NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3230-10T1

EILEEN S. HELFAND,

Plaintiff-Respondent,

v.

CDI CORPORATION and
BARRY O'DONNELL,

Defendants-Appellants.

Argued November 16, 2011 - Decided January 13, 2012

Before Judges Fuentes, Harris and Koblitz.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4363-10.

Thomas J. Barton argued the cause for appellants (Drinker Biddle & Reath L.L.P., attorneys; Mr. Barton, Daniel H. Aiken and Aaron M. Moyer, on the briefs).

Richard P. Flaum argued the cause for respondent (DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis & Lehrer, P.C., attorneys; Mr. Flaum and Thomas R. Basta, on the brief).

PER CURIAM

Plaintiff, Eileen S. Helfand, an employee of defendant CDI Corporation (CDI), brought suit in the trial court alleging violations of the New Jersey Law Against Discrimination (NJLAD),

N.J.S.A. 10:5-1 to -42. Approximately eight months after plaintiff filed her complaint, defendants filed a motion to compel arbitration pursuant to an arbitration clause in plaintiff's employment contract. The trial court denied defendants' motion, finding they waived their right to arbitration by participating in litigation. Defendants appeal this decision.

Plaintiff, on appeal, maintains that the trial court was correct in its waiver analysis. In addition, plaintiff asserts that the arbitration clause is unenforceable and, in any event, does not waive NJLAD claims. After reviewing the record in light of the contentions advanced on appeal, we hold that the arbitration clause is enforceable and was not waived. We therefore reverse.

On January 30, 1998, plaintiff was hired by CDI as a salesperson. She signed an employment agreement, which contained the terms and conditions of her employment. The employment agreement contained a section entitled "Arbitration," which stated,

> You and we agree that it would be mutually beneficial to obtain prompt and cost effective resolutions of any controversies, claims or disputes which may arise out of, or relate to, your employment with us or the termination of such employment, or this Employment Agreement or an alleged breach thereof, or the relations between you and

> us, arising either during or after the employment relationship. Accordingly, you and we agree that, to the extent permitted by law, all such controversies, claims and disputes will be decided by arbitration in accordance with the then current Commercial Arbitration Rules of the American Arbitration Association, and not by a court of law, and you and we specifically waive all rights to a jury trial of such issues . . . . Claims covered by this agreement to arbitrate include . . . claims for discrimination . . . and claims for violation of any federal, state or other governmental law, statue, regulation or ordinance.

The agreement also contained a choice-of-law provision stating that the agreement "will be construed and interpreted in accordance with the laws of the Commonwealth of Pennsylvania (without regard to the principles of conflicts of law therein)." The agreement stated the arbitration provision (section 11) "will survive, and be enforceable following, termination of [the] Agreement or [plaintiff's] employment [there]under." Finally, the agreement explained that if plaintiff's compensation is changed during the terms of the agreement, "the compensation provision in the Information Section will be deemed to have been amended to reflect the different compensation." Plaintiff and defendants initialed each page of the agreement.

During her time with CDI, plaintiff changed positions several times. Each time, plaintiff signed a new "compensation"

or "commission" plan. These documents pertain only to compensation of employees.

On May 28, 2010, plaintiff filed a complaint alleging discriminatory practices in violation of NJLAD against defendants CDI and Barry O'Donnell. Defendants' answer did not raise arbitration as a defense. The answer included a "reservation of rights" section where "[d]efendants reserve[d] the right to plead any additional separate defenses, the availability of which may come to light as the action progresses."

Neither defendants nor plaintiff took any depositions during the litigation, although they did exchange written discovery. On December 21, 2010, defendants notified plaintiff in an e-mail of their intention to enforce the arbitration clause in the employment agreement. Shortly after this e-mail was received, the parties engaged in mediation, which unfortunately was not successful.

