NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0930-14T4

GAIL KAMENSKY,

Plaintiff-Appellant,

v.

HOME DEPOT U.S.A., INC.
and FEDERAL WARRANTY SERVICE
CORPORATION,

Defendants-Respondents,

Submitted May 13, 2015 – Decided September 29, 2015

Before Judges Fuentes and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1606-13.

Kamensky Cohen & Riechelson, attorneys for appellant (Jerrold Kamensky, of counsel and on the brief; David S. Cerra, on the brief).

Dentons US, LLP, attorneys for respondents (John R. Vales, on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

Plaintiff Gail Kamensky appeals from the order of the Law Division dismissing her complaint against defendants, Home Depot U.S.A., Inc. and Federal Warranty Service Corporation (Federal),

and compelling her to adjudicate her common law claims of fraud and various violations of consumer protection laws before an arbitrator, pursuant to an arbitration provision contained in an extended service contract. We affirm.

On May 30, 2011, plaintiff purchased a washing machine from defendant Home Depot U.S.A., Inc., and an extended service contract offered to her by Home Depot's sales staff at the checkout counter. The record shows plaintiff paid $99.95 for the extended service protection provided by Federal. Paragraph thirteen of this multipage extended service contract contains an arbitration provision requiring "[a]ny and all claims, disputes, or controversies of any nature whatsoever" connected with the contract to "be resolved by binding arbitration before a single arbitrator."[1]

Plaintiff experienced mechanical problems with the washing machine on August 27, 2012. She contacted Federal and scheduled a service appointment for a particular date between the hours of noon and five in the afternoon. Plaintiff took a half-day off

[1] The complete arbitration clause comprehensively describes the nature of all the various potential causes of action that are subject to arbitration and selects the American Arbitration Association to administer the arbitration process and provide the arbitrator. Finally, the arbitration clause has severability language preserving the forum selection provision even if any ancillary procedural section of the arbitration process is deemed unenforceable.

from work because she wanted to be present to explain the problem to the service mechanic. At approximately 2:30 p.m., plaintiff received a recorded message from Federal advising her she needed to reschedule the service appointment because no one was available to repair the washing machine that day.

According to plaintiff, she made a second service appointment and again took a half-day off from work. No one from Federal responded to the service call. A representative from Federal informed plaintiff the company was unable to "guarantee" that a technician would be available on any specific date because the schedule is not available until the day of the appointment. Plaintiff had the washing machine repaired by a third-party.

On July 29, 2013, plaintiff filed a complaint in the Superior Court, Law Division against Home Depot and Federal alleging common law fraud, negligent misrepresentation, and negligence - violations of the Magnuson-Moss Warranty Improvement Act, 15 U.S.C.A. §§ 2301 to 2312, and the Unfair Trade Practices and the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -109.[2] In lieu of an answer, Federal filed a motion to

[2] It is undisputed plaintiff did not seek to cancel or rescind the contract in exchange for a partial refund, as provided for in paragraph eleven of the extended service contract.

compel arbitration and dismiss plaintiff's complaint, or alternatively to stay the action. Represented by the same attorneys, Home Depot filed an answer and affirmative defenses. Three weeks later, Home Depot joined in Federal's motion to compel arbitration. Plaintiff opposed both motions.

After the parties engaged in limited discovery and motion practice related to the case's track assignment, the court heard oral argument on defendants' motion to dismiss and compelled arbitration on August 4, 2014. The court granted defendants' motions to compel arbitration, but stayed the final dismissal of plaintiff's complaint pending the outcome of the arbitration proceedings. The court made this decision to preserve plaintiff's right to prosecute any claims the arbitrator found to be beyond the scope of the arbitration clause. The court also denied plaintiff's subsequent motion for reconsideration.

Plaintiff now appeals arguing the trial court erred in not voiding the extended service contract in its entirety based on fraud in the inducement, the absence of a meeting of the minds between the parties, and defendants' violation of the CFA. Defendants argue the trial court properly enforced the forum selection clause. Defendant also noted plaintiff had the right to present evidence in support of her claims of fraud and other

alleged violations of consumer protection laws before the arbitrator.

