SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3082-19

LORIN CANGIANO,

Plaintiff-Appellant,

v.

THE DOHERTY GROUP, INC. d/b/a DOHERTY ENTERPRISES[1], TIMOTHY DOHERTY, DANIEL BRATCHER, CINDY GONZALEZ, and PAUL SCHOBEL,

Defendants-Respondents.

Submitted March 7, 2022 – Decided April 8, 2022

Before Judges Messano, Accurso, and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3571-19.

McOmber McOmber & Luber, PC, attorneys for appellant (R. Armen McOmber, of counsel and on the briefs; Matthew A. Luber, on the briefs).

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[1] Incorrectly pled as Doherty Enterprises, Inc.

Saul Ewing Arnstein & Lehr, LLP, attorneys for respondents (Dena B. Calo, Gillian A. Cooper, and Erik P. Pramschufer, on the brief).

PER CURIAM

Plaintiff Lorin Cangiano appeals from a Law Division order compelling arbitration and dismissing without prejudice her amended complaint against her former employer, The Doherty Group, Inc. d/b/a Doherty Enterprises, and four of its employees, and denying her cross-motion for counsel fees and costs. For the reasons that follow, we affirm.

I.

On May 8, 2019, plaintiff applied for a business analyst position with Doherty Enterprises by completing the company's online application. As part of the requisite application process, plaintiff created a unique profile and input information in response to a series of questions. She acknowledged the company's policies by typing her name and date in the corresponding fields. Plaintiff indicated her "[m]ost [r]ecent [e]ducational [l]evel" was college graduate.[2]

The third section of the application contains a six-paragraph provision, displayed in bold font and entitled: "MANDATORY ARBITRATION

[2] According to her initial complaint filed in October 2019, plaintiff also attained a master's degree in business administration.

AGREEMENT" (Agreement). After she was hired, on May 20, 2019, plaintiff electronically acknowledged she had signed the Agreement as part of her employment application.

Pursuant to the Agreement's first paragraph, plaintiff assented to "binding arbitration to resolve any dispute, controversy, or claim arising out of, relating to or in connection with [her] employment with Doherty Enterprises." The following paragraph provides, in full:

> I and Doherty Enterprises both agree that any claim, dispute, and/or controversy (including but not limited to any claims of employment discrimination, harassment, and/or retaliation under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Uniformed Services Employment and Reemployment Rights Act, and any other applicable federal, state, or local statute, regulation or common law doctrine) which would otherwise require or allow resort to any court between myself and Doherty Enterprises (and/or its parents, subsidiaries, affiliates, owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, ending of my employment with, or other association with Doherty Enterprises, whether based in tort, contract, statutory, or equitable law, or otherwise, shall be submitted to and determined exclusively by binding arbitration.
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> [(Emphasis added).]

Paragraph four states the Agreement is governed by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16; arbitration will be conducted pursuant to the American Arbitration Association's (AAA) employment arbitration rules; and the arbitrator's decision will be "final and binding upon both parties." The final paragraph is set forth in all capital letters, commencing with the following provision: "I UNDERSTAND BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND DOHERTY ENTERPRISES WAIVE OUR RIGHT TO TRIAL BY JURY."

Plaintiff signed the Agreement by typing her name and date, and submitting the application through the company's website. Plaintiff was employed by Doherty Enterprises for three months until she was terminated on August 21, 2019. Thereafter, plaintiff timely sued Doherty Enterprises, Timothy Doherty, Daniel Bratcher, Cindy Gonzalez, and Paul Schobel, asserting retaliation and wrongful termination under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, and wrongful discharge in violation of public policy.

Plaintiff also sought to declare the arbitration agreement void under N.J.S.A. 10:5-12.7 (Section 12.7),[3] a 2019 amendment to New Jersey's Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50, governing certain waiver provisions set forth in employment contracts. Notably, plaintiff did not assert a claim under any section of the LAD.

In a cogent statement of reasons accompanying a March 19, 2020 order, the judge granted defendants' ensuing motion to compel arbitration. Analyzing the terms of the Agreement pursuant to the governing law, the judge found its language clearly reflects the parties' mutual understanding that their disputes would be submitted to arbitration, and their assent to waive their right to trial by jury. The judge noted the capitalized text of the final paragraph emphasizes the waiver provision. The judge further found the Agreement "identifies the

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[3] Effective March 18, 2019, two months prior to the effective date of the Agreement in this case, the Legislature amended the LAD to add several sections, including Section 12.7, which provides, in pertinent part:

> a. A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.
>
> b. No right or remedy under the "[LAD]," . . . or any other statute or case law shall be prospectively waived.

forum and terms of the proceeding," and "outlines the claims and issues the parties agree will be subject to arbitration." The judge also determined plaintiff acknowledged the terms of the Agreement during the application process and after she was hired.

