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SHADI RAMADAN, Plaintiff, v. LIPPOLIS ELECTRIC, INC., and CARMINE LIPPOLIS, JASON HUMPHREY, KRIS MOLINARI, and JOHN AND/OR JANE DOES 1-20 (Names Being Fictitious), in their individual and corporate capacities, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY DOCKET NO.: PAS-L-002064-20 **ORDER**

THIS MATTER coming before the Court on the Motion of Brandon J. Broderick, LLC, by Marc W. Garbar, Esq., attorney for the plaintiff, Shadi Ramadan, on notice to all counsel of record, and good and sufficient cause having been shown:

IT is on this 23RD day of MARCH 2022,

ORDERED that the Court's prior Order entered on August 26, 2021 be and hereby is reconsidered and vacated as to the Order granting summary judgment and granting defendants leave to file a motion for attorneys' fees; and it is further

ORDERED that a copy of the within Order be served upon all counsel within 7 days of the date hereof.

/s/ Frank Covello
HON. FRANK COVELLO, J.S.C.

(X) opposed
( ) unopposed

SEE ATTACHED STATEMENT OF REASONS

Shadi Ramadan v. Lippolis Electric, Inc., et. al.
Docket No. L- 2064-20

STATEMENT OF REASONS

This matter comes before the court on the opposed motion by Plaintiff, Shadi Ramadan, for reconsideration of this Court's August 26, 2021 Order granting Defendant, Lippolis Electric, Inc.'s motion for summary judgment. Plaintiff's motion is **Granted** for the reasons set forth below.

FACTS

On September 16, 2021, Plaintiff filed the instant motion for reconsideration of this court's decision dated August 26, 2021. The matter arises out of allegations of discrimination made by Plaintiff against Jason Humphrey, a project manager at Lippolis Electric, Inc., et al., while employed. Plaintiff alleged Lippolis Electric, Inc. terminated him in violation of the New Jersey Law Against Discrimination ("NJLAD") in his initial complaint. Prior to Plaintiff's employment, Lippolis Electric, Inc. established an employee handbook with arbitration agreement with its employees that required arbitration as the means for resolving employment related disputes. Plaintiff was given the employee handbook and acknowledged receipt. Plaintiff never commenced an arbitration against Lippolis Electric, Inc. regarding his termination of employment or regarding any allegations of discrimination he faced while employed by the Defendant in the Complaint.

STANDARD OF REVIEW

Pertinent to the Court's review of the reconsideration motion are Rules 4:42-2 and 4:49-2 of the Rules Governing the Courts of the State of New Jersey. Under Rule 4:49-2, "a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later

than 20 days after service of the judgment or order upon all parties . . ." R. 4:49-2 (2020). However, under Rule 4:42-2, when none of: (1) a complete adjudication of a separate claim; (2) complete adjudication of all the rights and liabilities asserted as to any party; or (3) where partial summary judgment or other order for payment of part of a claim are present, then the rule mandates that:

> any order or form of decision which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims, and it shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice.

R. 4:42-2 (2020); see Lombardi v. Masso, 207 N.J. 517, 534 (2011) ("the trial court has the inherent power [in its sound discretion] to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment."); Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250 (App. Div. 1987), certif. den'd. 110 N.J. 196 (1988) (holding that an order adjudicating fewer than all the claims is subject to revision in the interests of justice prior to entry of final judgment).

Yet, the power to reconsider interlocutory orders is "not subject to wanton invocation or unfettered judicial response." Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 264 (App. Div. 1987), certif. den'd. 110 N.J. 196 (1988). "It is only for good cause shown and in the service of the ultimate goal of substantial justice that the court's discretion should be exercised . . . [this standard] is endowed with an unmistakable substantive content by the common understanding [] of what is fair, right, and just in the circumstances." Ibid.

A court will reconsider its decision only in cases where: (1) it rested its initial decision upon palpably incorrect or irrational bases; or (2) it is obvious that the Court neither considered nor appreciated the significance of probative, competent evidence. D'Atria v. D'Atria, 242 N.J.

Super. 392, 401 (Ch. Div. 1990). “If a litigant wishes to bring new or additional information to the court’s attention which it could not have provided on the first application, the court should [] consider the evidence.” Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). However, “motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour . . . the [c]ourt must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.” Ibid.

Pursuant to Rule 4:46-2(c), summary judgment may be entered:

> [I]f the pleadings, depositions, answers to interrogatories and admissions on file together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law

Summary judgment is designed to provide a prompt, inexpensive method of resolving cases where a review of all operative documents and testimony provide no genuine issue of material fact requiring disposition of the case at trial. See Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016).

The summary judgment rule set forth in Rule 4:46-2 "serve[s] two competing jurisprudential philosophies": first, "the desire to afford every litigant who has a bona fide cause of action or defense the opportunity to fully expose his case," and second, to guard "against groundless claims and frivolous defenses," thereby saving the resources of the parties and the court. Ibid. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541-42 (1995) (quoting Robbins v. Jersey City, 23 N.J. 229, 240-41 (1957))). With attention paid to the interests involved when a party seeks summary judgment, the court must carefully evaluate the record in light of the governing law, and determine the facts in the light most favorable to the non-moving party. R. 4:46-2(c).

Rule 4:46-2(c)'s "genuine issue [of] material fact" standard mandates that the opponent party must do more than simply "point[ ] to any fact in dispute" to defeat summary judgment. Brill

v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). Under this standard, after the movant presents sufficient evidence in support of the motion, the opposing party must "demonstrate by competent evidential material that a genuine issue of fact exists[.]" Robbins v. Jersey City, 23 N.J. 229, 241 (1957); see also Brill, supra, 142 N.J. at 529, (noting opposing party should "come forward with evidence that creates a 'genuine issue as to any material fact challenged'" (quoting R. 4:46-2)). Justice Coleman stated in Brill that "if the party opposing the summary judgment motion offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment, taking as true the statement of un-contradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. 142 N.J. at 529, (quoting Judson, supra 17 N.J. at 75).

A court deciding a summary judgment motion does not draw inferences from the factual record as does the factfinder in a trial, who "may pick and choose inferences from the evidence to the extent that 'a miscarriage of justice under the law' is not created." Id. at 536 (quoting R. 4:49-1(a)). Instead, the motion court draws all legitimate inferences from the facts in favor of the non-moving party. R. 4:46-2(c); see also Durando v. Nutley Sun, 209 N.J. 235, 253 (2012) ("courts construe the evidence in the light most favorable to the non-moving party in a summary judgment motion" (quoting Costello v. Ocean Cty. Observer, 136 N.J. 594, 615 (1994))); Brill, supra, 142 N.J. at 536 ("[o]n a motion for summary judgment the court must grant all the favorable inferences to the non-movant").

A court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case were tried. Bhagat, supra, 217 N.J. at 40; Davis v. Devereux Foundation, 209 N.J. 269, 286 (2012); see Davidson v. Slater, 189 N.J. 166,

187 (2007). As such, “the motion court . . . can[not] ignore the elements of the cause of action or the evidential standard governing the cause of action." Bhagat, supra, 217 N.J. at 38; Id. at 47–48, (reviewing grant of summary judgment in light of elements of valid and irrevocable gift and clear and convincing standard of proof); Durando, supra, 209 N.J. at 253–57 (applying clear and convincing evidentiary standard to grant of summary judgment in defamation action); Brill, supra, 142 N.J. at 542–45, (evaluating motion court's summary judgment determination in light of substantive standard and burden of proof governing the cause of action). With the factual record construed in accordance with Rule 4:46-2(c), "the court's task is to determine whether a rational factfinder could resolve the alleged disputed issue in favor of the non-moving party[.]" Perez v. Professionally Green, LLC, 215 N.J. 388, 405–06 (2013); see also Bhagat, supra, 217 N.J. at 39 (indicating that when deciding a summary judgment motion, a court determines whether reasonable jury could rule in favor of non-moving party).

