NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1157-14T1

BARRY M. EPSTEIN, ESQ. and
BARBARA G. QUACKENBOS, ESQ.,

Plaintiffs-Respondents,

v.

WILENTZ, GOLDMAN & SPITZER, P.A.,

Defendant-Appellant.

Argued July 14, 2015 – Decided January 22, 2016

Before Judges Kennedy and Hoffman.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4169-14.

Gregory C. Parliman argued the cause for appellant (Day Pitney, attorneys; Mr. Parliman, of counsel and on the briefs; Jeffrey A. Gruen, on the briefs).

Bruce P. McMoran argued the cause for respondent (McMoran, O'Connor & Bramley, attorneys; Mr. McMoran, of counsel and on the brief; Douglas S. Bramley, on the brief).

PER CURIAM

Defendant appeals the denial of its motion to dismiss the complaint pursuant to R. 4:6-2(e). Although the motion broadly asserted that plaintiffs' complaint - alleging that defendant

law firm terminated their employment in violation of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -14, and Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 73 (1980) - was substantively inadequate, defendant has limited this appeal to the issue of whether the Law Division erred in denying dismissal and refusing to compel arbitration.[1]

Defendant argues that incorporating the American Arbitration Association (AAA) rules and procedures into the arbitration clause provides "clear and unmistakable evidence" of the parties' intention to authorize the arbitrator to decide all questions of arbitrability. Consequently, defendant submits that the Law Division erred in ignoring the parties' intent when it implicitly arrogated to itself the task of construing the agreement.

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[1] Defendant filed a notice of appeal of this interlocutory order as of right, see R. 2:2-3(a), seeking reversal of the order insofar as it denied the motion to compel arbitration. It is clear that other aspects of the order unrelated to the arbitrability determination are not appealable as of right. Other aspects of an interlocutory order are reviewable only in the exercise of our sole discretion. See Edwards v. McBreen, 369 N.J. Super. 415, 420 (App. Div. 2004); Towpath Unity Tenants Ass'n v. Barba, 182 N.J. Super. 77, 81 (App. Div. 1981); see also Henry Heide, Inc. v. WRH Prods. Co., 766 F.2d 105, 112 (3d Cir. 1985). Accordingly, we do not consider denial of the motion to dismiss, generally; we consider only whether plaintiffs were required to arbitrate any or all of the claims alleged without deciding whether any of those claims state a claim upon which relief may be granted.

We have carefully considered these arguments in light of the law and the limited record before us and we affirm. Whether the parties are bound by an agreement to arbitrate, and, if so, whether the agreement ascribes to the arbitrator, rather than the court, the preliminary task of deciding if plaintiffs' claims are subject to arbitration, are so exquisitely fact sensitive that we find no fault in the trial judge's order at this stage of the litigation.[2] Further, we reject defendants' argument that the mere reference to the AAA's "Rules and Procedures" in the arbitration clause, without more, requires a court to refer all questions about arbitrability to an arbitrator.

Briefly, the facts are as follows. Plaintiffs are attorneys who started working for defendant in July 2007. During their employment, they represented the plaintiffs in a class action lawsuit against Aetna. In that action, they alleged that Aetna knowingly used flawed data in setting the "usual customary and reasonable" rates they paid to out-of-network providers, thereby systematically underpaying benefits to the detriment of subscribers and providers.

[2] The remarks of the Law Division judge, fairly read, do not support the claims that the judge arrogated to himself the task of deciding the issue of arbitrability, in any event. Rather, the judge's remarks simply reflected appropriate caution in considering motions to dismiss on pleadings alone.

Plaintiffs were fired by defendant, effective June 2013, without notice or explanation. Thereafter, plaintiffs brought the present action, in which they claimed they were fired because they opposed an allegedly unethical and grossly inadequate proposal to settle the Aetna litigation favored by defendant's "senior management" in order to ". . . get paid the millions of dollars in attorney's fees and costs" from the settlement fund.[3] Rather than answer the two-count complaint, defendant moved to dismiss pursuant to R. 4:6-2(e).

