SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0723-22

CRYSTAL SETTLE,

Plaintiff-Appellant,

v.

SECURITAS SECURITY SERVICES USA, INC., and STEVEN MEDINA, both individually and in his managerial and/or supervisory capacity,

Defendants-Respondents.

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Submitted March 22, 2023 – Decided April 12, 2023

Before Judges Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1934-22.

O'Connor, Parsons, Lane & Noble, LLC, attorneys for appellant (Gregory B. Noble and R. Daniel Bause, of counsel and on the briefs).

Kluger Healey, LLC, attorneys for respondents (Lance N. Olitt, on the brief).

PER CURIAM

Plaintiff Crystal Settle appeals from an October 7, 2022 order granting defendants Securitas Security Services USA, Inc.'s and Steven Medina's application to compel arbitration and dismiss her complaint. We affirm.

I.

Plaintiff was employed by Securitas as a security officer for approximately one month, from mid-March 2021 until April 2021. She was assigned to a Securitas client site in Weehawken, and reported to Steven Medina, the Securitas Account Manager. Prior to commencing her employment, plaintiff signed a written Dispute Resolution Agreement Acknowledgment, dated February 25, 2021 (DRA Acknowledgment). The DRA Acknowledgment provided:

> I have received a copy of the Securitas Security Services USA, Inc. (the "Company") Dispute Resolution Agreement (the "Agreement") and I have read and I understand all of the terms contained in the Agreement. I understand that employment at the Company constitutes acceptance of this Agreement and its terms. I further acknowledge that the Company and I are mutually bound by this Agreement and its terms, and that all covered employment-related disputes between me and the Company must be resolved on an individual basis in arbitration rather than in court.

The referenced Agreement provided it was governed by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-402,[1] and specifically stated:

> This [Agreement] . . . is an arbitration agreement governed by the [FAA]. Under the terms set forth below, both you (sometimes referred to as "Employee") and the Company mutually agree and thus are required to resolve covered claims either may have against the other by Arbitration instead of in a court of law. Acceptance of this Agreement is a condition of employment with Securitas Security Services USA, Inc.
> . . . .
>
> This Agreement is governed by the [FAA] and evidences a transaction involving commerce. . . . [T]his Agreement applies to any dispute arising out of or related to your employment with Securitas Security Services USA, Inc. or one of its affiliates, subsidiaries or parent companies ("Company") or termination of employment and survives after the employment relationship terminates.
> . . . .
>
> [T]his Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. It requires all such disputes to be resolved only by an Arbitrator through final and binding arbitration and not by way of court or jury trial. Except as this Agreement otherwise provides, such disputes include, without limitation, disputes arising out of or relating to the

[1] An arbitration agreement within a contract involving interstate commerce is subject to the FAA. See Gras v. Assoc. First Capital Corp., 346 N.J. Super. 42 (App. Div. 2001). Here, plaintiff has not disputed, before the trial court or us, the Agreement involves interstate commerce.

> interpretation or application of this Agreement, including disputes over the scope, enforceability, revocability, or validity of the Agreement, or any portion of the Agreement.
>
> [T]his Agreement applies, without limitation, to disputes with any entity or individual arising out of or related to the . . . employment relationship or the termination of that relationship . . . discrimination, or harassment and claims arising under . . . state statutes or regulations addressing the same or similar subject matters (except to the extent a valid and enforceable state law precludes certain claims from being subject to a pre-dispute arbitration agreement), and, to the full extent permitted by law, all other federal or state legal claims . . . arising out of or relating to Employee's employment or the termination of employment.

On June 14, 2022, plaintiff filed a five-count complaint against defendants asserting numerous violations of the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -50. She specifically claimed defendants created a hostile work environment and Medina sexually assaulted her. She also alleged quid pro quo sexual harassment by Medina, gender discrimination, and constructive discharge. She further maintained defendants aided and abetted harassment and discrimination in the workplace.

In lieu of an answer, defendants filed a motion to dismiss plaintiff's complaint under Rule 4:6-2(e) and compel arbitration, in part arguing the FAA preempted N.J.S.A. 10:5-12.7 of the NJLAD (Section 12.7). Section 12.7 states

in pertinent part that "[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," and also states "[n]o right or remedy under [NJLAD] . . . shall be prospectively waived." N.J.S.A. 10:5-12.7(a) to (b). Section 12.7, therefore, makes unenforceable agreements which require the relinquishment of the right to resolve disputes in court and receive a jury trial for claims regarding discrimination and harassment, which is one of the "defining features" of an arbitration agreement. See Antonucci v. Curvature Newco, Inc., 470 N.J. Super. 553, 566 (App. Div. 2022) (internal citations omitted).

