SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4733-15T4

SNAP PARKING, LLC,

Plaintiff-Respondent,

v.

MORRIS AUTO ENTERPRISES, LLC,
d/b/a PERFORMANCE FORD and
PERFORMANCE FORD LINCOLN,

Defendant-Appellant.

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Submitted February 16, 2017 — Decided March 27, 2017

Before Judges Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2162-16.

Bruce E. Baldinger, attorney for appellant.

The Wolf Law Firm, LLC, attorneys for respondent (Henry P. Wolfe, Andrew R. Wolf and Matthew S. Oorbeek, on the brief).

PER CURIAM

Defendant Morris Auto Enterprises, LLC, which operates an automobile dealership in Randolph, appeals from a Law Division

order denying its motion to stay plaintiff's class action complaint pending arbitration and to compel individual arbitration of plaintiff's claims. We affirm.

We discern the following facts from the motion record. Plaintiff operates a parking business that utilizes shuttle vans to transport customers between Newark Airport and an off-site parking lot. Plaintiff purchased two Ford vans from defendant: the first, in April 2014, and the second, in January 2015. In both instances, defendant's sales representatives offered plaintiff service contracts entitling plaintiff to certain repairs. Plaintiff purchased service contracts for each vehicle, totaling $1,498.00 and $1,417.75, respectively. Plaintiff alleged that during these transactions, defendant's sales representatives knew or should have known plaintiff was purchasing the vehicles for commercial use.

In September 2015, the second van experienced transmission issues, rendering it unusable for plaintiff's business. Plaintiff brought the van to the service department at Jersey City Ford and requested repairs pursuant to the service contract. Jersey City Ford rejected this request, informing plaintiff "the warranty policy that the van has on it is not specified for commercial use." Plaintiff requested a refund from defendant, which it

refused. Plaintiff also learned the service contract for the first van did not cover commercial vehicles.

On March 28, 2016, plaintiff filed a one-count class action complaint and jury demand, alleging violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20. The complaint described the class as all persons to whom, within the past six years prior to the complaint's filing date, "[d]efendant sold a service contract . . . that did not cover vehicles used for commercial purposes in conjunction with the purchase of a vehicle intended for commercial use[.]"

Defendant moved to stay this action and to compel individual arbitration. Defendant submitted a memorandum of law and a certification in support of this motion, attaching the 2015 Retail Order for the second van. The Retail Order contained an arbitration provision (the Agreement), which both parties signed. According to the certification, the Agreement required "that all claims, disputes, or controversies arising from the transaction must be arbitrated . . . ; that the parties waive their right to other proceedings, including court actions; [and] that the parties agree that any arbitration shall not be conducted as a class action."

The full text of the Agreement states:

> **AGREEMENT TO ARBITRATE ANY CLAIMS. READ THE FOLLOWING ARBITRATION PROVISION CAREFULLY, IT**

**LIMITS YOUR RIGHTS, INCLUDING THE RIGHT TO MAINTAIN A COURT ACTION.**

The parties to this agreement agree to arbitrate any claim, dispute, or controversy, including all statutory claims and any state or federal claims, that may arise out of or relating to the sale or lease identified in this agreement. By agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes. Consumer Fraud, Used Car Lemon Law, and Truth-in-Lending claims are just three examples of the various types of claims subject to arbitration under this agreement. The parties also agree to waive any right (i) to pursue any claims arising under this agreement including statutory, state or federal claims, as a class action arbitration, or (ii) to have an arbitration under this agreement consolidated with any other arbitration or proceeding. The arbitration shall be administered by the American Arbitration Association under its Commercial Arbitration Rules, and the Consumer Related Disputes Supplementary Procedures to the extent applicable, before a single arbitrator who shall be a retired judge or an attorney. Dealership shall advance both party's filing, service, administration, arbitrator, hearing, or other fees, subject to reimbursement by decision of the arbitrator. Each party shall bear his or her own attorney, expert, and other fees and costs, except when awarded by the arbitrator under applicable law. The arbitration shall take place in New Jersey at a mutually convenient place agreed upon by the parties or selected by the arbitrator. The decision of the arbitrator shall be binding upon the parties. Any further relief sought by either party will be subject to the decision of the arbitrator. If any part of this arbitration clause, other than waivers of class action rights, is found to be unenforceable for any

