SUPERIOR COURT OF NEW JERSEY

ROBERT L. POLIFRONI, P.J.Cv.
CIVIL DIVISION

BERGEN COUNTY JUSTICE CENTER
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July 21, 2017

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RE: Fidelity & Deposit Company of Maryland v. Frawley
Docket No. BER-L-4103-16

Dear Counsel:

This matter comes before the court by way of defendant's contested motion for summary judgment. Oral argument was heard by this court on July 7, 2017.

BACKGROUND

The complaint was filed on May 25, 2016 sounding in tort. By way of brief background, this matter arises from defendant's alleged conversion, breach of duty of loyalty, unjust enrichment, and breach of employment contract.

LEGAL ARGUMENTS

Defendant's Motion for Summary Judgment

Defendant asserts in 1980 she was employed by Radio and Telephone Broadcast Engineers Union, Local 1212 International Brother of Electrical Workers (hereinafter "IBEW"), located in New York. On August 1, 2004, she and IBEW entered into a written agreement (hereinafter "the Agreement") prepared and drafted by IBEW. On November 10, 2014, she was terminated. Prior

to the termination date, the agreement was never amended, suspended or terminated. Section six (6) of the agreement contains an arbitration provision, providing:

> 6. Any dispute, complaint, controversy, claim or grievance whatsoever between Frawley and the Union which directly or indirectly arises under, out of or in connection with this Agreement may be submitted to arbitration by either party upon notice to the other party under and pursuant to the labor arbitration rules of the American Arbitration Association. No complaint, controversy, claim or grievance shall be submitted to arbitration unless either party gives notice to the other, which notice must be given not later than thirty (30) days from the date the dispute, complaint or grievance arose. Each party shall bear their costs and expenses of arbitration and the cost of the arbitration shall be divided equally between the parties. [Frawley Certification Ex. E].

Prior to the termination date, neither party served a Notice of Arbitration upon the other. On November 10, 2014, IBEW filed a claim with its insurer, plaintiff, alleging irregularities and improprieties by its former employee, defendant. Defendant asserts all of IBEW's alleged claims arose out of and are in connection with IBEW and defendant's employer-employee relationship. Plaintiff paid certain amounts in claims to IBEW, after which IBEW assigned its rights, if any, against defendant. For the purposes of this action, plaintiff is IBEW's subrogee.

Defendant argues the court should apply New York law with respect to the construction, interpretation and enforcement of the August 1, 2004 Agreement. Defendant maintains other than her New Jersey residence, all contacts regarding the Agreement, including negotiation, execution, performance and subject matter, are New York based. Defendant emphasizes New York public policy favors arbitration as an efficient means of resolving disputes, particularly where the arbitration clause is sufficiently broad. As such, defendant argues the Agreement contains a broad arbitration clause mandating adjudication of any claim or dispute via arbitration. Defendant maintains plaintiff's claims are covered by the broad language of the Agreement. Additionally, defendant adds the use of the word "may" in the Agreement refers to a party's choice to bring a claim, not choice of forum. IBEW chose to file its claims against defendant with plaintiff. Thus, defendant argues plaintiff is bound by IBEW's waiver of its claims.

Defendant argues the court should grant summary judgment dismissing plaintiff's complaint with prejudice pursuant to R. 4:46-2(c). Defendant reiterates she and IBEW entered into a written agreement, whereby the parties agreed "[a]ny dispute, complaint, controversy, claim or grievance whatsoever concerning defendant's employment be resolved via arbitration." See [Frawley Ex. E]. Accordingly, the parties mutually waived their right to bring an action in a court of law. Moreover, plaintiff, as IBEW's subrogee, is bound by the arbitration clause. Because IBEW and

plaintiff failed to submit their claims to arbitration within the required time period, plaintiff cannot avail itself of either the judicial or the arbitration forum.

Additionally, defendant argues plaintiff, as IBEW's subrogee, has no independent right of action against her. Rather, plaintiff's causes of action are derivative of IBEW's rights, if any, against defendant. As such, defendant argues all rights and defenses available to her against IBEW are viable against plaintiff. Accordingly, plaintiff is bound by the Agreement to provide timely notice of its intent to arbitrate, and to timely arbitrate any claims against her. Both IBEW and plaintiff have failed to do so, thus, defendant argues plaintiff's claims must be dismissed.

Plaintiff's Opposition

Plaintiff agues defendant's motion should be denied, as it is factually and legally meritless. Plaintiff asserts whether New Jersey or New York law governs the enforcement of the arbitration provision depends on a New Jersey's choice-of-law analysis, citing Fu v. Fu, 160 N.J. 108, 117 (1999) ("Because New Jersey is the forum state, the issue must be determined in accordance with this State's choice-of-law rules."). Plaintiff maintains the parties' signing of the agreement in New York is only one factor among others to be considered. Plaintiff adds both parties have substantial contacts with New Jersey, as defendant resides in, and plaintiff does business in, New Jersey. Nevertheless, plaintiff argues a choice-of-law analysis is unnecessary because New Jersey procedural law applies to the arbitrability of this dispute, even if a different state's substantive law governs.

Plaintiff argues defendant's motion is belated, thus, defendant waived any right she had to demand arbitration, citing Cole v. Jersey City Med. Ctr., 215 N.J. 265, 277 (2013) (identifying seven factors to consider when determining whether a party waived its right to demand arbitration). Plaintiff asserts defendant's motion is delayed, as it was filed over 330 days into the 360 discovery period. The parties have actively litigated the claims before the court, with no mention of arbitration, as motions have been filed and non-binding mediation has been ordered. The parties have conducted extensive discovery. Defendant belatedly raised arbitration as an affirmative defense in her amended answer on May 10, 2017, twelve months after plaintiff filed its complaint. Finally, transferring this dispute to arbitration would prejudice plaintiff, as plaintiff has expended significant resources in prosecuting its claims. Thus, plaintiff argues defendant's motion is untimely.

Alternatively, plaintiff argues the Agreement does not mandate all claims between IBEW and defendant be arbitrated. Rather, it provides a claim "may" be arbitrated by one party upon notice upon the other. Plaintiff asserts it and defendant's active litigation over the past year indicate plaintiff chose to adjudicate its claims in court, rather than through arbitration. Moreover, plaintiff argues the arbitration clause does not require arbitration to the exclusion of any court proceedings, as it does not clearly and unambiguously stipulate the parties waive their right to litigate, citing

Altalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 446-47 (2014) ("[T]he clause, at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute.") Finally, plaintiff argues arbitration is barred, as neither party provided notice of arbitration within the required thirty-day time period. Defendant did not provide notice of its demand for arbitration until May 24, 2017, one year after plaintiff filed its complaint. Thus, plaintiff argues litigation in this court is the only alternate forum.

Defendant's Reply

Defendant argues plaintiff concludes New Jersey law governs without performing a "governmental interest" analysis, as required by Fu, supra, 160 N.J. 108. Defendant argues New Jersey has no compelling interest to impose its substantive and decisional law in the interpretation of the Agreement and to plaintiff's causes of action. Defendant maintains the only contact this action has with New Jersey is defendant's residence there, therefore, New Jersey's nexus to this case is fortuitous.

Additionally, defendant emphasizes she does not seek removal to arbitration, but seeks dismissal of plaintiff's complaint and the awarding of summary judgment, as the time to arbitrate has passed. Defendant maintains her motion was not delayed, as she only recently discovered the Agreement. Plaintiff repeatedly failed to produce the demanded copies of agreements between defendant and IBEW. Defendant notes plaintiff's opposition failed to provide an affidavit of a person with knowledge concerning the underlying facts of the case and Agreement. As such, defendant is left to presume plaintiff had possession of the agreement since the outset of this litigation and intentionally withheld it so this case could proceed. Moreover, defendant asserts had plaintiff produced a copy of the Agreement, she would not have pursued settlement negotiations and would have moved for summary judgment earlier.

Finally, defendant maintains the use of the word "may" in the arbitration clause refers to a party's choice to bring a claim.[1] Also, plaintiff's assertion it was unaware it was waiving its right to litigate in this court falls flat, as its insured, IBEW, drafted the Agreement. Thus, defendant requests the court grant summary judgment and dismiss plaintiff's complaint with prejudice.

ANALYSIS

Initially, the court rejects plaintiff's timeliness objection, and finds plaintiff is estopped from seeking relief on those grounds. This court recently granted defendant's motion to compel

[1] Plaintiff's opposition did not cite contrary authority. Thus, at oral argument on July 7, 2017, this court permitted plaintiff additional time to address defendant's citation of Egol v. Egol, 68 N.Y.2d 893 (1986) as it pertains to the interpretation of an arbitration clause. On July 11, 2017, this court received a letter from plaintiff, dated July 7, 2017. Counsel acknowledged the applicability of the Egol holding to the issue presented herein, if the Court applied New York law.

discovery from plaintiff, who resisted producing discovery from IBEW. In fact, plaintiff has never produced the employment contract in issue. (See order dated June 9, 2017.) The court further accepts the defense position that the contract was only recently discovered by defendant.

