

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4793-10T3

LAURA ANA KNECHT,

Plaintiff-Appellant,

v.

225 RIVER STREET, L.L.C.,
a New Jersey Limited
Liability Company,

Defendant-Respondent.

Argued February 8, 2012 - Decided March 28, 2012

Before Judges Axelrad and Sapp-Peterson.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1205-11.

William N. Dimin argued the cause for appellant (Spector & Dimin, P.A., attorneys; Mr. Dimin and Michelle Joy Munsat, on the brief).

Patrick J. Perrone argued the cause for respondent (K & L Gates, L.L.P., attorneys; Mr. Perrone, of counsel and on the brief; Loly G. Tor, on the brief).

PER CURIAM

Plaintiff appeals from the trial court order setting aside the arbitrator's award finding that she was entitled to the return of her deposit in this failed real estate transaction.

We affirm.

In November 2006, plaintiff entered into a contract with defendant to purchase a luxury condo unit for \$1,995,000, new construction scheduled to be completed in two years. Simultaneously with the execution of and in accordance with the contract, plaintiff gave deposit monies to defendant's attorney totaling \$299,250. During the attorney review period, plaintiff's attorney forwarded correspondence dated December 8, 2006, advising defendant's counsel that plaintiff "disapprove[d] of the [c]ontract in its entirety[,] but also indicating that plaintiff would agree to the terms of the contract provided certain amendments were included. Among the proposed amendments was the following provision:

The [b]uyer agrees to make a good faith effort to obtain a conventional first mortgage loan at the prevailing rate in an amount not to exceed [eighty-five percent] of the purchase price. If the [b]uyer has not obtained [her] written mortgage commitment within (90) days from the conclusion of attorney review, the [b]uyer or [s]eller may terminate the contract and all deposit monies will be promptly returned.

Plaintiff also insisted that the agreement eliminate all references to "[t]ime of the [e]ssence" but agreed that in the event defendant would "ultimately declare a [t]ime of the [e]ssence closing date, then [defendant] may impart monetary penalties for the [b]uyer's failure to close title as set forth

in the [p]urchase [a]greement." Defendant agreed to these proposed changes and the parties finalized the agreement.

Notwithstanding plaintiff's insistence upon the ninety-day mortgage contingency clause, she made no effort to obtain a mortgage during this time period. On March 31, 2009, defendant notified plaintiff that closing would take place on April 20, 2009. In an April 3 letter, plaintiff's attorney advised defendant "[his] client [was] very much interested in moving forward with the transaction if she can be provided with financing." He also indicated that defendant "still [had] not responded to [his] request for lenders who will provide financing." Plaintiff failed to appear at the closing as scheduled. When defendant refused to return the deposit, she instituted an action, first in the Law Division. However, because the contract called for binding arbitration, the parties, by consent order, dismissed the action.

The parties proceeded to arbitration. At its conclusion, the arbitrator ruled: (1) "both parties knew or should have known that financing could not be finalized in the ninety (90) day time limit"; (2) plaintiff "used her reasonable best efforts, but failed to obtain a mortgage commitment" when the time came for closing; (3) market conditions had changed; and (4) both parties acted in good faith. Based upon these

findings, the arbitrator concluded plaintiff was entitled to the return of her deposit.

Defendant filed a motion to vacate the arbitration award. Plaintiff filed an order to show cause seeking confirmation of the award. The court consolidated both matters. Judge Maureen B. Mantineo conducted oral argument and offered counsel an opportunity to put forth further arguments, beyond the points raised in their respective briefs. Neither counsel elected to do so. The judge proceeded to render her decision orally.

Judge Mantineo considered the statutory standards governing the setting aside of an arbitration award and found the arbitrator's interpretation of the contractual language was not reasonably debatable. She concluded the arbitrator exceeded the scope of his powers by disregarding the clear terms of the parties' contract, essentially rewriting for plaintiff a better contract than that for which she bargained. The present appeal followed.

On appeal, plaintiff contends the court erred as a matter of law in vacating the arbitration award and based its determination upon considerations prohibited by controlling case law. We disagree.

Arbitration, as a vehicle through which parties may resolve disputes, is favored in New Jersey. Malik v. Ruttenberg, 398 N.J. Super. 489, 494-95 (App. Div. 2008). Arbitration is

"'meant to be a substitute for and not a springboard for litigation.'" N.J. Turnpike Auth. v. Local 196, I.F.P.T.E., 190 N.J. 283, 292 (2007) (quoting Local No. 153, Office & Prof'l Employees Int'l Union v. Trust Co. of N.J., 105 N.J. 442, 449 (1987)). Therefore, where the parties elect arbitration as the forum for resolution of a dispute, it "operates as a trial court, and [j]udicial review of [the awards rendered by it] is extremely narrow, generally confined to matters of corruption or errors appearing on the face of the award." Ukranian Nat'l Urban Renewal Corp. v. Joseph L. Muscarelle, Inc., 151 N.J. Super. 386, 396 (App. Div. 1977) (internal quotations omitted).

Because arbitration is a favored remedy in New Jersey, a court will vacate an arbitration award only under limited circumstances. Fawzy v Fawzy, 199 N.J. 456, 470 (2009). To do otherwise, would be to severely undermine its purpose, which is to provide an "effective, expedient, and fair resolution of disputes." Ibid. (citing Barcon Assocs. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981)). N.J.S.A. 2A:23B-23(a) provides that an arbitration award may be vacated if:

- (1) the award was procured by corruption, fraud, or other undue means;
- (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

In the present matter, we are concerned solely with whether the arbitrator exceeded the scope of his powers. An arbitrator exceeds the scope of his powers when he disregards the terms of the parties' contract or rewrites the contract for the parties. Cnty. College of Morris Staff Assoc. v. Cnty. College of Morris, 100 N.J. 383, 391 (1985). See also Commc'ns Workers of Am. v. Monmouth Cnty. Bd. of Soc. Servs., 96 N.J. 442, 448 (1984) (noting that when contractual limits on arbitral authority are not heeded, arbitrator exceeds his powers). To be enforced, an arbitration award must draw its essence from the terms of the agreement executed between the parties. Cnty. College of Morris

Staff Assoc., supra, 100 N.J. at 392. "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." Policemen's Benev. Ass'n v. City of Trenton, 205 N.J. 422, 429 (2011).

Here, the mortgage contingency clause was clear and unambiguous. It required plaintiff to make a good faith effort to obtain a mortgage "within (90) days from the conclusion of the attorney review," and in the event plaintiff was unsuccessful, she was entitled to the return of her deposit, and either plaintiff or defendant could terminate the contract. The ninety-day period expired on March 20, 2007, and neither party terminated the agreement at that time. Not seeking to terminate the contract at that time did not preclude plaintiff from purchasing the property. She was free to do so. However, because she did not make any effort to obtain a mortgage during the contingency period, she forfeited her right to terminate the agreement two years later based upon her inability to obtain a mortgage. Additionally, she forfeited her right to the return of her deposit.

In finding that both parties knew or should have known that financing could not be finalized in the ninety-day time period and that plaintiff, when the time for closing approached, "used her reasonable best efforts" to obtain a mortgage commitment, the arbitrator added terms to the contract. Specifically, the

arbitrator extended the time period during which plaintiff could seek to obtain the mortgage from ninety days following the conclusion of the attorney review period to essentially just before closing more than two years later. He also effectively determined that plaintiff was entitled to the return of her deposit monies at any time, as long as she made a good faith effort, as he found, to obtain a mortgage when the time for closing approached. The time period during which plaintiff could seek to obtain a mortgage and to secure the return of her deposit monies if her good faith efforts failed was clearly set forth in the agreement. By adding new terms, the arbitrator looked beyond the four corners of the agreement and altered unambiguous terms. Id. at 430. As such, the arbitration award did not draw its essence from the contract. Id. at 429.

Arbitration is solely a creature of contract, and the scope of the arbitrator's powers under the contract are not unlimited. Kimm v. Blisset, 388 N.J. Super. 14, 26 (App. Div. 2006). Rather, the arbitrator's powers are defined solely by the terms of the agreement reached between the parties. Ibid. An arbitrator may not disregard the agreement's terms that are clearly and unambiguously expressed. Policemen's Benev. Ass'n, supra, 205 N.J. at 430. Although arbitrators in the private sector have broad discretion in determining legal issues, they may not disregard terms and conditions set forth in the

agreement. State, Dept of Law & Public Safety v. State Troopers Fraternal Ass'n of N.J., Inc., 91 N.J. 464, 469 (1982). Nor may an arbitrator rewrite the contract for the parties. Cnty. Coll. of Morris Staff Ass'n, supra, 100 N.J. at 391. Having done so here, the arbitrator made a better contract for plaintiff than that for which she bargained. Therefore, Judge Mantineo properly found that the arbitrator exceeded the scope of his authority.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION