SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3273-21

GUNTON CORPORATION,

Plaintiff-Respondent,

v.

ANITA DIORIO,

Defendant/Third Party
Plaintiff-Appellant,

v.

SERVICE FINANCE COMPANY, LLC,

Third-Party Defendant.

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Submitted September 18, 2023 – Decided October 23, 2023

Before Judges Sabatino and Chase.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1282-21.

Trimble & Register, attorneys for appellant (John W. Trimble, Jr. and Katrina M. Register, on the briefs).

Rawle & Henderson LLP, attorneys for respondent (John C. McMeekin, II, and David J. Samlin, on the brief).

PER CURIAM

This appeal stems from the trial court's order compelling arbitration of a dispute between a consumer and a company that installed door products at her house. The trial court ruled that an arbitration clause within the parties' sales agreement was enforceable. The court also ruled that the company had not invoked the arbitration clause too late, despite the fact that the company first sued the consumer in court.

Because the trial court soundly applied the relevant legal principles to the circumstances, we affirm.

I.

We glean the following pertinent details from the record.

In September 2020, defendant Anita Diorio purchased Pella door products from plaintiff Gunton Corporation to install in her house. The contract price for the door products, inclusive of installation, was $36,989. Diorio paid a $10,000 down payment. The $26,489 balance was to be repaid through 144 monthly payments and financed by another company, Service Finance Company ("SFC"), a third-party defendant that is not participating in this appeal.

Diorio signed two form contracts for the transaction: (1) a services contract with Gunton for the sale and installation and (2) a financing agreement. Before signing the contracts, Diorio was informed and shown photos of the door products that would be installed. Diorio signed each page of the services contract identifying the door products to be installed.

Thereafter, Gunton delivered and installed door products to Diorio. Although she paid $500 upon their installation as called for under the contract, Diorio was dissatisfied with them and also believed they were incomplete. She accordingly stopped her monthly payments that were due on the remaining balance.

Gunton consequently filed a collections action against Diorio in the Law Division to recover the balance due. In response, Diorio filed numerous counterclaims against Gunton, including: breach of contract; negligence; fraud; and violations of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -195; the Home Improvement Practices regulations, N.J.A.C. 13:45A-16; and the Fair Debt Collections Practices Act, 15 U.S.C. § 1692. Diorio also asserted a third-party complaint against SFC and additional parties. Both Gunton and Diorio demanded a jury trial.

Gunton moved to dismiss Diorio's counterclaims, invoking an arbitration clause in its form services contract. In pertinent part, the arbitration clause reads:

> YOU and Pella and its subsidiaries and the Pella Branded Distributor AGREE TO ARBITRATE DISPUTES ARISING OUT OF OR RELATING TO YOUR PELLA PRODUCTS (INCLUDES PELLA GOODS AND PELLA SERVICES) AND WAIVE THE RIGHT TO HAVE A COURT OR JURY DECIDE DISPUTES. . . . You may opt out of this Arbitration Agreement by providing notice to Pella no later than ninety (90) calendar days from the date You purchased or otherwise took ownership of Your Pella Goods. . . . For complete information, including the full terms and conditions of this Arbitration Agreement, which are incorporated herein by reference, please visit www.pella.com/arbitration or e-mail to pellawebsupport@pella.com, with the subject line: "Arbitration Details" or call (877) 473-5527.

Gunton asserts that Diorio failed to timely exercise her right under the contract to opt out of the arbitration within 90 days of payment or receipt of the goods. Diorio, meanwhile, contends that Gunton waived its right to arbitrate by bringing the collections action against her in the Law Division. She further argues the clause is unclear and unenforceable under the standards of Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014), and other case law.

The trial court granted Gunton's motion to dismiss and compelled arbitration. As part of its ruling, the court dismissed the complaint and

counterclaims without prejudice, enabling them all to be litigated in arbitration. In the court's written statement of reasons, it found the arbitration clause was sufficiently clear and unambiguous to be enforceable. The court also rejected Diorio's argument that Gunton waived the right to arbitrate, noting that there was no prejudice to either party and that the lawsuit was only in its preliminary stage.

