SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CIVIL PART
ESSEX COUNTY
DOCKET NO.: ESX-L-8519-21
A.D. # _____

PADDY SELLINO,

Plaintiff,

vs.

JOHN GALIHER, et al.,

Defendant.

TRANSCRIPT
OF
MOTION

Place: Essex County Historic Cthse.
(Heard via Teams)

Date: May 25, 2022

BEFORE:

HONORABLE JEFFREY B. BEACHAM, J.S.C.

TRANSCRIPT ORDERED BY:

LISA MANSHEL, ESQ.,
(Manshel Law, LLC)

APPEARANCES:

LISA MANSHEL, ESQ.,
(Manshel Law, LLC)
Attorney for Plaintiff

ANDY MERCADO, ESQ.,
(Olgetree Deakins)
Attorney for Defendant

Transcriber: Sharon Conover
PHOENIX TRANSCRIPTION
796 Macopin Road
West Milford, NJ 07480
(862)248-0670

Audio Recorded
Recording Opr: Surya-Nicole Bond

I N D E X

(Hearing commenced at 10:02 a.m.)

THE COURT: Good morning, this is Judge Beacham. We're on the record. This is the case of Paddy Sellino versus John Galiher, Bay Grove Capital Group, LLC, et al., docket number Essex County ESX-L-8519-21. Good morning, counsel your appearances for the record.

MS. MANSHEL: Good morning, Your Honor. Can you hear me?

THE COURT: Yes, I can.

MS. MANSHEL: Okay, thank you. This is Lisa Manshel of Manshel Law in Florham Park. I represent plaintiff Paddy Sellino in the action.

MR. MERCADO: Good morning, Your Honor. This is Andy Mercado of Olgetree Deakins I represent defendants. By the way, can you hear me?

THE COURT: Yes, I can.

MR. MERCADO: Okay, great.

THE COURT: Okay, good morning and thank you. Okay, this is defendant's motion to dismiss and compel arbitration, so we'll start with Mr. Mercado.

MR. MERCADO: Thank you, Your Honor. And I appreciate you accommodating our schedules and for allowing the parties to present their arguments today. I understand that there's a lot of issues presented in

front of the Court. So as succinctly as possible I would like to identify the four main issues and address them accordingly.

The first is whether section 12.7 of the NJ LAD is still preempted by the Ending Forced Arbitration Act. The second being whether plaintiff manifested consent to the arbitration agreement. Third, being whether any contractual defenses exist against the arbitration agreement. And finally, who are the parties if it goes to arbitration that are going to arbitration.

As to the first issue, amendments to the Federal Arbitration Act, which prohibit enforcement of Arbitration agreements when sexual harassment disputes are expressly prospective in nature. They apply to matters that arise on or after March 3rd, 2022.

The disputes in this matter all occur, at least the allegations suggest that the -- this matter arose from conduct occurring between 1995 and 2020. This the parties agree. The parties really here dispute whether the purpose of these new amendments, align with 12.7 of the NJ LAD, which in itself also prohibits arbitration of such matters.

With respect to cases arising before that statute is enacted, since the statute is not

retrospective in nature, so to the new purpose does apply retrospective. In that regard, 12.7 should still be preempted. Case law that has been relied upon cited in my brief, referenced in (indiscernible) as well, is still good law. We can discuss cases arising before March 3rd, 2022. In that regard, the whole purpose, the ratification of arbitration agreements, of contractual agreements in that regard, should still remain.

Your Honor, if you have any specific questions, by the way, as I go along, feel free to shoot by, otherwise I'll continue to move through the issues.

As to the second issue, whether or not a consent was manifested, New Jersey Courts routinely find that click-through agreements, click to accept acknowledgment agreements present sufficient manifestation of consent with respect to arbitration agreements. Here the plaintiff clicked through and completed her work day tasks on October 15th, 2019. In that process she was presented several tasks in her what's called a work-day account, work-day inbox, that populates in her inbox.

One of those tasks has to do with the arbitration acknowledgment. When accessing that task

plaintiff was presented with a pdf attachment. She was also presented with a clickable I agree box next to a signature statement that identified her acknowledgment that she read the agreement that she understood the agreement, and that she entered the agreement voluntarily.

Once that task was completed, it was archived into her account. That's why in my moving papers, I indicated that this specific page, specific screen that plaintiff viewed at the time of going through this process cannot be replicated, but the information and content was ultimately saved within her account, accessible by her in her archive.

There is no requirement in this regard, when we talk about employer to employee arbitration agreements to have mechanisms in place to force plaintiff or another employee to review the acknowledgment agreements. That, the only requirement that you sign into her cases that such as the ones cited by the plaintiff, Wollen and Caspi, those claims also involve (indiscernible) acknowledgment -- click through acknowledge language that we're discussing here.

So the claim that she saw the arbitration agreement but she never read it, is just not

sufficient. There's already case law such as Gomez, that indicate that that's not sufficient to reflect that arbitration -- compel to arbitration. Also, the basic tenor of contract law suggests that the failure to read a contract and signing it, in this case electronically shouldn't excuse the performance of that contract.

As to this third issue, whether any contractual defenses exist, here the two defenses presented by plaintiff are fraud and inducement, and lack of consideration. Put forth those defenses are whether or not consideration existed at the time that Ms. Sellino executed the arbitration agreement. Both parties agree continued employment does constitute a consideration.

But really the dispute is that whether that promise at the time (indiscernible). The allegations was presented by plaintiff, to suggest that it wasn't legitimate are not sufficient here to say -- to refute the legitimacy of that consideration.

Ms. Sellino signed the agreement, and five months later she voluntarily decided to resign her employment. The fact that there was an acquisition by lineage of Preferred Freezer Services, and you know, the things inherently that are involved in that kind of

reorganization, termination of other employees, re-designation of roles and duties, has no bearing on whether or not the promise to Ms. Sellino specifically who continues to be employed after those employees were terminated, the promise for continued employment was legitimate. It did nothing except for speculation to suggest otherwise.

