NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3692-10T2

T & BEER, INC., a New York Corporation,

Plaintiff-Appellant,

v.

WINE SOURCE SELECTIONS, L.L.C., d/b/a GRAPE SOLUTIONS,[1]

Defendant-Respondent,

and

RIONDO U.S.A, L.L.C., a New Jersey L.L.C., CANTINE RIONDO U.S.A., INC., a New York Corporation, CHARLES MASSIE, a resident of New Jersey, individually, BEVCON GROUP, INC., a New Jersey Corporation, MAJESTIC WINES, INC., a New York Corporation, TOVTRY IMPORTING, INC., a New York Corporation, CANTINE RIONDO, S.P.A., ABELE CASAGRANDE, individually, and FEDERICO TASSONI, individually,

Defendants.

Argued October 26, 2011 - Decided February 6, 2012

Before Judges Axelrad, Sapp-Peterson, and Ostrer.

---

[1] Improperly pled as Grape Solutions.

On appeal from the Superior Court of New Jersey, Chancery Division, General Equity Part, Bergen County, Docket No. C-321-10.

LisaAnne R. Bicocchi argued the cause for appellant (Archer & Greiner, P.C., attorneys; Patrick Papalia, of counsel; Ms. Bicocchi, on the brief).

Gary E. Stern argued the cause for respondent.

PER CURIAM

Plaintiff, T & Beer, Inc., appeals the March 18, 2011 order removing to arbitration the portion of its amended verified complaint asserting claims against defendant Wine Source Selections, L.L.C. (Wine Source).[2] The complaint seeks injunctive relief to enforce a restrictive covenant and reformation, and it alleges tortious interference with contract. The trial judge concluded that in accordance with the terms of a Distribution Agreement ("the Agreement") executed between the parties, the disputes raised in the complaint were subject to arbitration. The trial court retained jurisdiction over the remaining claims in the complaint asserted against the other named defendants, who are not participants in this appeal. In addition, the court continued the temporary restraints it

[2] Defendant was previously named Grape Solutions, L.L.C. Many quoted materials in this opinion therefore refer to Grape Solutions instead of Wine Source Selections. For consistency, we shall refer to it as "Wine Source."

previously imposed upon defendant to maintain the status quo, and it directed that upon appointment of an arbitrator, defendant could file a motion to dismiss the litigation as to it. The present appeal followed.[3] We now reverse.

I.

Plaintiff is engaged in the wholesale distribution of beer and wine, primarily in New York and New Jersey. Defendant is a supplier and importer of wine and other alcoholic beverages, including Riondo brand wines. Its chief executive officer at all relevant times in the present matter was Charles Massie. Under the Agreement, defendant agreed to sell to plaintiff, as a distributor, the products listed in the Agreement's appendix in New York and New Jersey "on an exclusive basis." The term of the Agreement was from July 1, 2007 through June 30, 2012. The Agreement contained the following clause related to the resolution of disputes:

> The parties agree that any and all disputes between them, including, but not limited to, disputes arising out of or relating to the instant Agreement, will be subject to resolution only through final and binding

[3] Five days following the entry of this order, the Court decided GMAC v. Pittella , 205 N.J. 572, 587 (2011), in which it held that going forward "*all* orders compelling and denying arbitration shall be deemed final for purposes of appeal, regardless of whether such orders dispose of all issues and all parties, and the time for appeal therefrom starts from the date of the entry of that order."

> arbitration through the American Arbitration Association ("AAA") in accordance with the Commercial Litigation rules of the AAA, as modified by applicable law and the terms of this Agreement. . . . By entering this Agreement, the parties understand and recognize that they are waiving their right to have any disputes decided by a court or presented to a jury.

The Agreement also contained a "Waivers and Modifications" clause, stating that "[n]o modification or waiver of any provision of this Agreement shall be effective unless in writing and signed by the parties."

Plaintiff claims that contrary to the terms of the Agreement, other retailers and wholesale distributors were distributing products in New York and New Jersey that were subject to its exclusive distributorship with defendant. Plaintiff, in accordance with the Agreement, demanded arbitration.

Arbitration did not immediately occur. Instead, through their respective attorneys, the parties engaged in negotiations, which were memorialized in a series of emails exchanged between counsel. In one such email from defense counsel dated September 24, 2010, defense counsel consented to having the claims asserted by T & Beer removed from arbitration and heard in the Superior Court. Defense counsel also consented to personal jurisdiction. In addition, defense counsel agreed to accept

service of the "Summons and Complaint via regular mail and/or email."

A second email from defense counsel, dated September 27, 2010, stated:

> As per our conversation, we propose the following:
>
> 1. T & Beer withdraws its Demand for Arbitration with the AAA;
> 2. [Wine Source] withdraws its Termination of the Distribution Agreement;
> 3. T & Beer pays [Wine Source] all outstanding balance[s] that [are] due and owing as per the Distribution Agreement on or before 10/8/10;
> 4. The parties have a meeting the week of October 11, 2010; and
> 5. In the event that the parties are unable to amicably resolve all issues, all matters would be heard in the Superior Court of NJ, Law Division, Bergen County[,] and [t]he Scheier Law Firm, LLC, would accept service on behalf of [Wine Source] and Riondo USA[.]