Diorio appeals, repeating arguments she made in the trial court. She also points out that her financing agreement with SFC contains no arbitration clause.

II.

Because the errors complained of by Diorio mainly concern questions of law, we review those legal issues de novo. "The validity of an arbitration agreement is a question of law, and we conduct a plenary review of such legal questions." Perez v. Sky Zone LLC, 472 N.J. Super. 240, 247 (App. Div. 2022) (citing Atalese, 219 N.J. at 445-46).

Applying that de novo review standard, we first address Diorio's contention that Gunton waived its right to seek arbitration of their dispute because it chose to file suit against her in the Law Division and included a jury demand with its complaint.

"Any assessment of whether a party to an arbitration agreement has waived that remedy must focus on the totality of the circumstances." Cole v.

Jersey City Med. Ctr., 215 N.J. 265, 280 (2013). Courts must "concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute." Ibid.

"'[T]he mere institution of legal proceedings . . . without ostensible prejudice to the other party' does not constitute a waiver [of an arbitration provision]." Spaeth v. Srinivasan, 403 N.J. Super 508, 514 (App. Div. 2008) (quoting Hudik-Ross, Inc. v. 1530 Palisade Ave. Corp., 131 N.J. Super. 159, 167 (App. Div. 1974)). Prejudice is also not generally shown through "simply wasting a party-opponent's time and money." Id. at 515.

Although not cited in the parties' appellate briefs, the Supreme Court instructed in Cole that the following factors, among others, are relevant to an assessment of waiver:

> (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 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. No one factor is dispositive.
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> [Cole, 215 N.J. at 280-81.]

In Cole, the Supreme Court's "evaluation of the totality of the circumstances of this case le[d] to the inexorable conclusion that [the defendant] waived its right to arbitrate . . . ." 215 N.J. at 283. There, the defendant "engaged in all of the usual litigation procedures for twenty-one months" and only invoked its right to arbitrate just three days before the scheduled trial. Id. at 281-83. "Such conduct undermines the fundamental principles underlying arbitration and is strongly discouraged in our state." Id. at 283.

The present case does not involve such extreme circumstances and a protracted time frame. As the trial court correctly recognized, the lawsuit was only in its incipient pleadings stage when Gunton moved to compel arbitration. There was only a modest delay (Cole factor #1) before Gunton filed its motion. The motion was the first motion filed in the case (Cole factor #2). There is no indication in the record that the brief delay was part of a litigation strategy (Cole factor #3). No discovery had yet been conducted (Cole factor #4). However, Gunton did not raise the arbitration clause in its initial pleading (and it would have been illogical to do so as the plaintiff), instead waiting until after Diorio filed her counterclaims (Cole factor #5). No trial date had been set (Cole factor #6). Moreover, Diorio has not identified how she has been prejudiced, other than the expenditure of her time and legal resources in the Law Division, neither of which are dispositive. See Spaeth, 403 N.J. Super. at 514-15.

The situation here is markedly different than the circumstances in Cole, where the defendant invoked its right to arbitrate just three days before the scheduled trial date. 215 N.J. at 281-83. The balance of the factors in this case clearly weighs against a finding of waiver.

The subject matters of Gunton's collections complaint and Diorio's counterclaims overlap significantly. The motion judge rightly treated them as part and parcel of the same dispute. It would make little sense to have an arbitrator decide if Diorio had valid grounds to decline to pay for the door products installation and then relitigate that same question in the Law Division. The complaint and counterclaims should be decided at the same time by the same tribunal. Indeed, Gunton has not cross-appealed the court's decision to combine the proceedings to resolve the complaint and counterclaims in one forum.

We do not know from the record exactly why Gunton did not immediately proceed to arbitration, but its apparent initial misstep in filing a Superior Court action does not require the dispute to be litigated to conclusion in court, assuming the arbitration clause is enforceable. We therefore turn to that question of enforceability.

The applicable law on this question has been well developed in recent precedents, and we need not elaborate them at length here. "Section 2 of the

[Federal Arbitration Act, 9 U.S.C. § 2 ("FAA")] represents 'a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.'" Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 132 (2020) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

The New Jersey Arbitration Act ("NJAA") "is nearly identical to the FAA and enunciates the same policies favoring arbitration." Arafa v. Health Express Corp., 243 N.J. 147, 167 (2020) (citing Atalese, 219 N.J. at 440). The NJAA provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B-6(a).

"[C]ourts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (internal citations omitted). "As with other contractual provisions, courts look to the plain language the parties used in the arbitration provision." Medford Twp. Sch. Dist. v. Schneider Elec. Bldgs. Ams., Inc., 459 N.J. Super. 1, 8 (App. Div. 2019); see also Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 321 (2019) ("A basic tenet of contract interpretation is that contract terms should be given their plain and

ordinary meaning."). And "even in the consumer context, '[a] party who enters into a contract in writing, without any fraud or imposition being practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect.'" Kernahan, 236 N.J. at 321 (alteration in original) (quoting Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353 (1992)).

"An arbitration agreement must be the result of the parties' mutual assent, according to customary principles of state contract law." Skuse v. Pfizer, Inc., 244 N.J. 30, 48 (2020) (citing Atalese, 219 N.J. at 442). "Thus, 'there must be a meeting of the minds for an agreement to exist before enforcement is considered.'" Ibid. (quoting Kernahan, 236 N.J. at 319). "Mutual assent requires that the parties have an understanding of the terms to which they have agreed." Atalese, 219 N.J. at 442. "By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court." NAACP of Camden Cnty. E. v. Foulke Mgmt., 421 N.J. Super. 404, 425 (App. Div. 2011). "An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." Knorr v. Smeal, 178 N.J. 169, 177 (2003) (citing W. Jersey Title & Guar. Co. v. Indus. Tr. Co., 27 N.J. 144, 153 (1958)).

Our Supreme Court has made clear that to establish mutual assent in the context of an arbitration provision in a consumer contract, the arbitration clause

must use language that is "clear and unambiguous." Atalese, 219 N.J. at 447. Although "[n]o particular form of words is necessary to accomplish a clear and unambiguous waiver of rights," the clause must ensure that consumers "have a basic understanding that they are giving up their right to seek relief in a judicial forum," and "that there is a distinction between resolving a dispute in arbitration and in a judicial forum." Id. at 435, 444-45. Arbitration clauses "will pass muster when phrased in plain language that is understandable to the reasonable consumer." Id. at 444. However, the Supreme Court clarified that it was "impos[ing] no greater burden on an arbitration agreement than on any other agreement waiving constitutional or statutory rights." Id. at 447.

In Kernahan, the Court held that an arbitration provision in a consumer contract was unenforceable because "[t]he provision's language [was] debatable, confusing and contradictory – and, in part, misleading." 236 N.J. at 308. The Court concluded that "[t]he small typeface, confusing sentence order, and misleading caption exacerbate[d] the lack of clarity in expression" and found it "unreasonable to expect a lay consumer to parse through the contents of this small-font provision to unravel its material discrepancies." Id. at 326.

In contrast, the arbitration agreement in Flanzman met the Atalese standard. 244 N.J. at 137-38. The Supreme Court found that this agreement "clearly and unmistakably inform[ed] the parties that for '[a]ny and all claims or

controversies arising out of or relating to [Flanzman's] employment, the termination thereof, or otherwise arising between' Flanzman and JC USA, 'final and binding arbitration' will take the place of 'a jury or other civil trial.'" Ibid. "Although the Agreement provide[d] only a general concept of the arbitration proceeding that would replace a judicial determination of Flanzman's claims, it ma[de] clear that the contemplated arbitration would be very different from a court proceeding." Id. at 138.

Guided by these standards, we agree with the trial court that the arbitration clause in this case was enforceable. As we noted above, the clause specified that the parties "AGREE[D] TO ARBITRATE DISPUTES ARISING OUT OF OR RELATING TO YOUR PELLA PRODUCTS (INCLUDES PELLA GOODS AND PELLA SERVICES) AND WAIVE[D] THE RIGHT TO HAVE A COURT OR JURY DECIDE DISPUTES." The contract linked to a website that included definitions of words and phrases in the clause.

This quoted language, although brief, is sufficiently "clear and unambiguous" to pass muster under the Atalese standard. See 219 N.J. at 447. The clause is "phrased in plain language that is understandable to the reasonable consumer," and therefore put Diorio on notice that she was "giving up [her] right to seek relief in a judicial forum." Id. at 435, 444-45.

Unlike in Kernahan, the present arbitration provision had bold typeface and a clear caption, and the language was in no way misleading. See 236 N.J. at 308, 326. And, as in Flanzman, the present arbitration clause "clearly and unmistakably inform[ed] the parties that for '[a]ny and all claims or controversies arising out of or relating to'" the contracted services, arbitration would take the place of a civil trial. See Flanzman, 244 N.J. at 137-38. Accordingly, the trial court did not err in enforcing the arbitration agreement.

We ascribe no significance to the fact that Diorio's related financing contract with SFC did not have an arbitration clause. We concur with Gunton that the services contract and financing contract are "separate and independent" contracts "for two different purposes."

"[T]he clarity and internal consistency of a contract's arbitration provisions are important factors in determining whether a party reasonably understood those provisions and agreed to be bound by them." Foulke, 421 N.J. Super. at 425. In Foulke, the contract terms in "three key documents" were at issue in determining whether the parties would be compelled to arbitrate. Id. at 435. We ruled that the "material parts of" the arbitration-related provisions in all three documents were "collectively riddled with vague and inconsistent provisions," including conflicting provisions related to "venue, arbitrators' credentials, time limitations, costs, and class waivers." Id. at 435, 437. "Further

adding to the confusion," two of the documents "contain[ed] provisions stating that each would take precedence over any other agreements in the event of a dispute." Id. at 434. Under those confusing circumstances, "[a] purchaser easily could find it difficult to harmonize and understand such dissonant terms," which "compel[led the court] to declare them unenforceable for lack of mutual assent." Id. at 435, 438.

Here, the financing and services contracts are in no way conflicting or inconsistent. Diorio does not point to any language in the financing contract that negates the language in the services contract. In contrast, the terms within the Foulke contracts actually conflicted with one another. See 421 N.J. Super. at 435-38.

Lastly, we reject Diorio's argument that, because she "did not take ownership" of the goods, the ninety-day opt-out window has not yet begun to run, and she could therefore still opt out of the arbitration agreement. Under the terms of the contract, Diorio had the opportunity to "opt out of this Arbitration Agreement by providing notice to Pella no later than ninety (90) calendar days from the date [she] purchased or otherwise took ownership of [her] Pella Goods."

Although Diorio disputes whether she took full ownership of all of the Pella goods she ordered, she does not and cannot argue that she did not purchase

them. Diorio paid a $10,000 deposit for her Pella goods. She acknowledges that she paid $500 due "at the completion of the installation." The ninety-day window began to run, at the very latest, at the completion of the installation and the $500 payment. The record fails to document that Diorio served an opt-out notice within that time frame. Having failed to opt out within the prescribed period, Diorio is now bound by the arbitration provision.

For these reasons, we affirm the trial court's decision referring the complaint and counterclaims to arbitration. We do note one loose end: the trial court did not dispose of Diorio's third-party complaint against SFC, and whether that claim should be stayed pending the outcome of the arbitration. See GMAC v. Pittella, 205 N.J. 572, 580 (2011). We remand that narrow issue to the trial court for its determination—on notice, of course, to SFC, which has not participated in this appeal.

Affirmed in part and remanded in part. We do not retain jurisdiction.