Moore v. Fischer

Superior Court of New Jersey, Appellate Division

October 6, 2016, Argued; February 13, 2017, Decided

DOCKET NO. A-3419-15T3

Reporter
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MARJORIE MOORE, on behalf of herself and others similarly situated, Plaintiff-Appellant, v. DAVID FISCHER d/b/a CAPITOL TITLE LOANS, Defendant-Respondent.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1661-15.

Counsel: Henry P. Wolfe argued the cause for appellant (The Wolf Law Firm LLC, attorneys; Andrew R. Wolf, Mr. Wolfe, and Kelly Samuels Thomas, of counsel; Ms. Thomas on the briefs).

Randi A. Wolf argued the cause for respondent (Spector, Gadon & Rosen, PC, attorneys; Mr. Wolf, on the brief).

Judges: Before Judges Fuentes, Carroll and Gooden Brown.

Opinion

PER CURIAM

Plaintiff Marjorie Moore appeals from a March 4, 2016 Law Division order dismissing with prejudice her complaint against defendant David Fischer, doing business as Capitol Title Loans[1] and John Does 1-5,[2] and compelling her to arbitrate her claims pursuant to an arbitration provision contained in the parties' short-term consumer loan agreement. Based on the record before us, we conclude that the trial court erred in dismissing plaintiff's complaint and compelling arbitration. Accordingly, we reverse and remand.

I.

We derive the following facts from the record. On December 23, 2013, plaintiff entered into a title loan contract with defendant in Delaware. Under the terms of the contract, plaintiff received $3000, was charged interest at an annual percentage [*2] rate of 180.43%, totaling $457.50, and was required to pay back $3542.50 one month later on January 22, 2014. Plaintiff secured the loan using her 2007 Toyota Camry as collateral, granting defendant a security interest in the vehicle. The contract added to the loan balance an $85 fee for defendant to file a lien on plaintiff's vehicle with the New Jersey Motor Vehicle Commission. In the

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[1] Defendant David Fischer contends that it was incorrectly identified in plaintiff's complaint as "David Fischer d/b/a Capitol Title Loans," and the correct party name is "Scalessa-Fischer, L.L.C. d/b/a Capitol Title Loans."

[2] Defendants John Does 1-5 are "fictitiously named entities or individuals, who as parent entities, affiliates, officers, owners, directors, supervisors, managers, employees, agents and/or representatives of Capitol Title Loans, either individually or jointly, had a role in setting the policies, procedures and practices" alleged in the complaint.

event of a dispute, the contract included a binding arbitration provision entitling either party to demand arbitration upon written notice, excluding "any claim of $2,500 or less which is within the jurisdictional limits of a small claims or equivalent court . . . ."[3]

Plaintiff ultimately defaulted on the loan, although she made two payments by check in the amount of $445 and $500, which defendant cashed on February 5, 2014 and April 4, 2014, respectively. On January 20, 2015, defendant repossessed plaintiff's vehicle in New Jersey. On January 21, 2015, defendant mailed plaintiff a repossession notice stating that her vehicle would be sold at auction or by private sale on February 9, 2015, or any time thereafter. The notice included a list of charges plaintiff owed in order to redeem her vehicle prior [*3] to sale. Specifically, $3085 was listed as the principal balance due, plus interest totaling $5048.25, repossession fees in the amount of $575, and a daily storage fee of $25.

On December 18, 2015, plaintiff filed a three-count class action complaint in the Superior Court, Law Division, seeking certification of a class of New Jersey consumers who entered into title loan contracts with defendant charging interest at a rate greater than 30% per annum and certification of a proposed subclass of consumers who received notices similar to plaintiff's after their cars were repossessed. Specifically excluded from the proposed class were persons whose combined claims exceeded $2500.

In count one, plaintiff alleged that defendant's title loan contracts entered into with New Jersey residents and secured by vehicles registered in New Jersey violated the criminal usury statute, *N.J.S.A.* 2C:21-19(a)(2), by loaning money at an interest rate exceeding 30% per annum. Plaintiff sought statutory damages of $100 on behalf of herself and each member of the putative class pursuant to the Truth in Consumer Contract, Warranty and Notice Act (TCCWNA), *N.J.S.A.* 56:12-17.

In count two, plaintiff alleged that defendant's repossession notices sent to plaintiff [*4] and those similarly situated were commercially unreasonable and violated Article 9, Part 6 of the Uniform Commercial Code (UCC), *N.J.S.A.* 12A:9-601 *et seq.*, by: (1) failing to specify the intended method of disposition of the collateral and the intended time and place of any sale in violation of *N.J.S.A.* 12A:9-613(1)(E); (2) failing to inform debtors that they were entitled to an accounting of the unpaid indebtedness in violation of *N.J.S.A.* 12A:9-613(1)(D); (3) failing to include a description of any liability for a debtor deficiency in violation of *N.J.S.A.* 12A:9-614(1)(B); (4) misrepresenting the principal amount due by failing to account for prior payments; and (5) failing to provide adequate notification of redemption rights as required by *N.J.S.A.* 12A:9-614. The complaint alleged that, under *N.J.S.A.* 12A:9-625(c)(2), such violations entitled plaintiff and putative class members to statutory damages calculated as the finance charge plus 10% of the principal amount due, which, in plaintiff's case, totaled $766.

In count three, plaintiff alleged that defendant's deficient repossession notices sent to her and members of the putative subclass included provisions that violated the TCCWNA, specifically *N.J.S.A.* 56:12-15. For this violation, plaintiff sought statutory damages of $100 pursuant to *N.J.S.A.* 56:12-17 for herself and each putative subclass member. [*5] Plaintiff also sought reasonable attorney's fees and costs pursuant to *N.J.S.A.* 56:12-17.

On January 28, 2016, defense counsel notified plaintiff's counsel in writing that defendant demanded arbitration in accordance with the arbitration provision in the loan contract. Defense counsel also requested that plaintiff dismiss the complaint and select an arbitrator within twenty days of receipt of the letter. When plaintiff failed to comply, defendant moved to dismiss plaintiff's complaint and compel arbitration in lieu of filing an answer. Plaintiff opposed the motion arguing that the arbitration clause expressly excluded "any claim of $2500 or less which is within the jurisdictional limits of small claims or equivalent court." Plaintiff argued that her class action complaint, which sought less than $2500 per putative class member, was cognizable in small claims court and thus not subject to arbitration.

On March 4, 2016, following oral argument, the court granted defendant's motion to dismiss the complaint and compel arbitration, concluding that the complaint failed to fit within the jurisdictional limits of the small claims court "because of the putative class action based on allegations of New Jersey [*6] statutes." On April 18, 2016, pursuant to *Rule* 2:5-1(b), the court

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[3] The complete arbitration agreement, governed by the Federal Arbitration Act (FAA), 9 *U.S.C.A.* §§ 1 to 16, provided a detailed description of the types of claims subject to arbitration, the procedure to initiate arbitration and allocation of fees, as well as waivers of the right to litigate in court and participate in a class action or class arbitration. In addition, the agreement contained severability language preserving the remaining portions of the agreement if any portion was deemed invalid or unenforceable.

issued a written statement of reasons to supplement its earlier order reasoning that two clauses contained in the arbitration provisions of the contract were in dispute. Specifically, the court elaborated that to support its motion to compel arbitration, defendant asserted that under the terms of the contract, claims subject to arbitration include "[d]isputes about whether this [a]rbitration [provision] is valid or binding or about whether or when it applies." Whereas plaintiff, according to the court, maintained that the arbitration provisions expressly excluded "any claim of [$2500] or less which is within the jurisdictional limits of a small claims or equivalent court . . . ." Citing *Rule* 6:1-2(a)(2), which delineates the jurisdictional limits of New Jersey's small claims court, the court concluded that plaintiff's complaint failed to fit within the "jurisdictional limits [of small claims court] because it is a class action based upon alleged violations of New Jersey statutes." This appeal followed.