Recognizing Section 12.7 is part of the LAD – and plaintiff's complaint failed to assert a violation of the LAD – the judge determined Section 12.7 was inapplicable to the claims asserted in plaintiff's amended complaint. The judge distinguished the similar purpose underscoring both acts, see Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 417-18 (1994), and their similar causes of action from "the express terms within either statute." He reasoned those terms "only apply to the claims under the [a]ct in which they fall."

Referencing paragraph (b) of Section 12.7, the motion judge noted the Agreement "d[oes] not 'waive' any right or remedy under any statute or law." Instead, the agreement "identifie[s] the venue in which such right or remedy must be pursued." See Martindale v. Sandvik, Inc., 173 N.J. 76, 93-94 (2002) ("The essential point is that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial, forum.'" (alteration in

original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))).

The motion judge did not reach defendant's preemption argument under the FAA. This appeal followed.

On appeal, plaintiff reprises her arguments that Section 12.7 is applicable to all retaliation claims, including those under the CEPA, and the Agreement "is an unenforceable and unconscionable contract of adhesion." She further contends defendant's preemption argument is inapplicable to challenges to the Agreement's enforceability and scope, which are subject to "ordinary contract principles under state law." Plaintiff also argues the judge erroneously denied her cross-motion for fees and costs.

II.

We review the trial court's decision to compel or deny arbitration de novo. Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020). Because the enforceability of a contractual arbitration provision is a legal determination, we need not defer to the trial court's interpretative analysis, "unless we find it persuasive." Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019); see also Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207 (2019).

It is well settled that "arbitration is a matter of contract." NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011) (internal quotation marks omitted). In determining whether a matter should be submitted to arbitration, a court must first evaluate whether a valid agreement to arbitrate exists and, if so, then decide whether the dispute falls within the scope of the agreement. Martindale, 173 N.J. at 85, 92.

An agreement to arbitrate "must be the product of mutual assent, as determined under customary principles of contract law." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442 (2014) (internal quotation marks omitted). "As with other contractual provisions, courts look to the plain language the parties used in the arbitration provision," Medford Twp. Sch. Dist. v. Schneider Elec. Bldgs. Ams., Inc., 459 N.J. Super. 1, 8 (App. Div. 2019), thereby honoring the intentions of the parties, Quigley v. KPMG Peat Marwick, LLP, 330 N.J. Super. 252, 270 (App. Div. 2000). "[T]o be enforceable, the terms of an arbitration agreement must be clear, and any legal rights being waived must be identified." Antonucci v. Curvature Newco, Inc., ___ N.J. Super. ___, ___ (App. Div. 2022) (slip op. at 8); see also Skuse, 244 N.J. at 49 ("[A] waiver-of-rights provision [must] be written clearly and unambiguously.").

"In an employment setting, employees must 'at least know that they have agree[d] to arbitrate all statutory claims arising out of the employment relationship or its termination.'" Skuse, 244 N.J. at 49-50 (alteration in original) (quoting Atalese, 219 N.J. at 447). "When the waiver of rights is an agreement to arbitrate employment disputes, courts 'require[ ] some concrete manifestation of the employee's intent as reflected in the text of the agreement itself.'" Id. at 48 (alteration in original) (quoting Leodori v. Cigna Corp., 175 N.J. 293, 300 (2003))). The waiver-of-rights provision need not include a "prescribed set of words." Atalese, 219 N.J. at 447. Instead, the provision, "at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." Ibid.

The FAA and the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -36, reflect federal and state policies that favor arbitration of disputes. The FAA preempts state laws "that single out and invalidate arbitration agreements." Roach v. BM Motoring, LLC, 228 N.J. 163, 174 (2017). Therefore, a court "cannot subject an arbitration agreement to more burdensome requirements than other contractual provisions." Ibid. (internal quotation marks omitted). And the terms of an arbitration provision should be read liberally and in favor

of arbitration. Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2006); see also Preston v. Ferrer, 552 U.S. 346, 362-63 (2008) (noting incorporation of the AAA rules weighs in arbitration's favor).

With those general principles in mind, we first consider the enforceability of the Agreement and conclude – as did the motion judge – its terms are clear, and the waiver of plaintiff's right to trial by jury was prominently displayed in capital letters and bolded font. The terms of the Agreement clearly state the parties agreed to arbitrate all employment-related claims before an AAA arbitrator, and "waive [their] right to trial by jury." The Agreement expressly states it covers all statutory claims and the parties. The Agreement also was the product of mutual assent. Plaintiff acknowledged she signed the Agreement during the application process and again when she was hired. We therefore conclude the Agreement is valid and enforceable.[4]

[4] Plaintiff does not argue her claims fall outside the scope of the Agreement, which delegated to the arbitrator any question concerning the arbitrability of all claims. Delegations of the scope of an arbitration agreement are enforceable under the FAA. Henry Schein, Inc. v. Archer & White Sales, Inc., 592 U.S. ___, 139 S. Ct. 524, 529-30 (2019); see also Goffe, 238 N.J. at 211.

We also reject plaintiff's contentions that as a contract of adhesion,[5] the Agreement is unenforceable. See Martindale, 173 N.J. at 89, 96 (holding even if the arbitration provision at issue were deemed a contract of adhesion, its terms were "clear and unambiguous" and "sufficiently broad to encompass reasonably [the] plaintiff's statutory causes of action"). Similar to the applicant in Martindale, plaintiff in the present case "has failed to demonstrate how the terms of the arbitration agreement were oppressive or unconscionable." Id. at 91. At the very least, plaintiff was a college graduate when she acknowledged the terms of the Agreement during the application process and thereafter when she was hired. She expressed no inability to understand those terms. Moreover, "[t]he insertion of an arbitration agreement in an application for employment simply does not violate public policy." Id. at 92.

We turn to the application of Section 12.7 to plaintiff's retaliation claims under the CEPA. Plaintiff maintains notwithstanding the inclusion of the section in the LAD statute, paragraph (b) plainly states: "No right or remedy

[5] "[T]he essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the 'adhering' party to negotiate except perhaps on a few particulars." Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353 (1992).

under the '[LAD],' . . . or any other statute or case law shall be prospectively waived." (Emphasis added). While we acknowledge plaintiff's argument, we need not decide the issue.

Instead, we consider defendants' contention that Section 12.7 is preempted by the FAA, which we recently addressed in Antonucci. ___ N.J. Super. at ___ (slip op. at 7). In that case, the plaintiff filed a discrimination complaint under the LAD against his former employer. Id. at ___ (slip op. at 1-2). Similar to the present matter, the plaintiff signed an arbitration agreement, stating "it was 'enforceable under and subject to the [FAA].'" Id. at ___ (slip op. at 5).

We held Section 12.7 is preempted "when applied to prevent arbitration called for in an agreement governed by the FAA." Id. at ___ (slip op. at 15). In reaching our decision, we reiterated the FAA's primary purpose, i.e., to "'ensur[e] that private arbitration agreements are enforced according to their terms.'" Id. at ___ (slip op. at 11-12) (alteration in original) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011)). Although we observed the FAA does not contain a preemptive provision, we were persuaded "the FAA protects arbitration agreements involving interstate commerce" and, as such, "a state law that conflicts with the FAA or frustrates its purpose

violates the Supremacy Clause of the United States Constitution." Id. at ___ (slip op. at 12-13).

Applying those principles to the newly enacted amendment to the LAD, we observed:

> Section 12.7 does not expressly use the term "arbitration," nor does it expressly state that it applies to agreements to arbitrate. Nevertheless, applied to an arbitration agreement in the employment context, the plain language of Section 12.7 of LAD prohibits all pre-dispute agreements if those agreements prospectively waive the right to file a court action for a LAD claim.
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> The waiver of the right to go to court and receive a jury trial is one of the primary objectives or "defining features" of an arbitration agreement.
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> [(Id. at ___ (slip op. at 13-14) (quoting Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. ___, 137 S. Ct. 1421, 1426 (2017)).]

Similar to the motion judge in the present case, we were persuaded an agreement to arbitrate a dispute "'does not forgo the substantive rights afforded by the statute.'" Id. at ___ (slip op. at 15) (quoting Martindale, 173 N.J. at 93).

We conclude the FAA preempts N.J.S.A. 10:5-12.7 in the present matter for the same reasons we found controlling in Antonucci, id. at ___ (slip op. at 12-15); because the parties agreed to arbitrate their disputes pursuant to the FAA, the motion judge properly dismissed plaintiff's complaint and compelled

arbitration. To the extent we have not specifically addressed a particular argument, it is because either our disposition makes it unnecessary, or the argument was without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION