SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2056-21

ARBOR GREEN CONDOMINIUM ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

START 2 FINISH RESTORATION & BUILDING SERVICES, LLC, JAMIE KENNEDY, and MICHAEL PALCKO,

Defendants-Respondents,

and

P & A MANAGEMENT, INC., and ALBERT PELLEGRINO,

Defendants.

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Argued April 17, 2023 — Decided April 24, 2023

Before Judges Whipple, Mawla, and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-1903-21.

I. Dominic Simeone argued the cause for appellant (Simeone & Raynor, LLC, attorneys; I. Dominic Simeone and Michael R. Hahn, on the briefs).

Adam S. Rosengard argued the cause for respondents Start 2 Finish Restoration & Building Services, LLC, Jamie Kennedy, and Michael Palcko (Eisenberg, Gold & Agrawal, PC, attorneys; Adam S. Rosengard, on the brief).

PER CURIAM

Plaintiff Arbor Green Condominium Association, Inc. appeals from February 17 and April 12, 2022 orders granting defendants Start 2 Finish Restoration & Building Services, LLC, Jamie Kennedy,[1] and Michael Palcko's motion to dismiss plaintiff's complaint and compel arbitration. We affirm.

Plaintiff is a condominium association, which hired defendant to reconstruct two buildings destroyed in a storm, at a cost of over $3 million. The parties entered a lengthy and detailed written contract on standard forms

[1] Kennedy and Palcko are principal members of Start 2 Finish Restoration & Building Services, LLC. Wherever we use "defendant" in this opinion we intend to reference the LLC.

promulgated by the American Institute of Architects (AIA).[2] Section 6.2 of the contract contained a provision entitled "Binding Dispute Resolution," which provided as follows:

> For any [c]laim subject to, but not resolved by, mediation . . . the method of binding dispute resolution shall be as follows:
> (Check the appropriate box.)
>
> [ ] Arbitration pursuant to Section 15.4 of [the contract]

[2] According to the AIA, its documents

> are the most widely used standard form contracts in the construction industry. They facilitate communications among all the parties involved in construction, which makes it easier to produce a high quality project in a timely and economical fashion.
>
> . . . AIA contracts and forms are consensus documents that reflect advice from practicing architects, contractors, engineers as well as owners, surety bond producers, insurers, and attorneys. AIA documents balance the interests of all the parties, so no one interest, including that of the architect, is unfairly represented.
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> [Why Use AIA Documents, AIALA, https://aiala.com/why-use/aia-documents-2/#:~:text=AIA%20contracts%20and%20forms%20are,the%20architect%2C%20is%unfairly%20represented (last visited Apr. 12, 2023).]

[ ] Litigation in a court of competent jurisdiction

[ ] Other (Specify)

> If the [o]wner and [c]ontractor do not select a method of binding dispute resolution, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, [c]laims will be resolved by litigation in a court of competent jurisdiction.

Plaintiff placed an "X" inside the first box, choosing arbitration as the form of dispute resolution.

Section 15.4.1 of the contract states: "Claims subject to, but not resolved by, mediation shall be subject to arbitration[,] which . . . shall be administered by the American Arbitration Association [(AAA)] in accordance with its [c]onstruction [i]ndustry [a]rbitration [r]ules . . . ." The agreement further provides arbitration awards are "final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

The agreement required defendant to have the work substantially completed by a specific date. When the date passed, the parties disputed whether defendant had complied with its contractual obligations. Plaintiff retained an engineering firm, which prepared a lengthy report detailing the alleged deficiencies in defendant's workmanship. Approximately one year

after plaintiff served defendant with notice of the alleged deficiencies and the failure to meet the substantial completion deadline, plaintiff terminated the contract.

Defendant filed a construction lien against each building for the unpaid balance owed under the contract, followed by two demands for arbitration with the AAA. Plaintiff did not file a timely answer with the AAA, and as a result, the arbitrator entered two awards in the amount of the liens.

Defendant filed two orders to show cause and verified complaints in the Law Division to confirm the arbitration awards. Its pleadings contained proposed orders asking the court to enter judgments rather than confirm the arbitration awards.

