SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0528-21

JAMES DAHL,

Plaintiff-Respondent,

v.

OPEN ROAD AUTO GROUP, and JAMES DEMARCO, individually and as agent of OPEN ROAD AUTO GROUP,

Defendants-Appellants.

Submitted March 30, 2022 – Decided April 18, 2022

Before Judges Hoffman, Whipple, and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0630-21.

Methfessel & Werbel, attorneys for appellants (Eric L. Harrison and Tiffany D. Tagarelli, on the briefs).

Resnick Law Group, PC, attorneys for respondent (Vincent A. Antoniello, on the brief).

PER CURIAM

Defendants Open Road Auto Group (Open Road) and James DeMarco appeal from Law Division orders denying their motion to dismiss plaintiff James Dahl's complaint and to compel arbitration, and their motion for reconsideration. We affirm.

We take the following facts from the motion record. Plaintiff was employed by Open Road as a Service Manager at Open Road BMW Newton. He commenced working there in April 2014. On April 30, 2014, plaintiff was called to meet with Office Manager Jackie Kornitzer and General Manager Ken Castellaneta to sign an arbitration agreement. At the impromptu meeting, plaintiff signed the arbitration agreement, as did a representative of Open Road.

In 2016, Open Road recruited plaintiff to come back to work for them after a break in his employment. Plaintiff made salary demands and returned to work for $10,500 per month guaranteed compensation. He worked uneventfully at Open Road from his recruitment in 2016 until the COVID-19 pandemic struck in 2020. Plaintiff disagreed with the way Open Road allegedly ignored certain guidelines, social distancing, and non-essential business protocols in addition to falsely representing certain aspects of the business to customers. Plaintiff took an approved leave of absence on May 22, 2020, pursuant to the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654, and notified Lisa

Cesaro, Vice President of Human Resources that he expected to return to work on August 17, 2020. However, Open Road shrugged off plaintiff's plans and DeMarco notified plaintiff on August 17 that he was terminated, explaining that Open Road "consolidated" his position due to COVID-19.

On May 4, 2021, plaintiff filed a complaint against Open Road and his former manager, DeMarco, alleging: (1) violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42; (2) violation of the New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14; (3) a Pierce[1] claim; (4) a claim for unpaid wages and unlawful deductions; and (5) breach of contract. Based on the arbitration agreement, defendants moved to dismiss the action without prejudice and to compel arbitration.

In support of their motion, defendants relied on a certification of Cesaro, who had worked for Open Road for fourteen years. She certified that Open Road has a "comprehensive new hire process to inform each and every new employee of the policies [and] practices" they employ. Cesaro stated that every employee hired by Open Road is furnished with a new hire packet at orientation that includes a New Hire Acknowledgement. She asserted that plaintiff was provided with the new hire packet and "signed the New Hire Acknowledgement

[1] Pierce v. Ortho Pharm. Corp., 84 N.J. 58 (1980).

on April 23, 2014." However, the exhibit attached to her certification is an Acknowledgement and Confidentiality Agreement that bears plaintiff's signature.[2]

Cesaro further certified all new hires execute an Arbitration Agreement as part of their orientation, as did plaintiff on April 30, 2014. The Arbitration Agreement was countersigned by former Open Road Human Resources Specialist Jaime Buckalew.

Cesaro explained that she personally handles orientation for all new hires and provides instruction on mandatory binding arbitration while also discussing the concept in a classroom discussion with the new hires. New employees are also supplied with a handout[3] which explains mandatory binding arbitration and that the Arbitration Agreement is a condition of employment. She further stated that "if any employee has questions or concerns regarding any documentation they're allowed to take any document home" and "are given as much time as necessary to review and sign all their required documentation." After orientation attendees sign the new hire paperwork, it is collected and

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[2] Cesaro mistakenly claims this is the New Hire Acknowledgement, which is not part of the record on appeal.

[3] The copy of the handout included in the record does not contain signatures.

subsequently reviewed by a Human Resources Specialist "to ensure each document has been executed" and is then marked with a yellow check.

Plaintiff's opposing certification pointed out alleged falsehoods in Cesaro's certification. He points out that Kornitzer, not Buckalew, countersigned the Arbitration Agreement. Plaintiff stated he did not attend any new hire orientation. He claims he never received any instruction regarding mandatory binding arbitration because Vice President Andrew Paul "excused [him] from attending because [they] were too busy for [plaintiff] to miss a full day of work." Plaintiff also states that the "handout" which explains mandatory binding arbitration was never given to him and he "is entirely unfamiliar" with it.

