SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2813-22

JULIA ROSE NAWROCKI, individually and on behalf of all others similarly situated,

Plaintiff-Respondent,

v.

J&J AUTO OUTLET, trading as AUTO CONCEPTS, MICHAEL GARRO and JOE GALLO,

Defendants-Appellants.

Argued October 18, 2023 – Decided November 3, 2023

Before Judges Currier and Vanek.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-0221-23.

Peter V. Koenig argued the cause for appellants (O'Toole Scrivo, LLC, attorneys; Steven A. Weiner, of counsel; Peter V. Koenig, on the briefs).

Lewis G. Adler argued the cause for respondent (Lewis G. Adler and Perlman-DePetris Consumer Law,

attorneys; Lewis G. Adler, Lee M. Perlman, of counsel;
Paul DePetris, of counsel and on the brief).

PER CURIAM

Defendants J&J Auto Outlet trading as Auto Concepts (Auto Concepts), Michael Garro, and Joe Gallo appeal from a March 31, 2023 order denying their motion to dismiss plaintiff Julia Nawrocki's complaint and to compel arbitration.[1] Defendants also appeal from a May 12, 2023 order denying their motion for reconsideration. We affirm.

In September 2022, plaintiff bought a used 2012 Ram 1500 truck from Auto Concepts. Gallo is the owner of Auto Concepts and Garro is employed as a salesperson. Plaintiff signed several documents relating to the sale including a Buyer's Order, a Buyers Guide, and a Service Contract.

The only document containing an arbitration clause is a Service Contract between plaintiff and United Service Protection Corporation (USPC). Auto Concepts was authorized to sell the Service Contract pursuant to an agreement with Royal Administration Services, Inc. (Royal) dated January 4, 2019, titled "Automobile Vendor Agreement for Administrative Services" (the Vendor

[1] The trial court also denied plaintiff's cross-motion for partial summary judgment by order entered on March 31, 2023. That order has not been appealed.

Agreement). The Vendor Agreement does not address the arbitration clause, nor does it state the Service Contract applies to Auto Concepts.

The Service Contract includes a definitions section which states in part as follows:

> **This Service Contract is an agreement between You and Us. We, Us, Our** and **Provider** refers to United Service Protection Corporation . . . . The Provider is the party responsible to You for the benefits under this Service Contract, except as noted in the State Requirement section located at the end of this Service Contract. **You, Your and Contract Holder** refers to You, the purchaser of this Service Contract and the owner of the Vehicle described in the Registration Page of this Service Contract.
>
> [(Emphasis in original).]

The Service Contract also contains a section regarding arbitration of disputes which states in part as follows:

> **9. ARBITRATION**
>
> **READ THE FOLLOWING ARBITRATION PROVISION CAREFULLY. IT LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO OBTAIN RELIEF OR DAMAGES THROUGH COURT ACTION.**
>
> To begin Arbitration, either You or We must make a written demand to the other party for Arbitration. The Arbitration will take place before a single arbitrator. It will be administered in keeping with the Expedited Procedures of the Commercial Arbitration Rules

> ("Rules") of the American Arbitration Association ("AAA") in effect when the Claim is filed. . . . The filing fees to begin and carry out Arbitration will be shared equally between You and Us. . . . Unless You and We agree, the arbitration will take place in the county and state where You live. The Federal Arbitration Act, 9 U.S.C. § 1, et seq., will govern and no state, local or other arbitration law will apply. **You AGREE AND UNDERSTAND THAT this Arbitration provision means that You give up Your right to go to court on any Claim covered by this provision.** You also agree that any Arbitration proceeding will only consider Your claims. Claims by, or on behalf of, other individuals will not be arbitrated in any proceeding that is considering Your Claims. . . . In the event this Arbitration provision is not approved by the appropriate state regulatory agency, and/or is stricken, otherwise deemed unenforceable by a court of competent jurisdiction, You and We specifically agree to waive and forever give up the right to a trial by jury. Instead, in the event any litigation arises between You and Us, any such lawsuit will be tried before a judge, and a jury will not be impaneled or struck.
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> [(Emphasis in original).]

The Service Contract also states in part as follows: The Registration Page and this Service Contract constitute the entire agreement between You and the Provider and no other documents are legal and binding unless provided to You by the Administrator or Provider.

Royal is the administrator of the Service Contract. The only reference to Auto Concepts in the Service Contract is the identification of the dealer on the

Contract Registration Page and in the definition of "Dealer" as the party that sold plaintiff the Service Contract. There was no separate cost for the Service Contract.

The Buyers Guide states there is a three months/3,000 mile "Royal Pref Warranty" on the vehicle. There were no other options on the Buyers Guide for non-dealer warranties and service contracts selected. Auto Concepts asserts the dealer warranty referenced in the Buyers Guide is the Service Contract.

After purchasing the vehicle, plaintiff began experiencing mechanical issues which she reported to Auto Concepts. Auto Concepts serviced the car, but the mechanical problems continued. Plaintiff and Auto Concepts communicated regarding issues with the vehicle through the end of 2022 when plaintiff alleges the dealer stopped returning her calls and messages.

On January 23, 2023, plaintiff filed a twelve-count putative class action complaint alleging, among other things, that defendants Auto Concepts, Gallo, and Garro violated her rights under the Consumer Fraud Act, N.J.S.A. 56:8-1 to -227; the Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A 56:12-14 to -18; the Automotive Sales Practices Regulations, N.J.A.C. 13:45A-26B.1 to -26B.4; and the Motor Vehicle Advertising Practices Regulations, N.J.A.C.

13:45A-26A.1 to -26A.10. The complaint did not name USPC or Royal as defendants.

On February 24, 2023, defendants filed a request with the American Arbitration Association to arbitrate the matter. On March 3, 2023, defendants filed a motion to dismiss the complaint and to compel arbitration seeking to enforce the arbitration provision in the Service Contract. The trial court denied the motion on March 31, 2023, finding the dispute between the parties arose from the purchase agreement rather than the Service Contract and there was no arbitration clause in the purchase agreement. On May 12, 2023, the trial court denied defendants' motion for reconsideration of the March 31, 2023 order, stating that it could "not find any basis to utilize the arbitration provision in the Service Contract with United Service Protection Corporation" to compel arbitration regarding the contract between plaintiff and defendants.

Our review on appeal is limited to the trial court's determination that the arbitration provision in the Service Contract is not binding on the dispute between plaintiff and defendants. We apply a de novo standard when reviewing a trial court's determination of the enforceability of a contract. Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207 (2019) (citing Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013)). "The enforceability of arbitration provisions

is a question of law; therefore, it is one to which we need not give deference to the analysis by the trial court . . . ." Ibid. (citing Morgan v. Sanford Brown Inst., 225 N.J. 289, 303 (2016)).

The Federal and New Jersey Arbitration Acts express a general policy favoring arbitration. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 440 (2014); see also 9 U.S.C. §§ 1 to 16; N.J.S.A. 2A:23B-1 to -32. Arbitration agreements are governed by principles of contract law. In Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301 (2019), the Supreme Court stated:

> In this state, when called on to enforce an arbitration agreement, a court's initial inquiry must be—just as it is for any other contract—whether the agreement to arbitrate all, or any portion, of a dispute is 'the product of mutual assent, as determined under customary principles of contract law.'
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> [Id. at 319 (quoting Atalese, 219 N.J. at 442).]

In Atalese, the Court further stated, "because arbitration involves a waiver of the right to pursue a case in a judicial forum, 'courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.'" 219 N.J. at 442-43 (internal citation omitted). Consequently, the contractual waiver of a right to pursue a statutory remedy in court "must be clearly and unmistakably established." Id.

at 444 (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001)).

The Supreme Court has held when the validity of an arbitration clause is in dispute, we must look to the plain language of the contract to determine the parties' intent. See Roach v. BM Motoring, LLC, 228 N.J. 163, 174 (2017) (holding courts must determine the parties' intentions when construing the language of the arbitration clause). We apply the "basic tenet of contract interpretation [] that contract terms should be given their plain and ordinary meaning." Kernahan, 236 N.J. at 321.

In this case, the trial court found the requisite mutual assent to arbitrate was lacking between plaintiff and defendants since only plaintiff and USPC were parties to the Service Contract, which is the sole document containing an arbitration clause. We agree. By its plain terms, the Service Contract is an agreement between only plaintiff and USPC. Nor is Auto Concepts a party to the Service Contract simply because it signed as a dealer representative. The plain language of the Service Contract does not indicate that the arbitration clause is applicable to defendants.

Defendants also argue the Service Contract and Buyers Guide read together constitute an agreement binding upon plaintiff and Auto Concepts

inclusive of the mandatory arbitration provision. However, the Service Contract sets forth that the Contract Registration Page and that contract itself constitute the entire agreement between plaintiff and USPC. Based on this express language, the Service Contract cannot be considered interwoven with other documents relating to the purchase of the vehicle which were signed by plaintiff and Auto Concepts for purposes of compelling plaintiff to arbitrate the claims against defendants.

Even if we were to read the documents as a collective whole as suggested by defendants, the arbitration provision is not enforceable as to plaintiff's statutory claims against them based upon application of New Jersey law. The absence of any language in the arbitration agreement constituting a waiver of plaintiff's statutory rights is fatal to its enforceability as to the claims against defendants which primarily assert violations of consumer protection statutes. The arbitration clause does not contain any plain language objectively understandable to a reasonable consumer that expressly waives the consumer's ability to litigate statutory rights. Since "'[a]n effective waiver requires a [consumer] to have full knowledge of [her] legal rights' before she relinquishes them," the arbitration clause at issue is not tantamount to a waiver of plaintiff's statutory rights to sue Auto Concepts and the individual defendants. Atalese,

219 N.J. at 447 (alterations in original) (citing Knorr v. Smeal, 178 N.J. 169, 177 (2003)).

The Supreme Court has also made it clear that claims that are tangential to those covered under an arbitration clause are not required to be resolved through arbitration. "Stated simply, we reject intertwinement as a theory for compelling arbitration when its application is untethered to any written arbitration clause between the parties, evidence of detrimental reliance, or at a minimum an oral agreement to submit to arbitration." Hirsch, 215 N.J. at 192-93. Therefore, any argument that the arbitration clause applies to plaintiff's complaint against defendants based upon being intertwined with a claim that could be subject to arbitration with USPC is foreclosed under New Jersey law.

We also reject defendants' argument that the arbitration clause should be enforceable as to the claims against them based upon agency principles. "An agency relationship is created 'when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.'" N.J. Lawyers' Fund for Client Prot. v. Stewart Title Guar. Co., 203 N.J. 208, 220 (2010) (internal citation omitted). "[A]rbitration may be

compelled by a non-signatory against a signatory to a contract on the basis of agency principles." Hirsch, 215 N.J. at 192. The scope of an agent's authority is limited to the actual, implied, and apparent authority it had been granted. See Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 27 (App. Div. 2021) (noting that an agent may only bind his principal for such acts that are within his actual or apparent authority).

Defendants assert the Buyers Guide establishes they accepted the Service Contract as agent for USPC and Royal as well as on their own behalf. However, defendants have not pointed to any contractual language to establish they have been designated as the agent of USPC for purposes other than selling the Service Contract. The Vendor Agreement between Auto Concepts and Royal states the dealer was authorized to sell the Service Contract and was required to collect and remit the price of the contract in "a fiduciary trust capacity" for Royal. This language establishes Auto Concepts as a conduit for payment of the cost of the Service Contract to Royal, rather than as an agent for USPC generally or for purposes of enforceability of the arbitration clause.

Defendants also fail to offer any specific facts to support the theory that they are intended third-party beneficiaries to the Service Contract, either individually or collectively. "The principle that determines the existence of a

third[-]party beneficiary status focuses on whether the parties to the contract intended others to benefit from the existence of the contract, or whether the benefit so derived arises merely as an unintended incident of the agreement." Broadway Maint. Corp. v. Rutgers, State Univ., 90 N.J. 253, 259 (1982).

Defendants assert the Service Contract was clearly for their benefit because the agreement fulfilled the contractual obligation to provide a dealer's warranty under the Buyers Guide. Without any specific facts in the record to establish it was the intention of plaintiff and USPC to benefit each defendant, this court cannot conclude defendants are intended third-party beneficiaries to the Service Contract and its arbitration clause. We reject any argument that the arbitration clause is applicable to defendants as an unintended incident of the Service Contract under Atalese which requires a specific waiver of statutory rights in order to compel arbitration.

We review a trial judge's decision on whether to grant or deny a motion for reconsideration for an abuse of discretion. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); Kornbleuth v. Westover, 241 N.J. 289, 301 (2020). In addition to affirming the trial court's denial of defendants' motion to dismiss the complaint and to compel arbitration, we also conclude the trial court did not abuse its discretion by denying defendants' motion for reconsideration of the

March 31, 2023 order. Any new evidence presented in the motion record on reconsideration, including the text messages between plaintiff and defendants, did not warrant modification of the order denying the motion.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION