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Judge P. Buchsbaum

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CAROLYNE MORGAN,

Plaintiff,

v.

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

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
HUNTERDON COUNTY

DOCKET NO. L-235-11

Civil Action

ORDER

CERTIFIED TO BE
A TRUE COPY

THIS MATTER having been opened to by Orloff, Lowenbach, Stifelman & Siegel, P.A., attorneys for defendants Cesar Parra, Katie Riley, and Piaffe Performance, Inc. ("Piaffe") on the return date of defendants' cross-motion to compel arbitration of plaintiffs' claims asserted in the proposed First Amended Complaint and the Court having read and considered the papers submitted in support of and in opposition to the motion, and for good cause shown,

IT IS on this 3 day of September, 2012

ORDERED:

1. That plaintiffs' motion is denied.

DENIED

COPY SENT
10/3/12

SEE ATTACHED MEMO

2. That defendants' cross-motion is granted and the parties are directed to proceed to arbitration pursuant to the terms of their contracts.

3. That a true copy of this Order be served within 7 days.

DENIED
PETER A. BUCHSBAUM, J.S.C., J.S.C.

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NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

Carolynne Morgan
v.
Cesar Parra, et al.

Docket No. HNT-L-235-11

Motion to Reinstate, Motion to Amend, Order to Enforce
Litigant's Rights, Cross-motion to compel arbitration

Opposed

Argued: September 28, 2012

Decided: October 3, 2012

The Honorable Peter A. Buchsbaum, J.S.C.

Facts and Procedural Posture:

This matter is a contract dispute arising from the sale of plaintiff's horse, Florence, by defendants. Plaintiff, Carolynne Morgan, brings this motion to reinstate her initial complaint since the parties were unsuccessful at mandatory mediation. Defendants oppose this motion, stating that the terms of the contract mandate binding arbitration if mediation does not produce a settlement. Plaintiff also seeks to amend her complaint to include subsequent conduct by defendants that would further support her Consumer Fraud Act violation claim. Finally, plaintiff seeks to enforce this Court's May 1, 2012 Order requiring defendant to place all funds acquired from the sale of Florence, into an escrow account of defendants' counsel, Samuel Feldman, Esq. Plaintiff's complaint asserts defendants sold Florence for 180,000€ but only deposited 100,000€ into the account. Specifically, plaintiff asserts that defendants sold Florence to Mathias Krieg, a disinterested party, for 180,000€ on January 18, 2012 yet led plaintiff to believe that Florence was sold to Stephanie Trappe, another disinterested party, on January 25, 2012 for 100,000€. Plaintiff asserts defendants informed her of this allegedly sham sale almost four months after the sale of Florence. Plaintiff asserts she never consented to the sale of Florence for 100,000€ and the sale was conditioned upon her consent. Plaintiff further contends defendants intentionally fabricated a sale to Ms. Trappe after

they had already sold Florence to Mr. Krieg. Plaintiff also alleges defendants have intentionally kept the surplus money from the 180,000€ sale outside of the escrow account as mandated by this Court's May 1, 2012 Order.

The parties previously engaged in mediation on June 11, 2012, with no successful settlement. Since mediation was unsuccessful, parties now contest whether the Bill of Sale entered into by the parties contain a mandatory binding arbitration provision.

Analysis:

Motion to Reinstate Plaintiff's Complaint

Arbitration is strongly favored by New Jersey's public policy as a means of settling disputes. *Mt. Hope Development Associates v. Mt. Hope Waterpower Project*, 154 N.J. 141, 151-52 (1998) (citations omitted). In determining whether the parties have agreed to arbitrate, state law contract principles apply. *Quigley v. KPMG Peat Marwick, LLP*, 330 N.J. Super. 252, 270, (App. Div. 2000). While affording the liberal view of arbitration contracts, "it is equally true that the duty to arbitrate, and the scope of arbitration are dependent solely on the parties' agreement." *Quigley*, 330 N.J. Super. at 271 (citations omitted). While arbitration clauses are to be liberally construed, a court should construe ambiguous contract language against the interest of the party that drafted it. *Pacifico v. Pacifico*, 190 N.J. 258, 267 (2007); see also *Quigley*, 330 N.J. Super. at 269. "A clause depriving a citizen of access to the courts should clearly state its purpose," especially where the choice is to arbitrate disputes rather than litigate them. *Quigley*, 330 N.J. Super. at 330. Thus, "the point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." *Id.* When a contract term is ambiguous, that rule of contract interpretation requires a court to adopt the meaning that is most favorable to the non-drafting party. As such, to be given effect, any waiver of a statutory right "must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively." *Id.*

