SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0410-22

BEDROCK STEEL, LLC,

Plaintiff-Respondent,

v.

RARITAN URBAN RENEWAL, LLC, ACCURATE BUILDERS LIMITED LIABILITY COMPANY, and YERIK MIDDLETOWN LLC,

Defendants-Appellants,

and

GRACE CONSTRUCTION MANAGEMENT COMPANY, LLC,

Defendant-Respondent.

Argued April 18, 2023 – Decided May 8, 2023

Before Judges Geiger, Fisher and Chase.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-1440-22.

Jennifer Ann Hradil argued the cause for appellants (Gibbons PC, attorneys; Kevin W. Weber and Michael A. Conforti, on the briefs).

Jonathan Fleisher argued the cause for respondent.

PER CURIAM

In this appeal, we consider when written or emailed communications may evolve into an enforceable arbitration agreement. While the parties' few communications may have ripened into an agreement to arbitrate as defined by N.J.S.A. 2A:23B-6(a), we affirm the order that refused to compel arbitration because there is no evidence the parties agreed arbitration would be mandatory or the exclusive means of resolving their disputes.

The limited record before us reveals that, by one contract, plaintiff Bedrock Steel, LLC, agreed to perform certain steel work for defendants Raritan Urban Renewal LLC and Accurate Builders Limited Liability Company at a location in Raritan, and that by another, plaintiff agreed to perform steel work for defendant Yerik Middletown LLC in Middletown. These written contracts did not contain arbitration clauses.

When defendants defaulted on what plaintiff believed was due, plaintiff sought to commence arbitration under Jewish law at a bais din.[1] On April 22, 2021, Rabbi Wolfe, the Director of Bais HaVaad Rabbinical Court in Lakewood, sent out, at plaintiff's behest, a hazmana,[2] which "summoned" defendants "to appear" before the bais din on a certain date. The hazmana described the matter to be discussed as plaintiff's claim for the payment of unpaid balances on the contracts. When defendants did not respond, a second hazmana was sent. When the second failed to trigger a response, a third hazmana was sent. Finally, on October 13, 2021, defendants' principal responded by email to Rabbi Wolfe and plaintiff's principal, stating:

> I don't know why I am being sent an hazmanah[.] I agree that I owe [plaintiff] the money and we paid him some of it[.] I am happy to come but I don't know what we will discuss[.]

The rabbi responded to defendants that "[m]aybe it would be helpful if you propose payment terms." Plaintiff's principal also responded, asking if defendants could "notify us on when he plans to pay." The next day, defendants' principal stated he would "let you know next week."

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[1] Materials in the record sometimes refer to this rabbinical tribunal as a beis din.

[2] This is also spelled in the record at times as hazmanah.

Ten days later, plaintiff's principal sent to defendants and Rabbi Wolfe a two-word email[3] asking: "[a]ny update?" Receiving no response, plaintiff again sent the identical two-word email four days later.

When defendants' silence persisted, plaintiff sent to the rabbi an email, stating: "Can we please proceed to get a siruf[4] now that [defendants' principal] isn't responding to the 3rd hazmana?" Rabbi Wolfe responded by observing that defendants "had responded earlier that he was willing to appear in the Bais Din but had agreed that the amount claimed was owed and would be paid." The rabbi stated that he would send out a notice scheduling "a session." A notice was sent to both parties a few days later. In his November 15, 2021 email in response, defendants' principal identified Rabbi Spiegel as the person "who will be representing me," and he also questioned whether "we will be going to a different bais din."

Two days later, Rabbi Wolfe emailed Rabbi Spiegel and inquired about the identity of the "bais din you are prepared to appear before by the end of the day." A few hours later, Rabbi Spiegel provided the name of a bais din in

[3] The prior communications were also conveyed by email.

[4] This word is also spelled in the record as "siruv" and appears to connote a default.

Monsey, New York. Plaintiff responded by asking about an option to proceed with the matter in Lakewood; plaintiff also asked whether a date could be scheduled. Rabbi Spiegel first responded with an email that only referred to January 11 and January 12 – presumably dates he was proposing for a session – and then, a few days later, he emailed that the "dates will be released by the end of today." Later that day, an email was sent from the Monsey bais din that "Jan. 11th 3:00 PM is confirmed by all," but with a note that "we might be able to change it for 11:00 AM, we will know by Monday."

The record reflects no other communications from then until January 10, 2022, when the bais din emailed the parties to say, "[j]ust a reminder for tomorrow 3:00 PM." Plaintiff responded with an email stating "[c]onfirmed" along with a request for confirmation that defendants' principal would be attending. A response from Rabbi Spiegel at 1:53 p.m. that day conveyed that he had spoken with defendants' principal and "[h]e confirmed that he will come." About two hours later, plaintiff's principal emailed to identify his advocate, who "will be in touch to reschedule." The bais din then emailed to confirm the cancellation of the "Tovala" scheduled for the following day; the email also inquired about the availability of the participants in the future.

There were apparently no further communications or actions about the cancelled session before the bais din. Instead, in July 2022, plaintiff commenced this suit for a judgment on the alleged unpaid debt. Defendants filed an answer and promptly moved to compel arbitration. The trial judge denied the motion, concluding that the alleged agreement to arbitrate was not in writing and therefore there "was nothing to bind the parties to the rabbinical forum to begin with."

In appealing, as was their right, R. 2:2-3(b)(8), defendants argue that: (1) they "accepted plaintiff's offer to arbitrate the dispute between them, and therefore the parties have an enforceable agreement to arbitrate"; (2) plaintiff "should have been equitably estopped from disavowing the agreement to arbitrate"; and (3) plaintiff's opposition to the motion to compel arbitration was "not timely filed," requiring the trial judge to view the motion as "unopposed." We find insufficient merit in defendants' third point to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).[5] We reject defendants' other arguments for the following reasons.

[5] We would add only that the motion papers were just one day late and that in these circumstances – despite the time frames contained in Rule 1:6-3 – the judge would have abused his discretion if he decided defendants' motion without considering plaintiff's opposition. See, e.g., Tyler v. N.J. Auto. Full Ins., 228

Defendants' first argument poses questions about whether the parties' communications about appearing before a bais din created an agreement to arbitrate that a court must enforce. To respond to this, it is helpful to consider a brief history of the enforcement of arbitration agreements in this State.[6]

Although it has no application here, the former New Jersey Arbitration Act, N.J.S.A. 2A:24-1 to -11, declared that "[a] provision in a written contract to settle by arbitration . . . shall be valid, enforceable and irrevocable[.]"[7]

N.J. Super. 463, 468 (App. Div. 1988). We would note that defendants never complained to the trial judge about the late filing; had they done so, the judge – if he perceived some prejudice resulting from the lateness – could have adjourned the motion or taken other steps to alleviate the prejudice. Because defendants did not object at the time, they deprived the judge of the opportunity to alleviate any prejudice. We will not now consider this late complaint about the late filing.

[6] The parties have proceeded on the assumption that the court's authority to enforce their alleged agreement to arbitrate must come from either the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -36, or our common law. Neither party has argued or suggested that the Federal Arbitration Act, 9 U.S.C. §§ 1-16, applies. And, indeed the record does not suggest there is any federal interest implicated here, since the parties' appear to be New Jersey entities and the contracts on which plaintiff has sued called for work to be performed solely in New Jersey.

[7] The similarly-worded FAA also suggests the need for a "written" arbitration agreement. 9 U.S.C. § 2 (emphasis added) (declaring that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in

N.J.S.A. 2A:24-1 (emphasis added). That arbitration act, however, does not apply.[8] It was replaced in 2003 by our version of the Uniform Arbitration Act, which is codified at N.J.S.A. 2A:23B-1 to -36, and which declares that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy . . . is valid, enforceable, and irrevocable[.]" N.J.S.A. 2A:23B-6(a) (emphasis added). The Act defines "record" as constituting "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." N.J.S.A. 2A:23B-1.

The definition ascribed to "record" in N.J.S.A. 2A:23B-1 is taken verbatim from the Uniform Arbitration Act, which lifted it from the Uniform Commercial Code, which New Jersey also adopted, see N.J.S.A. 12A:1-201(b)(31). That definition – as the UCC drafters noted – was obtained from the definition of "record" in the UCC's ninth article, N.J.S.A. 12A:9-102(a)(69),

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writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable . . .").

[8] The old arbitration act, N.J.S.A. 2A:24-1 to -11, "only appl[ies] to an arbitration or dispute arising from a collective bargaining agreement or a collectively negotiated agreement," N.J.S.A. 2A:24-1.1, or to arbitration agreements formed before January 1, 2003, N.J.S.A. 2A:23B-3.

which provides that "'Record,' except as used in 'for record,' 'of record,' 'record or legal title,' and 'record owner,' means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form."

Without getting too lost in the weeds on the definition of "record," for our purposes it is safe to assume that the phrase "agreement in a record" found in N.J.S.A. 2A:23B-6(a), incorporates electronic documents – like the emails contained in the appellate record – and we assume further that these emails were maintained so as to make them "retrievable in perceivable form." But we don't believe the adjustment – from the old enactment to the new – in the requirements for a valid and enforceable arbitration agreement have otherwise changed much. The Legislature has simply kept pace with the advance of technology by appreciating that each passing day limits the likelihood that parties' understandings and undertakings will be found in writing on paper. And so, the new arbitration act permits the enforcement of arbitration agreements that are both in "writing" as prior generations understood the term and those that are "in a record," meaning those that may also have been expressed and maintained in electronic form. See Bryan A. Garner, Black's Law Dictionary (11th ed. 2019) at 1527, 1929 (defining "record" by reference to the UCC's meaning of that term,

and defining "writing" as an "intentional recording of words in a visual form, whether in handwriting, printing, typewriting, or any other tangible form that may be viewed or heard with or without mechanical aids," and as including "hard-copy documents, electronic documents on computer media, audio and videotapes, e-mails, and any other media on which words can be recorded").

We, thus, view the essential prerequisite for obtaining the enforcement of an arbitration agreement under N.J.S.A. 2A:23B-6, as something that is recorded in the manner we have just discussed. This would mean that a party seeking to compel arbitration must produce a writing as traditionally understood as containing handwritten or typewritten information on paper, or other "hard-copy," or an electronic document that can somehow be seen or reproduced in a reliable fashion.

As can be seen from what we have just described, explaining what constitutes a writing is easy, and what constitutes a "record" is a little more complicated because of rapidly changing technology. But both concepts distinguish themselves from agreements formed through the spoken word, or at least the spoken word that is not reliably recorded. And we think that particular distinction – between the written or recorded, on the one hand, and an unrecorded oral agreement, on the other – must be maintained for at least one

essential reason: "writings" and "records" are more trustworthy than unrecorded "oral" agreements.[9] Indeed, statutes of frauds have been with us for centuries because the law views oral agreements with skepticism and with an appreciation for the fact that individuals – in the absence of a written memorialization – may express, either deliberately or unintentionally, differing views about the existence of an agreement or its terms. Although we can offer no prior precedent in support, we are satisfied from a broader view of our jurisprudence that when, in the prior arbitration act, the Legislature referred to arbitration provisions in "written" agreements as being valid and enforceable, and when, in the current arbitration act, the Legislature referred to agreements "in a record" as being valid and enforceable, the Legislature revealed its intent to exclude from the statute's ambit unrecorded "oral" agreements.[10]

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[9] We do not suggest or conclude that an oral agreement that is, for example, expressed in a recorded court proceeding would not be enforceable. Because that never occurred here, we need not opine further on that subject.

[10] We do not preclude enforceability of oral arbitration agreements in other contexts. For example, in an instance when parties orally agreed to arbitrate, then arbitrate and receive the arbitrator's decision, and then later assert that the oral arbitration agreement is unenforceable, we have applied waiver principles to enforce the arbitrator's decision. See Mill v. J. Daunoras Constr. Inc., 278 N.J. Super. 373, 378 (App. Div. 1995). That also didn't happen here.

Of course, that holding does not eliminate what defendants contend. While we have concluded that an oral agreement to arbitrate is unenforceable at a pre-arbitration stage, the parties do not actually contend they reached an oral agreement to arbitrate. Their competing certifications do not assert or recount any verbal discussion they may have had about arbitration. Instead, they rely only on the written hazmana and the various emails we have already mentioned to argue whether they agreed to arbitrate and whether that agreement is enforceable. As we have already explained, an enforceable arbitration agreement may be found if it is memorialized "in a record." N.J.S.A. 2A:23B-6. So, the initial question is whether the "record" we have already described contains such an agreement.

The parties' emails suggest an agreement on the location of the proceeding described in the hazmana, and the hazmana describes the claim to be discussed. The parties never seemed to have agreed on a date for whatever was to occur, although we do not find that fatal to an agreement's validity or enforceability.

The parties' competing certifications, however, reveal a dispute about their intentions about what would occur once they appeared at the bais din. For instance, plaintiff's representative asserted in his certification that he "did not intend to be bound by any arbitral panel without signing an arbitration

agreement," and indeed it is customary – although we express no competency in what Jewish law requires – for rabbinical tribunals to first secure the parties' agreement to arbitrate and the scope of the terms, fees, and rules, of the arbitration in writing before proceeding further. So, there is no reason to conclude on this factual record, which was not explored beyond the moving and opposing papers, that the parties – through the hazmana and their emails alone – intended anything other than to meet and discuss something.

In short, there is – at best – a genuine factual dispute about whether the parties' communications evinced an intent to arbitrate or an intent to meet to discuss how to proceed. Until resolution of that factual dispute – a dispute that would have to be resolved in our courts, since N.J.S.A. 2A:23B-6(b) declares that "[t]he court[11] shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate" – the trial court would be unable to compel arbitration. And this dispute would require the trial court to consider whether there was a "meeting of the minds," Morton v. 4 Orchard Land Trust, 180 N.J. 118, 120 (2004), through consideration of the parties' testimony about what they thought they had or hadn't agreed on through their emails and

[11] "Court" is defined as "the Superior Court of New Jersey." N.J.S.A. 2A:23B-1.

other written communications since, when compiled and considered collectively, they are hardly unambiguous or are otherwise silent as to what the parties thought they had agreed to discuss at the bais din.

The court would also be required to consider a more difficult question about whether plaintiff freely and voluntarily entered into an arbitration agreement. That is, plaintiff's representative stated in his certification that "[t]he only reason that we initially proceeded with a Beis Din was because we were required to do so by Jewish Law"; he went on to explain that he was later advised that Jewish law no longer compelled a proceeding in the bais din because defendants' representative "explicitly admitted that he owed the money, and was simply using the Beis Din system to delay our judgment." It is not clear from the record whether defendants dispute this interpretation of Jewish law since their representative's certification is silent on the matter, but, if they do, it would require the trial judge's determination about the impact of Jewish law on whether plaintiff freely entered into an arbitration agreement. See, e.g., Atalese v. U.S. Legal Servs. Grp., 219 N.J. 430, 442 (2014).

Against this factual backdrop, we observe that courts tend to readily enforce arbitration agreements by invoking not only the statutory authority to do so but also the public policy that favors arbitration as a means of resolving

disputes. See Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 556 (2015). By the same token, we can say with more than a little confidence that there is no public policy that favors extensive litigation for the sole purpose of determining whether parties have agreed to arbitrate. See Local No. 153, Office & Pro. Emp. Int'l Union v. The Trust Co. of N.J., 105 N.J. 442, 449 (1987) (quoting from Korshalla v. Liberty Mut. Ins. Co., 154 N.J. Super. 235, 240 (Law Div. 1977) in observing that arbitration is "meant to be a substitute for and not a springboard for litigation"); see also Bor. of Carteret v. Firefighters Mut. Benevolent Assoc., Local 67, 247 N.J. 202, 211 (2021). The parties' efforts so far have generated extensive litigation in both the trial court and here to resolve whether they intended to arbitrate their disputes. And, while the law favors arbitration, it does so because arbitration is viewed as an efficient and rapid means of resolving disputes. See Middletown Twp. PBA Local 124 v. Twp. of Middletown, 193 N.J. 1, 10 (2007). More than two years have passed without a meaningful step toward a resolution of plaintiff's claim even though defendants seem to have admitted an indebtedness. Whatever interest the law has in arbitration as a quick and efficient means of resolving this dispute has long since evaporated here.

Through application of the legal principles about the existence of an enforceable arbitration – and but for the matter to which we will shortly turn –

we would be compelled to relegate the parties to an even lengthier delay by remanding for an evidentiary hearing to determine whether the parties reached an enforceable agreement to arbitrate. See N.J.S.A. 2A:23B-6(b).

But we need not impose such a mandate because, for different reasons, we conclude the order denying the motion to compel arbitration must be affirmed. We affirm because even if an arbitration agreement could ultimately be found "in a record," that record is silent about whether the parties intended to waive their right to sue in a court of law or whether they intended that arbitration would be the exclusive means of adjudicating their disputes.

To be sure, the Court in Atalese recognized that an arbitration agreement "by its very nature" involves a waiver of the right to sue. 219 N.J. at 442. But most arbitration agreements – or at least those that have been enforced – include an express agreement that arbitration is mandatory and the sole means of resolving disputes:

- "All disputes, controversies or differences . . . aris[ing] between [the parties out of their contract] shall be finally settled by arbitration." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 617 (1985) (emphasis added).

- "Any disputes arising out of or relating to this engagement agreement . . . will be conducted pursuant to the JAMS/Endispute Arbitration

Rules and Procedures . . . ." Delaney v. Dickey, 244 N.J. 466, 476 (2020) (emphasis added).

- "Any and all claims or controversies arising out of or relating to Employee's employment . . . shall, in lieu of a jury or other civil trial, be settled by final and binding arbitration." Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 126 (2020) (emphasis added).

- "[A]ll disputes, claims, complaints, or controversies that you have now or at any time in the future may have against Pfizer . . . are subject to arbitration pursuant to the terms of this Agreement and will be resolved by arbitration and NOT by a court or jury." Skuse v. Pfizer, Inc., 244 N.J. 30, 38 (2020) (emphasis added but the upper case "NOT" is in the original).

- "[Y]ou and we agree that either you or we have an absolute right to demand that any dispute be submitted to an arbitrator in accordance with this agreement. If either you or we file a lawsuit . . . or other action in a court, the other party has the absolute right to demand arbitration following the filing of such action." Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 197 (2019) (emphasis added).

- "[T]he parties shall submit the dispute to binding arbitration . . . ." Cnty. of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498, 501 (App. Div. 2023) (emphasis added).

In short, our Supreme Court has recognized that "[a] clause depriving a citizen of access to the courts should clearly state its purpose . . . to assure that the

parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993) (emphasis added); see also Garfinkel v. Morristown Obs. & Gyn. Assoc., P.A., 168 N.J. 124, 132 (2001). The Court later held that arbitration may not be compelled absent an express waiver of the right to seek relief in a court of law. Atalese, 219 N.J. at 436.[12]

Even if an agreement to arbitrate might be cobbled together from the materials contained "in a record," those emails did not include or even suggest a waiver of their right to seek relief in a court of law. Nor do those emails contain or suggest that the parties agreed or understood that arbitration was mandatory or constituted the exclusive means for resolving their disputes. Even viewing the "record" in a light most favorable to defendants, any agreement that might be gleaned from the parties' emails can be understood as suggesting nothing more than arbitration in the bais din was an option that, by filing suit, plaintiff declined to pursue.

Affirmed.

[12] We recognize that it may be arguable that the present matter does not fall within Atalese's scope, see Cnty. of Passaic, 474 N.J. Super. at 501, but the absence of a waiver of the right to sue – whether a prerequisite to compelling arbitration or not – highlights here the lack of a mutual understanding that arbitration would be the parties' sole or exclusive means for seeking relief.