SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5640-16T1

EMILY MURRAY,

Plaintiff-Appellant,

v.

MANORCARE-WEST DEPTFORD OF PAULSBORO NJ, LLC, KARINE PETERSIDE, ROBYN MONTGOMERY, KELLY KNORR, and RONALD HOLZER,

Defendants-Respondents.

Submitted April 18, 2018 — Decided May 31, 2018

Before Judges Nugent, Currier and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-0367-17.

Michael J. Pimpinelli, attorney for appellant.

Littler Mendelson, PC, attorneys for respondents (William J. Leahy and Paul C. Lantis, on the brief).

PER CURIAM

Plaintiff Emily Murray appeals from a July 25, 2017 order compelling her to arbitrate her Conscientious Employee Protection

Act (CEPA), N.J.S.A. 34:19-1 to -14, and employment-related claims against defendants and dismissing her amended complaint. After carefully considering the record in light of the applicable principles of law, we vacate the order and remand for a plenary hearing to determine whether the parties entered into a binding arbitration agreement.

Defendant ManorCare-West Deptford of Paulsboro NJ, LLC (ManorCare) is a nursing home that had employed plaintiff for approximately fourteen years in its housekeeping department. ManorCare also employed the remaining defendants, Karine Peterside, Robin Montgomery, Kelly Knorr, and Ronald Holzer, during the time periods relevant to plaintiff's complaint.

Manorcare is a subsidiary of HCR ManorCare, Inc. and utilizes a computer-based system, HCR ManorCare University, provided by HCR ManorCare to disseminate new agreements, policies, and training materials to its employees. Every ManorCare employee is assigned a unique username and password that allows him or her to log in to the ManorCare University portal. Whenever ManorCare requires employees to review, accept, or complete a new agreement, policy, or training protocol, the employee must log in to the portal to view the requirement. After an employee completes a training session or acknowledges a new policy or agreement, an electronic record is contemporaneously made.

ManorCare circulated a proposed Mutual Agreement to Arbitrate Claims (the Arbitration Agreement) to its employees through the HCR ManorCare University system. The Arbitration Agreement contains the following provisions regarding entering into or opting out of the agreement:

> **UNLESS YOU CHOOSE TO OPT OUT OF THE AGREEMENT IN ACCORDANCE WITH SECTION 8 BELOW, YOU AND THE COMPANY MUTUALLY AGREE THAT ALL DISPUTES COVERED BY THIS AGREEMENT SHALL BE DECIDED BY AN ARBITRATOR THOUGH ARBITRATION AND NOT BY WAY OF COURT, JURY TRIAL, OR ANY OTHER ADJUDICATORY PROCEEDING.**
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> 1. **Covered Claims/Disputes.** Except as otherwise provided in this Agreement, this Agreement applies to any and all disputes, past, present or future, that may arise between Employee and EMPLOYER, including without limitation any dispute arising out of or related to Employee's application for employment, employment, and/or separation of employment with EMPLOYER, and this Agreement survives after the employment relationship terminates. This Agreement applies to a covered dispute that EMPLOYER may have against Employee or that Employee may have against EMPLOYER or its officers, directors, owners, employees, managers, agents, and attorneys.
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> . . . .
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> **8. Opting Out of the Agreement.** This Agreement is not a mandatory condition of employment. If Employee does not wish to be bound by this Agreement, he/she must send an email to the following email address: EmployeeArbitrationOptOut@hcr-manorcare.com, within fourteen (14) days of agreeing to the terms of this Agreement. In that email, Employee should provide his/her first and last

> name and state that he/she is opting out of this Agreement. If Employee timely opts out as provided in this section, Employee will not be subject to any adverse employment action as a consequence of that decision, and neither Employee nor EMPLOYER will be bound by this Agreement. Should Employee not opt out of this Agreement within fourteen (14) days, both Employee and EMPLOYER will be required to arbitrate all claims and disputes covered by this Agreement in accordance with its terms. Employee has the right to consult with counsel of his/her choice concerning this Agreement.
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> . . . .
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> **10. <u>Employee's Agreement</u>.** You are accepting and agreeing to the terms of this Agreement by either signing this Agreement by hand (if this is a paper copy) or through an electronic signature (if you are reviewing this Agreement electronically/via computer). You also agree that by agreeing to this Agreement through an electronic signature you are binding yourself just like you had signed it by hand.

