

Arbitration Forum Dispute Does Not Necessarily Breach Contract Nor Waive Arbitration Right

May 11, 2016

Richard Raysman

It is not breaking news that arbitration clauses are both increasingly favored and enforced, especially after the 2011 Supreme Court decision that held that the Federal Arbitration Act preempted a California state law that had prohibited contracts from barring class-wide arbitration. Unsurprisingly, this has led to an increase in commercial contracts which prohibit aggrieved consumers from circumventing mandatory arbitration clauses through bringing class action suits. Notwithstanding the broadening of arbitration rights by the high court five years ago, the fairness standard by which a court will judge an arbitration clause remains. This fact-sensitive inquiry often cannot be extrapolated from one decision to another, but a New Jersey Appellate Division decision may be the recent exception. The case, which involves a pair of class action plaintiffs seeking to avoid an arbitration clause in an agreement signed with a car dealership they alleged to have defrauded them, has been accepted for review by the New Jersey Supreme Court, and therefore may be the outlier which casts a significant influence over future disputes involving arbitrability. See *Roach v. BM Motoring, LLC*, No. L-1333-14, 2015 WL 9853066 (N.J. App. Div. Jan. 20, 2016), *appeal granted*, (N.J. April 29, 2016).

Facts

Plaintiffs Emelia Jackson and Tahisha Roach (collectively, plaintiffs) each purchased a used car from BM Motoring LLC (defendant or BM) in 2013. Each signed a substantially identical "Dispute Resolution Agreement" (DRA) as part of their purchases. Under the DRA, each plaintiff mutually agreed with BM to arbitrate "any claim, dispute, or controversy, including all statutory claims and any state or federal claims, that may arise out of or relating to the sale or lease identified by this agreement." The DRA further specified that the "arbitration shall be concluded in accordance with the rules of the American Arbitration Association [(AAA)] ... [BM] shall advance both party's filing, service, administration, arbitrator, hearing or other fees" Prior to joinder, each plaintiff's claims took different paths, though both are material to the court's holding, and are discussed below in turn.

In October 2013, Jackson filed an arbitration claims with the AAA alleging that BM had violated the New Jersey Consumer Fraud Act, based on its "refusal to sell the car for the advertised price, overcharging for title and registration fees, and misrepresenting the terms of an extended service plan." BM never responded to the claim, nor any letters from the AAA instructing it to advance the filing and arbitrator's fees. The AAA also informed BM that if it did not pay these fees, it would not arbitrate Jackson's claim and could decline to arbitrate any future claims by other consumers against it. Ultimately, the AAA closed Jackson's claim and informed BM that it would no longer administer any claims brought by consumers against it.

In August 2013, after a dispute arose relating to her vehicle purchase, Roach sued BM in a New Jersey superior court (the Law Division). The latter filed a motion to dismiss on the grounds that the court lacked subject matter jurisdiction because of the DRA. The court agreed and granted the defendant's unopposed motion without prejudice. Roach then filed a claim against BM at the AAA in

January 2014. Less than a week later, the AAA confirmed what it had told BM in the Jackson matter that it would no longer arbitrate claims involving BM.

After receiving these letters, Roach joined Jackson and filed a putative class action in the Law Division based primarily on BM's alleged "pattern and practice of overcharging for title and registration fees." BM again filed a motion to dismiss on jurisdictional grounds and to compel arbitration. More specifically, in its MTD, BM argued that the DRA does not "contemplate" using the AAA as the arbitration forum, and that it has not used the AAA because of high expenses; therefore, neither plaintiff commenced arbitration in a manner permissible under the DRA. In opposition, the plaintiffs argued that BM had never specified that the AAA was *not* the proper forum nor suggested another option. This was true, as its filing in the second action in the Law Division was the first time it had communicated its objection to arbitration via the AAA.

Nonetheless, the Law Division rejected the plaintiffs' argument that BM's previous actions constituted a material breach of the DRA, which would have given them a defense to enforcement of the arbitration clause therein. Rather, the Law Division concluded that the DRA is "pretty clear. The intent is to go to arbitration and ... the parties should remain faithful to that clause" Accordingly, it compelled the plaintiffs to arbitrate with the AAA, and when the AAA accepted their claim, the court dismissed the class action with prejudice.

On appeal to the Superior Court of New Jersey, Appellate Division (the Appellate Division), the plaintiffs switched the rationale for their claims of the unenforceability of the DRA when they contended that BM materially breached the DRA by failing to arbitrate after receiving service of their demands. Moreover, they argued that BM waived the right to invoke the DRA by failing to pay the required arbitration and filing fees. BM countered that the AAA was not the mandatory forum to bring claims, so no breach or waiver of the DRA had occurred.

Legal Analysis and Conclusions

The court considered the plaintiffs' arguments that BM either (1) breached the DRA; or (2) waived its right to arbitrate pursuant to the DRA. It rejected both.

In terms of standard of review, the Appellate Division reviewed the lower court's conclusions *de novo* and without special deference, but did cite to the mandate of the New Jersey Supreme Court to be "mindful of the strong preference to enforce arbitration agreements, both at the state and federal level." *Hirsch v. Amper Fin. Servs., LLC*, 71 A.3d 849, 856 (N.J. 2013). As another threshold matter, in terms of the permissible scope of review under the Federal Arbitration Act, the Appellate Division acknowledged that it could not invalidate the DRA on public policy grounds or defenses endemic to arbitration agreements, but could invalidate the DRA by "invoking traditional legal doctrines governing the formation of a contract and its interpretation." (citations omitted).

As noted above, the court declined to hold that BM had breached the DRA based on plaintiffs' allegations that it had committed a prior material breach by failing to neither advance the arbitration fees nor to arbitrate upon service of the plaintiffs' demands. It credited BM's claim that it failed to respond to the plaintiff's entreaties to arbitrate because of a disagreement over the appropriate forum. More important, it held that the record supported the Law Division's conclusion that a sufficient factual dispute about the proper arbitration forum existed so as to preclude a claim that BM had breached the DRA, which would have taken the plaintiffs' claims outside the purview of arbitration.

Second, the court held that BM had not waived its right to arbitrate. A waiver is never presumed, and the trial court's factual determination are "entitled to deference and are subject to review for clear error." *Cole v. Jersey City Med. Center*, 72 A.3d 224, 230 (N.J. 2013). Explicit, e.g., voluntary and

intentional, and implicit waivers are possible, and a court makes a determination after concentrating on a the party's "litigation conduct to determine if its consistent with its reserved right to arbitrate the dispute." See *id.* at 233 (listing factors to determine consistency of a party's litigation conduct). In applying these principles, the court found no waiver. First, it concluded that the plaintiff's contention that BM's refusal to pay the requisite fees could not amount to an "implicit waiver by indifference" was meritless, as BM had a reasonable belief that the AAA was not the appropriate forum. There was no clear agreement between the AAA and the parties to use its dispute resolution services, and such a difference of opinion was adequately resolved by the Law Division's order to compel arbitration. Second, the court reviewed BM's litigation conduct and found that it was not dilatory or in bad faith so as to exempt it from the right to arbitration, for reasons including but not limited to, the fact that BM did not delay in making an arbitration request in either occasion, and instead quickly filed motions to dismiss.

Accordingly, the Appellate Division upheld the ruling of the Law Division and enforced the arbitration provision of the DRA against the plaintiffs.

Subsequent Developments

On April 29, 2016, the New Jersey Supreme Court accepted the plaintiffs' appeal.

Related Practices

Technology
E-Commerce
Litigation and Dispute Resolution
Class Action Litigation and Arbitration

Related Client Sector

Technology, Telecommunications & Media