SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0554-17T2

DANIEL RIZZO,

Plaintiff-Appellant,

v.

ISLAND MEDICAL MANAGEMENT HOLDINGS, LLC and VINCENT MORRA,

Defendants-Respondents.

Argued May 9, 2018 – Decided May 25, 2018

Before Judges Currier and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-0016-17.

David H. Kaplan argued the cause for appellant.

James P. Flynn argued the cause for respondents (Epstein Becker & Green, PC, attorneys; James P. Flynn, of counsel and on the brief; Amy E. Hatcher, on the brief).

PER CURIAM

Plaintiff Daniel Rizzo appeals from an August 22, 2017 order compelling arbitration of his discrimination claims and dismissing

his complaint with prejudice. For the following reasons, we affirm.

Defendant Island Medical Holdings, LLC (Island Medical) employed plaintiff as its Vice President of Recruiting from February 2015 to January 4, 2016. Island Medical provides "physician management services in emergency departments and urgent care centers as well as hospitalist and integrated care programs." Island Medical's main office is located in Hauppauge, New York. Plaintiff was "responsible for directing and managing the physician recruitment department as well as the development of strategies for department improvement."

At the time he was hired, plaintiff entered into an employment agreement (the Employment Agreement) that contained the following arbitration and forum selection provision:

> Any disputes arising under the terms of this Employment Agreement will be subject to binding arbitration conducted pursuant to the rules of the American Arbitration Association. The Arbitrator's determination shall be final and binding and not subject to further appeal. Venue for the Arbitration will be Hauppauge, NY. This agreement shall be interpreted and governed by laws of the State of New York without giving effect to its conflict of laws provisions.

Plaintiff signed the Employment Agreement following its substantive provisions and below the following statement in bold print: "I have reviewed the foregoing Employment Agreement and

accept it, including all of its terms and conditions." The Employment Agreement was signed on behalf of Island Medical by Martin Trpis, its Vice President of Operations and General Counsel, and by defendant Vincent Morra, its Chief Operating Officer. Morra is a New York resident.

Whether defendant provided plaintiff with a New York office is disputed. It is not disputed that plaintiff used his Westfield, New Jersey house as a home office and performed a substantial portion, but not all, of his work responsibilities from his house. However, the company's New York address and a "631" area code are reflected on defendant's business cards and on plaintiff's e-mail signature.[1]

In November 2015, plaintiff sustained a serious head injury outside of work. Plaintiff's neurologist recommended he remain out of work until mid-December 2015 to recover. Plaintiff's neurologist cleared him for light duty around this time. Plaintiff presented a physician's note to Island Medical and advised its staff of his medical condition. Plaintiff "also requested a reasonable accommodation from the defendant based on the recommendations of his physician."

[1] The "631" area code covers Suffolk County, New York, where Hauppauge is located.

On January 4, 2016, in response to a discussion plaintiff initiated with Morra concerning his medical condition, plaintiff alleges Morra sent him an e-mail stating his "position was being eliminated and that his duties were terminated immediately." Plaintiff contends defendants hired a younger, healthier individual to assume his responsibilities. After being terminated and before filing his complaint, plaintiff filed for, and received, New York State Unemployment Benefits. Plaintiff also filed a temporary disability claim in New York.

On January 3, 2017, plaintiff filed a complaint alleging wrongful termination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42, against defendants. Defendants filed a notice of removal to the United States District Court for the District of New Jersey. Following motion practice, the District Court remanded the case to the Superior Court of New Jersey.

Subsequently, defendants moved to compel arbitration pursuant to the Employment Agreement's arbitration and forum selection provision. Plaintiff opposed the motion, claiming the arbitration clause was not enforceable because it did not contain an express waiver of his statutory rights and the right to a jury trial. Plaintiff further argued the arbitration clause was limited to "disputes arising under the terms of this Employment Agreement"

and did not extend to claims involving statutory rights under the LAD. Plaintiff also argued the arbitration clause should not apply to his claims against Morra individually.

Defendants argued the forum selection and arbitration clause was enforceable, the Employment Agreement must be interpreted under New York law, and similarly worded arbitration clauses are enforceable in New York despite the absence of an express waiver of statutory rights and the right to seek relief in court. Plaintiff concedes, under New York law, an arbitration clause in the employment context does not have to contain an express waiver of the right to enforce statutory rights in court to be valid and enforceable. During the motion hearing, plaintiff limited his argument to the arbitration provision's failure to comply with New Jersey law with regard to LAD claims. Plaintiff contended no other issues should be part of the analysis and did not argue that New York law would not require arbitration.

