NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2456-21

DARO M. LARGOZA, M.D., MARIA P. LARGOZA, M.D., THE ESTATE OF ROMEO P. PINEDA, ROSABELLA S. PINEDA, DARO MABEL REALTY, LLC, and NORTHWESTERN RESIDENCE, INC., a New Jersey Corporation, a/k/a MERRIAM CASA BELLA,

Plaintiffs-Appellants,

v.

FKM REAL ESTATE HOLDINGS, INC., FE MARTINEZ CALIOLIO, a/k/a FE MARTINEZ, ROLANDO DAVID, a/k/a ROLAND DAVID, a/k/a YOLANDO DAVID, a/k/a R. DAVID, R DAVID & ASSOCIATES, PA, LLC, ERNEST G. IANETTI, ESQ., MITCHELL H. BERGER, ESQ., MITCHELL H. BERGER, PA, HAPPY VALLEY MANOR, INC., CUSHMAN & WAKEFIELD, PLC, a/d/b/a CUSHMAN & WAKEFIELD OF CONNECTICUT, INC., CLIFFORD LEE GREENFIELD, REAL ESTATE VALUATION SERVICES, LLC, PAUL MESSINA, NATIONWIDE CAPITAL, FIDELITY NATIONAL TITLE INSURANCE COMPANY,

APPROVED FOR PUBLICATION

November 21, 2022

APPELLATE DIVISION

and FOUNDATION TITLE, LLC,

Defendants,

and

CELTIC BANK CORPORATION,

Defendant-Respondent.

Argued September 29, 2022 – Decided November 21, 2022

Before Judges Vernoia, Firko and Natali.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Sussex County, Docket No. L-0531-20.

Kevin M. Kilcommons and Leonard J.C. Hardesty, Jr., argued the cause for appellants (Kilcommons Law, PC, and Hardesty Law Group, PC, attorneys; Kevin M. Kilcommons and Leonard J. C. Hardesty, Jr., on the brief).

Michael C. Klauder argued the cause for respondent (Cole Schotz, PC, attorneys; James T. Kim and Michael C. Klauder, of counsel and on the brief; Jeffery M. Sauer, on the brief).

The opinion of the court was delivered by

NATALI, J.A.D.

Plaintiffs appeal, pursuant to leave granted, from two Law Division orders. The first dismissed their multi-count complaint against defendant Celtic Bank Corporation under Rule 4:6-2(e) based on a forum selection clause

which required plaintiffs to submit to the jurisdiction of Salt Lake County, Utah, where Celtic is headquartered, in the event plaintiffs filed a "lawsuit" against Celtic. They also challenge a subsequent order denying their motion for reconsideration.

Before us, plaintiffs argue the court mistakenly enforced the forum selection clause because they properly pled that Celtic fraudulently induced them to enter the agreement which contained that provision. Having done so, they maintain the contract was void ab initio thereby rendering the forum selection clause inoperative. Second, they contend enforcing the clause would be contrary to New Jersey public policy, as expressed in the entire controversy doctrine. Plaintiffs further maintain compelling them to litigate their claims against Celtic in Utah, while they prosecute similar claims against the remaining defendants in New Jersey, would be unduly expensive and inconvenient for them and their witnesses. Finally, plaintiffs argue Celtic belatedly asserted its rights under the forum selection clause and consented to jurisdiction in New Jersey by filing a motion to dismiss based on New Jersey law, thereby waiving its right to enforce the provision.

Plaintiffs' attempt to avoid enforcement of the forum selection clause by alleging Celtic fraudulently induced them into the operative contract fails as they never contended, in their pleadings or before us, that Celtic improperly

obtained their assent to that provision specifically, a necessary requirement to vitiate such clauses under the majority rule. Plaintiffs also improperly rely on the entire controversy doctrine, which prevents enforcement of a forum selection clause in certain limited circumstances where the party subject to the clause is inseverable from the ongoing litigation, a condition not present here. Plaintiffs further fail to demonstrate any inconvenience sufficient to circumvent the forum selection clause, which was contained in a negotiated contract between sophisticated parties. With respect to their waiver argument, however, we determine a remand is necessary as the court did not make required factual findings and legal conclusions on this issue.

I.

Plaintiffs, Daro M. Largoza, M.D. and Maria P. Largoza, M.D., through Northwestern Residence, Inc. and Daro Mabel Realty, LLC, purchased a residential health care facility in Newton, from defendants Fe M. Caliolio, FKM Real Estate Holdings, Inc., and Happy Valley Manor, Inc. The transaction included a contract for the real property (Merriam Property) for a purchase price of $2,500,000 and an Asset Purchase Agreement for the assets of the business for $150,000. To procure financing for the transaction, defendants Roland David and Caliolio referred plaintiffs to Celtic, from which they applied for a $2,125,000 Small Business Administration (SBA) loan.

As part of the loan approval process, Celtic retained defendant Cushman & Wakefield to independently appraise the Merriam Property. Plaintiffs allege Celtic inappropriately instructed Cushman to appraise the property as an assisted living facility and assert the appraised value would have been significantly lower had it been correctly valued as a residential health care facility. In support of this allegation, plaintiffs rely upon the engagement letter between Celtic and Cushman that stated: "[i]f the business is a gas station, hotel, car wash, restaurant or assisted living facility the appraisal must include the good will value and equipment value (as applicable) in addition to the separate real estate value." (Emphasis added). Cushman appraised the property as an assisted living facility and valued the property at $2,700,000. An underwriter for Celtic later reviewed the Cushman appraisal and suggested adjusting the value downward to $2,370,000. Plaintiffs maintain, however, that Celtic never disclosed this adjustment to them.

Celtic sent plaintiffs a commitment letter informing them that they had been approved for an SBA loan in the amount of $2,125,000. As a condition to close the loan, the commitment letter included a provision requiring the "[l]oan to value not to exceed [eighty-five percent]." Plaintiffs allege they relied on the commitment letter as confirmatory proof the Merriam Property was appraised at a value of $2,500,000, at a minimum.

The parties subsequently executed a business loan agreement identifying Northwestern Residence, Inc., and Daro Mabel Realty, LLC, as the borrowers. Both the loan agreement and accompanying mortgage agreement contained an identical forum selection clause, referred in the agreements as a "Choice of Venue" provision, that stated: "[i]f there is a lawsuit, [plaintiffs] agree[] upon [l]ender's request to submit to the jurisdiction of the courts of Salt Lake County, State of Utah." The agreements contained a severability provision, which preserved the remaining terms of the agreement should any other provision therein be held illegal, invalid, or unenforceable by a court of competent jurisdiction. The agreements also contained an anti-waiver provision which maintained all Celtic's rights under the contract absent a waiver signed in writing.

In November 2019, a former employee of the business advised plaintiffs that David and Caliolio had been stealing from the company. Plaintiffs claim their investigation confirmed these allegations and exposed misrepresentations which they contend induced them into purchasing the Merriam Property. Plaintiffs further contend their audit of the business uncovered that Caliolio and David defrauded them into executing two additional notes for a total of $1,400,000.

Plaintiffs thereafter filed an eighteen-count complaint against defendants, which included a negligent misrepresentation claim against Celtic. Before defendants responded, plaintiffs filed a first amended complaint that added an equitable fraud claim against Celtic seeking recission of the loan agreement due to Celtic's alleged overinflation of the property's value.

Rather than invoking the forum selection clause, on April 8, 2021, over three months after plaintiffs filed the amended complaint, Celtic's counsel sent plaintiffs a letter pursuant to Rule 1:4-8(b) contending the claims asserted against it were frivolous under New Jersey law and demanding plaintiffs withdraw them. Two weeks later, Celtic filed a Rule 4:6-2(e) motion to dismiss the negligent misrepresentation and equitable fraud claims. Relying primarily on United Jersey Bank v. Kensey, 306 N.J. Super. 540, 552 (App. Div. 1997), it contended, as a matter of New Jersey law, banks do not owe borrowers a fiduciary duty to disclose information concerning the financial viability of the borrower's transaction. After considering the parties' submissions and oral arguments, the court entered an order granting Celtic's application and dismissing plaintiffs' claims against it without prejudice.

Plaintiffs filed a third amended complaint in November 2021, alleging eleven new claims against Celtic and repleading the two original claims. Plaintiffs contended Celtic engaged in a civil conspiracy to defraud plaintiffs

when it "knowingly directed that the business be assessed as an [a]ssisted [l]iving [f]acility, rather than a [r]esidential [h]ealth [c]are [f]acility, in order to overvalue the property and issue a high dollar, high commission loan to the [p]laintiffs" and "knowingly misclassified the business as an [a]ssisted [l]iving [f]acility in order to obtain an insurance policy under the SBA 7(a) loan program."

Plaintiffs claimed they provided Celtic with the contract for the Merriam Property which "was expressly conditioned on the [p]laintiffs Largozas being able to procure an SBA loan," as well as licensing information clearly identifying the property as a residential health care facility. They further contended "it is common knowledge amongst SBA lenders . . . that residential health care facilities are regulatorily ineligible for SBA 7(a) financing." According to plaintiffs, Celtic knowingly falsified their lending applications to ensure plaintiffs received the SBA loan despite their ineligibility.

Plaintiffs also maintained Celtic has since improperly accelerated the loan, which they argue represents Celtic's "direct attempt to monetize the SBA guarantee solely to the financial benefit of [Celtic], and in furtherance of the fraud committed on the [p]laintiffs." Plaintiffs contended Celtic "acted in concert" with other defendants "to commit unlawful acts[,] or committed lawful acts by unlawful means: to wit, they committed lending fraud in the

said transaction to obtain the loan proceeds to pay[] off their many debts, and/or to enrich themselves at the Largozas' expense."

Plaintiffs also pled their loan agreement with Celtic was void ab initio and voidable, contending they were regulatorily ineligible for SBA financing and, thus, the agreement "violate[d] the law and offend[ed] public policy." Plaintiffs further argued the contracts were voidable due to Celtic's "fraud and misrepresentation," which denied them the "ability to make a fully informed, educated decision on the terms of the contracts."

On November 11, 2021, Celtic sent plaintiffs a letter contending their new claims were similarly frivolous and violated Rule 1:4-8. Significantly, Celtic also asserted, for the first time, plaintiffs' "contract" claims failed, in part, because the forum selection clause required claims arising from the loan agreement to be adjudicated in Utah. It thereafter filed a second Rule 4:6-2(e) motion and sought sanctions under Rule 1:4-8(b) and N.J.S.A. 2A:15-59.1.

Following oral argument, the court concluded the forum selection clause applied to all plaintiffs' causes of action against Celtic and entered an order dismissing plaintiffs' claims. The court found plaintiffs were provided with reasonable notice of the forum selection clause, enforcement of the clause did not offend public policy, "[t]here [was] no appreciable inconvenience that

would occur if these claims were to be litigated in Utah," and the claims were separate and distinct from plaintiffs' claims against the remaining defendants.

Plaintiffs filed a motion for reconsideration and argued the court erred in enforcing the forum selection clause because the contract between the parties was illegal from the beginning and therefore void. They also asserted enforcing the clause, particularly as to their conspiracy claims, would result in piecemeal litigation contrary to the entire controversy doctrine. Plaintiffs further argued Celtic waived its rights under the clause by belatedly objecting to jurisdiction and failing to raise the argument in their initial motion to dismiss. Finally, they contended enforcing the clause would be unreasonable and effectively deny them their day in court.

After considering the parties' oral arguments, the court entered an order denying plaintiffs' application. In an oral opinion, the court explained plaintiffs have presented "no facts . . . that persuade[] [the court] that . . . these claims against [Celtic] need to be joined in this case in New Jersey." It further noted that no facts were alleged to "bring[] [Celtic] into the web of a conspiracy to hoodwink the plaintiffs into going forward with this loan."

The court also rejected plaintiffs' contention that the contract was illegal as "circular" because the plaintiffs voluntarily entered into the contract and participated in processing the application. In its accompanying written

opinion, the court similarly emphasized it was "[p]laintiffs' position that the [l]oan [d]ocuments constitute[d] a valid and binding contract between [p]laintiffs and [Celtic]," and plaintiffs "admitted by way of their pleadings that a valid and binding contractual agreement existed between the parties."

As to the entire controversy doctrine, the court explained plaintiffs had not asserted their claims against Celtic in a prior action, and Celtic was dismissed on jurisdictional grounds, not after an adjudication on the merits. The court further noted, despite "similarities surrounding the facts between all defendants in this case, [p]laintiffs have provided no evidence, apart from bald assertions, that the [Celtic] defendants are necessary to this matter." The court concluded the claims asserted against defendant were "separate contractual claims that, as the adage goes, are 'not the main event.'" The court did not expressly address, in its oral decision or written opinion, plaintiffs' contention that Celtic waived its rights under the forum selection clause.

Although it denied plaintiffs' reconsideration motion, the court amended its initial order such that the dismissal of plaintiffs' claims against Celtic was without prejudice. Plaintiffs thereafter filed a motion for leave to appeal, which we granted and, in doing so, limited our review to the "issues of jurisdiction, the forum selection clause, and the entire controversy doctrine." We also instructed the court to retain jurisdiction "to permit, in its discretion,

discovery on unrelated issues while the interlocutory appeal is pending." Largoza v. FKM Real Estate Holdings, Inc., No. AM-0417-21 (App. Div. Apr. 14, 2022) (slip op. at 2).

II.

We review a court's ruling on the legal enforceability of a forum selection clause de novo. Hoffman v. Supplements Togo Mgmt., LLC, 419 N.J. Super. 596, 605 (App. Div. 2011). "[F]orum selection clauses are prima facie valid and enforceable in New Jersey." Caspi v. The Microsoft Network, L.L.C., 323 N.J. Super. 118, 122 (App. Div. 1999) (quotation omitted). "[T]he enforceability of forum selection clauses is governed by requirements of notice, and reasonableness." Copelco Capital, Inc. v. Shapiro, 331 N.J. Super. 1, 5 (App. Div. 2000) (citations omitted). Forum selection clauses "will be enforced unless the party objecting thereto demonstrates (1) the clause is a result of fraud or overweening bargaining power, or (2) the enforcement in a foreign forum would violate strong public policy of the local forum, or (3) enforcement would be seriously inconvenient for the trial." McNeill v. Zoref, 297 N.J. Super. 213, 219 (App. Div. 1997) (quoting Wilfred MacDonald Inc. v. Cushman Inc., 256 N.J. Super. 58, 63-64 (App. Div. 1992) (citations omitted) (emphasis omitted)).

A.

Plaintiffs first argue the forum selection clause is unenforceable because it is embedded in an illegal contract that is void ab initio and voidable due to Celtic's material misrepresentations. We disagree.

"A void contract is '[a] contract that is of no legal effect, so that there is really no contract in existence at all. A contract may be void because it is technically defective, contrary to public policy, or illegal.'" D'Agostino v. Maldonado, 216 N.J. 168, 194 n.4 (2013) (alteration in original) (quoting Black's Law Dictionary 374 (9th ed. 2009)); see also Vasquez v. Glassboro Serv. Ass'n, Inc., 83 N.J. 86, 98 (1980) ("No contract can be sustained if it is inconsistent with the public interest or detrimental to the common good."). A contract may also be deemed void if it was made under circumstances such as fraud or mistake. See Dunkin' Donuts of America, Inc. v. Middletown Donut Corp., 100 N.J. 166, 183 (1985).

Additionally, "under ordinary contract princip[le]s, transactions entered into in reliance upon material misrepresentations are voidable." Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 325 (D.N.J. 1993). "If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in

relying, the contract is voidable by the recipient." Restatement (Second) of Contracts § 164(1) (1981).

As noted, forum selection clauses are prima facie enforceable, Caspi, 323 N.J. Super. at 122, unless the objecting party establishes that the clause is a product "of fraud or overweening bargaining power," Wilfred MacDonald Inc., 256 N.J. Super. at 63. We must therefore determine whether plaintiffs' generalized allegations of fraud are sufficient to invoke this exception. To resolve that issue, we examine analogous authority from the United States Supreme Court and our Supreme Court in the context of arbitration agreements, as well as authority from other jurisdictions that have answered this precise question. Based on those authorities, which we discuss below, we conclude plaintiffs' general fraud allegations and claims of illegality, even if true, cannot alone serve to invalidate the parties' forum selection clause.

In Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967), the United States Supreme Court, relying on the Federal Arbitration Act, concluded that arbitration clauses are severable from other provisions in the contracts in which they are embedded, despite general fraud in the inducement claims, unless such claims pertain to the arbitration clause specifically. Similarly, in Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 72 (2010), the Court enforced a provision in an arbitration agreement delegating

the question of arbitrability to the arbitrator despite a challenge to the validity of the contract as a whole.

Our Supreme Court followed Prima Paint and Rent-A-Center in Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 195-96 (2019), and concluded that the plaintiffs' claims were subject to an enforceable arbitration agreement. In Goffe, the plaintiffs "attack[ed] the sales contracts in their entirety, challenging their formation process and arguing that they [were], at best, unenforceable." Id. at 195. Plaintiffs did not, however, challenge the validity of the arbitration clause specifically. Ibid. Accordingly, the Court held that "the arbitration agreement [was] severable and enforceable" and required the plaintiffs to arbitrate their claims. Id. at 216-17. Similarly, in Van Syoc v. Walter, 259 N.J. Super. 337, 339 (App. Div. 1992), we enforced an arbitration clause despite allegations of fraudulent inducement as to the contract, reasoning "[u]nless the arbitration provision itself was a product of fraud, the election should be enforced."

No published New Jersey decisions have extended the Prima Paint or Goffe courts' holdings to forum selection clauses.[1] The United States Supreme

[1] In Wilfred MacDonald Inc., 256 N.J. Super. at 64, the court enforced a forum selection clause and, in doing so, noted "the trial judge did not find fraud or overreaching in connection with [that provision]." See also Caspi, 323 N.J. Super. at 122 (explaining the plaintiffs' consent to the forum selection

Court in Scherk, however, held that generalized allegations of fraud are insufficient to invalidate a forum selection clause:

> In . . . Bremen,[2] we noted that forum-selection clauses "should be given full effect" when "a freely negotiated private international agreement (is) unaffected by fraud . . . ." This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable. Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion.
>
> [417 U.S. 506, 519 n.14 (1974) (second and third alterations in original) (quoting Bremen, 407 U.S. at 13).]

Additionally, the majority approach adopted by jurisdictions that have considered this issue applies Prima Paint to forum selection clauses. See Karon v. Elliot Aviation, 937 N.W.2d 334, 341-43, 346 n.7 (Iowa 2020) (describing the majority and minority approaches and joining the majority); Energy Claims Ltd. v. Catalyst Inv. Grp. Ltd., 325 P.3d 70, 83-85 (Utah 2014)

---

clause "[did] not appear to be the result of fraud or overweening bargaining power"). Neither Wilfred MacDonald Inc., nor Caspi, however, addressed the precise issue before us: whether the fraud exception to enforcing a forum selection clause applies only where allegations of fraud specifically relate to the clause itself. We also note those courts did not cite Prima Paint or Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.14 (1974), and both cases pre-date Goffe.

[2] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 (1972).

(describing the majority and minority approaches and joining the minority). For example, in Karon, the Iowa Supreme Court analyzed "whether Prima Paint applies to a forum selection clause," noting that "a number of state appellate courts have followed the United States Supreme Court's lead in ruling that forum-selection clauses are enforceable unless the fraud goes specifically to the clause." 937 N.W.2d at 339, 341.

Against plaintiffs' challenge that their purchase agreement was procured by fraud and void ab initio, the Karon court adopted the majority approach and held, "the plaintiffs' general allegations of fraud in the inducement are insufficient to avoid enforcement" of the parties' forum selection clause. Id. at 346-47; see also Ex parte PT Sols. Holdings, LLC, 225 So. 3d 37, 45 (Ala. 2016) ("[The plaintiff] is certainly entitled to argue that the contract never became effective, but the argument must be raised in the forum dictated by the forum-selection clause because the possible invalidity of the contract as a whole does not negate enforcement of the forum-selection clause."); Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C., 67 A.3d 373, 380 (Del. 2013) ("If the forum selection clause, standing alone, is found to be valid, the court having jurisdiction over the dispute is to decide whether the contract is enforceable or void ab initio."); Brandt v. MillerCoors, LLC, 993 N.E.2d 116, 122 (Ill. App. Ct. 2013) ("[I]n order to invalidate the clause on the ground of

fraud and overreaching, the fraud alleged must be specific to the forum selection clause itself." (quotation omitted)); Original Pizza Pan v. CWC Sports Grp., Inc., 954 N.E.2d 1220, 1223 (Ohio Ct. App. 2011) ("[A] general claim of fraud or misrepresentation as to the entire contract does not affect the validity of the forum selection clause." (quotation omitted)); Provence v. Nat'l Carriers, Inc., 360 S.W.3d 725, 730 (Ark. 2010) (holding parties "must plead fraud in the inducement of the forum-selection clause itself to avoid its application. Generalized allegations of fraud with respect to the inducement of the contract as a whole . . . will not operate to invalidate a forum-selection clause"); Karty v. Mid-Am. Energy, Inc., 903 N.E.2d 1131, 1135 (Mass. App. Ct. 2009) (enforcing the forum selection clause "[b]ecause the allegations set out in [plaintiff's] complaint and amended complaint speak only to fraud in the inducement as to the entire subscription agreement and fail to allege or set out any facts concerning the specific question whether the forum-selection clause was obtained by fraud"); Edge Telecom, Inc. v. Sterling Bank, 143 P.3d 1155, 1162 (Colo. App. 2006) ("[S]o long as a forum selection clause is itself not the result of fraud, the parties can fairly expect to litigate any issues, including the plaintiff's general allegations of fraud, in the designated forum."); Golden Palm Hosp., Inc. v. Stearns Banks Nat'l Ass'n, 874 So. 2d 1231, 1235 (Fla. Dist. Ct. App. 2004) ("When it claims that a forum selection clause is invalid

based on fraud, the party must show that the clause itself is the product of the fraud or that the fraud caused the inclusion of the clause in the agreement.").

We also recognize, without following, authority that has adopted the minority approach. See Energy Claims Ltd., 325 P.3d at 85 ("[A] plaintiff's claim that the contract was entered into fraudulently [is] sufficient to render the forum selection clause unenforceable."); SRH, Inc. v. IFC Credit Corp., 619 S.E.2d 744, 746 (Ga. Ct. App. 2005) ("Since we cannot say that [plaintiff] is bound to fail in its rescission claim under any set of provable facts, we hold that the trial court erred in dismissing the case on the basis of a forum selection provision in the contract alleged to have been procured by fraud."); Lamb v. MegaFlight, Inc., 26 S.W.3d 627, 632 (Tenn. Ct. App. 2000) ("[W]e find that [p]laintiffs were fraudulently induced into entering the contract. As such, the contract should be rescinded and the forum selection clause should be rendered invalid.").

As noted by the Supreme Court of Utah, "the majority approach is tailored to dispel the fear that a party could avoid the enforcement of a forum selection clause 'by merely alleging fraud or coercion in the inducement of the contract at issue.'" Energy Claims Ltd., 325 P.3d at 84-85 (quoting A.I. Credit Corp. v. Liebman, 791 F.Supp. 427, 430 (S.D.N.Y. 1992)); see also Karon, 937 N.W.2d at 346 ("If a forum-selection clause could be challenged simply

based on fraud in an overall transaction, the advantages of predictability and efficiency would be lost."). The majority approach also prevents litigation related to the merits of a plaintiff's fraud claim in one forum only to determine the litigation should then proceed in a second forum pursuant to the parties' forum selection clause. See Karon, 937 N.W.2d at 346. We are persuaded by the logic of the majority approach that invalidating otherwise-enforceable forum selection clauses based solely on generalized allegations of fraud would too easily allow parties to circumvent such clauses, which are presumptively valid and "give effect to the legitimate expectations of the parties." Paradise Enters. Ltd. v. Sapir, 356 N.J. Super. 96, 104 (App. Div. 2002) (quoting Bremen, 407 U.S. at 12).

At bottom, plaintiffs contend the loan agreement they entered with Celtic was illegal as they were regulatorily ineligible to contract for an SBA loan. They also maintain they agreed to the contract only after being fraudulently induced by Celtic's misrepresentations regarding the value of the Merriam Property. Plaintiffs' allegations do not relate to the forum selection clause directly, but rather involve claims that Celtic engaged in a larger scheme to fraudulently induce them into entering the contract and later improperly applying for an SBA loan. In rejecting plaintiffs' argument, we align our holding with the majority approach adopted by other jurisdictions, as

well as our Supreme Court's holding in Goffe, and conclude that plaintiffs' allegations of generalized fraud do not provide a basis to invalidate the forum selection clause.

B.

Plaintiffs next argue enforcement of the forum selection clause would violate "the strong public policy interest of the entire controversy doctrine." They maintain requiring litigation in Utah would result in "duplicative litigation in two forums of the civil conspiracy claim, arising from the same set of facts, from the same transaction," and would result in "piecemeal litigation." We disagree.

The entire controversy doctrine "generally requires parties to an action to raise all transactionally related claims in that same action." Carrington Mortg. Servs., LLC v. Moore, 464 N.J. Super. 59, 67 (App. Div. 2020); see also Pressler & Verniero, Current N.J. Rules, cmt. 1 on R. 4:30A (2023). Specifically, under Rule 4:30A, "[n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine." As our Supreme Court has noted, "[t]he entire controversy doctrine 'seeks to impel litigants to consolidate their claims arising from a single controversy whenever possible.'" Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman &

Stahl, P.C., 237 N.J. 91, 98 (2019) (quoting Thornton v. Potamkin Chevrolet, 94 N.J. 1, 5 (1983)). "The doctrine serves 'to encourage complete and final dispositions through the avoidance of piecemeal decisions and to promote judicial efficiency and the reduction of delay.'" Ibid. (quoting Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 610 (2015)). "Underlying the [e]ntire [c]ontroversy [d]octrine are the twin goals of ensuring fairness to parties and achieving economy of judicial resources." Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co., 207 N.J. 428, 443 (2011).

We have previously declined to enforce a forum selection clause when enforcement would be contrary to the "strong public policy . . . found in the entire controversy doctrine." McNeil, 297 N.J. Super. at 222-24 (citations omitted). In McNeill, the plaintiff and her late husband entered into a mortgage with Mercury Capital and on the same day entered into an "Agreement for Mortgage Brokerage Services," which was signed by the plaintiff and defendant Gleitman, president of Mercury. Id. at 217. The brokerage services agreement contained a clause mandating all related litigation to be venued in New York County. Ibid. The plaintiff thereafter brought suit in New Jersey against Mercury, its officers, and agents, including Gleitman, seeking discharge of the mortgage. Id. at 218. The court enforced the forum selection clause and dismissed the complaint as to all defendants on

jurisdictional grounds. Ibid. The plaintiff appealed and argued the court erred in enforcing the forum selection clause because it applied only to Gleitman. Ibid.

We reversed and concluded the remaining defendants "[could] not be funneled through the forum-selection clause of the brokerage services agreement into New York County for the purpose of litigation based on the mortgage agreement." Id. at 221. We also explained that Gleitman was properly joined in the New Jersey action as president of Mercury. Id. at 222. We agreed with the defendants that Gleitman was the "primary defendant" in the litigation but concluded his status required us to apply the entire controversy doctrine, rather than enforce the forum selection clause. Ibid. As we described, "[t]he fact that Gleitman may have worn two hats in this mortgage loan transaction, one as the president of Mercury and the other as a mortgage broker, necessarily continues his connection to this litigation. It is Gleitman's choices that have put him into the litigation mix." Ibid.

We further observed that, were we to apply the forum selection clause as to Gleitman, "[w]e would thereby sanction that if any relief were obtained against defendant Gleitman under the brokerage services agreement, it would have to be secured in New York when all the remaining parties to the mortgage transaction that Gleitman was instrumental in producing would be in New

Jersey." Ibid. Accordingly, we held that the forum selection clause "must give way" to the entire controversy doctrine. Id. at 223.

Unlike in McNeil, plaintiffs will not be prejudiced or precluded from adjudicating their claims against the remaining defendants absent Celtic's participation. Plaintiffs' allegations describe a broad and complex scheme perpetrated primarily by defendants Caliolio and David to: fraudulently induce them into purchasing the Merriam Property and a second property unrelated to their claims against Celtic; deceive them into executing two notes and two mortgages for the defendants' benefit under the false pretense that they were signing documents necessary to close their purchase of the Merriam Property thereby increasing plaintiffs' debt by $1,400,000; induce them to pay substantial monies to defendant David as part of a non-existent "rescue" plan for distressed property owners; and commit theft against plaintiffs' business after they purchased the Merriam Property. Though plaintiffs allege Celtic's provision of the SBA loan aided this larger scheme, we are satisfied those allegations are sufficiently distinct from plaintiffs' claims against Celtic such that the entire controversy doctrine does not require nullification of the forum selection clause here.

As noted in McNeil, the objectives behind the entire controversy doctrine are "(1) to encourage the comprehensive and conclusive determination

of a legal controversy; (2) to achieve party fairness, including both parties before the court as well as prospective parties; and (3) to promote judicial economy and efficiency by avoiding fragmented, multiple and duplicative litigation." Ibid. We find nothing in plaintiffs' complaint to suggest that enforcing the forum selection clause as to Celtic will hinder their ability to comprehensively and conclusively adjudicate their claims against the remaining defendants. We also conclude, subject to any determination resulting from the remanded proceedings, it is not unfair to enforce the forum selection clause, because to do so will adhere to the legitimate expectations of the parties as manifested in their negotiated agreement. See Paradise Enters. Ltd., 356 N.J. Super. at 104 (citing Bremen, 407 U.S. at 12).

C.

In a related argument, plaintiffs maintain the forum selection clause is unenforceable because: (1) litigating in two forums creates an extreme financial hardship; (2) New Jersey's Consumer Fraud Act provides stronger protections than the analogous Utah law; (3) "[t]here is no guarantee that Utah would faithfully apply New Jersey law"; and (4) the statute of limitations will have run on certain claims if the Utah court applies Utah law. We are unpersuaded by these arguments as well.

As noted, forum selection clauses are unenforceable if "enforcement would be seriously inconvenient to trial." Wilfred MacDonald Inc., 256 N.J. Super. at 64 (emphasis omitted). Plaintiffs claim that the distance between New Jersey and Utah increases the costs of litigation, they will have difficulty securing witnesses and experts in Utah, and any witnesses will be seriously inconvenienced by the need to travel to Utah.

We addressed, and rejected, similar arguments in Wilfred MacDonald Inc., wherein we held the inconvenience exception to enforcing a forum selection clause does not apply merely because geographic distance "would make it difficult to obtain the presence of nonparty witnesses." Id. at 65. As we stated, "we [do not] find the difficulty MacDonald might have in producing its witnesses in Nebraska to be the type of inconvenience that would warrant nonenforcement." Ibid. Rather, we concluded the inconvenience exception applies when "trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived his day in court." Ibid. (quoting Bremen, 407 U.S. at 18). We are satisfied the record does not support any argument that enforcement of the forum selection clause would deprive plaintiffs of their day in court by way of serious inconvenience of any trial, or plaintiffs' ability to present witnesses or necessary evidence to any factfinder.

In their remaining arguments, plaintiffs contend they will suffer prejudice in the event the Utah court applies Utah law, in part, because its consumer protection laws are more restrictive than New Jersey's and the statute of limitations under Utah law has already run on "certain" unidentified claims. Plaintiffs have failed to engage in any meaningful conflict of law analysis to support their contention that the Utah court would apply Utah law to disputes arising from a contract entered in New Jersey or to other tortious actions occurring in this jurisdiction. And, Celtic itself maintained that New Jersey law applies to the underlying action.

Indeed, Celtic relied upon New Jersey law in its initial motion to dismiss and stated on numerous occasions, including in letters to plaintiffs' counsel and its reply memorandum related to its first motion to dismiss, New Jersey law applies to plaintiffs' claims. Moreover, plaintiffs have failed to demonstrate, by citation to the record or any persuasive authority, how any specific conflict between New Jersey and Utah law, assuming one exists, warrants vitiating the forum selection clause.

D.

Finally, plaintiffs argue Celtic waived its rights under the forum selection clause because it failed to invoke the provision prior to sending the November 11, 2021 letter, over eleven months after plaintiffs filed their

complaint. They also contend Celtic consented to litigate in New Jersey by filing its initial motion to dismiss based on New Jersey law, thereby waiving its rights under the clause. As noted, the court did not address these specific arguments, nor did it engage in necessary findings on the waiver issue. In such circumstances, we believe it inappropriate to exercise original jurisdiction under Rule 2:10-5, see Tomaino v. Burman, 364 N.J. Super. 224, 234 (App. Div. 2003), and instead remand the matter for the court to address the parties' arguments on the waiver claim in the first instance.

"Waiver . . . involves the intentional relinquishment of a known right, and thus it must be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them." Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276, 291 (1988). "The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." Knorr v. Smeal, 178 N.J. 169, 177 (2003). "The party waiving a known right must do so clearly, unequivocally, and decisively." Ibid.

In Cole v. Jersey City Med. Ctr., 215 N.J. 265, 268 (2013), our Supreme Court "address[ed] a party's ability to invoke an arbitration clause where that party moved to compel arbitration twenty-one months after being joined as a defendant to an action and after actively participating in the litigation

involving the other party to the arbitration agreement." The Court held that "[a]ny assessment of whether a party to an arbitration agreement has waived that remedy must focus on the totality of the circumstances," and the analysis "is, by necessity, . . . fact-sensitive." Id. at 280. It further stated, "[i]n deciding whether a party to an arbitration agreement waived its right to arbitrate, we concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute." Ibid. The Court also provided seven non-exclusive factors for consideration, none of which is dispositive:

> (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 issues 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 party, if any.
>
> [Id. at 280-81.]

Relying on these factors, the Court concluded that the defendant's litigation conduct was "inconsistent with its right to arbitrate the dispute." Id. at 281. In addition to the twenty-one-month delay, the Court explained "[t]he timing of the motion to compel arbitration is important here because it

occurred three days before the scheduled trial date," by which point "the parties invested considerable time in the lawsuit and anticipated a judicial determination in the near future." Id. at 281-82. The Court also noted that the defendant advanced thirty-five affirmative defenses in its initial answer without invoking the arbitration agreement. Id. at 281. Finally, the Court reasoned that the parties engaged in extensive motions practice and highlighted the defendant's summary judgment motion as particularly indicative of its submission to the authority of the court. Id. at 282. Accordingly, the Court held "the totality of the circumstances of this case leads to the inexorable conclusion that [the defendant] waived its right to arbitrate during the course of litigation." Id. at 283.

We find no principled reason why the Cole analysis should not extend to waiver considerations in the context of forum selection clauses. In reaching our decision on this point, we rely on authority from other jurisdictions that have considered whether a party's litigation conduct was inconsistent with the right to enforce a forum selection clause when determining if that party waived the right to enforce the clause and, in doing so, have considered similar factors to those relied on by the Cole Court. See e.g., Avicanna Inc. v. Mewhinney, 487 P.3d 1110, 1115-17 (Colo. App. 2019) (assessing whether defendant's litigation conduct was inconsistent with the right to enforce a forum selection

clause by considering the timing and impact of dispositive motions, whether the defendant independently invoked the court's jurisdiction, the reason for delay, and prejudice to the plaintiff); RMBS Recovery Holdings, I, LLC v. HSBC Bank USA, 827 S.E.2d 762, 770 (Va. 2019) (considering the length of defendant's delay in enforcing the forum selection clause and its extensive use of the "litigation machinery" through filing multiple motions, including a motion to dismiss and several discovery motions); Drulias v. 1st Century Bancshares, Inc., 241 Cal.Rptr.3d 843, 855-56 (Ct. App. 2018) (assessing the length of delay in enforcement, reason for delay, and extent of motions practice to determine whether enforcing the forum selection clause was unreasonable); In re Nationwide Ins. Co. of Am., 494 S.W.3d 708, 713-17 (Tex. 2016) (discussing actual prejudice to the plaintiff and analyzing the extent of defendant's litigation conduct prior to enforcing the forum selection clause through its answers, counterclaim, dispositive motions, and discovery requests); Russo v. Barger, 366 P.3d 577, 580-82 (Ariz. Ct. App. 2016) (relying upon defendants' dispositive motions, extensive participation in discovery and conferencing with the court, and delay in enforcing the clause until after the case had been set for trial, as well as the significant expenses and judicial resources expended in the litigation, to assess defendant's litigation conduct); Ex parte Spencer, 111 So. 3d 713, 719 (Ala. 2012)

(describing defendant's substantial invocation of the litigation process for over two years by "filing responsive pleadings, engaging in extensive discovery and pretrial conferences, and attempting to resolve the case through mediation").

As noted, the court here did not directly address plaintiffs' waiver arguments, nor is the record before us sufficient to embark on this fact-intensive analysis. For example, although it is clear that Celtic delayed over eleven months before raising the forum selection clause, the parties advance conflicting accounts of Celtic's reason for that delay, including whether that decision was strategic, or if a more benign reason existed for its failure to raise the issue earlier.

On remand, the court should address the reason for Celtic's delayed reliance on the forum selection clause and the significance of Celtic's affirmative application for relief, which included a request for attorneys' fees and resulted in a without prejudice dismissal of certain of plaintiffs' claims. The court should also consider, under its totality of the circumstances analysis, the fact that in Celtic's November 2021 letter it appears to have expressed a more limited interpretation of the forum selection clause when it contended only plaintiffs' "contract" claims, rather than its tort-based allegations, needed to be litigated in Utah. Further, the court should determine the significance of the litigation's procedural posture, including the parties' proximity to trial and

the extent of discovery. Finally, the court's analysis should address Celtic's argument made before us that plaintiffs' waiver argument is meritless as the operative contracts contain non-waiver and severability provisions, and any and all other arguments made by the parties in support of their respective positions.

In sum, on remand, the court should address the waiver issue by making necessary factual findings and legal conclusions through the prism of the Cole test and, depending on the court's determination, proceed as appropriate with the remanded proceedings. Nothing in our opinion should be interpreted as an expression of our view of the outcome of the remanded proceedings, including the fact that we rejected the majority of plaintiffs' other challenges to the applicability of the forum selection clause. We addressed those claims to ensure the matter is resolved in an efficient manner. Finally, we leave it to the court's discretion if additional discovery and briefing would assist in addressing the waiver issue.

The matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.