II.

Our review of "the trial court's decision regarding the applicability and scope of an arbitration agreement" is de novo and therefore we owe no special deference to [*7] the trial court's determination. *Jaworski v. Ernst & Young US LLP*, 441 N.J. Super. 464, 472, 119 A.3d 939 (App. Div.), *certif. denied*, 223 N.J. 406, 125 A.3d 392 (2015). *See also EPIX Holdings Corp. v. Marsh & McLennan Cos.*, 410 N.J. Super. 453, 472, 982 A.2d 1194 (App. Div. 2009) (noting that the "standard of review of the applicability and scope of an arbitration provision is plenary"). "Similarly, the issue of whether parties have agreed to arbitrate is a question of law that is reviewed de novo." *Jaworski*, *supra*, 441 N.J. Super. at 472.

The interpretation of an applicable arbitration clause is also subject to de novo review on appeal. *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404, 430, 24 A.3d 777 (App. Div.) (quoting *Coast Auto. Grp., Ltd. v. Withum Smith & Brown*, 413 N.J. Super. 363, 369, 995 A.2d 300 (App. Div. 2010)), *certif. granted*, 209 N.J. 96, 35 A.3d 679 (2011), *appeal dismissed*, 213 N.J. 47, 59 A.3d 1083 (2013). Nevertheless, "[i]n reviewing such orders, we are mindful of the strong preference to enforce arbitration agreements, both at the state and federal level." *Hirsch v. Amper. Fin. Servs., LLC*, 215 N.J. 174, 186, 71 A.3d 849 (2013).

"The Federal Arbitration Act (FAA), 9 *U.S.C.* §§ 1-16, and the nearly identical New Jersey Arbitration Act, *N.J.S.A.* 2A:23B-1 to -32, enunciate federal and state policies favoring arbitration" as a mechanism of resolving disputes that otherwise would be litigated. Atalese *v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 440, 99 A.3d 306 (2014), *cert. denied*, __ U.S. __, 135 S. Ct. 2804, 192 L. Ed. 2d 847 (2015). Nonetheless, "[a]rbitration's favored status does not mean that every arbitration clause, however phrased, will be enforceable." *Id.* at 441.

Arbitration is fundamentally a matter of contract. *Foulke*, *supra*, 421 N.J. Super. at 424. That said, "[a]n agreement to arbitrate 'must be the product of mutual assent, as determined under customary principles of contract law.'" *Barr v. Bishop Rosen & Co., Inc.*, 442 N.J. Super. 599, 605-06, 126 A.3d 328 (App. Div. 2015) (quoting Atalese, *supra*, 219 N.J. at 442), *certif. denied*, 224 N.J. 244, 130 A.3d 1246 (2016). "Mutual assent requires [*8] that the parties understand the terms of their agreement" and, where the "agreement includes a waiver of a party's right to pursue a case in a judicial forum, 'clarity is required.'" *Id.* at 606 (citation omitted). That is, "the waiver must be clearly and unmistakably established, . . . should clearly state its purpose, . . . [a]nd the parties must have full knowledge of the legal rights they intend to surrender." *Ibid.* (citations omitted).

The FAA permits states to invalidate arbitration clauses "'upon such grounds as exist at law or in equity for the revocation of any contract.'" Atalese, *supra*, 219 N.J. at 441 (quoting *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 85, 800 A.2d 872 (2002); *see also* 9 *U.S.C.* § 2). An arbitration agreement that fails to clearly and unambiguously signal to parties that they are surrendering their right to pursue a judicial remedy renders such an agreement unenforceable. *Ibid.*

Here, we have little trouble concluding that the contract contained a valid and binding provision for arbitration of disputes. Indeed, plaintiff neither alleged in her complaint nor in her opposition to defendant's motion that the arbitration clause was itself invalid, and specifically acknowledged during oral argument that "there's no allegation that the arbitration clause is invalid or that it is not generally [*9] binding."[4] "[B]ecause an agreement to arbitrate is a contract, 'only those issues may be

[4] The first paragraph of the arbitration provision includes cautionary language informing plaintiff, "[a]rbitration is a method of deciding disputes outside the court system. This arbitration provision governs when and how any claims or disputes you and we may have will be arbitrated, instead of litigated in court. THIS ARBITRATION PROVISION MAY SUBSTANTIALLY LIMIT OR AFFECT YOUR RIGHTS. PLEASE READ IT CAREFULLY, KEEP THIS PROVISION OR A COPY FOR YOUR RECORDS."

arbitrated which the parties have agreed shall be.'" *Curtis v. Cellco P'ship*, 413 N.J. Super. 26, 35, 992 A.2d 795 (App. Div.) (quoting *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 168 N.J. 124, 132, 773 A.2d 665 (2001)), *certif. denied*, 203 N.J. 94, 999 A.2d 462 (2010). Therefore, we must examine whether the contractual language clearly and unmistakably established that plaintiff's complaint falls within the scope of the exclusion clause of the arbitration provision. To that end, plaintiff argues that "the plain language of the provision" excludes plaintiff's claims from arbitration. In the alternative, plaintiff asserts that any "ambiguities that exist in [d]efendant's arbitration clause regarding jurisdictional limits in small claims court should be considered against defendant, as [d]efendant was the drafter of the clause."

"[W]hether a contract provision is clear or unambiguous is a question of law." *Grow Co. v. Chokshi*, 403 N.J. Super. 443, 476, 959 A.2d 252 (App. Div. 2008) (citing *Nester v. O'Donnell*, 301 N.J. Super. 198, 210, 693 A.2d 1214 (App. Div. 1997)). "A basic principle of contract interpretation is to read the document as a whole in a fair and common sense manner." *Hardy ex rel. Dowdell v. Abdul-Matin*, 198 N.J. 95, 103, 965 A.2d 1165 (2009). Moreover, "'[w]ords and phrases are not to be isolated but related to the context and the contractual scheme as a whole, and given the meaning that comports with the probable intent and purpose.'" *Republic Bus. Credit Corp. v. Camhe-Marcille*, 381 N.J. Super. 563, 569, 887 A.2d 185 (App. Div. 2005) (quoting *Newark Publishers' Ass'n. v. Newark Typographical Union*, 22 N.J. 419, 426, 126 A.2d 348 (1956)).

Further, " the 'court should not torture the language of [a contract] [provision] to create [*10] ambiguity.'" *Schor v. FMS Fin. Corp.*, 357 N.J. Super. 185, 191, 814 A.2d 1108 (App. Div. 2002) (first alteration in original) (quoting *Nester v. O'Donnell*, 301 N.J. Super. 198, 210, 693 A.2d 1214 (App. Div. 1997)). As such, "[a]mbiguity is determined not by adopting an interpretation preferred by the judge but by determining whether the provision in question is 'susceptible to at least two reasonable alternative interpretations.'" *Chokshi*, *supra*, 403 N.J. Super. at 476 (quoting *Kaufman v. Provident Life & Cas. Ins. Co.*, 828 F. Supp. 275, 283 (D.N.J. 1992), *aff'd* 993 F.2d 877 (3d Cir. 1993)).

Here, under the exclusion clause of the arbitration agreement, arbitration does not apply "[t]o any claim of [$2500] or less which is within the jurisdictional limits of a small claims or equivalent court so long as there is a right to appeal a decision of the small claims court to a higher court[.]" The term "any claim" is defined in the parties' arbitration agreement to include "any dispute, claim or controversy" between the parties, and a broad list of potential claims is further enumerated.[5] The exclusionary language also directly follows the clause defining the scope of arbitrability.

Even assuming an average consumer lacked sufficient knowledge regarding the jurisdictional limits of small claims court, the exception specifies the monetary value of the claims that are excluded from arbitration. Reading the document as a whole, it is clear that the drafter's intention was to exclude from arbitration claims [*11] of $2500 or lesser value that are subject to the jurisdictional limits of a small claims court. Therefore, we find no ambiguity with respect to the interpretation of the exclusionary provision. *See Johnson v. Roselle EZ Quick LLC*, 226 N.J. 370, 386, 143 A.3d 254 (2016) (stating "[i]f the plain language leads to a clear and unambiguous result, then our interpretive process is over" (citation omitted)).

Because the arbitration agreement is enforceable and the exclusion provision is unambiguous, we conclude that plaintiff should be permitted to litigate her individual statutory claims in court rather than an arbitral forum. While we agree with the court that, under *Rule* 6:1-2(a)(2),[6] class actions are not cognizable in small claims court, the arbitration provision does not bar plaintiff

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In addition, the arbitration provision contained an express rejection clause located directly above the signature line. The rejection clause afforded plaintiff an opportunity to reject the arbitration provision by mailing a signed written rejection notice within fifteen days after the effective date of the loan agreement. The clause further specified that rejection of the arbitration agreement would not affect any other provisions or the status of the agreement, but failure to reject rendered the arbitration agreement effective as of the date of the contract.

[5] The enumerated list of claims subject to arbitration consists of any dispute, claim or controversy between the parties that arises as a result of or has anything to do with (1) a motor vehicle equity line of credit account; (2) this agreement; (3) the relationship between the parties, including attempts to collect an obligation or repossess the collateral securing the account; (4) any products, including club memberships, or any services offered; (5) disputes about whether the arbitration agreement is valid or binding or about whether or when it applies; (6) claims under or disputes relating to constitutional provisions, statutes, ordinances, regulations, court decisions, or compliance with the agreement; (7) disputes relating to wrongful acts of every type, whether intentional, fraudulent, reckless or just negligent; and (8) any claim or request for injunctive or declaratory relief.

[6] The jurisdiction of the small claims court is defined by *Rule* 6:1-2(a)(2), which provides:

from asserting her statutory claims on an individual basis because the matter was not certified as a class action prior to dismissal of the complaint. *See R.* 4:32-1; *cf. Dugan v. TGI Fridays, Inc.*, 445 N.J. Super. 59, 79, 135 A.3d 1003 (App. Div. 2016) (finding that the court erred by allowing plaintiffs to maintain a class action to pursue claims under the TCCWNA and remanding for further proceedings on plaintiffs' individual claims). Further, contrary to defendant's assertion, statutory claims are cognizable in small claims court. *See, e.g., Local Baking Products, Inc. v. Kosher Bagel Munch, Inc.*, 421 N.J. Super. 268, 272, 23 A.3d 469 (App. Div.) (affirming that no class action could [*12] be brought based upon plaintiff's complaint alleging violation of the Telephone Consumer Protection Act (TCPA), 47 *U.S.C.A.* § 227, and reasoning that individual claims filed in the small claims court were a "far superior method to vindication" aligned with the TCPA's statutory intent), *certif. denied*, 209 N.J. 96, 35 A.3d 679 (2011). However, we take no position on the outcome of plaintiff's case if it is later certified as a class action pursuant to *Rule* 4:32-1. Accordingly, we reverse the dismissal, reinstate the complaint, and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

Reversed and remanded.

Small claims actions, which are defined as all actions in contract and tort (exclusive of professional malpractice, probate, and matters cognizable in the Family Division or Tax Court) and actions between a landlord and tenant for rent, or money damages, when the amount in dispute, including any applicable penalties, does not exceed, exclusive of costs, the sum of $3,000. Small claims also include actions for the return of all or part of a security deposit when the amount in dispute, including any applicable penalties, does not exceed, exclusive of costs, the sum of $5,000. The Small Claims Section may provide [*13] such ancillary equitable relief as may be necessary to effect a complete remedy. Actions in lieu of prerogative writs and actions in which the primary relief sought is equitable in nature are excluded from the Small Claims Section.