SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4562-19

POMUM LIBER, LLC,

Plaintiff-Respondent,

v.

BLUE APPLE BOOKS, LLC, HARRIET ZIEFERT, INC., BLUE APPLE BOOKS and HARRIET ZIEFERT, individually,

Defendants-Appellants.

———————————————

Submitted October 12, 2021 - Decided April 14, 2022

Before Judges Accurso and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2817-19.

Fox Rothschild LLP, attorneys for appellants (David J. Sprong, of counsel and on the briefs).

Riley E. Horton, Jr., attorney for respondent.

PER CURIAM

Defendants Blue Apple Books, LLC, Harriet Ziefert, Inc., and Harriet Ziefert appeal from an August 12, 2020 trial court order denying, in part, their motion to dismiss the complaint of plaintiff Pomum Liber, LLC and compel arbitration.

Plaintiff initiated suit against defendants after they allegedly defaulted on five separate loan agreements. The trial court granted defendants' motion to dismiss several counts of plaintiff's complaint and to compel arbitration of any claims relating to the first agreement pursuant to the agreement's arbitration clause. The trial court declined, however, to compel plaintiff to arbitrate claims related to the other four matters as none of those agreements include an arbitration provision. We agree the five transactions constitute five separate agreements initiated at different times, with different terms involving some different lenders or investors, and thus the arbitration clause in one agreement does not compel plaintiff to arbitrate its claims relating to the other four. Accordingly, we affirm.

Although the facts are hotly disputed, the basic contours of the litigation are clear. Plaintiff Pomum Liber is a Maplewood-based private investment company, managed by Alberto Fernandez and the late John Kellenyi. Fernandez also owns and manages Inter-Nation Capital Management Group,

an investment consulting business. Ziefert, a children's book author, owns and manages Blue Apple Books, another Maplewood-based company, which sells and distributes Ziefert's books, as well as children's books written by other authors. Harriet Ziefert, Inc. used to do business as Blue Apple Books until the latter became a limited liability company and acquired Ziefert, Inc.

Fernandez and Ziefert, both commercial tenants in the same Maplewood building, met near the end of 2010 and began discussing a possible investment in Blue Apple.[1] Ziefert provided Fernandez with financial information concerning Blue Apple, leading to discussions of issuance of a convertible debenture. Plaintiff asserts it and its assignors thereafter entered into several loan agreements with defendants, all of which it claims are in default. Defendants contend plaintiff and its assignors were not "lenders" but sophisticated investors making investments in, not loans to, Blue Apple's business, and that nothing is owed plaintiff.

Although we refer to the several agreements between the parties, variously as "loans," or "investments," for want of other terms to describe them for purposes of this opinion, we take no position on these disputes. We

[1] At the time, Ziefert, Inc. was doing business as Blue Apple Books. With plaintiff's 2011 investment, Blue Apple Books became a New Jersey limited liability company.

specifically express no opinion on whether the monies allegedly advanced by plaintiff and its assignors constituted loans or investments. We set forth what appear to be the essential terms of the agreements between the parties only in so far as they affect the issue before us, that is, whether the parties will litigate their disputes in the Law Division or in arbitration.

The record reflects in March 2011, plaintiff allegedly invested $500,000 in Blue Apple in the form of a debenture — i.e., an unsecured loan — accruing simple interest at a six percent annual rate to be repaid on or before March 4, 2016.[2] Plaintiff had the option of converting that debenture into a twelve percent non-voting membership interest in Blue Apple. Ziefert executed the "6% Convertible Subordinated Debenture Agreement" on behalf of Blue Apple and Ziefert, Inc. Fernandez executed the agreement on behalf of plaintiff.

The debenture agreement contains an arbitration clause stating in relevant part, "11.2 (Binding Arbitration) All disputes, claims, and controversies between the parties arising out of or related to this Agreement or the breach hereof shall be submitted to binding arbitration." The debenture agreement also contains two provisions addressing additional capital.

[2] The debenture agreement is between Blue Apple and plaintiff.

Section 7.7 of the debenture agreement allowed Blue Apple to incur additional debt prior to the conversion of the note "provided, however, that [plaintiff] . . . be given the right of first offer to provide the necessary capital." The agreement indicated plaintiff could "make voluntary member loans at an annual interest rate of 8% . . . payable prior to repayment of the [debenture] and other distributions of available cash being made in the reverse order in which they were made." Any additional member loans by plaintiff were to "be considered straight debt, and [would] not convert into equity."