On August 22, 2017, the trial court granted defendants' motion and issued an order compelling arbitration of all of plaintiff's claims and dismissing the complaint with prejudice. In a written opinion, the trial court held plaintiff made "no argument that New York would not require arbitration" and left "unopposed the authority provided in the [m]oving [b]rief in support of that contention." The judge concluded "the agreement expressly notes

that it is governed by New York law" and "even if no such clear choice of law provision were present, New York was the center of [p]laintiff's employment, and, therefore, its law applies here."

The judge further determined plaintiff's claims against Morra were also subject to mandatory arbitration, reasoning:

> Employees are covered by their employer's arbitration agreement "to the extent that the alleged misconduct relates to their behavior as officers or directors or in their capacities as agents of the corporation." Hirschfield Prods., Inc. v. Mirvish, 88 N.Y.2d 1054, 1056 (1996). This rule permitting employee non-signatories to invoke the arbitration agreement of their employer is followed not only by the New York Court of Appeals, but by the Second Circuit Court of Appeals as well. See Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1360 (2d Cir. 1993) (stating that "employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement"). Further, it is somewhat of a mischaracterization of the agreement to say Vincent Morra was a non-signatory because Morra in fact signed the agreement for Island Medical. He clearly is, therefore, a "disclosed agent of an entity that is a party to an arbitration agreement," and is therefore "protected by that agreement.["] Campaniello Imps., Ltd. v. Saporiti Italia SpA, 117 F.3d 655, 668 (2d Cir. 1997) (citing [Roby, 996 F.2d at 1360)].

The judge cited several additional New Jersey and Third Circuit opinions to support his conclusion.[2]

The judge also held plaintiff was judicially estopped from contending he was not employed within the State of New York after he applied for, and received, New York State Unemployment Benefits. This appeal followed.

On appeal, plaintiff raises the following points:

> POINT I
>
> THE TRIAL COURT ERRED IN RULING THAT NEW YORK RATHER THAN NEW JERSEY HAS THE GREATEST INTEREST IN THE PLAINTIFF'S LITIGATION.
>
> POINT II
>
> THE DEFENDANT'S ARBITRATION CLAUSE IS INSUFFICIENT BECAUSE IT FAILED TO CONTAIN A WAIVER OF THE PLAINTIFF'S STATUTORY RIGHTS AS WELL AS THE RIGHT TO A JURY TRIAL.
>
> POINT III
>
> THE TRIAL COURT'S DETERMINATION THAT DEFENDANT MORRA WAS AN OFFICER OR DIRECTOR OF DEFENDANT [ISLAND MEDICAL] CONSTITUTES ERROR AND PLAINTIFF'S CLAIM AGAINST THE NON-SIGNATORY OF THE EMPLOYMENT UNDERSTANDING SHOULD NOT BE DISMISSED.

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[2] See Tracinda Corp. v. DaimlerChrysler AG, 502 F.3d 212, 224 (3d Cir. 2007); Pritzker v. Merrill Lynch, Pierce Fenner & Smith, Inc., 7 F.3d 1110, 1121-22 (3d Cir. 1993); Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560 (App. Div. 2007); Singer v. Commodities Corp., 292 N.J. Super. 391, 413-14 (App. Div. 1996).

"The existence of a valid and enforceable arbitration agreement poses a question of law . . . ." Barr v. Bishop Rosen & Co., 442 N.J. Super. 599, 605 (App. Div. 2015). We review a trial court's decision to compel or deny arbitration de novo. Dispenziere v. Kushner Cos., 438 N.J. Super. 11, 15 (App. Div. 2014) (citing Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013)). "Therefore, 'the trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Ibid. (quoting Waskevich v. Herold Law, PA, 431 N.J. Super. 293, 297 (App. Div. 2013) (citations omitted)). However, when reviewing an order to compel arbitration, courts must take into account the strong public policy both at the state and federal levels favoring arbitration agreements. Hirsch, 215 N.J. at 186.

Plaintiff contends New Jersey has a greater interest in plaintiff's case than New York and, as a result, should have its law applied. Plaintiff claims he performed a substantial amount of his work at his home office in New Jersey, received his medical treatment in New Jersey, reported his disability and leave information from New Jersey, spent his leave time in New Jersey, and received his termination letter at his New Jersey address. Plaintiff argues "defendant has a continuous and deliberate

presence" in New Jersey "as it seeks employees, physicians and clients from [the state]."

"When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). Pursuant to "the Uniform Arbitration Act, N.J.S.A. 2A:23B-1 to -32, an arbitration agreement is . . . 'valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.'" Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276 (2013) (quoting N.J.S.A. 2A:23B-6). Furthermore, New Jersey has a strong public policy in favor of arbitration as a means of dispute resolution. See Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006).

The law is well-settled "that a court cannot hear a case as to which it lacks subject matter jurisdiction." Pepper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 65 (1978) (citations omitted). A corollary to that principle is that "[a] court lacks subject matter jurisdiction over a case if it is brought in an ineligible forum." Hoffman v. Supplements Togo Mgmt., LLC, 419 N.J. Super. 596, 606 (App. Div. 2011) (citing Pepper, 77 N.J. at 65). For that reason, "a plaintiff cannot file suit in a court if he or she has entered into an enforceable agreement to bring

such claims in another forum." Ibid. (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-94 (1991)).

A forum selection clause in a contract is enforceable unless: (1) it is a result of "fraud, undue influence, or overweening bargaining power;" (2) it violates "a strong public policy;" or (3) enforcement would be seriously inconvenient for the trial. Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc., 146 N.J. 176, 186-88 (1996) (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10-15 (1972)).

The Employment Agreement provides: "Any disputes arising under the terms of the Employment Agreement" are "subject to binding arbitration conducted pursuant to the rules of the American Arbitration Association." It further provides: "Venue for the arbitration will be in Hauppauge, [New York]." The Employment agreement also provides it "shall be interpreted and governed by the laws of the State of New York without giving effect to its conflict of laws provisions."

The terms of the forum selection clause are clear and unambiguous. Those terms must be "given their 'plain and ordinary meaning.'" Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) (quoting Kaufman v. Provident Life and Cas. Ins. Co., 828 F. Supp. 275, 283 (D.N.J. 1992), aff'd, 993 F.2d 877 (3d Cir. 1993)). None of the exceptions to enforcement of a forum selection

clause apply here. Therefore, the forum selection clause is enforceable. Consequently, plaintiff's claims are subject to binding arbitration under the rules of the American Arbitration Association, venued in Hauppauge, New York, with the Employment Agreement interpreted under New York law. Because we find the terms of the forum selection clause clearly and unambiguously established New York law would control disputes related to plaintiff's employment, we need not address plaintiff's contention that the arbitration clause is insufficient under New Jersey law.

Plaintiff only argued the issue of whether the arbitration provision complied with New Jersey law before the trial court. Consequently, we need not address plaintiff's claim here that the trial court erred in deciding that New York, rather than New Jersey, has the greatest interest in this claim as appellate courts may not "consider questions or issues not properly presented to the trial court when an opportunity for such a presentation [was] available." State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). Because we find the terms of the forum selection clause established New York law would control, and because plaintiff did not preserve this issue for appeal, we do not consider plaintiff's greater interest argument.

Plaintiff applied for and received unemployment benefits in New York. That application was premised on his assertion he was employed within the State of New York. In light of our ruling, we also do not reach the issue of whether the trial court erred in determining plaintiff is judicially estopped from asserting a contrary position by disclaiming New York employment in this proceeding.

Finally, plaintiff contends Morra should not be protected by the arbitration provision because the Employment Agreement was between the plaintiff and Island Medical and not Morra. Plaintiff further argues the trial court erred by making a determination as to the relationship between Morra and Island Medical. We are unpersuaded by these arguments.

Plaintiff concedes Morra is Island Medical's Chief Operating Officer and signed the Employment Agreement on behalf of Island Medical in that capacity. Employees are covered by their employer's arbitration agreement "to the extent that the alleged misconduct relates to their behavior as officers or directors or in their capacities as agents of the corporation." Hirschfield Prods., Inc., 88 N.Y.2d at 1056. This rule permitting employee non-signatories to invoke an arbitration agreement of their employer is supported not only by the decision of the New York Court of Appeals, ibid., but also by decisions of the Second

Circuit Court of Appeals, see Roby, 996 F.2d at 1360, the Third Circuit, see Pritzker, 7 F.3d at 1121-22, and the Appellate Division of this State, see Singer, 292 N.J. Super. at 413-14. Therefore, the trial court appropriately found that plaintiff's claims against Morra are also subject to mandatory binding arbitration in New York.

Affirmed.