NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1861-20

LOUIE PEREZ,

Plaintiff-Appellant,

v.

SKY ZONE LLC, SKY ZONE FRANCHISE GROUP, LLC, CIRCUSTRIX HOLDINGS, LLC, GO AHEAD AND JUMP 4, LLC d/b/a SKY ZONE, ABEO NORTH AMERICA, INC., and FUN SPOT MANUFACTURING, LLC,

Defendants-Appellants.

APPROVED FOR PUBLICATION

May 16, 2022

APPELLATE DIVISION

Argued February 2, 2022 – Decided May 16, 2022

Before Judges Gilson, Gooden Brown, and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-3464-20.

Jared M. Placitella argued the cause for appellant (Cohen, Placitella & Roth, PC, and Chazen & Chazen, LLC, attorneys; Jared M. Placitella, Christopher M. Placitella, and David K. Chazen, on the briefs).

Jill A. Mucerino argued the cause for respondents Sky Zone LLC, Sky Zone Franchise Group, LLC, Circustrix Holdings, LLC and Go Ahead and Jump 4, LLC d/b/a Sky Zone (Wood Smith Henning & Berman LLP,

attorneys; Jill A. Mucerino and Sean P. Shoolbraid, on the brief).

The opinion of the court was delivered by

GILSON, J.A.D.

Plaintiff Louie Perez placed a check mark next to an arbitration provision contained in an agreement he signed to enter a trampoline park. He appeals from an order compelling his personal-injury claims to arbitration and staying the action he filed in the Law Division. We hold that the arbitration provision contained in the agreement that plaintiff signed is valid and enforceable. We, therefore, affirm the portion of the order compelling arbitration of the claims against defendants Sky Zone, LLC, Sky Zone Franchise Group, LLC, Circustrix Holdings, LLC, and Go Ahead and Jump 4, LLC (collectively the Sky Zone defendants).

We remand for entry of a new order compelling the claims against the Sky Zone defendants to arbitration and staying the Law Division action, including the claims against defendants Abeo North America, Inc. (Abeo) and Fun Spot Manufacturing, LLC (Fun Spot). There is nothing in the record establishing that Abeo or Fun Spot is an affiliate company or agent of the Sky Zone defendants and, therefore, neither defendant was covered by the arbitration provision.

Consequently, the claims against Abeo and Fun Spot are to be stayed until the arbitration proceedings are concluded.

I.

On October 26, 2019, plaintiff, together with his seven-year-old son, went to the Sky Zone trampoline park in Springfield, New Jersey. To enter the park, plaintiff was required to check himself and his son in at a kiosk. At the kiosk, plaintiff had an opportunity to review a "Participation Agreement, Release and Assumption of Release (The Agreement)."

The Agreement contained various provisions, including provisions entitled "ACKNOWLEDGEMENT OF POTENTIAL INJURIES;" "VOLUNTARY ASSUMPTION OF RISK ACKNOWLEDGMENT;" "RELEASE OF LIABILITY;" and "ARBITRATION OF DISPUTES; TIME LIMIT TO BRING CLAIM" (the Arbitration Provision).

The Arbitration Provision stated that plaintiff was waiving his right to bring a lawsuit against the Sky Zone defendants and, instead, was agreeing to arbitrate any claims arising out of his access to or use of the trampoline park. The Provision also stated that the arbitrator would resolve any disputes concerning the scope of the agreement to arbitrate. Furthermore, the Arbitration Provision stated that it was governed by New Jersey law and that any arbitration

would be governed by the Federal Arbitration Act (the FAA), 9 U.S.C. §§ 1-16.