On January 19, 2011, defendants filed a motion to compel arbitration pursuant to plaintiff's employment agreement. The motion judge found that under "the totality of the circumstances the [d]efendants have waived their right to [] arbitration." He determined the delay in invoking the arbitration provision prejudiced plaintiff by causing her to spend six months pursuing

the case in the court system, including court-ordered mediation, settlement discussions and interrogatories, while incurring significant legal fees.

On appeal, defendants argue that the motion judge erred in finding that their delay in seeking arbitration constituted a waiver of the contract arbitration agreement. We agree.

We "review the denial of a request for arbitration de novo." Frumer v. Nat'l Home Ins. Co., 420 N.J. Super. 7, 13 (App. Div. 2011). "[O]rders compelling or denying arbitration are deemed final and appealable as of right as of the date entered." GMAC v. Pittella, 205 N.J. 572, 587 (2011).

Where a contract contains a choice-of-law provision, we apply the substantive laws of the chosen state. N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 568 (1999) (citing Instructional Sys., Inc. v. Computer Curriculum Corp., 130 N.J. 324, 341 (1992)). Notwithstanding the application of the substantive laws of that state, we apply our own procedural rules. See Heavner v. Uniroyal, Inc., 63 N.J. 130, 135 (1973).

Waiver, in this context, is based on the conduct of the parties during litigation, not the conduct of the parties before litigation. Thus, the procedural rules of the forum state govern. Whereas the Pennsylvania Civil Procedure rules require a defendant to raise arbitration as an affirmative defense to

avoid waiver, see 231 Pa. Code § 1032(a); Teodori v. Penn Hills Sch. Dist. Auth., 196 A.2d 306, 310 (Pa. 1964); Samuel J. Marranca Gen. Contracting Co. v. Amerimar Cherry Hill Assocs. Ltd. P'ship, 610 A.2d 499, 501 (Pa. Super. Ct. 1992), New Jersey does not mandate such action. See, e.g., Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 333 N.J. Super. 291, 295-96 (App. Div. 2000), rev'd on other grounds, 168 N.J. 124 (2001).

Plaintiff initially alleges that defendants waived arbitration when they failed to raise it in their answer. Plaintiff adopts this position based on the inclusion of arbitration as an affirmative defense under Rule 4:5-4, and her assertion that an affirmative defense is waived unless pleaded. However, we have recognized that the failure to raise arbitration as an affirmative defense is not dispositive on the issue of waiver. See Spaeth v. Srinivasan, 403 N.J. Super. 508, 516-17 (App. Div. 2008) (finding the defendant did not waive arbitration despite not raising arbitration as an affirmative defense); Garfinkel, supra, 333 N.J. Super. at 296 ("'[T]he mere filing of a complaint or an answer to the complaint is not a waiver of arbitration. . . .'") (quoting Wasserstein v. Kovatch, 261 N.J. Super. 277, 290 (App. Div.), certif. denied, 133 N.J. 440 (1993))), rev'd on other grounds, 168 N.J. 124 (2001).

Plaintiff also alleges that defendants waived their right to arbitration through their litigation conduct. A party can waive its right to arbitration either expressly or by implication. Spaeth, supra, 403 N.J. Super. at 514. Whether a party waives arbitration implicitly depends on the totality of the circumstances. Ibid. ("There is no single test for the type of conduct that may waive arbitration rights."). Instead, "[t]here is a presumption against waiver of an arbitration agreement, which can only be overcome[] by clear and convincing evidence that the party asserting [arbitration] chose to seek relief in a different forum." Ibid. (citing Am. Recovery Corp. v. Computerized Thermal Imaging, 96 F.3d 88, 92 (4th Cir. 1996)).

Because "'[n]ot every foray into the courthouse effects a waiver of the right to arbitrate,'" Lucier v. Williams, 366 N.J. Super. 485, 500 (App. Div. 2004) (alteration in original) (quoting Shevlin v. Prudential Commercial Ins. Co., 256 N.J. Super. 691, 700 (Law Div. 1991)), it is "the presence or absence of prejudice [that] has been deemed determinative of the issue of waiver." Spaeth, supra, 403 N.J. Super. at 515. Citing a decision of the Second Circuit, we recognized that "simply wasting a party-opponent's time and money [is] insufficient to constitute prejudice . . . ." Ibid. (citing Rush v. Oppenheimer

& Co., 779 F.2d 885, 888 (2d Cir. 1985)). However, when it is a defendant seeking to compel arbitration, it is more likely that arbitration is waived when a defendant "use[s] the litigation process improperly, such as to gain pretrial disclosure not generally available in arbitration." See Lucier, supra, 366 N.J. Super. at 500 (citing Shevlin, supra, 256 N.J. Super. at 700-01).

In Farese v. McGarry, 237 N.J. Super. 385, 394 (App. Div. 1989), we found that the plaintiff waived his right to compel arbitration where he affirmatively filed a complaint and then filed an answer to a counterclaim without alleging arbitration. When the plaintiff did finally raise arbitration in an amended answer filed nine months after the complaint, it was a mere two weeks before trial was set to begin. Ibid.

In Lucier v. Williams, supra, 366 N.J. Super. at 490-91, we found no waiver of the right to invoke arbitration where the defendant answered the complaint, filed a partial motion for summary judgment, which was granted, and only then filed a motion for summary judgment on the basis that the contract required arbitration. We determined that answering a complaint is "an acceptable effort to preserve the status quo pending arbitration . . . ." Id. at 500.

Likewise, in Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 146, 150-51 (App. Div. 2008), we found no waiver where the defendants filed a motion to strike the plaintiff's demand for a jury trial, and then, four months later filed a motion to compel arbitration. We concluded that plaintiff suffered no prejudice because it "did not actively litigate th[e] case during the four-month interval between the filing of his complaint and the filing of defendants' motion to compel arbitration." Id. at 150-51.

In Spaeth, supra, a case with similar facts, the plaintiff filed a complaint on December 15, 2006 after voluntarily dismissing a complaint filed four months earlier on August 10, 2006. 403 N.J. Super. at 512. On February 9, 2007, the defendant filed an answer, in which it did not raise the defense of arbitration, and also filed counterclaims. Ibid. The parties engaged in "[m]inimal discovery" and mediation in May 2007. Ibid. Then, on June 25, 2007, the defendant "assert[ed] for the first time, just six months after the filing of the complaint, that [the] plaintiff's cause of action was barred by the contractual arbitration clause . . . ." Ibid. In support of the decision, we found

> [the d]efendant, who appeared pro se throughout, asserted her right to arbitration only six months after [the] plaintiff filed his Superior Court

> complaint, well before any meaningful exchange of discovery—much less the discovery end date—and well in advance of fixing a trial date. Indeed, the litigation had not even reached the point of noticing and taking depositions or filing dispositive motions, save, of course, for [the] defendant's efforts to dismiss the lawsuit. And when [the] defendant did assert her right to arbitration—twice in very short order—she acted thereafter in accordance with her intention to seek arbitration.
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> [Id. at 516.]

Here, defendants notified plaintiff of their intention to compel arbitration seven months after plaintiff filed the original complaint (five months after plaintiff filed an amended complaint). One month later, defendants filed a formal motion to compel arbitration. The parties engaged in limited discovery. They took no depositions, they exchanged only one set of written discovery, and plaintiff produced no documents.[1] The only motion filed by defendants was the motion to compel arbitration.

Based on the limited litigation that occurred prior to the defendants' motion, the trial court erroneously concluded that defendants waived their right to arbitration through litigation conduct.

[1] Defendants also credibly maintain that the limited discovery exchange was necessary for mediation.

Plaintiff further argues that defendants are judicially estopped from asserting their right to arbitration. Judicial estoppel, an "'extraordinary remedy,'" applies only when a party "'advocates a position contrary to a position it successfully asserted in the same or a prior proceeding.'" Ali v. Rutgers, 166 N.J. 280, 288 (2000) (quoting Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 608 (App. Div. 2000), certif. denied, 167 N.J. 88 (2001)). Courts recognize the doctrine of judicial estoppel "'to protect the integrity of the judicial process.'" Ibid. (quoting Kimball Int'l, Inc., supra, 334 N.J. Super. at 608). For judicial estoppel to apply, "'[a party must] have convinced the court to accept its position in the earlier litigation.'" Ibid. (alteration in original) (quoting Kimball Int'l, Inc., supra, 334 N.J. Super. at 608)). Here, defendants at no point advocated before the trial court that it was the proper forum. The only affirmative motion defendants filed was a motion to compel arbitration. Thus, defendants' conduct does not trigger this "extraordinary remedy."

Plaintiff further contends that the arbitration clause is unenforceable because the contract is one of adhesion. Because the contract contains a choice-of-law provision, Pennsylvania contract law should be used.

Plaintiff argues that this contract was non-negotiable and thus the arbitration clause should not be enforced. In Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46, 126 S. Ct. 1204, 1209, 163 L. Ed. 2d 1038, 1044 (2006), the Supreme Court held that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." Here, the challenge is to the arbitration clause and is therefore properly before the court.

In Pennsylvania, a contract of adhesion is not per se unconscionable. See Thibodeau v. Comcast Corp., 912 A.2d 874, 882 (Pa. Super. Ct. 2006). Instead, an adhesion contract "is only unconscionable if it unreasonably favors the drafter." Ibid. Here, plaintiff does not allege unconscionable terms, but rather complains simply that the contract is "take it or leave it." Plaintiff did not present any evidence to show that the terms of the employment agreement unreasonably favor defendants. Under Pennsylvania law, therefore, the arbitration clause is not unenforceable as a contract of adhesion.

Plaintiff also maintains that the original employment agreement was no longer enforceable because the subsequent actions of the parties and subsequent signed documents superseded that agreement.

Under Pennsylvania law, the primary concern in interpreting any contract is determining the intent of the contracting parties. Hutchison v. Sunbeam Coal Corp., 519 A.2d 385, 389 (Pa. 1986). When a contract is "clear and unambiguous," the contract itself will determine the parties' intent. Id. at 390. Here, the contract language is clear and unambiguous as to the parties' intent to arbitrate any and all disputes that may arise from their relationship. Therefore, the contract's language applies unless the contract was either terminated or superseded.

Plaintiff alleges that the arbitration contract was superseded because she signed several compensation plans after signing the original employment agreement, none of which discussed arbitration.[2] However, the original agreement anticipated such new contracts. The employment contract expressly stated:

> If at any time during the term of this Agreement you and we agree that compensation different from the compensation set forth in the Information Section should be paid to you, and we pay you and you accept such different compensation, then the compensation provision in the Information Section will be deemed to have been amended to reflect the different compensation.

[2] Plaintiff also signed an inventions confidentiality document.

Therefore, the parties contemplated that plaintiff's position and compensation would change during her employment with the company.

The employment agreement further gave CDI "the right to modify [plaintiff's] duties or position by giving [plaintiff] one week's notice of such modification." Lastly, the contract stated that plaintiff "agree[s] that, from time to time as [CDI] may request, [plaintiff] will sign all documents and do all other things (at [CDI's] cost) which may be necessary to secure or establish [CDI] or [CDI's] customers' ownership of such inventions." The express provisions of the contract contemplated every document signed by plaintiff during her time with CDI. No subsequent document superseded the original arbitration provision.

Plaintiff also asserts that her NJLAD claim does not fall within the scope of the arbitration agreement. All parties agree that the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-14, governs this employment contract. However, plaintiff and defendants disagree as to which law covers the issue of arbitrability.

In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626, 105 S. Ct. 3346, 3353, 87 L. Ed. 2d 444, 455 (1985)), the Supreme Court held that courts should "apply[] the

'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'" (quoting Moses H. Cone Mem'l Hos. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785 (1983)). Because the Supreme Court found in Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 476, 109 S. Ct. 1248, 1254, 103 L. Ed. 2d 488, 498 (1989), that the FAA was meant "to ensure the enforceability, according to their terms, of private agreements to arbitrate," courts have found that contracts can displace the federal law of arbitrability using a choice-of-law provision. See, e.g., Flattery Ltd. v. Titan Mar., LLC, 647 F.3d 914, 919 (9th Cir. 2011); Ford v. NYL-Care Health Plans of Gulf Coast, Inc., 141 F.3d 243, 248-49 (5th Cir. 1998); Sea Bowld Marine Grp., LDC v. Oceanfast Pty., Ltd., 432 F. Supp. 2d 1305, 1311-12 (S.D. Fla. 2006). The issue then becomes how to determine whether or not the choice-of-law provision displaces the FAA.

The Third Circuit has held that federal law governs the issue of arbitrability for agreements covered by the FAA. Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 43 (3d Cir. 1978) ("[W]hether a particular dispute is within the class of those disputes governed by the arbitration and choice of law clause is a matter of federal law."). The

Becker court provides an example, in a footnote, analogous to the situation here.

> For example, consider the case where a contract containing an arbitration clause provides that the law of state X shall govern the agreement. Assume that the law of state X will not enforce, or gives very limited effect to arbitration clauses, such that under X law the dispute would not be submitted to arbitration. If one party sues on the contract in federal court, and the contract involves "commerce", the federal district court, in deciding a motion to stay the proceedings and compel arbitration under 9 U.S.C. § 3, would look to federal law in determining the scope of the arbitration clause.[3]
>
> [Ibid.]

Here, the choice-of-law provision is general, and under the Third Circuit's analysis, federal law would govern the question of arbitrability.

Under federal law, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." Moses H. Cone, supra, 460 U.S. at 24, 103 S. Ct. at 941, 74 L. Ed. 2d at 785. Furthermore, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . ." Id. at 24-25, 785, 941. "[A]n

[3] Although the example specifically references claims brought in federal court, the Supreme Court has since decided that the FAA applies in state court. See Southland Corp. v. Keating, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

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." AT&T Techs. v. Commc'ns. Workers of Am., 475 U.S. 643, 650, 106 S. Ct. 1415, 1419, 89 L. Ed. 2d 648, 656 (1986) (internal quotations omitted).

Here, the arbitration clause was broad. It covered

> any controversies, claims or disputes which may arise out of, or relate to, your employment with us or the termination of such employment, or this Employment Agreement or an alleged breach thereof, or the relations between you and us, arising either during or after the employment relationship . . . . Claims covered by this agreement to arbitrate include . . . claims for discrimination . . . and claims for violation of any federal, state or other governmental law, statue, regulation or ordinance.
>
> [(Emphasis added).]

As the contractual language expressly delineated claims for both discrimination and state statutes, the parties clearly contemplated that NJLAD claims would be resolved through arbitration. An NJLAD claim is therefore an arbitrable claim under the original employment contract.

Finally, plaintiff argues that if this case is referred to arbitration, we should award attorney's fees to plaintiff because defendants did not raise arbitration as a defense. New

Jersey has "generally adhered to the so-called 'American Rule,' meaning that 'the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.'" N. Bergen Rex. Transp., supra, 158 N.J. at 569 (quoting Rendine v. Pantzer, 141 N.J. 292, 322 (1995)). Notwithstanding this general rule, "'a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract.'" Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 385 (2009) (quoting Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 440 (2001)). The NJLAD explicitly allows for a prevailing party to recover attorney's fees. N.J.S.A. 10:5-27.1. Should plaintiff prevail on her claim in arbitration, she might then be entitled to an award of counsel fees.

Reversed.