> reason, the remaining provisions shall remain enforceable. If a waiver of class action and consolidation rights is found unenforceable in any action in which class action remedies have been sought, this entire arbitration clause shall be deemed unenforceable, it being the intention and agreement of the parties not to arbitrate class actions or in consolidated proceedings. In the event that any subsequent lease, finance, or other agreement between the parties contains a provision for arbitration of claims which conflicts with or is inconsistent with this arbitration provision, the terms of such subsequent arbitration provision shall govern and control to the extent of such conflict or inconsistency. **THIS ARBITRATION PROVISION IS GOVERNED BY THE FEDERAL ARBITRATION ACT. THIS ARBITRATION PROVISION LIMITS YOUR RIGHTS, INCLUDING YOUR RIGHT TO MAINTAIN A COURT ACTION. PLEASE READ IT CAREFULLY, PRIOR TO SIGNING.**
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> [(emphasis added).]

Plaintiff filed a brief in opposition to defendant's motion, and defendant responded with a reply memorandum. The Law Division judge declined defendant's request for oral argument, electing to decide the motion on the papers. On June 24, 2016, the judge entered an order denying defendant's motion. The judge provided the following handwritten explanation on the order, citing to an unpublished Appellate Division opinion:

> Denied. While the arbitration agreement states that all claims between the parties will be arbitrated, it states that any participation in a class action is "waived," in contravention of [Rotondi v. Dibre Auto Group, L.L.C., A-1051-13 (App. Div. July 9, 2014), certif. denied, 220 N.J. 41 (2014)].

This appeal followed. Defendant contends the judge's language suggests she erroneously determined class action waivers are invalid per se. Defendant further argues the judge erred by failing to enforce the plain language of the Agreement, requiring arbitration of all disputes and waiving plaintiff's right to initiate a class action lawsuit. Defendant asserts the Federal Arbitration Act (FAA), federal law, and New Jersey law mandate we enforce the Agreement.

The validity of an arbitration agreement is a question of law; therefore, we review de novo an order denying a motion to compel arbitration. Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 605 (App. Div. 2015) (citing Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013); Frumer v. Nat'l Home Ins. Co., 420 N.J. Super. 7, 13 (App. Div. 2011)), certif. denied, 224 N.J. 244 (2016).

Both the FAA, 9 U.S.C.A. §§ 1 to 16, and the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, reflect federal and state policies favoring arbitration. See Hojnowski v. Vans Skate Park, 187 N.J. 323, 341-42 (2006) (noting that the Legislature, in enacting the New Jersey Arbitration Act, codified existing judicial policy favoring arbitration as a "means of dispute resolution"). "The [FAA] . . . requires that arbitration agreements be placed 'on an equal footing with other contracts' and enforced according to their terms." Morgan v. Sanford Brown

Inst., 225 N.J. 289, 303 (2016) (quoting Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403, 410 (2010)).

However, the preferential status for arbitration agreements "is not without limits." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001). In determining whether the parties agreed to arbitrate, courts should generally apply state-law contractual principles. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985, 993 (1995). Courts may invalidate an arbitration clause "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. § 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 Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 425 (App. Div. 2011), certif. granted, 209 N.J. 96 (2011), appeal dismissed, 213 N.J. 47 (2013). Mutual assent to an agreement "requires that the parties have an understanding of the terms to which they have agreed." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442, 448 (2014) (denying a motion to

compel arbitration on the grounds that "the wording of the service agreement did not clearly and unambiguously signal to [the] plaintiff that she was surrendering her right to pursue her statutory claims in court"), cert. denied, ___ U.S. ___, 135 S. Ct. 2804, 192 L. Ed. 2d 847 (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, cert. denied, 540 U.S. 938, 124 S. Ct. 74, 157 L. Ed. 2d 250 (2003). "[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.'" Garfinkel, supra, 168 N.J. at 132 (quoting Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 78 N.J. 122, 140 (1978)).

In Muhammad v. County Bank of Rehoboth Beach, 189 N.J. 1, 22 (2006), cert. denied, 549 U.S. 1338, 127 S. Ct. 2032, 167 L. Ed. 2d 763 (2007), our Supreme Court held that waivers of class-wide actions in contracts of adhesion were against public policy where the injured party could not practically pursue small individual claims. The United States Supreme Court then effectively overruled Muhammad, holding that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." AT&T Mobility LLC v. Concepcion, 563 U.S. ___, 131 S.

Ct. 1740, 1753, 179 L. Ed. 2d 742, 758 (2011); see also Litman v. Cellco P'ship, 655 F.3d 225, 231 (3d Cir. 2011) ("[T]he rule established by the New Jersey Supreme Court in Muhammad is preempted by the FAA."), cert. denied, 565 U.S. 1115, 132 S. Ct. 1046, 181 L. Ed. 2d 741 (2012).

In Gras v. Associates First Capital Corp., 346 N.J. Super. 42, 47, 52 (App. Div. 2001), certif. denied, 171 N.J. 445 (2002), we determined that wording in an arbitration clause stating it applies to "any claim or dispute based on a federal or state statute" was sufficient to enforce arbitration of the plaintiff's CFA claims. Moreover, we held the arbitration agreement valid even though it precluded class actions in arbitration. Id. at 45, 54.

Nevertheless, we still must determine whether the Agreement under review is enforceable based on the plain meaning of its terms. Atalese, supra, 219 N.J. at 444. We conclude it is not. The Agreement first states the parties agree to arbitrate all claims and to waive all rights to court action. It then states the parties waive the right "to pursue any claims arising under this agreement . . . as a class action arbitration." It later notes it is "the intention and agreement of the parties not to arbitrate class actions or in consolidated proceedings." We find these provisions are inconsistent and confusing in light of the

Agreement as a whole. The Agreement appears to preserve any claims for arbitration, but then waives the right to "class action arbitration." Since the Agreement does not explicitly state it bars class actions altogether, we conclude the "class action arbitration" waivers were not stated with sufficient clarity to constitute a complete abandonment of court proceedings to pursue a class action.

Defendant urges us to interpret these provisions as first establishing the parties must arbitrate all claims, and second, that the agreed-upon arbitration will not be a class action. Defendant also contends the language of the Agreement as a whole, including the bolded language at the beginning and end, sufficiently informs the parties they are limiting their rights. "[W]ords and phrases are not to be isolated but related to the context and the contractual scheme as a whole . . . ." Republic Bus. Credit Corp. v. Camhe-Marcille, 381 N.J. Super. 563, 569 (App. Div. 2005) (citation omitted). However, "clarity is required" in arbitration clauses. Foulke Mgmt. Corp., supra, 421 N.J. Super. at 425 (quoting Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 37 (App. Div. 2010)). We find the Agreement lacks clarity, and therefore, we decline to reverse the Law Division judge on this basis.

Defendant further argues the Law Division judge violated Rule 1:36-3 by relying on an unpublished opinion in her decision. Under Rule 1:36-3, "[E]xcept to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court." Unpublished cases are non-precedential and non-binding. Ibid.

However, "[i]t is well settled that a trial court's order or judgment may be affirmed for reasons other than those expressed by the judge." Price v. N.J. Mfrs. Ins. Co., 368 N.J. Super. 356, 359 n.1 (App. Div. 2004) (citing Ellison v. Evergreen Cemetery, 266 N.J. Super. 74, 78 (App. Div. 1993)), aff'd, 182 N.J. 519 (2005). "[I]f the order of the lower tribunal is valid, the fact that it was predicated upon an incorrect basis will not stand in the way of affirmance." Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (citations omitted). Therefore, because we find the Law Division judge correctly denied defendant's motion, we decline to reverse on this basis.

Affirmed.