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OF THE COMMITTEE ON OPINIONS

NAVIGATORS SPECIALTY INSURANCE  
COMPANY as subrogee of AJD  
CONSTRUCTION CO., INC.,

Plaintiff,

v.

JANGHO CURTAIN WALL AMERICAS  
CO., LTD., BLADE CONTRACTING INC.,  
SAFEGATE SAFETY SOLUTIONS,  
ROBERT ROES 1-25 (being fictitious  
parties), AIG PROPERTY CASUALTY,  
INC., THE TRAVELERS COMPANY, INC.  
and ABC CORPORATIONS 1-25 (being  
fictitious parties),

Defendants.

**SUPERIOR COURT OF NEW JERSEY**  
**LAW DIVISION – BERGEN COUNTY**

**DOCKET NO. BER-L-8246-19**

**Argued: April 24, 2020**  
**Decided: June 10, 2020**

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

Joseph F. Herbert, III, Esq. appearing on behalf of Plaintiff Navigator's Specialty Insurance Company as subrogee of AJD Construction Co., Inc. M.G. McLaren, PC and McLaren Technical Services, Inc. d/b/a McLaren Engineering Group (from L'Abbate, Balkan, Colavita & Contini, L.L.P.)

Charles M. Adams, Esq. appearing on behalf of Defendant Blade Contracting, Inc. (from Langsam Stevens Silver & Hollaender LLP)

**PROCEDURAL HISTORY**

**THIS MATTER** first arose out of a personal injury action filed by Carlos M. Roman and Veronica Roman. Mr. Roman alleged that on August 26, 2014 he sustained serious and permanent bodily injuries while employed by Jangho Curtain Wall Americas Co., LTD ("Jangho"). Mr. Roman stated that he was injured while stepping on broken pieces of cinder block while working at a project located at the 70-90 Columbus Drive site. AJD was the general contractor for the construction project and contracted with Blade Contracting, Inc. to perform masonry. AJD then

brought a third-party action against Plaintiff's employer, Jangho, and fictitious entities, including those who provided services for the construction project.

After the personal injury action settled, the third-party action was voluntarily dismissed without prejudice. Subsequent to the dismissal, the instant matter was timely filed on December 2, 2019. In the instant matter, Navigators became the subrogee of Plaintiff's claims and filed the instant suit. Navigator's Complaint includes nine counts, among which are breach of contract, contractual indemnity, failure to procure insurance, and a declaratory judgment, seeking a judgment from the court that Plaintiff is entitled to the relief as a matter of law.

### **FACTUAL BACKGROUND**

The instant motion concerns a dispute regarding an arbitration clause in the parties commercial contract. On August 21, 2013, AJD and Blade entered into a subcontractor contract in which Blade agreed to do masonry work on a property located at 70 Columbus Drive, Jersey City, New Jersey. The contract was negotiated between sophisticated parties and was not an employment contract nor a consumer contract.

The contract contains a provision in Section 6 that states: "Any claim arising out of or related to this Subcontract, except those waived in this Subcontract, shall be subject to mediation as a condition precedent to a binding dispute resolution." The Contract also contains a provision regarding "Binding Dispute Resolution". In Section 6.2 of the contract, the parties to the contract were to check off a box next to the following options in the contract: Arbitration pursuant to Section 6.3 of the Agreement; Litigation in a court of competent jurisdiction or "Other". The Contract also states that "[I]f no selection is made, then the claims will be resolved by litigation in a court of competent jurisdiction."

On the copy of the contract produced by AJD, there is no check mark by the binding dispute resolution. On the copy of the contract produced by Blade, there is a check mark by the box for “Arbitration pursuant to Section 6.3 of this Agreement”. This discrepancy is the basis of the instant motion.