The motion was supported by a certification from a shareholder in the defendant law firm who claimed that plaintiffs were also "shareholders" subject to section 6.10 in the shareholder agreement, which stated:

> Any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration in Woodbridge, New Jersey, in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon any award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof.[4]

Defendant's counsel also submitted a certification which contained a copy of the AAA's "Commercial Arbitration Rules and Mediation Procedures" amended on October 1, 2013. Rule 7

[3] The Aetna settlement proposal was later withdrawn.
[4] This was the only part of the agreement provided to the Law Division.

provides that the arbitrator "shall have the power to rule on his or her own jurisdiction" including "the arbitrability of any claim or counterclaim."[5]

Defendant, while conceding that the clause is identical to the clause at issue in Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 127 (2001), nonetheless argues that the Supreme Court never considered the effect of the reference to the AAA rules. Defendant adverts to a number of out-of-state opinions which suggest that by incorporating the AAA arbitration rules in their arbitration agreement, the parties have "clearly and unmistakably" evidenced their intent to commit to the arbitrator issues pertaining to the arbitrability of a claim.

In order to avoid any misconstruction of our decision, we pause to explain that the question before us requires a three-step analysis. Initially, a court must decide whether the parties had entered any contract at all governing post-separation claims. If the answer to the first question is affirmative, then the court must decide whether that contract

[5] It is unclear whether the AAA's "Commercial Arbitration Rules" were the intended object of the citation. Moreover, the version cited by defendant was amended in October 2013, whereas the termination occurred in June 2013. The record does not explain whether the commercial arbitration rules had changed at all following the date plaintiffs were hired and the date they were fired.

requires arbitration of all, some or none of the post-separation claims. If the agreement does require arbitration of post-separation claims, then the court must decide whether the claims raised by the plaintiff are subject to arbitration or whether that decision — the so-called "arbitrability" issue - has been, by agreement of the parties, committed to the arbitrator.

We begin by setting forth the principles that guide our analysis. The existence of a valid and enforceable arbitration agreement poses a question of law, and as such, our standard of review of an order denying a motion to compel arbitration is de novo. Hirsch v. Amper Fin. Servs., L.L.C., 215 N.J. 174, 186 (2013); Frumer v. Nat'l Home Ins. Co., 420 N.J. Super. 7, 13 (App. Div. 2011).

A legally enforceable agreement requires "a meeting of the minds." Morton v. 4 Orchard Land Trust, 180 N.J. 118, 120 (2004). Parties are not required "to arbitrate when they have not agreed to do so." Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S. Ct. 1248, 1255, 103 L. Ed. 2d 488, 499 (1989); see Garfinkel, supra, 168 N.J. at 132.

An agreement to arbitrate "must be the product of mutual assent, as determined under customary principles of contract law." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430,

442 (2014), cert. denied, ___ U.S. ___, 135 S. Ct. 2804, 192 L. Ed. 2d 847 (2015). Mutual assent requires that the parties understand the terms of their agreement. Ibid.

Therefore, "[a]lthough the public policy of this State is to favor arbitration as a means of settling disputes which otherwise would go to court, it is equally true that the duty to arbitrate, and the scope of the arbitration, are dependent solely on the parties' agreement." Cohen v. Allstate Ins. Co., 231 N.J. Super. 97, 100-101 (App. Div.) (citations omitted), certif. denied, 117 N.J. 87 (1989); see also Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 556 (2015). "In evaluating the existence of an agreement to arbitrate, a court 'consider[s] the contractual terms, the surrounding circumstances, and the purpose of the contract.'" Hirsch, supra, 215 N.J. at 188 (alteration in original) (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)).

"'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 148-49 (App. Div. 2008) (quoting AT&T Techs., Inc. v. Commc'ns Workers of America, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648, 655 (1986)); Lederman

v. Prudential Life Ins. Co., 385 N.J. Super. 324, 344 (App. Div.), certif. denied, 188 N.J. 353 (2006).

"'Subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be.'" Garfinkel, supra, 168 N.J. at 132 (quoting In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 228-29 (1979)). In considering whether an agreement includes a waiver of a party's right to pursue a case in a judicial forum, "clarity is required." Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 37 (App. Div. 2010). That is, the waiver "must be clearly and unmistakably established," Garfinkel, supra, 168 N.J. at 132, and "should clearly state its purpose." Marchak, supra, 134 N.J. at 282.

The parties must have full knowledge of the legal rights they intend to surrender. Knorr v. Smeal, 178 N.J. 169, 177 (2003). Although an arbitration clause need not identify "the specific constitutional or statutory right guaranteeing a citizen access to the courts" that is being waived, it must "at least in some general and sufficiently broad way" convey that parties are giving up their right to bring their claims in court or have a jury resolve their dispute. Atalese, supra, 219 N.J. at 447. An arbitration agreement that fails to "clearly and

unambiguously signal" to parties that they are surrendering their right to pursue a judicial remedy renders such an agreement unenforceable. Id. at 448.

Although we might go further and review the wealth of case law which contravenes defendant's substantive view of the enforceability of the agreement,[6] we see little point in doing so. Because the first question to be answered is whether there is an agreement between the parties, we affirm the trial court's holding at this stage of the litigation. Whether the parties intended to enter a contract at all governing post-employment claims cannot be decided on this barren record. Both plaintiffs deny they entered any agreement which would govern post-separation claims. Because these issues require the court to ascertain the intent of the parties, and related state of mind issues, granting a motion to dismiss on the basis of the pleadings would have been error.

Now, if after an appropriate basis has been provided which would allow a court to hold that the parties did enter into a

[6] "'A clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue.'" Garfinkel, supra, 168 N.J. at 132 (quoting Marchak, supra, 134 N.J. at 282). For that reason, "a party's waiver of statutory rights 'must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.'" Ibid.

contract that includes section 6.10, the next step in the analysis is whether the parties intended the contract to require questions of arbitrability to be decided by the arbitrator or by the court. Again, this fact specific question cannot be conclusively decided on the record before us.

As we stated earlier, we look to the language of the agreement to determine if the parties intended to waive their right to litigate their claim in court, as well as the breadth of the arbitrator's jurisdiction. Contract provisions are to be "read as a whole, without artificial emphasis on one section, with a consequent disregard for others." Borough of Princeton v. Bd. of Chosen Freeholders of Cty. of Mercer, 333 N.J. Super. 310, 325 (App. Div. 2000), aff'd, 169 N.J. 135 (2001). "Literalism must give way to context." Ibid. (citation omitted). A court must keep in mind "the contractual scheme as a whole," Republic Bus. Credit Corp. v. Camhe-Marcille, 381 N.J. Super. 563, 569 (App. Div. 2005) (quoting Newark Publishers' Ass'n v. Newark Typographical Union, 22 N.J. 419, 426 (1956)), and "the objects the parties were striving to attain." Celanese Ltd. v. Essex Cty. Imp. Auth., 404 N.J. Super. 514, 528 (App. Div. 2009) (citations omitted).

Parties to a contract can express their intention to arbitrate their disputes rather than litigate them in court,

without employing any special language. An arbitration clause is generally not required:

> to identify the specific constitutional or statutory right guaranteeing a citizen access to the courts that is waived by agreeing to arbitration. But the clause, at least in some general and sufficiently broad way, must explain that the plaintiff is giving up [the] right to bring [the] claims in court or have a jury resolve the dispute.
>
> [Atalese, supra, 219 N.J. at 447.]

These principles of construction, which have long been a part of New Jersey jurisprudence, require us to reject defendant's argument that a single reference to AAA rules is a sufficient basis on which to conclude that the parties intended to submit issues of arbitrability to an arbitrator, rather than a court. Such a narrow focus would be inconsistent with the repeated admonition of our Supreme Court that in construing these agreements, courts must undertake a broad-reaching inquiry and avoid artificial emphasis on one phrase to the exclusion of others within the document. See Ibid.

Affirmed.