Choice of Law

The court rejects plaintiff's argument that the choice of law analysis is irrelevant since issues involving arbitration are procedural and therefore must be governed by the law of the forum state. The core issue presented here is contractual, and it is the interpretation of the contract that will control this court's decision. Said issue involves substantive law, and the choice of law analysis is necessary and appropriate.

It is well-settled that trial courts have the power to determine issues of enforceability of an arbitration clause, as well as the scope of the matters to be arbitrated. See Moreira Constr. Co. v. Wayne, 98 N.J. Super. 570, 575 (App. Div. 1968) ("[I]t is inescapably the duty of the judiciary to construe the contract to resolve any disagreement of the parties as to whether they have agreed to arbitrate or as to the scope of the subject matter agreed to be arbitrated"). See also, Clifton Bd. of Educ. V. Clifton Teachers Assoc., 154 N.J. Super. 500, 503-04 (App. Div. 1977) ("When there is a dispute as to whether a grievance falls within the terms of the arbitration clause of the contract, it is the duty of the courts to determine whether the matter is arbitrable."). Such determinations require an analysis of (1) whether the parties have agreed to arbitrate at all, and (2) which particular issues the parties have agreed to arbitrate. See Garfinkel v. Morristown Obstetrics & Gynecology Assoc., 168 N.J. 124, 132 (2001) ("In the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute. Subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be.")

The parties disagree as to whether New Jersey or New York law governs plaintiff's claims. Because the action was filed in New Jersey, the court must conduct a New Jersey's choice-of-law analysis to determine which law governs. See Gantes v. Kason Corp., 145 N.J. 478, 484 (1996). In this regard, New Jersey has adopted the "governmental-interest" standard, "which requires application of the law of the state with the greatest interest in resolving the particular issue that is raised in the underlying litigation." See Veazey v. Doremus, 103 N.J. 244, 247-48 (1986); Ronson v. Talesnick, 33 F. Supp. 2d 347, 351 (D.N.J. 1999). The first prong of the court's governmental-interest analysis seeks to find "whether a conflict exists between the law of the interested states." Veazey, supra, 103 N.J. at 478. Where the court finds a conflict, the second prong requires the court to "identify the governmental policies underlying the law of each state and how those policies are affected by each state's contacts to the litigation and to the parties." Id.

New Jersey and New York law differ with respect to the interpretation of an arbitration clause. In New Jersey, "[t]he absence of *any* language in the arbitration provision that [a party is] waiving [its] statutory right to seek relief in a court of law renders the provision unenforceable." Atalese

v. U.S. Legal Services Grp. L.P., 219 N.J. 430, 436 (2014). "[N]o prescribed set of words must be included in an arbitration clause to accomplish a waiver of rights. Whatever words compose an arbitration agreement, they must be clear and unambiguous that a [party] is choosing to arbitrate disputes rather than have them resolved in a court of law." Altalese, 219 N.J. at 447. Conversely, in New York, "the use of the phrase 'either party may submit such dispute to arbitration' should be interpreted to limit the aggrieved party to a choice between arbitration and abandonment of the claim (Matter of Elliot v. City of Binghamton, 94 A.D.2d 887, aff'd 61 N.Y.2d 920; Bonnor v. Congress of Ind. Unions, 331 F.2d 355, 359)." See Egol v. Egol, 68 N.Y.2d 893, 896 (1986). Thus, a conflict exists between New Jersey and New York law.

In both New Jersey and New York, there is long standing public policy favoring arbitration. In New Jersey, arbitration is preferred as a "speedy, inexpensive, expeditious" means of dispute resolution. See Garfinkel, supra, 168 N.J. at 131 (quoting E. Eng'g Co. v. Ocean City, 11 N.J. Misc. 508, 511 (1933). Similarly, in New York, arbitration is preferred unless the arbitration clause cannot be interpreted to cover the dispute. See Ibarra v. 101 Park Rest. Corp., 140 A.D.3d 700, 702 (2d Dept. 2016). However, as set forth above, there are significant differences between the two states in the interpretation of the breadth and scope of arbitration clauses, particularly in the area of employment contracts. As defendant noted, other than her New Jersey residence, all contacts regarding the Agreement, are New York based. Defendant worked in IBEW's New York office for over thirty years. During that time, she and IBEW executed the agreement in New York. Said agreement, prepared by IBEW, concerns defendant's employ at IBEW. Thus, this court finds New York has a greater interest in resolving the underlying dispute. Consequently, this court finds New York law governs the parties' dispute.

Summary Judgment

This court is compelled to apply New Jersey procedural law in respect to hearing this motion for summary judgment as this action was filed in the New Jersey Superior Court. To wit, R. 4:46-2 authorizes summary judgment upon a showing that "there is no genuine issue as to any material fact." See Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). In determining whether a genuine issue of material fact exists, the New Jersey Supreme Court has provided the following test:

> [T]he motion judge [must] consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

Brill, 142 N.J. at 523. Bare conclusions in the pleadings without factual support in affidavits will not defeat a motion for summary judgment. Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999). Mere sworn conclusions of ultimate facts, without basis or supporting affidavits by persons having actual knowledge of the facts, are insufficient to withstand the motion

for summary judgment. James Talcott, Inc. v. Shufman, 82 N.J. Super. 438, 443 (App. Div. 1964). However, disputes as to immaterial or irrelevant facts will not bar successful summary judgment. Johnson v. City of Hackensack, 200 N.J. Super. 185, 189 (App. Div. 1985). As such, a party opposing the motion must present a "genuine" issue of material fact. See Brill, supra, 142 N.J. at 540.

Having found New York substantive law governs the underlying dispute regarding the scope and enforcement of the arbitration provision contained within the contract, this court is compelled to apply New York law to the subrogation issue. Accordingly, the New York Supreme Court has discussed the rights of a subrogee to pursue third-party claims:

> The rights of an insurer as equitable subrogee against a third party are derivative and limited to such rights as the insured 'would have had against such third party for its default or wrongdoing.' (Ocean Acc. & Guar. Corp. v. Hooker Electrochemical Corp., supra, at 47). Thus, the insurer can only recover if the insured could have recovered and its claim as subrogee is subject to whatever defense the third party might have asserted against its insured (see, American Sur. Co. v. Town of Islip, 268 App. Div. 92, 94; 11A Appleman, Insurance Law & Practice § 6551, at 3-9; see generally, 16 Couch, Insurance 2d § 61:285, at 326).
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> Federal Insurance Co. v. Arthur Andersen & Co., 75 N.Y.2d 366, 372 (1990).

In light of the undisputed facts, and New York's subrogation law, this court finds no dispute as to the enforceability of the arbitration clause. It is undisputed on August 1, 2004, defendant and IBEW entered into a valid, written agreement prepared and drafted by IBEW. Said agreement pertained to defendant's employ at IBEW. On November 10, 2014, defendant was terminated. Prior to the termination date, the agreement was never amended, suspended or terminated. Section six (6) of the agreement contains an arbitration provision, providing:

> 6. Any dispute, complaint, controversy, claim or grievance whatsoever between Frawley and the Union which directly or indirectly arises under, out of or in connection with this Agreement **may** be submitted to arbitration by either party upon notice to the other party under and pursuant to the labor arbitration rules of the American Arbitration Association. No complaint, controversy, claim or grievance shall be submitted to arbitration unless either party gives notice to the other, which notice must be given not later than thirty (30) days from the date the dispute, complaint or grievance arose. Each party shall bear their costs and expenses of arbitration and the cost of the arbitration shall be divided equally between the parties. (Emphasis added.) [Frawley Cert. Ex. E]

Prior to the termination date, neither party served a Notice of Arbitration upon the other as required by the Agreement. Further, on November 10, 2014, IBEW filed a claim with plaintiff. Said claim arose out of IBEW and defendant's employer-employee relationship, as it alleged irregularities and improprieties by defendant. By filing said claim, IBEW assigned its rights against defendant, and plaintiff became IBEW's subrogee. This court finds plaintiff, as IBEW's subrogee, assumed IBEW's rights and responsibilities as they pertain to defendant, and is therefore bound by the Agreement. It is undisputed both IBEW and plaintiff failed to provide timely notice of its intent to arbitrate, as required by the Agreement.

However, this court declines to rule as to the final disposition of plaintiff's claims. While this court has rightfully determined the arbitrability of the parties' dispute, "[t]he ultimate disposition of the merits is of course reserved for the arbitrators and the courts are expressly prohibited from considering 'whether the claim with respect to which arbitration is sought is tenable, or otherwise [passing] upon the merits of the dispute.'" See Stillman v. Stillman, 80 A.D.2d. 356, 358 (1st Dept. 1981). Therefore, plaintiff is not barred from seeking relief in binding arbitration, presumably in New York. Defendant is not precluded from contesting the validity of the arbitration demand on any grounds, including the timelines of same.

CONCLUSION

For the reasons set forth above, defendant's motion for summary judgment is GRANTED, in part. Plaintiff's complaint is dismissed.

Very truly yours,

Robert L. Polifroni, P.J.Cv.

RLP/len