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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3592-20**

ROBERT YURA,

Plaintiff-Appellant,

v.

**MONETTI HOMES, LLC,
and THOMAS MONETTI,**

Defendants-Respondents.

Submitted May 9, 2022 – Decided May 23, 2022

Before Judges Sabatino and Mayer.

On appeal from the Superior Court of New Jersey, Law
Division, Ocean County, Docket No. L-0857-21.

Singley, Gindele & Rinaldi, LLC, attorneys for
appellant (Matthew J. Gindele, on the briefs).

Richard M. Sasso, attorney for respondents.

PER CURIAM

Plaintiff Robert Yura appeals from a May 21, 2021 order denying his motion to declare an arbitration provision in a March 20, 2020 contract unenforceable and dismiss the arbitration proceeding. We reverse and remand for a plenary hearing.

Plaintiff owns and operates the Barnegat Funeral Home. Defendant Monetti Homes, LLC (Homes) is a construction and home improvement company. Homes is owned and operated by defendant Thomas Monetti (Monetti).

On March 20, 2020, plaintiff and Homes signed a contract to construct an addition to the funeral home. The cost for the work totaled \$183,089.44. The contract contained the following provision:

33. ARBITRATION. Any controversy arising out of the construction . . . of the structure referred to in this contract or relating to the interpretation of this contract, or any subcontract or sub-subcontract, shall be decided by arbitration. The Owner, the Contractor, and all subcontractors, sub-subcontractors, material suppliers, engineers, designers, architects, construction lenders, and all other parties concerned with and involved in the construction of the structure are bound, each to each other, by this arbitration clause, provided such party has signed this contract, or has signed a contract which incorporates this contract by reference, or signs any other agreement to be bound by this arbitration clause. Arbitration shall be had in accordance with the

Construction industry Rules of the American Arbitration Association which are in effect at the time of the arbitration. Should any party refuse or neglect to appear or to participate in whatever evidence is presented[,] [t]he arbitrator is authorized to award any party or parties such sums as he shall deem proper for the time, expense, and trouble of arbitration, including interest on unpaid balances due Contractor, arbitration fees and attorney fees. Arbitration under this Contract shall take place in Ocean County, New Jersey pursuant to the laws of the State of New Jersey. Should any party refuse or neglect to participate or appear in such arbitration, the non-participating party shall be bound by the arbitrator's decision based on any evidence presented.

The contract contained no provision explicitly stating the parties were waiving their rights to a jury trial.

During construction, disputes arose regarding improper and incomplete work and the assessment of charges beyond the original scope of work. Due to these disputes, in August 2020, Homes refused to complete the work.

On November 27, 2020, Monetti filed for arbitration, seeking payment for the balance due under the contract. Plaintiff filed an answer in the arbitration action.

On March 31, 2021, plaintiff filed a complaint against defendants for breach of contract, unjust enrichment, failure to act in good faith, and violations of the Consumer Fraud Act and Truth-in-Consumer Contract, Warranty and

Notice Act. Homes and Monetti filed an answer and counterclaim. Simultaneous with the filing of the complaint, plaintiff moved to dismiss the arbitration and proceed with his claims in the Superior Court of New Jersey.

Plaintiff was not represented by counsel when he signed the Homes' contract. Nor did plaintiff seek to modify or alter the terms of the contract prior to signing the document. According to his certification, plaintiff believed the contract encompassed home improvement work because the document referred to the Consumer Fraud Act and Home Improvement Contractor's Registration Act. Plaintiff also asserted the contract's arbitration provision lacked any acknowledgement that he waived the right to litigate disputes in a court of law or the right to a trial by jury.

Defendants opposed the motion, arguing the contract governed Homes' construction of an addition for a commercial business. According to Monetti, plaintiff's funeral home is situated in the municipality's commercial zone. He submitted a certification stating the contract was negotiated and signed by two sophisticated businessmen. Monetti attached the funeral home's brochures in support of his claim the contract was between two sophisticated commercial parties, not an individual homeowner.

In a reply certification, plaintiff described his educational background as having taken a few college courses and attended mortuary school. Plaintiff explained his business did not require the services of an attorney because the funeral home did "not enter into any sophisticated or significant contracts with suppliers or clients" Plaintiff stated the contract with Homes "was the product of limited negotiations between [d]efendants and [himself] that concerned only the price, timing and scope of the work to be completed." In operating "a small funeral home," plaintiff did not consider himself "a sophisticated business man." He claimed he was unaware "that in signing the contract with the arbitration provision that [he] would be absolutely waiving [his] right to a jury trial and would be required to submit any and all claims arising out of [the] project to arbitration"

On May 21, 2021, the motion judge heard the arguments of counsel on plaintiff's motion to dismiss the arbitration. In a May 21, 2021 order and attached written statement of reasons, the judge denied plaintiff's motion. The judge found Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014) inapplicable to the parties' contract. Without reciting supporting facts, the judge concluded,

[t]his was a contract between two commercial parties that had equal bargaining power. It is clear, based on

the language of the contract, that the parties intended the arbitration clause to be [a] part of the agreement. The court finds that there was a meeting of the minds on the arbitration clause

On appeal, plaintiff argues the motion judge erred in denying his motion to void the arbitration clause and dismiss the arbitration. We agree. Here, because the parties submitted contradictory certifications regarding the negotiation and execution of the contract, the case would have been better served by the court conducting a plenary hearing. Thus, we remand to the trial court to conduct a plenary hearing addressing the pivotal factual issue - whether plaintiff knew, or had reason to know, he was waiving his right to a jury trial upon signing the Homes contract.

