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KENSINGTON PARK OWNERS CORPORATION d/b/a KENSINGTON PARK OWNERS CORP. MASTER B., Plaintiff, v. ARCHITECTURA, INC.; CONRAD RONCATI; CIBCO CORP. a/k/a CIBCO CONSTRUCTION CORP.; DIMICK FENCE CORP.; UNITED FEDERATED SYSTEMS, INC.; JOHN DOES 1-10 and ABS CORPS. 1-10 (fictitious parties), Defendants.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION – BERGEN COUNTY DOCKET NO. **BER-L-2055-19** Civil Action **OPINION**

Argued: **June 21, 2019**
Decided: **June 28, 2019**

HONORABLE ROBERT C. WILSON, J.S.C.

Martine Pierre-Paul, Esq. appearing on behalf of plaintiff Kensington Park Owners Corporation (from Verde, Steinberg & Pontell, LLC).

Joseph C. Nuzzo, Esq. appearing on behalf of defendants Cibco Corporation and Dimick Fence Corporation.

FACTUAL BACKGROUND

THIS MATTER arises out of a construction dispute. Defendant Cibco Corporation ("Cibco") is a general contractor who has been active in New Jersey and surrounding states for several years. Cibco was retained by plaintiff Kensington Owners Corporation ("Kensington Park") on January 9, 2015 as general contractor to build, improve, and renovate the "entryway" and "gatehouse" for Kensington Park, a townhouse-style residential community on Palisade Avenue in Fort Lee, New Jersey (the "Project").

The Project included the construction of four gates, but the issues relevant in this matter involve the main vehicular entry gate to the complex. Defendants Architectura, Inc. ("Architectura") and Conrad Roncati ("Roncati") (collectively, the "Architect Defendants") were

retained by Kensington Park as the architects for the Project. The contract documents used to retain the Architect Defendants for the construction were encompassed in the American Institute of Architects ("AIA") Forms A101 and A201-2007 (collectively, the "AIA Agreement"). Cibco's architects and engineers had the duty of design and engineering for the Project as contained in the aforementioned forms.

Pursuant to the AIA Agreement, the Architect Defendants created what were accepted by Kensington Park as the plans, final project details, and drawings for the Project. Upon receiving a detailed, single gate design with enhanced technologies, Cibco subcontracted the gate's construction to defendant Dimick Fence Corporation ("Dimick") and subcontracted the gate's operators system to United Federated Systems, Inc. ("UFS"). At some point during the project, the Architect Defendants' plans were found inadequate or nonconforming, and the parties involved in constructing the gate agreed on a modification of the plans and materials for the gate's construction.

The agreed upon modifications called for a large single gate in steel, rather than aluminum, as was required by Kensington Park. Cibco also made recommendations regarding the agreed upon modifications, including the installation of steel brackets and fence posts to counter the weight of the large steel gate upon the masonry piers. Cibco and Dimick performed all of the agreed upon tasks.

Kensington Park continued to be unsatisfied, since the single steel gate rendered UFS' gate operator system insufficient, and incorrect as to the location of the gate. Cibco contends that the Architect Defendants recommended UFS' system to Kensington Park before Cibco was retained as general contractor. The gate was again modified as a "split" gate" in order to accommodate the UFS system and minimize costs. Sometime thereafter, Kensington Park allegedly approved the fix and paid Cibco and the remaining subcontractors on their invoices.

Afterwards, Kensington Park then complained that the gate did not work as expected, and that the two sections of the gate no longer closed at their point of joinder. Kensington Park and UFS allegedly attempted to correct this issue after Cibco was released.

On March 18, 2019, the instant lawsuit was filed by Kensington Park against Cibco and the other subcontractor defendants. Defendants Cibco and Dimick now move for dismissal of the lawsuit and to compel the matter to arbitration, based on the agreed-upon, standard language in the AIA Agreement. Kensington Park opposes the motion, arguing that the Cibco cannot be compelled to arbitration because: (1) it was not a party to the AIA Agreement and only the Architect Defendants were, and (2) the language of the arbitration clause is ambiguous, and therefore unenforceable. For the reasons set forth below, defendants Cibco and Dimick's motion is **GRANTED**.

MOTION TO DISMISS STANDARD UNDER RULE 4:6-2(e)

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id.

Under the New Jersey Court Rules, a complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See, NCP Litigation Trust

v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

RULES OF LAW AND DECISION

I. The AIA Arbitration Provisions are Enforceable

The strong "public policy of this State favors arbitration as a means of settling disputes that otherwise would be litigated in a court." Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 554, 556 (2015). The Federal Arbitration Act, 9 U.S.C. 1-16, "expresses a national policy favoring arbitration" and requires courts to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." Morgan v. Sanford Brown Inst., 225 N.J. 289, 304 (2016); AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 339 (2011). The New Jersey Arbitration Act follows these same principals. N.J.S.A. 2A:23B-1 to -22; Leodori v. CIGNA Corp., 175 N.J. 293, 302 (2003).

"An agreement to arbitrate, like any other contract, 'must be the product of mutual assent, as determined under customary principals of contract law." Atalese v. U.S. Legal Servs. Grp. L.P., 219 N.J. 430, 446 (2014). "Mutual assent requires that the parties have an understanding of the terms to which they have agreed." Id. "This requirement of a 'consensual understanding' about the rights of access to the courts that are waived in the agreement has led our courts to hold that clarity is required." Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 37 (App. Div. 2010).

"By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court." Atalese, 219 N.J. at 442. However, "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." Id.

In this matter, Section 13.2 of the AIA Agreement expressly instructed the parties to choose whether their "method of binding dispute resolution" would be "Arbitration" or "Litigation in a court of competent jurisdiction." Furthermore, this section advised if the parties failed to select or agree on "a binding dispute resolution method other than litigation, Claims would be resolved by litigation in a court of competent jurisdiction. Thus, when Kensington Park selected "Arbitration," they did so with full knowledge "that arbitration is a substitute for the right to have [its] claims adjudicated in a court." Id.

The AIA Agreement made clear the consequences of Kensington Park's choice in Section 15.4 of the General Conditions, entitled "ARBITRATION." That section provided the following:

> If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association, in accordance with its Construction Industry Arbitration Rules.

Furthermore, Section 15.4.2 emphasized that "[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." Section 15.4.3 indicated "[t]he foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to

by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof."[1]

Unlike the plaintiff in Atalese, Kensington Park was not an "average member of the public." Id. Kensington Park was sophisticated enough to operate as a corporation responsible for maintaining a townhouse association, to hire representatives, and engage in a transaction to construct and modify structures for the association's use. It is evident that Kensington Park is a sophisticated entity familiar with entering into agreements with licensed professionals and contractors to perform construction on the premises, pursuant to its responsibilities for the upkeep and maintenance of the townhouse association.

The matter at issue also differs from Atalese in other respects. In Atalese, a consumer seeking debt relief entered into a contract containing an arbitration provision which "made no mention that plaintiff waived her right to seek relief in court." Atalese, 219 N.J. at 435, 437. The Court held "[t]he absence of *any* language in the arbitration provision that plaintiff was waiving her statutory right to seek relief in a court of law renders the provision unenforceable." Id. at 436. Here, the AIA Agreement made clear that Kensington Park was choosing arbitration, rather than seeking relief through litigation in court.

The Court "emphasize[d] that no prescribed set of words must be included in an arbitration clause to accomplish a waiver of rights." Id. at 447. "Whatever words" are chosen, "they must be clear and unambiguous that consumer is choosing to arbitrate disputes rather than have the resolved in a court of law." Id. Atalese simply requires a contract "to explain in some minimal way that arbitration is a substitute for a consumer's right to pursue relief in a court. Morgan, 225 N.J. at 294.

[1] The AIA arbitration provisions are the most widely used arbitration provisions in the construction industry.

In this instance, the AIA Agreement informed the parties that there was a distinction between resolving a dispute in arbitration and in court, and Plaintiffs chose arbitration rather than court, as indicated by their markings on the AIA Agreement. Specifically, in Section 6.2, entitled "Binding Dispute Resolutions," has two options for a signatory to choose from: (1) "Arbitration pursuant to Section 15.4 of AIA Document A 201-2007;" or (2) "Litigation in a court of competent jurisdiction." Plaintiffs selected the former option by marking an "x" in the appropriate checkbox. Section 15.4, entitled "Arbitration," states that "[i]f the parties have selected arbitration . . . any claim . . . not resolved by mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association."

As set forth above, it is abundantly clear that the AIA Agreement explains in a "minimal way" that there is a distinction between arbitration and litigation in a court of competent jurisdiction. Morgan, 225 N.J. at 294. Therefore, as the AIA Agreement's arbitration clause is compliant with the requirements set forth in Atalese. Defendants Cibco and Dimick's motion to dismiss and compel arbitration is accordingly granted.

II. Defendants Cibco and Dimick May Properly Enforce the Arbitration Provisions of the AIA Agreement

A. Cibco is Entitled to Enforce the AIA Agreement's Arbitration Provisions

"It is not always necessary that a party be a signatory to an arbitration agreement to be bound by that agreement." Bruno v. Mark MaGrann Associates, Inc., 388 N.J. Super. 539, 546 (2006). In Bruno, the signatory plaintiffs were compelled to arbitrate their claims against non-signatory defendants in a matter alleging that a homebuilder installed a defective heating system. Id. at 542. The purchasers also commenced a second action against the heating subcontractors, with whom they had no contractual relationship. Id. That court determined that the plaintiffs

were also required to arbitrate their claims against the subcontractors. The Appellate Division reasoned that "[t]he expansive arbitration clause in plaintiffs' contracts with [the homebuilder] encompasses the dispute with the subcontractors over the heating systems in plaintiffs' homes. Consequently, plaintiffs are required to submit those disputes to arbitration, even in the absence of a direct contractual relationship with the subcontractors." Id. at 543.

Here, Plaintiff's claims against Dimick and UFS cannot be resolved without reference to the arbitration clauses in the AIA Agreement. While they are not signatories to the AIA Agreement, these defendants can be made subject to the arbitration provisions. Defendant Dimick has also agreed to submit this action to arbitration by joining in this motion. Therefore, in light of the foregoing, claims against the aforementioned defendants can be resolved in accordance with the AIA Agreement's arbitration provisions.

B. The Non-Signatory Defendants May Enforce the Arbitration Provision in the AIA Agreement

A non-signatory defendant may enforce an arbitration provision where it is a principal of the signatory and plaintiff's claims arise out of the contract. Wasserstein v. Kovatch, 261 N.J. Super. 277, 285-86 (App. Div. 1993). In Wasserstein, home purchasers sued the principals of the general contractor who had built their home. Id. at 281. Although the defendants were not parties to the contract containing the arbitration clause, the court granted their motion to compel arbitration. That court reasoned that, because all of the claims against the defendants arose from the performance of their duties as agents of the general contractor, these claims were covered by the arbitration clause in the home buyers' contract with the general contractor. Id. at 286.

The court further determined that the parties could not avoid arbitration merely by naming non-signatories as defendants. Id. at 285-86. The court compelled arbitration, reasoning that the individual defendants in the fraud action are entitled to arbitration as agents of the

homebuilder, even though they had not individually signed an arbitration agreement. All claims against the non-signatory defendants stemmed from their actions relating to or arising out of the performances of the contract by the homebuilder. Id.

Here, the same result would be appropriate. UFS and Dimick are essentially intertwined with the services performed by Cibco, and governed by the AIA Agreement containing the arbitration provisions. All of Plaintiff's claims against the defendants arise out of and relate to the same facts, and are inseparable from the claims asserted against Cibco. Therefore, Dimick may also enforce the AIA Agreement's arbitration provisions.

CONCLUSION

For the aforementioned reasons, defendants Cibco and Dimick's Motion to Dismiss the Plaintiff's Complaint is **GRANTED**.