NEUTRAL NOTES

THE JACOBS CENTER FOR JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION™

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CONDO ASSESSMENT SENT TO ARBITRATION

The Appellate Division concluded, in Bell Tower Condominium Association v. Haffert, et al., Docket No. A-3218-10T2, that the repair assessment for the Condominium Association was a "housing-related dispute" and must be arbitrated.

The amount in dispute was an assessment of $22,400.00. The defendants refused to pay based upon the Association's decision-making process concerning the special assessment.

The court broadly interpreted the term "housing-related disputes" and said it refers to any dispute "arising directly from the condominium relationship." Thus, disputes regarding fee assessments are considered housing-related disputes and should be submitted to arbitration or other forms of alternative dispute resolution pursuant to statute.

The underlying dispute concerned five units in Sea Isle and an $80,000.00 special assessment for repairs. Since the defendants owned the largest unit they were assessed $22,400.00 instead of $14,400.00 which the other unit owners were assessed.

After correspondence in which defendants refused to pay the assessment, the Association brought a claim against them. The Association argued that while housing-related disputes must be sent to arbitration, a refusal to pay a special assessment was not a housing-related dispute for which arbitration was required.

The court rejected that argument particularly considering the "strong public policy of this State favoring arbitration as a mechanism for resolving disputes."

The Condominium Act, N.J.S.A. 46:8B14(k) provides as follows:

> An association shall provide a fair and efficient procedure for the resolution of housing-related disputes between individual unit owners and the association, and between unit owners, which shall be readily available as an alternative to litigation.

The court concluded that the present dispute was clearly housing-related since it dealt with one of the sections of the Act and the "present dispute's origins in the disagreement over the scope of the special assessment, all compel the conclusion that under the statute, arbitration or other from of alternative dispute resolution is required."

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The Jacobs Center for Justice and Alternative Dispute Resolution is dedicated to assisting individuals and companies in resolving problems and disputes of all types.

Q & A

Q. Can arbitration be enforced even if it will not resolve all issues in dispute?

A. Yes. In David R. Edenbaum, D.M.D. v. Teresa Addiego-Moore, D.M.D., the Appellate Division ruled that despite the application of the entire controversy doctrine in New Jersey, the dispute between the two dentists formerly operating State of the Art Smiles, P.A. ("SAS") must be arbitrated.

The parties, once partners, split up and had a number of issues in dispute. One of the issues not susceptible to arbitration was the BMW lease. Dr. Edenbaum argued that because the BMW matter could not be arbitrated the entire dispute should not be arbitrated.

The court ruled to the contrary and held that the strong preference for arbitration in New Jersey meant that even if not every issue could be resolved the matter should be sent to arbitration.

The agreement between the parties provided for arbitration as follows:

> Any dispute, difference, disagreement, or controversy between or among the parties hereto, arising out of or in connection with this Agreement or the interpretation of the meaning or construction of this Agreement, shall be referred to a single arbitrator agreed upon by the parties.

The chancery judge based his decision on the parties' shareholder agreement which stated in principal part that all disputes arising out of or in connection with the agreement "shall be referred to a single arbitration agreed upon by the parties."

Edenbaum argued that his objections were closer to an oppressed shareholder's suit and was a creature of statute not arising out of the agreement.

The Appellate Division reiterated, again, the strong policy favoring arbitration and noted that the courts in New Jersey have compelled arbitration of a variety of statutory claims including LAD, consumer fraud, and RICO, among others.

Edenbaum also argued that the entire controversy doctrine precluded arbitration because one aspect of his dispute had to do with a breach of the BMW agreement and it was not arbitrable.

The court said that "Edenbaum's argument that there should be no arbitration of any claims if there cannot be arbitration of all claims reveals a fundamental misunderstanding about the entire controversy doctrine." Instead, the court declared that the doctrine does not compel the litigation of all claims in the same action at the same time "when judicial economy would not be served."

The court opined that efficient management could avoid an inconsistent result. For example, the matter could proceed to arbitration and then be subject to the statutory review of arbitrations.

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Q. Can a party move to compel enforcement of an arbitration provision even after litigation has begun?

A. Yes. In Helfand v. CDI Corporation and Barry O'Donnell the Appellate Division found that even though litigation had gone on for 6 months it would grant a motion to compel arbitration pursuant to a provision between the parties and send the matter from the courts to arbitration.

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Q. Can arbitration agreements exclude certain claims?

A. Yes, but. In Wagner v. Open Road Auto Group, et al. the Appellate Division recently rejected a trial court's refusal to compel arbitration as well as its interpretation of the arbitration provision.

