SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0794-22

MOSES FALLAH,

Plaintiff-Appellant,

v.

TESLA ENERGY OPERATIONS, INC., as Successor-In-Interest to Solar City Corporation,

Defendant-Respondent.

———————————————————

Argued January 18, 2023 – Decided February 24, 2023

Before Judges Susswein, Berdote Byrne and Fisher.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-2455-20.

Lisa R. Considine argued the cause for appellant (DiSabato & Considine LLC, Law Office of Edward Hanratty, and Schmierer Law Group, LLC, attorneys; David J. DiSabato, Lisa R. Considine, Edward Hanratty, and Ross H. Schmierer, on the brief).

Seth W. Lloyd (Morrison & Foerster LLP) of the District of Columbia and California bars, admitted pro

hac vice, argued the cause for respondent (Wong Fleming, PC, Lavin, Cedrone, Graver, Boyd & DiSipio, David J. Fioccola (Morrison & Foerster LLP), Seth W. Lloyd, and Joseph R. Palmore (Morrison & Foerster LLP) of the District of Columbia and New York bars, admitted pro hac vice, attorneys; David C. Fleming, Michael J. Wozny, and David J. Fioccola, on the brief).

PER CURIAM

In 2015, plaintiff Moses Fallah entered into a contract with SolarCity Corporation by which he purchased power produced by a solar panel system SolarCity installed on his home. The contract contained SolarCity's promise "not [to] put a lien on" plaintiff's property. Both parties agreed "that any dispute, claim or disagreement between us . . . shall be resolved exclusively by arbitration."

Years later, plaintiff discovered that SolarCity had recorded a lien on his property. He commenced this action against defendant Tesla Energy Corporation, which acquired SolarCity in 2016, seeking a declaratory judgment and damages arising from the imposition of the lien.

Defendant promptly moved to compel arbitration. According to the trial judge, the contract's section 18, which contained the arbitration agreement, lacked a "concrete manifestation" of a waiver of plaintiff's statutory rights; for

that reason, the trial judge denied the motion. Defendant did not appeal that determination despite the right to do so. See R. 2:2-3(b)(8).

Plaintiff then filed an amended complaint, seeking to pursue his claims for those similarly situated. In response, defendant moved to bar plaintiff's pursuit of a class action by relying on language in the same arbitration agreement the judge found unenforceable. The trial judge granted this motion and dismissed the class-action allegations in the amended complaint. We granted leave to appeal to consider plaintiff's argument, among others, that the judge's finding that the arbitration agreement was unenforceable compelled a determination that the class-action waiver within the arbitration agreement should also be unenforceable. We reverse the order under review for the following reasons.

First, we must divorce from our consideration the overriding notion, ever-present in appeals of orders compelling or denying arbitration, that public policy favors enforcement of the parties' agreement. See, e.g., Bor. of Carteret v. Firefighters Mut. Benevolent Ass'n, Local 67, 247 N.J. 202, 211 (2021); Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 132 (2020). We are not considering the enforcement of an arbitration agreement or a class-action waiver contained within an enforceable arbitration agreement; we are

considering enforcement of a purported waiver of a right to pursue class actions in a court of law. The policy in favor of arbitration is irrelevant.

Second, once removed from the arbitration setting, we are driven by a public policy that favors class actions and disfavors class-action waivers. The Supreme Court has recognized that class actions are "valuable to litigants, to the courts, and to the public interest," Muhammad v. Cnty. Bank of Rehoboth Bch., 189 N.J. 1, 17 (2006), and that the class-action mechanism "should be construed liberally in a case involving allegations of consumer fraud," In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 435 (1983), as here.

Third, the enforceability of a class-action waiver turns on an interpretation of the parties' agreement and an application of accepted principles of contract law. The party seeking relinquishment of a right favored in our jurisprudence must show that the other party "clear[ly] and unambiguous[ly]" agreed to forego that right. Atalese v. U.S. Legal Serv. Grp., 219 N.J. 430, 445 (2014); see also Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001). Defendant has not come close to carrying that burden.

Defendant relies on a single sentence appearing in section 18 in seeking a holding that plaintiff waived the right to pursue a class action in a court of

law; that sentence, however, is solidly linked to the parties' agreement to arbitrate and should be so interpreted and limited. To ascertain the meaning of the sentence on which defendant relies, it is appropriate to consider not only the wording of that sentence but its neighboring words and phrases as well. See Shelton v. Restaurant.com, Inc., 214 N.J. 419, 440 (2013); Germann v. Matriss, 55 N.J. 193, 220 (1970).

The purported class-action waiver is contained in the contract's section 18, which is labeled "Applicable law; Arbitration." That section consists of seven paragraphs, the first and seventh of which are all in upper case letters, thereby signifying to a lay person the importance of these emphasized paragraphs.[1] Each paragraph starts with language that reveals arbitration is its principal object:

- "PLEASE READ THIS SECTION CAREFULLY. ARBITRATION REPLACES THE RIGHT TO GO TO COURT . . .";

- After explaining that the agreement is to be governed by the laws of plaintiff's home state, this second paragraph states: "We agree that any dispute, claim or disagreement between us . . . shall be resolved exclusively by arbitration";

[1] We have appended this entire section to this opinion.

- "The arbitration, including the selection of the arbitrator, will be administered by JAMS . . ."

- "If you initiate the arbitration, you will be required to pay the first $125 of any filing fee . . .";

- "Only Disputes involving you and SolarCity may be addressed in the arbitration . . .";

- "The arbitrator shall have the authority to award . . .";

- "BECAUSE YOU AND WE HAVE AGREED TO ARBITRATE ALL DISPUTES . . ."

[Emphasis added.]

By our count, the words "arbitration," "arbitrator," "arbitrate," and "arbitrates" appear thirty-nine times in section 18. The few references to court proceedings in section 18 are those that convey that access to the courts is waived in favor of arbitration.[2]

[2] Section 18's seventh paragraph specifically refers to the right of either party to seek redress in a court of law but it is only in context of seeking review and enforcement of an arbitration award. It is noteworthy that despite section 18's insistence on disputes being resolved in arbitration, defendant – by way of section 16 – purports to relegate to itself the right to commence "appropriate court action" to enforce the contract upon a default by plaintiff. Since the trial judge has already determined that arbitration may not be compelled, we need not determine whether the inconsistency between sections 16 and 18 precludes defendant from seeking arbitration under the latter.

Deserving of close analysis is the seventh paragraph, which contains the single sentence that expresses the class-action waiver on which defendant solely relies. Both that sentence's wording and location within the paragraph reveals it is limited to the waiver of the class-action mechanism in an arbitration and not in a court of law; we set forth the entire seventh paragraph to demonstrate what we mean, emphasizing the sentence on which defendant entirely relies:

> BECAUSE YOU AND WE HAVE AGREED TO ARBITRATE ALL DISPUTES, NEITHER OF US WILL HAVE THE RIGHT TO LITIGATE THAT DISPUTE IN COURT, OR TO HAVE A JURY TRIAL ON THAT DISPUTE, OR ENGAGE IN DISCOVERY EXCEPT AS PROVIDED FOR IN THE RULES. FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENT-ATIVE OR MEMBER OF ANY CLASS PERTAINING TO ANY DISPUTE. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING ON THE PARTIES AND MAY BE ENTERED AND ENFORCED IN ANY COURT HAVING JURISDICTION, EXCEPT TO THE EXTENT IT IS SUBJECT TO REVIEW IN ACCORDANCE WITH APPLICABLE LAW GOVERNING ARBITRATION AWARDS. OTHER RIGHTS THAT YOU OR WE WOULD HAVE IN COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.
>
> [Emphasis added.]

The seventh paragraph's first sentence states the parties' agreement to "arbitrate all disputes" and that neither will litigate any dispute in a court of law. Those declarations are then followed by a sentence that starts with "Further." Defendant argues that "further" connotes that what follows is an obligation "independent" of the immediately preceding sentence. That is, defendant argues that "further" represents a complete break from what the prior sentence – or, for that matter, the remainder of the paragraph – otherwise conveys. We disagree.

