his former employer, defendant Wells Fargo, and certain

Wells Fargo employees, defendants Gino Cammarota and Laura Prinzo. For the reasons that follow, we affirm.

Plaintiff, a college graduate, was twenty-three years old when he became employed by Wells Fargo in late May 2003. Blumert was terminated from his employment in June 2009 and filed his complaint in October 2009. Each of the twelve counts in the complaint asserted claims directly related to his employment and termination: defamation (count one), defamation per se (count two), fraud (count three), negligent misrepresentation (count four), breach of implied covenant of good faith and fair dealing (count five), common law wrongful termination/breach of termination policies (count six), common law wrongful termination/conflict of interest (count seven), intentional infliction of emotional distress (count eight), violation of the New Jersey Law Against Discrimination, (LAD), N.J.S.A. 10:5-1 to -49, based upon a failure to provide a reasonable accommodation for a temporary disability (count nine), violation of the LAD (aiding and abetting) (count ten), unlawful denial of temporary disability benefits (count eleven), and vicarious liability of an employer for an employee's act (count twelve).

Defendants filed answers and motions to dismiss the complaint pursuant to R. 4:6-2(e) on the grounds that an

arbitration clause contained in plaintiff's employment agreement (the Agreement) required the submission of plaintiff's claims to arbitration. Defendants' motions were supported by a certification by Cammarota, accompanied by a copy of the one-page Agreement, dated May 27, 2003. Paragraph 2 of the Agreement reads:

> Your employment is at will. This means that either Employee or Employer may terminate your employment at any time for any reason or for no reason. The fact that Employer voluntarily agrees to arbitrate employment related claims shall not be construed to undermine the parties' at will relationship. It is contemplated that either party will provide one week's written notice prior to termination of employment. The payment by Employer of one week's annual salary shall be equivalent to and in lieu of the one week notice provision. No notice shall be required by either party during the first ninety (90) days of employment, nor shall notice be required if you are discharged for misconduct or if you work an average of 30 hours per week or less.

The following clause was prominently featured, in all capital letters, above the signature line:

> I AGREE TO SETTLE ANY AND ALL CLAIMS OR CONTROVERSIES ARISING OUT OF OR RELATED TO MY APPLICATION OR CANDIDACY FOR EMPLOYMENT, EMPLOYMENT, OR TERMINATION OF EMPLOYMENT WITH THE COMPANY EXCLUSIVELY BY FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR.

Plaintiff's name, signature and social security number appear immediately below this clause.

In his certification, Cammarota, a District Manager for Wells Fargo Bank, states he personally presented the Agreement to plaintiff on his first day of employment. He certified further that he "reviewed each and every paragraph of the Agreement with Mr. Blumert, including the arbitration clause, and gave him the opportunity to ask any questions." Then, he "asked Mr. Blumert to read through the document on his own, and afforded him a second opportunity to seek clarification of any of the provisions contained therein, before he affixed his signature." He stated further, "Mr. Blumert advised [him] that he understood and accepted all the terms of the Agreement, and then signed and dated the document on May 27, 2003."

Plaintiff filed a certification in opposition. He stated that Cammarota gave him a stack of documents and told him "they must be signed and sent to the Human Resources Department within twenty-four (24) hours, case closed." He denied that Cammarota had provided a thorough explanation of any of the forms, stating:

> The true nature of this process was "no signature, no employment." At no time was I told that an arbitration process of any kind was included. At no time was the status of my legal rights ever explained to me, including any concept that I would be waiving the litigation of all potential legal claims, including statutory claims, and replacing them with binding arbitration.

Plaintiff also certified:

> At the time I was hired, I was twenty-three (23) years old, and it is safe to say that someone in the position of being hired directly after college graduation will not understand the nature of arbitration. Someone in this or similar situation could or would reasonably ask a question like, "what is arbitration and what does it have to do with me?" Unless explained correctly, a new college graduate is not going to know what that is.

However, plaintiff does not state that he, as opposed to the generic recent college graduate, asked such a question or did not understand the nature of arbitration.[1]

On May 14, 2010, the trial judge granted the motion to dismiss the complaint and send the matter to arbitration.[2]

In this appeal, plaintiff argues that the court erred in dismissing his complaint because he did not knowingly consent to waiving litigation rights to all claims and because a factual dispute existed that precluded dismissal without discovery. After carefully reviewing the record and briefs, we are satisfied that neither argument has merit.

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[1] In his certification, plaintiff also states that the pertinent employment agreement was not among the documents presented to him at the time he began employment.

[2] The order references only Wells Fargo and Cammarota, but no party has suggested the complaint was not dismissed against Prinzo.

Because the court considered material beyond the pleadings, the motion to dismiss was governed by the standards applicable to summary judgment motions. See R. 4:6-2(e). When reviewing a grant of summary judgment, we employ the same legal standard applied by the trial court, that is, "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue[s] in favor of the non-moving party." Spinks v. Twp. of Clinton, 402 N.J. Super. 465, 473 (App. Div. 2008) (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995)), certif. denied, 197 N.J. 476 (2009). We review issues of law de novo and accord no deference to the motion judge's conclusions on issues of law. Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009).

The party opposing summary judgment must present affirmative evidence that is competent, credible and shows that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514-15, 91 L. Ed. 2d 202, 217 (1986). "Competent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009). Clearly, arguments contained in briefs and allegations in pleadings that are unsupported by the

record cannot create a genuine issue of fact. See Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 381-82 (Law Div. 2002); aff'd 362 N.J. Super. 245 (App. Div.), certif. denied, 178 N.J. 32 (2003) (no issue of fact presented by plaintiff's allegation that lacked factual support in record); Triffin v. Somerset Valley Bank, 343 N.J. Super. 73, 87 (App. Div. 2001); Daus v. Marble, 270 N.J. Super. 241, 247-48 (App. Div. 1994).

The question presented by the motion here was whether, based upon the record, there was a genuine issue of fact regarding the enforceability of the arbitration clause. The record consists of the Agreement and the opposing certifications of Cammarota and Blumert.

Blumert's argument that the arbitration clause was not enforceable because it was not properly explained to him fails both factually and legally. Although he states in his certification that it was not explained correctly to him and that persons in his position cannot be expected to understand the concept of arbitration, he never states that he did not understand the arbitration clause. His contention that he was required to sign the documents within twenty-four hours to be employed falls far short of alleging either fraud or an unenforceable adhesion contract. A potential employee's need for a job does not constitute sufficient pressure to invalidate

an arbitration agreement. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33, 111 S. Ct. 1647, 1655, 114 L. Ed. 2d 26, 41 (1991); Martindale v. Sandvik, Inc., 173 N.J. 76, 90 (2002); Young v. Prudential Ins. Co. of Am., 297 N.J. Super. 605, 621 (App. Div.) certif. denied, 149 N.J. 408 (1997). In the absence of such fraud or misconduct, "[a] party who enters into a contract in writing . . . is conclusively presumed to understand and assent to its terms and legal effect[,]" Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353, cert. denied sub nom., First Fidelity Bank, N.A. v. Rudbart, 506 U.S. 871, 113 S. Ct. 203, 121 L. Ed. 2d 145 (1992), and a signature is taken as a reliable indicator of assent to a contract. See Leodori v. CIGNA Corp., 175 N.J. 293, 306-07, cert. denied, 540 U.S. 938, 124 S. Ct. 74, 157 L. Ed. 2d 250 (2003).

A review of the Agreement itself shows that the arbitration clause was prominently featured and unlikely to be overlooked by someone signing the Agreement. See Rockel v. Cherry Hill Dodge, 368 N.J. Super. 577, 585 (App. Div.) certif. denied, 181 N.J. 545 (2004) ("The size of the print and the location of the arbitration provision in a contract has great relevance to any determination to compel arbitration, particularly when . . . the provision is contained in a contract of adhesion.").

Since it is presumed that Blumert understood and agreed to the arbitration clause, we turn to the language of the clause itself. For the clause to effect a waiver of the right to sue in court, it must express that purpose with clarity. See Moore v. Woman To Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 37 (App. Div. 2010). "The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." Ibid. (quoting Fawzy v. Fawzy, 199 N.J. 456, 469 (2009)). See also Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282-83 (1993).

Clearly it would be preferable if the arbitration clause here explicitly included a waiver of the right to judicial adjudication. See Curtis, supra, 413 N.J. Super. at 37. However, the clause states unequivocally that the employee agrees "to settle any and all claims . . . exclusively by final and binding arbitration before a neutral arbitrator." We are satisfied that, under the facts of this case, this language was sufficient.

Blumert properly acknowledges that the arbitration clause need not explicitly identify each statutory claim to be covered. See Martindale, supra, 173 N.J. at 96. His argument that the clause here is insufficiently clear rests upon references to

public policy against the waiver of the right to litigate intentional or reckless torts, and, citing Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132-36 (2001), the law's favor for explicit recognition of the waiver of statutory claims.

A presumption of arbitrability applies to our analysis of the scope of the arbitration clause. "[A]n 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." EPIX Holdings Corp. v. Marsh & McLennan Cos., 410 N.J. Super. 453, 471 (App. Div. 2009) (quoting Caldwell v. KFC Corp., 958 F. Supp. 962, 973 (D.N.J. 1997)); see also Curtis v. Cellco P'ship, 413 N.J. Super. 26, 34 (App. Div.), certif. denied, 203 N.J. 94 (2010); Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div. 2010).

In Martindale, the pertinent clause read

> AS A CONDITION OF MY EMPLOYMENT, I AGREE TO WAIVE MY RIGHT TO A JURY TRIAL IN ANY ACTION OR PROCEEDING RELATED TO MY EMPLOYMENT WITH SANDVIK.
>
> I UNDERSTAND THAT I AM WAIVING MY RIGHT TO A JURY TRIAL VOLUNTARILY AND KNOWINGLY, AND FREE FROM DURESS OR COERCION.
>
> I UNDERSTAND THAT I HAVE A RIGHT TO CONSULT WITH A PERSON OF MY CHOOSING, INCLUDING AN ATTORNEY, BEFORE SIGNING THIS DOCUMENT.

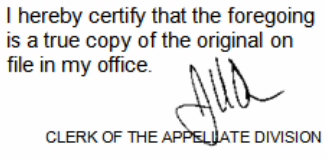
> I AGREE THAT ALL DISPUTES RELATING TO MY EMPLOYMENT WITH SANDVIK OR TERMINATION THEREOF SHALL BE DECIDED BY AN ARBITRATOR THROUGH THE LABOR RELATIONS SECTION OF THE AMERICAN ARBITRATION ASSOCIATION.
>
> [173 N.J. at 81-82.]

Although the clause contained no reference to statutory claims, the language describing the disputes subject to arbitration was broad. Because the clause mentioned "all disputes relating to my employment . . . or termination," and did not "contain any limiting references," the Court held that the clause was sufficiently broad to include statutory claims. Id. at 96.

The language here is similarly broad, including "any and all claims or controversies arising out of or related to my application or candidacy for employment, employment, or termination of employment. . . ." It contains no exclusions that might otherwise mislead one into believing that some, but not all, claims must be arbitrated. It cannot, therefore, be said with "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" between Blumert and Wells Fargo.[3]

[3] Blumert's argument that the arbitration clause renders the Agreement an exculpatory contract also fails because the clause does not shield Wells Fargo from liability for future acts but only requires that liability be determined in arbitration rather than in a court. See Delta Funding Corp. v. Harris, 189 N.J. (continued)

Affirmed.



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28, 44 (2006); Martindale, supra, 173 N.J. at 93 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S. Ct. 3346, 3354, 87 L. Ed. 2d 444, 456 (1985)).