In opposition to defendants' motion, plaintiff argued Section 12.7 was not preempted by the FAA based on a recent amendment, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFA), Pub. L. No. 117-90, § 2(a), 136 Stat. 26, 26-27 (2022) (codified at 9 U.S.C. §§ 401-402). Under the EFA "no pre[-]dispute arbitration agreement . . . shall be valid or enforceable with respect to a case which is filed under Federal, Tribal or State law and relates to the . . . sexual assault dispute or the sexual harassment dispute." 9 U.S.C. § 402(a). The EFA applies expressly "to any dispute or claim that arises or accrues on or after the date of enactment," which was March 3,

2022, EFA § 3, 136 Stat. at 28. Further, Section 2 of the FAA was amended in accordance with the EFA and provides that contracts containing agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in [9 U.S.C. §§ 401-402]." 9 U.S.C. § 2. Plaintiff claimed notwithstanding the EFA's effective date, by precluding arbitration in sexual harassment and sexual assault claims, the EFA was actually consistent with Section 12.7, thus permitting her claims to be brought in court, as her arbitration agreement was unenforceable under the NJLAD.

In response, defendants relied on our decision in Antonucci, 470 N.J. Super. at 558. In that case, plaintiff sought to assert claims of wrongful termination and discrimination under Section 12.7 against his employer in court, despite having previously agreed to arbitrate those claims. We held that Section 12.7 is preempted "when applied to prevent arbitration called for in an agreement governed by the FAA." Id. at 566. Defendants argued our decision in Antonucci, as well as the "clear language of the . . . [EFA] statute" compelled enforcement of plaintiff's arbitration agreement for her claims of sexual assault and sexual harassment, as they occurred or accrued prior to the passage of the EFA.

After considering the parties' submissions and oral arguments, the court granted defendants' motion, dismissed plaintiff's complaint and directed plaintiff to submit her claims to arbitration and detailed its reasoning in an oral opinion. The court concluded under the United States Constitution's Supremacy Clause, U.S. Const. art. VI, cl. 2, the FAA preempted Section 12.7 with respect to sexual harassment or sexual assault claims as we decided in Antonucci, 470 N.J. Super. at 566. The court explained the EFA applied only "to claims that arose or accrue[d] on or after" the date of its enactment, March 3, 2022, relying both on the express language of the statute as well as Congress' intent as support. It determined it would be "unreasonable" to deduce a congressional intention that the EFA would exempt from arbitration "any and all claims whenever they arose or accrue[d] relating to sexual harassment." This appeal followed.

II.

Against this factual background, plaintiff reprises the arguments she made before the trial court and contends Congress's enactment of the EFA resulted in a lack of conflict between Section 12.7 and the FAA, as both federal law and New Jersey law evinced a desire to prevent "victims of sexual assault or sexual harassment to be forced into arbitration." She further maintains she is not seeking a retroactive application of the EFA, nor is she "attempting to enforce

the EFA." Rather, plaintiff argues she is "seeking to enforce a State law that enforces the exact same interests" as the EFA.

Defendants argue the plain language of the EFA requires plaintiff to arbitrate her claims, as the EFA applies only to claims that accrued after its effective date of March 3, 2022. Defendants further argue when Section 2 of the FAA was amended in accordance with the EFA to include the phrase "or as otherwise provided in [9 U.S.C. §§ 401-402]," Congress specifically maintained the applicability of pre-enactment arbitration agreements such as plaintiff's. Defendants therefore argue Section 12.7 "still directly conflicts with and frustrates the purpose of the FAA," for such pre-enactment sexual harassment or assault claims.

We disagree with plaintiff's arguments and agree with defendants the EFA applies to claims that accrued after its effective date. As the accrual of plaintiff's claim indisputably preceded the effective date of the EFA, her complaint remains preempted by the FAA thereby requiring arbitration of her disputes against Securitas and Medina.

III.

We review de novo a trial court's determination that an arbitration agreement is valid and enforceable. Hirsch v. Amper Fin. Servs., LLC, 215 N.J.

174, 186 (2013). We also review federal preemption questions de novo. Hejda v. Bell Containers Corp., 450 N.J. Super. 173, 186-87 (App. Div. 2017).

"Under both the FAA and New Jersey law, arbitration is fundamentally a matter of contract." Antonucci, 470 N.J. Super. at 561 (citing Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010); 9 U.S.C. § 2; NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011)). The FAA "places arbitration agreements on an equal footing with other contracts." Ibid. (quoting Rent-A-Center, 561 U.S. at 67). As such, "the FAA 'permits states to regulate . . . arbitration agreements under general contract principles,' and a court may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'" Ibid. (quoting Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 441 (2014)). Nevertheless, a state may not "subject an arbitration agreement to more burdensome requirements than those governing the formation of other contracts." Leodori v. CIGNA Corp., 175 N.J. 293, 302 (2003).

Arbitration, however, cannot be compelled when there was no agreement to arbitrate. Accordingly, as a threshold matter, a court must determine: (1) whether a valid arbitration agreement exists; and (2) whether the dispute falls within the scope of the agreement. See Martindale v. Sandvik, Inc., 173 N.J.

