SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1355-16T4

AMANDA KERNAHAN,

Plaintiff-Respondent,

v.

HOME WARRANTY ADMINISTRATOR OF FLORIDA, INC. and CHOICE HOME WARRANTY,

Defendants-Appellants.

Submitted May 8, 2017 – Decided June 23, 2017

Before Judges Nugent and Currier.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-7052-15.

Archer & Greiner, P.C., attorneys for appellants (Lori Grifa, of counsel; Ms. Grifa and Josiah Contarino, on the briefs).

Keefe Law Firm and Carton & Rudnick, attorneys for respondent (Stephen T. Sullivan, Jr., and Jonathan Rudnick, on the brief).

PER CURIAM

Defendants, Home Warranty Administrator of Florida, Inc. (Choice Florida) and Choice Home Warranty (Choice Home), appeal

from the denial of their motion for dismissal of the complaint, contending that the arbitration provision contained in the parties' agreement was enforceable. Because the arbitration clause did not provide plaintiff Amanda Kernahan with adequate notice that she was relinquishing her right to bring a consumer fraud claim in court, we affirm.

In March and April 2015 plaintiff purchased a service agreement (agreement) from each of the defendants. The agreements provided for the repair or replacement of home appliances and systems. Upon the consumer's request, defendants would arrange for a service provider to repair or replace the systems and appliances listed in the contracts.

Plaintiff cancelled the first contract in June 2015 and received a refund of her full purchase price. She submitted claims and received benefits in excess of $3000 on the Choice Home agreement.

In November 2015, plaintiff filed a class action complaint alleging violations of the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -204, and the New Jersey Truth in Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to -18, as well as breach of the implied covenant of good faith and fair dealing. Plaintiff alleged that the agreement misrepresented the term of the contract. The cover page stated that the contract

term was for three and a half years from "4/23/2015-10/23/2018." On the second page of the agreement, however, under "COVERAGE PERIOD," it stated that "[c]overage starts 30 days after acceptance of application by Us and receipt of applicable contract fees and continues for 365 days from that date." (emphasis added).

Plaintiff also asserted that a section of the Agreement located on the last page entitled "MEDIATION" failed to advise her that she was waiving her right to file a court action and have her claims decided by a jury; instead she was required to present her claims in an arbitration, at which the remedies of treble damages, punitive damages, attorney's fees and costs were not available.

Defendants moved to dismiss the complaint, or alternatively, to compel arbitration pursuant to the provision in the agreement. On May 27, 2016, following oral argument, the judge issued an oral decision from the bench. After setting forth the standard for the dismissal of a complaint under Rule 4:6-2, the judge found that plaintiff had sufficiently pleaded her causes of action to avoid dismissal. In his consideration of the arbitration clause, the judge found it did not comply with the requirements established by the Supreme Court in 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). The motion judge determined that the arbitration provision failed to apprise plaintiff of the

required notice elements and of the rights she was waiving. The motion to dismiss the complaint or compel arbitration was denied.

A subsequent motion for reconsideration was denied in a written decision of November 18, 2016. In his decision, the judge expanded on his reasons for the unenforceability of the arbitration clause. He stated that the "provision is not written in a clear and straightforward manner and is not satisfactorily distinguished from other contract terms." The clause was on page five in a five-page contract within a paragraph entitled "Mediation." The judge noted that there was no language advising plaintiff that she was waiving her right to bring her claims in court and proceed to a jury trial.

On appeal, defendants contend that the arbitration provision conforms with the requirements of Atalese and is enforceable. We disagree.

The validity of an arbitration agreement is a question of law; therefore, our review of the order denying arbitration is de novo. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). "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, supra, 140 N.J. at 378 (citations omitted).

Defendants contend that the arbitration provision in its agreement is valid under Atalese and sufficiently informs plaintiff that her sole remedy is arbitration. The clause states:

> G. MEDIATION
>
> In the event of a dispute over claims or coverage You agree to file a written claim with Us and allow Us thirty (30) calendar days to respond to the claim. The parties agree to mediate in good faith before resorting to mandatory arbitration in the State of New Jersey. Except where prohibited, if a dispute arises from or relates to this Agreement or its breach, and if the dispute cannot be settled through direct discussions you agree that:
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> 1. Any and all disputes, claims and causes of action arising out of or connected with this Agreement shall be resolved individually, without resort to any form of class action.
>
> 2. Any and all disputes, claims and causes of action arising out of or connected with this Agreement (including but not limited to whether a particular dispute is arbitrable hereunder) shall be resolved exclusively by the American Arbitration Association in the state of New Jersey under its Commercial Mediation Rules. Controversies or claims shall be submitted to arbitration regardless of the theory under which they arise, including without limitation contract, tort, common law, statutory, or regulatory duties or liability.

> 3. Any and all claims, judgments and awards shall be limited to actual out-of-pocket costs incurred to a maximum of $1500 per claim, but in no event attorneys fees.
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> 4. Under no circumstances will you be permitted to obtain awards for, and you hereby waives [sic] all rights to claim, indirect, punitive, incidental and consequential damages and any other damages, other than for actual out-of-pocket expenses, and any and all rights to have damages multiplied or otherwise increased. All issues and questions concerning the construction, validity, interpretation and enforceability of this Agreement, shall be governed by, and construed in accordance with, the laws of the State of New Jersey, U.S.A. without giving effect to any choice of law or conflict of law rules (whether of the State of New Jersey or any other jurisdiction), which would cause the application of the laws of any jurisdiction other than the State of New Jersey.

An agreement to arbitrate "must be the product of mutual assent, as determined under customary principles of contract law." Atalese, supra, 219 N.J. at 442 (citation omitted). Mutual assent requires that the parties understand the terms of their agreement. Ibid. Our Supreme Court has recognized that "[c]onsumers can choose to pursue arbitration and waive their right to sue in court, but should know that they are making that choice." Id. at 435.

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) (citing Fawzy v. Fawzy, 199 N.J. 456, 469-70 (2009)). That is, the waiver "must be clearly and unmistakably established," Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001) (citation omitted), and "should clearly state its purpose," Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993). And the parties must have full knowledge of the legal rights they intend to surrender. Knorr v. Smeal, 178 N.J. 169, 177 (2003) (citing W. Jersey Title & Guar. Co. v. Ind. Trust Co., 27 N.J. 144, 153 (1958)). 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 in front of a jury. 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 444, 448.

In Atalese, the Court provided several examples of language sufficient to meet these expectations. Each example explicitly

stated that arbitration was the sole remedy under the contract and that the party was waiving the right to bring a suit in court. For example, the Court referred to Martindale v. Sandvik, Inc., 173 N.J. 76, 81-82 (2002), where the Court had previously "upheld an arbitration clause because it explained that the plaintiff agreed 'to waive [her] right to a jury trial' and that 'all disputes relating to [her] employment . . . shall be decided by an arbitrator.'" Atalese, supra, 219 N.J. at 444 (alteration in original). See also Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div. 2010); Curtis v. Cellco P'ship, 413 N.J. Super. 26, 31 (App. Div.), certif. denied, 203 N.J. 94 (2010).

The key, as the Court recognized, is clarity; the parties must know at the time of formation that "there is a distinction between resolving a dispute in arbitration and in a judicial forum." Atalese, supra, 219 N.J. at 445. See also Rockel v. Cherry Hill Dodge, 368 N.J. Super. 577, 583-87 (App. Div.), certif. denied, 181 N.J. 545 (2004).

With these principles in mind, we have considered the language in this arbitration provision and agree with the trial judge that it failed to clearly and unambiguously inform plaintiff of her waiver of the right to pursue her claims in a judicial forum. To the contrary, the clause before us does not contain any waiver

language at all. As the Supreme Court noted, "an average member of the public may not know — without some explanatory comment — that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." Atalese, supra, 219 N.J. at 442. Just stating that arbitration is the "exclusive" remedy, as this provision does, is not sufficient. It must be clear to the parties that "arbitration is a substitute for the right to seek relief in our court system," and by agreeing to this provision, the parties have waived their right to a court action. Morgan v. Sanford Brown Inst., 225 N.J. 289, 307-08 (2016). The deficiency renders the arbitration clause unenforceable.

Affirmed.