Orders compelling or denying arbitration are deemed final for purposes of appeal. R. 2:2-3(a); GMAC v. Pittella, 205 N.J. 572, 587 (2011). The "'interpretation of an arbitration clause is a matter of contractual construction that this court should address de novo.'" NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 430 (App. Div. 2011) (quoting Coast Auto. Grp., Ltd. v. Withum Smith & Brown, 413 N.J. Super. 363, 369 (App. Div. 2010)), appeal dismissed, 213 N.J. 47 (2013). A "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). We review orders compelling or denying arbitration mindful of the strong preference to enforce arbitration agreements, both at the state and federal level. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013).

Plaintiff's arguments attacking the enforceability of the arbitration clause under the circumstances of this case are unavailing. The Federal Arbitration Act (FAA), 9 U.S.C.A. § 1 to -16, which governs the extended service contract we review here, reflects a strong federal policy favoring arbitration.

Foulke, supra, 421 N.J. Super. at 424 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785 (1983)). "New Jersey law comports with its federal counterpart in striving to enforce arbitration agreements." Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254, 257 (App. Div.), certif. denied, 170 N.J. 205 (2001). Given their favored status, arbitration agreements must be read liberally in favor of enforcement. Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001).

However, this preference for arbitration is not limitless. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 441 (2014). We are authorized to invalidate an arbitration clause if it violates common law contract defenses like fraud, duress, or unconscionability. Ibid. As with any other contract, an agreement to arbitrate must have been the product of mutual assent. Id. at 442. A legally enforceable agreement requires a "meeting of the minds." Ibid. Stated differently, parties are not required to arbitrate when they have not agreed to do so. The concept of mutual assent requires: (1) a bilateral understanding of the terms of the agreement; (2) a knowing waiver of the rights to seek judicial redress; (3) evidence showing the party had full knowledge of her legal rights; and

(4) the party intended to surrender those rights. Ibid. Because "arbitration involves a waiver of the right to pursue a case in a judicial forum, 'courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.'" Id. at 442-43 (internal citations omitted).

Here, there is no question that the extended service contract plaintiff signed is a contract of adhesion. As defined by the Supreme Court, contracts of adhesion are those presented on a take-it-or-leave-it basis, in a standardized printed form, without opportunity for the "adhering" party to negotiate. Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353, cert. denied sub nom., First Fid. Bank v. Rudbart, 506 U.S. 871, 113 S. Ct. 203, 121 L. Ed. 2d 145 (1992). However, contracts of adhesion are not per se unenforceable.

The arbitration clause contained within the extended service contract is clearly denoted "Arbitration," and situated within its own section. The first paragraph of the clause appears in bold-face type and instructs the purchaser to "Read The Following Arbitration Provision ("Provision") Carefully. It Limits Certain Of Your Rights, Including Your Right To Obtain Relief or damages Through Court Action." The arbitration clause is not concealed or minimized within the extended service

contract. Home Depot was not obligated to alert plaintiff of its existence. Gras v. Assocs. First Capital Corp., 346 N.J. Super. 42, 56 (App. Div. 2001). Absent extraordinary circumstances relating to a party's competence, failure to read a contract or misunderstanding its legal import does not provide a basis for a court to decline enforcing it. Id. at 57.

Plaintiff accepted the terms contained within the extended service contract when she signed the credit card receipt confirming its purchase. She understood its legal significance when she subsequently attempted to take advantage of the services Federal agreed to provide. Furthermore, Section Eleven of the contract described a procedure to cancel the contract in exchange for a refund. In short, plaintiff could have cancelled the contract if she found any of its terms unacceptable. See Curtis v. Cellco P'ship, 413 N.J. Super. 26, 32 (App. Div.), certif. denied, 203 N.J. 94 (2010).

Plaintiff's claims of fraud in the inducement are predicated on her establishing Home Depot offered this service contract knowing Federal did not intend to honor its contractual obligations to service the washing machine. Plaintiff is free to raise this argument with the arbitrator. The forum selection clause does not preclude plaintiff from raising this common law

claim. It merely obligates her to present evidence of her claim before an arbitrator, instead of a judge and jury.

Based on the same legal principles, plaintiff may raise her CFA claims before the arbitrator. "There is no inherent conflict between arbitration and the underlying purposes of the CFA." Gras, supra, 346 N.J. Super. at 52. Arbitration rules allow CFA plaintiffs to vindicate their statutory rights in the arbitration forum. Id. at 53. Arbitrators are permitted to grant any remedy or relief that is just and equitable, assess and apportion fees, expenses, and compensation, and provide for interest or attorney's fees if authorized by law or agreement. Ibid. (citing AAA Arbitration Rule R-45(a); Rule R-45(c); Rule R-45(d)).

Affirmed.