The word "further" may certainly be understood, when interpreted according to common usage, N.J.S.A. 1:1-1, as conveying to the reader that something has been "added," as any dictionary will reveal and as defendant argues. But that argument is too facile, because what "further" really means is that something has been added to what was just mentioned. Grey v. Greenville & H.R.Co., 59 N.J. Eq. 372, 384 (Ch. 1900), aff'd, 62 N.J. Eq. 768 (E. & A. 1901); see also Blair v. Scribner, 67 N.J. Eq. 583, 588 (E. & A. 1905); Berardi v. Butter, 42 N.J. Super. 39, 49-50 (App. Div. 1956), aff'd, In re Berardi, 23 N.J. 485 (1957). Indeed, because it appears in the middle of the paragraph, "further" should be understood as "adding" something that relates to what immediately precedes and, for that matter, to what immediately follows. See

William Strunk Jr. & E.B. White, The Elements of Style 13 (3rd ed. 1979) (recognizing that "the paragraph [is] the unit of composition," that "[o]rdinarily . . . a subject requires division into topics, each of which should be dealt with in a paragraph," and that "[t]he object of treating each topic in a paragraph by itself is, of course, to aid the reader"). So, in recognizing that the sentence, which precedes "further," declares that the parties agreed to arbitrate "all" disputes, the additional information contained in the next sentence, which begins with "further" – to be sensible and consistent with principles of clear and unambiguous writing – must relate to those disputes that are to be arbitrated and no others.

If that were not enough, it is further noteworthy that the sentence in question is immediately followed in that same paragraph by a declaration that "[t]he arbitrator's decision will be final and binding . . . ." In short, the sentences that bracket the purported waiver of class actions in courts of law relate solely to the parties' obligation to arbitrate and their rights within that arbitration; the suggestion that the sandwiched-in "further" sentence relates to some other, unrelated rights about proceedings in a court of law is simply an unreasonable and implausible interpretation.

Further, the sentence that defendant claims is a waiver of the right to pursue a class action in a court of law is limited, by its express language, to "the right to participate as a representative or member of any class pertaining to any dispute" (emphasis added). Section 18's second paragraph gives the word "dispute" a particular meaning by stating the parties agree

> that any dispute, claim or disagreement between us (a "Dispute") shall be resolved exclusively by arbitration.

By defining the word "dispute" as including those disputes, claims or disagreements that are to be resolved "exclusively by arbitration," its use in the "further" sentence on which defendant solely relies again leads to the only reasonable interpretation: that the class-action waiver described there applies only to those disputes, claims and disagreements to be resolved in arbitration.

The entire sense of the seventh paragraph, let alone all seven paragraphs of the arbitration agreement, is that there will be no litigation between these parties, only arbitration.[3] We find unconvincing the notion that – after attempting to convey throughout section 18 that plaintiff would have no right

[3] The fifth paragraph also expresses a class-action waiver but, like the seventh paragraph, only speaks about class actions in arbitration. We have not closely analyzed the language of that paragraph as we have the seventh paragraph because defendant has not argued the fifth paragraph supports the trial judge's decision.

to litigate a dispute in a court of law – defendant also extracted from plaintiff a waiver of the right to pursue a class action in a forum that the parties agreed would be unavailable to plaintiff. That twisted logic is inconsistent with a literal or reasonable interpretation of section 18. Moreover, even if defendant's argument may be said to be fairly debatable, there still can be no doubt that the alleged class-action waiver in section 18 was not clearly and unambiguously expressed.

We lastly observe that our recent decision in Cerciello v. Salerno Duane, Inc., 473 N.J. Super. 249 (App. Div. 2022) (emphasis added), does not require a different result. There, the class-action waiver, which stated that the parties "waive[d] the right to maintain a court action, or to pursue a class action in court and in arbitration," unambiguously encompassed both arbitration and court proceedings, unlike here. Id. at 253 (emphasis added).

* * *

The order under review, insofar as it dismissed with prejudice plaintiff's class claims, is reversed and the matter remanded for further proceedings in conformity with this opinion.

Reversed and remanded. We do not retain jurisdiction.