The Arbitration Agreement contains the following language regarding the arbitrator's authority to resolve disputes relating to the Arbitration Agreement:

> Additionally, the Arbitrator, and not any court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement.

ManorCare's records reflect on December 15, 2016, plaintiff used her unique login credentials to access the Arbitration Agreement and accompanying slides through the portal. The records

further indicate plaintiff logged back into the portal and acknowledged the Arbitration Agreement on December 19, 2016. Whether plaintiff actually logged into the portal and acknowledged the Arbitration Agreement is disputed.

Plaintiff contends she has difficulty reading English, she never entered into the Arbitration Agreement with ManorCare, she neither owns nor knows how to use a computer, and when necessary management would operate the computer and open training sessions for plaintiff using her unique login credentials.

In December 2016 and January 2017, plaintiff noticed a reduction in housekeeping staff resulted in allegedly unsanitary conditions for the elderly residents of the facility. Plaintiff voiced these concerns to Peterside, a facility administrator, who told her the facility could not hire more housekeeping staff due to budgetary constraints. Concerned for the welfare of the elderly residents, plaintiff filed a complaint with the New Jersey Office of the Ombudsman for the Institutionalized Elderly. The complaint outlined her concerns stemming from the reduction in staff and her suspicion that the State Department of Health had given ManorCare advance notice of pending inspections in violation of Federal and State regulations. The Ombudsman's Office responded by sending an agent to investigate plaintiff's complaint and interview

plaintiff at the ManorCare facility. Shortly thereafter, ManorCare suspended and terminated plaintiff.

In response to her termination, plaintiff filed a complaint in the Law Division alleging CEPA violations and common law causes of actions. Defendants responded by moving pursuant to Rule 4:6-2(e) to dismiss the complaint and compel arbitration. Defendants submitted the declaration of Kathy Hutchinson, ManorCare's Director of Safety and Operations Support, and numerous computer printouts in support of the motion.

Plaintiff opposed the motion. In her opposing certification, plaintiff certified she was born and educated in the Philippine Islands where she learned to read and speak Tagalog. She stated her reading skills in English "are extremely limited." Plaintiff further stated when she was "recently shown a copy of the alleged arbitration agreement," she "was unable to understand the meaning of most of the words." In particular, she stated she did not understand what arbitration, arbitrator, opting out, and many other words meant.

Plaintiff contended she never completed the online program acknowledging assent to the Arbitration Agreement through defendant's online training portal. In that regard, plaintiff certified:

> 8. The defendant is alleging that on December 19, 2016, I utilized a computer at their facility and electronically consented to an arbitration agreement. This is a complete lie. I am a practicing Catholic and it is against my religion to lie especially when I take an oath to tell the truth.
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> . . . .
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> 11. The defendant's allegation that I entered into their computer on December 19, 2016 and executed a contract to arbitrate any legal issues is an absolute complete lie. During the month of December, I had absolutely no access to their computer. Even if I was presented with the alleged arbitration agreement, I would not have been able to read and understand this complicated document. Again, the first time I saw this agreement [was] when it was shown to me by my attorney. The defendant is attempting to perpetrate a fraud upon the Court.

In essence, plaintiff argues she never agreed to the Arbitration Agreement with defendant, which includes the delegation provision.

On July 25, 2017, the trial court granted defendants' motion, dismissing plaintiff's complaint and compelling arbitration of "all claims which were or could have been asserted in the [c]omplaint."[1] In her oral decision, the motion judge recognized the standard for deciding a motion to dismiss "is whether a cause of action is suggested by the facts" "afford[ing] plaintiff reasonable inferences." The judge noted plaintiff had used the

[1] The motion was decided without oral argument.

ManorCare University portal since 2007 and acknowledged completing more than 100 courses, tests, or agreements. The judge further noted plaintiff had the option to opt out of the agreement but chose not to do so. The judge also reiterated the provision in the agreement, which stated "the arbitrator shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the agreement." The judge concluded the arbitration clause "does cover the enforceability of this agreement" and the matter should proceed to arbitration with the arbitrator determining enforceability. In supplemental hand-written comments added to the order, the judge stated:

> Plaintiff contends she never entered into [the] arbitration agreement thru the electronic system [known as] HCR ManorCare University, however there is no dispute as to her lengthy period of employment with the defendant of approx[imately] 14 years. [Defendant] had employed this University System since 2007 and [plaintiff] had completed more than 100 courses, tests [and/or] agreements during that time period which required a unique username [and] password. This arbitration provision gives authority to [the] arbitrator to resolve disputes that include those alleged by [plaintiff], including the interpretation, enforceability, and formation of the agreement. She did not opt out of this agreement. Her claim can be fully advanced, including the language issue, before the arbitrator who had exclusive authority.

This appeal followed. Plaintiff raises the following point on appeal:

> THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO DISMISS THE COMPLAINT AND FORCE ARBITRATION BASED UPON CERTIFICATIONS THAT DID NOT CONTAIN ADMISSIBLE EVIDENCE THAT THE PLAINTIFF HAD ENTERED INTO A CONTRACT TO ARBITRATE CLAIMS AGAINST THE DEFENDANTS.

Our standard of review of the validity of an arbitration agreement is de novo. Morgan v. Sanford Brown Inst., 225 N.J. 289, 302 (2016) (citing Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 446 (2014)). Reviewing courts owe no deference to the interpretive analysis of the trial court. Id. at 303 (citing Atalese, 219 N.J. at 445-46).

Despite the national policy favoring arbitration, "the law presumes that a court, not an arbitrator, decides any issue concerning arbitrability." Id. at 304 (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995)). However, "[p]arties to an arbitration agreement can agree to delegate to an arbitrator the issue of whether they agreed to arbitrate a particular dispute." Id. at 303 (citing Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68-69 (2010)). "[T]o overcome the judicial-resolution presumption, there must be 'clea[r] and unmistakabl[e]' evidence 'that the parties agreed to arbitrate arbitrability.'" Id. at 304 (alterations in original) (quoting

First Options, 514 U.S. at 944). "Silence or ambiguity in an agreement does not overcome the presumption that a court decides arbitrability." Ibid.

"Arbitration 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." Bernetich, Hatzell & Pascu, LLC v. Med. Records Online, Inc., 445 N.J. Super. 173, 179 (App. Div.) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986)), certif. denied, 227 N.J. 245 (2016). "State law governs not only whether the parties formed a contract to arbitrate their disputes, but also whether the parties entered an agreement to delegate the issue of arbitrability to an arbitrator." Morgan, 225 N.J. at 303 (citing First Options, 514 U.S. at 944). A party opposing a motion to compel arbitration "must mount a specific challenge to the validity of a delegation clause." Id. at 305 (citing Rent-A-Center, 561 U.S. at 72).

Here, the delegation clause states "the [a]rbitrator, and not any court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement." Plaintiff does not allege the delegation clause is unclear or ambiguous. Rather, she contends she never entered into the arbitration agreement.

The arbitration agreement and purported delegation clause in this matter are subject to state-law contract principles. Morgan, 225 N.J. at 308 (citing First Options, 514 U.S. at 944). "An enforceable agreement requires mutual assent . . . ." Ibid. (citing Atalese, 219 N.J. at 442); accord Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 605-06 (App. Div. 2015) ("An agreement to arbitrate 'must be the product of mutual assent, as determined under customary principles of contract law.'" (quoting Atalese, 219 N.J. at 442)). "Mutual assent requires that the parties understand the terms of their agreement." Barr, 442 N.J. Super. at 606 (citing Atalese, 219 N.J. at 442).

Where "a party claims that it never actually manifested assent to a contract containing an agreement to arbitrate . . . that party cannot be forced to arbitrate until it is first established by a court that the party willingly manifested assent to the underlying contract." Nuclear Electr. Ins. v. Cent. Power & Light Co., 926 F. Supp. 428, 434 (S.D.N.Y. 1996) (citing Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140-41 (9th Cir. 1991); Restatement (Second) of Contracts § 163 cmt. a, § 174 cmt. a (Am. Law Inst. 1981)).

Contract formation issues relating to an arbitration agreement containing a delegation clause are properly resolved by the trial court, not an arbitrator. See Sandvik AB v. Advent

Int'l Corp., 220 F.3d 99, 107 (3d Cir. 2000) (holding a court must examine a person's signatory authority because agreement to a contract "is a necessary prerequisite to the court's fulfilling its role of determining whether the dispute is one for an arbitrator to decide under the terms of the arbitration agreement"); see also Spahr v. Secco, 330 F.3d 1266, 1272 (10th Cir. 2003) (holding a court must decide whether a party had sufficient mental capacity to enter into a contract containing an arbitration provision); Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 854-55 (11th Cir. 1992) (holding a court must decide the issue of whether a party signed a contract containing an arbitration provision). Consistent with these principles, a trial court should decide a dispute as to whether a party assented to the terms of an arbitration contract, including a provision delegating disputes over arbitrability to the arbitrator.

Although the matter was presented on defendants' motion to dismiss under Rule 4:6-2(e), the parties relied upon materials outside the pleadings. Consequently, the motion must be "treated as one for summary judgment and disposed of as provided by [Rule] 4:46." R. 4:6-2(e); see Pressler & Verniero, Current N.J. Court Rules, cmt. 4.1.2 on R. 4:6-2(e) (2018) (stating "if any material outside the pleadings is relied on on a 4:6-2(e) motion, it is automatically converted into a summary judgment motion"). Because

the motion is treated as a motion for summary judgment, the trial court must determine if the pleadings and motion record "show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment as a matter of law." R. 4:46-2(c). The trial court's task is not to weigh the evidence but rather to view the evidence "in the light most favorable to the non-moving party" and determine "whether there exists a 'genuine issue' of material fact that precludes summary judgment." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). "It is not the court's function to weigh the evidence and determine the outcome but only to decide if a material dispute of fact existed." Parks v. Rogers, 176 N.J. 491, 502 (2003) (quoting Gilhooley v. County of Union, 164 N.J. 533, 545 (2000)). The presence of a genuine issue of material fact precludes summary judgment. Brill, 142 N.J. at 540.

Here, the trial court's ruling is in direct conflict with these principles. Plaintiff certified she never assented to the terms of the arbitration agreement, she neither owns nor knows how to utilize a computer, she has difficulty reading English, and management opened training sessions for her using her unique login credentials. Defendant counters with documentary evidence that demonstrates – according to defendant's certification – plaintiff completed the online acknowledgment of the agreement along with

more than 100 other courses through the online portal. Despite these disputed factual issues, the judge, without conducting an evidentiary hearing, held an agreement to arbitrate existed and compelled the parties to arbitrate their disputes, including those concerning formation of the agreement.

Plaintiff argues defendants failed to submit any admissible evidence establishing she acknowledged the arbitration agreement on defendant's online portal or otherwise entered into the Arbitration Agreement. In the absence of evidence establishing the existence of a valid agreement, plaintiff asserts defendants, as the parties seeking to enforce the arbitration agreement, failed to meet their burden of proof.

In the alternative, plaintiff asserts that even if defendants provided some admissible evidence in their certifications, then the judge should have conducted a plenary hearing to settle factual disputes. Citing Conforti v. Guliadis, plaintiff argues trial courts are required to conduct a plenary hearing to settle factual disputes arising from conflicting certifications. 128 N.J. 318, 328 (1992).

The material facts on the threshold issue of contract formation are sharply in dispute. Since "an appellate court may not 'weigh the evidence,' assess the credibility of the witnesses, or make conclusions about the evidence," State v. Segars, 172 N.J.

481, 488 (2002), we are constrained to vacate the July 25, 2017 order and remand this matter for a plenary hearing to resolve the conflicting factual contentions on the threshold issue of whether plaintiff entered into an enforceable arbitration agreement. See Conforti, 128 N.J. at 322-23, 328-29 (holding material facts in conflicting affidavits warrant plenary hearing); Bruno v. Gale, Wentworth & Dillon Realty, 371 N.J. Super. 69, 76-77 (App. Div. 2004) (reversing and remanding for plenary hearing to resolve conflicting factual contentions in certifications); Klier v. Sordoni Skanska Constr. Co., 337 N.J. Super. 76, 85-86 (App. Div. 2001) (stating trial court should have conducted a plenary hearing where there are conflicting certifications); Pressler & Verniero, cmt. 2 on R. 1:62-2(b) (2018) (stating factual disputes require resolution by trial or plenary hearing).

Plaintiff also requests the matter be heard by a different judge on remand. We agree. In her motion decision, the judge rendered rulings on whether plaintiff electronically signed the agreement and discounted plaintiff's alleged difficulty understanding English given her lengthy employment by ManorCare and her completion of over 100 courses, tests, and agreements online. "The judge of any court shall be disqualified . . . if the judge . . . has given an opinion upon a matter in question in the action." R. 1:12–1(d). Additionally, a matter remanded after

appeal should be assigned to a different judge if the first judge previously "expressed conclusions regarding witness credibility." Pressler & Verniero, cmt. 4 on R. 1:12-1(d). A different judge shall conduct the plenary hearing on remand.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.