ARGUMENTS

Plaintiff contends that the court failed to consider the probative evidence and controlling precedent when it compelled Plaintiff to binding arbitration. Plaintiff argues Defendant did not satisfy the first and second requirements necessary to effectuate a waiver of rights. Furthermore, Plaintiff contends that the court erred in granting Defendant’s leave to seek attorney’s fees and that Plaintiff did not bring the charge in bad faith. Defendant maintains in their opposition that Plaintiff’s complaint was made in bad faith and that the LAD is preempted by the Federal Arbitration Act (“FAA”).

ANALYSIS

Arbitration Enforcement in New Jersey

Plaintiff bases his initial complaint on allegations of discrimination in violation of the New Jersey Law Against Discrimination (hereinafter "LAD"). Similar to its federal counterpart, Title VII, 42 U.S.C. § 2000(e), LAD is a broader anti-discrimination statute that prohibits employers from taking action against an employee of a protected class detailed in the statute. Included in its protected classes are persons of a certain "creed" which would include the alleged statements and acts by Defendant Humphrey regarding Plaintiff's religion. See N.J.S.A. § 10:5-12. The Court begins its analysis by recognizing that arbitration is, fundamentally, a matter of contract and ultimately governed by the agreement of the parties. NAACP of Camden Cnty. East v. Foulke Management Corp., 421 N.J. Super. 404, 424 (App. Div.) certif. granted, 209 N.J. 96 (2011), appeal dismissed, 213 N.J. 47 (2013); Young v. Prudential Ins. Co. of Am., Inc., 297 N.J. Super. 605, 617 (App. Div.), certif. denied, 149 N.J. 408 (1997). Congress passed the FAA in 1925 to encourage the use of arbitration to resolve legal disputes. 9 U.S.C.A. §§ 1 et seq.

In New Jersey, agreements to arbitrate are governed by the revised New Jersey Arbitration Act ("NJAA"). N.J.S.A. § 2A:23B-1. The NJAA is similar to the FAA and provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." Id. In reviewing orders compelling arbitration, New Jersey courts are mindful of the strong preference to enforce arbitration agreements. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013); see also Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc., 240 N.J. Super. 370, 375 (App. Div. 1990) (confirming that New Jersey law, like federal law, "liberally enforces

arbitration agreements"). Because arbitration agreements are contracts, courts consider customary principles of contract law when determining their enforceability, most notably, mutual assent. See Atalese v. U.S. Legal Servs. Grp., 219 N.J. 442 (2014).

Our Supreme Court has determined the validity of arbitration agreements by considering the intentions of the parties "as reflected in the four corners of the written agreement." Leodori v. CIGNA Corp., 175 N.J. 293, 302 (2003). To determine the validity of an arbitration provision, the court must address the following issues of contract formation: (i) whether the employee explicitly and knowingly assented to the agreement and (ii) whether there are any applicable defenses to contract formation, such as fraud, duress, or unconscionability, preventing the formation of a valid, enforceable contract. Id. As to the first requirement, an employee will be deemed to have explicitly and knowingly assented to an arbitration agreement if both of the following elements are satisfied: (i) the agreement contains a waiver-of-rights provision which reflects an unambiguous intention to arbitrate claims; and (ii) the evidence indicates that plaintiff clearly and explicitly agreed to such provision. See Id.

Scope of the Arbitration Provision

The arbitration clause in question is found in the Lippolis Electric, Inc. Employee Handbook (hereinafter "handbook") starting at the bottom of page 43 and ending on page 44. It provides the following:

> "ARBITRATION OF EMPLOYMENT DISPUTES
> All claims from potential, current or former employees of Lippolis Electric, Inc. accruing at any time including, but not limited to, claims pursuant to all Federal, State and Local statutory employment statutes including, but not limited to, any claims for monies that may have been owed for back wages, vacation, overtime,

prevailing wage or minimum wage claims, including claims under the Fair Labor Standards Act, the New York State Labor Law or similar law, claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the ADA Amendments Act of 2008, the Family and Medical Leave Act, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act, the Genetic Information Nondiscrimination Act, the Equal Pay Act, the Worker Adjustment Retraining and Notification Act, claims alleging violations of any state or local law, statute, regulation, executive order, or ordinance, including, but not limited to, the constitution and laws of the State of New York, the New York State Human Rights Law, the New York Executive Law and Administrative Code of the City of New York, (collectively "Covered Claims") must be submitted to binding arbitration before the American Arbitration Association pursuant to the AAA Employment Arbitration Rules and Mediation Procedures then in effect. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration provision. The costs charged by the arbitrator shall be borne by Lippolis Electric, Inc. and not the employee. The arbitrator shall apply all applicable laws, rules and regulations when issuing a decision.

No party shall have the right to bring or participate in a class, collective or other representative proceeding concerning any Covered Claim in any forum including any court of law or arbitration. To be clear all Covered Claims submitted to arbitration must be handled on a singular individual basis.

By accepting or continuing your at-will employment you have agreed to this arbitration provision regardless of whether you sign the handbook receipt.

It is your responsibility to be knowledgeable of and to follow company protocol."

The acknowledgment of receipt on page 79 that Plaintiff signed does not refer to the arbitration clause starting on page 43, however Defendants have since added a reference to the arbitration clause in an updated handbook which they submitted as an exhibit with their motion for summary judgment in June of this year. The updated acknowledgment of receipt page provides:

"I also understand that this handbook contains a mandatory arbitration provision with a class action waiver and that by accepting and/or continuing my at-will employment I agree to the binding arbitration provision set forth in this handbook

> regardless of whether I sign this acknowledgment. I further acknowledge that acceptance of the mandatory arbitration policy is a condition of continued employment."

Here, Plaintiff argued at summary judgment that Defendant's waiver-of-rights provision is deficient because there is no explanation of the rights and statutory remedies Plaintiff waived by signing the agreement and that Plaintiff lacked the requisite knowledge of the legal rights he was surrendering. Plaintiff argues the handbook did not contain the word "jury" and that it failed to inform the employee of their waiver of rights to have individual claims adjudicated by a court of law. Plaintiff cites to Atalese, wherein a plaintiff entered into a service contract with the defendant for debt-adjustment services and subsequently sued alleging violations of the Consumer Fraud Act. Atalese, supra, 219 N.J. at 435. Atalese involved an average member of the public, similar to the case at bar, and is distinguishable from cases involving individuals regularly engaged in commercial activities. See id. There, the Court found the arbitration agreement in question to be deficient and unenforceable for three reasons: (1) it did not include any explanation that the plaintiff was waiving her right to seek relief in a court of law, (2) it did not explain what arbitration is nor how it is different from a court proceeding, and (3) it did not contain plain language "that would be clear and understandable to the average consumer" that she was waiving statutory rights. See id. at 446.

Plaintiff further argues that the arbitration provision is unenforceable, because the employee handbook, signed by the plaintiff, contained the following disclaimers: the Handbook contains the following disclaimers:

> i. "This handbook does not create a contract for employment for any specified period or definite duration."
>
> ii. "This handbook is not to be construed as an employment contract."

iii. "Accordingly, neither the handbook nor any other communication by a management representative is intended in any way to create a contract of employment."

iv. "Furthermore, I understand that this handbook or any other written or verbal communication by a management representative is neither a contract of employment nor a legally-binding agreement."

The Federal Arbitration Act (FAA), 9 U.S.C.A. § 1-307, requires "courts [to] place arbitration agreements on equal footing with all other contracts. " Skuse v. Pfizer, Inc., 244 N.J. 30, 47 (2020) (internal quotation marks omitted) (quoting Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. , 137 S. Ct. 1421, 1424 (2017)). Under the FAA, a state "may not 'subject an arbitration agreement to more burdensome requirements than those governing the formation of other contracts,'" or invalidate the agreement through "state-law 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" Ibid. (first quoting Leodori v. CIGNA Corp., 175 N.J. 293, 302 (2003)); and then quoting Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 441 (2014). The FAA, however, does not bar all state-law defenses and "specifically permits states to regulate contracts, including contracts containing arbitration agreements under general contract principles." Ibid. (quoting Martindale, 173 N.J. at 85).

Similarly, the New Jersey Legislature codified its own endorsement of arbitration agreements in the New Jersey Arbitration Act (NJAA), N.J.S.A. 2A:23B-1 to -36. See Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006). The NJAA provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B-6(a).

