NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0862-08T2

MARK A. GODFREY and DELOY GODFREY, his wife,

Plaintiffs-Appellants,

v.

CHRISTOPHER MARTIN, individually and t/a MARTIN BUILDERS & RENOVATORS, GARY MERTZ, a Registered Architect, MERTZ ARCHITECTS, P.C., a professional corporation, PAUL MANYOKE, individually and t/a CHIMNEY SWIFT SWEEPS,

Defendants-Respondents.

Argued September 23, 2009 – Decided December 17, 2009

Before Judges Payne and C.L. Miniman.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2519-05.

Walter T. Wolf argued the cause for the appellants (Walter T. Wolf, L.L.C., attorneys; Mr. Wolf, of counsel and on the briefs).

Craig S. Hilliard argued the cause for respondent Christopher Martin (Leary, Bride, Tinker & Moran, attorneys; Mr. Hilliard, of counsel, Mark Bongiovanni, on the brief).

Gary R. Backinoff argued the cause for respondents Gary Mertz and Mertz Architects,

P.C. (Teich Groh, attorneys; Mr. Backinoff, on the brief).

Diana Powell McGovern argued the cause for respondent Paul Manyoke (Zimmerer, Murray, Conyngham & Kunzier, attorneys; Robert Zimmerer, of counsel and on the brief).

PER CURIAM

Plaintiffs Mark A. Godfrey and Deloy Godfrey appeal from a September 23, 2008, order denying their motion for reconsideration of four orders entered between February 14, 2006, and January 28, 2008, and granting the cross-motion of defendant Christopher Martin, individually and trading as Martin Builders & Renovators, seeking dismissal of the complaint with prejudice as to all defendants.

The four orders as to which reconsideration was sought are (1) an order of February 14, 2006, requiring arbitration of plaintiffs' Consumer Fraud Act[1] (CFA) claims but denying dismissal of their complaint; (2) a mediation referral order of March 27, 2006, entered pursuant to Rule 1:40-1, which required completion of mediation within ninety days; (3) a January 24, 2008, order dismissing plaintiffs' complaint without prejudice but with leave to vacate if some unspecified proceeding did not dispose of the case; and (4) a virtually identical order of January 28, 2008, dismissing plaintiffs' complaint without

[1] N.J.S.A. 56:8-1 to -182.

prejudice but with leave to vacate if some unspecified proceeding did not dispose of the case.

At the heart of the procedural dispute here are arbitration agreements contained in the architectural-services agreement to which plaintiffs and defendants Gary Mertz and Mertz Architects, P.C. (collectively Mertz), are parties, and in the home-improvement contract to which plaintiffs and Martin are parties.[2] On May 2, 2001, plaintiffs accepted a proposal for architectural services to be performed by Mertz. The attached Proposal Criteria provided in pertinent part in ¶ 7 as follows:

> Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association [AAA] currently in effect unless the parties mutually agree otherwise. No arbitration arising out of or relating to this Agreement shall include, by consolidation, join[der] or in any other manner, an additional person or entity not a party to this Agreement except by written consent containing a specific reference to this Agreement signed by the Owner, Architect, and any other person or entity sought to be joined. . . . In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by

[2] Defendant Paul Manyoke, individually and trading as Chimney Swift Sweeps, apparently worked without a written contract.

> the applicable statutes of limitations. The award rendered by the arbitrator or arbitrators shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

The August 6, 2001, Contractor's Work Assignment Agreement between plaintiffs and Martin more simply provided:

> The parties agree that any action to enforce this agreement or any duties or obligations arising out of it shall be submitted to the [AAA], pursuant to the Construction Industry Dispute Resolution Procedures. The prevailing party in such proceeding, shall receive in addition to all other rights and remedies, any reasonable costs and expenses [in]curred in such proceedings, including reasonable attorney fees.

The complaint in this matter was filed on September 22, 2005, and summonses were issued on November 18, 2005. Martin appeared and moved to dismiss on November 30, 2005. On December 27, 2005, Mertz filed a cross-motion to dismiss. On January 5, 2006, counsel for Manyoke wrote to the judge advising that his client was willing to voluntarily submit the matter to arbitration. On January 12, 2006, counsel for plaintiffs advised the court that they had decided to consent to a single arbitration proceeding with all defendants in the case. The judge placed his decision on the record on February 6, 2006.

The judge explained that Martin sought to dismiss plaintiffs' CFA claim for failure to state a claim on which

relief could be granted and to dismiss the balance of their claims because of the arbitration clause in the home-improvement agreement. He observed that Mertz had filed a cross-motion but that it had been withdrawn because the parties were going to arbitration. He further noted that plaintiffs contended that neither arbitration clause was applicable. However, he found that both arbitration clauses were sufficiently broadly worded to encompass the CFA claims because they arose out of the failure to perform under the contracts. He also found that the allegations of the complaint were sufficient to state claims on which relief could be granted. As a result, he entered the February 14, 2006, order denying the motion to dismiss and ordering arbitration of the CFA claims.

No order was entered dismissing or staying the action pending arbitration between plaintiffs and Mertz nor did the order of February 14, 2006, stay the action against Martin. Furthermore, these defendants never filed answers to the complaint. Although Manyoke filed an answer on January 9, 2006, he never submitted an order compelling arbitration of the action against him. As a result, from the perspective of the Civil Division Manager's Office, the case was active as to Manyoke. Accordingly, a computer-generated order referred the matter to mediation pursuant to Rule 1:40 governing complementary dispute

resolution. The appointed mediator was to schedule an organizational telephonic conference and mediation was to be completed in thirty days. Discovery was not stayed.

Thereafter, three court-initiated orders dismissing the claims against Martin and Mertz pursuant to Rule 1:13-7 were entered on April 28, 2006, based on plaintiffs' failure to prosecute the action against them, no answers, defaults, or default judgments having been filed. Then, on October 13, 2006, the court entered a notation on the docket that court-ordered mediation had been unsuccessful. No further activity was noted on the docket until October 30, 2007.

In the meantime, rather than file a demand for arbitration with the AAA, at the suggestion of Manyoke as a prelude to arbitration, plaintiffs negotiated a nonbinding mediation agreement with all defendants that was signed by the mediator on May 14, 2006; by plaintiffs on October 15, 2006; and by defendants on May 14, 2007. Thus, it took an entire year to get the mediation agreement signed.

The pending civil action against Manyoke continued to age and was ultimately scheduled for trial on November 5, 2007. This prompted a communication to the court from someone that triggered an October 30, 2007, order of disposition indicating that the matter had been settled pending trial.

On November 30, 2007, plaintiffs' counsel wrote to the court enclosing the February 14, 2006, order, one of our unpublished decisions, and a copy of N.J.S.A. 2A:23B-7. He argued that the case should have been stayed pending arbitration pursuant to N.J.S.A. 2A:23B-7(g)——not dismissed——because the contract was dated August 6, 2001. Plaintiffs' counsel again wrote to the court on January 22, 2008, explaining that the parties were in the midst of mediation/arbitration and submitting an order under the five-day rule staying the case "to avoid the constant listing of this case for [t]rial." However, on January 24, 2008, the judge who had entered the February 14, 2006, order entered an order of disposition again dismissing the action "without prejudice with leave to vacate if proceeding does not dispose of case." The same judge entered a virtually identical order on January 28, 2008.

No further action was taken until July 11, 2008, when plaintiffs filed their motion for reconsideration and to reinstate the case to the active trial list. Mark Godfrey averred that over two years had elapsed since the initial order for mediation yet the matter still had not been mediated due to "numerous and extensive delays." In particular, he complained of an adjournment by Martin of a mediation for which plaintiffs had cancelled a planned vacation to be available. He expressed

that he felt defendants "have had sufficient time and opportunity to mediate and resolve this matter, yet their foot dragging indicates to me a clear desire to avoid their responsibility for the damages caused to our home."

Plaintiffs' counsel certified that numerous dates had been set for the mediation, but they were "continually adjourned by the defendants for over twenty-four (24) months and seven (7) sessions." He asserted the case was "out of control; the defendants have not agreed to a new mediation date and are only now raising the issue of whether mediation should even be utilized." He urged the defendants were acting in bad faith and plaintiffs' withdrawal from mediation was understandable.

Martin cross-moved to dismiss plaintiffs' complaint with prejudice. His counsel certified that he prepared a consent order in 2006 for dismissal of the entire case and referral of all claims to arbitration but plaintiffs did not consent to it, which left the action to continue in court. He averred to the best of his knowledge plaintiffs never filed any arbitration proceeding anywhere against any of the defendants and never moved to vacate the dismissal for lack of prosecution. As a result, the matter was listed for trial on March 12, July 16, and October 15, 2007. Ultimately, the court dismissed the claims against Manyoke on October 30, 2007. Martin's attorney

also certified that after plaintiffs' counsel wrote to the court on January 22, 2008, he wrote to the court on February 11, 2008, pointing out that no arbitration proceeding was ever filed against Martin, the claims against Martin had been dismissed two years earlier with no effort for two years to vacate the dismissal, and the remainder of the case had been dismissed in October 2007. He further asserted that plaintiffs took no action for the six months prior to the filing of the motion to reinstate the case.

Martin also submitted a certification in which he denied causing any delay in the mediation and averred that he had never been served with any AAA Statement of Claim commencing arbitration in the two and one-half years since arbitration was ordered. The other defendants apparently did not file certifications in opposition to plaintiffs' motion, although their counsel participated in the argument of the motion.

The judge placed his decision on the record immediately after oral argument on September 12, 2008. The judge observed that it was plaintiffs' burden to pursue arbitration and that certain "red flags" went up from the court after arbitration was ordered, which required plaintiffs to take some more definitive action with the court. He found that arbitration clauses were enforceable and that the case had been dismissed, not stayed.

He further found that as the statute of limitations approached, it was incumbent on plaintiffs to file an arbitration demand. He concluded that reconsideration was inappropriate and "[t]here were just too many things that should have been done in this case that were not done that now render them not able to be done." As a result, he declined to reinstate the case and denied reconsideration, dismissing the case with prejudice. An order to that effect was entered on September 23, 2008. This appeal followed.

Plaintiffs contend the judge erred in dismissing their complaint because the Uniform Arbitration Act (UAA) as adopted in New Jersey, N.J.S.A. 2A:23B-1 to -32, applies to these agreements to arbitrate and mandates a stay rather than a dismissal of any judicial proceeding. They also assert that the judge erred in denying their motion to reinstate because the statute of limitations had not yet expired and reinstatement or restoration of a complaint did not trigger the statute of limitations. Alternatively, they argue the judge abused his discretion in denying their motion for reconsideration because the orders of January 24 and 28, 2008, were interlocutory, not final, and the February 14, 2006, order compelling arbitration should have been reconsidered because the arbitration agreements were unenforceable.

Although the portion of the September 23, 2008, order denying reconsideration of a prior order pursuant to Rule 4:49-2 is subject to review for a mistaken exercise of discretion, Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996), the scope of our review of the balance of the order dismissing the complaint with prejudice is plenary as the relief was based on a pure question of law. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

Martin urges that plaintiffs' reliance on the UAA is misplaced because the statute only applies to arbitration agreements made on or after January 1, 2003. That was the year the UAA was adopted in New Jersey. Assembly Judiciary Committee Statement to Senate No. 514, L. 2003, c. 95, eff. Jan. 1, 2003. The act specifically provides that it only governs agreements to arbitrate made on or after January 1, 2003, N.J.S.A. 2A:23B-3(a), unless the parties to an earlier-made arbitration agreement specifically agree to application of the UAA, N.J.S.A. 2A:23B-3(b). However, it also provides, "On or after January 1, 2005, this act governs an agreement to arbitrate whenever made . . . ." N.J.S.A. 2A:23B-3(c). We have construed that provision

to apply to arbitrations commenced after January 1, 2005. Rock Work, Inc. v. Pulaski Const. Co., 396 N.J. Super. 344, 353 (App. Div. 2007), certif. denied, 194 N.J. 272 (2008). This suit was instituted on September 22, 2005, and thus the UAA applies to the ordered arbitration. The UAA further provides: "If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration." N.J.S.A. 2A:23B-7(g). Generally, the term "shall" connotes a mandate. Harvey v. Bd. of Chosen Freeholders, 30 N.J. 381, 391-92 (1959); see also Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 325 (2000); No Illegal Points, Citizens for Drivers Rights, Inc. v. Florio, 264 N.J. Super. 318, 329 (App. Div.), certif. denied, 134 N.J. 479 (1993); Franklin Estates, Inc. v. Twp. of Edison, 142 N.J. Super. 179, 184 (App. Div. 1976), aff'd, 73 N.J. 462 (1977).

We next consider whether the judge was mistaken in exercising his discretion to deny reconsideration of the February 14 and March 27, 2006, orders and the January 24 and 28, 2008, orders.

> "[J]udicial discretion" is the option which a judge may exercise between the doing and the not doing of a thing which cannot be demanded as an absolute legal right, guided by the spirit, principles and analogies of the law, and founded upon the reason and conscience of the judge, to a just result in

> the light of the particular circumstances of the case.
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> [Smith v. Smith, 17 N.J. Super. 128, 132 (App. Div. 1951), certif. denied, 9 N.J. 178 (1952).]

The exercise of judicial discretion "is not unbounded and it is not the personal predilection of the particular judge." State v. Madan, 366 N.J. Super. 98, 109 (App. Div. 2004). Moreover, the exercise of judicial discretion must have a factual underpinning and legal basis. Id. at 110.

In light of the mandate of N.J.S.A. 2A:23B-7(g), we are satisfied the judge mistakenly exercised his discretion to deny reconsideration of the February 14, 2006, and January 24 and 28, 2008 orders. Those orders should have been reconsidered and an order staying this proceeding should have been entered on September 23, 2008, to bring the status of the case into compliance with N.J.S.A. 2A:23B-7(g). Furthermore, the motion for reconsideration was not untimely because the orders of January 24 and 28, 2008, were not final orders as the dismissal was specifically made without prejudice and with leave to vacate if the arbitration did not resolve all issues. The twenty-day time prescription of Rule 4:49-2 applies only to final orders. Bender v. Walgreen E. Co., 399 N.J. Super. 584, 593 (App. Div. 2008).

Martin urges that any stay would apply only to the CFA claims because the February 14, 2006, order did not require arbitration of anything else. This contention ignores the agreement of all parties, including Manyoke, to submit the entire case to arbitration. Although no order was entered compelling same, one seemed hardly necessary. Thus, the order of February 14, 2006, ought to have stayed the entire case pending the outcome of arbitration. Indeed, as plaintiffs' counsel advised the court on January 12, 2006, "Arbitration is the universally accepted course in this matter."

Martin contends that the trial judge correctly determined the action was barred under the applicable statute of limitations because N.J.S.A. 2A:23A-16 expressly provides that "a party may assert the limitation [of time] as a bar to the alternative resolution to a court to which application has been made to compel alternative resolution under this act." However, "this act" refers to the New Jersey Alternative Procedure for Dispute Resolution Act (APDRA), N.J.S.A. 2A:23A-1 to -30. APDRA only applies where "the parties agree to settle by means of alternative resolution, as provided in this act." N.J.S.A. 2A:23A-2(a) (emphasis added). "In order for the provisions of this act to be applicable, it shall be sufficient that the parties signify their intention to resolve their dispute by

reference in the agreement to 'The New Jersey Alternative Procedure for Dispute Resolution Act.'" Ibid. Here, there was no agreement to mediate pursuant to the APDRA.

Mertz contends that the statute of limitations now bars arbitration as no demand for same was made within six years of the alleged defaults. Martin urges that plaintiffs cannot refile their complaint because "the statute of limitations continues to run after a [c]omplaint is filed and is not tolled for that reason alone," citing Zaccardi v. Becker, 88 N.J. 245, 258 (1982).

Plaintiffs, on the other hand, contend that the arbitration agreements were never enforceable in the first instance and the judge mistakenly exercised his discretion in denying reconsideration of the order compelling arbitration of the CFA claims. To be enforceable, an arbitration agreement restricting one's right to sue must "assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993). We examine the language of the arbitration clause and the underlying facts of the dispute to determine waiver of the right to sue. Quigley v. KPMG Peat Marwick, L.L.P., 330 N.J. Super. 252, 271-72 (App. Div.), certif. denied, 165 N.J. 527 (2000). Any ambiguity in the

agreement must be construed against the drafter. Id. at 271. The clause must contain language clearly stating that the arbitral award is legally binding. Caruso v. Ravenswood Developers, Inc., 337 N.J. Super. 499, 502, 508 (App. Div. 2001) (finding language that "[t]he decision of the arbitrator shall be final and binding" satisfied this requirement). See also Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 136 (requiring an "unambiguous writing" for an agreement to arbitrate all claims to be enforceable). A waiver of the right to sue in an arbitration agreement "'must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.'" Quigley, supra, 330 N.J. Super. at 271 (quoting Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High School Bd. of Educ., 78 N.J. 122, 140 (1978)).

As we have previously observed, it is a mistaken exercise of discretion to deny reconsideration of an order predicated on legal error. Here, the Martin arbitration agreement contains no language that adequately conveyed the concept of a waiver of the right to sue. Furthermore, it did not in any fashion state that an award was legally binding. As a consequence, the Martin agreement to arbitrate did not result in a waiver of the right to sue. Marchak, supra, 134 N.J. at 282; Quigley, supra, 330

N.J. Super. at 271. Concomitantly, the informal agreement to arbitrate the disputes with Manyoke, which was never reduced to any writing, cannot be found to have constituted a waiver of the right to sue and agreement that an award would be final and binding. These conclusions render the statute of limitations issue raised by these defendants moot.[3,4] Plaintiffs are entitled to a trial.

The architect's arbitration clause, on the other hand, provided, "The award rendered by the arbitrator or arbitrators shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." This language clearly stated that any arbitral award was legally binding, satisfying our requirement in Caruso, supra, 337 N.J.

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[3] Mertz did not contend that the statute of limitations was a bar to arbitration or trial.

[4] We do not by this decision suggest that the issue of the statute of limitations was an issue for the court to decide. The UAA provides that "[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." N.J.S.A. 2A:23B-6(b). It is the arbitrator who "decide[s] whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." N.J.S.A. 2A:23B-6(c). Although N.J.S.A. 2A:23B-7 empowers the courts to determine whether enforceable arbitration agreements exist, it specifically provides "[t]he court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established." N.J.S.A. 2A:23B-7(d). No reported case has yet to decide whether a statute of limitations issue falls within this proscription.

Super. at 502. We are also satisfied that the language of the agreement adequately conveyed the concept of a waiver of the right to sue. However, there is no signed contract in the record on appeal and the Mertz proposal provided for acceptance by plaintiff Mark Godfrey only. This certainly raises an issue as to the enforceability of the agreement against plaintiff Deloy Godfrey. We also cannot determine from the record on appeal whether this agreement was legally binding on plaintiff Mark Godfrey. These issues will have to be explored in a plenary hearing.

Reversed.