The Arbitration Provision stated:

> I understand that by agreeing to arbitrate any dispute as set forth in this section, I am waiving my right, and the right(s) of the minor child(ren) above, to maintain a lawsuit against [the Sky Zone defendants] and the other Releasees for any and all claims covered by this Agreement. By agreeing to arbitrate, I understand that I will **NOT** have the right to have my claim determined by a jury, and the minor child(ren) above will **NOT** have the right to have claims(s) determined by a jury. Reciprocally, [the Sky Zone defendants] and the other Releasees waive their right to maintain a lawsuit against me and the minor child(ren) above for any and all claims covered by this Agreement, and they will not have the right to have their claim(s) determined by a jury. **ANY DISPUTE, CLAIM OR CONTROVERSY ARISING OUT OF OR RELATING TO MY OR THE CHILD'S ACCESS TO AND/OR USE OF THE SKY ZONE PREMISES AND/OR ITS EQUIPMENT, INCLUDING THE DETERMINATION OF THE SCOPE OR APPLICABILITY OF THIS AGREEMENT TO ARBITRATE, SHALL BE BROUGHT WITHIN ONE YEAR OF ITS ACCRUAL (i.e., the date of the alleged injury) FOR AN ADULT AND WITHIN THE APPLICABLE STATUTE OF LIMITATIONS FOR A MINOR AND BE DETERMINED BY ARBITRATION IN THE COUNTY OF THE SKY ZONE FACILITY, NEW JERSEY, BEFORE ONE ARBITRATOR. THE ARBITRATION SHALL BE ADMINISTERED BY JAMS PURSUANT TO ITS RULE 16.1 EXPEDITED ARBITRATION RULES AND PROCEDURES. JUDGMENT ON THE AWARD MAY BE ENTERED IN ANY COURT HAVING JURISDICTION. THIS CLAUSE**

> **SHALL NOT PRECLUDE PARTIES FROM SEEKING PROVISIONAL REMEDIES IN AID OF ARBITRATION FROM A COURT OF APPROPRIATE JURISDICTION.** This Agreement shall be governed by, construed and interpreted in accordance with the laws of the State of New Jersey, without regard to choice of law principles. Notwithstanding the provision with respect to the applicable substantive law, any arbitration conducted pursuant to the terms of this Agreement shall be governed by the Federal Arbitration Act (9 U.S.C., Sec. 1-16). I understand and acknowledge that the JAMS Arbitration Rules to which I agree are available online for my review at jamsadr.com, and include JAMS Comprehensive Arbitration Rules & Procedures; Rule 16.1 Expedited Procedures; and, Policy On Consumer Minimum Standards Of Procedural Fairness.

The Agreement also contained a severability clause, which provided: "If any term or provision of this Release shall be held illegal, unenforceable, or in conflict with any law governing this Release the validity of the remaining portions shall not be affected thereby." In the Agreement, plaintiff acknowledged: "I have had sufficient opportunity to read this entire document. I have read and understood and voluntarily agree to be bound by its terms."

After having an opportunity to review it, plaintiff checked the box located at the beginning of the Arbitration Provision. At the end of the Agreement, plaintiff added his name, his son's name, their birthdates, and his address, phone number, and email address.

On October 20, 2020, plaintiff filed a lawsuit alleging that he suffered physical injuries while at the trampoline park. As defendants, he named the Sky Zone defendants, as well as Abeo and Fun Spot. The Sky Zone defendants moved to dismiss plaintiff's complaint and compel arbitration. Abeo and Fun Spot did not join that motion. Instead, Fun Spot filed an answer. The record provided to us does not contain an answer by Abeo.

On February 5, 2021, the trial court heard oral arguments on the motion. At that hearing, an attorney representing Abeo and Fun Spot informed the trial court that his clients were not joining the motion. After hearing oral argument, the trial court granted the motion and entered an order compelling all of plaintiff's claims to arbitration and staying the litigation. The court also issued a statement of reasons supporting its ruling. The trial court held that the Arbitration Provision was valid and enforceable against plaintiff and that it covered all his claims. The court also held that the claims against Fun Spot and Abeo should be compelled to arbitration, reasoning that those entities fell under the Arbitration Provision "based on agency principles." In making that holding, the court did not analyze or make any factual findings that Fun Spot or Abeo is an agent of the Sky Zone defendants. Moreover, the court concluded that it would not be equitable for plaintiff to avoid arbitration simply because he chose

to name parties who had not signed the Arbitration Provision. Plaintiff now appeals from the February 19, 2021 order compelling arbitration and staying the Law Division action.

II.

On appeal, plaintiff argues that the trial court erred in (1) ruling that the Arbitration Provision was enforceable; (2) severing the Arbitration Provision from other provisions that were allegedly not enforceable; and (3) compelling his claims against Abeo and Fun Spot to arbitration. In his reply brief, plaintiff also contends that the Sky Zone defendants waived the argument that the questions concerning the scope of the Arbitration Provision should be delegated to the arbitrator and that the Arbitration Provision did not clearly delegate scope questions to the arbitrator.

A. The Enforceability of the Arbitration Provision.

We use a de novo standard of review when determining the enforceability of an arbitration agreement. Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207 (2019) (citing Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013)). The validity of an arbitration agreement is a question of law, and we conduct a plenary review of such legal questions. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 445-46 (2014) (citing Kieffer v. Best Buy, 205 N.J. 213, 222-23

(2011)); Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 605 (App. Div. 2015) (citing Hirsch, 215 N.J. at 186).

The FAA and "the nearly identical New Jersey Arbitration Act [(NJAA)], enunciate federal and state policies favoring arbitration." Atalese, 219 N.J. at 440 (citation omitted). Under both the FAA and NJAA, arbitration is fundamentally a matter of contract. 9 U.S.C. § 2; NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011). "[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)).

In determining whether a matter should be submitted to arbitration, a court must evaluate (1) whether a valid agreement to arbitrate exists, and (2) whether the dispute falls within the scope of the agreement. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985); Martindale, 173 N.J. at 92. The FAA and the NJAA, however, allow the second question - the scope of what is subject to arbitration – to be delegated to the arbitrator. Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. ___, 139 S. Ct. 524, 529-30 (2019);

Goffe, 238 N.J. at 211; Morgan v. Sanford Brown Inst., 225 N.J. 289, 303 (2016).

To reflect mutual assent to arbitrate, the terms of an arbitration provision must be "sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right." Atalese, 219 N.J. at 443. "No particular form of words is necessary to accomplish a clear and unambiguous waiver of rights." Id. at 444. If "at least in some general and sufficiently broad way" the language of the clause conveys that arbitration is a waiver of the right to bring suit in a judicial forum, the clause will be enforced. Id. at 447. "The key . . . is clarity." Barr, 442 N.J. Super. at 607.

The language of the Arbitration Provision in the Agreement signed by plaintiff is clear. It states plaintiff was "agreeing to arbitrate any dispute" arising out of his use of the trampoline park and was "waiving [his] right . . . to maintain a lawsuit." It sets forth that "[b]y agreeing to arbitrate, [plaintiff] understand[s] that [he] will NOT have the right to have [his] claim determined by a jury." That broad language is a clear and unambiguous waiver of plaintiff's right to a jury trial and to pursue his claims in a court of law and, accordingly, is enforceable. See Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 137-38 (2020); Atalese, 219 N.J. at 444-45; Martindale, 173 N.J. at 92, 96.

Plaintiff argues that the Arbitration Provision is unenforceable because it calls for an arbitration by JAMS, but JAMS was not available to conduct the arbitration. The Arbitration Provision states it will be interpreted in accordance with New Jersey law and the arbitration would be governed by the FAA. The FAA and the NJAA provide for a court-appointed arbitrator if the designated arbitrator is unavailable. Section 5 of the FAA authorizes a court to designate an arbitrator "if for any other reason there shall be a lapse in the naming of an arbitrator . . . or in filling a vacancy." 9 U.S.C. § 5. The NJAA has a similar provision, authorizing court-appointment of an arbitrator if "an arbitrator appointed fails or is unable to act." N.J.S.A. 2A:23B-11(a).

Moreover, our Supreme Court has held that "[n]o New Jersey statutory provision or prior decision has elevated the selection of an 'arbitral institution' . . . to the status of [an] essential contract term[]." Flanzman, 244 N.J. at 139. Federal courts have also construed section 5 of the FAA as allowing for the substitution of an arbitrator when the designated arbitrator is unavailable. Khan v. Dell Inc., 669 F.3d 350, 357 (3d Cir. 2012). Unless the parties have unambiguously expressed their intent not to arbitrate their disputes when the designated arbitral forum is unavailable, an alternative arbitration forum can be appointed. Id. at 354.