New Jersey courts "may 'regulate [arbitration] agreements, including those that relate to arbitration, by applying its contract-law principles that are relevant in a given case.'" Skuse, 244 N.J. at 47 (quoting Leodori, 175 N.J. at 302). When reviewing a motion to compel arbitration, courts apply a two-pronged inquiry: (A) whether there is a valid and enforceable agreement to arbitrate disputes; and (B) whether the dispute falls within the scope of the agreement. Martindale, 173 N.J. at 83, 92.

In assessing whether parties entered into a valid, enforceable agreement to arbitrate, the reviewing court must adhere to and apply New Jersey contract-law principles. Leodori v. CIGNA Corp., 175 N.J. 293, 302 (2003). As such, to determine the validity of an arbitration provision, the court must address the following issues of contract formation: (i) whether the employee explicitly and knowingly assented to the agreement and (ii) whether there are any applicable defenses to contract formation, such as fraud, duress, or unconscionability, preventing the formation of a valid, enforceable contract. Id. As to the first consideration, an individual will be deemed to have explicitly and knowingly assented to an arbitration agreement if both of the following elements are satisfied: (i) the agreement contains a waiver-of-rights provision which reflects an unambiguous intention to arbitrate claims and (ii) the evidence indicates that plaintiff clearly and explicitly **agreed** to such provision. Id. (emphasis added)

Although this court properly determined that the FAA preempts the NJ LAD amendment that would prohibit arbitration of NJ LAD claims, it appears that this court did not adequately assess the arbitration agreement (i.e. the existence of an agreement) under ordinary contract terms. Regardless of the FAA preemption, the parties must have an agreement.

Not cited in this court's decision on the Summary Judgment motion was Morgan v. Raymours Furniture Co., 443 N.J. Super. 338 (App. Div. 2016). In Morgan, the employee handbook that contained the arbitration clause also included more than one disclaimer:

> Nothing in this Handbook or any other Company practice or communication or document, including benefit plan descriptions, creates a promise of continued employment, [an] employment contract, term or obligation of any kind on the part of the Company.
>
> * * *
>
> [the employee] understand[s] that the rules, regulations, procedures and benefits contained therein are not promissory or contractual in nature and are subject to change by the company.

Morgan v. Raymours Furniture Co., Inc., 443 N.J. Super. at 342. The Appellate Division in Morgan affirmed the trial court determination that the plaintiff did not clearly and unambiguously waive his right to sue in court. An employer may not "seek both the benefit of its disclaimer . . . while insisting that [its materials were] contractual when it suits its purposes." Ibid. In Morgan, where the plaintiff was terminated after refusing to sign a stand-alone arbitration agreement, the Appellate Division determined the prominent disclaimer included in the employee handbook precluded enforcement of the arbitration agreement contained in the same handbook. 433 N.J. Super. at 343. "By inserting such a waiver provision in a company handbook, which, at the time, the employer insisted was not 'promissory or contractual,' an employer cannot expect—and a court, in good conscience, will not conclude—that the employee clearly and unambiguously agreed to waive the valued right to sue." Ibid.

In this matter, it is clear that this court, in deciding the motion for summary judgment, failed to take into consideration the disclaimers in the employee handbook signed by the Plaintiff. The absence of an affidavit or certification by the plaintiff in opposition to the motion

for summary judgment or in support of the motion for reconsideration is of no consequence. Plaintiff's agreement to abide by terms of a document that is declared to be "neither a contract of employment **nor a legally-binding agreement**" cannot possibly create an enforceable agreement – under traditional contract law – to submit to arbitration. Consistent with the Appellate Division's decision in Morgan, you cannot both state that a document is not a legally binding agreement and that it is a legally binding agreement depending on the reason enforcement is sought. It is either an enforceable agreement or it is not. Defendant declared, in the body its document that it now seeks to enforce against the Plaintiff, that it is not a legally binding agreement. And so, it is not.

CONCLUSION

For the reasons stated above, the Plaintiff's Motion for Reconsideration is granted. The order for Summary Judgment is vacated and the Motion for Counsel fees is denied.