The next morning, at 9:14 a.m., plaintiff's counsel sent an email to defense counsel acknowledging receipt of the September 27 email and requesting that defense counsel

> amend item 1 to state that T & Beer will suspend its demand for arbitration with the AAA, pending the four[-]way meeting to take place between the parties during the week of

> October 11, 2010. Please also amend item 5 in your email to reflect that, in the event the parties are unable to resolve all issues, and resort to the courts is deemed necessary, all such matters will be heard in the Superior Court of New Jersey, Bergen County[,] and that the Scheier Law Firm, LLC[,] will accept service on behalf of [Wine Source] and Riondo USA.

Within hours, defense counsel responded with an email, which incorporated the above requests:

> As per our conversation, we propose the following:
>
> 1. T & Beer will suspend its Demand for Arbitration with the AAA pending a meeting the week of October 11, 2010[;]
> 2. [Wine Source] withdraws its Termination of the Distribution Agreement;
> 3. T & Beer pays [Wine Source] all outstanding balance[s] that [are] due and owing as per the Distribution Agreement on or before 10/8/10;
> 4. The parties have a meeting the week of October 11, 2010; and
> 5. In the event that the parties are unable to amicably resolve all issues, and T & Beer elects to withdraw[] its Demand for Arbitration and commence litigation, all matters would be heard in the Superior Court of NJ, Law Division, Bergen County[,] and [t]he Scheier Law Firm will accept service on behalf of [Wine Source] and Riondo USA. Grape Solutions and

Riondo USA consent to personal jurisdiction in NJ.

On October 11, 2010, plaintiff filed a verified complaint for injunctive relief to enforce the restrictive covenant contained in the Agreement and for reformation of the Agreement. Four days later, the court issued an order to show cause with temporary restraints, pursuant to Rule 4:4-52, temporarily restraining defendants from acting in "concert with any person or entity to distribute or sell any of the products" subject to the Agreement, pending a hearing on November 19, 2010.

The scheduled November 19, 2010 hearing did not take place, as the parties consented to its adjournment. Defendant submitted opposition to the order to show cause on November 30, 2010. Discovery commenced, which included the scheduling of depositions. On February 10, 2011, the court issued a preliminary injunction in favor of plaintiff, temporarily enjoining all defendants from directly, or through others, distributing or selling any of the products identified in Appendix B of the Agreement in the territories subject to the Agreement.

On March 2, 2011, defendant filed a motion to dismiss plaintiff's complaint. In support of the motion, Massie submitted a certification stating that any disputes involving the Agreement were subject to arbitration and that Wine Source

"**never agreed** to have any disputes arising out of the Distribution Agreement to be decided by this [c]ourt." Plaintiff opposed the motion, arguing that defendant, through its attorney, "consistently represented to this [c]ourt . . . that this matter is properly before the [c]ourt and that they submit to the jurisdiction of this [c]ourt" and "have waived submitting this matter to arbitration."

The trial court found no such waiver. In its written opinion, the court noted that defense counsel "agreed to waive arbitration and have this matter heard by this [c]ourt." The court noted further that defense counsel "tacitly agreed to waive arbitration by failing to object when this [c]ourt asked whether 'both parties [are] waiving the arbitration provision?' and Plaintiff's counsel responded[,] 'That's correct, Your Honor.'" In addition, citing Jennings v. Reed, 381 N.J. Super. 217, 231 (App. Div. 2005), and Carlsen v. Carlsen, 49 N.J. Super. 130, 137 (App. Div. 1958), the court acknowledged that stipulations by attorneys and their clients before the court are enforceable. Nonetheless, the court reasoned that given the explicit language of the Agreement that "[n]o modification or waiver of any provision of this Agreement shall be effective unless in writing and signed by the parties," the absence of a document executed between the parties explicitly waiving

arbitration did not preclude defendant from "now seeking enforcement of the arbitration provision." We disagree.

II.

The trial court framed the issue before it as whether defendant waived its right to invoke the arbitration clause by consenting to having this matter heard in the Superior Court. It then properly concluded that resolution of the issue called for its construction of the Agreement executed between the parties, thus requiring its interpretation of the contractual language. Contract interpretation generally involves a question of law for disposition by the court. Adron, Inc. v. Home Ins. Co., 292 N.J. Super. 463, 473 (App. Div. 1996).

Our standard of review of a trial court's interpretation of a contractual provision is de novo. See Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995) (holding that "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference"). As such, we review the Agreement with a fresh look. Kieffer v. Best Buy, 205 N.J. 213, 223 (2011).

That fresh look unquestionably leads us to conclude, as did the trial court, that the Agreement expressly and unequivocally calls for arbitration of disputes between the parties and written modification of any of the terms of the Agreement. We

disagree, however, with the trial court's conclusion that there was no written modification of the arbitration provisions. We are persuaded the emails sent between September 24 and 28, 2010 satisfy the requirement that any modification of the terms of the agreement must be in writing and signed by the parties. Moreover, the parties' actions thereafter clearly and convincingly represent additional evidence demonstrating defendant's knowing and voluntary waiver of the arbitration provisions contained in the Agreement. See Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435-36 (1992) (holding that an offeree's conduct alone can manifest assent to terms of an offer); see also Home Owners Constr. Co. v. Glen Rock, 34 N.J. 305, 316-17 (1961) (holding that despite the existence of a term in a contract that all modifications must be in writing, "the writing requirement may be expressly or impliedly waived by the clear conduct or agreement of the parties or their duly authorized representatives").

"[I]t is the clear policy of our courts to recognize acts by the attorneys . . . . Consequently, an attorney is presumed to possess authority to act on behalf of the client[.]" Jennings, supra, 381 N.J. Super. at 231 (internal citations and quotations omitted). Thus, the emails exchanged between counsel must be construed as written modifications of the Agreement's

arbitration provision intended to bind both parties. While it is true that neither party actually signed a written document embodying those terms, to conclude that no modification occurred based on this omission amounts to exalting form over substance. See Historic Smithville Dev. Co. v. Chelsea Title & Guar. Co., 184 N.J. Super. 282, 293 (Ch. Div. 1981) (holding that a court will look "to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the 'real' relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction"), aff'd, 190 N.J. Super. 567 (App. Div. 1983).

Nor are we persuaded that the language in the emails referencing "suspending" the demand for arbitration pending a meeting between the parties during the week of October 11, 2010, combined with the fact that the parties never met during that week as contemplated, should result in a different outcome. In the September 28, 2010, 9:14 a.m. email, plaintiff's counsel requested that defense counsel revise his September 27, 2010 email to include, among other revisions, that "in the event the parties are unable to resolve all issues, and resort to the courts is deemed necessary, all such matters will be heard in the Superior Court of New Jersey" and that defense counsel would

accept service on behalf of defendant. Less than three hours later, defense counsel memorialized the proposed revisions by adding the aforesaid language to a subsequent email forwarded to plaintiff's counsel. Plaintiff's "resort to the courts" on October 11, 2010 not only reflects the parties' inability to amicably resolve the issues at that point, but is also consistent with the September 28 email that in the absence of an amicable resolution, plaintiff's remedies would be pursued in Superior Court.

Defense counsel's conduct was also consistent with the parties' mutual assent that the dispute would be resolved in Superior Court. Defense counsel accepted service of the summons and complaint on behalf of defendant. Following the October 15, 2010 hearing, defense counsel submitted opposition to the order to show cause, which did not raise the arbitration provision contained in the Agreement as a defense. Additionally, defendant filed an answer to the complaint in which it failed to expressly raise, as an affirmative defense, the court's lack of subject matter jurisdiction because of the arbitration provision contained in the Agreement.

Further, from our review of the transcript of the parties' first appearance before the court on October 15, 2010, it was not defense counsel who raised the issue of whether the matter

should proceed to arbitration. Rather, it was the court that inquired whether both parties were waiving the arbitration provision. Plaintiff's counsel responded affirmatively and advised the court that a letter had been sent to the AAA withdrawing the arbitration. Defense counsel, in response to the court's question whether he agreed with plaintiff's counsel's position, responded:

> I do. There is still [an] issue, actually[,] as to the jurisdiction requirement. We did have an agreement, but we never met and I'm not sure if that agreement is upheld. There was an email that set forth that there was going to be a meeting. And the not law [sic] defendants were -- in that. So I'm just letting Your Honor know I haven't had a chance to address it[. T]he arbitration was filed against Grape Solutions and R[io]ndo USA. Charles Mass[ie] is a resident of New Jersey. But as far as Cant[ine] R[io]ndo, I'm not sure this [c]ourt has jurisdiction over them. And as far as choice of law, that has not been discussed, because it clearly states a choice of law [as] New York. But I haven't had an opportunity to address that with the clients.

It is evident from this colloquy with the court that the jurisdictional issue being raised related to the court's personal jurisdiction over defendants, not parties to the Agreement, rather than the court's jurisdiction over the subject matter as it pertained to plaintiff and Wine Source. Moreover, plaintiff scheduled depositions, with one deposition actually

occurring prior to the return date of defendant's dismissal motion.

In short, the actions of the attorneys on behalf of their respective clients clearly and unequivocally evinced the parties' intent to waive arbitration. Although plaintiff's complaint had been pending for merely six months at the time defendant filed its motion to dismiss and does not approach the length of time the parties engaged in litigation before the question of removing the matter to arbitration arose in Wein v. Morris, 194 N.J. 364 (2008),[4] we are satisfied, as was the Court in Wein, that the parties' conduct here clearly and unequivocally reflects their mutual waiver of their right to arbitrate. Id. at 376.

Reversed.

[4] In Wein, the parties engaged in almost five years of discovery before the arbitration issue arose. Wein, supra, 194 N.J. at 376.