### **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 Court Does Not Have Subject Matter Jurisdiction**

New Jersey law encourages the resolution of disputes through arbitration to improve the judicial process. See Willingboro Mall, Ltd. v. 240/242 Franklin Ave, LLC, 71 A.3d 888, 895 (N.J. 2013). Parties “may agree to any form of dispute resolution that they wish.” Barcon Assocs., Inc. v. Tri-City Asphalt Corp., 430 A.2d 214, 222 (N.J. 1981). In the instant contract, Section 6.1 states that “any claim arising out of or related to this Subcontract... shall be subject to mediation.” This clause requires the parties to attempt mediation before filing suit. The parties have not yet engaged in dispute resolution. The Court does not have subject matter jurisdiction since the contract requires the parties to attempt mediation

## **II. The Parties’ Contract Require Claims to Be Submitted to Binding Arbitration**

N.J.S.A 2A:23B-6(a) states:

An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract

The Court can order parties to arbitrate if there is an enforceable arbitration agreement in place. The New Jersey Supreme Court set forth two requirements that must be present in an enforceable arbitration agreement. There must be (1) mutual assent and (2) a clear and unambiguous waiver of rights. See Atalese v. U.S. Legal Services Group, L.P., 99 A.3d 306, 312-15 (N.J. 2014).

### **A. Plaintiff’s Claims Must Be Submitted to Arbitration in Accordance With Their Binding Contract**

The first requirement for establishing an enforceable arbitration agreement is whether the agreement is “the product of mutual assent, as determined under customary principles of contract law.” Kernahan v. Home Warranty Administrator of Florida, Inc., 199 A.3d 766, 776 (N.J. 2019). This determination is made on a case-by-case basis. Martindale v. Sandvik, Inc., 808 A.2d 872, 880 (N.J. 2002). The parties must understand the terms of the contract and the ramifications of those terms. Atalese, *supra* 99 A.3d at 313.

The Blade-AJD contracts in possession of both Blade and AJD have a clause labeled “BINDING DISPUTE RESOLUTION”. This clause sets forth the parties agreed-upon method of dispute resolution. On the Blade copy of the contract, there is a check mark in the box next to the subclause “Arbitration pursuant to Section 6.3 of this Agreement.” This copy of the contract is signed by representatives of **both** AJD and Blade indicating mutual assent by both parties.

AJD contends that their copy of the contract does not have a check mark next to the “BINDING DISPUTE RESOLUTION” clause and therefore there was no mutual assent. Certain characteristics of the Blade contract categorically demonstrate that the Blade contract is the final version. Namely, that the name and title of the Blade representative is located under the signature line on the Blade copy and not on the AJD copy. Therefore, this Court concludes that the Blade version of the contract was the final version of the parties agreement.

### **B. AJD Is A Sophisticated Business Entity**

The second prong of the Supreme Court’s test for enforcing binding arbitration agreements is that the parties must clearly and unmistakably waive their right to adjudicate their claim in court. See Atalese, 99 A.3d at 313. The twin concerns in Atalese in relation to contracts are: (1) a consumer may not be versed in “law -imbued terminology” and (2) “that the plain language explanations of consequences in contract cases are required in other settings where a

person would not be presumed to understand what was being agreed to.” See Kernahan, *supra* at 777.

There are three main categories of arbitration agreements considered by courts: consumer, employment, and commercial. See In Re Remicade, 938 F.3d 515, 525 (3d. Cir. 2019). The Atalese rule has been applied to both consumer and employment arbitration agreements. New Jersey courts have not applied Atalese to commercial contracts because both parties in a commercial contract are sophisticated so the concerns underlying the Atalese rule are not implicated. See In Re Remicade, at 525-26. Commercial contracts involve sophisticated parties that are knowledgeable about their rights regarding contractual claims and therefore can knowingly waive those rights.

The enforceability of an arbitration provision in a commercial contract is guided by the sophistication of the parties. In Re Remicade provides a guide for applying Atalese to sophisticated parties engaging in a commercial contract. The Court found that due to the parties’ status as “highly sophisticated participants” in their market that the plain language explanations in the contract of the rights of the parties that were given up by agreeing to arbitration was not fatal. See In Re Remicade, at 525-26.

In the instant case, the arbitration agreement binds both parties in the contract. The AJD-Blade contract is a commercial contract. Both parties to the contract crossed out subsections in the subcontract and changed the terms of the Standard Form agreement. In the instant contract, no part of the arbitration provision was crossed out in either AJD or Blade’s form of contract. Both parties then certainly knew their contractual rights and were sophisticated enough to know the implications of failing to fully redact the arbitration provision. AJD is a licensed construction company. Both parties had engaged in contract negotiations before this one and both parties were sophisticated contractors.

**CONCLUSION**

For the aforementioned reasons, Defendant's Motion to Dismiss is **GRANTED**.