(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-04428-12T2

GOLF LUCKY PARTNERS,

Plaintiff-Respondent,

and

STEVEN STIL,

Plaintiff,

v.

PGG, LLC, t/a THE CLUB

AT PATRIOT'S GLEN, and

DAVID QUINN,

Defendants,

and

EDWARD QUINN,

Defendant-Appellant.

October 2, 2014

Argued January 23, 2014 – Decided

Before Judges Grall and Nugent.

On appeal from Superior Court of New Jersey, Chancery Division, Camden County, Docket No. C-151-09.

Richard B. Supnick argued the cause for appellant.

Diane R. Sever argued the cause for respondent (McDowell Posternock Law, P.C., attorneys; Daniel F. Posternock and Kurt David Raatzs, on the brief).

The opinion of the court was delivered by

NUGENT, J.A.D.

Defendant Edward Quinn (Quinn) appeals from two Chancery Division orders. The first order denied his motion to confirm an arbitration award in his favor against plaintiff Golf Lucky Partners (Golf Lucky); the second denied his motion for reconsideration. Although Golf Lucky

had not appealed the court's order compelling arbitration and had participated in the arbitration, it opposed Quinn's motion to confirm the arbitration award, asserting that the order compelling arbitration was void, the court having entered it in the absence of any agreement by the parties to arbitrate their dispute. The court agreed. We disagree. The trial court's order compelling arbitration was voidable, not void. Golf Lucky waived its right to dispute the court's order by failing to appeal and then participating in the arbitration. Accordingly, we reverse and remand for entry of judgment on the arbitration award.

Plaintiff Golf Lucky Partners, defendant Edward Quinn, and others not parties to this appeal, became embroiled in a dispute over the management of a golf course in which they had invested. Golf Lucky and Steven Stil filed a complaint against Quinn and others seeking injunctive relief and damages. The defendants filed an answer and counterclaim in which they alleged that plaintiffs had filed a frivolous complaint, maliciously interfered with the operation of the golf course, maliciously interfered with defendants' attempt to sell the golf course, and failed to repay debts they owed to defendants. Within six months of defendants filing the counterclaim, the parties entered into a settlement agreement, which they subsequently amended. The parties then became embroiled in a dispute over the terms of the settlement agreement.

Quinn filed two motions to enforce the settlement agreement. Although the court apparently delivered an opinion from the bench disposing of the first motion, the parties have represented that they could not agree upon the form of the order and that their disagreement about the form of the order was never resolved. The court disposed of the second motion by entering an order that "[t]he settlement . . . shall remain and the terms enforced." The order further provided:

> 2. The parties will submit the dispute as to what amounts are owed to binding arbitration, unless either party notifies the court within one weeks [sic] time of their choice to proceed

with the Maryland lawsuit to determine what amounts are owed; in which event the court will determine if the dispute will be subject to binding arbitration.

3. In the event of binding arbitration if the parties cannot agree on an arbitrator then each party shall separately submit three names of arbitrators to the court for the court to choose one or for the court to suggest someone else.

Neither the settlement agreement nor the amendment to that agreement contained an arbitration clause. Nevertheless, the parties did not file an appeal from the order. The arbitration took place seven months later, and a month after the hearing the arbitrator issued an award in favor of Quinn.

After Quinn received the arbitration award, he filed a motion seeking an order confirming the arbitration award and entering judgment in his favor in the amount of the award. Golf Lucky did not file a cross-motion to vacate, modify, or set aside the award. Rather, it opposed confirmation of the award based on its argument that the court had no authority to refer the dispute to binding arbitration.

Following oral argument, the court declined to confirm the arbitration award. Acknowledging that it made a mistake when it ordered the parties to proceed to binding arbitration, and concerned about what to do because Golf Lucky had not appealed from the order compelling arbitration, the court decided that since the action before it had been dismissed it did not have the authority "to do anything further on the binding arbitration." Consequently, the court denied Quinn's motion. Thereafter, the court denied Quinn's motion for reconsideration. This appeal followed.

The court entered its order compelling arbitration on March 26, 2012. Four years earlier, the Supreme Court held that "[t]o avoid further uncertainty in this area, and to provide a uniform procedure, we find it appropriate to deem an order compelling arbitration a final judgment appealable as of right . . . . In our view, that will provide uniformity, promote judicial economy, and assist the speedy resolution of disputes." Wein v. Morris, 194 N.J. 364, 380 (2008). The court "exercise[d] [its] rulemaking authority and amend[ed] Rule 2:2-3(a) to add an order of the court compelling arbitration to the list of orders that shall be deemed final judgments for appeal purposes." Ibid. "The Civil Practice Committee drafted a recommended amendment to the Rule to implement Wein, and in July 2010, [the Supreme Court] adopted the amendment, which became effective on September 1, 2010." GMAC v. Pittella, 205 N.J. 572, 583 (2011).

In Pittella, the Supreme Court held "that Rule 2:2-3(a) be further amended to permit appeals as of right from all orders permitting or denying arbitration." Id. at 586. Rule 2:2-3(a) has since been amended to implement that holding. Pittella was decided more than a year before the trial court in the case now before us entered the order compelling arbitration.

Golf Lucky does not dispute that the trial court's order compelling arbitration was a final order for purposes of appeal; nor does Golf Lucky attempt to explain why it did not appeal the order. Rather, it asserts that unlike Wein and Pittella, there was neither a statute nor an arbitration clause in the settlement agreement that compelled the parties to arbitrate their dispute.[1] Golf Lucky reasons that because there was no statutory or contractual obligation that required the parties to arbitrate their dispute, the court had no authority to compel arbitration, and the court's order compelling arbitration is therefore "void and not valid." We disagree.

The flaw in Golf Lucky's reasoning is that it wrongfully characterizes the court's order as void rather than voidable. A judgment is considered void "if there has been a failure to comply with a requirement which is a condition precedent to the exercise of jurisdiction by the court." James v. Francesco, 61 N.J. 480, 485 (1972) (citing Restatement of Judgments, § 8, comment b, pp. 46-

47 (1942)). A "voidable" judgment, on the other hand, is one that, "although seemingly valid, is defective in some material way; esp., a judgment that, although rendered by a court having jurisdiction, is irregular or erroneous." Black's Law Dictionary 848 (7th ed. 1999).

Here, the Superior Court, Chancery Division, had personal and subject-matter jurisdiction over the disputes before it. "The Superior Court shall have original general jurisdiction throughout the State in all causes." N.J. Const. art. VI, § 3, ¶ 2. The court erred in the manner in which it disposed of the controversy that properly fell within its jurisdiction. Consequently, the order was voidable, not void. The order was subject to the doctrine of waiver.[2]

Golf Lucky waived its right to contest the order compelling arbitration. We have previously explained that

> [t]he principle of waiver is invoked to assure that a party may not get two bites of the apple: if he chooses to submit to the authority and jurisdiction of an arbitrator, he may not disavow that forum upon the return of an unfavorable award. That important policy would be subverted if a party could enter a nominal objection to the arbitrator's jurisdiction, submit himself fully to the arbitration and still retain the option to demand a new hearing if he does not like the outcome of the arbitration. Reservation of an objection to the arbitration surely is a relevant fact in determining waiver. But that fact alone cannot be dispositive.
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> [Highgate Dev. v. Kirsh, 224 N.J. Super. 328, 333 (App. Div. 1988).]

The Supreme Court approved the Highgate approach in Wein, and provided further guidance to trial courts deciding whether a party who has participated in an arbitration has waived the right to later object to an arbitration award. Wein, supra, 194 N.J. at 383. The Supreme Court explained that

> the court should consider the totality of circumstances to evaluate whether a party has waived the right to object to arbitration after the matter has been ordered to arbitration and arbitration is held. Some of the factors to be considered in determining the waiver issue are whether the party sought to enjoin arbitration or sought interlocutory review, whether the party challenged the jurisdiction of the arbitrator in the arbitration proceeding, and whether the party included a claim or cross-claim in the arbitration proceeding that was fully adjudicated.
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> [Id. at 383-84.]

In concluding that the defendants in Wein had waived their right to contest the order compelling arbitration, the Supreme Court noted that

> it would be a great waste of judicial resources to permit defendants, after fully participating in the arbitration proceeding, to essentially have a second run of the case before a trial court. That would be contrary to a primary objective of arbitration to achieve final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner.

Id. at 384-85.

Significantly, the Court also noted that "[a] motion for leave to appeal, whether granted or not, would have been favorable evidence for defendants in deciding the waiver issue." Id. at 384.

Of course, orders compelling arbitration are no longer interlocutory, but are now considered final for purposes of appeal. Having had the right to appeal the court's order compelling arbitration, Golf Lucky's failure to do so is compelling, particularly in the absence of any explanation as to why it did not file an appeal before proceeding to arbitration.

Even assuming Golf Lucky objected to the court's order compelling arbitration, which Golf Lucky has represented that it did, and even considering the objection Golf Lucky made to the arbitrator, that he lacked jurisdiction to hear the dispute, those factors pale in comparison to the inexplicable failure to appeal the court's order. The consequence of that failure is that the parties have expended time and money arbitrating the case, all for naught if we accept Golf Lucky's argument. Considering those circumstances, we have no difficulty concluding that Golf Lucky waived its right to contest the order compelling arbitration.

For the foregoing reasons, we reverse the court's order denying Quinn's motion to confirm the arbitration award and remand this matter to the trial court to issue an order confirming the arbitration award and entering judgment in favor of Quinn.

Reversed and remanded.

1 Golf Lucky also asserts in its brief that it objected when the trial court entered the order compelling arbitration. Golf Lucky has not included a citation to the record to support that assertion, nor has it provided the transcript of the motion hearing in which it claims to have made the objection. See R. 2:6-1(a)(1)(I); 2:6-3; 2:6-2(a)(4); 2:6-4(a).

2 That is not to imply that that a party by its conduct either can or cannot waive the right to contest a void order. That issue is not before us and we do not address it.