Plaintiff moved to dismiss both complaints and filed a fourteen-count complaint alleging various causes of action against defendants.[3] Plaintiff argued the contract's arbitration provision was unenforceable because it contained multiple "confusing" cross references, "refers to documents that are not necessarily attached to each other[,]" and there is no language in the contract "that states [plaintiff is] waiving [its] right to a trial by jury . . . ."

[3] The complaint also asserted claims against plaintiff's management company, but they are not a part of this appeal.

Alternatively, plaintiff argued if the provision was found valid, defendant waived its right to arbitration when it filed complaints seeking monetary judgments.

Defendant moved to compel arbitration. It conceded it mistakenly filed suit to confirm the lien, but that was not tantamount to a waiver of arbitration.

The motion judge entered an order dismissing defendant's complaints, consolidating the controversy under plaintiff's existing complaint and docket number. He concluded defendant did not waive arbitration by filing its complaints "inartfully asking" the court to enter monetary judgments pursuant to the liens. Regarding the validity of the arbitration provision, the judge found as follows:

> [In Atalese v. United States Legal Services, t]he Court emphasized . . . no prescribed set of words must be included in [an] arbitration clause to accomplish a waiver of rights. [219 N.J. 430, 447 (2014)]. Whatever words are chosen, they must be clear and unambiguous that consumer is choosing to arbitrate disputes rather than have . . . them resolved in a court of law. Atalese simply required the contract to explain in some minimal way that arbitration is a substitute for consumer rights to pursue relief in court. . . . [Morgan v. Sanford Brown Inst.], 225 N.J. 289, 294 (2016)].
>
> In this instance, the . . . agreement informed the parties that there was a distinction between resolving the dispute in arbitration and in court. . . . [P]laintiff[]

> cho[se] arbitration rather than court as indicated from the markings on the . . . waiver, specifically, in Section . . . 6.2. . . . Plaintiff[] selected the former . . . .
>
> Section 15.4 entitled [a]rbitration states that the parties have selected arbitration. Any claim not resolved by mediation shall be subject to arbitration[,] which unless the parties mutually agree otherwise[,] shall be administered by the . . . [AAA].
>
> . . . [I]t is abundantly clear that the . . . agreement explains in a minimal way that there is a distinction between arbitration and litigation in a court of competent jurisdiction. . . . [Id.] at 294.

The judge also noted plaintiff was a sophisticated entity, which had hired a management company, and entered into agreements "with licensed professionals and contractors who performed construction on the premises pursuant to the responsibilities . . . for upkeep and maintenance of the [properties.]"

The judge found the arbitration agreement enforceable. He granted defendants' motion and dismissed plaintiff's complaint.

I.

We review a motion to dismiss pursuant to Rule 4:6-2(e) de novo. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021). Like the trial court, we "examine 'the legal sufficiency of the facts alleged on the face of the

complaint,'" while giving the plaintiff the benefit of all reasonable inferences of fact. Ibid. (quoting Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107 (2019)). The test for determining the adequacy of a pleading is "whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)).

We also "apply a de novo standard of review when determining the enforceability of contracts, including arbitration agreements." Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207 (2019) (citing Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013)). "The enforceability of arbitration provisions is a question of law; therefore, it is one which we need not give deference to the analysis" of a trial court. Ibid. (citing Morgan, 225 N.J. at 303).

II.

Plaintiff argues the arbitration provision is invalid because it fails to describe the scope of arbitration, does not differentiate between arbitration and a trial, and does not adequately apprise the reader they are waiving their right to a jury trial. We are unpersuaded.

An agreement to arbitrate "must be the product of mutual assent," which "requires that the parties have an understanding of the terms to which they have agreed." Atalese, 219 N.J. at 442 (quoting NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011), certif. granted, 209 N.J. 96 (2011), and appeal dismissed, 213 N.J. 47 (2013)). A party "cannot be required to arbitrate when it cannot fairly be ascertained from the contract's language that [they] knowingly assented to the provision's terms . . . ." Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 322 (2019).

"No magical language is required to accomplish a waiver of rights in an arbitration agreement." Morgan, 225 N.J. at 309. "Instead, '[o]ur courts have upheld arbitration clauses that have explained in various simple ways "that arbitration is a waiver of the right to bring suit in a judicial forum."'" Antonucci v. Curvature Newco, Inc., 470 N.J. Super. 553, 561-62 (2022) (alteration in original) (quoting Morgan, 224 N.J. at 309). A valid arbitration clause "must state its purpose clearly and unambiguously." Atalese, 219 N.J. at 435. Arbitration clauses are sufficient if they advise the parties they are waiving the right to seek relief in court; there is no requirement to advise a party of all the component rights encompassed by the waiver. Id. at 444-45.

Requiring more would undermine the preference for arbitration as a means of resolving disputes expeditiously. See Jaworski v. Ernst & Young U.S., LLP, 441 N.J. Super. 464, 480-81 (App. Div. 2015) (upholding an arbitration clause stating the parties would not "be able to sue in court" and rejecting the plaintiff's argument that the "arbitration agreement must inform the parties of (1) the number of jurors, (2) the parties' right to choose the jurors, (3) how many jurors would have to agree on a verdict, and (4) who will decide the dispute instead of the jurors").

A party's sophistication is relevant to determining whether they knowingly and voluntarily agreed to a contract's terms. See McMahon v. City of Newark, 195 N.J. 526, 546 (2008) (enforcing an agreement between "obviously sophisticated parties"); Van Duren v. Rzasa-Ormes, 394 N.J. Super. 254, 265 (App. Div. 2007) (noting the contracting parties were "highly sophisticated businesspeople of relatively equal bargaining position and represented by counsel when they entered into [an] arbitration agreement"), aff'd, 195 N.J. 230 (2008).

The arbitration provision here is plainly written and expressly advises the reader to select how to resolve their dispute. The agreement sets forth the rules that would apply in arbitration and the finality of an arbitration award.

Plaintiff is a sophisticated party, having entered a multi-million-dollar transaction for restoration of large residential buildings, contracted for managing agents to oversee the association, and retained experts to review defendant's work. The record lacks any evidence of an unequal bargaining power between the parties, a lack of sophistication, or of other evidence supporting plaintiff's claims it did not understand it had to arbitrate its claims against defendant.

III.

We are similarly unpersuaded defendant waived its right to arbitration by filing complaints in the Law Division. Waiver of the right to arbitration precludes later enforcement. Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008). "The party [waiving its right] must 'have full knowledge of [its] legal rights and intent to surrender those rights.'" Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276 (2013) (second alteration in original) (quoting Knorr v. Smeal, 178 N.J. 169, 177 (2003)). "In other words, for there to be a waiver of arbitration rights, a party must know of the right and affirmatively reveal the intent to waive the right." Spaeth, 403 N.J. Super. at 514 (citing Knorr, 178 N.J. at 177).

"An agreement to arbitrate a dispute 'can only be overcome by clear and convincing evidence that the party asserting [arbitration] chose to [litigate] in a different forum.'" Cole, 215 N.J. at 276 (quoting Spaeth, 403 N.J. Super. at 514). "The clear and convincing standard 'should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.'" Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169-70 (2004) (quoting In re Purrazzella, 134 N.J. 228, 240 (1993)).

In Cole, our Supreme Court explained a trial court must consider the totality of the circumstances in deciding whether arbitration has been waived. 215 N.J. at 280. The analysis is fact-sensitive. Ibid. In addition to considering whether the parties' litigation conduct is consistent with asserting its right to arbitration,

> courts should evaluate: (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of the discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any.
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> [Id. at 280-81.]

Having considered plaintiff's arguments pursuant to the Cole factors, we are unconvinced the motion judge erred. Defendant did not delay seeking arbitration and asserted it shortly after plaintiff terminated the contract without delay, including by way of dispositive motion and as a defense. Discovery did not occur, and trial was not yet scheduled when defendant moved to dismiss plaintiff's complaint. There was no concomitant prejudice to plaintiff because there is no clear and convincing evidence defendants pursued a litigation, let alone invoked arbitration after the fact. The Cole factors do not favor plaintiff.

Affirmed.