NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0455-21

KRISTIN K. M. STRICKLAND,
and JANELLE MCCALL,

Plaintiffs-Appellants,

v.

FOULKE MANAGEMENT CORP.,
d/b/a CHERRY HILL DODGE,

Defendant-Respondent.

APPROVED FOR PUBLICATION

March 3, 2023

APPELLATE DIVISION

Submitted November 28, 2022 – Decided March 3, 2023

Before Judges Currier, Bishop-Thompson and Puglisi.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1800-21.

David C. Ricci, attorney for appellants.

Capehart & Scatchard, PA, attorneys for respondent (Laura D. Ruccolo, on the brief).

The opinion of the court was delivered by

CURRIER, P.J.A.D.

In this matter arising out of the purchase of a vehicle, we consider whether parties may expand the scope of judicial review of an arbitration agreement

governed by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 to 16. The agreement here contained a clause that permitted a court to review an arbitrator's award for errors of New Jersey law. Guided by the United States Supreme Court's holding in Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008), we conclude that when the FAA controls an arbitration agreement, its vacatur terms are exclusive and cannot be modified by contract. Therefore, the pertinent clause in the arbitration agreement is unenforceable and severable from the remainder of the agreement. We affirm the court's order dismissing plaintiffs' complaint seeking to vacate the arbitration award.

Plaintiffs purchased a used vehicle from defendant. They were listed as co-buyers on the Motor Vehicle Retail Order (MVRO1) and Retail Installment Sales Contract (RISC1). Plaintiffs also signed a Sold Vehicle Odometer Statement. Issues arose regarding the financing of the vehicle and plaintiffs executed a second set of documents. After plaintiffs failed to make several payments, defendant repossessed the car.

Plaintiffs filed an arbitration demand, and, after a hearing, the arbitrator dismissed plaintiffs' claims. Plaintiffs moved for an order to show cause to vacate the arbitration award. The court denied plaintiffs' application. We affirm.

At the time of purchase on February 24, 2017, both plaintiffs signed MVRO1 directly below the following clause:

> **I ACKNOWLEDGE THAT I HAVE RECEIVED, READ, UNDERSTAND AND HAVE SIGNED THE ARBITRATION AGREEMENT WHICH APPLIES TO THIS TRANSACTION. CUSTOMER AGREES THAT CUSTOMER WILL BRING ANY CLAIMS CUSTOMER MAY HAVE HAD AGAINST DEALER, EXCEPT FOR UCC CLAIMS BUT, INCLUDING ALL CLAIMS UNDER THE NEW JERSEY CONSUMER FRAUD ACT, WITHIN 180 DAYS FROM THE DATE OF THIS AGREEMENT AND IF NOT BROUGHT WITHIN 180 DAYS ALL CLAIMS WILL BE TIME BARRED. UCC CLAIMS MUST BE BROUGHT WITHIN ONE YEAR.**

The document was stamped 2/24/17.

Plaintiffs also executed RISC1 which advised them regarding a gap or debt cancellation contract. Plaintiffs signed below the following language: **"[y]ou agree to the terms of this contract. You confirm that before you signed this contract, we gave it to you, and you were free to take it and review it. You confirm that you received a completely filled-in copy when you signed it."** The document was also stamped 2/24/17. The RISC1 granted defendant a security interest in the car and provided "[f]ederal law and the law of the state of our address shown on the front of this contract apply to this contract."

As part of the transaction, plaintiffs signed a Spot Delivery Agreement (SDA) that stated:

> [i]t is my understanding and agreement that I am taking possession and delivery of the above described vehicle prior to financing being finalized. I understand that the [d]ealership is not financing this transaction. I further understand that financing for the purchase of the vehicle has not been finalized and is subject to approval by an outside financing source. . . . I understand that this Spot Delivery Agreement is for the purpose of allowing me to take possession of the vehicle, subject to the following terms and conditions, until a final decision regarding my request for financing is made.

The SDA informed plaintiffs that if financing could not be obtained within seven days of the contract being signed, plaintiffs would either obtain financing themselves or surrender the vehicle.[1] Additionally, "[i]n the event that [plaintiffs were] required to return the vehicle to the [d]ealership . . . . the [d]ealership will refund any payments made by [plaintiffs], less the cost of repairing any damage . . . ." If additional documents were required by "any third party who is considering approving financing," plaintiffs agreed to provide them, and a failure to provide such documentation within two days of the request would require plaintiffs to immediately return the vehicle or pay the amount due in full. The SDA also stated that "in order to obtain financing, [plaintiffs] may

[1] Defendant reserved the right to extend the time limitations for approving financing at its own discretion.

agree to amend purchase terms. However, if that happens, [plaintiffs] understand that this [SDA] will remain in full force and effect until such time as [plaintiffs] return the vehicle to the [d]ealership." Finally, the document provided that in signing the SDA, "[plaintiffs] acknowledge that [they] have been given the opportunity to read this [SDA] and fully understand and agree to be bound by the terms and conditions set forth herein. This [SDA] is hereby incorporated by reference into any other purchase documents which [plaintiffs] may execute." The SDA was signed by both plaintiffs and date-stamped 2/24/2017.

Plaintiffs also signed an arbitration agreement. It stated at the top of the document and again just above the signature line: **"[R]EAD THIS ARBITRATION AGREEMENT CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO MAINTAIN A COURT ACTION."** The arbitration agreement provided that "The Federal Arbitration Act applies to and governs this agreement with the exceptions provided for in this agreement,"[2] and "[i]f any term of this agreement is unenforceable, the remaining terms of this agreement are severable and enforceable to the fullest extent permitted by law."

Pertinent to this litigation, paragraph nine stated:

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[2] There are no exceptions delineated in the arbitration agreement.

> **THE ARBITRATOR SHALL RENDER HIS/HER DECISION ONLY IN CONFORMANCE WITH NEW JERSEY LAW. IF THE ARBITRATOR FAILS TO RENDER A DECISION IN CONFORMANCE WITH NEW JERSEY LAW, THEN THE AWARD MAY BE REVERSED BY A COURT OF COMPETENT JURISDICTION FOR MERE ERRORS OF NEW JERSEY LAW. A MERE ERROR IS THE FAILURE TO FOLLOW NEW JERSEY LAW.**

Paragraph ten read:

> **[PLAINTIFFS] AGREE[] TO WAIVE THE APPLICABLE STATUTE OF LIMITATIONS AS FOLLOWS: [PLAINTIFFS] AGREE[] THAT [THEY] WILL BRING ANY AND ALL CLAIMS . . . AGAINST DEALER, EXCEPT FOR CLAIMS FOR BREACH OF CONTRACT UNDER THE NEW JERSEY UNIFORM COMMERCIAL CODE, BUT INCLUDING CLAIMS UNDER THE NEW JERSEY CONSUMER FRAUD ACT WITHIN 180 DAYS FROM THE DATE OF THIS AGREEMENT. IF CLAIMS ARE NOT BROUGHT WITHIN 180 DAYS THE CLAIMS WILL BE TIME BARRED. ALL CLAIMS UNDER THE NEW JERSEY CODE FOR BREACH OF CONTRACT MUST BE BROUGHT WITHIN ONE YEAR AFTER THE CAUSE OF ACTION ACCRUES.**

The arbitration agreement was date-stamped 2/24/2017.

Plaintiffs acknowledged receipt of the arbitration agreement, signing it under the following language:

> **[PLAINTIFFS] . . . HEREBY ACKNOWLEDGE THAT THE ATTACHED CONDITIONAL SALES OR LEASE CONTRACTS WERE FULLY COMPLETED AND EXPLAINED TO**

[PLAINTIFFS] PRIOR TO [THEIR] AFFIXING [THEIR] SIGNATURE ON THE CONTRACT. [PLAINTIFFS] IMMEDIATELY RECEIVED A COPY OF THE CONTRACTS ALONG WITH THIS ARBITRATION AGREEMENT, AND ACKNOWLEDGE THAT [PLAINTIFFS] FULLY UNDERSTAND THE CONTENTS THEREIN.

Plaintiffs also signed a Sold Vehicle Odometer Statement.

On the day following the purchase—February 25—defendant's representative sent plaintiff Kristin Strickland a text message asking if she had sent her pay stubs to "Dan from finance." Strickland replied she had sent her most recent paystub but she was out of work for several weeks and was not getting paid for the time off. Therefore, it was not a current paystub.

On March 2, defendant's representative informed Strickland by text that she was approved by another bank and her payment would go up "a lil" [sic]. Defendant asked plaintiffs to come in that day to sign new paperwork.

Strickland signed MVRO2 and RISC2 on March 3, 2017. Plaintiff McCall signed the documents either later that day or the following day.

MVRO2 listed a higher cost for the car than on MVRO1—$19,995.00, up from $17,700.[3] Therefore, the final price owed was $23,831.08, up from

[3] The increased unit price was due to a bank fee assessed by the new financing lender against defendant and then passed on to plaintiffs.

$19,495.95 under MVRO1. All other terms were the same including the arbitration acknowledgment. MVRO2 was dated 2/24/17.

RISC2 listed a higher annual percentage rate and finance charge. In light of these numbers and the increased total price of the car, the monthly payments were approximately $244 more than listed on MVRO1. All other terms were the same as RISC1, with the exception of the assignment section, which listed a different assignee—the new financing bank. Both plaintiffs signed RISC2, which was date-stamped 2/24/17.

Strickland testified during the arbitration hearing that she was "very upset" when she saw the increased monthly payments because she could not afford them. She stated she told defendant's representative that she no longer wanted the car, and defendant's representative responded she could leave the car and it would be treated as a "voluntary repossession." Strickland testified that her understanding of leaving the car was that she would "still owe the debt and . . . would[] [not] be able to get back [her] down payment." She and McCall conceded during the arbitration hearing that they did not thoroughly read the purchase and financing documents at any point prior to signing them.

Strickland made two payments on the car, but then stopped after May 2017 because she could no longer afford it. The financing assignee repossessed the car in October 2018.

On April 5, 2018, plaintiffs filed an arbitration demand with the American Arbitration Association. The complaint asserted violations of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -227; violations of Used Car Lemon Law warranty provisions, N.J.S.A. 56:8-67 to -80; breaches of express and implied warranties under the New Jersey Uniform Commercial Code, N.J.S.A. 12A:2-313 to -314; violations of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312; violations of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C. §§ 32701–32711; violations of the Truth-in-Consumer Contract, Warranty, and Notice Act, N.J.S.A. 56:12-14 to -18; and fraud.

Plaintiffs contended, in pertinent part, that defendant "[m]isrepresent[ed] the nature of the [vehicle] sale as requiring bank approval so [defendant] could declare the finance contingency triggered and coerce [plaintiffs] into signing new sales documents with much more onerous financial terms," the vehicle was leaking oil and had a "burning oil problem" even though defendant represented the vehicle was in good condition, defendant did not provide an updated odometer disclosure statement when plaintiffs signed MVRO2, and the parties signed RISC2 with an outdated odometer disclosure.

Defendant moved to dismiss the arbitration demand, asserting the claims were barred as untimely because they were brought beyond the one-year limitations period set forth in the arbitration agreement. The arbitrator granted

the motion in part, dismissing the breach of contract claims but denying the motion as to all other claims. Plaintiffs then filed an amended arbitration demand, asserting a new claim for violations of the Federal Truth in Lending Act (TILA), 15 U.S.C. §§ 1601–1667.

The arbitration hearing took place in October 2020, during which plaintiffs and defendant's finance director testified. On March 16, 2021, the arbitrator issued his award.

In considering the timeliness of plaintiffs' claims, the arbitrator found the one-year and 180-day limitation terms were "reasonable and conspicuously displayed." He also noted New Jersey law permitted parties to enter into contracts with shortened limitations period to pursue claims. The arbitrator concluded that all of plaintiffs' claims were barred by the contractual limitation period contained in the MVROs and arbitration agreement. Nevertheless, the arbitrator addressed the merits of the claims.

