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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2797-21

BENDER ENTERPRISES, INC. and CENTRAL JERSEY ELECTRICAL SALES & SERVICE, INC.,

Plaintiffs,

v.

WEST RAC CONTRACTING CORP.,

Defendant-Appellant,

and

SAPTHAGIRI, LLC,

Defendant-Respondent.

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SAPTHAGIRI, LLC,

Third-Party Plaintiff/ Respondent,

v.

GARY P. KRUPNICK, VICTOR

WEISBERG, R.A., GLOBAL CONTRACTING CONCEPTS, LLC,

Third-Party Defendants/ Appellants.

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Submitted October 12, 2022 – Decided November 17, 2022

Before Judges Messano, Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3359-21.

Forcehelli Deegan Terrana, LLP, attorneys for appellants (Parshhueram T. Misir, on the briefs).

Skolnick Legal Group, PC, attorneys for respondent Sapthagiri, LLC (Martin P. Skolnick, on the brief).

PER CURIAM

Defendant West Rac Contracting Corp. (WRC), and third-party defendants Gary P. Krupnick, Victor Weisberg, R.A., and Global Contracting Concepts, LLC (Global), appeal from the May 6, 2022 order denying their motion to compel arbitration and stay further litigation with defendant/third-party plaintiff, Sapthagiri, LLC (Sapthagiri). The parties are before us a third time. See W. Rac Contr. Corp. v. Sapthagiri, No. A-2355-20 (App. Div. Mar. 28, 2022) (West Rac); Bender Enters. v. W. Rac Contr. Corp., No. A-0948-21 (App. Div. Apr. 8, 2022) (Bender I).

I.

In May 2015, Sapthagiri entered into a contract with WRC to serve as construction manager for a project to construct a hotel on Sapthagiri's property in Fort Lee (the Contract). Article 9 of the Contract, entitled "Dispute Resolution," provides: "Any Claim between [Sapthagiri] and [WRC] shall be resolved in accordance with the provisions set forth in Article 9 and Article 15."[1] Section 15.3.1 provides that "[c]laims, disputes, or other matters in controversy arising out of or related to the Contract . . . shall be subject to mediation as a condition precedent to binding dispute resolution." Section 9.2 provides: "For any [c]laim subject to, but not resolved by mediation pursuant to Section 15.3 of [the Contract], the method of binding dispute resolution shall be . . . [a]rbitration pursuant to section 15.4 . . . ." Section 15.4 includes specific details regarding arbitration procedures and designates the arbitral forum.

In 2018, the parties arbitrated a payment dispute that resulted in an award to WRC. In 2019, WRC again prevailed in arbitration and was awarded more than $500,000. The Law Division confirmed the award in February 2021, and

[1] The Contract broadly defines a "claim" as "a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief," and "other disputes and matters in question between [Sapthagiri] and [WRC] arising out of or relating to the Contract."

Sapthagiri appealed. In West Rac, we rejected Sapthagiri's arguments and affirmed the award. Id. slip op. at 1, 5. We also noted:

> During the arbitration, [Sapthagiri] requested the arbitration award include a reservation of [its] right to litigate in separate proceedings any claims [Sapthagiri] had or might have in the future against [WRC] for indemnification for subcontractor liens on the construction project and any claims [Sapthagiri] might have against [WRC] for a claim [Sapthagiri] asserted arose during the testimony of the final witness, [WRC's] president, concerning a "related party transaction" that is prohibited under the Contract Agreements. In the award, the arbitrator expressly declined [Sapthagiri's] request for the reservation of rights related to those claims.
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> [Id. slip op. at 5.]

We rejected Sapthagiri's contention on appeal that the arbitrator's refusal to specifically preserve its claims required reversal. Id. slip. op. at 7–8. We noted that at oral argument before us, WRC agreed "no claims . . . for indemnification . . . for subcontractor liens on the project, and no claims . . . for violation of the related-party-transaction provision of the Contract Agreements, were presented to the arbitrator for decision or were decided by the arbitrator in the award." Id. slip op. at 23. WRC also "agreed that nothing in the arbitration award, in the litigation concerning the vacatur or affirmance of the award, or in this appeal precludes [Sapthagiri] from pursuing the subcontractor

indemnification or related-party claims in other proceedings." Ibid. Sapthagiri's nascent arbitration claims are the crux of the present dispute.

Before entry of the Law Division's order confirming the arbitration award and our affirmance in West Rac, Sapthagiri filed a complaint against WRC, the third-party defendants and other defendants alleging a conspiracy "to engage in an undisclosed related party transaction." On March 5, 2021, the parties executed a stipulation of dismissal. WRC and the third-party defendants assert the complaint was dismissed because Sapthagiri failed to submit the dispute to mediation as required by the Contract before filing suit. That is apparently the case, because the record includes Sapthagiri's July 2, 2021 mediation statement, which includes allegations of a conspiracy regarding related third-party transactions.[2]

[2] Sapthagiri claimed the Contract required WRC to "promptly notify" Sapthagiri in writing of any specific bidder that WRC recommended if that bidder "may be considered a 'related party'" and obtain Sapthagiri's consent. Sapthagiri contended that, in the summer of 2015, WRC and the third-party defendants made "fraudulent representations" that Sapthagiri relied on to modify existing plans and specifications "to . . . use an Ecospan Composite Floor System," allegedly saving Sapthagiri millions of dollars of construction costs. WRC purchased the Ecospan System through Global, a "related party," without the necessary notice in writing and subsequent consent, and Sapthagiri alleged that related-party purchase resulted in increased costs and delays.

On May 21, 2021, before the mediation commenced, plaintiffs Bender Enterprises, Inc., and Central Jersey Electrical Sales & Service, Inc., two of WRC's subcontractors, filed their complaint. Among other things, plaintiffs alleged WRC breached the subcontracts. They also named Sapthagiri as a defendant because plaintiffs sought to foreclose on construction liens they filed against the property pursuant to the Construction Lien Law, N.J.S.A. 2A:44-1 to -38.

WRC filed an answer that did not include any crossclaim but asserted as an affirmative defense that Sapthagiri was responsible to plaintiffs for any monies owed. Sapthagiri, however, filed an answer that denied plaintiffs' claims, sought to dismiss their construction lien claims, and included a crossclaim against WRC and third-party complaint against Krupnick, Weisberg and Global. Sapthagiri alleged Krupnick—WRC's president, CEO, and sole member of Global—and Weisberg—WRC's project executive—engaged in "a conspiracy . . . to fraudulently obtain Sapthagiri's approval for [WRC] to engage in an undisclosed related party transaction with . . . Global" that violated Sapthagiri's contract with WRC, increased its costs, and delayed the project. In short, the crossclaim and third-party complaint were unrelated to the allegations in plaintiffs' complaint and, instead, resurrected Sapthagiri's allegations that the

arbitrator earlier had declined to consider and were the subject of Sapthagiri's now-dismissed complaint in the Law Division.

Before filing responsive pleadings, WRC and the third-party defendants (hereafter, collectively Defendants) moved to dismiss the crossclaim and third-party complaint pursuant to Rule 4:6-2(e). The appellate record did not include the motion or the parties' argument before the judge on October 8, 2021. We have since requested and received a transcript of the oral argument.

Defendants contended Sapthagiri's claims should be dismissed because they were already adjudicated during the 2019 arbitration or the prior 2018 arbitration; alternatively, Defendants contended the claims must be dismissed under the Entire Controversy Doctrine (ECD), because Sapthagiri knew of the claims but failed to present them during the arbitration.[3] Additionally, Defendants argued that if Sapthagiri's claims were not dismissed under "res judicata" or the ECD, they "need[ed] to go to . . . arbitration."

Notably, while arguing it was never permitted to present its claims in the arbitrations, Sapthagiri contended the Contract's arbitration provision did not apply to the third-party defendants because they were not parties to the Contract.

[3] Defendants' position before the Law Division judge was entirely inconsistent with representations made before us at a later date when WRC argued as respondent in West Rac.

It argued there were "inter-related claims and . . . factual issues, whether it be efficiencies . . . and economies to do it all in one proceeding and to parcel out Sapthagiri and [WRC] to go to arbitration while not having the other parties in arbitration" could result in "duplication or inconsistent results." The judge reserved decision.

On October 18, 2021, the judge denied Defendants' motion to dismiss. In a written statement of reasons supporting the order, the judge applied the indulgent standard required when considering motions to dismiss brought pursuant to Rule 4:6-2(e), see, e.g., Green v. Morgan Prop.'s, 215 N.J. 431, 456 (2013), and concluded that if Sapthagiri's claims were proven, neither the ECD nor res judicata applied to bar the complaint. He found that Defendants' motion was "premature." The judge never addressed the Contract's arbitration provisions.

The judge issued a second order on October 26, 2021 that was unaccompanied by a statement of reasons. It provided only that he denied WRC's "plea for relief as to the arbitration clause in the contract" because "the issue was not thoroughly briefed or presented within the body of the motion, nor was the plea to remove proceedings to arbitration in the proposed form of [o]rder."

Defendants filed an answer to the crossclaim and third-party complaint; they asserted as an affirmative defense that disputes under the Contract were subject to arbitration. Within one week thereafter, Defendants filed a motion to compel arbitration, which Sapthagiri opposed.[4] The judge's November 23, 2021 order denied defendants' motion without any statement of reasons. Defendants appealed.

After recounting much of this procedural history, Bender I, slip op. at 1–5, we concluded:

> [T]he trial court failed to comply with Rule 1:7-4(a) because no findings of fact or conclusions of law regarding defendants' motion to compel arbitration were made. The court simply signed an order denying the motion to compel arbitration. No oral argument was conducted either.
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> [Id. slip op. at 8.]

We reversed and remanded to the trial judge to make adequate findings of fact and conclusions of law and left conduct of the remand to the judge's sound discretion. Id. slip op. at 8–9.

On May 6, 2022, without oral argument but with counsel present, the judge placed his findings and conclusions on the record. The parties have not

[4] Defendants' motion also sought appointment of a specific arbitrator and a stay of the crossclaims and third-party complaint pending arbitration.

supplied us with any submissions they may have made to the judge following our remand. However, in summarizing the parties' positions, the judge for the first time noted Sapthagiri's contention that Defendants waived their right to arbitrate by first bringing a motion to dismiss. The judge found this fact to be "[o]f utmost importance," and, relying on Cole v. Jersey City Medical Center, 215 N.J. 265 (2013), he concluded the "moving defendants waived their right to arbitration when they filed and argued a dispositive motion to dismiss with this [c]ourt." Recognizing "[b]oth parties raised issues . . . as to whether non-signatories of the original contract could compel arbitration," the judge said that issue was now moot. The judge also said that if he had concluded WRC had not waived its right to arbitration, "further discovery" was necessary "to determine the nature of the relationships between the moving defendants and whether those parties could invoke the privilege of a contract they did not execute."

The judge filed his May 6, 2022 order denying arbitration, and Defendants again appealed.

II.

Defendants contend the judge erred as a matter of law when he determined they waived their right to arbitrate under the Contract by first filing a motion to dismiss that did not explicitly seek to compel arbitration. They also argue third-

party defendants "Krupnick and Weisberg are officers of [WRC] and are therefore agents of [WRC]," "Global is a related/sister company of [WRC] and the causes of action [in Sapthagiri's complaint] arise out of the Contract and are intertwined with the terms of the Contract." See, e.g., Hirsch v. Amper Fin, Servs., LLC, 215 N.J. 174, 192 (2013) ("[A]s a matter of New Jersey law, courts properly have recognized that arbitration may be compelled by a non-signatory against a signatory to a contract on the basis of agency principles.").

Sapthagiri counters arguing: the judge's factual findings supported his conclusion that defendants waived any arbitration rights pursuant to Cole's seven-factor test; the third-party defendants have no right to arbitration under the Contract; arbitration of Sapthagiri's claims against WRC would be premature and must await disposition of plaintiffs' complaint; and ordering arbitration "of a limited portion of the larger dispute" with Defendants would "violate the intent and purpose of the [ECD]."

Having considered the arguments in light of the record and appropriate legal principles, we reverse and remand for the judge to enter an order compelling arbitration of Sapthagiri's crossclaim against WRC. The crossclaim as pled has nothing to do with plaintiffs' claims against WRC and Sapthagiri and is premised solely on Sapthagiri's allegations of a conspiracy to force the

purchase of materials from a company related to WRC without notice and consent. We further remand for the judge to permit reasonable discovery necessary to determine third-party defendants' relationships with WRC and decide whether third-party defendants are entitled to invoke the arbitration provisions of the Contract.

III.

Some well-known principles inform our review. We review a trial court's order granting or denying a motion to compel arbitration de novo because the validity of an arbitration agreement presents a question of law. Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020) (citing Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019)). Similarly, "[t]he issue of whether a party waived its arbitration right is a legal determination subject to de novo review." Cole, 215 N.J. at 275 (citing Manalapan Realty LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995); In re S & R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80, 83 (2d Cir. 1998)). "Nonetheless, the factual findings underlying the waiver determination are entitled to deference and are subject to review for clear error." Ibid. (citing Rova Farms Resort, Inc. v. Inv.'s Ins. Co. of Am., 65 N.J. 474, 483–84 (1974)).

A reviewing court must be "mindful of the strong preference to enforce arbitration agreements." Hirsch, 215 N.J. at 186. "Although 'arbitration [is] a favored method for resolving disputes . . . [t]hat favored status . . . is not without limits.'" Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 23 (App. Div. 2021) (alterations in original) (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., PA, 168 N.J. 124, 131–32 (2001)). An arbitration agreement may be modified, superseded, or, in certain circumstances, waived. Cole, 215 N.J. at 276 (citing Wein v. Morris, 194 N.J. 364, 376 (2008)).

Because Cole is the seminal decision regarding waiver of arbitration rights, we quote the Court's language at length.

> Waiver is never presumed. An agreement to arbitrate a dispute "can only be overcome by clear and convincing evidence that the party asserting it chose to seek relief in a different forum." The same principles govern waiver of a right to arbitrate as waiver of any other right.
>
> "Waiver is the voluntary and intentional relinquishment of a known right." The party must "have full knowledge of [its] legal rights and intent to surrender those rights." We have determined that a party need not expressly state its intent to waive a right; instead, waiver can occur implicitly if "the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." Such a waiver must be done "clearly, unequivocally, and decisively." Determining whether a party waived a right is a fact-sensitive analysis.

> [215 N.J. at 276–77 (alteration in original) (citations omitted).]

In conducting this "fact-sensitive analysis," a court "must focus on the totality of the circumstances" with concentration "on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute." Id. at 280. Among other factors, courts should consider:

> (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any.
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> [Id. at 280–81.]

Although the judge considered these seven factors, we conclude he erred as a matter of law by determining Defendants "clearly, unequivocally, and decisively" waived their contractual arbitration rights. Knorr v. Smeal, 178 N.J. 169, 177 (2003) (citing Country Chevrolet, Inc. v. Twp. of N. Brunswick Plan. Bd., 190 N.J. Super. 376, 380 (App. Div. 1983)).

A.

As to factor one, the judge found "there was a significant delay in making the arbitration request." He noted Defendants filed the motion to compel arbitration "more than three and a half months after the cross claim was filed by Sapthagiri." The judge reasoned in the interim, "the parties went through the full litigation process for a motion to dismiss for failure to state a claim. . . . Allowing the litigation process to commence and conducting oral argument prior to the motion to compel arbitration constitutes a significant delay in the eyes of this [c]ourt."

However, when considering whether Defendants raised the arbitration provision in their pleadings as an affirmative defense—Cole factor five—the judge "recognized that in the moving papers on the motion to dismiss, . . . [D]efendants d[id] state to the extent that any of Sapthagiri's claims are not dismissed for the reasons discussed . . . , they should be dismissed because the [Contract] . . . contains a broad mandatory arbitration clause." The judge seemingly failed to recall that he never addressed that issue when he first decided the motion to dismiss or when he denied the motion to compel arbitration without explanation. In addition, it is undisputed that Defendants

asserted the arbitration provisions as an affirmative defense in the very first pleading filed in response to Sapthagiri's crossclaim and third-party complaint.

In Cole, the party seeking to compel arbitration waited twenty-one months after being brought into the suit to request arbitration and never asserted arbitration as one of the thirty-five affirmative defenses in its pleading. 215 N.J. at 281. To the contrary, in Spaeth v. Srinivasan, we held a six-month delay in asserting arbitration rights did not evidence a waiver of those rights. 403 N.J. Super. 508, 516 (2008).

As to Cole factors two and three, the judge correctly characterized Defendants' motion to dismiss as a dispositive motion because if "the [c]ourt had decided the motion in favor of [Defendants], Sapthagiri's claims would have been extinguished by a legal action." He also concluded Defendant's decision to first seek dismissal "can only be seen as a litigation tactic."

Undoubtedly, "[t]he filing of a dispositive motion is a significant factor demonstrating a submission to the authority of a court to resolve the dispute." Cole, 215 N.J. at 282. But as already noted, the judge was fully aware at the time Defendants first moved to dismiss that they had asserted, albeit tangentially, referral to arbitration was appropriate. Indeed, the judge knew that

Sapthagiri and WRC had already participated in two arbitrations under the Contract.

We acknowledge that Defendants' decision to seek dismissal before answering and moving to compel arbitration was part of their "litigation strategy." We do not countenance their sleight-of-hand, arguing as part of their motion to dismiss that Sapthagiri's claims were either decided in the 2019 arbitration or should have been presented in that arbitration when they knew full well the arbitrator refused to consider the claims and acknowledged that fact later at oral argument before us in West Rac. Nevertheless, in their initial motion to dismiss, Defendants proposed arbitration under the Contract was an alternative remedy, and the judge never addressed the issue.

As to Cole factors four and six, the judge explicitly found no discovery had occurred when the arbitration motion was filed. In fact, Sapthagiri had filed its first discovery demands only one day earlier. The judge noted no trial date had been set. Compare Cole, 215 N.J. 281–82 (noting the motion to compel arbitration was filed "three days before the scheduled trial date. By then, as evidenced by the preparation and submission of proposed witness and exhibit lists, interrogatory and discovery readings, and motions in limine, the parties' conduct reflected a commitment to try the case").

Under Cole factor seven, the judge found permitting Defendants to invoke the arbitration provisions of the Contract "would severely prejudice Sapthagiri." He reasoned:

> If this [c]ourt were to determine that the right to arbitration was not waived, it would be forcing Sapthagiri to defend its claims in two separate forums. . . . Allowing the litigation . . . in two separate forums in addition to increasing the chances that Sapthagiri would be unsuccessful in its claims creates further expenses and workload for Sapthagiri, adding to unnecessarily defend[ing] its claims in two separate forums.

Additionally, and somewhat inexplicably, the judge found Sapthagiri was prejudiced because it allegedly did not find out about its potential related-party claims under the Contract until the final day of the 2019 arbitration and was now "left . . . in an unfair position to fairly arbitrate claims."

"'[T]he mere institution of legal proceedings . . . without ostensible prejudice to the other party' does not constitute waiver." Spaeth, 403 N.J. Super. at 514 (quoting Hudik-Ross, Inc. v. 1530 Palisade Ave. Corp., 131 N.J. Super. 159, 167 (App. Div. 1974)). Rather, the Court has defined "prejudice as 'the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—[that] occurs when the party's opponent forces it to litigate an issue

and later seeks to arbitrate that same issue.'" Cole, 215 N.J. at 282 (quoting PPG Indus. v. Webster Auto Parts, 128 F.3d 103, 107 (2d Cir. 1997)).

In West Rac, we affirmed the arbitrator's award, despite his refusal to permit Sapthagiri to pursue the related-party claim, because we recognized Sapthagiri's ability to do so in a subsequent lawsuit or arbitration. Sapthagiri then commenced this suit against Defendants, not once, but twice, dismissing its first complaint to pursue an unsuccessful mediation as required under the Contract. Sapthagiri did not institute the suit again until, in response to plaintiffs' construction lien claims, it filed a wholly unrelated crossclaim against WRC and a wholly unrelated third-party complaint. We fail to see how Sapthagiri has been prejudiced by Defendants' litigation conduct, that is, the filing of a motion to dismiss before filing an answer.

The judge found prejudice if Sapthagiri was forced to litigate its claims in two forums. First, this presumes the third-party defendants are unable to invoke the Contract's arbitration provisions, an issue we have already noted requires further discovery. Second, the claims against Defendants in Sapthagiri's pleading have nothing to do with plaintiffs' lawsuit. In other words, Sapthagiri must defend against plaintiffs' complaint in the Law Division even if its claims against Defendants are arbitrated. Finally, there can be no dispute that

Sapthagiri's claims against WRC fall squarely within the Contract's arbitration provisions, because Sapthagiri alleges WRC breached the Contract by conspiring with the third-party defendants to force changes in the project's design and specifications that increased Sapthagiri's costs to benefit Global, a related entity. Nor was it appropriate to consider that compelling contractual arbitration would somehow "increase[e] the chances that Sapthagiri would be unsuccessful in its claims." Compelling arbitration between Sapthagiri and WRC can hardly be grounds to find "inherent unfairness" to Sapthagiri.

To the extent we have not specifically addressed Sapthagiri's arguments opposing arbitration of their claims against WRC, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(e). We reverse the order denying arbitration of Sapthagiri's crossclaim against WRC.

B.

Non-signatories to a contract containing an arbitration provision may compel arbitration pursuant to various "'traditional principles' of state law [that] allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third[-]party beneficiary theories, waiver and estoppel.'" Hirsch, 215 N.J. at 188 (quoting Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009)). A non-

signatory may also compel arbitration "on the basis of agency principles." Id. at 192.

Here, Section 1.1.2 of the Contract provides "[t]he Contract [d]ocuments shall not be construed to create a contractual relationship of any kind . . . between any persons or entities other than the [Sapthagiri] and the [WRC]." Given this express language, it is unlikely that the third-party defendants were intended beneficiaries of the Contract's arbitration provision. See, e.g., Hojnowski ex rel. Hojnowski v. Vans Skate Park, 375 N.J. Super. 568, 576 (App. Div. 2005) ("[T]he real test is whether the contracting parties intended that a third party should receive a benefit which might be enforced in the courts." (alteration in original) (quoting Borough of Brooklawn v. Brooklawn Hous. Corp., 124 N.J.L. 73, 77 (E.&A. 1940))).

However, the judge alluded to the need to conduct some limited discovery to decide whether the third-party defendants could, under principles of agency or other state law principles, enforce the Contract's arbitration provisions. We agree with that analysis because the record currently consists of little more than the pleadings. We therefore remand the matter to the trial judge to conduct whatever limited additional discovery may be necessary to decide whether the third-party defendants may also enforce the Contract's arbitration provisions. If

the court concludes they may do so and if the court further concludes Sapthagiri's claims against the third-party defendants "aris[e] out of or related to the Contract," then it shall enter an order compelling arbitration of Sapthagiri's third-party complaint.

C.

"Under section 3 of the [Federal Arbitration Act (FAA)], the court must stay an arbitrable action pending its arbitration." Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560, 577 (App. Div. 2007) (citing 9 U.S.C.A. § 3). "Under the FAA an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." Ibid. (citing Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923, 938 (3d Cir. 1985)). "Although not mandatory, where significant overlap exists between parties and issues, 'third party litigation [that] involves common questions of fact result[s] in a stay of the entire action pending arbitration.'" Ibid. (second alteration in original) (citing Crawford v. W. Jersey Health Sys., 847 F. Supp. 1232, 1243 (D.N.J. 1994)).

If the judge decides Krupnick, Weisberg and Global may invoke the arbitration provisions of the Contract between WRC and Sapthagiri, he shall enter an order compelling arbitration and stay Sapthagiri's crossclaim and third-

party complaint pending completion of the arbitration. If the judge decides the third-party defendants may not compel arbitration with Sapthagiri, because Sapthagiri's claims demonstrate "significant overlap . . . between parties and issues" and "involve[] common questions of fact," the judge shall enter an order staying Sapthagiri's third-party complaint pending completion of the arbitration between WRC and Sapthagiri.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION