NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1231-12T2

CAROLYNE MORGAN,

Plaintiff-Respondent,

v.

CESAR PARRA, Individually,
KATIE RILEY, Individually,
and PIAFFE PERFORMANCE, INC.,

Defendants-Appellants.

Argued March 20, 2013 – Decided April 15, 2013

Before Judges Simonelli and Accurso.

On appeal from Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-235-11.

Samuel Feldman argued the cause for appellants (Orloff, Lowenbach, Stifelman & Siegel, P.A., attorneys; Mr. Feldman, of counsel and on the briefs).

Anthony P. Seijas argued the cause for respondent (Weber Gallagher Simpson Stapleton Fires & Newby LLP, attorneys; Mr. Seijas, of counsel; Brad Baldwin, on the brief).

PER CURIAM

Defendants Cesar Parra, Katie Riley and Piaffe Performance, Inc. appeal from the denial of their motion to compel arbitration. Because we conclude that the contract between the parties contained an enforceable, unambiguous two-stage alternative dispute resolution (ADR) clause, we reverse.

Plaintiff Carolyne Morgan of Savannah, Georgia entered into two contracts for the purchase of fractional interests in two Westphalian dressage horses from defendants in Hunterdon County. Both contracts, styled as bills of sale and requiring payment in euros, contained substantially identical mediation and arbitration clauses.

> H. Mediation and Arbitration
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> In the event of any dispute or disagreement relating in any manner whatsoever to this AGREEMENT the parties agree and consent to engage in mediation in a good faith effort to resolve the dispute amicably before either party resorts to court action. Mediation shall be conducted by and according to the rules of the Equine Dispute Resolution Service (EDRS) and shall be commenced within 45 days of such disagreement or the request of either party to mediation. In the event that the parties are unable to successfully resolve said dispute through said mediation, then, in that event, the parties agree to submit the dispute to binding arbitration before a mutually acceptable arbitrator by and according to the rules of Equine Dispute Resolution Service (EDRS), within 30 days of any declaration of impasse by EDRS. Each

> party shall be entitled to representation by counsel in any mediation or arbitration. The parties agree to submit the question of the payment of mediation and arbitration expenses of both parties to the mediator or arbitrator as well.

After a dispute arose over the horses, plaintiff filed a complaint in Superior Court alleging breach of contract, misrepresentation, fraud, and consumer fraud. Defendants filed a motion to dismiss and to compel plaintiff to proceed with mediation and arbitration. In opposition, plaintiff argued that the clause did not extend to her consumer fraud claim, was unenforceable because EDRS was no longer in operation, and invalid because the contract was procured by fraud. Plaintiff did not argue that the clause was ambiguous.

The trial court granted the motion and ordered the parties to mediation. Specifically, the court rejected plaintiff's argument that the clause did not extend to her consumer fraud claim. The judge reasoned that the clause was as broad as the one in Martindale v. Sandvik, Inc., 173 N.J. 76 (2002), and that plaintiff's consumer fraud claim related precisely to the subject of the contract – the sale of the horses. The court also rejected the claim that EDRS's inability to serve could nullify the clause, as N.J.S.A. 2A:23B-11(a) provides that the court shall appoint an arbitrator if the parties' method of arbitration fails or an arbitrator is unable to act. The court

rejected plaintiff's final argument that the clause was invalid because of fraud on the basis of N.J.S.A. 2A:23B-6(c), which provides that an arbitrator is to determine whether a contract containing a valid agreement to arbitrate is enforceable, and Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 36-37, n.1 (App. Div. 2010), holding that fraud claims relating to the contract itself are subject to an arbitration clause.

The court, however, limited its holding to the mediation clause. At oral argument on the motion, the judge raised a question about that portion of the clause stating that mediation had to be undertaken before court action. Construing the remainder of the clause requiring arbitration in the event mediation were unsuccessful as "a giving and a taking away of the right to court action," the court ordered the parties to mediation but did not compel arbitration in the event mediation was unsuccessful. Instead, the court determined that it need not reach the issue of arbitration at that juncture.