In this case, the relevant language of the Bill of Sales states:

"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 by and according to the rules of Equine Dispute Resolution Service (EDRS), within 30 days of any declaration of impasse by EDRS. 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. (emphasis added)

See Cert. of Samuel Feldman, Exh. C and D, ¶H.

Defendants assert this language unambiguously mandates arbitration while plaintiff asserts the language is ambiguous and should thus be construed against the defendant drafters. Specifically, plaintiff asserts the contract allows for court action in the event that mediation is unsuccessful, yet then prohibits court action by subjecting parties to binding arbitration since mediation, which was unambiguously required, had not yet occurred. This Court previously acknowledged the appeal of plaintiff's argument, yet declined to decide on this issue of arbitration. See Memorandum of Opinion by the Honorable Peter A. Buchsbaum, August 16, 2011, pg. 7. Defendants direct this Court to cases that establish New Jersey public policy towards construing contracts in favor of arbitration. See Def.'s Brief in Opposition to Motion to Reinstate, pg. 4; see also *Caruso v. Ravenswood Developers, Inc.*, 337 N.J. Super 499, 504 (App. Div. 2001). Plaintiff replies that this liberal approach should apply to unambiguous contracts and not contracts in which it is unclear whether plaintiff clearly waived rights to court action.

This Court is not convinced that the contract language is unambiguous. As this Court noted in its prior opinion, "there is a giving and a taking away of the right to court action." See Memorandum of Opinion by the Honorable Peter A. Buchsbaum, August 16, 2011, pg. 7. As such, this Court cannot find that the parties were clearly aware of the relinquishment of the right to litigate. While the language of the contract does refer to binding arbitration, which would lead one to presume no further court action is permissible, the preceding language does not provide any indication that "court action" includes the process of binding arbitration. It remains misleading, thus leaving a reader to presume court action includes the actual option of litigation in court. While arbitration is strongly favored, it cannot be imposed when all parties did not clearly intend to forfeit the right to appear before a court and dispute the matter. *NAACP of Camden County East v. Foulke Management Corp.*, 421 N.J. Super. 404 (App. Div.), certif. granted, 209 N.J. 96 (2011). If parties did intend for such action, the language of the contract must unambiguously state as such. This Court does not find that the provision clearly mandates arbitration and will allow plaintiff to reinstate her complaint as a result of the failed mediation.

Motion to File Amended Complaint

Rule 4:9-1 provides, in part:

A party may amend any pleading as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90 days after it is served. Thereafter a party may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice. A motion for leave to amend shall have annexed thereto a copy of the proposed amended pleading. Id.

A court should freely grant a motion to amend even where there exists uncertainty as to the merits of the amendment. *Marinelli v. Mitts & Merrill*, 303 N.J. Super. 61, 63 (App. Div. 1997). However, a court should deny a motion to amend if prejudice would result to the opposing party "or if the amended pleading itself is without legal merit, that is, if the

amendment as proposed would be futile." *Notte v. Merchs. Mut. Ins. Co.*, 185 N.J. 490, 500-01 (2006). Plaintiff seeks leave to file her First Amended Complaint to include newly revealed conduct by defendants regarding the unauthorized sale of Florence that would further support Count VII of her initial complaint which alleges a violation of the Consumer Fraud Act. Plaintiff's initial consumer fraud claim addressed the September 2008 sale of Florence by defendant, Cesar Parra, to plaintiff. Plaintiff seeks to amend the factual portion of the complaint to include information regarding defendants' allegedly fraudulent sale of Florence to Mr. Krieg. Plaintiff contends defendants' unauthorized sale of Florence and deceptive actions after the sale of Florence violate the Consumer Fraud act. Given that this Court must apply a liberal standard when contemplating a motion to amend, it is proper to grant plaintiff's motion to file a First Amended Complaint. Plaintiff seeks to support her claim with further evidence that has allegedly developed since the initial complaint was filed and the interest of justice demand that such an amendment go forward.

Defendants assert plaintiff's CFA claim lacks merit and should not be permitted. However, defendants would have the Court dismiss plaintiff's CFA claim when plaintiff seeks merely to add facts to amend a claim that was already included in her initial complaint, which has never been challenged. Plaintiff is not seeking to add another Count – she is seeking to supplement her Count VII with facts. Given this posture, and the liberal standard for amendments, the defendants opposition borders on frivolous. This Court must apply a liberal standard when examining plaintiff's right to add such a supplement, and grant the motion to amend. Further, given the generous reading which this Court must give complaints, the assertion that violation of the CFA was insufficiently pled appears to lack merit.¹

Motion to Enforce Litigant's Rights

Plaintiff's final motion seeks to enforce this Court's May 1, 2012 Order mandating defendants to place all proceeds from the sale of Florence in the escrow account of their attorney. Plaintiff alleges defendants have failed to deposit the full 180,000€ into the escrow account held by defendants' attorney, Samuel Feldman, as mandated by this Court. Instead, plaintiff asserts, defendants left the money in the escrow account it had

¹ There is no CFA rule requiring that whether something is a good rather than an investment, or that it was offered to the public, be specifically pled.

been in prior to the May 1, 2012 Order. As such, plaintiff seeks this Court compel defendants to comply with the Order, pursuant to R. 1:10-3. Specifically, plaintiff's request that defendants: (1) pay 180,000€ to the court; (2) pay all of plaintiff's costs and fees associated with investigation's defendants' deceptive sale; (3) pay all of plaintiff's counsel fees related to this motion; and (4) be subjected to a coercive levy of 1% of Florence's sell price of 180,000€ for each day that defendants continue to ignore the May 1, 2012 Order. Defendants contend that plaintiff consented to the sale of Florence for 100,000€ and that plaintiff has been aware that the money has been held in escrow by defendant Parra's Kentucky counsel Frost, Brown & Todd, LLC and that she never raised an objection to this arrangement. Plaintiff, in response, asserts that her objection, or lack thereof, does not excuse defendants from disobeying a court order.

Defendants' opposition fails to address plaintiff's allegations that even though plaintiff consented to a lower price sale, Florence was sold for 80,000€ more than what plaintiff's were told and actually to another party. Plaintiff has supplied translated emails in her supporting documents certifying that Florence was sold to Mr. Krieg for 180,000€. See Cert. of Anthony P. Seijas, Exh. R. Furthermore, plaintiff has supplied an certification by Mr. Krieg confirming his purchase of Florence for 180,000€. This is direct evidence of such a sale. Id. at Exh. M. At oral argument, when asked about the remaining funds, defendants could not tell this Court where the extra money was placed.

At this time, plaintiffs have shown enough to warrant an expedited hearing per R. 1:10-3 on whether defendants have violated the Court's order of May 1, 2012 requiring that "all sale proceeds be held in escrow" (emphasis added). Defendants are holding the 100,000€ in escrow and there remains as dispute as to the location of the allegedly missing funds. When the initial claims are adjudicated to establish the whether plaintiff consented to the sale of Florence for 100,000€ and whether such a sale has taken place, the Court will act on plaintiff's requests for additional deposits into the escrow account.

Cross-Motion to Compel Arbitration

Given this Court's decision to reinstate plaintiff's complaint, defendants' cross-motion to compel arbitration is denied.

Conclusion:

For the reasons stated above, plaintiff's motion to reinstate her complaint is **GRANTED**. Plaintiff's motion to amend her complaint is **GRANTED**. Plaintiff's motion to enforce litigant's rights will be adjudicated at a hearing to be held in the near future. Defendant's motion to compel arbitration is **DENIED**.

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