UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

ANTHONY KOZUR,	:	
	:	
-V-	:	1:18-cv-08750-JHR-JS
	:	
F/V ATLANTIC BOUNTY, LLC, and SEA HARVEST, INC.	:	

DEFENDANTS' F/V ATLANTIC BOUNTY, LLC AND SEA HARVEST, INC.'S SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS AND COMPEL ARBITRATION

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DEFENDANTS' F/V ATLANTIC BOUNTY, LLC AND SEA HARVEST, INC.'S SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS AND COMPEL ARBITRATION

I. Undisputed Facts Established at January 9, 2020 Hearing

Plaintiff Anthony Kozur has been a commercial fisherman for approximately twenty-six (26) years. *See* Testimony of Anthony Kozur, Transcript of Hearing of January 9, 2020; attached as Exhibit "A" at 26:16 – 21. He earned a general equivalency degree. *Id.* at 26:14 – 15. He is able to read and write English, and considers himself of "above average" ability in same. *Id.* at 26:19 – 20; 30:7 - 16. He knows what a courtroom, judge, and jury are, and understands how cases are decided involving injury claims. *Id.* at 30:17 to 31:14. He knew that he was signing an employment agreement when he signed the manifest. *Id.* at 26:21-25

Plaintiff, as a licensed contractor, ran his own remodeling construction company prior to being a commercial fisherman. *Id.* at 31:16 – 24. As such, he was legally required to provide his clients written contract for work he provided, and did so. *Id.* at 31: 25 to 32:7. As a business owner himself, the terms of a contract were important to him, and he would want them to be signed before he began work. *Id.* at 32:8 – 15.

In August of 2017 he claims he was an employee of Atlantic Cape Fisheries, Inc. (hereinafter "Atlantic Capes") or alternatively, of Sea Harvest, Inc. (hereinafter "Sea Harvest") when he was a member of the crew of the F/V ATLANTIC BOUNTY. *Id.* at 16: 22 to 18:1.

His routine on the day before one of Defendant's commercial fishing vessel departed, would depend on whether he was a mate or deckhand, and would include such things as doing gear work, obtaining groceries, loading supplies, engine room oil changes

and the like before steaming out to sea. *Id.* at 8 – 24. But before the lines were thrown, everyone in the crew was required to sign the manifest. *Id.* He was typically the second person to do so. *Id.*

Plaintiff admits that the manifest is an important document because it requires him to provide information for him to get paid, provide an emergency contact, and advise as to whether the crewmember have any pre-existing medical condition so that a Captain can tell whether they are fit for duty. *Id.* at 18:25 to 19:6. In August of 2017, Plaintiff further admitted that the manifest included multiple pages (noting "whatever's in it") and additional pages for crewmembers to sign and provide their individual information. *Id.* at 19:7 – 12. He remembers signing such manifests for every trip he has taken under Atlantic Capes or Sea Harvest since he started with either of them in 2009. *Id.* at 20:5 – 10; 32:24 to 25:3. Plaintiff admits that his signature appears on Manifests that date back to 2005 that contain arbitration clauses. *Id.* at 33:19 to 34:10; *See also* Exhibit D-1. He recalls that if he were serving as the Mate, the Captain would hand it to him, and other times if he was a deckhand, the Captain would announce on deck that the manifest was available and everyone would need to sign it before the vessel would leave. *Id.* at 20: 11 – 19; 23:3 - 6. As he and other workers signed these forms every trip, they would often write "same" in the address field if their information had not changed since the last time they signed a manifest. *Id.* at 20:23 – 25. He related that the form was so important to vessel operators, that on one trip, where the captain failed to turn it in before the vessel left dock, the captain was chastised. *Id.* at 20:1 – 4.

With respect to the Manifest for the trip that is the subject of the present litigation, Plaintiff testified that he first encountered it on a table in the galley of the Atlantic

Bounty already opened to the second signature page (the fifth page). *Id.* at 22:4 to 23:3.[1] He understood that, when he signed the manifest, he was signing an employment agreement that would allow him to work on the F/V ATLANTIC BOUNTY, and that it controlled the terms of his employment. *Id.* at 26:21 – 25. He never reviewed the arbitration clause in this particular document on this particular occasion. *Id.* at 23:7 to 27:8. Indeed, he testified never read through the entire agreement or found it contained an arbitration clause. *Id.* at 24:11 - 13. He does not even recall when the vessel owners began putting such clauses in the manifests *Id.* at 14:14 – 17. He admits however, that he never had to sign manifests for fishing vessels other than those associated with the defendants in this matter. *Id.* at 36:13 – 17. Yet he never wondered "Why?" *Id.* at 36:18 – 22. Further, with respect to the Manifest at issue in this matter, Plaintiff admitted that its pages were numbered sequentially. *Id.* at 36:23 to 38:12. In the nearly three years leading up to the instant manifest, Plaintiff admitted to signing nine (9) other manifest that had the same arbitration clause contained therein. *Id.* at 38:13 to 40:10. Plaintiff denied reading the terms and conditions of any of these documents. *Id.* at 40:19 – 23. Although he admitted that he was provided the manifest for review, he never asked for a copy of the manifests to review later.. *Id.* at 41:21 – 24, 43:25 – 44:9. He was perfectly aware that the document had other pages he did not ever review. *Id.* at 42:16 – 18. Plaintiff also admits that during the course of the three years covering the manifests submitted to the Court, he never once took the opportunity to read any of them. *Id.* at 40:19-23. Plaintiff also admits that during the eight years he worked for the Defendant he could have

[1] Despite serving as the mate on this voyage, and being the first to complete the manifest in question, Plaintiff denies that the Captain asked him to have the rest of the crew sign the manifest on this occasion.

requested and been given a copy of a manifest for his review if he so desired. *Id.* at 54:6 – 11.

The truth is that Plaintiff has a habit of not reading contracts that would have an impact on his life. He has never read the terms and conditions of the contracts related to his purchase of his vehicles. *Id* at 36:2 – 5. He has also not ever read the terms of his credit card agreements. *Id.* at 36:6 – 12. And here, as was the case in other contracts he signed – he simply chose not to read its terms. *Id.* 46:4-10.

Plaintiff's assertion in his supplemental brief that he believed he was simply providing crew member identification to the office is belied by his own testimony. Plaintiff admitted that he knew he was signing an employment agreement. *Id.* 26:21-25.

Finally, Plaintiff continues to assert that the arbitration page was not attached to the manifest he signed on August 25, 2017. *Plaintiff's Supplemental Brief at p. 2* [Dckt. 34]. Yet again, however, Plaintiff has testified that he was perfectly aware that the document had other pages he did not ever review. *Exhibit A* at 42:16 – 18. Plaintiff also provided a Certification to this Court wherein he stated that the manifest consisted of "three" pages. *Certification of Kozur in Opposition ¶ 7.* [Dckt.14-2]. He admitted under cross examination that he read and signed his Certification. *Exhibit A* at 44:10 – 45:9. He further testified that he never read the entire manifest, so he had no idea how many pages it contained. *Id.* at 45:25 – 46:2.

II. Additional Argument

A. Recent New Jersey Decision Cited by Plaintiff is Inapposite.

Skuse v. Pfizer, Inc. involved a computer based "training module " that included an acceptance of an arbitration agreement. Employees at Pfizer were never asked to

provide a signature, and they were never asked within the four corners of the "click" box to memorialize that they agreed to the arbitration policy. 202 A.3d 1, 457 N.J. Super 539, 542 (App. Div. 2019) *cert. granted* 238 N.J. 374 (2019).

Here, notwithstanding Plaintiff's choice not to read the manifest, he provided a signature, which he testified was his, on a number of manifests, both before and one after the one in question. Further, the arbitration clause here states in bold font,

> **"I understand and agree that any dispute, claim or controversy arising out of my work as a crewmember …".**

[Defendant – 1 at SH0041].

> **It also provides, "I have read, understand and agree to the terms of the above Agreement. By signing below, I acknowledge that I have been given time to review this Agreement, that I have read (or otherwise understand) and agree to its terms, and that I make this Agreement freely and voluntarily."**

Id.

Unlike in *Pfizer*, Plaintiff had the entire document, notwithstanding his argument to the contrary, and chose not to read the language. He admits he can read and write and does so at an "above average" level.

Pfizer also cites to *Atalese v. U.S. Legal Services Group*, L.P. for what is required. 99 A.3d 306, 219 N.J. 430 (2014) cert. denied . *Atalese* requires "clear and unambiguous 'language' that the plaintiff is waiving her right to sue or go to court to secure relief." *Id.* at 446 (*emphasis added*). The language contained in the arbitration clause at issue is not only clear and unambiguous, it takes up nearly the entire page, and is in bold and/or capitalized font.

B. Plaintiff's Failure to Read the Employment Agreement he signed does not Bar Enforcement.

Seaman are no longer the Wards of Admiralty. The concept of Ship's Articles, the agreement amongst the Captain and the crew as to how the ship will operate and the rules of the vessel that apply to the seaman is as old as time. The crewman signed onto such Articles and were expected to obey same subject to penalties. In this matter, the Ship's Manifest is the modern equivalent. Now instead of seamen getting the lash or other discipline, disputes can be resolved by Court cases or as in this case, by agreed upon arbitration of the claims.

Further, there has been a sea change with respect to viewing seaman as helpless wards of the admiralty court. As noted most recently in *The Dutra Group v. Batterton*, the Supreme Court noted that special solicitude for the welfare of seamen is a doctrine that has its roots in the paternalistic approach taken toward mariners by 19th century courts. 139 S. Ct. 2275, 2287 (2019). However, "the doctrine has never been a commandment that maritime law must favor seamen whenever possible. Indeed, the doctrine's apex coincided with many of the harsh common-law limitations on recovery that were not set aside until the passage of the Jones Act. And, while sailors today face hardships not encountered by those who work on land, neither are they as isolated nor as dependent on the master as their predecessors from the age of sail. In light of these changes and of the roles now played by the Judiciary and the political branches in protecting sailors, the special solicitude to sailors has only a small role to play in contemporary maritime law". *Id.* In short, Mr. Kozur has a responsibility to read and understand what he is signing, and should be held to the terms of the arbitration clause.

Failure to read what one was presented before signing is no defense. The Supreme Court has observed: "It will not do for a man to enter into a contract, and, when called

upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained." *Upton v. Tribilcock,* 91 U.S. 45, 50 (1875). In this Circuit, a "party is bound by those terms, even if he failed to read them." *Noble v. Samsung Electonics America, Inc.*, 682 Fed. Appx. 113, 116 (3d Cir. 2017); *See also Sarbak v. Citigroup Global Markets, Inc.*, 354 F. Supp. 2d 531, 541 (D.N.J. 2004). Arbitration agreements in the employment context are not exempt from this principle. *Morales v. Sun Contractors, Inc.* 541 F.3d 218 (3d. Cir. 2008)(*quoting Booker v. Robert Half Int'l, Inc.*, 315 F. Supp. 2d 94, 101 (D.D.C. 2004) ["Failure to read or understand an arbitration agreement, or an employer's failure to explain it, simply will not constitute 'special circumstances' warranting relieving an employee from compliance with the terms of an arbitration agreement that she signed."]

Defendants had no obligation to spoon feed the Employment Agreement to Plaintiff. Plaintiff also attempts to place the blame on the Defendants for not alerting him to read the manifest. Plaintiff misreads the controlling law. No obligation exists for the Defendants to alert Plaintiff to the arbitration clause. *Gras v. Associates First Capital Corp.* 786 A.2d 886, 346 N.J. Super 42, 55 (App. Div. 2001) *cert. denied* 171 N.J. 445. Further, nothing in *Atalese* or other controlling law require an employer to read the agreement to the person signing, the law only requires clear and unambiguous language be contained therein, which the agreement at issue meets. Plaintiff had admitted that he knew he was signing an employment agreement – so he was also on notice as to what he was signing. *Id.* at 26:21-25.

C. There is no new Development in the Statutory Law applicable to this matter.

1. The 2019 amendments to Law Against Discrimination ("LAD" raised by Plaintiff during the January 9, 2020 hearing, and in his Supplemental Brief, apply only prospectively by the very language of the legislation. L. 2019, c. 39, § 6, states: "[t]his act shall take effect immediately and shall apply to all contracts and agreements entered **into, renewed, modified, or amended on or after the effective date.**" *See also Neith v. Esquared Hospitality LLC*, 2020 WL 278692 at fn. 4 (D.N.J. Jan. 16, 2020) (provision does not apply to contracts executed prior to passage of amendment); *Guirguess v. PSEG*, 2019 WL 6713411 at *4 (N.J. App. Div. Dec. 10, 2019); *Hannen v. Group One Automative, Inc.*, 2019 WL 7287119 (N.J. App. Div. Dec. 30, 2019)(affirming order compelling arbitration due to inapplicability of 2019 LAD amendments).

The effective date of the amendments to the LAD was March 18, 2019. Even if this new provision of Title 10 were applicable here, which is denied, the contract in this matter was formed in August of 2017. Accordingly, the new statutory provisions cannot be applied to the contract before the Court. The pending action before Judge Thompson will have no effect on the issues now before this Court who may easily dismiss this argument's applicability.

2. The Amendments to LAD only apply to Discrimination Claims. Even if the statute were retrospective in application, the legislative history of the 2019 Amendments to the LAD make it clear that it was never the intended to effect pre-dispute agreements to arbitrate related to employment agreements. Prior to its adoption, the New Jersey Senate Appropriations Committee specifically stated:

> As amended, this bill would bar provisions in employment contracts that waive certain rights or remedies. It would also bar certain agreements that conceal details relating to discrimination claims.
> Under the bill, a provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment would be deemed against public policy and unenforceable.

N.J. Stat. Ann. § 10:5-12.7 (West).

Questions related to statutory interpretation are legal ones. *State v. S.B.*, 165 A.3d 722, 725 (N.J. 2017). The overriding goal of all statutory interpretation "is to determine as best we can the intent of the Legislature, and to give effect to that intent." *State v. Robinson*, 217 N.J. 594, 604, 92 *A.*3d 656 (2014) (*quoting State v. Hudson*, 209 N.J. 513, 529, 39 A.3d 150 (2012)). To ascertain legislative intent, we begin with the statute's plain language and give terms their ordinary meaning. *DiProspero v. Penn*, 183 N.J. 477, 492, 874 A.2d 1039 (2005). In order to construe the meaning of the Legislature's selected words, we can also draw inferences based on the statute's overall structure and composition. *State v. Hupka*, 203 N.J. 222, 231–32, 1 A.3d 640 (2010). If the Legislature's intent is clear on the face of the statute, then the "interpretative process is over." *Id.* at 232 *quoting Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 192 N.J. 189, 195–96, 927 A.2d 543 (2007). When the plain language is ambiguous, however, we consider extrinsic interpretative aids, including legislative history. *Hupka*, *supra*, 203 *N.J.* at 232.

Here the Plaintiffs argue that that the amendment affects any and all arbitration clauses over any dispute arising from an employment contract. However, a review of the plain language and the legislative history indicates that (not only does the statutory amendment apply prospectively) there was no intent to affect arbitrability of Jones Act

and related claims, but rather – only discrimination claims. This should not be surprising as the amendment was made to a statute specifically meant to address the public interest in providing remedies for discriminatory conduct.

Plaintiff asks this Court to look only to the statutory text, then provides only an excerpt, which of course is portions that he believes favor his position. Notably, Plaintiff has failed to start from the beginning of the very statute that he claims should be read plainly. The Act begins, "**AN ACT** concerning discrimination and supplementing Title 10 of the Revised Statutes". (*emphasis added*) P.L. 209, Chapter 39. Title 10 codifies New Jersey's anti-discrimination laws. The Act in question was codified under N.J.S.A. 10:5-12.7, which is similarly entitled, "Restrictions on waiver of substantive or procedural rights or remedies *relating to claims of discrimination, retaliation or harassment.*" (*emphasis added*). Section 1(a) states clearly 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."

The language in Section 1 sets the scope of the statute's applicability, which is to provisions relating to "claims of discrimination, retaliation, or harassment". The statutory text in 1(b) then addresses with whether such rights or remedies can be prospectively waived, and provides with particularity that, "no right or remedy under the Law Against Discrimination" can be waived, and then more broadly, "or any other statute or case law", can be prospectively waived. Plaintiff asks this Court to read this Section 1(b) in a vacuum, and posits that the Legislature has, within Title 10, Section 1(b), reached beyond Title 10, to every statute and case law, both state and federal, that provides an employee a right or remedy, and declares that any prospective waiver of such a right or remedy, in

any employment contract is against the public policy of the State of New Jersey. Such a reading is frankly ridiculous. Plaintiff again simply reads the law wrongly, in yet another attempt to avoid the arbitration agreement that he signed, but did not read.

Plaintiff then asserts that the status of the very law he cites is still in flux, arguing that a case pending before the Honorable Anne E. Thompson, *NJ Civil Justice Inst. V. Grewal*, 3:19-cv-17518, relating to enforcement of N.J.S.A. 10:5-12.7 could impact this case.[2] For the reasons set forth above, even if the matter in issue here, whether a seaman can be compelled to arbitrate in an employment agreement, were within that statutes' scope, which Defendants assert it is not, the Statute is prospective only and the signing of the employment agreement here preceded the Statute's effective date. Notwithstanding the Statute's clear inapplicability here, both as to time and scope, we will, nevertheless, address Plaintiff's contention.

D. The Case pending before Judge Thompson is not on point.

Plaintiff, at oral argument, sought to stay a decision here, in large part because of a case pending before Judge Thompson, that he asserted impacts this matter. However, even in the case before Judge Thompson, the briefing makes clear that the concern of the plaintiff is the enforcement of N.J.S.A. 10:5-12.7 in the discrimination context. The plaintiff's brief makes this clear - "Earlier this year, the New Jersey Legislature enacted a statute that (a) makes any provision in an employment agreement that "waives any substantive or procedural right" under the state's Law Against Discrimination unenforceable and (b) provides that "[n]o right or remedy under" the Law Against

[2] The motion has now been adjourned until March 2, 2020, and will be heard on the papers.

Discrimination "or any other statute or case law" may be "prospectively waived." N.J.S.A. 10:5-12.7(a)-(b)." *Complaint* at p.4.[19-cv-17518, Dckt. 1].

Moreover, the issue in *NJ Civil Justice* is not implicated here. That case stands for the proposition that N.J.S.A. 10:5-12.7 is pre-empted by the Federal Arbitration Act (FAA). In other words, the State cannot enact a statute that makes an arbitration agreement otherwise enforceable under the FAA, unenforceable under New Jersey law. But that is not the issue before this Court. Here, Defendants are not attempting to enforce the arbitration agreement signed by Plaintiff pursuant to the FAA – but quite the opposite. Defendants' argument is that it is the law in the Third Circuit that you treat the employment agreement signed by the Plaintiff as a seaman, as exempt from enforcement under the FAA, -- as if the FAA did not exist. *See Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir. 2004) *cert. denied* 543 U.S. 1049 (2005). The only question then, is, "whether the arbitration clause is otherwise enforceable under New Jersey law"? As previously briefed, and briefed further herein, Defendants contend that the employment agreement signed by Plaintiff, which contained an arbitration clause that he chose not to read, is enforceable, and the enactment of N.J.S.A. 10:5-12.7 does not change this result.

E. The FAA does not pre-empt enforcement of the Arbitration Clause under State Law and the cases cited by Plaintiff pending before the New Jersey Supreme Court favor Dismissal.

Plaintiff acknowledges that in *Colon v Strategic Delivery Solutions*, LLC, the panel agreed with the very argument that the Defendants have made here – that since the FAA did not apply the New Jersey Arbitration Act is still available. 210 A.3d 932, 459 N.J. Super 349 (App. Div. 2019) *cert. granted* 239 N.J. 519; Plaintiff's Supplemental Brief at p. 9. Plaintiff then cites to the grant of certification in *Arafa v. Health Express*

Corp., 2019 WL 5188593 in an attempt to show that there is a conflict in the Appellate Court decisions – that is not the case.

Plaintiff appears to argue that in *Arafa* the court held, "since the FAA could not apply to compel arbitration, the claimants did not have to submit their claims to arbitration. *Plaintiff's Supplemental Brief* at p. 9. However, unlike here, the employment agreement at issue in *Arafa* specifically stated, "This Agreement is governed by the Federal Arbitration Act [(FAA)], 9 [U.S.C.A. §§ 1 to 16]". *Arafa v. Health Express,* 2019 WL 2375387 (N.J. Super. June 5, 2019) *cert. granted* 218 A.3d 306. The panel in *Arafa* held that because the employee was a worker engaged in interstate commerce, he came within the exception of 9 U.S.C. § 1, and because the claimant's agreement specifically stated that it was governed by the FAA, and the employer sought to enforce the agreement pursuant to the FAA, the claimant could not be compelled to arbitrate by the FAA's own terms. *Id.*

Again, those are not the facts before this Court. The agreement here does not invoke the FAA, in fact it specifically addresses what is to occur if the employment agreement is determined to be unenforceable under the FAA, and as previously argued, and pursuant to controlling case law (*Palcko*), the FAA should be treated as if it did not exist. Doing so here, does not have the same effect as in *Arafa*, and the employment agreement signed by plaintiff survives analysis under the FAA, and remains enforceable pursuant to the New Jersey Arbitration Act.

New Prime Inc. v. Oliveira, 139 S. Ct. 532, 534 (2019), relied upon by Plaintiff at oral argument in this matter, also has no application here. While the First Circuit's decision did find that the FAA applied to the independent owner-operators of tractor

trailers as transportation workers, it found only that the arbitration agreement was unenforceable under the FAA, which is what New Prime sought. *Oliviera v. New Prime, Inc.* 857 F. 3d 7, 24 (1st Cir. 2017). The Supreme Court agreed, on the same grounds -- that enforcement was sought under the FAA. *New Prime, Inc.* 139 S. Ct. at 533.

In this matter, Defendant has and continues to argue that the contract in this matter does not even come within the provision of the Federal Arbitration Act because seamen are exempt from the FAA. Instead, state law controls the interpretation and enforceability of the contract. *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir. 2004) cert. denied 543 U.S. 1049 (2005) (*citing Mason-Dixon Lines, Inc. v. Local Union No. 560*, 443 F.2d 807 (3d Cir. 1971)). New Jersey State appellate courts have held the same. *Colon v. Strategic Delivery Sols., LLC*, 210 A.3d 932, 939 (N.J. Super. App. Div. 2019) ("The Third Circuit has held "[t]here is no language in the FAA that explicitly preempts the enforcement of state arbitration statutes." *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 595 (3d Cir. 2004). Thus, under *Palcko*, the NJAA could be applied even if the FAA did not apply). Further, Plaintiff concedes that New Jersey substantive law should apply to the enforceability of the arbitration clause before the Court. *See* Exhibit "A" at 9.

F. Recent Case Law from this District Supports the Granting of Defendants' Motion.

Most recently, in *Neith v. Esquared Hospitality, LLC*, No. 19-13545 9KM)(JBC), 2020 WL 278692 *8-9 (D.N.J. January 16, 2020), the Court applied the three-part test set out by the Third Circuit in *Moon v. Breathless Inc*, 868 F.3d 209, 214 (3d Cir. 2017)[3] to

[3] Moon surveyed New Jersey case law concerning arbitration including *Garfinkel, Atalese, and Martindale.*

determine whether statutory claims were covered by an arbitration provision, and found the arbitration agreement enforceable. *Moon* requires the arbitration agreement affecting waiver of statutory claims to, 1) identify the substantive area of the arbitration clause, 2) reference the type of claims waived, and 3) explain the difference between arbitration and litigation.

Similar to the facts in *Neith*, here the arbitration clause provides a broad scope of coverage to include all claims or disputed arising out of plaintiff's work as a crewmember, including common law and statutory claims:

> **PLEASE COMPLETELY AND LEGIBLY FILL IN ALL BLANKS ON THE FOLLOWING PAGES. IF YOU HAVE NO PRIOR EMPLOYMENT CLAIMS OR MEDICAL HISTORY, PLACE "N/A" ON THAT LINE**

As to the first two elements, the Agreement signed by Plaintiff covers any dispute arising out of his work as a crewmember, and he alleges he was injured while performing work as a crewmember of the F/V ATLANTIC BOUNTY. This clause is similar in scope to that of *Neith* which covered all claims against the restaurant, including federal state and local laws, regulations, and common law claims. *Neith* at *8.

As to the third element, the agreement at issue here went further than Neith in explaining to plaintiff the difference between arbitration and litigation. In *Neith*, the agreement provided:

> In a dispute between Dancer and Club under this Agreement, either may request to resolve the dispute by binding arbitration. THIS MEANS THAT NEITHER PARTY SHALL HAVE THE RIGHT TO LITIGATE SUCH CLAIM IN COURT OR TO HAVE A JURY TRIAL—DISCOVERY AND APPEAL RIGHTS ARE LIMITED IN

ARBITRATION. ARBITRATION MUST BE ON AN INDIVIDUAL BASIS. THIS MEANS NEITHER YOU NOR WE MAY JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION, OR LITIGATE IN COURT OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS.

Here, the agreement sets forth not only the difference between arbitration and litigation, but sets forth the venue, the provider and specifically reiterates that all of the claims made by Plaintiff in this matter come within its scope:

themselves decide. Each party shall be responsible for their own attorney fees and costs and lay and expert witness fees and costs, unless contrary to law. Judgment on the Arbitration Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction; however, each party shall bear its own costs in pursuing such remedies.

I have read, understand and agree to the terms of the above Agreement. By signing below, I acknowledge that I have been given time to review this Agreement, that I have read (or otherwise understand) and agree to its terms, and that I make this Agreement freely and voluntarily.

PLEASE COMPLETELY AND LEGIBLY FILL IN ALL BLANKS ON THE FOLLOWING PAGES. IF

Any suggestion by Plaintiff that his statutory claims cannot be the subject of arbitration are belied by the holding in *Neith* applying the *Moon* factors on facts less enforceable than those now before this Court.

III. Conclusion

Plaintiff is no longer a ward of admiralty and he is owed no special solicitude by this court. Plaintiff, by his own words, can read and write and does so at an above average level. Plaintiff admitted he signed many employment agreements or manifests during his employment with the Defendants. He was aware that there were pages beyond the signature pages that he signed that contained the terms of his employment on the vessel. He simply "chose" not to read them over his eight years of employment. In doing so, he accepted the risk that the language was something that he should have read. There is no law that saves him from that result.

There is also no new controlling case law or conflict of law that would suggest that the Defendants' motion be denied or that this court should stay a decision, pending rulings by other courts. In fact, recent case law suggests the contrary – that the arbitration clause contained in Plaintiff's employment agreement should be enforced, this case dismissed, and Plaintiff should be compelled to arbitrate his claims against the Defendants. For the reasons stated herein and in Defendants' opening Brief and Reply, it is respectfully suggested that Defendants' Motion to Dismiss and Compel Arbitration of all Claims should be granted and this court should not delay its decision.

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2019 WL 2375387

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Essam ARAFA, on behalf of himself and others similarly situated, Plaintiff-Appellant,

v.

HEALTH EXPRESS CORPORATION, Defendant-Respondent.

DOCKET NO. A-1862-17T3

|

Argued May 13, 2019

|

Decided June 5, 2019

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4792-17.

Attorneys and Law Firms

Anthony S. Almeida argued the cause for appellant (The Sattiraju Law Firm, PC, attorneys; Ravi Sattiraju, of counsel and on the brief; Anthony S. Almeida, on the brief).

Michael T. Grosso argued the cause for respondent (Littler Mendelson, PC, attorneys; Michael T. Grosso and Dylan C. Dindial, on the brief).

Before Judges Messano, Fasciale and Rose.

Opinion

PER CURIAM

***1** We granted permission to reinstate this appeal, which is from a December 6, 2017 order granting defendant's motion to dismiss and compel arbitration, in the aftermath of the Supreme Court's decision in New Prime Inc. v. Oliveira, 586 U.S. ——, 139 S. Ct. 532, 202 L.Ed.2d 536 (2019). [1] Relying on New Prime, we now reverse and remand.

Pursuant to a "contract of employment" entered into between plaintiff and defendant, plaintiff drove a truck and delivered defendant's pharmaceutical products in and around New Jersey. Defendant classified plaintiff as an independent contractor instead of an employee. That classification led to this lawsuit, in which plaintiff alleged that defendant violated two statutes: the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a to -56a38; and the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1 to -4.14. Plaintiff alleged that defendant violated these statutes by failing to pay plaintiff for all of the hours that he worked and by withholding money from him.

In support of its motion to dismiss and compel arbitration, defendant relied on the parties' arbitration agreement. The agreement specifically states: "This Agreement is governed by the Federal Arbitration Act [(FAA)], 9 [U.S.C.A. §§ 1 to 16]." Notwithstanding his status as an employee or an independent contractor, plaintiff opposed the motion relying on 9 U.S.C. § 1, which states in pertinent part "nothing herein contained shall apply to contracts of employment ... of workers engaged in foreign or interstate commerce." He contended that his employment agreement qualified under Section 1. Plaintiff argued that because the FAA itself exempted employment contracts like his, it could not govern the parties' arbitration proceeding. In other words, the parties lacked a meeting of the minds. The judge granted defendant's motion without addressing the FAA argument and without conducting oral argument, although plaintiff had requested it.

On appeal, plaintiff maintains (like Oliveira in New Prime) that even as an independent contractor – as opposed to an employee – his contract with defendant qualifies as a "contract of employment" under Section 1. In New Prime, the Court resolved this question. Applying the meaning of the FAA as enacted in 1925, the Court concluded that a "contract of employment" meant "nothing more than an agreement to perform work." New Prime, 139 S. Ct. at 539. "As a result, most people then would have understood § 1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work." Ibid. Therefore, the Court upheld the First Circuit's determination that it "lacked authority under the [FAA] to order arbitration." Id. at 544.

***2** Relying on New Prime, we conclude that plaintiff's employment contract qualifies under Section 1 under the FAA. Consequently, the FAA cannot govern the arbitration agreement, as contemplated by the parties. The inapplicability of the FAA to the parties' arbitration agreement undermines the entire premise of their contract. Because the FAA cannot apply to the arbitration, as required by the parties, their arbitration agreement is unenforceable for lack of mutual assent. And because the arbitration agreement is invalid, all other arbitration issues are moot.

Reversed and remanded. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2019 WL 2375387, 2019 Wage & Hour Cas.2d (BNA) 206,098

Footnotes

1 We originally listed argument for May 21, 2018, but granted an adjournment because on that day, the Court issued its opinion in Epic Systems Corp. v. Lewis, 584 U.S. ——, 138 S. Ct. 1612, 200 L.Ed.2d 889 (2018). Counsel returned for oral argument in October 2018, but voluntarily dismissed the appeal since the Supreme Court granted certiorari in Oliveira v. New Prime, Inc., 857 F.3d 7 (1st Cir. 2017), cert. granted, 586 U.S. ——, 138 S. Ct. 1164 (2019). We allowed the parties to reinstate the appeal after the Court decided New Prime.

End of Document

2019 WL 6713411
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

David GUIRGUESS, Plaintiff-Appellant,
v.
PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Public Service Electric and Gas Services Corporation and Richard Blackman, Defendants-Respondents.

DOCKET NO. A-2704-18T1
|
Argued October 16, 2019
|
Decided December 10, 2019

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-3041-17.

Attorneys and Law Firms

Darren C. Barreiro argued the cause for appellant (Greenbaum, Rowe, Smith & Davis, LLP, attorneys; Darren C. Barreiro, of counsel and on the briefs; Irene Hsieh, on the briefs).

Amanda Kirsten Caldwell argued the cause for respondents (Fisher & Phillips LLP, attorneys; Amanda Kirsten Caldwell, of counsel and on the brief; David J. Treibman, on the brief).

Before Judges Fisher, Accurso, and Gilson.

Opinion

PER CURIAM

***1** Plaintiff David Guirguess appeals from a February 4, 2019 order granting defendants' motion to compel arbitration and dismissing plaintiff's complaint with prejudice. We affirm the portion of the order compelling arbitration, but remand with direction that a new order be entered staying the action pending the arbitration.

I.

In a letter dated December 17, 2008, plaintiff was offered employment for the position of "Nuclear Shift Supervisor" with "PSEG Power Nuclear LLC" (PSEG Power), a subsidiary of Public Service Enterprise Group Incorporated (PSEG). The offer stated that plaintiff was joining PSEG, and that his "employment with PSEG P[ower] is and will be considered at-will ...." Plaintiff accepted the offer.

On the same day plaintiff countersigned the offer letter, he signed a mandatory arbitration agreement (the Arbitration Agreement). Plaintiff agreed to arbitrate all disputes related to his employment or termination of his employment with "PSEG." The Arbitration Agreement also stated that "all disputes arising out of or relating to this [Arbitration] Agreement or my employment ... will ... be resolved through binding arbitration administered by the American Arbitration Association (AAA) in accordance with" certain AAA rules and "the United States Arbitration Act." Specifically, the Arbitration Agreement stated:

> As a condition of my employment, I agree to waive my right to a jury trial in any action or proceeding related to my employment with PSEG. I understand that I am waiving my right to a jury trial voluntarily and knowingly, and free from duress or coercion. I understand that I have a right to consult with a person of my choosing, including an attorney, before signing this document. I agree that all disputes relating to my employment with PSEG or termination thereof, whether based upon statute, regulation, contract, tort or other common law principles, shall be decided by an arbitrator through the Labor Relations Section of the American Arbitration Association.
>
> Any and all disputes arising out of or relating to this Agreement or my employment, other than an unemployment or workers compensation claim, will, at the demand of either me or PSEG, whether made before or after the institution of any legal proceeding, be resolved through binding arbitration administered by the American Arbitration Association (AAA) in accordance with the Employment Dispute Resolution Rules of the AAA and with the United States Arbitration Act. The arbitration will be conducted before one arbitrator in Newark, New Jersey or by mutual consent at another agreed upon location. If the parties cannot agree on the arbitrator within 30 days after the demand for an arbitration, then either party may request the AAA to select the arbitrator, which selection will be

deemed acceptable to both parties. To the maximum extent practicable, the arbitration proceeding will be concluded within 180 days of filing the demand for arbitration with the AAA. All costs and fees of the arbitration will be shared equally by the parties, unless otherwise awarded by the arbitrator. Each party agrees to keep all such disputes and arbitration proceedings strictly confidential except for disclosure of information required by law. Each party further agrees to abide by and perform any award rendered by the arbitrator, and that a judgment of a court of competent jurisdiction may be entered on the award.

***2** Three years later, on May 19, 2011, plaintiff accepted the position of "Project Manager (Remediation) at Corporate Headquarters-Newark, NJ." The offer letter was sent on letterhead from "PSEG Services Corporation" and stated that plaintiff's employment was "with PSE & G." The letter did not define "PSE & G." The offer letter also stated that plaintiff "will continue to be eligible to participate in PSEG's discretionary Performance Incentive Plan (PIP) under the terms and conditions of that plan." The May 19, 2011 letter did not mention arbitration and it did not enclose an arbitration agreement.

Five years later, on September 9, 2016, Richard Blackman, a senior project manager at PSE & G sent plaintiff a letter, on PSE & G letterhead, informing him that his employment was terminated effective that day. The letter stated that plaintiff was being terminated because he had submitted inaccurate records concerning the hours he worked, he was "attending to a side business when [he] should have been working[ ]," he falsified expense reports, and he had removed sign-in sheets from a project site he was managing.

In May 2017, plaintiff filed a complaint against Public Service Electric & Gas Company (PSE & G), PSEG Services Corporation (PSEG Services), and Richard Blackman. Plaintiff asserted that he had been employed by PSE & G and PSEG Services, which he identified collectively as "PSE & G."[1] He then alleged that his employment had been terminated in violation of the New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and the common law.

Defendants filed a motion to compel arbitration, contending that the Arbitration Agreement plaintiff signed in 2008 applied to plaintiff's employment with PSE & G and PSEG Services. Without hearing oral argument or giving reasons for its decision, the trial court granted defendants' motion and, on September 15, 2017, entered an order compelling arbitration and dismissing plaintiff's complaint with prejudice.

Plaintiff appealed and we vacated the September 15, 2017 order. We explained that the trial court needed to hear oral argument and give reasons for its decision. Accordingly, we remanded and "directed [the trial court] to reconsider defendants' motion with oral argument and enter a new order, together with a written or oral statement of reasons in conformity with Rule 1:7-4." Guirguess v. Pub. Serv. Elec. and Gas Co., No. A-0511-17 (App. Div. July 30, 2018) (slip op. at 6).

After hearing oral argument following the remand, the court again granted the motion to compel arbitration and explained its reasons on the record. Following extensive questioning of the parties' counsel, the trial court held that the 2008 Arbitration Agreement covered PSEG and its subsidiaries, including PSE & G and PSEG Services. The court also held that when plaintiff changed jobs in May 2011, from PSEG Power to PSE & G, that change was effectively a "transfer" from one PSEG subsidiary to another because plaintiff continued to receive PSEG benefits. Consequently, the trial court ruled that the 2008 Arbitration Agreement governed plaintiff's termination from his employment in 2016. The court memorialized its decision in an order entered on February 4, 2019. That order compelled arbitration and dismissed plaintiff's complaint with prejudice. Plaintiff now appeals from the February 4, 2019 order.

II.

On this second appeal, plaintiff makes three arguments. First, plaintiff asks us to exercise our original jurisdiction and to hold that the Arbitration Agreement does not govern the claims in his complaint. Second, plaintiff argues that the Arbitration Agreement is unenforceable because it is contrary to a newly-enacted provision of LAD. Finally, he contends that the Arbitration Agreement does not govern his claims because the Arbitration Agreement was with PSEG Power and it does not apply to his employment with PSE & G and PSEG Services. In that regard, plaintiff asserts that, at best, the Arbitration Agreement is ambiguous, and therefore too vague to enforce, because it failed to state expressly that it applied to affiliates of PSEG Power.

***3** We use a de novo standard of review when determining the enforceability of arbitration agreements. Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207, 208 A.3d 859 (2019) (citing Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186, 71 A.3d 849 (2013)). The validity of an arbitration agreement is a question of law, and we conduct a plenary review of such legal questions. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 445-46, 99 A.3d 306 (2014) (citing Kieffer v. Best Buy Stores, L.P., 205 N.J. 213, 222-23, 14 A.3d 737 (2011)); Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 605, 126 A.3d 328 (App. Div. 2015) (citing Hirsch, 215 N.J. at 186, 71 A.3d 849).

The Arbitration Agreement signed by plaintiff stated that all disputes concerning his employment or its termination will be "resolved through binding arbitration administered by the [AAA] in accordance with the Employment Dispute Resolution Rules of the AAA and with the United States Arbitration Act." The "United States Arbitration Act" obviously refers to 9 U.S.C. §§ 1 to 16, which courts usually refer to as the Federal Arbitration Act (the FAA). The FAA applies to a "written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ...." 9 U.S.C. § 2. The FAA and "the nearly identical New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, enunciate federal and state policies favoring arbitration." Atalese, 219 N.J. at 440, 99 A.3d 306 (citations omitted).

Under both the FAA and New Jersey law, arbitration is fundamentally a matter of contract. 9 U.S.C. § 2; NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424, 24 A.3d 777 (App. Div. 2011) (citing Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010)). "[T]he 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.' " Atalese, 219 N.J. at 441, 99 A.3d 306 (citations omitted) (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 85, 800 A.2d 872 (2002)).

In determining whether a matter should be submitted to arbitration, a court must evaluate (1) whether a valid agreement to arbitrate exists, and (2) whether the dispute falls within the scope of the agreement. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); Martindale, 173 N.J. at 92, 800 A.2d 872. The FAA, however, allows the second question the threshold arbitrability question to be delegated to the arbitrator. Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. ——, 139 S. Ct. 524, 529-30, 202 L.Ed.2d 480 (2019).

The Arbitration Agreement signed by plaintiff is valid. It was the product of mutual assent and it clearly stated that the parties were giving up their right to pursue all employment-related claims in court and, instead, agreed to arbitrate those claims before an AAA arbitrator. See Atalese, 219 N.J. at 442, 99 A.3d 306 ("An agreement to arbitrate, like any other contract, 'must be the product of mutual assent, as determined under customary principles of contract law.'" (quoting NAACP, 421 N.J. Super. at 424, 24 A.3d 777)).

Contrary to plaintiff's argument, the Arbitration Agreement is neither invalid nor unenforceable under the recent amendments to LAD. Effective March 18, 2019, the Legislature amended LAD to add several sections, including a section stating 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." N.J.S.A. 10:5-12.7(a) (codifying L. 2019, c. 39, § 1(a)). Plaintiff argues that the amendment to LAD prohibits an arbitration agreement that prevents LAD claims or CEPA claims from being resolved in a court because one of the procedural rights under LAD and CEPA is the right to pursue an action in court. See N.J.S.A. 10:5-13; N.J.S.A. 34:19-5.

***4** The 2019 amendments to LAD apply only prospectively. L. 2019, c. 39, § 6, states: "[t]his act shall take effect immediately and shall apply to all contracts and agreements entered into, renewed, modified, or amended on or after the effective date." As noted earlier, the effective date of the amendments to LAD was March 18, 2019. The Arbitration Agreement signed by plaintiff was entered into on December 20, 2008. Accordingly, the new section of LAD does not apply to or govern the Arbitration Agreement at issue here.

Despite that clear language, plaintiff argues that prospective application of the new sections of LAD does not apply to N.J.S.A. 10:5-12.7. Plaintiff also asserts that N.J.S.A. 10:5-12.7 should be applied under the "time of decision rule" because the amendment took effect before this appeal was decided. We reject both those arguments as inconsistent with the plain language establishing an effective date of March

18, 2019, for the amendments and the legislative mandate for prospective application. See L. 2019, c. 39, § 6.

Plaintiff also argues that the Arbitration Agreement does not cover his dispute with PSE & G. That issue, however, is a threshold arbitrability question. The Arbitration Agreement delegated the threshold question of the scope of the agreement to the arbitrator. In that regard, the Arbitration Agreement stated "all disputes ... relating to this Agreement ... will ... be resolved through binding arbitration ...." The Arbitration Agreement also stated that the arbitration would be conducted in accordance with the "Employment Dispute Resolution Rules" of the AAA. Those rules state that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." American Arbitration Association (AAA), Employment Dispute Resolution Rule 6(a) (Nov. 1, 2009); see Oracle Am., Inc. v. Myriad Group A.G., 724 F.3d 1069, 1074 (9th Cir. 2013) (noting that "[v]irtually every [federal] circuit [court of appeals] to have considered the issue has determined that incorporation of the [AAA] arbitration rules [in an arbitration agreement] constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability" (citations omitted)); Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 763-64 (3d Cir. 2016).

Our Supreme Court has stated that "[t]he FAA constitutes the supreme law of the land regarding arbitration." Goffe, 238 N.J. at 207, 208 A.3d 859 (citing Southland Corp. v. Keating, 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984)). Moreover, the Court acknowledged "that when the parties' contract delegates the question of the arbitrability of a particular dispute to an arbitrator, a court may not override the contract, even if the court thinks that the argument that the arbitration agreement applies to a dispute is 'wholly groundless.'" Id. at 211, 208 A.3d 859 (quoting Schein, 586 U.S. at ___, 139 S. Ct. at 528-29).

In summary, the Arbitration Agreement is valid and delegates the threshold question of the scope of the arbitration to the arbitrator. Therefore, under the FAA the parties are obligated to proceed to arbitration. 9 U.S.C. §§ 3, 4; Goffe, 238 N.J. at 207, 211, 208 A.3d 859.

We disagree with the trial court in one respect. The trial court should not have dismissed the complaint with prejudice. Instead, the FAA provides that a party may request a stay if a court action has been commenced and that action involves "any issue referable to arbitration under an agreement in writing for such arbitration ...." 9 U.S.C. § 3. Accordingly, we remand with direction that the trial court enter a new order. That order will provide that plaintiff's claims in his complaint are stayed pending arbitration, and the parties are to proceed to arbitration in accordance with the Arbitration Agreement. The arbitrator will then decide if the Arbitration Agreement governs plaintiff's termination from PSE & G. If so, the arbitrator will then decide the merits of plaintiff's claims. If the arbitrator determines that plaintiff's claims do not fall within the scope of the Arbitration Agreement, then the stay can be lifted and the merits of plaintiff's claims will be decided in the trial court.

***5** Finally, our ruling that the Arbitration Agreement is valid and that the parties must proceed to arbitration moots plaintiff's argument concerning our exercise of original jurisdiction. Consequently, we do not reach that issue.

Affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2019 WL 6713411

Footnotes

1 In his complaint, plaintiff misnamed PSEG Services as Public Service Electric and Gas Services Corporation.

End of Document

2019 WL 7287119
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

LAURA HANNEN, Plaintiff-Appellant,
v.
GROUP ONE AUTOMOTIVE, INC., BMW OF ATLANTIC CITY, KERRY LAWS, and THOMAS ALFINITO, Defendants-Respondents.

DOCKET NO. A-3551-18T2
|
Submitted December 11, 2019
|
Decided December 30, 2019

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0148-19.

Attorneys and Law Firms

Castronovo & McKinney, LLC, attorneys for appellant (Thomas A. McKinney, of counsel and on the briefs; Megan Frese Porio, on the briefs).

Cozen O'Connor, attorneys for respondents (George A. Voegele, Jr., and Steven D. Millman, on the brief).

Before Judges Mayer and Enright.

Opinion

PER CURIAM

***1** Plaintiff appeals from an April 12, 2019 order dismissing her complaint with prejudice and compelling arbitration. We affirm the order compelling arbitration. However, we remand the matter to the trial court to enter an amended order staying the case pending arbitration.

For ten years, plaintiff worked as a human resources manager for defendant Group One Automotive, Inc.[1] When she began her employment, plaintiff signed an "Employee Acknowledgement and Agreement." Section three of the Employee Acknowledgement and Agreement included an "Arbitration Agreement," setting forth detailed information related to plaintiff's rights.

Upon signing the Arbitration Agreement, plaintiff acknowledged she "under[stood] that by agreeing to submit covered claims[2] to arbitration, both the company and I give up our rights to a jury trial." The Arbitration Agreement provided "the arbitrator selected by me and the Company to arbitrate any and all covered claims shall be a retired federal or state court judge." In addition, the Arbitration Agreement stated the arbitrator was bound by the rules "applicable in civil actions in United States District Courts." Immediately above the signature line on the Employee Acknowledgement and Agreement was the following language:

> MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS. MY SIGNATURE FURTHER ACKNOWLEDGES THAT I HAVE HAD THE OPPORTUNITY TO ASK QUESTIONS ABOUT THE TERMS OF THIS AGREEMENT.

On November 12, 2018, plaintiff learned her job was being eliminated. The next day, plaintiff was terminated. She was over sixty years old at the time. According to plaintiff, defendants replaced her with an individual in his early thirties.

Plaintiff filed a complaint in the Superior Court, alleging age discrimination and other causes of action under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. In response, defendants filed a motion to dismiss her complaint and compel arbitration in accordance with the Arbitration Agreement. Plaintiff opposed defendants' motion, arguing the Arbitration Agreement failed to identify a valid forum for conducting arbitration. Plaintiff further argued the Arbitration Agreement was unenforceable because it failed to identify who would pay the fees and costs for arbitration.

In an oral decision on April 12, 2019, the judge determined that in the absence of an express provision in an arbitration agreement governing payment of the arbitrator's fees, "there's an implied agreement to share the cost of arbitration" and "arbitration contracts that divide the [costs] of arbitration are proper and enforceable." The judge expressly stated, "the arbitration clause is not unconscionable" because "the provisions of the [A]rbitration [A]greement would only require plaintiff to pay [her] portion of the arbitration fees."

*2 On the failure to specify a forum, the judge concluded the document "set forth a basic method for choosing the arbitrator. It sets forth basic rules that should apply to the arbitrator ...." He also rejected plaintiff's argument that the holding in Flanzman v. Jenny Craig, Inc., 456 N.J. Super. 613 (App. Div. 2018), certif. granted, 237 N.J. 310 (2019), rendered the Arbitration Agreement void for lack of a forum. Unlike the agreement in Flanzman, the judge found the Arbitration Agreement "sets forth the arbitrator will be a retired judge. More importantly, it set forth the rules for the arbitration. ... The agreement in this matter explains exactly what rules are to be used for the arbitration and what arbitrator will be arbitrating the case."

On appeal, plaintiff argues the Arbitration Agreement is void for lack of mutual assent because it failed to set forth a valid forum. She also contends the failure to establish who pays the arbitrator's fees and costs rendered the Arbitration Agreement unenforceable.

We apply a de novo standard of review when construing an arbitration provision in a contract. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 446 (2014). We apply the same de novo review when deciding whether a valid and enforceable arbitration agreement exists. Barr v. Bishop Rosen & Co., 442 N.J. Super. 599, 605 (App. Div. 2015) (citing Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013)). We owe "no special deference to the judge's determination of [the enforceability of an arbitration agreement]." Flanzman, 456 N.J. Super. at 619.

Here, both federal and state laws governing arbitration agreements are applicable. The Federal Arbitration Act, 9 U.S.C. §§ 1 to 16, and the Uniform Arbitration Act, N.J.S.A. 2A:23B-1 to -32, favor arbitration of disputes. KPMG LLP v. Cocchi, 565 U.S. 18, 21 (2011); Roach v. BM Motoring, LLC, 228 N.J. 163, 173 (2017). [3]

"[A]n agreement to arbitrate, like any other contract, 'must be the product of mutual assent, as determined under customary principles of contract law.'" Atalese, 219 N.J. at 442 (citing NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011)). "Mutual assent requires that the parties have an understanding of the terms to which they have agreed." Ibid. A legally enforceable agreement requires a "meeting of the minds." Ibid. (citing Morton v. 4 Orchard Land Tr., 180 N.J. 118, 120 (2004)).

Having reviewed the record, the Arbitration Agreement is valid because it clearly and unambiguously informed plaintiff that she waived her right to assert a claim in a judicial forum and agreed to submit her claims to binding arbitration. By signing the Arbitration Agreement, plaintiff acknowledged her understanding of its terms and assented to those terms. Therefore, there was a "meeting of the minds" to establish a valid and enforceable agreement to arbitrate.

We next consider whether the Arbitration Agreement was void because it failed to list a proper forum. An arbitral forum is defined "as the mechanism – or setting – that parties utilize to arbitrate their dispute." Flanzman, 456 N.J. Super. at 623. If the parties "agree that a dispute would be arbitrated by an arbitral institution, or an arbitrator or arbitrators, then that is the agreed upon forum." Ibid. The failure to identify a specific arbitrator does not "render[ ] the agreement unenforceable." Ibid.

*3 Here, unlike the agreement in Flanzman that omitted any reference to an arbitral forum, the Arbitration Agreement specified the mechanism replacing plaintiff's right to pursue her claims in a court of law. The Arbitration Agreement specified that arbitration would follow the rules and procedures applicable to civil actions in the United States District Court and stated the arbitrator shall be a retired federal or state court judge. By signing the Arbitration Agreement, plaintiff agreed to the forum as specified. There is no need to identify the arbitrator by name or state where and how the arbitration would be conducted to find the Arbitration Agreement set forth a valid forum. Id. at 625-27.

We next consider plaintiff's claim that the Arbitration Agreement is unenforceable because defendant failed to assume all costs associated with the arbitration and any apportionment of the "extremely high" costs associated with arbitration would "effectively prevent [p]laintiff from vindicating her statutory LAD claims."

"[A]n arbitration agreement's silence with respect to [arbitration costs and fees] does not render the agreement unenforceable." Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 82; 92 (2000). As the United States Supreme Court held, "the 'risk' that [the plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." Id. at 91.

There is nothing in the Arbitration Agreement suggesting plaintiff would be responsible to pay the entire cost of arbitration. See Jaworski v. Ernst & Young U.S. LLP, 441 N.J. Super. 464, 481-82 (App. Div. 2015) (upholding an arbitration agreement that "does not provide for the potential shifting of the entire cost of arbitrating to a non-prevailing party."). An employee's payment of a portion of the arbitration fees and costs are "limited by substantive law and arbitration rules." Id. at 482. N.J.S.A. 2A:23B-21(d) allows an arbitrator's expenses and fees to "be paid as provided in the [arbitration] award." Consistent with this statute, the Legislature vested the arbitrator with the discretion to allocate his or her arbitration fees and costs among the parties to the arbitration.

Applying these principles, we reject the argument that the costs of arbitration that may be borne by plaintiff are prohibitive. Here, there is no punitive measure contained in the Arbitration Agreement that would shift the entire financial cost of arbitration to plaintiff in the event she did not prevail. Further, N.J.S.A. 2A:23B-21(d) authorizes the arbitrator to allocate his or her expenses and fees as part of any arbitration award.

While we affirm the order compelling arbitration of plaintiff's claims, the judge improvidently dismissed plaintiff's complaint with prejudice. See GMAC v. Pittella, 205 N.J. 572, 582 n.6 (2011) (citing N.J.S.A. 2A:23B-7(g)). The Uniform Arbitration Act provides for stays, rather than dismissals, of matters pending arbitration. Ibid. Therefore, we remand the matter to the trial court to enter an amended order staying the action pending arbitration.

Affirmed as to compelling arbitration. Remanded for the entry of an amended order consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2019 WL 7287119

Footnotes

1 Defendant BMW of Atlantic City is wholly owned by Group One Automotive, Inc. Defendant Kerry Lewis was plaintiff's supervisor. Defendant Thomas Alfinito was the general manager of another dealership wholly owned by Group One Automotive, Inc. We shall refer to these parties collectively as "defendants."

2 The term "covered claims" included "claims, disputes, and/or controversies including but not limited to claims related to harassment, discrimination, and wrongful discharge ...."

3 Plaintiff cites N.J.S.A. 10:5-12.7 in claiming the Arbitration Agreement is void and unenforceable. However, she concedes the statute is inapplicable because the law applies prospectively to agreements after March 18, 2019, and the Arbitration Agreement was signed in March 2009.

End of Document

2020 WL 278692
Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

ORANE NEITH, Plaintiff,
v.
ESQUARED HOSPITALITY LLC, BC COMMISSARY NJ LLC, DEBRA MULHOLLAND, ABC CORPORATIONS 1-20 (FICTITIOUS NAMES), JANE DOES 1-20 (FICTITIOUS NAMES), JOHN DOES 1-20 (FICTITIOUS NAMES), Defendants.

Civ. No. 19-13545 (KM) (JBC)
|
Filed 01/16/2020

OPINION

Kevin McNulty United States District Judge

***1** Pending before the Court is a motion (DE 5) to dismiss the complaint and enforce the parties' agreement to arbitrate, filed by defendants ESquared Hospitality, LLC ("ESquared"), BC Commissary NJ, LLC ("BC"), and Debra Mulholland. Defendants also move for an award of attorney's fees. (*Id.*). For the reasons explained herein, the defendants' motion to dismiss is granted and the matter is referred to arbitration. Defendants' motion for fees is denied.

I. Summary [1]

a. Factual Background

Defendants make and distribute vegan products. Mr. Neith was employed by defendants for several years, eventually holding the title of production manager at defendants' New Jersey facility. (Compl. ¶ 5).

On October 11, 2018, Mr. Neith was operating a "Formatic cookie molding machine" when he seriously injured his hand. (*Id.* ¶ 1). As a result of his injury, Mr. Neith requested and received leave under the Family Medical Leave Act ("FMLA") (*id.* ¶ 23) and went on temporary disability. (*Id.* ¶ 6). During this time Mr. Neith also collected workers' compensation benefits. (*Id.*).

However, on October 22, 2018, 11 days after his injury, Mr. Neith's employment was terminated. (*Id.*). Mr. Neith asserts that he was fired in retaliation for his having applied for workers' compensation, filed suit in "the workers' compensation courts" against defendants (*id.* ¶ 10–11), and made a request for FMLA leave (*id.* ¶ 23).

b. Procedural History

On December 14, 2018, Mr. Neith filed a complaint in the Superior Court of New Jersey, Law Division, Essex County. The complaint essentially asserts four claims:

- **Count I**: Retaliation in violation of New Jersey Workers' Compensation Act ("NJWCA"), N.J. Stat. Ann. § 34:15-39.1;
- **Counts II**: Wrongful termination and discrimination based on disability under the New Jersey Law Against Discrimination ("NJLAD"), N.J. Stat. Ann. § 10:5-1, *et seq.*;
- **Count III**: Retaliation in violation of the FMLA, 29 U.S.C. § 2615(a); and
- **Count IV**: Aiding and abetting wrongful termination and discrimination based on disability under the NJLAD.

Counts V and VI assert similar claims against fictitious defendants, which have not been identified, so I do not discuss them.

On May 8, 2019, defendant BC was served with a copy of the summons and complaint. (DE 1 at 5). On June 7, 2019, counsel for ESquared Hospitality and Debra Mulholland accepted service. (*Id.*). The same day, they filed a timely notice of removal to federal court. (*Id.*).

On June 26, 2019, defendants moved to dismiss the complaint in favor of arbitration. (DE 5) Mr. Neith filed papers in opposition to that motion. (DE 6). Defendants filed a reply. (DE 9)

c. The arbitration provision

Defendants assert that Mr. Neith signed an enforceable arbitration agreement. Attached to their papers is a copy of the 2017 arbitration agreement that they say Mr. Neith electronically signed. (DE 5-2 at 4–7; DE 9-2 at 4–7). Ms. Mulholland submits a certification as a former "Talent Strategy Manager" for ESquared. In it, she states that in January 2017 defendants began using an online platform called "Harri" that allows employees to review

and electronically sign employment documents. (DE 9-2 (Declaration of Debra Mulholland) at 1).

*2 Electronic records, she says, demonstrate that on May 1, 2017 at 5:26 pm GMT, Mr. Neith, through Harri, electronically signed an "Agreement to Resolve Disputes by Arbitration." (*Id.* at 2–3). She attached to her certification an additional document that provides the "IP address" [2] for the device used by Mr. Neith to electronically sign the agreement and provides the date and time that Mr. Neith signed the agreement. (*Id.* at 7).

The other party to the arbitration agreement is "The Restaurant," defined to "include[ ] any affiliates and their current and former employees and agents." (DE 5–2 at 4). The Restaurant is not otherwise defined in the agreement. At the top of page 1 of the agreement, however, appears a logo showing a large "E 2", *i.e.*, E Squared, with a fork interwoven with the "2." Defendants assert that this is ESquared's letterhead (DE 9 at 7).

The relevant portions of the arbitration agreement read as follows:

> The Restaurant tries to work with employees to resolve differences promptly when they arise. Employees should first try to resolve their disputes informally by speaking with their supervisor. If you do not feel comfortable approaching your supervisor, the Restaurant encourages you to seek assistance from Human Resources staff or other members of the Restaurant's management team. If these informal efforts aren't successful, you agree to refer employment related disputes to the arbitration process described below.
>
> 1. ***Overview***. You and the Restaurant agree that (except for "Excluded Claims" which are described below), all disputes, claims or controversies ("claims") against the Restaurant that could be brought in a court will be resolved through arbitration. This Agreement applies to all federal, state and local laws, regulations, common law claims and claims for costs, attorneys' fees and expenses, and is governed by the Federal Arbitration Act to the maximum extent permitted by law.
>
> "Excluded Claims" include claims for workers' or unemployment compensation benefits, claims under any of the Restaurant's equity plans or other pension or welfare benefit plans containing its own procedure for resolving plan disputes, and all other claims that legally are not subject to mandatory binding pre-dispute arbitration under the Federal Arbitration Act. This agreement does not prohibit you from filing complaints with agencies such as the National Labor Relations Board or the Equal Opportunity Commission.
>
> You agree to pursue all claims on an individual basis only. You waive your right to commence or be a part of any class or collective claims, or to bring a claim with another person. The arbitrator. has no power to consolidate claims or adjudicate a class or collective action.
>
> ...
>
> 4. ***Specific Arbitration Provisions***. A single arbitrator in accordance with the Employment Rules and Procedures of National Arbitration and Mediation ("NAM") will hear the dispute....
>
> The arbitrator shall apply the Federal Rules of Civil Procedure (except for Rule 23) and the Federal Rules of Evidence as interpreted in the jurisdiction where the arbitration is held....
>
> The arbitration will take place in the county in which the employee was employed. The Restaurant will pay for the arbitration costs and fees imposed, except that You will be responsible for the costs equal to the cost of filing a Complaint in federal court.
>
> *3 5. ***Other matters***. "The Restaurant" includes any affiliates and their current and former employees and agents. "You" or "your" includes you, as well as your heirs, administrators or executors. Nothing in this Agreement is intended to create a contract of employment for a specific duration. This Agreement will be governed by and interpreted in accordance with the laws of the state in which you are employed by the Restaurant. Nothing precludes you from challenging the enforceability of this Agreement; however, the Restaurant will assert that you have agreed to pursue all claims individually in arbitration. The consideration for entering into this Agreement includes its mutuality, and your continued employment and/or your accepting employment with the Restaurant. You agree that this consideration is sufficient to support the Agreement.
>
> **I KNOWINGLY AND FREELY AGREE TO THIS MUTUAL AGREEMENT TO ARBITRATE CLAIMS WHICH OTHERWISE COULD HAVE BEEN BROUGHT IN COURT. I AFFIRM THAT I HAVE HAD SUFFICIENT TIME TO READ AND**

UNDERSTAND THIS AGREEMENT AND THAT I HAVE BEEN ADVISED OF MY RIGHT TO SEEK LEGAL COUNSEL REGARDING THE MEANING AND EFFECT OF THIS AGREEMENT PRIOR TO SIGNING. THE RESTAURANT AGREES TO BE BOUND TO ITS TERMS WITHOUT ANY REQUIREMENT TO SIGN THIS AGREEMENT.

II. Discussion

a. Legal standards

This Circuit's case law has meandered somewhat in defining the proper standard of review of a motion to compel arbitration. The upshot, however, is fairly clear. Where the issue can be decided without evidence, it will be, based on an application of the familiar Rule 12(b)(6) standard to the face of the pleadings. Failing that, however, the Court will permit discovery and decide the issue on a summary judgment standard, pursuant to Rule 56. If there is a genuine issue of fact, summary judgment will be denied and the issues will be tried.

Because arbitration is a "matter of contract" between two parties, "a judicial mandate to arbitrate must be predicated upon the parties' consent." *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 771 (3d Cir. 2013) (quoting *Par–Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980)). Pursuant to the Federal Arbitration Act ("FAA"), a court may enforce a contract to arbitrate, but only if the court is satisfied that the "making of the agreement" to arbitrate is not "in issue." *Id.*

In *Guidotti v. Legal Helpers Debt Resolution*, the Third Circuit stated the approach a court must take on a motion to compel arbitration. The judiciary must balance the competing goals of the FAA: the speedy and efficient resolution of disputes, and the enforcement of private agreements. *Id.* at 773. Reconciling sometimes murky precedent in light of those competing interests, the *Guidotti* court reasoned that where "the affirmative defense of arbitrability of claims is apparent on the face of a complaint (or ... documents relied upon in the complaint), ... the FAA would favor resolving a motion to compel arbitration under a motion to dismiss standard without the inherent delay of discovery." *Id.* at 773-74. Such an approach "appropriately fosters the FAA's interest in speedy dispute resolution. In those circumstances, '[t]he question to be answered ... becomes whether the assertions of the complaint, given the required broad sweep, would permit adduction of proofs that would provide a recognized legal basis' for rejecting the affirmative defense." *Id.* at 774 (quoting *Leone v. Aetna Cas. & Sur. Co.*, 599 F.2d 566, 567 (3d Cir. 1979).

"In many cases, however, a more deliberate pace is required, in light of both the FAA's insistence that private agreements be honored and the judicial responsibility to interpret the parties' agreement, if any, to arbitrate." *Id.*

> [The Rule 12(b)(6) standard will not be appropriate] when either the motion to compel arbitration does not have as its predicate a complaint with the requisite clarity to establish on its face that the parties agreed to arbitrate or the opposing party has come forth with reliable evidence that is more than a naked assertion ... that it did not intend to be bound by the arbitration agreement, even though on the face of the pleadings it appears that it did. Under the first scenario, arbitrability not being apparent on the face of the complaint, the motion to compel arbitration must be denied pending further development of the factual record. The second scenario will come into play when the complaint and incorporated documents facially establish arbitrability but the non-movant has come forward with enough evidence in response to the motion to compel arbitration to place the question in issue. At that point, the Rule 12(b)(6) standard is no longer appropriate, and the issue should be judged under the Rule 56 standard.
>
> ***4** Under either of those scenarios, a restricted inquiry into factual issues will be necessary to properly evaluate whether there was a meeting of the minds on the agreement to arbitrate and the non-movant must be given the opportunity to conduct limited discovery on the narrow issue concerning the validity of the arbitration agreement. In such circumstances, Rule 56 furnishes the correct standard for ensuring that arbitration is awarded only if there is an express, unequivocal agreement to that effect.
>
> *Id.* (internal citations and quotations and external citation omitted).

Thus, where the complaint and supporting documents are unclear as to an agreement to arbitrate or where a plaintiff responds to a motion to compel with additional facts sufficient to place the issue of arbitrability "in issue," then the parties should be entitled to discovery. After limited discovery, a court may then "entertain a renewed motion to compel arbitration" and should review such a motion under the summary judgment standard.

If summary judgment is unwarranted in light of material factual disputes regarding an agreement's enforceability, a court should then proceed to trial "regarding 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same,' as Section 4 of the FAA envisions." *Id.* (quoting *Somerset Consulting, LLC v. United Capital Lenders, LLC*, 832 F. Supp. 2d 474, 482 (E.D. Pa. 2011)). In every instance, "[b]efore a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect." *Id.* (quoting *Par–Knit Mills*, 636 F.2d at 54).

Federal law is decidedly pro-arbitration. The FAA's purpose is "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Thus, the statute makes agreements to arbitrate "valid, irrevocable, and enforceable," 9 U.S.C. § 2, subject only to traditional principles of contract formation and interpretation. The FAA provides that contract provisions manifesting the intent of the parties to settle disputes in arbitration shall be binding, allows for the stay of federal court proceedings in any matter that is referable to arbitration, and permits both federal and state courts to compel arbitration if one party has failed to comply with an agreement to arbitrate. 9 U.S.C. §§ 2–4.

Cumulatively, those provisions "manifest a liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 24 (quotations omitted). Thus, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

The Supreme Court has recently given new content to that strong federal pro-arbitration policy. In fact, the Court seems to have implied, with disapproval, that the states were promulgating facially neutral rules that were in fact intended to discriminate against agreements to arbitrate vis-a-vis other contracts:

> The FAA ... preempts any state rule discriminating on its face against arbitration—for example, a "law prohibit[ing] outright the arbitration of a particular type of claim." .... And not only that: The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.

***5** *Kindred Nursing Centers Ltd. P'ship v. Clark*, — U.S. —, 137 S. Ct. 1421, 1426, 197 L.Ed.2d 806 (2017) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)). Any consideration of State law, then, must bear in mind the *Kindred* preemption principle.

New Jersey courts, too, have held that arbitration "is a favored means of dispute resolution." *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 342, 901 A.2d 381 (2006). The state courts have "long noted our public policy that encourages the 'use of arbitration proceedings as an alternative forum." *Wein v. Morris*, 194 N.J. 364, 375-76, 944 A.2d 642 (2008) (citing *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479, 489, 610 A.2d 364 (1992)); *see also Delta Funding Corp. v. Harris*, 189 N.J. 28, 39, 912 A.2d 104 (2006). Accordingly, arbitration clauses are afforded a "presumption of arbitrability," which can only be overcome if the Court can determine with "positive assurances" that the clause does not cover the dispute at issue. *AT&T Techs. v. Commc'ns. Workers of Am.*, 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986); *see also Moses H. Cone Mem'l Hosp.*, 460 U.S. at 4, 103 S. Ct. 927 ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). Ultimately, arbitration agreements should be read liberally to find arbitrability whenever possible. *Jansen v. Solomon Smith Barney, Inc.*, 776 A.2d 816 (N.J. Super. App. Div. 2001).

b. Existence, validity, and scope of arbitration agreement

Arbitration is a creature of contract. Before referring any controversy to arbitration, the Court must determine whether the parties have indeed agreed to arbitrate it. Green *Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). That determination has three subparts:

(1) whether the parties agreed to arbitrate;

(2) whether the dispute is within the scope of the agreement; and

(3) whether Congress nevertheless intended the dispute to be non-arbitrable.

Sarbak v. Citigroup Global Markets, Inc., 354 F. Supp. 2d 531, 536–37 (D.N.J. 2004).

i. Existence of agreement, Congressional policy

I dispose of elements **(1)** and **(3)** briefly.

As for element **(1)**, Ms. Mulholland has supported her contentions with a certification.

A declarant with knowledge, she establishes that the arbitration agreement was electronically signed by Mr. Neith while he was employed by defendants. She attaches the relevant electronic business records to establish this. (*See* DE 9-2 at 1–2). In the Facts section of Mr. Neith's opposing brief, his attorney seemingly expresses skepticism, but does not forthrightly deny that Mr. Neith signed the agreement with ESquared. Counsel briefly complains that there is no affidavit sponsoring the electronic signature (but immediately transitions to the assumption *arguendo* that it was signed). Ms. Mulholland's certification, submitted in reply, remedies that deficiency.

Ms. Mulholland's declaration also states credibly that the "Restaurant" in the agreement refers to ESquared. The agreement, she demonstrates, is printed on that entity's letterhead. (*See* 9–2 at 1–2; DE 5-2). Again, plaintiff's counsel, in the Facts section of the brief, argues that the "Restaurant" is not adequately defined. Mr. Neith, however, offers no evidence or sworn statement in opposition to Mulholland's declaration. Nor does he explain who, if not ESquared, he was contracting with.

***6** Attorney statements in a brief, particularly equivocal nondenial-denials like these, carry no evidentiary weight. Tellingly, the operative Argument section of Mr. Neith's brief does not assert an argument that these parties did not enter into this agreement. It assumes that existence of the agreement and is devoted exclusively to the argument that this dispute falls outside the legitimate scope of the arbitration provision.[3]

As for element **(3)**, I find no statement of legislative intent to preclude a waiver of judicial remedies for NJLAD, FMLA, and NJWCA claims. *See, e.g.*, *Parker v. Hahnemann Univ. Hosp.*, No. CIV. 00-4173(JBS), 2001 WL 797247, at *5 (D.N.J. June 15, 2001) (accepting parties' determination that Congress had not prohibited arbitrating FMLA claims). At least prior to the March 18, 2019 amendments to the NJLAD, it was understood that NJLAD claims may be pursued through arbitration. *See, e.g.*, *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 93, 800 A.2d 872, 882 (2002) ("There is no indication in the text or legislative histories of either the FLA or the [NJ]LAD that restrict the use of an arbitral forum to pursue those claims.... The [NJ]LAD always permitted such claims to be pursued through an administrative hearing proceeding. N.J.S.A. 10:5–13.").[4]

ii. Scope: Statutory claims

I turn to the main argument, concerning element **(2)**, the legitimate scope of the arbitration agreement. The parties disagree as to whether Mr. Neith's claims, which are statutory, are subject to arbitration as a matter of law. Mr. Neith maintains that statutory claims like the ones he asserts here are not covered by the arbitration agreement. (DE 6 at 10–17).

In support, he points to *Moon v. Breathless Inc.*, 868 F.3d 209, 214 (3d Cir. 2017). In *Moon*, the question was whether an employment agreement that contained an arbitration provision was enforceable with respect to that plaintiff's claims under FLSA, the New Jersey Wage Payment Law ("NJWPL"), N.J. Stat. Ann. § 34:11-4.1, *et seq.*, and the New Jersey Wage and Hour Law ("NJWHL"), N.J. Stat. Ann. § 34:11-56a, *et seq. Moon*, 868 F.3d at 212.

In *Moon*, the Third Circuit surveyed the case law and outlined a three-part test to determine whether statutory claims were covered by an arbitration provision:

> To cover a statutory right under New Jersey law, an arbitration clause must do three things. **First, it must identify the general substantive area that the arbitration clause covers**: "To pass muster, however, a waiver-of-rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination." *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 168 N.J. 124, 773 A.2d 665, 672 (2001); *see also Atalese v. U.S. Legal Servs. Grp.*, 219 N.J. 430, 99 A.3d 306, 315–16 (2014) ("But the clause, at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute."); *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 800 A.2d 872, 883 (2002) ("In the circumstances of this case, the language in the arbitration agreement not only was clear and unambiguous, it was also sufficiently broad to encompass reasonably plaintiff's statutory causes of action.").
>
> ***7 Second, it must reference the types of claims waived by the provision**: "It should also reflect the employee's general understanding of the type of claims included in the waiver, *e.g.*, workplace discrimination claims." *Garfinkel*, 773 A.2d at 672. It need not, however, mention the specific

statutory rights at issue: "We do not suggest that the arbitration clause has to identify the specific constitutional or statutory right guaranteeing a citizen access to the courts that is waived by agreeing to arbitration." *Atalese*, 99 A.3d at 315.

Third, it must explain the difference between arbitration and litigation: "The waiver-of-rights language, however, must be clear and unambiguous—that is, the parties must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum." *Id.* at 315; *see also Martindale*, 800 A.2d at 884 (enforcing an arbitration clause because it, *inter alia*, "addressed specifically a waiver of the right to a jury trial, augmenting the notice to all parties to the agreement that claims involving jury trials would be resolved instead through arbitration").

Moon, 868 F.3d at 214 (emphasis added).

Two of the cited state cases, *Garfinkel* and *Atalese*, held that the arbitration clause did not cover plaintiff's statutory claims:

In *Garfinkel*, language in the arbitration provision confined its scope to disputes concerning interpretation of the contract terms. Arbitration was limited to "any controversy or claim arising out of, or relating to, this Agreement or the breach thereof." *Garfinkel*, 773 A.2d at 672. That plaintiff's statutory claims therefore fell outside the scope of the arbitration provision.

In *Atalese*, the New Jersey Supreme Court interpreted the arbitration provision of a debt-adjustment service contract. The arbitration clause, it found, did not sufficiently notify the plaintiff that she was surrendering her right to pursue her statutory claims in court. The *Atalese* provision read as follows:

> In the event of any claim or dispute between Client and the USLSG related to this Agreement or related to any performance of any services related to this Agreement, the claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request on the other party.

Atalese, 99 A.3d at 310.

In a third case discussed by the Third Circuit, *Martindale*, the New Jersey Supreme Court came to the opposite conclusion. That employment agreement contained the following broad arbitration provision:

> As a condition of my employment, I agree to waive my right to a jury trial in any action or proceeding related to my employment with [the Employer]. I understand that I am waiving my right to a jury trial voluntarily and knowingly, and free from duress or coercion.

Martindale, 800 A.2d at 875. That language, the New Jersey Supreme Court held, contained no limit as to the kind of employment-related disputes that were covered. Moreover, it was appropriately clear regarding the waiver of the right to litigate in court. *Id.* at 884. Therefore, the *Martindale* court determined that plaintiff's statutory claims were covered by the arbitration agreement.

In *Moon*, which applied this case law, the arbitration provision read as follows:

> In a dispute between Dancer and Club under this Agreement, either may request to resolve the dispute by binding arbitration. THIS MEANS THAT NEITHER PARTY SHALL HAVE THE RIGHT TO LITIGATE SUCH CLAIM IN COURT OR TO HAVE A JURY TRIAL—DISCOVERY AND APPEAL RIGHTS ARE LIMITED IN ARBITRATION. ARBITRATION MUST BE ON AN INDIVIDUAL BASIS. THIS MEANS NEITHER YOU NOR WE MAY JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION, OR LITIGATE IN COURT OR ARBITRATE ANY

> CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS.

***8** *Moon* ultimately held that this arbitration provision fell on the *Garfinkel/Atalese*, not the *Martindale*, side of the line, and therefore did not cover plaintiff's statutory claims. The "dispute between Dancer and Club under this Agreement," *Moon* held, referred only to contract disputes, not statutory claims. 868 F.3d at 216.

iii. Application of *Moon* test to this case

I find that this case is most analogous to *Martindale* and therefore hold that Mr. Neith's claims fall within the scope of the arbitration agreement.

The first prong of the *Moon* test—that the agreement must identify the general substantive area that the arbitration provision covers—is satisfied. The arbitration agreement covers "employment related disputes" and includes very broad language requiring arbitration of "all disputes that could be brought in a court." Indeed, the clause explicitly states that it applies to "all federal, state and local laws" claims:

> [A]ll disputes, claims or controversies ("claims") against the Restaurant that could be brought in a court will be resolved through arbitration. This Agreement applies to all federal, state and local laws, regulations, common law claims and claims for costs, attorneys' fees and expenses, and is governed by the Federal Arbitration Act to the maximum extent permitted by law.

(DE 5-2 at 4). This provision does not contain any limiting language that would exclude statutory claims.

It is true that the agreement does outline a subset of "Excluded Claims." (*See id.*) For example, claims for unpaid workers' or unemployment compensation benefits are excluded. That only tends to confirm that, where the drafters of the agreement intended to exclude a particular kind of claim, they knew how to do so. Mr. Neith's claims here do not fall within the exclusion of claims for unpaid workers' compensation. [5]

The second prong of the *Moon* test—that the arbitration provision must reference the types of claims waived—has also been met. Mr. Neith points out that the NJLAD, FMLA, and NJWCA statutes are not specifically mentioned in the agreement. (DE 6 at 13). But, as *Garfinkel* noted, "we do not suggest that a party need refer specifically to the LAD or list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights. To pass muster, however, a waiver-of-rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination." 773 A.2d at 672. Defendants' arbitration agreement passes this test. It provided Mr. Neith with notice that "all federal, state and local laws, regulations, common law claims" arising from his employment are covered. This is perfectly clear; no more is required.

The third prong of the *Moon* test—that the agreement sufficiently explain the difference between arbitration and litigation—is likewise satisfied. The agreement is substantially dedicated to discussing the terms under which Mr. Neith agreed to arbitrate disputes. (*See* agreement, quoted at pp. 3–6, *supra.*) The agreement starts in its first paragraph by indicating that should an employee be unable to resolve a dispute informally, then the employee agrees to the "arbitration process described below." (DE 5–2 at 4). That arbitration process, as outlined in the agreement, tells each employee that an arbitration must be brought by an employee on an individual basis rather than as a class action. (*Id.*). The employee is then told that an arbitrator, rather than a judge, will have exclusive authority to resolve all disputes. (*Id.* § 2). However, the agreement states that should it be determined that the bar on class actions is unlawful, "then that action may proceed in a court." (*Id.*). The Agreement then highlights the rules governing the arbitration: how many arbitrators will hear the case, how an arbitrator is to render decisions, what should happen if summary judgment motions are submitted, where the arbitration will take place, and who will pay for the arbitration. (*Id.* § 4). Finally, the agreement concludes by stating that "I KNOWINGLY AND FREELY AGREE TO THIS MUTUAL AGREEMENT TO ARBITRATE CLIAMS WHICH OTHERWISE COULD HAVE BEEN BROUGHT IN COURT." (*Id.* at 6). The agreement thus spells out how the arbitration proceeding is to take place and explains that this process is different from a court proceeding. Again, this could hardly be clearer. It cannot be said that Mr. Neith was

not informed that an arbitration proceeding would be different from, and would take place in lieu of, a court proceeding.

*9 Accordingly, I find that Mr. Neith's claims are covered by the parties' arbitration agreement. That agreement will be enforced, and all of the claims in the complaint will be referred to arbitration.

c. Stay vs. Dismissal

A procedural question remains. The Arbitration Act, 9 U.S.C. § 3, provides that the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." The Court of Appeals has held that a stay, rather than dismissal, is mandatory when one of the parties has made application for it. See *Lloyd v. HOVENSA, LLC.*, 369 F.3d 263, 269 (3d Cir. 2004).

No such application has been made here, however. The plaintiff has moved for dismissal. The defendant has not moved for a stay, but has argued in the alternative that, if only some claims are arbitrable, then only they should be dismissed. (*See* Def. Brf. 13, DE 6 at 17.) By negative implication, defendant is endorsing the notion that dismissal is the remedy in connection with referral of claims to arbitration. At least where all claims have been found arbitrable and no party has moved for a stay, it would appear that the court retains the discretion to dismiss rather than stay the case. *Cf. LaFurno v. Virbac Corp.*, No. CIV.A. 11-4774 SRC, 2012 WL 646029, at *2 (D.N.J. Feb. 24, 2012).

I will exercise my discretion to grant Defendants' motion to dismiss the complaint in connection with referring the claims to arbitration.

d. Legal fees

Defendants assert, without citation to legal authority, that they should be awarded their attorney's fees in connection with this motion. I disagree.

When Mr. Neith signed the arbitration agreement, he was guaranteed the right to challenge the enforceability of the arbitration provision: "Nothing precludes you from challenging the enforceability of this Agreement; however, the Restaurant will assert that you have agreed to pursue all claims individually in arbitration." (DE 5–2 at 5). That is precisely what has taken place; I cannot find that any wrongful litigation conduct has occurred.

In any event, "[o]ur basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–253 (2010); *see also In re Niles*, 176 N.J. 282, 293–94 (N.J. 2003) ("New Jersey has a strong public policy against the shifting of costs" and that "[t]his Court has embraced that policy by adopting the 'American Rule,' which prohibits recovery of counsel fees by the prevailing party against the losing party.").

Accordingly, defendants' motion for attorney's fees is **DENIED**. Each party will bear its own costs.

III. Conclusion

For the reasons set forth above, the arbitration agreement is enforced, the matter is referred to arbitration. The motion to dismiss (DE 5) is **GRANTED**. Defendants' motion for attorney's fees is **DENIED**.

An appropriate order follows.

Dated: January 15, 2020

All Citations

Slip Copy, 2020 WL 278692

Footnotes

1 Citations to the record will be abbreviated as follows. Citations to page numbers refer to the page numbers assigned through the Electronic Court Filing system, unless otherwise indicated:
"DE" = Docket entry number in this case.
"Compl." = The Complaint filed by Mr. Neith. [DE 1].

2 An IP address or "internet protocol address" is a unique numerical identifier that attaches to any electronic device that uses the internet protocol.

3 Legal issues not discussed in the argument section of a brief ordinarily need not be considered. *Cf. Travitz v. Ne. Dep't ILGWU Health & Welfare Fund*, 13 F.3d 704, 711 (3d Cir. 1994) ("When an issue is not pursued in the argument section of the brief, the appellant has abandoned and waived that issue on appeal.")(citations omitted); *Kadetsky v. Egg Harbor Twp. Bd. of Educ.*, 82 F. Supp. 2d 327, 334 n.5 (D.N.J. 2000) (finding "casual reference" to a claim results in waiver). I do not go so far as to say these contentions are waived, but they certainly do not seem to be pressed.

4 The March 18, 2019 amendment to N.J. Stat. Ann. § 10:5-12.7 may restrict the use of arbitration provisions with respect to claims for discrimination. *See id.* ("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"). However, whether this restricts arbitrations is left to another day as this provision applies prospectively and does not affect the contract at issue here, which was signed in 2017.

5 He does claim he was fired in retaliation for exercise of his rights under the workers' compensation laws, but I find such a claim to be distinct.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

ANTHONY KOZUR,	:	
	:	
-V-	:	1:18-cv-08750-JHR-JS
	:	
F/V ATLANTIC BOUNTY, LLC,	:	
ATLANTIC CAPE FISHERIES, INC., and	:	
SEA HARVEST, INC.	:	

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2019, I electronically filed the foregoing document with the United States District Court for the District of New Jersey by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF System:

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