Section 8.5 of the debenture agreement further expounds on plaintiff's right of first offer to provide loans. That provision states that "[s]hould [Blue Apple] desire to raise additional capital by the issuance of debt, membership interests or security of [Blue Apple], it shall provide [plaintiff] of notice of such intent and the proposed terms thereof." Plaintiff would then "have a right of first refusal to so provide the additional capital exercisable on the same terms and conditions as contained in the proposed offer," conditioned on proper notice to Blue Apple. Plaintiff alleges Blue Apple ultimately defaulted on the debenture agreement.

Five months after entering into the debenture agreement, Ziefert, Inc. allegedly executed a promissory note to one of plaintiff's then-managing

members, Kellenyi, in his individual capacity, for a $100,000 loan with simple interest at an annual rate of five percent to be repaid by July 31, 2012. According to the terms of the note, Ziefert, Inc. consented to the non-exclusive jurisdiction of the State and federal courts in New Jersey for any litigation arising thereunder, and both parties waived any right to a jury trial.[3]

---

[3] The note provides in pertinent part:

> [ZIEFERT, INC.] HEREBY EXPRESSLY AND IRREOVCABLY SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF THE COURTS OF THE STATE OF NEW JERSEY AND OF ANY UNITED STATES DISTRICT COURT LOCATED IN NEW JERSEY FOR THE PURPOSE OF ANY LITIGATION ARISING HEREUNDER. [ZIEFERT, INC.] FURTHER IRREVOCABLY CONSENTS TO THE SERVICE OF PROCESS BY REGISTERED MAIL, POSTAGE PREPAID, OR BY PERSONAL SERVICE WITHIN OR WITHOUT THE STATE OF NEW JERSEY. [ZIEFERT, INC.] HEREBY EXPRESSLY AND IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY OBJECTION WHICH IT MAY HAVE OR HEREAFTER MAY HAVE TO THE LAYING OF VENUE OF ANY SUCH LITIGATION BROUGHT IN ANY SUCH COURT REFERRED TO ABOVE AND ANY CLAIM THAT ANY SUCH LITIGATION HAS BEEN BROUGHT IN AN INCONVENIENT FORUM.
>
> LENDER (BY ITS ACCEPTANCE OF THIS PROMISSORY NOTE) AND [ZIEFERT, INC.]

Ziefert, Inc. allegedly failed to repay the loan on maturity and in February 2014, Kellenyi renewed and extended the note to December 31, 2014. Plaintiff alleges Ziefert, Inc. eventually defaulted on the loan.

A few days after the Kellenyi loan was extended, Blue Apple allegedly entered into its second loan with plaintiff — a secured corporate promissory note for $160,000 with monthly interest payable on the unpaid principle at an annual rate of eight percent, which plaintiff refers to as the Pomum Liber secured note. The Pomum Liber note was purportedly secured by Blue Apple's current and future receivables, commissions, accounts, contract rights, and all other cash and non-cash proceeds. The first payment was due March 15, 2014,

---

> HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS THEY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS PROMISSORY NOTE, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF LENDER OR [ZIEFERT, INC.]. [ZIEFERT, INC.] ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION AND THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR THE LENDER MAKING THE LOAN EVIDENCED HEREBY.

and the total capital and final interest was due six months later, on August 15, 2014. Plaintiff contends Blue Apple defaulted on the note.

On the same day the first payment was due on the Pomum Liber note, March 15, 2014, Blue Apple allegedly executed a secured corporate promissory note to Inter-Nation Capital Group, Fernandez's investment consulting company. The Inter-Nation note was for $150,666 with monthly interest payable on the unpaid principal at an eight percent annual rate. As with the Pomum Liber note, the Inter-Nation note was purportedly secured by Blue Apple's current and future receivables, commissions, accounts, contract rights, and all other cash and non-cash proceeds. Loan payments were to commence March 15, 2014, and any outstanding balance owed was due six months later, on September 15, 2014. Plaintiff contends Blue Apple defaulted on this note as well.

On November 5, 2015, Kellenyi and Inter-Nation assigned their notes to plaintiff, with notice to defendants. The following day, Blue Apple entered into an agreement with plaintiff to "assist through partial funding of expenses," to the extent of $52,500, litigation against Blue Apple's then publisher. As part of the "Agreement to Terms for Distribution of Legal Complaint Proceeds," Blue Apple "acknowledge[d] and confirm[ed] . . . the aggregate

amount due [plaintiff] by virtue of the loans granted directly and/or assigned to [plaintiff]" as of the date of the agreement was $990,633, and that the "proceeds of [Blue Apple's] complaint" were to be used "to repay the debts owed [plaintiff] and fund Blue Apple" as described therein.

The agreement establishes plaintiff's agreement "to a one-time, non-refundable contribution of US $10,000.00" to fund the filing of the complaint and that "[f]urther agreement to fund Blue Apple" would be subject to plaintiff's review and approval of invoices, "limited to 50% of approved invoices." The agreement further establishes how any "settlement proceeds" would be allocated, with the first proceeds used to reimburse Blue Apple and plaintiff for the amount advanced to fund "the Legal Complaint," excepting the $10,000 "to be borne solely by [plaintiff]."

The agreement provides the next $150,000 of the proceeds would be paid to Blue Apple directly and would "not reduce the outstanding balances of the loans in default," while the following $490,633 would be paid to the account of plaintiff and would reduce "the total outstanding default balances due [plaintiff]." The agreement specifies that any further amounts remaining would be allocated equally between Blue Apple and plaintiff and would "reduce balances due." Finally, the agreement states in bold type that "This

Agreement in no way diminishes or waives our rights and privileges under the Summary Term Sheet, the Convertible Debenture Agreement, the Promissory Notes, Assignments and relevant loan documents."

Attached to the agreement is a schedule of "Blue Apple Books, LLC Loans Due — In Default" with balances as of November 6, 2015. The schedule states the date of each of the four prior loans, and for each lists: status, principal, interest, total, and for two of the loans, the date of assignment. The schedule also provides a total $990,633 due on all four loans for principal, interest and total amount due. Plaintiff alleges Ziefert received far less than expected from the lawsuit and whatever proceeds she obtained were not used to repay plaintiff for any amounts owed.

In April 2019, plaintiff sued defendants in the Law Division, alleging breach of contract, unjust enrichment, misrepresentation, fraud, breach of the implied covenant of good faith and fair dealing, and that it should be permitted to recover against Ziefert by piercing the corporate veil of Blue Apple and Ziefert, Inc. Defendants responded by filing a motion to dismiss for failure to state a claim and to compel arbitration. Plaintiff subsequently filed a cross-motion for summary judgment. After hearing argument, the trial court granted defendants' motion in part and denied plaintiff's cross-motion.

Specifically, as relevant to the issue before us, the court ordered the parties to arbitration on any claims relating to the debenture note but rejected defendants' argument that plaintiff be compelled to arbitrate claims it never agreed to arbitrate or that the five loan "contracts are somehow inextricably intertwined." Accordingly, the trial court declined to compel plaintiff to arbitrate claims related to the Kellenyi note, the Pomum Liber note, the Inter-Nation note, or plaintiff's agreement to assist with Blue Apple's litigation expenses in the suit against its publisher.

Defendants filed a timely appeal as of right pursuant to Rule 2:2-3(a) seeking to overturn the trial court's order that only claims relating to the debenture agreement should proceed to arbitration. Plaintiff has not cross-appealed from that order. Accordingly, the only issue before us is whether plaintiff's claims relating to the Kellenyi note, the Pomum Liber note, the Inter-Nation note, or the litigation funding agreement are subject to arbitration.

Defendants' "primary argument" is that "all of the remaining claims in [plaintiff's] complaint fall squarely within the scope of the valid and enforceable arbitration provision" in the debenture agreement and, as such, "this court must dismiss the entirety of [plaintiff's] complaint with prejudice." Defendants assert that all of plaintiff's claims "arise only from and relate

directly to the Debenture Agreement," and such agreement "is the primary agreement between the parties, and is the genesis of their business relationship." "Simply put," defendants contend, "none of the other agreements at issue in this case would have existed if not for the parties' business relationship as created and governed by the Debenture Agreement."