The arbitrator noted that the SDA "was a critical part of the deal" as it expressly stated plaintiffs' rights and obligations, in particular, a condition subsequent that financing would be obtained for the purchase of the vehicle. The arbitrator commented that plaintiffs could have returned the vehicle and recovered their deposit on March 3, but they chose to buy the vehicle on "the more onerous terms" offered in MVRO2 and RISC2. They were not entitled to

relief because "[t]he SDA clearly provided for what would occur in exactly the situation faced by [plaintiffs]."

The arbitrator further concluded the second set of documents was not improperly backdated because the car was sold on February 24, plaintiffs exercised exclusive possession of it from that day, and the documents were amended to substitute the financing company and to change the financing terms; there was no new contract arising from the termination of a previous one. The arbitrator also found plaintiffs' claim regarding the odometer was meritless because there was no new sale on March 3 and the mileage shown on February 24 was accurate. Furthermore, plaintiffs were in sole possession of the car between February 24 and March 3 and were aware of any mileage they put on the car.

The arbitrator considered and rejected plaintiffs' remaining claims, finding them without merit. All claims were dismissed.

Thereafter, plaintiffs filed an order to show cause to vacate the arbitration award. Plaintiffs asserted they were entitled to judicial review and a reversal of the award under paragraph nine of the arbitration agreement because the arbitrator failed to render a decision in conformance with New Jersey law. Plaintiffs contended the arbitrator improperly upheld the 180-day statute of limitations, improperly allowed the backdating of the agreement, failed to "toll

and grant [p]laintiffs' claim of a TILA violation" regarding the finance charge, enforced an SDA that misrepresented the nature of the transaction, and disregarded the "unrebutted" testimony that defendant threatened repossession if plaintiffs did not agree to the second financing agreement.

During the hearing on the order to show cause, plaintiffs asserted the court had jurisdiction to review the award under the New Jersey Arbitration Act, N.J.S.A. 23B-1 to -36, and paragraph nine of the arbitration agreement. Defendant disagreed, highlighting the specific language in the agreement that the FAA governed the arbitration agreement. Defendant contended paragraph nine was unenforceable because it expanded the court's jurisdiction to review the award and therefore, it should be severed from the contract under Goffe v. Foulke Mgmt. Corp., 238 N.J. 191 (2019).

In response, plaintiffs asserted that if paragraph nine was unenforceable, there was no mutual agreement to arbitrate and therefore "the whole arbitration should be overturned." Defendant noted plaintiffs had not raised the issue of mutual assent before the arbitrator.

In its oral decision issued August 17, 2021, the court found the arbitration agreement "clearly state[d] that the [FAA] applies and governs this agreement." As to paragraph nine and its purported inconsistency with the FAA, the court found the issue of unenforceability was not raised before the arbitrator.

Therefore, the issue was waived. The court denied the order to show cause and dismissed the verified complaint on August 25, 2021.

On appeal, plaintiffs raise numerous arguments for this court's consideration: (1) the trial court erred in not addressing the substantive issues in the verified complaint; (2) the trial court erred in finding the FAA precludes state court jurisdiction and in concluding the FAA preempted the contractual right to reverse the arbitrator's award; (3) the doctrines of waiver, estoppel, and laches preclude defendant from contending the contractual basis to review the award is unenforceable; and (4) the arbitrator failed to follow New Jersey law.

"To foster finality and 'secure arbitration's speedy and inexpensive nature,' reviewing courts must give arbitration awards 'considerable deference.'" Borough of Carteret v. Firefighters Mut. Benevolent Ass'n, Loc. 67, 247 N.J. 202, 211 (2021) (quoting Borough of E. Rutherford v. E. Rutherford PBA Loc. 275, 213 N.J. 190, 201 (2013)). Therefore, "[j]udicial review of an arbitration award is very limited." Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J. 4, 11 (2017) (quoting Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 276 (2010)). The award of an arbitrator should not "be cast aside lightly" and is only "subject to being vacated . . . when it has been shown that a statutory basis justifies that action." Ibid. (quoting Kearny PBA Loc. No. 21 v. Town of Kearny, 81 N.J. 208, 221 (1979)).

Absent factual disputes, the interpretation of a contract is reviewed de novo. Serico v. Rothberg, 234 N.J. 168, 178 (2018). The enforceability of arbitration provisions is a question of law, "one to which we need not give deference to the analysis by the trial court . . . ." Goffe, 238 N.J. at 207 (citing Morgan v. Sanford Brown Inst., 225 N.J. 289, 303 (2016)). "[A] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

We begin with plaintiffs' contention that paragraph nine of the arbitration agreement contractually expanded the scope of judicial review of the arbitration award beyond that permitted under the FAA.[4] We disagree.

Paragraph one of the arbitration agreement expressly states "[t]he Federal Arbitration Act applies to and governs this agreement with the exceptions provided for in this agreement." The New Jersey Arbitration Act is not mentioned anywhere in the agreement.

[4] To the extent the trial court expressed it did not have jurisdiction over the matter because it was governed by the FAA, that is a misapprehension of the law. The court was permitted to review the award to determine whether plaintiffs demonstrated any bases for vacatur under the FAA.

Congress enacted the FAA to replace judicial indisposition to arbitration with a "national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts." Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

The FAA provides a specific list of instances in which a court may vacate an arbitration agreement. 9 U.S.C. § 10. These instances include: the award being "procured by corruption, fraud, or undue means"; "evident partiality or corruption in the arbitrators"; misconduct on the part of the arbitrator in failing to postpone the hearing when there was sufficient cause or declining to hear pertinent and material evidence; and the arbitrators exceeding or "so imperfectly execut[ing]" their powers. 9 U.S.C. § 10(a)(1)-(4). The FAA does not allow the parties to contractually expand judicial authority to review an award. 9 U.S.C. §§ 1-16.

In Hall St., 552 U.S. at 576, the United States Supreme Court considered the issue now before this court and found parties cannot contractually agree to expand the basis of review of an arbitration award governed by the FAA. The Court found that when the FAA governs an arbitration agreement, its vacatur terms are exclusive and cannot be modified by contract. Id. at 578.

The arbitration agreement at issue in Hall St., governed by the FAA, provided: "The [c]ourt shall vacate, modify or correct any award: (i) where the

arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." Id. at 579. The plaintiffs sought to expand the review of the arbitration award pursuant to that language. Id. at 584. The Court rejected the argument, finding that because Sections Ten and Eleven of the of the FAA emphasize "extreme arbitral conduct" as the prerequisite for vacatur, the addition of supplemental terms, particularly those that fall below the high bars expressly provided for in the statute, would run contrary to "the old rule of ejusdem generis." Id. at 586.

The Court also looked at the overall statutory scheme of the FAA, noting that Section Nine states a court "must grant" an order to confirm an arbitral award "unless" it is "vacated, modified, or corrected" in accordance with Sections Ten and Eleven. Id. at 587; 9 U.S.C. § 9. The Court found these terms were unequivocal and not malleable. Hall St., 552 U.S. at 587. Therefore, Congress intended the terms to be mandatory. Id. at 587-88. The Court stated the "provision for judicial confirmation carries no hint of flexibility." Id. at 587.

Although we have not found a case in which a New Jersey court has directly addressed this issue, several circuit and district court decisions have considered it.

In a Fifth Circuit case, an operating agreement between two parties stated "[t]his [a]greement shall be governed by and construed and interpreted in

accordance with the laws of the State of California." Cooper v. WestEnd Cap. Mgmt., LLC, 832 F.3d 534, 544 (5th Cir. 2016) (first alteration in original). The operating agreement did not reference California arbitration law. Ibid. The plaintiff asserted that the choice-of-law provision required the arbitration to be enforced in accordance with California law. Ibid. The court disagreed, holding that "FAA rules apply absent clear and unambiguous contractual language to the contrary." Ibid. (quoting BNSF Ry. Co. v. Alstom Transp., Inc., 777 F.3d 785, 790 (5th Cir. 2015)). The general choice-of-law provision was insufficient to compel the application of California's arbitration standards. Ibid. The FAA's vacatur standards governed the scope of judicial review. Ibid.

The Seventh Circuit addressed a similar case in which the governing franchise agreement between the two parties was governed by Minnesota law, but the arbitration agreement specified that it was "governed by and enforceable under the terms of the [FAA]." Renard v. Ameriprise Fin. Servs. Inc., 778 F.3d 563, 565 (7th Cir. 2015). The court held that the plaintiff had "no way around this language"; the FAA was the applicable statute under which to review the award. Id. at 566.

In a recent Third Circuit case, the court considered a purchase agreement with a choice-of-law provision selecting Delaware law. MarkDutchCo 1 B.V. v. Zeta Interactive Corp., 411 F. Supp. 3d 316, 328 (D. Del. 2019). The

defendants argued that the choice of law provision required the application of Delaware's vacatur standards to the review of the arbitration award. Ibid. The Court rejected the assertion, stating "under Third Circuit law, state law vacatur standards apply only when the parties express a 'clear intent to apply state law vacatur standards instead of those of the FAA.'" Ibid. (quoting Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Acct., 618 F.3d 277, 293 (3d Cir. 2010)). The court found that the broad choice-of-law provision was not sufficient to establish the parties' clear intent to opt out of the FAA scheme. Ibid.

We discern no clear and unambiguous intent to opt out of the FAA statutory framework. The arbitration agreement does not reference the New Jersey Arbitration Act. Any reference to New Jersey law in other areas of the purchase documents is not sufficient. The only avenue of review available to plaintiffs is to allege and demonstrate a ground for vacatur under the FAA.

Plaintiffs did not allege the arbitrator acted with any egregious conduct. They only asserted the award did not conform to New Jersey law, relying on paragraph nine to present the argument. Under Hall St., the parties could not contractually expand the court's review under the FAA. 552 U.S. at 578. Therefore, paragraph nine was unenforceable.

In light of that conclusion, we must consider the severability of the provision, recognizing the United States and New Jersey Supreme Courts' holdings treating "an arbitration agreement as severable and enforceable." Goffe, 238 N.J. at 195 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967)). When a particular provision of an arbitration agreement is deemed unenforceable, a court must then "determine whether the unenforceability of [the] provision[] renders the remainder of the contract unenforceable." Jacob v. Norris, McLaughlin & Marcus Corp., 128 N.J. 10, 32 (1992). If the removal of an unenforceable provision "defeats the primary purpose of the contract, we must deem the entire contract unenforceable. However, if the illegal portion does not defeat the central purpose of the contract, we can sever it and enforce the rest of the contract." Curran v. Curran, 453 N.J. Super. 315, 322 (App. Div. 2018) (quoting Norris, 128 N.J. at 33).

Here, the arbitration agreement states: "[i]n consideration of the mutual promises made in this agreement, you 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." The agreement listed the FAA as the governing law and further provided "[i]f any term of this agreement is unenforceable, the remaining terms of this agreement are severable and enforceable to the fullest extent permitted by law."

It is clear the purpose of the arbitration agreement was to permit the parties to expeditiously settle any dispute related to the purchase and financing of the vehicle through binding arbitration. The express provision that any unenforceable provisions are severable demonstrates the parties did not intend paragraph nine to serve as the primary purpose of the agreement. Therefore, the provision may be severed from the arbitration agreement and the remaining provisions can be enforced.

Plaintiffs do not contend the FAA provides any basis for the vacatur of the award. They solely relied on paragraph nine to assert the arbitrator did not properly apply New Jersey law. Because we have found paragraph nine unenforceable, we do not consider plaintiffs' substantive arguments.[5] The trial court did not err in denying the order to show cause and dismissing plaintiffs' complaint.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION

[5] Plaintiffs did not raise the issues of fraud, laches, estoppel or waiver before the trial court. Therefore, we do not consider them here. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).