We review the validity of arbitration provisions de novo. Morgan v. Sanford Brown Inst., 225 N.J. 289, 302-03 (2016). Generally, we apply a deferential standard in reviewing factual findings by a judge. Balducci v. Cige, 240 N.J. 574, 594 (2020). We will not disturb the factual findings and legal conclusions rendered by a trial judge, unless those findings and conclusions are unsupported by or inconsistent with competent, relevant, and reasonably credible evidence. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011).

A motion judge should not resolve disputes based solely on competing certifications. See Palmieri v. Palmieri, 388 N.J. Super. 562, 564 (App. Div. 2006). "When a genuine issue of material fact exists, a plenary hearing is required." Ibid. See also Bruno v. Gale, Wentworth & Dillon Realty, 317 N.J. Super. 69, 76-77 (App. Div. 2004) (reversing and remanding for a plenary hearing where the trial judge reached a "decision based on certifications containing conflicting factual assertions").

Here, the parties submitted conflicting certifications regarding plaintiff's sophistication as a commercial businessman. The competing certifications describe different circumstances surrounding the negotiations leading to the signing of the contract and the execution of that document.

Based on the opposing certifications, we are unable to determine how the judge could ascertain whether plaintiff knew, or should have understood, he waived his right to a jury trial upon signing the Homes contract. In his certifications, plaintiff asserts he was unaware of the arbitration provision in the contract. Specifically, plaintiff claims he never understood by signing the contract he was waiving the right to a jury trial. The contract, as we noted, contains no such express waiver. On the other hand, Monetti's certification asserts the contract was negotiated by two sophisticated commercial businesses

and plaintiff fully understood he was agreeing to arbitrate all disputes arising under the contract and waiving the right to a jury trial. This dispute is central to the material issue before the trial court – whether the parties demonstrated a level of negotiation and sophistication concerning the arbitration provision in the contract document. Because the motion judge made no credibility determinations and rendered his decision based upon conflicting certifications, the judge's findings lacked the required evidentiary support to rule on plaintiff's motion. In evaluating the enforceability of the arbitration clause, the motion judge should consider the age of the parties, the educational level attained by the parties, the proven or disproven sophistication and business acumen of the parties, any hidden or unduly complex contractual terms, the negotiating tactics leading to the execution of the contract, and the specific setting for the contract's formation. See Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 189 N.J. 1, 15 (2006).

On appeal, plaintiff also contends the judge erred in finding the agreement was a commercial contract and, therefore, Atalese did not apply. Plaintiff also asserts the Atalese decision is not limited to consumer contracts and is applicable to commercial contracts.

In Atalese, our Supreme Court held "every 'consumer contract' in New Jersey must 'be written in a simple, clear, understandable and easily readable way.' Arbitration clauses – and other contractual clauses – will pass muster when phrased in plain language that is understandable to the reasonable consumer." 219 N.J. at 444 (quoting N.J.S.A. 56:12-2) (citation omitted). In reviewing an arbitration clause, the Atalese Court applied a "reasonable consumer" and the "average member of the public standard" rather than focusing on the subject matter of a contract to determine whether arbitration would be enforceable. Id. at 442, 444. The Court focused on whether the reasonable consumer or "average member of the public [would understand] – without some explanatory comment – that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." Id. at 442.

We read nothing in Atalese to explicitly restrict its holding to consumer contracts. Defendants have cited no published case law supporting that restrictive interpretation. In certain circumstances, Atalese may be applicable to businesspersons in a commercial setting, depending on the individual's level of sophistication and the clarity and prominence of the arbitration clause. On this record, we are unable to determine whether, as claimed by Homes and Monetti, the construction contract was the result of lengthy and sophisticated

negotiations or, as claimed by plaintiff, a contract to build an addition signed by a reasonable consumer acting as an average member of the public.

Thus, we remand for the judge to conduct a plenary hearing during which the parties shall testify, be subject to cross-examination, and may submit documentary evidence in support of their respective arguments. After conducting a hearing, the judge should render findings of fact, including credibility determinations, and set forth conclusions of law. We take no position on the outcome of plaintiff's motion.

Reversed and remanded for a plenary hearing. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION