NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5835-13T3

MOSHOOD D. SERIKI,

Plaintiff-Respondent,

v.

UNIQLO NEW JERSEY, L.L.C.,

Defendant-Appellant.

Argued January 6, 2015 – Decided July 14, 2015

Before Judges Yannotti, Fasciale and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-1879-14.

Keith J. Rosenblatt argued the cause for appellant (Littler Mendelson, P.C., attorneys; Mr. Rosenblatt and Jeannine R. Idrissa, on the briefs).

Alan Genitempo argued the cause for respondent (Piro, Zinna, Cifelli, Paris & Genitempo, L.L.C., attorneys; Mr. Genitempo, on the brief).

PER CURIAM

Defendant Uniqlo New Jersey, L.L.C., appeals from a July 11, 2014 Law Division order denying its motion to compel arbitration of the wrongful discharge complaint of its employee, plaintiff Moshood D. Seriki. We remand for an evidentiary

hearing to determine whether plaintiff clearly and unambiguously assented to arbitration.

I.

We discern the following facts from the motion record. Plaintiff began working as a loss prevention associate for defendant, a retail department store, in August 2012. On December 13, 2012, plaintiff attended a training session at defendant's human resources office. During this meeting, revised copies of defendant's employee handbooks were handed out along with a four-page document entitled Mutual Agreement to Arbitrate Claims (the "Agreement"). The following sentence appears in bold in the first paragraph of the Agreement: "All disputes covered by this Agreement between Employee and EMPLOYER shall be decided by an arbitrator through arbitration and not by way of court or jury trial." Further down on the first page, the Agreement provides, "Except as otherwise provided herein, this Agreement applies, without limitation, to any claims based upon or related to discrimination, harassment, retaliation, . . . [and] termination[.]"

The key provision at issue in this case appears on the bottom of the third page of the Agreement:

> Should Employee not sign this Agreement, continuing Employee's employment for a period of [thirty] days after Employee's receipt of this Agreement constitutes mutual

> acceptance of the terms of this Agreement commencing upon completion of that [thirty]-day period.

This is the only clause in the agreement that references implied mutual acceptance.

Kelly St. Hilaire, a human resource manager for defendant, certified that she explained the Agreement, including the paragraph on implied mutual acceptance, during the December 13, 2012 meeting. Plaintiff admits attending the meeting and receiving the Agreement, but certified that the Agreement was not discussed. According to plaintiff, St. Hilaire neither read the Agreement at the meeting, nor did she mention that the arbitration program was mandatory, that it was a condition of continued employment, or that thirty days of continued employment from receipt of the Agreement would constitute acceptance.

In the same meeting, plaintiff signed an acknowledgement of receipt of the employee handbook that stated, "I understand that I am responsible for reading and complying with the information contained in the [the employee handbook.]" The form also stated, "I further understand and agree that the . . . [e]mployee [h]andbook [is] not [a] contract[.]"

Plaintiff continued to work for defendant for another four months, until his discharge in April 2013. On March 19, 2014,

plaintiff filed a complaint asserting claims for wrongful discharge due to unlawful retaliation and discrimination.

Defendant moved for summary judgment, arguing that plaintiff's complaint must be resolved by final and binding arbitration pursuant to the terms of the Agreement. The Law Division denied the motion, concluding that plaintiff was not bound by the Agreement because he did not sign it.

On appeal, defendant argues that the motion judge erred in concluding that a signature was required to bind plaintiff to the Agreement. Defendant asserts that federal law prohibits the imposition of more cumbersome formation requirements than those applicable to other contracts, and that plaintiff assented to the Agreement by continuing his employment for four months after receiving the Agreement.

II.

We review motions for summary judgment, as well as interpretations of contracts, de novo. Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014). We first determine whether the moving party has demonstrated there are no genuine disputes as to material facts, and then we decide "whether the motion judge's application of the law was correct." Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006). In so doing, we

view the evidence in the "light most favorable to the non-moving party . . . ." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). We accord no special deference to the motion judge's legal conclusions. Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan, 140 N.J. 366, 378 (1995).

The Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1 to 16, and the nearly identical New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, enunciate federal and state policies favoring arbitration. Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006) (noting that the Legislature, in enacting the New Jersey Arbitration Act, codified existing judicial policy favoring arbitration as a "means of dispute resolution"). A provision requiring arbitration stands on equal footing with other contract provisions. Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687, 116 S. Ct. 1652, 1656, 134 L. Ed. 2d 902, 909 (1996).

However, arbitration's "favored status . . . is not without limits." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001). Invalidation of an arbitration agreement does not necessarily contradict the FAA. See Campbell v. Gen. Dynamics Gov't Sys. Corp., 407 F.3d 546, 558-59 (1st Cir. 2005) (holding that an employer's e-mail linking to a brochure did not serve as sufficient notice of the

employer's mandatory arbitration policy, and thus concluding the employee was not bound to arbitrate).

Although it is firmly established that the FAA preempts state laws that invalidate arbitration agreements, the FAA permits states to regulate contracts containing arbitration agreements under the state's general contract principles. 9 U.S.C.A. § 2; accord, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985, 993 (1995). An arbitration clause may be invalidated, "'upon such grounds as exist at law or in equity for the revocation of any contract.'" Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2002) (quoting 9 U.S.C.A. § 2).