Then quickly going onto the fourth issue, who are the parties to arbitrate, if compelled. One is it's a question of whether -- what this relationship of the corporate defendants are. We provided the certification that defines the relationships, show that the corporate defendants are affiliated in one way or another, either affiliated by the generally accepted terms of affiliation when (indiscernible) or through the corporate regulations defining affiliation.

All the corporate entities are affiliated and thus parties to the arbitration agreement. With respect to Mr. Galiher, many courts within this jurisdiction and outside of it permit non-signatory employees to invoke arbitration agreements of their employers. In some cases, involving the NJ Lad, involving claims with respect to aiding and abetting. Mr. Galiher was an employee of Preferred Freezer Services and he was an employee of Lineage. I don't

know what his status is as of this moment, but for all time periods relevant to the allegations in the complaint, Mr. Galiher is an employee. Therefore, he should benefit from the arbitration agreement, which is further exemplified by the scope of the agreement, which includes claims against other employees.

Here the specific claim is aiding and abetting. The question is aiding and abetting what? The principle violation. So it only makes sense for his claim to also be a part of the arbitration, because we need to first figure out if there is a principle violation. And in the event that that's not the case, and if Your Honor is leaning more towards not including him in the arbitration, then we respectfully ask that the litigation against Mr. Galiher be stayed, again because we first have to consider what the principle violation is, or if it even occurred.

A lot of these facts, a lot of these issues presented in Mr. Galiher's case overlap with what we discussed in arbitration. And those are all the issues.

Again, Your Honor, if you have any specific questions, but based on what I said today and based on our motion papers, we ask that our motion to compel be granted.

THE COURT: Thank you, Mr. Mercado. Ms. Manshel.

MS. MANSHEL: Thank you, Your Honor. Because I didn't, you know have a chance to respond to the reply brief, I'm going to take a little bit of a deeper dive. If it becomes tiresome and Your Honor wants to tell me I read the papers, Ms. Manshel. I do want to put, I think lot of the case law is cited out of context. There is controlling precedent and I feel it important for my client that I go through the way the case law was used on the reply somewhat methodically.

So if it becomes tiresome, please don't let me wear out my welcome, but I'm going to speak at some length.

This is not a termination case as Mr. Mercado indicates. This is a case that involves 24 years from end to end of really egregious sexual harassment of plaintiff. And the center of gravity in this case for 24 years is John Galiher, who was the owner of all the moving parts entities over that 24-year period, Ms. Sellino's employer, someone she had a lot of day-to-day contact with, even though he wasn't her nominal supervisor. He personally sexually harassed her up until the recent years, not just a one off comment back in the '90s, but continually. And he made every single

decision that's at issue in her underlying claim.

There is very little that any corporate entity is going to be able to add. This is a closely held company by Mr. Galiher alone, until a sudden at the tail-end acquisition by the litany of other corporate defendants. They're in the case because of empty chair concerns and I have not yet seen the contract between Mr. Galiher and the entities that acquired his business. But this case is about John Galiher and what he did for 24 years, how my client was treated and then the decisions he made.

All the discovery is going to come from his mouth and basically, the files that were created by his company until less than a year later, when nominally that entity became property of the list of other corporate parties.

So, I want to go also plunking through all four points of the reply brief, of the opposition brief. I think Mr. Mercado has sort of accepted the way I've broken out the issues. First, let's talk about preemption. It is clear to plaintiff that the Ending Forced Arbitration Act has absolutely obliterated the argument that a state like New Jersey, that decided to enact a prohibition on forced arbitration of certain kind of claims can't enforce

it's law in it's State on claims that arise under State Law.

This Court is not being asked to decide the prospect activity or the retroactivity of anything. Mr. Mercado argues that Your Honor should not apply something or other prospectively. That is not what is keyed up on this motion. Plaintiff is not arguing that Your Honor should apply the Ending Forced Arbitration Act, which now from March 3rd forward prohibits pre-dispute mandatory arbitration of cases relating to sexual harassment dispute. We're not saying that that's the controlling law in this case. To some extent, I'm repeating my brief here.

What we're saying is, now that that amended version of the Federal Arbitration Act is the law of the land, congress doesn't care if New Jersey wants to apply it's duly enacted law, which was effective in March 2019, long before plaintiff's continued violation arose, you know when she filed this claim -- she ended in February 2020 the sexual harassment ended. The New Jersey Statute was effective March 2019. That is the controlling law.

I think the way to understand the fallacy, the logical fallacy of the defendant's argument is to think of it this way. All of preemption doctrine

arises from the supremacy clause of the United State Constitution. So I submit that the Court should ask itself today when Paddy Sellino says under 12.7, I want to go to State Court and litigate my case relating to sexual harassment disputes, the Court should ask itself what is the supremacy clause argument that steps on New Jersey and says you can't let her use your law to do that? There's nothing.

There's certainly no federal policy under the FAA that says whoa that's anathema to what we want to see happen in our country. What the congress has said resoundingly is we don't want women who have cases relating to sexual harassment disputes to be bound by pre-dispute arbitration agreements, period, full-stop. Whether congress wanted it's own mechanism to apply prospectively or retroactively is not of moment today. What's of moment is what does congress want today. And what congress wants is to remove the anathema of women being bound by pre-dispute waivers of cases relating to sexual harassment disputes.

So there's no impediment, New Jersey -- we know that State Courts are permitted routinely to go farther in granting Constitutional -- State Constitutional or Statutory protections to employees. We do that under our State Free Speech protections, we

give more. Our State Anti-Discrimination Statutes, we give more. We have uncapped punitive damages. We have individual liability, you don't have that under Title 7. That isn't a preemption basis.

So I think it's very clear, I didn't insult the Court by attaching blogs to my brief. But I will tell you that defense firms, just defense firms are out there routinely Jones Day, my eyes aren't good. I was looking for the -- every defense blog out there has said for those 11 states or so that have laws like 12.7 preemption argument is gone everybody, be warned. I looked for one from Olgetree, because I thought wouldn't that be a nice a little coo. But they have not written on the subject yet.

There's no doubt that under 12.7 this is an easy case. It's very a consequential case. It's going to be heard. It's an important and big decision. But the law is not ambiguous. Defendants should just lose this motion outright under 12.7 at this time.

So moving on, I want to talk about the additional reasons why in arguendo the Court rejects you know the argument that 12.7 is the law now. Oh I'm sorry, one other thing about 12.7, Your Honor and your law clerk may find the unpublished decisions under 12.7 that are dated after March 3rd, 2022 that continue to

hold that 12.7 is preempted. I want to address that prophylactically so it isn't a curve ball that skews the results.

There's a handful of cases like that, that defendant cited two of them, I think I gave the Court Antonucci which might have post-dated. None of them, they were all briefed and argued to appeal decisions made long before the Ending Forced Arbitration Act became law this year. And none of them discuss it's implications. I would assume there are going to be pending motions for reconsideration in light of the material change in the law. But I want to disclose that the Court you know, less it moves the needle, maybe I think in the legally wrong direction.

So that's the first point. I think that disposes of this whole motion. The second issue which also disposes the motion is the lack of effective formation and the lack of clear manifestation of plaintiff's intent to arbitrate. Let's take basic Black Letter principles. Garfinkle, Leodori, Atalese together say in order to compel a party to waive her rights to their, you know sue in a court of law, the agreement -- the manifestation of the agreement must be clear, unambiguous and unmistakable. That's the background neutral principle. It's a high standard.

What is undisputed factually here today? And by this, I mean when you look at all of the reply certifications that defendants have produced, what's the net result factually? Okay, here's some things that are undisputed by any contrary reply certification. Plaintiff was rushed to complete the workday task. No emails were provided to plaintiff that in any substance described what the arbitration agreement said and explained it to terms in a way that would satisfy the requirement of a jury waiver notice, and an explanation of arbitration and what it is.

No FAQ, Frequently Asked Questions were provided to plaintiff, which is a -- it's detailed in the record because that was something that was in the Skuse versus Pfizer decision of the Supreme Court. It's undisputed there were not FAQs provided to plaintiff. Plaintiff was not given any training on the MAP, the Mutual Arbitration Agreement of these defendants. And certainly, she was not given any training that put in front of her and notified her what the arbitration agreement said and what rights she would be waiving if she signed.

It's undisputed that no one told plaintiff anything verbally about the arbitration agreement and what it's provisions were. That was her certification

and it is unrefuted. It is undisputed that plaintiff was told that they only wanted her to complete these work-day tasks so that paychecks wouldn't be delayed and her paycheck should be processed. Undisputed.

It's undisputed as plaintiff certified, that the work-day system was glitchy. And if you look at the exhibits, the screen shots, of -- excuse me -- the login record supplied by Marcy Breskin (phonetic) in the original moving certification, you will see on the date in October when plaintiff's electronic, so-called signature was registered there are multiple times over the course of the day for hours where she's making failed attempts to login. And if we got to discovery, she would testify, yeah it would glitch, it wouldn't work. I would get up. I would do work, I take care of stuff, I come back, I try to do it. It's undisputed that this process was glitchy in the actual use of the work-day process.

It's undisputed that as Roseanne O'Burn (phonetic) a former HR professional certified, that all the -- she experienced all the same things. She didn't know there was an arbitration agreement. She wasn't told verbally about an arbitration agreement. She never got an email which had substantive explanations, such as plaintiff in Skuse v. Pfizer received, these

women didn't receive anything like that.

And what's the most important of all, what's the most important of all, because there's so much smoke in conversation, the bottom line is it is undisputed that plaintiff was not required to click open the pdf, nor was she required to scroll through the mutual arbitration agreement before she was able to click and say I accept. That was completely obfuscated in defendants' moving papers. Marcy Breskin put a lot of words out there it's like my kids tell me, that's a lot of words. I talk a lot.

Marcy Breskin's original cert had a lot of words about we provided it to her, we reviewed it. She didn't come right out and say well it was a pdf sitting next to the box that plaintiff could click. She could open it if she wanted to. She tried to kind of slide that by on this motion. Now the plaintiff has certified and Roseanne O'Burn has certified you didn't have to open it. You didn't have to scroll through anything. I didn't really even know what it was.

Marcy Breskin gave this Court a reply certification, a supplement certification and low and behold she's not saying sure they did. You couldn't possibly click that box and accept until you opened up that pdf or until you scrolled through. Under Wollen

and Caspi that's just positive. Under the case laws, I'll go through a little more laboriously, that's just positive. Those things are all undisputed.

So getting to the law, in this case defendants gave -- defendants created an MAP with five signature lines. I think it's print your name, sign your name, what's your job, I don't know what all the other ones are. Five signature lines. No where does the MAP say but it can also be accepted by electronic signature. No where does it say that.

So defendants themselves have created a contract, and the formal method to accept as chosen unilaterally by defendants, is ink. It's undisputed plaintiff never inked that.

On this motion defendants say well that doesn't matter because she clicked the box. And I would have a quibble with defendants. I think it dishonestly in their brief -- in their reply brief on page five, defendants claim that the lineage designated method of assent is to choose electronically. That's just simply a false statement. Nowhere in the record does it show that they've ever said the MAP can be accepted electronically. In fact, the face of the MAP have five lines to be inked.

So, we know under Leodori, the New Jersey

Supreme Court case that when a document is created that should be inked, and it's not inked, maybe it can be enforced anyway. But in order to enforce it, the employer would have to come up with some unmistakable, that's the term of art, unmistakable indication that Paddy Sellino affirmatively agreed to arbitrate. Now I've already given the Court a litany of things that are undisputed factually. I think you know where I'm going with this. All of those facts make it impossible in my mind for the Court to conclude under Leodori, that although the inked lines weren't filled, I have -- the Court has found other unmistakable indications that plaintiff affirmatively agreed to arbitrate. I think those facts kill that argument.

But walking through the case law there's three significant decisions that can factor into and support whichever way the Court goes. First of course is Skuse v. Pfizer, that was an electronic signature. But here's the dispositive difference why Skuse was compelled to arbitrate, and plaintiff's electronic so-called signature does not meet the Skuse standard as indicia of other unmistakable assent to arbitrate.

In Skuse, the plaintiff in Skuse and I'm not going to tell every fact, I'm going to tell you the ones that I think are dispositive because it is a long

case. But different from this plaintiff, not once but twice in Skuse Pfizer sent Skuse and email that wasn't just you have a task in work-day click. It was this is the arbitration agreement, this is why it's important that you understand this, this is what arbitration is, et cetera, et cetera. The space of the emails to that were sent in Skuse explain the substance supporting a finding of knowing clicked assent. Okay.

In addition, dramatically different from plaintiff, Paddy Sellino, the plaintiff in Skuse was also sent an email to participate in a training module about the whole arbitration agreement. What does it say? What does it mean? How do you manifest acceptance, which in Skuse was by continuing to work by the way. And plaintiff, it's undisputed completed that training module. She completed it. She did the whole educational thing that told her why it's important and what her rights would be, and what she had to do to accept if she was going to accept. None of that happened here. Nothing, zip, zilch.

So under Skuse itself, there's no other unmistakable indication that plaintiff who never inked the deal nevertheless agreed to be bound.

Then we get to the two Appellate Division published decisions. First is Wollen, these are

consumer contracts. Skuse is employment. Okay, let me say Mr. Mercado suggests that we have a separate juris prudence for enforcing arbitration agreements in consumer cases rather than employment cases. I had this issue. I briefed this issue, I disagree. There is case law -- there are statements in the consumer cases that sometimes say, context matters. So in candor to the Court, there are statements in the consumer cases that say it matters, this is a consumer case.

But ultimately, I could give you examples but the New Jersey Supreme Court cases have a unified doctrine. They are applying the same standards, whether it's employment or consumer. Be that as it may, we have Skuse which is an employment case which dictates the Court finding for plaintiff.

But we also can look to the Wollen and Caspi cases, two Appellate Division consumer cases. Both of them turn on the question of whether the plaintiff in that case had been forced to open up and scroll through the punitive arbitration agreement. In one case the plaintiff had been forced to, so that plaintiff was required to arbitrate in Caspi, the other the plaintiff has not been forced and the plaintiff was not required to arbitrate, that was Wollen.

Again, it's undisputed in this case plaintiff wasn't required to. I would also point the Court to the Stowell versus Cantor Fitzgerald unpublished Appellate Division 2020 case, because on their reply brief defendant's cited that. It's Exhibit D to Mr. Mercado's supplemental certification.

That is an LAD case. And it's useful, I draw the Court's attention to it for two reasons based on the oral argument we just heard. First of all it's an LAD case which addresses this issue with the same legal analysis not withstanding it's not a consumer case. And it's cited by defendants. And here's the problem, in their reply brief, defendants cite this case for the proposition that you know, we enforce click wrap, we enforce browse wrap, we endorse -- we enforce agreements that are click accepted. That is a way too superficial way to think about this problem. The devil's in the details.

What was the plaintiff shown? Okay, how knowing was the click. And in the case itself which defendants rely on, what they don't tell the Court is the reason the Court found that the click was an enforceable acceptance of an arbitration contract was, and I'm going to read quote, "because plaintiff had to scroll through the agreement before she could

electronically sign it." The defendant doesn't cite that piece of the holding to the Court. But it's the very gravamen of the rule of decision that controls on this case.

The other cases cited by defendants because I am going on too long are just all off point. Some of them don't address -- I'll pick through them quickly. The Gomez case cited by defendants, Exhibit E to the Mercado supplemental cert, the plaintiff clicked, she didn't remember clicking, but that wasn't enough. It's not helpful in this case because we have no idea from the Gomez decision whether plaintiff was required to open up the arbitration agreement and scroll through it. I would agree that if she was, it's too bad if she doesn't remember clicking. But the point is what did the person who presented the arbitration agreement show the signator. So Gomez is unhelpful.

Flanzman versus Jenny Craig misrepresented in defendant's reply brief. The defendants suggest that it stands for the proposition that one click and you're bound. We're not going to think real deeply about this. In fact, the New Jersey Supreme Court in that decision mentioned in a footnote, a footnote, that plaintiff didn't recall signing, but she agreed it was her signature. It's not going to move the needle on

this motion.

The Flanzman case was about something totally different. The plaintiff said, the arbitration contract doesn't say who is going to arbitrate, what arbitration organization we use, or the prosecution arbitrator. That's a fatal defect. The New Jersey Supreme Court said no it's not. It has nothing to do with this case.

The Grass cited -- Appellate Division cited in defendant's reply brief, you know says basically plaintiff didn't remember reading it. These are paper arbitration agreements, a series of loan agreements, plaintiff inked it, that's not relevant here. The point is that plaintiff saw the agreement. Here the plaintiff did not see the agreement. And the Courts say the employers had the duty to show it to her, make her click it open, make her scroll through it.

The case in the Southern District of New York, boilerplate, there's nothing helpful. Leodori I've already discussed. Leodori, I'll make one more comment, because it's such a controlling case and it's a New Jersey Supreme Court published case. In defendant's reply brief, defendants cite Leodori for the proposition that a signature page doesn't have to recite everything in the arbitration contract. And

their point, I guess is, as long as you click, who cares if you saw the same. That's not what Leodori says.

In fact Leodori goes on to say, quote this is at page 307, "so long as" and I'm using ellipses here to make it relevant, "so long as the policy is described more fully in another document known to the employee." So even that reliance on Leodori was misleading, because obviously the facts here are that the arbitration document was not known to plaintiff, defendants never showed it -- forced her to open it up and scroll through it, which is their burden when they want to use the new technology of the expedience and immediate irrevocability of a click.

I'm going to come up for air, because for all of these reasons, clearly plaintiff never manifested other evidence of assent when she didn't put her ink on the agreement. The whole thing is not enforceable. This is a breaking point and I've talked like a fire hose. So I'm going to pause for a second and see if there are any questions or if the Court wants me to proceed differently because then I'll reach the fraud and John Galiher issues after.

THE COURT: Okay. Why don't we hear from Mr. Mercado?

MR. MERCADO: Thank you, Your Honor. Just with respect to -- there seems to be a general idea that scrolling through the agreement itself is the main requirement to express mutual assent of the arbitration agreement. But before I jump on that, a point was made with respect to whether or not another document contained the details of the arbitration policy. That other document was the pdf that was attached in the task presented to Ms. Sellino in this case.

Again, the fact that she decided not to click it and read it, really is on her. And there isn't -- Skuse doesn't really stand for the fact that you have to have a scroll through. Right, in fact, none of the cases really cited -- I would state that you must scroll through if you want to express a mutual assent. Here, what we're arguing is the signature box, the statement contained within the task itself, coupled with the pdf which was completely accessible to plaintiff for her review, is sufficient to show that she manifested assent to the arbitration agreement. Should she have clicked it? Yes. Was she -- did we -- are required as the employer to provide mechanism of enforcing that? Absolutely not. Does it help? Sure. Sure. But there is no case law that stands for that proposition.

Regarding whether -- so another comment was made with respect to a comment in the brief, characterizing that defendants state that the MAP can be accepted electronically and that was the primary format of acceptance. Let's think about that.

How as the MAP presented? It was presented within the work-day file. It's presented through the on boarding process. It's presented electronically. It was presented to plaintiff, yeah as a pdf and she could've print it, but the main option was to click that acknowledgment box. That is the basis for stating that electronic signature is the primary format for acceptance of the agreement.

With respect to Wollen and Caspi, I've addressed it enough in the brief and I mentioned it earlier during my initial arguments. So I am not going to belabor that point.

Just going back to the initial issue of whether the new amendments to the Federal Arbitration Act has an effect really on this matter. The reason why I'm placing importance on the prospective outlook of that statute, it is because all Courts place importance on that. If we -- the statute itself is expressive on that point. If we are to apply this statute retroactively, as if we took this new purpose,

this new purpose which is to prohibit these kinds of claims from going to arbitration, right, and then were to apply that and say well, we don't have to preempt New Jersey State Law. Even though in this specific context that we're dealing with issues arising before March 3rd. We're essentially not aligning with the new amendment, because that new purpose is with respect to matters arising after March 3rd, not before.

At some point those cases will dissipate. At some point all cases will arise after March 3rd. And the new purpose is the new purpose, there is no in-between, there is no twilight zone that we're dealing with right now. But right now, there are a handful of cases out there that still exist in accordance with the old law, still exist in accordance with the case law that supports a preemption of 12.7.

Otherwise -- to do otherwise, to say well you know, they can apply that law, right now even though we don't address the cases that arose before this State, they can apply the NJ LAD 12.7. What we're doing is saying, well we're depriving you of notes, we're depriving you of the notion of fairness that you associate with a prospective outlook. Just quickly, regarding the -- the circumstances which leads plaintiff to believe that there is a mutual assent, she

mentions that she is rushed, okay. But we don't have any details as to what that means, rushed.

What we do have, is she signed the document October of 2019 and the new payroll was going to be installed in January of 2020. I don't see how -- in what world is she rushing if she has months to complete the on boarding process. There was not training. Well we consent to that. And there was not a FAQ, F-A-Q.

The point with regard to the work-day account being glitchy, yes the time stamps do show that plaintiff was attempting to login. She failed to login. But ultimately, ultimately she sought -- she went through the tasks, she clicked the acknowledgment boxes. That part, I don't think is disputed. That part was not glitchiness of the work-day, whether or not the glitchiness actually occurred, even if we accept it as true, it seems to only relate to her ability to login, but not her ability to click these tasks.

And Your Honor, you have any specific questions, I'm happy to address them. But for now, that's that I have in response to Ms. Manshel's argument.

THE COURT: Okay. Thank you, Mr. Mercado. Ms. Manshel?

MS. MANSHEL: A little brief response and then I'll move onto the remaining issues. It's really fascinating actually. Most importantly, on the Ending Forced Arbitration Act and the eradication of any preemption argument, because there's no conflict anymore, I want to point something else out, it's a little academic but I think it's really important given Mr. Mercado's comments.

It is well understood by our legislatures in congress that there is such a thing as expressed preemption. There's implied preemption. There's expressed preemption. Under Bolt the U.S. Supreme Court decision on this topic, it's always been known that the Federal Arbitration Act did not have an expressed preemption clause.

But nevertheless, all of this preemption stuff we're talking about has been interpreted into it as implied preemption. When congress passed the Ending Force Arbitration Act, it was very well known we can understand as a matter of judicial notice that there were these states out there, New Jersey being one of them, New York being another, in the national legal news all the time passing these laws like our 12.7 trying to bar the enforcement of predispute waivers on civil rights claims.

When the Ending Forced Arbitration Act was enacted, congress was silent. It did not choose to suddenly why don't we include an expressed preemption provision and say listen you guys, you have to apply those prospectively, you can't enforce those laws anymore. Congress was silent. There is no basis to conclude that there is still a federal policy against the enforcement of more generous, more protective state laws that limit the enforcement of pre-dispute waivers in cases relating to sexual harassment disputes. It's just a red herring. It's not the way preemption law works. And if it were going to work that way, congress could've included an expressed preemption provision in the Ending Forced Arbitration Act itself.

In addition, Mr. Mercado makes a policy argument well the poor business interest, they didn't know until March 3rd, that they can't arbitrate their sexual harassment disputes anymore. Frankly, from a policy position I would keep in mind the women and the men that are being subjected to sexual harassment, who no longer are stuck with really draconian, pre-dispute arbitration agreements of adhesion that are wrong on so many levels, and they can finally have their time-honored right to sue.

But on the policy question, you know, New

Jersey business interests have known since March 2019 when 12.7 was enacted, you know we got a problem here. This is not big news. Everyone has been watching this like a hawk. I can't tell you the number of panels that I personally have just been on. This is not a big, oh my God, where did this come from? Poor New Jersey business interests that are going to suddenly wake up on March 3rd and find out that they have to arbitrate a claim that arose in 2020.

With that I'll move onto a different point, which is the issue of did defendants conceal a present intent to diminish plaintiff's job while they rushed her to sign the MAP. Clearly, under the FAA itself, state contract defenses like fraud and the inducement, like lack of consideration are valid defenses to enforcing an arbitration agreement under -- I gave the Court one for example, Third Circuit case, Guidotti versus Legal Helpers which talks about getting discovery in aid of that question. If the movant, in this case the plaintiff, raises a colorable question that a defense under State Law may exist. I think Mr. Mercado's argument is simply she's just making this up, there's nothing.

But I beg to differ. Plaintiff has certified that in August and later in the Fall she was included

in two different meetings, this is five months after the merger now, where everyone has said we have the one lineage now, we're all having these happy new lives together. I didn't include the documents, there's no dispute in reply that that happened.

And both plaintiff and Roseanne O'Burn attested to the rushed atmosphere misleadingly, not telling people we need you to agree to arbitrate, you're going to have to give up your right to sue if you want to continue working here, but just we got to process your payroll okay.

On the day it happened -- let me back off of that. And so she was rushed to do it, limited information, clicked, and then less than two months later, Rich Williams, her supervisor, tells her first we're demoting you, not in pay at this point, who knows what was yet to come. She moved on. We're demoting you and remember all those job duties we took from you beforehand when you still had your good title, and I promised you we weren't going to give them to anyone else, it was just that we're not reducing you, we're moving things differently, they hired two new people to take those job duties.

Rich Williams told her this in December maybe five, six weeks after she clicked her tasks in work-day

and lowered the boom. Now that's not speculation. Those are facts. It's well understood that timing is also evident. Timing is a form of circumstantial evidence that judges and lawyers work with all the time and the timing of these events, I would submit raises a colorable question, whether an international conglomerate and a private equity company, which is what Bay Grove the first named corporate defendant is, who effectuated a billion dollar merger of the second and third largest entities in the world in their industry were in fact clueless in October when they were bum rushing plaintiff, et cetera, and everyone else to sign it, just click through this document, were actually clueless that they might end up demoting or even ripping out employees like plaintiff.

I don't think that's speculation. I think that's a colorable allegation and entitles plaintiff to discovering on the case law -- discovering under the case law I've provided. That's going to be a call for the Court. I will say that it's really interesting, we got two certifications on reply. One was from Marcy Breskin who is the VP of HR for all of corporate, and based on Roseanne O'Burn's certification she thinks the second woman in her training session was named Marcy, was one of the people who came to New Jersey it would

appear and trained all of the preferred HR people how to roll out these work-day tasks and clicks. We got a certification from Marcy Breskin and we got a certification from Vanderelsin (phonetic) the chief Human Resources Office for the whole conglomerate, and neither one of them in reply said to the Court, Your Honor that's ridiculous. We made those decisions on the fly in the October 2019 time frame we were not even having backroom meetings looking at our headcount thinking about who might be redundant, who we might demote, who we might layoff, that's ridiculous.

So if Mr. Mercado were here this morning saying I was speculating, and he has certifications from one or both of these people who he bothered to get certifications from in reply, that said something like that, I might be kind of putting down my pen and saying, you know, maybe Your Honor plaintiff withdraws that argument.

But it's fairly astonishing to have an opportunity to submit reply certifications from the key HR people ever. I am not hiding the ball. I've told them exactly what I think they did wrong, and they're not even making a knee-jerk denial without discovery. We didn't do that. Not one sentence of either of them.

So I would submit Your Honor, that if all the

prior arguments failed to satisfy the Court this motion should be denied across the board. It certainly should be denied without prejudice and plaintiff should be afforded some focused discovery on these issues to determine whether there's a triable issue of fraud or lack of consideration in formation of a punitive arbitration agreement.

I can pause there, before I go onto John Galiher?

THE COURT: I think that's a good time to pause.

MS. MANSHEL: Okay.

THE COURT: Anything else, Mr. Mercado?

MR. MERCADO: Just, very quickly. I've already discussed the existence of the consideration itself. I just want to address sort of the fraud defense. Part of fraud requires a reasonable reliance by Ms. Sellino on the misrepresentation. So far, throughout all of the papers, all that we've discussed, I think both parties can say that Sellino -- Ms. Sellino did not even review the arbitration agreement which contains the -- that specific detail, the consideration, the promise of continued employment.

So to say that she was -- there was some kind of misrepresentation that she relied on or anything to

that effect, I think it's completely demoralized by the fact that she didn't even know what that misrepresentation would be.

With respect to whether or not there was dealings about who is redundant, what roles to be changed, I'll submit to the Court I don't -- I don't have the information, the specific information that was discussed throughout the entire acquisition process. I think it's safe to say that whenever you are talking about an acquisition, whenever you're talking about a merger, or something like that, there is some form of reorganization, and that would include termination of employees, that would include changing the roles, and changing the duties, but that doesn't -- that shouldn't invalidate every single arbitration agreement executed during that time. Right? That shouldn't be enough to say, well my guy, Ms. Sellino, for instance, has been one of those people that they intended to terminate, therefore, I am entitled to discovery.

I don't think that raises a colorable issue here with respect to fraud. I don't think that raises a colorable issue with respect to any of the defendants. It's still speculation because we're talking about the entire pool of every single employee. And ultimately, again, she was not -- Ms. Sellino was

not rift. She resigned months later. That's -- and -- at the end of the day, that does not entitle her to discovery.

That's all the points I have with respect to that. So I'll hear the rest of plaintiff's arguments.

THE COURT: Okay. The Court has read the papers submitted regarding John Galiher. The Court is ready to give a decision.

This is the defendant's motion to dismiss and compel arbitration. The defendants argue that even with the amendment to the Federal Arbitration Act, Section 12.7 of the New Jersey Law Against Discrimination, it's still preempted and the mutual arbitration policy and agreement is still enforceable against the plaintiff's claim of sexual harassment.

Enacted on March 3rd, 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 now amends the FAA to prohibit the enforcement of arbitration agreement in sexual harassment dispute. The new law also explicitly states that this act and the amendments make by this act shall apply with respect to any disputed claim that arises or accrues on or after the date of the enactment of this act.

The defendants argument in other words (indiscernible by plaintiff the FAA amendment only

prohibits the enforcement of arbitration agreements for sexual harassment claims that arise on or after March 3rd, 2022. Therefore, the purpose of the amendment is clear to reverse the federal policy on mandatory arbitration of such claims arising after it's enactment.

However, it's undisputed that this matter deals with claims of sexual harassment allegedly occurring between 1995 and 2020. The plaintiff's claims arose before the enactment of the Ending Forced Arbitration Act. Although, the prospective application of the act is not in dispute, the law used to determine whether a new statute can be retroactively applied are highly instructive in this regard. It is widely recognized that the preference for prospective application of new legislature is based to long held notions, notions of fairness, and due process. James versus New Jersey Manufacturer's Insurance Company.

Thus the defendants argue that the purpose of the prospective outlook of the act like any other prospective statute is to respect long held notions of fairness and due process and to avoid any unconstitutional interference with rights or manifest injustice.

Furthermore, the defendants argue that the

plaintiff has not evidence to dispute the credible evidence that she reviewed and electronically signed the agreement. The plaintiff attempts to gloss over the fact that this Court must resolve the (indiscernible) issue but against the backdrop of the strong federal and New Jersey public policy in favor of arbitration, which requires this Court to read the arbitration provision with liberality in favor of arbitration.

It is incumbent on the plaintiff to present credible evidence that she either did not sign the arbitration agreement, or that she did so under duress, or that her assent was otherwise involuntary within the meaning of the law. The defendant argues that the plaintiff simply cannot meet her burden in this regard.

First the defendant argues that the plaintiff's argument that the absence of any physical wet signature on the five lines of the agreement itself establishes her lack of assent is unavailing. New Jersey Courts routinely find that so-called click wrap, or click through, or click to accept electronic acknowledgments are sufficient manifestation of assent with regard to arbitration agreements.

Here the defendants argue that the competent arguments demonstrates that the plaintiff assented to

the agreement in accordance with the lineage defendant's designated method of expressing assent, for example the mouse click of the boxes indicating her assent. Skuse versus Pfizer, 244 N.J. 30, 60 (2020). Specifically as plaintiff admits at Exhibit B2, of Marcy Breskin's certification demonstrates the plaintiff clicked through and completed her work-day tasks on October 15th, 2019. When the plaintiff first assessed the -- accessed the MAP acknowledgment task in her box, she was clearly presented with a pdf attachment of the MAP.

Plaintiff was also presented with a clickable I agree box next to a signature statement in red, I acknowledge that I have carefully read the mutual arbitration document, that I understand it's terms and that I have entered into this agreement voluntarily and not in reliance on any promise or representation by the company or any persons other than those contained in the agreement.

As demonstrated in the plaintiff's lineage worker document, the plaintiff clicked on the I agree box next to the signature statement at 1:14 p.m. on October 15th, 2019. The fact that the agreement may be missing a physical wet signature therefore the defendant argues is in no way raises a dispute as to

plaintiff's assent.

The defendant argues that despite her attempts the plaintiff -- the plaintiff fails to distinguish this matter from Skuse where and expression of assent was found and fails to liken this matter to Wollen where assent was not found. Skuse involved an arbitration agreement and class waiver agreement that was disseminated by the employer to it's employees by a notification to their corporate mail account. The plaintiff employee received emails that linked to the agreement, completed her training module regarding the arbitration policy, and clicked the box on her computer screen that asked her to acknowledge her obligation to assent to the agreement.

Thus, unlike the plaintiff in Wollen, the plaintiff employee had knowledge of and assented to the agreement. The Wollen Court also noted that the consumer context of the contract matters in Skuse an employee -- employer/employee relationship already existed. Wollen on the other hand, involved a consumer and as such, the defendant argues involved an analysis of whether the consumer is tech savvy or reasonably prudent internet user.

Lastly Wollen involved a browser wrap agreement in contrast to the click wrap agreement found

in Skuse. Secondly, the defendant argues that the plaintiff offers her own self-serving testimony that she never saw and did not recall the agreement, and relies on the certification of former Lineage Warehouse administrator Roseanne O'Burn to support the conclusion.

Courts in New Jersey, including the Supreme Court have routinely rejected such statements to excuse the plaintiff, employee, from abiding by their contractual obligations to arbitrate. For example, in Gomez versus Rent-A-Center Inc, the District of New Jersey under circumstances similar to those presented here, held that a party's failure to recall electronically signing an arbitration agreement is insufficient to raise an issue as to the occurrence of that event and finding that ample safeguards were in place to ensure that not just anyone electronically signed the agreement on plaintiff's behalf.

Finally the defendant argues that plaintiff and O'Burn's inability to recall reviewing and assenting to the agreement does not matter in the face of the evidence presented by the defendant that she actually did so, for example, completing the work-day tasks by clicking the I agree box, next to the statement of acknowledgment. Flanzman versus Jenny

Craig Inc. The New Jersey Supreme Court held that an arbitration agreement was enforceable even where the plaintiff did not recall ever seeing the form called arbitration agreement before this litigation, and allegedly had no memory of being asked to sign this specific form alleged arbitration agreement.

The plaintiff argues in this case that this Court should decide as a matter of first impression nationwide that ending the Forced Arbitration Act signed into law by President Biden on March 3rd, 2022 has removed the bar of preemption from the Anti-Waiver Provision of the New Jersey Law Against Discrimination.

The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 prohibits compelled arbitration and it was effective March 18th, 2019. This lawsuit involved three LAD claims and a common law fraud claim that arises under case law. Under the state and clause of the Federal Arbitration Act, Courts may refuse to enforce an agreement to arbitrate upon such grounds at exist at law or in equity for the revocation of any contract. These defenses will be determined under the ordinary state law principles that govern the formation of contract.

However, if the State law obstructs the purposes of the FAA, those state laws will be subject

to preemption. Information Services versus Board of Trustees, holding that although the FAA does not contain an expressed preemption provision, State Law may nonetheless be granted to the extent that it actually conflicts with federal law, that is to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress.

Most unequivocally, State Law that prohibits the compelled arbitration of particular types of claims have until recently been preempted as an obstacle to the legislative purposes of the FAA under the Supremacy law.

Thus the Courts have considered the question, have until now held that the FAA preempts Section 12.7 of the LAD as an obstacle to the FAA's purposes burdening arbitration, despite not mentioning arbitration by name. The plaintiff argues that as of March 3rd, 2022 these preemption decisions are no longer good law. On March 3rd, 2020 President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.

The plaintiff argues that by amending the FAA in this way, congress has completely reversed the federal policy on mandatory arbitration. In this

lawsuit, Paddy Sellino is pursuing a case that relates to a sexual harassment dispute. As such, this case falls even more squarely within the newly announced congressional intent, because congress clearly abhors arbitration of this very type of a case.

The FAA as amended, however, does not provide a rule of decision on this motion, because direct application of the act is limited to any dispute or claim that arises or accrues on or after the date of an enactment of this act. The ultimate touchdown in every preemption case is congressional purpose. Wyatt versus Levine. The FAA itself now prohibits the enforcement of arbitration agreements in a case filed under the State Law that relates to sexual harassment dispute.

And this is such a case and accordingly enforcing section 12.7 in this case will fill rather than frustrate the purpose of congress under the FAA. So the Court in this case holds that the FAA does not preempt Section 12.7 of the LAD and the Court is denying the defendant's motion under the controlling authority of state law.

The next issue the Court must decide is whether the record provides clear and unmistakable evidence that the plaintiff knowingly agreed to arbitration. The law requires clear, unmistakable, and

unambiguous evidence that plaintiff knowingly assented to waive her right to sue. Atalese versus U.S. Legal Services Corp., 219 N.J. 430, 443 (2014).

The starting point for the Court's analysis in this case is the glaring lack of plaintiff's signature on the MAP itself. Although, the defendants urge the Court to recognize the electronic signature, the defendants failed to mention that the arbitration agreement includes five blank lines for execution as a method of demonstrating assent.

The New Jersey Supreme Court has held that when one party presents a contract for signature to another party, the admission of that other party's signature is a significant factor in determining whether the two parties mutually have agreed have reached an agreement. Leodori versus Cigna, 175 N.J. 293, 305 (2003).

The Court in Leodori acknowledged that absent the plaintiff's signature, some other unmistakable indication that the employee affirmatively had agreed to arbitrate, could support compel to arbitration. In fact, the Court agreed with Cigna that the plaintiff knew of the company's arbitration policy based on it's publication, the numerous documents that he had received during the employment, nevertheless the Court

refused to compel arbitration finding that that no one document or other piece of evidence that un-mistakenly reflects plaintiff's agreement to that policy.

In this case, the plaintiff attests that she did not open, view, or scroll through any documents while completing the work-day tasks. Further, while Marcy Breskin offers the conclusory statement that the plaintiff was required to review the documents relating to the task document were provided to plaintiff, those statements have not been proven.

Under work-day process did not require to plaintiff access, view, or scroll through any documents whatsoever. Under Wollen and Caspi, the defendant's work-day process was inadequate to demonstrate knowing assent, because there's no evidence that plaintiff accessed the arbitration agreement, or the process required access to the MAP in order to execute the electronic signature.

On the totality of the factual record, the defendants have failed to proffer some other unmistakable intent, indication that the employee affirmatively had agreed to arbitrate as required when an agreement is not signed in the space provide. Leodori versus Cigna, 175 N.J. 293, 307 (2003).

So, for those additional reasons the

defendant's motion is dismissed -- is denied. Thank you everyone. Everyone have a good day.

MS. MANSHEL: Thank you, Your Honor. Thank you Mr. Mercado.

MR. MERCADO: Thank you all, take care.

(Motion concluded at 11:13 a.m.)

* * * *

CERTIFICATION

I, Sharon Conover, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, Index No. from 10:02:23 to 11:13:27, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings, as recorded.

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