Plaintiff further claims he never had the benefit of a page-by-page review of the Arbitration Agreement and that Cesaro never explained anything to him about it. Plaintiff asserts he was met with "the expressed threat of no longer being employed" if he delayed signing the Arbitration Agreement or reviewed it with an attorney. Plaintiff submits that it was "clearly a take it or leave it situation" and "he understood that if he didn't sign it, he would be out of a job literally immediately, so he signed it." According to plaintiff, he signed the

agreement "unwillingly" and "without meaningfully understanding it" to keep his job.

During the motion hearing, the judge considered Atalese v. U.S. Legal Servs. Grp., LP, 219 N.J. 430 (2014), the seminal case on the enforceability of an arbitration agreement. After outlining the pertinent case law, the judge found he could not enforce the mandatory arbitration provision and waiver of the right to file this action under the circumstances presented. The judge noted that defendant's reply papers did not contest any of the facts asserted in plaintiff's certification. The judge concluded he must accept the uncontroverted facts certified by plaintiff and view those facts in the light most favorable to plaintiff, the non-moving party.

The judge explained that if someone who is given papers to sign asks to review them with an attorney, and is told "well, you're not allowed to do that, sign it now or leave and you're fired, . . . that is not an agreement that is a product of mutual assent." Because defendant did not dispute the facts asserted by plaintiff, the judge decided there was no need to conduct a plenary hearing.

The judge gave defendants the opportunity to renew their motion to dismiss the complaint and to compel arbitration, if supported by evidence set forth in a certification demonstrating the material facts.

Defendants moved for reconsideration. Defendants did not submit additional evidence or certifications to rebut plaintiff's version of events. The judge denied reconsideration. Plaintiff cross-moved for sanctions and fees under the frivolous litigation statute, N.J.S.A. 2A:15-59.1. The judge provided the following comments regarding what was missing from defendant's motion:

> It's fine to make a motion for reconsideration based on [that]. But if you're going to do that, show the [c]ourt exactly where it erred. That means get the transcripts of the [c]ourt's decision; point to where in my decision I erred. That's what needs to be done.
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> No transcript was obtained. No citation to my decision was obtained. The seminal case that I relied upon was not cited in the motion for reconsideration, not even in the reply papers.
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> [M]y decision, the holding that I rendered was misstated in the motion for reconsideration. It was stated that I found that there was a question of fact, and that's not the case. I found that based on the record there was no question of fact.

The judge then stated his findings of fact based on the certifications of plaintiff and Cesaro. Several days after plaintiff commenced work, he was told he had to sign the Arbitration Agreement. Because plaintiff did not understand what the agreement meant, he stated he was not comfortable signing it, and wished to bring it home to review it with an attorney. He was told he needed to sign it then and there or he would no longer be employed. Based on what

plaintiff was told, plaintiff signed the agreement unwillingly, without understanding it, and without being given a meaningful opportunity to understand it. The judge rejected defendants' argument that since plaintiff and an Open Road representative signed the agreement, there was a meeting of the minds.

The judge declined to award sanctions, noting defendant's original motion did not rise "to a level of frivolity." He recognized, however, that defendant's motion for reconsideration did rise to that level and acknowledged that plaintiff would again apply for sanctions, which he was likely to grant. This appeal followed.

Defendants raise the following point for our consideration.

> THE TRIAL COURT ERRED IN DENYING THE OPEN ROAD DEFENDANTS' MOTION TO DISMISS THE PLAINTIFF'S COMPLAINT AND COMPEL ARBITRATION AS A VALID ARBITRATION AGREEMENT EXISTS BETWEEN PLAINTIFF AND THE OPEN ROAD DEFENDANTS.

"The Federal Arbitration Act (FAA), 9 [U.S.C.] §§ 1-16, and the nearly identical New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, enunciate federal and state policies favoring arbitration." Atalese, 219 N.J. at 440 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)). Under the FAA, arbitration is a creature of contract. 9 U.S.C. § 2; Rent-A-Ctr., W., Inc.

v. Jackson, 561 U.S. 63, 67 (2010); see also Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 179 (2013) (explaining that under New Jersey law, arbitration is also a creature of contract). "[T]he FAA 'permits states to regulate . . . arbitration agreements under general contract principles,' and a court may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'" Atalese, 219 N.J. at 441 (alteration in original) (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2002)).

Appellate courts "apply a de novo standard of review when determining the enforceability of contracts, including arbitration agreements." Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207 (2019) (citing Hirsch, 215 N.J. at 186). No deference is owed to a trial court's "interpretative analysis." Morgan v. Sanford Brown Inst., 225 N.J. 289, 303 (2016) (citing Atalese, 219 N.J. at 445-46). We undertake a two-prong inquiry: (1) whether there is a valid and enforceable agreement to arbitrate disputes; and (2) whether the dispute falls within the scope of the agreement. Martindale, 173 N.J. at 86, 92.

