SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1221-22

GUY CITRON and HYEJIN CHOI, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

CINCH REAL ESTATE, INC., HOMESURE SERVICES, INC., and WEICHERT CO.,

Defendants-Respondents.

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Submitted May 9, 2023 – Decided May 22, 2023

Before Judges Fisher and Chase.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-1312-22.

Robert J. Basil (The Basil Law Group, PC), David A. Cohen (The Basil Law Group, PC), and Sean Collier (The Basil Law Group, PC), attorneys for appellants (Robert J. Basil, David A. Cohen and Sean Collier, on the briefs).

Wong Fleming, PC and David J. Fioccola (Morrison & Foerster LLP), attorneys for respondents (Daniel C. Fleming, David J. Fioccola, Joseph R. Palmore (Morrison & Foerster LLP) of the New York and District of Columbia bars, admitted pro hac vice, and Diana Li Kim (Morrison & Foerster LLP) of the Connecticut and District of Columbia bars, admitted pro hac vice, on the brief).

PER CURIAM

In this appeal, we consider plaintiffs' arguments that challenge enforcement of an arbitration provision contained in a home warranty plan. Concluding, as did the trial judge, that the arbitration provision was conspicuously presented and unambiguously declared the arbitrability of the disputes asserted in this action, we affirm the order under review except that we remand for a stay of the suit instead of the dismissal granted by the trial judge.

In the Summer of 2020, plaintiffs Guy Citron and Hyejin Choi, a married couple, employed defendant Weichert, to assist them in their search for a home. During that process, a Weichert agent encouraged plaintiffs to purchase a Weichert Home Protection Plan as offered by defendants Cinch Real Estate, Inc., and HomeSure Services, Inc.

In early July, Citron called a hotline administered by Cinch and HomeSure and purchased a two-year home warranty for $1,147.72. On July 7, 2020, plaintiffs received an envelope containing a twenty-seven-page booklet. Printed

on the outside of the envelope, in large and bold lettering, was the following: "IMPORTANT: Your Home Warranty Information is Enclosed. Please Keep Handy."

The booklet's first eleven pages contain welcoming information and explain the coverage provided and the claim process. Throughout those portions are footnotes directing the homeowner to "[s]ee terms, conditions and limitations in your service agreement." The service agreement is set forth in the booklet's remaining sixteen pages, at the start of which is a table of contents that labels "Dispute Resolution" as the agreement's section eight starting on the twenty-first page. On the page following the table of contents is the service agreement's introductory portion, where it is stated in bold print:

> This Agreement has provisions for the use of final and binding arbitration to resolve disputes and otherwise limits the remedies available to you. Please see DISPUTE RESOLUTION section for more information about arbitration.

The dispute resolution section, as promised by the table of contents, begins on the twenty-first page under a heading, in bold print, labeled "DISPUTE RESOLUTION." Immediately below that heading is subsection one, which starts with the word "ARBITRATION" in bold lettering and begins with the following declaration:

> All disputes, controversies or claims of any sort, arising out of or in any way relating to this Agreement, its negotiation, and the Services provided pursuant to it, whether based in contract, tort, regulation, or any other legal or equitable theory (collectively "Disputes"), shall be resolved at the consumer's choice by settlement or final and binding arbitration or in and through a small claims court having jurisdiction over such Disputes.

Subsection one then fixes the place for arbitration and the rules governing arbitration. That subsection also "empower[s]" the arbitrator "to decide all Disputes and all questions related to the enforceability and scope of these Dispute Resolution provisions, including but not limited to the validity, interpretation and applicability of these Disputes Resolution provisions." Subsection one declares as well that the arbitration provision is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 to 16, because the transaction involves interstate commerce. This subsection lastly precludes class arbitration.

Subsection two is prefaced with the bold-faced heading "Class Action and Jury Trial Waiver," and includes the parties' agreement that a dispute may only be commenced in the party's "individual capacity and not as a plaintiff or class member in any purported class or representative proceeding." This subsection lastly declares stipulates that: "Each party gives up or waives any right it may have to have any Disputes between them resolved by a jury."

Plaintiffs closed on their purchase of a home in Califon on August 27, 2020. On that date the warranty went into effect, yet it also contained a clause that permitted plaintiffs to cancel the agreement within the following thirty days so long as no claims were filed within that time.

Within a month of closing on their home purchase, plaintiffs made a series of claims under the warranty and, on several occasions, defendants Cinch and HomeSure dispatched third-party repair technicians to plaintiffs' home. Plaintiffs were dissatisfied with defendants' efforts and the results obtained.

On their own behalf and on behalf of a class of individuals similarly situated, plaintiffs commenced this action against defendants in March 2022. Plaintiffs alleged statutory violations of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20, the Plain Language Review Act, N.J.S.A. 56:12-1 to -10, and the Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 to -18. They also alleged fraud, fraud in the inducement, and defendants' breach of fiduciary duties. Defendants promptly moved to dismiss, under Rule 4:6-2(e), based on the arbitration provision. The motion judge found the arbitration provision enforceable and dismissed the complaint.

Plaintiffs filed this appeal, as was their right, R. 2:2-3(b)(8), arguing the arbitration agreement was unenforceable because: the motion judge erred by

failing to recognize that it was "presented in an improperly obscure and even hidden manner"; the provision itself was "insufficiently clear and unambiguous to be enforced against consumers"; the provision contains "internal discrepancies and self-contradictions" that render it unenforceable; and the motion judge "misread the course-of-conduct evidence and assigned it outsized importance." Plaintiffs also argue that the judge erred in "enforcing the delegation clause," i.e., the clause that delegates to the arbitrator any disputes about arbitrability. We find insufficient merit in these arguments to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following brief comments about some of plaintiffs' arguments.

We start by noting the apparently undisputed fact that the FAA applies,[1] meaning that the national policy in favor of arbitration, which "displace[s]" all state law bans on arbitration of particular claims, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011), must be enforced absent the parties' failure to mutually assent or otherwise reach a meeting of the minds about arbitration. See Atalese v. U.S. Legal Servs., Grp., L.P., 219 N.J. 430, 442

[1] The FAA would apply only if the transaction involved interstate commerce. The record does not provide much from which a court could resolve that question, but we do note that plaintiffs alleged in their complaint that Cinch and HomeSure were incorporated in Florida and maintain principal places of business in Boca Raton, Florida.

(2014). Whether the parties agreed to arbitrate is a question that turns on the application of state law contract principles. See First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

In questioning whether the parties agreed to arbitrate, plaintiffs allude to that part of their agreement which recognized arbitration is not necessarily the exclusive means for resolving their disputes. The provision instead acknowledges that, in seeking relief from defendants, plaintiffs had three "choice[s]"; they could resolve their disputes "by settlement or final and binding arbitration or in and through a small claims court having jurisdiction" (emphasis added). Plaintiffs claim there is some ambiguity in this either because of the existence of options or because the limits of the options are not precisely defined. We disagree. The options are clearly stated in plain language and, because plaintiffs opted for neither of the other two choices – reaching a settlement with defendants or suing in a small claims court – they were relegated to the third remaining option: final and binding arbitration. We find nothing ambiguous or uncertain in the options the parties agreed upon to describe how their disputes would be resolved.

More importantly, even though the provision provided plaintiffs with the option of suing in a small claims court,[2] there is no ambiguity that would suggest plaintiffs were permitted to proceed with this class action or to obtain the benefit of their jury demand. Subsection two of the arbitration provision clearly expresses plaintiffs' agreement not to commence a class action as well as both parties' waiver of the right to trial by jury. Because both the jury trial waiver and the preclusion of class actions are unambiguously stated and prominently presented, they must be enforced. See, e.g., Concepcion, 563 U.S. at 352 (enforcing class action waivers contained in arbitration agreements); Atalese, 219 N.J. at 443 (recognizing the enforceability of jury trial waivers when clearly and unambiguously expressed).

In the final analysis, like the trial judge, we find in the parties' arbitration provision no lack of clarity in its wording or lack of conspicuousness in its presentation. The envelope containing the parties' written agreement stated the importance of the material inside, and the booklet inside repeatedly directs the reader's attention, with clear and bold language, to the unambiguous arbitration

[2] This one option may be ambiguous because it does not clearly distinguish between actions brought under Rule 6:1-2(a)(2) in the Small Claims Section and actions brought under Rule 6:1-2(a)(1) in the Special Civil Part. But, because plaintiffs did not opt to proceed in either of those fora, the alleged ambiguity plays no role here.

provision. We, thus, conclude that the judge did not err in enforcing the arbitration provision.

We do, however, vacate that part of the order under review that dismissed plaintiffs' complaint. The action should not have been dismissed but stayed. See 9 U.S.C. § 3; Antonucci v. Curvature Newco, Inc., 470 N.J. Super. 553, 567 (App. Div. 2022).

Affirmed but remanded in part. Our remand is limited to the motion judge's entry of an order vacating the dismissal of the complaint and imposing instead a stay. We do not retain jurisdiction.