76, 83, 92 (2002). "To be enforceable, the terms of an arbitration agreement must be clear, and any legal rights being waived must be identified." Antonucci, 470 N.J. Super. at 561. Further, waiver clauses "must explain that the plaintiff is giving up [their] right to bring [their] claims in court or have a jury resolve the dispute." Atalese, 219 N.J. at 447.

As a preliminary matter, we note plaintiff's arbitration agreement clearly and unambiguously required "all disputes [are] to be resolved only by an Arbitrator through final and binding arbitration and not by way of court or jury trial," and also provided a non-exhaustive list of disputes, including "discrimination, or harassment." As a result of this clear language, we conclude the February 2021 agreement is a valid arbitration agreement. Martindale, 173 N.J. at 92; Atalese, 219 N.J. at 448.

We also conclude plaintiff's claims are preempted by the FAA. While the enactment of the EFA eliminated any conflict between the FAA and Section 12.7 as to sexual assault and sexual harassment claims that accrued on or after March 3, 2022, it did not eliminate the conflict for claims, such as plaintiff's, that accrued before that date.

Under the Supremacy Clause, "the Laws of the United States" are "the Supreme Law of the Land; and the Judges in every State shall be bound

thereby[.]" U.S. Const. art. VI, cl. 2. "Consistent with that command, [the United States Supreme Court has] long recognized that state laws that conflict with federal law are 'without effect.'" Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)). In fact, "[a] bedrock principle of the United States Constitution is that Congress is empowered to preempt state law." In re Altice, ___ N.J. ___, ___ (2023) (slip op. at 10). Thus, a state law is preempted to the extent of any conflict with a federal statute such as when a conflict occurs when compliance with both federal and state regulations is impossible. Hager v. M&K Construction, 246 N.J. 1, 29 (2021). Because Section 12.7 conflicts with the FAA, as to claims that accrued before March 3, 2022, it is preempted as to those claims.

As noted, in Antonucci, 470 N.J. Super. at 566, we held Section 12.7 of the NJLAD is preempted "when applied to prevent arbitration called for in an agreement governed by the FAA." We concluded the arbitration agreement in Antonucci was "binding and that LAD's procedural prohibition, which would preclude arbitration, is preempted when applied to an arbitration agreement governed by the FAA." Id. at 557. As plaintiff and Securitas agreed the FAA governed claims under the agreement, the federal law in effect when plaintiff's harassment occurred preempts Section 12.7, and the court therefore properly

compelled arbitration. Further, the amended language of Section 2 of the FAA specifically included a carve out for the EFA. If Congress intended to render all arbitration agreements for sexual harassment and assault claims unenforceable, regardless of the EFA's enactment date, it would have done so.

Finally, plaintiff's repeated assertions that she does not seek a retroactive application of the EFA are unavailing, as we cannot discern how the relief she requests avoids that result.[2] Indeed, in order to enforce Section 12.7, the EFA would have to apply retroactively, as plaintiff's claims occurred prior to the EFA's enactment in March 2022. In the absence of a contrary indication, however, a statute will not be construed to have retroactive application. See In re D.C., 146 N.J. 31, 50 (1996) ("It is well-settled that statutes generally should be given prospective application."). Here, as noted, the EFA contains no language indicating that is should have retroactive effect and in fact, only refers

[2] As noted, plaintiff does not contend the EFA has retroactive effect and thus did not brief if Congress intended a retroactive application "either expressly or implicitly," James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 563 (2014), if "the statute is ameliorative or curative," Gibbons v. Gibbons, 86 N.J. 515, 523 (1981), or if "the parties' expectations warrant retroactive application," State v. J.V., 242 N.J. 432, 444 (2020). We therefore do not address these issues and consider those arguments waived. See Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023) ("[A]n issue not briefed is deemed waived."); Telebright Corp. v. Dir., N.J. Div. of Taxation, 424 N.J. Super. 384, 393 (App. Div. 2012) (deeming a contention waived when the party failed to include any arguments supporting the contention in its brief).

to "any dispute or claim that arises or accrues on or after the date of enactment." EFA § 3, 136 Stat. at 28. Such plain language indicates a Congressional intent to apply the EFA prospectively. See W.S. v. Hildreth, 252 N.J. 506, 518 (2023) ("When the plain language of a statute is clear and unambiguous, we apply the law as written."). We acknowledge the EFA represents a significant evolution in the enforcement of arbitration provisions, however, Congress has specifically elected to apply this change prospectively rather than retroactively.

Adopting plaintiff's position would not only ignore the clear language of the EFA but would also violate the established principle that "[a]n arbitration clause cannot be invalidated by state-law 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" Atalese, 219 N.J. at 441 (quoting AT& T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)); see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 251 (2017) (stating the FAA "also displaces any rule that covertly accomplishes the . . . objective [of] disfavoring contracts that . . . have the defining features of arbitration agreements").

To the extent we have not addressed the remaining arguments raised by plaintiff it is because we have determined they lack sufficient merit to warrant further 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