When a trial court is "called on to enforce an arbitration agreement, a court's initial inquiry must be -- just as it is for any other contract -- whether the agreement to arbitrate all, or any portion, of a dispute is 'the product of mutual assent, as determined under customary principles of contract law.'" Kernahan

v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 319 (2019); accord Atalese, 219 N.J. at 442. "Under state law, 'if parties agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract.'" Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 135 (2020) (quoting Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992)). However, a party cannot be required to submit a dispute to arbitration unless they have agreed to do so. Angrisani v. Fin. Tech. Ventures, LP, 402 N.J. Super. 138, 148 (App. Div. 2008) (citing AT&T Techs. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986); Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 228 (1979)). "In the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute." Grover, 80 N.J. at 228.

Defendants argue that plaintiff's "subjective lack of understanding is insufficient to escape the applicability of a contract" that is unambiguous and that "the requirement that an arbitration agreement be accepted as a condition of future employment does not render acceptance of that condition evidence of coercion." We are unpersuaded.

Defendants cite to the frequently asked questions (FAQ) sheet on Mandatory Binding Arbitration as evidence that plaintiff was "expressly advised that his assent to the binding agreement was a condition of continued

employment" but there is no evidence in the record that plaintiff received the FAQ sheet. Nor have defendants shown that plaintiff attended an orientation session where the FAQ sheet would have been disseminated to him.

Defendant summarily contend that signing the Arbitration Agreement coupled with being advised that his signature was required to continue working, demonstrates mutual assent. We disagree. Under the circumstances presented, physically signing the agreement does not conclusively establish that plaintiff assented to its terms.

To be enforceable, an agreement requires mutual assent. Morgan, 225 N.J. at 308 (citing Atalese, 219 N.J. at 442). State contract law is applied to ascertain whether the parties had a meeting of the minds when contracting and whether a party has clearly and unambiguously consented to arbitration. Atalese, 219 N.J. at 442. "Mutual assent requires that the parties have an understanding of the terms to which they have agreed," or, in other words, a "meeting of the minds." Ibid. (quoting Morton v. 4 Orchard Land Tr., 180 N.J. 118, 120 (2004)); see also Barr v. Bishop Rosen & Co., 442 N.J. Super. 599, 606 (App. Div. 2015) ("Mutual assent requires that the parties understand the terms of their agreement.").

"The meaning of arbitration is not self-evident to the average consumer, who will 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.'" Morgan, 225 N.J. at 308 (quoting Atalese, 219 N.J. at 442). The waiver of a legal right (here, the right to trial by jury) requires "a clear, unequivocal, and decisive act of the party . . . . 'Waiver' presupposes a full knowledge of the right and an intentional surrender; waiver cannot be predicated on consent given under a mistake of fact." W. Jersey Title & Guar. Co. v. Indus. Tr. Co., 27 N.J. 144, 152-53 (1958) (internal citations omitted). In Atalese, the Court refused to enforce an arbitration agreement because "the provision does not explain what arbitration is, nor does it indicate how arbitration is different from a proceeding in a court of law." 219 N.J. at 446.

Although the enforceability of an arbitration clause is reviewed de novo, the trial court's factual findings are "considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1984). Because the facts presented by plaintiff were uncontroverted, the record supports the trial court's findings. Those undisputed facts include that plaintiff did not attend an orientation session or otherwise receive an explanation of the agreement, did not

understand the meaning of the Arbitration Agreement he signed, was rushed into signing it, and was told if he delayed signing the agreement to review it with an attorney, he would not have a job. Plaintiff only possessed a high school diploma. Considering these facts, absent a discussion informing the employee about the implications and waivers implied in the arbitration agreement, it is unenforceable.

Given these undisputed facts, defendants have not demonstrated there was a meeting of the minds or mutual assent to arbitrate the claims raised by plaintiff. Therefore, the agreement is not enforceable. Accordingly, the motions to dismiss the complaint and to compel arbitration, and the motion for reconsideration, were properly denied.

In light of our ruling, the denial of defendants' motion for reconsideration does not require extensive discussion. We affirm the denial of reconsideration substantially for the reasons expressed by the trial court. The trial court's findings of fact are adequately supported by the record. R. 2:11-3(e)(1)(A). "Reconsideration under Rule 4:49-2 is a matter within the sound discretion of the [trial] court . . . ." Casino Reinvestment Dev. Auth. v. Teller, 384 N.J. Super. 408, 413 (App.Div.2006). We discern no abuse of discretion.

Affirmed.