NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0749-14T4

TAHISHA ROACH and EMILIA JACKSON,
on behalf of themselves and all
others similarly situated,

Plaintiffs-Appellants,

v.

BM MOTORING, LLC and FEDERAL AUTO
BROKERS, INC., both corporations,
t/a BM MOTOR CARS, BORIS FIDELMAN
and MIKHAIL FIDELMAN,

Defendants-Respondents.

Argued October 20, 2015 – Decided January 20, 2016

Before Judges Yannotti and St. John.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-1333-14.

Henry P. Wolfe argued the cause for appellants (The Wolf Law Firm, LLC and Law Office of David C. Ricci, attorneys; Mr. Wolfe, Daniel I. Rubin, Andrew R. Wolf and David C. Ricci, on the briefs).

Thomas C. Jardim argued the cause for respondents (Jardim, Meisner & Susser, P.C., attorneys; Mr. Jardim, of counsel and on the brief; Matthew A. Stoloff, on the brief).

PER CURIAM

Plaintiffs Emelia Jackson and Tahisha Roach, on behalf of themselves and all others similarly situated, appeal the trial court order dismissing their complaint with prejudice and compelling arbitration with BM Motoring LLC and Federal Auto Brokers, Inc., both t/a BM Motor Cars (BM). Following our review of the arguments advanced on appeal, in light of the record and applicable law, we affirm.

I.

The record reflects the following facts and procedural history. Jackson purchased a used car from BM on August 17, 2013. At purchase, she signed a "Dispute Resolution Agreement" (DRA) as part of the contract. Under the DRA, BM and Jackson mutually agreed to arbitrate "any claim, dispute, or controversy, including all statutory claims and any state or federal claims, that may arise out of or relating to the sale or lease identified by this agreement." The DRA specified that the "arbitration shall be conducted in accordance with the rules of the American Arbitration Association [(AAA)] before a single arbitrator, who shall be a retired judge or attorney. Dealership shall advance both party's filing, service, administration, arbitrator, hearing, or other fees, subject to reimbursement by decision of the arbitrator." Also included in

the DRA was a waiver of any right to pursue a claim as a class action arbitration.

On October 8, 2013, Jackson filed an arbitration claim with the AAA. The claim alleged that BM had violated the Consumer Fraud Act, N.J.S.A. 56:8-1 to -184, based on its refusal to sell the car for the advertised price, overcharging for title and registration fees, and misrepresenting the terms of an extended service plan. A copy of this claim was served on BM. On October 15, 2013, the AAA sent a letter to BM in response to Jackson's claim, advising it to pay the filing and arbitrator fees, totaling $3,200, no later than October 29, 2013. BM never paid or acknowledged the letter. On October 31, 2013, the AAA sent a letter to both parties stating that there was no response and the deadline to pay the fee will be November 11, 2013. The letter warned if BM did not pay, the AAA would not administer arbitration on this claim and could decline to arbitrate any future claims by other consumers against it. Again, BM did not pay or acknowledge the letter, and on November 13, 2013, AAA sent a final letter to both parties closing the claim. The letter also stated:

> Further, since Federal Auto Brokers, Inc. d/b/a BM Motor Cars and BM Motoring, LLC has not complied with our request to adhere to our policy regarding consumer claims, we must decline to administer any other consumer disputes involving this business.

> We request that Federal Auto Brokers, Inc. d/b/a BM Motor Cars and BM Motoring, LLC remove the AAA name from its arbitration clause so that there is no confusion to the public regarding our decision.

BM alleges that its counsel was in communication with Jackson's counsel regarding the possibility of settlement before the AAA closed the claim.

Roach purchased a used car from BM on February 16, 2013. Roach signed a substantially identical DRA in connection with the purchase. A dispute arose relating to the purchase, and on August 13, 2013, Roach filed a complaint against BM in the Law Division. On October 3, 2013, BM filed a motion to dismiss based on the DRA, asserting the court lacked jurisdiction over the matter. Roach did not oppose the motion and an order was entered on October 25, 2013, compelling the parties to arbitrate and dismissing the complaint without prejudice.

Pursuant to the order, Roach filed a claim with the AAA on January 6, 2014, and served BM on the same date. On January 9, 2014, the AAA sent a letter to both parties' attorneys stating that BM had previously failed to comply with AAA policies, therefore the AAA would no longer accept any disputes involving BM. On January 23, 2014, the AAA sent a second letter stating the same thing.

After receiving these letters, Roach returned to court and filed a complaint, jointly with plaintiff Jackson as a putative class action, based on BM's alleged pattern and practice of overcharging for title and registration fees. In response, BM filed a motion to dismiss plaintiffs' complaint and compel arbitration.

BM alleged that the DRA does not contemplate using the AAA as the forum for arbitration and that it has consistently not used the AAA because of the high expense, thus neither Jackson nor Roach pursued arbitration in accordance with the DRA. In opposition, plaintiffs argued that BM had never specified that the AAA was not the proper forum nor suggested an alternative. In fact, despite counsel for both parties speaking numerous times, following Jackson's filing of a claim with the AAA, this was the first time BM communicated any objection to arbitration through the AAA.

On June 6, 2014, the trial court heard oral argument on BM's motion to dismiss and compel arbitration. BM argued that the DRA is valid and enforceable, and the only dispute is the forum. Plaintiffs alleged that BM's actions constituted a material breach of the DRA, thus they had a defense to enforcement of the DRA. The court granted BM's motion, finding that, "the contract is pretty clear. The intent is to go to

arbitration, and . . . the parties should remain faithful to that clause. . . ." The judge ordered arbitration through the AAA, within a reasonable time, however made the order conditional on the AAA accepting the claim and BM paying the requisite fees. The AAA accepted the claim, and on August 22, 2014, the court entered a final order dismissing the class action with prejudice. This appeal followed.

On appeal, plaintiffs contend that BM materially breached the DRA by failing to arbitrate after receiving service of their demands for arbitration, and BM waived the right to enforce the DRA by failing to pay the fees as was required. BM contends that the AAA was not the appropriate forum to initiate the claims, so there was no breach or waiver.[1]

II.

Orders compelling or denying arbitration are deemed final for purposes of appeal. See R. 2:2-3(a); Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013). "We exercise plenary review of the trial court's decision regarding the applicability

[1] In their brief, plaintiffs have alleged that after the AAA had opened new claims for their respective disputes, BM again failed to pay the filing fees and the claims were subsequently closed. Counsel for BM advised that they would not pay because the pendency of this appeal. The trial court's record does not contain any evidence to support these allegations; therefore, we will not consider these statements. R. 2:5-4; Townsend v. Pierre, 221 N.J. 36, 45 n.2 (2015).

and scope of an arbitration agreement." Jaworski v. Ernst & Young US LLP, 441 N.J. Super. 464, 472 (App. Div. 2015). Similarly, the issue of whether parties have agreed to arbitrate is a question of law that is reviewed de novo. See Hirsch, supra, 215 N.J. at 186; see also Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). However, we review orders compelling or denying arbitration "mindful of the strong preference to enforce arbitration agreements, both at the state and federal level." Hirsch, supra, 215 N.J. at 186.

The Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-16, and the New Jersey Arbitration Act (NJAA), N.J.S.A. 2A:23B-1 to -32, both promote federal and state policies favoring arbitration as a means of resolving disputes by establishing the validity of arbitration provisions. See 9 U.S.C.A. § 2; N.J.S.A. 2A:23B-6. Due to the preemptive effect of the FAA, a state may not invalidate an agreement to arbitrate on public-policy grounds or by defenses "'that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 441 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, ___,

131 S. Ct. 1740, 1746, 177 L. Ed. 2d 742, 751 (2011)), cert. denied, ___ U.S. ___, 135 S. Ct. 2804, 192 L. Ed. 2d 847 (2015). "However, 'state courts remain free to decline to enforce an arbitration provision by invoking traditional legal doctrines governing the formation of a contract and its interpretation.'" Jaworski, supra, 441 N.J. Super. at 476 (quoting NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 428 (App. Div.), certif. granted, 209 N.J. 96 (2011), appeal dismissed, 213 N.J. 47 (2013)).

New Jersey contract law has long recognized the defense of prior material breach, under which one party's material breach of a contract provides a complete defense to the other party's further obligations under the contract. See Vosough v. Kierce, 437 N.J. Super. 218, 243 (App. Div. 2014) (citations omitted), certif. denied, 221 N.J. 218 (2015); See Restatement (Second) of Contracts § 237 (1981). A "material breach" is one that "strikes at the very heart" of the agreement. Globe Motor Co. v. Igdalev, 436 N.J. Super. 594, 606 (2014).

Here, plaintiffs contend that BM's failure to advance the requisite fees as required by the DRA and its failure to engage in arbitration after being served with plaintiffs' demands constituted a material breach of the DRA. Therefore, despite a policy in favor of arbitration, plaintiffs argue they have a

recognized contract defense to performance of their obligation to proceed with arbitration. BM contends that there was no breach because the DRA did not specifically name the AAA to administer arbitration, but stated a retired judge or attorney, employing the AAA rules. Therefore, any failure to arbitrate through the AAA was not a material breach. Although BM did not respond to plaintiffs' claims, it alleges this was because of the disagreement over the appropriate forum, and ultimately, arbitration is what it seeks.

The motion judge determined, in an oral decision, that a sufficient factual dispute as to the forum existed and thus ordered arbitration through the AAA. The record supports the judge's determination. The judge correctly found that BM did not materially breach the DRA, and thus, arbitration between the parties was still enforceable.

Likewise, BM has not waived its right to arbitrate. "The issue of whether a party waived its arbitration right is a legal determination subject to de novo review. Nonetheless, the factual findings underlying the waiver determination are entitled to deference and are subject to review for clear error." Cole v. Jersey City Medical Center, 215 N.J. 265, 275 (2013). A waiver is never presumed. Id. at 276. Whether a party has waived its right to enforce arbitration is a fact

sensitive analysis, which is undertaken "on a case-by-case basis." Id. at 277. A waiver of the right to enforce arbitration must be voluntary and intentional. Id. at 276 (citing Knorr v. Smeal, 178 N.J. 169, 177 (2003)). However, a waiver "can occur implicitly if 'the circumstances clearly show that the party knew of the right and then abandoned it, either by design or by indifference.'" Id. at 277 (quoting Knorr, supra, 178 N.J. at 177 (2003)). Courts "concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute," with seven factors, including the delay in making the arbitration request, the filing of motions, and prejudice suffered by the other party, among others, to be considered. Id. at 280-81.

Here, BM did not voluntarily and intentionally waive its right to enforce arbitration. Likewise, there is no evidence of an implicit waiver. In reviewing BM's litigation conduct, it did not delay in making the arbitration request, quickly moving for dismissal after plaintiffs filed their complaint. At that early point in the process, no discovery had been exchanged and plaintiffs suffered no prejudice from the timing of the motion.

Plaintiffs' contention that BM's failure to pay the requisite fees amounts to an implicit waiver by indifference is without merit. BM did not believe the AAA was the appropriate

forum, and thus would not pay the AAA's fees. There was no clear agreement with the AAA and the parties to use their services nor any scheduled arbitration. This difference of opinion between the parties has now been resolved by the court's order to arbitrate through the AAA.

It is important to note that because the issue of waiver is fact sensitive, we defer to the trial court's findings. See Cole, supra, 215 N.J. at 280. Here, the trial court accepted BM's explanations about its failure to initially pay and the dispute over appropriate forum, and found that the DRA's intention to arbitrate should be enforced. Again, there is no basis to second-guess the court's decision.

Overall, although BM's non-response to plaintiffs' initial claims with the AAA was problematic, the court determined there is a willingness to arbitrate (in fact, there is a court order to do so). There would be recourse for plaintiffs if BM ultimately does not abide this order. The trial court's decision to compel arbitration, now specifying the forum, was sound and in accordance with the terms of the DRA.

Affirmed.