When mediation proved unsuccessful, plaintiff moved to reinstate her complaint, and defendants cross-moved to compel arbitration. The court ordered reinstatement and denied defendants' motion to compel arbitration. In an accompanying memorandum, the court wrote that it "is not convinced that the

contract language is unambiguous." Although noting the express requirement of binding arbitration in the event mediation were not successful, the court found that the earlier reference to "court action" made the clause misleading and did not clearly mandate arbitration. This appeal followed.

We review the denial of a motion to compel arbitration de novo. Frumer v. Nat'l Home Ins. Co., 420 N.J. Super. 7, 13 (App. Div. 2011). The construction of contract language is generally a question of law unless its meaning is unclear and turns on conflicting testimony. Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001). Because the issue involves solely one of contractual construction and does not depend on the trial court's assessment of the credibility of any witness, we owe no special deference to the court's assessment of the language. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

It is axiomatic that contract provisions are to be "read as a whole, without artificial emphasis on one section, with a consequent disregard for others." Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 333 N.J. Super. 310, 325 (App. Div. 2000), aff'd, 169 N.J. 135 (2001). "Literalism must give way to context." Ibid. We cannot read the "Mediation and Arbitration" clause of these agreements, in light of those

principles, as ambiguous in its intent that both mediation and arbitration were to precede any court action.

Reading the clause as a whole, it seems clear to us that the parties designed a two-stage ADR process that was to begin with mediation and proceed to mandatory arbitration in the event mediation proved unsuccessful. This general design must be "kept in view in ascertaining the sense of particular terms." Krosnowski v. Krosnowski, 22 N.J. 376, 387 (1956). Although the first line of the "Mediation and Arbitration" clause states only that the parties agree to go to mediation "before either party resorts to court action," the remainder of the clause, and specifically those portions stating that the parties will go to binding arbitration under the auspices of EDRS, the same organization overseeing the mediation, within thirty days of EDRS's declaration of impasse, makes plain that mediation and arbitration were but two parts of a single ADR process. Because a subsidiary provision of a contract should be interpreted so as not to conflict with its dominant purpose, ibid., we cannot read the deferral of court action as limited to only the first stage of what the parties clearly intended to be an integrated two-stage process ending in arbitration.

Our construction of the language as compelling both mediation and arbitration is more in keeping with the

interpretive principle that greater regard is to be given to the clear intent of the parties than to any particular word which they may have used in expressing their intent. Id. at 387-88. It is also more in harmony with our State's strong policy of liberal enforcement of arbitration agreements. Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993); Kalman Floor Co. v. Jos. L. Muscarelle, Inc., 196 N.J. Super. 16, 27 (App. Div. 1984), aff'd, 98 N.J. 266 (1985). Further, these transactions between citizens of different states for the sale of fractional interests in two international dressage horses would appear to come within the broad reach of the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-16. See Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 55-56, 123 S. Ct. 2037, 2039-40, 156 L. Ed. 2d 46, 51 (2003). Congress's intent in enacting the FAA was "to abrogate the then-existing common law rule disfavoring arbitration agreements 'and to place arbitration agreements upon the same footing as other contracts.'" Martindale, supra, 173 N.J. at 84 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L. Ed. 2d 26, 36 (1991)). The federal cases "strongly hold that ambiguities in agreements are to be resolved in favor of arbitration." Yale Materials Handling Corp. v. White Storage

& Retrieval Sys., Inc., 240 N.J. Super. 370, 376 (App. Div. 1990).

We agree that plaintiff's consumer fraud claim is encompassed within the mediation and arbitration provision of the parties' agreement for the reasons expressed by the trial judge. Plaintiff is free to pursue in arbitration a claim for all statutory remedies available to her under the Consumer Fraud Act. Gras v. Assocs. First Capital Corp., 346 N.J. Super. 42, 52-53 (App. Div. 2001), certif. denied, 171 N.J. 445 (2002).

Reversed.