Moreover, 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." NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 425 (App. Div. 2011), appeal dismissed, 213 N.J. 45 (2013). Mutual assent to an agreement requires mutual understanding of its terms. Atalese v. U.S. Legal Servs. Grp, L.P., 219 N.J. 430, 442-48 (2014) (denying a motion to compel arbitration on the grounds that "the wording of the service agreement did not clearly and

unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court"), cert. denied, ___ U.S. ___, ___ S. Ct., ___ L. Ed. 2d ___ (2015).

Any contractual waiver-of-rights provision must reflect that the party has agreed "clearly and unambiguously" to its terms. Leodori v. Cigna Corp., 175 N.J. 293, 302 (2003), cert. denied, 540 U.S. 938, 124 S. Ct. 74, 157 L. Ed. 2d 250 (2003); see e.g. Dixon v. Rutgers, State Univ. of N.J., 110 N.J. 432, 460-461 (1988) (holding that collective bargaining agreement cannot deprive one of statutory rights to evidentiary materials in anti-discrimination cases because, "[u]nder New Jersey law[,] for a waiver of rights to be effective it must be plainly expressed"). If a waiver-of-rights provision is to be enforceable it "requires some concrete manifestation of the employee's intent as reflected in the text of the agreement . . . ." Garfinkel, supra, 168 N.J. at 135.

While signatures are customary and desirable, a contract may be enforceable upon proof of some other explicit indication of intent to be bound. Leodori, supra 175 N.J. at 305. Within the context of arbitration, continued employment has been found to constitute sufficient consideration in New Jersey. Quigley v. KPMG Peat Marwick, L.L.P., 330 N.J. Super. 252, 265 (App. Div.) ("[E]mployment can be deemed consideration for an

employee's submission to various demands of an employer."), certif. denied, 165 N.J. 527 (2000). However, "[w]hen one party . . . presents a contract for signature to another party, the omission of that other party's signature is a significant factor in determining whether the two parties mutually have reached an agreement." Leodori, supra, 175 N.J. at 305.

In Leodori, the employer distributed a handbook that included an arbitration clause. Id. at 297. The plaintiff signed a form acknowledging receipt of that handbook. Ibid. The employer also gave plaintiff a separate form acknowledging agreement to the terms contained in the handbook. Id. at 297-98. This form specifically mentioned that arbitration is a condition of continued employment. Id. at 298. The plaintiff did not sign the second form. Ibid. The plaintiff then received the following e-mail from the employer:

> Upon reflection, and based upon your feedback, we are removing the link between signing the Handbook receipt and future compensation and benefits actions. We now believe that the recent high level of visibility and dialogue around the Handbook more than meets the test of ensuring that everyone is fully aware of company policy and eliminates the need for potential penalties.
>
> For those of you who have not yet acknowledged receipt of the Handbook, a simplified form similar to those we have used in prior years is available from your supervisor. For those who already have

> signed the original receipt, you need take no further action; however, if you would like, you can request and sign the revised form.
>
> [Id. at 299]

Although finding the actual waiver-of-rights provision in the handbook unambiguous, the Court was unable to conclude that the plaintiff clearly agreed to it and therefore held the provision invalid, as applied to the plaintiff. Id. at 295.

III.

In light of the applicable law and conflicting certifications submitted, absent an evidentiary hearing, the motion court erred in concluding plaintiff was not subject to the Agreement. The absence of plaintiff's signature did not conclusively reflect either assent or lack of assent. There remains an issue of fact regarding whether plaintiff was aware that his continued employment for thirty days would bind him to the Agreement, regardless of the absence of a signature.

Plaintiff claims he did not read the Agreement, and that it was never explained to him that he was implicitly agreeing to its terms by continuing to work for defendant for more than thirty days. Defendant asserts that plaintiff attended a meeting where the Agreement was read and explained to him. Without conducting an evidentiary hearing, and on the basis of the written submissions alone, the motion judge rejected

defendant's assertion that plaintiff agreed to submit any employment claims to arbitration.

Although we do not treat the sworn assertions of defendant's human resources manager as necessarily credible or conclusive, we are persuaded that the motion judge should have conducted an evidentiary hearing to test the veracity of plaintiff's assertions before concluding that plaintiff had not clearly agreed to arbitrate his claims. We therefore remand this matter to the Law Division for a full hearing, so that the motion judge may have the opportunity to assess the demeanor and credibility of plaintiff, defendant's human resource manager, and any other witnesses with relevant knowledge. With the benefit of an amplified record, the court can then determine if, in the absence of plaintiff's signature, there is "some other unmistakable indication that [plaintiff] affirmatively . . . agreed to arbitrate his claims." Leodori, supra, 175 N.J. at 307.

By ordering a remand, we do not preordain the outcome of the proceeding. The court may well reach the conclusion that plaintiff did not clearly agree to arbitrate his claims. We simply hold, as a procedural matter, that a plenary hearing is necessary. To expedite this matter, the court shall conduct a case management conference within thirty days of this opinion,

at which time the necessary hearing may be scheduled, and the exchange of any discovery germane to that hearing coordinated.

Vacated and remanded. We do not retain jurisdiction.