The Arbitration Provision does not state the parties intended not to arbitrate their disputes if JAMS is unavailable, and nothing indicates the designation of JAMS was integral to the Arbitration Provision. Moreover, the Provision enables the parties to seek "provisional remedies in aid of arbitration" from a court. Accordingly, we conclude the unavailability of JAMS does not render the Arbitration Provision unenforceable.

B. Whether Other Provisions of the Agreement Can Be Severed.

Plaintiff also contends that the Arbitration Provision is unenforceable because the Agreement contains other unenforceable provisions that render the entire Agreement invalid. He challenges the validity of the release-of-liability provision and the assumption-of-the-risk provision. Plaintiff argues that the trial court erred in severing and enforcing the Arbitration Provision. This argument is premised on a misinterpretation of the trial court's ruling and is incorrect as a matter of law.

The trial court did not sever other provisions; rather, the trial court correctly recognized that the validity of the other provisions was a scope-of-arbitrability question that had to be presented to the arbitrator. We agree because that is what the law requires when parties delegate those issues to the arbitrator. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006)

(finding "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator"); Goffe, 238 N.J. at 211 ("[D]elegation of authority to the arbitrator to resolve disputes relating to the enforceability of the agreement [is] valid.").

C. The Claims Against Abeo and Fun Spot.

The final issue is whether plaintiff's claims against Abeo and Fun Spot can be compelled to arbitration or should be stayed pending the arbitration. The Arbitration Provision defines the parties that it covers to include the Sky Zone defendants "and their respective and collective agents, owners, officers, managers, shareholders, affiliates, volunteers, participants, employees, and all other persons or entities acting in any capacity on their respective or collective behalf (collectively, 'SZ')." There is nothing in the record showing that Abeo or Fun Spot is an affiliate company or agent of the Sky Zone defendants. To the contrary, Fun Spot filed an answer and did not assert that it was covered by the Arbitration Provision. Consequently, we find no support for the trial court's conclusory determination that the claims against Abeo and Fun Spot could be compelled to arbitration "based on agency principles." "An agency relationship is created 'when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the

principal's control, and the agent manifests assent or otherwise consents so to act.'" Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 26 (App. Div. 2021) (quoting N.J. Laws.' Fund for Client Prot. v. Stewart Title Guar. Co., 203 N.J. 208, 220 (2010)). Nor do we agree with the trial court that the circumstances warrant using equitable estoppel to compel arbitration. We, therefore, reverse and vacate the portion of the trial court's order that compelled plaintiff to arbitrate his claims against Abeo and Fun Spot.

Under the FAA and the NJAA, a court must stay an arbitrable action pending the arbitration. 9 U.S.C. § 3; N.J.S.A. 2A:23B-7(g). Although not mandatory, when significant overlap exists between parties and issues, claims against parties who have not agreed to arbitrate should be stayed pending the arbitration. See Barrowclough v. Kidder, Peabody & Co., Inc., 752 F.2d 923, 938 (3d Cir. 1985), rev'd on other grounds, Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3d Cir. 1993); Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560, 577 (App. Div. 2007). In other words, the arbitration agreement must be enforced notwithstanding the presence of other persons who are not parties to the Agreement. Accordingly, on remand we direct the trial court to enter a new order compelling plaintiff to arbitrate his claims against the

Sky Zone defendants and staying the Law Division action, including the claims against Abeo and Fun Spot.

In making that direction, we add a comment. The trial court stated that Fun Spot and Abeo could agree to arbitrate their claims. That is true, with an important caveat. Plaintiff would also have to agree to arbitrate his claims against Abeo and Fun Spot. Consequently, on remand, if plaintiff, Fun Spot, and Abeo agreed, all the claims could be sent to arbitration. If plaintiff does not agree, then the claims against Abeo and Fun Spot must be stayed pending the arbitration.

Affirmed in part, reversed in part, and remanded for entry of a new order. We do not retain jurisdiction.