Defendants also raise two alternative arguments. Defendants contend plaintiff's remaining claims are arbitrable because they are "factually intertwined" with the claims related to the debenture agreement. Defendants also contend that "fairness and judicial economy so dictate [that] all of [plaintiff's] claims . . . be dismissed with prejudice in favor of binding arbitration in accordance with the Arbitration Clause" in the debenture agreement.

Having considered defendants' arguments in light of the record and the applicable law, we affirm the trial court's decision denying defendants' request to arbitrate the claims related to the Kellenyi note, the Pomum Liber note, the Inter-Nation note and the litigation funding agreement largely for the reasons expressed by the trial court. We add only the following.

We review orders compelling or denying arbitration de novo, bearing in mind the strong preference to enforce arbitration agreements found in our State

and federal law. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013). Nevertheless, agreements 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) (quoting NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011)). "[B]ecause arbitration involves a waiver of the right to pursue a case in a judicial forum, courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." Id. at 442-43 (internal quotations omitted).

It is undisputed plaintiff executed three separate agreements with defendants and stepped into the shoes of two different contracting parties, Kellenyi and Inter-Nation, with respect to two others. The transactions occurred among different parties, at different times and were subject to wholly different terms. Only the first of these five agreements — Pomum Liber's debenture agreement — contained an arbitration clause. That clause made no reference to claims arising out of other loan agreements or transactions.

Although we acknowledge the debenture agreement allows for the provision of additional capital to Blue Apple via "Member Loans" and provides plaintiff "a right of first refusal" to provide "additional capital

exercisable on the same terms and conditions as contained in the proposed offer," neither party contends the Kellenyi note, the Pomum Liber note, the Inter-Nation note, or the litigation funding agreement were "Member Loans" as described in the debenture agreement or capital provided via the mechanism described therein.

Other than the debenture agreement being the first agreement between the parties and plaintiff's lawsuit alleging malfeasance as it relates to all five of the loans, defendants offer no explanation as to how the subsequent loans "arise out of or are related to the Debenture Agreement." Nothing in the agreements ties the loans together or draws the subsequent loans under the supposed umbrella of the debenture agreement. Even the litigation funding agreement, in which defendants acknowledge and confirm all the sums owed to plaintiff, lists the debts separately and due in accordance with the terms of their respective agreements.

Defendants' reliance on the "intertwinement theory," Hirsch, 215 N.J. at 192, for their "secondary argument" is unavailing. As an initial matter, our Supreme Court has "reject[ed] intertwinement as a theory for compelling arbitration when its application is untethered to any written arbitration clause between the parties, evidence of detrimental reliance, or at a minimum an oral

agreement to submit to arbitration." Id. at 192-193. As the Court has made clear, "intertwinement of claims and parties in the litigation — in and of itself —" is not "sufficient to give a non-signatory . . . standing to compel arbitration." Id. at 193.

The intertwinement theory is most often invoked when a non-signatory seeks to compel arbitration against a signatory to an arbitration agreement, or the inverse — a signatory seeking to compel arbitration against non-signatories. See e.g., id. at 192-195; Crystal Point Condo. Ass'n v. Kinsale Ins. Co., 466 N.J. Super. 471, 478, 484-486 (App. Div.), certif. granted, 248 N.J. 10 (2021); Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 146, 153-154 (App. Div. 2008). Here, plaintiff and Blue Apple, which had acquired Ziefert, Inc., are both signatories to the debenture agreement and its arbitration provision.

But the debenture agreement is only one agreement of the five plaintiff sues on and none of the others contains an arbitration agreement. The trial court was undoubtedly correct in ruling the parties' claims relating to the debenture agreement are subject to arbitration. That the debenture agreement marked the start of the relationship between plaintiff and defendants and spawned the other agreements between them, as well as those between

defendants and Kellenyi and Inter-Nation, and that each of the various individuals and entities involved here has some relationship to one another and to the claims and counterclaims is simply not enough to compel plaintiff to arbitrate its claims against defendants arising out of the four subsequent agreements under Hirsch. Accordingly, the trial court did not err in concluding the claims relating to the Kellenyi note, the Pomum Liber note, the Inter-Nation note, and the litigation funding agreement — all separate agreements without arbitration provisions — were not arbitrable.

Affirmed.