James Wagner was employed as a service manager for Open Road from February 2009 until he was terminated on August 20, 2010.

As a condition of employment he signed a one-page arbitration agreement which stated that the employer and employee would arbitrate "any dispute arising between them, instead of going to court before a judge or jury."

The agreement specifically defined dispute as follows:

> any claim, dispute, difference, or controversy, whether or not related to or arising ou[t] of the employment relationship, and including any claim, dispute, difference, or controversy (i) arising under federal, state or local statu [t]e or ordinance (including claims of discrimination and harassment); (ii) based on any common-law rule of practice, including breach of contract or fraud; (iii) involving the validity or interpretation of this [a]greement; or (iv) any other claim, dispute, difference, or controversy whatsoever.

On February 9, 2011, plaintiff filed a complaint alleging sexual har-

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assment by the company's finance manager as well as inappropriate sexual conduct with a customer. He alleged the company failed to act and he was terminated shortly thereafter. Plaintiff characterized his complaint as retaliation under the New Jersey Law Against Discrimination (NJLAD) as well as a violation of the Conscientious Employee Protection Act (CEPA). Shortly after filing his complaint, defendants filed a motion to stay the litigation and compel arbitration. The motion was rejected by the trial court which filed a written opinion concluding that plaintiff was not required to arbitrate his claims since the agreement specifically did not state that it applied to termination or retaliation in its definition of dispute.

The appellate court noted that the "favored status" of arbitration is "not without limits." Contrary to other authority cited by the parties, the appellate division said it was "convinced that the arbitration agreement between the parties in this matter requires plaintiff to submit his claims to binding arbitration." The agreement specifically referred to statutory claims including claims for discrimination and harassment and explicitly waived a right to a jury trial in court. Furthermore, the agreement was not limited to disputes arising out of the employment agreement. Thus, the court found that the arbitration agreement "clearly and unambiguously applies to claims for wrongful termination of the sort asserted by plaintiff."

There seems to be constant attention to arbitration agreements and mediation issues. Practitioners need to be aware of the give and take in the courts on a regular basis.

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Q. Is it legal malpractice to recommend arbitration?

A. No. In Goodwin v. Donohue Hagan Klein Newsome & O'Donnell the court held that a recommendation by a matrimonial attorney to attempt to resolve the dispute by arbitration was not legal malpractice. In that particular case there were actually changes of counsel which accounted for delay. In other words, while arbitration can be an efficient and less costly alternative, depending upon the circumstances it is not always the case. The court further commented on the "undeniable fact" that "nine months before the arbitration award, plaintiff terminated defendant's legal services and retained his third attorney, after which defendant clearly and indisputably had no control over the course of proceedings leading to the ultimate result." The court simply reiterated the State's strong public policy favoring alternative means of dispute resolution and said there was "no legal duty on the part of defendant to refrain from recommending arbitration."

The Jacobs Center for Justice and Alternative Dispute Resolution™

Roger B. Jacobs, Esq.
103 Eisenhower Parkway
Suite 103
Roseland, NJ 07068

973-226-0499 Phone
973-226-0110 Fax
866-720-8000 Toll Free
jacobsjustice@gmail.com E-mail

COMING SOON - The Jacobs Center for Justice and Alternative Dispute Resolution website

THE COURT SAYS MEDIATE FIRST

In Decilveo v. Decilveo, an ongoing matrimonial dispute, the court recently rejected motions for enforcement of litigant's rights by directing the parties to mediation. The parties had agreed to resolve marital disputes with a provision as follows: resolve the disputes with each other or with the advice of counsel or, if unable to, "through mediation." When the parties filed dueling motions the court rejected the motions because the parties had not contacted a mediator. Shortly thereafter the parties reached a comprehensive agreement through mediation. Not long after that agreement additional motions were filed allegedly based upon new issues. Faced with a new round of motions, and after oral argument, Judge Frances McGrogan rejected plaintiff's attempt to re-raise certain issues and found that she had failed to attempt mediation prior to filing her motion. She directed the parties to attend mediation to resolve any and all outstanding economic issues. On review in the Appellate Division, the court affirmed the trial judge's findings with specific reference to the agreement. The court ruled that since the parties had "voluntarily agreed in their PSSA to attempt to settle their disputes through mediation before filing in court," the agreement of the parties must govern. The court noted that mediation was an appropriate process for voluntary resolution of family disputes and enforced Judge McGrogan's order.

TIP: Courts will enforce agreements to mediate first and mediate first means just that.