NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0952-21

COUNTY OF PASSAIC,

Plaintiff-Appellant,

v.

HORIZON HEALTHCARE SERVICES, INC., d/b/a HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY,

Defendant-Respondent.

APPROVED FOR PUBLICATION
February 8, 2023
APPELLATE DIVISION

Argued January 18, 2023 – Decided February 8, 2023

Before Judges Susswein, Berdote Byrne and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-1385-21.

Kenneth D. McPherson, Jr., argued the cause for appellant (Waters, McPherson, McNeill, PC, attorneys; Kenneth D. McPherson, Jr., and Mark J. McPherson, of counsel; Kenneth D. McPherson, Jr., and Natasha Montalvo, on the briefs).

Patricia A. Lee argued the cause for respondent (Connell Foley LLP, attorneys; Patricia A. Lee, of counsel and on the brief).

PER CURIAM

Starting in 2002, plaintiff County of Passaic contracted with defendant Horizon Healthcare Services, Inc. to manage the County's self-funded health benefit plan; that relationship, in one form or another, lasted until December 31, 2019. The County filed this action in 2021, claiming, among other things, that Horizon breached their contract by failing to implement certain modified reimbursement rates. Horizon quickly – and successfully – moved to compel arbitration based on a stipulation in their 2009 written agreement that "[i]n the event of any dispute between the parties to this Agreement arising under its terms, the parties shall submit the dispute to binding arbitration under the commercial rules of the American Arbitration Association." In appealing, the County asserts that the arbitration provision is unenforceable because it lacks the explicit waiver of access to the courts prominently featured in the Supreme Court's landmark decision in Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014). We reject this argument and affirm because, even though the arbitration provision does lack such an explicit waiver, the County is a sophisticated contracting party and is not – as in Atalese and other authorities – an employee or consumer lacking sufficient bargaining power to resist the extraction of an agreement to arbitrate.

I

We start our analysis by recognizing that both the Federal Arbitration Act, 9 U.S.C. §§ 1 – 16, and the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -36, express a general policy favoring arbitration "as a means of settling disputes that otherwise would be litigated in a court." Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 556 (2015). The FAA, which is applicable here, declares that a written arbitration provision encompassed by the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The "save-upon" phrase at the end of 9 U.S.C. § 2 opens the door to the application of "ordinary state-law principles that govern the formation of contracts." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995). So, when determining the enforceability of an arbitration agreement, like any other contract, our courts will consider whether there was mutual assent, as impacted by notions of unconscionability, which vary from case to case based on the parties' sophistication and the one-sided nature of the negotiations. Muhammad v. Cnty. Bank of Rehoboth Beach, 189 N.J. 1, 15 (2006) (citing Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555, 564-66 (Ch. Div. 2002)).

These basic principles are critical in determining whether there is merit to the County's claim that Atalese bars enforcement of the arbitration agreement in question. We hold – because the parties are sophisticated and possess relatively equal bargaining power – Atalese's requirement of an express waiver of the parties' right to seek relief in a court of law is inapplicable and the arbitration agreement is enforceable.

To be sure, our Supreme Court has not expressly limited Atalese's insistence on an express waiver of the right to seek relief in a court of law. But the clues are there. For example, in reaching its conclusion, the Atalese Court relied on the Consumer Fraud Act, N.J.S.A. 56:8-1 to -227, which declared that consumer contracts be "written in a simple, clear, understandable and easily readable way." 219 N.J. at 444 (quoting N.J.S.A. 56:12-2). Throughout the Atalese opinion, the Court mentioned that the arbitration provision was contained in a consumer contract, and, in its holding, the Court emphasized that an arbitration provision must "be sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right." 219 N.J. at 443 (emphasis added). And, later, in Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 320 (2019), the Court observed that in Atalese "[t]he consumer context of the contract mattered."

Atalese, as well as other decisions from our Supreme Court, focus on the unequal relationship between the contracting parties or the adhesional nature of the contract when holding that an arbitration agreement could not be enforced without an express waiver of the right to seek relief in a court of law. As the United States Court of Appeals for the Third Circuit has recognized, our Supreme Court has adopted the stricter approach found in Atalese "only in the context of employment and consumer contracts." In re Remicade Antitrust Litigation, 938 F.3d 515, 525 (3d Cir. 2019). This observation is certainly correct. See, e.g., Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 124 (2020) (employment contract); Kernahan, 236 N.J. at 307 (consumer contract); Morgan v. Sanford Brown Institute, 225 N.J. 289, 294 (2016) (consumer contract); Atalese, 219 N.J. at 435 (consumer contract); Leodori v. Cigna Corp., 175 N.J. 293, 295 (2003) (employment contract); Martindale v. Sandvik, Inc., 173 N.J. 76, 81 (2002) (employment contract); Garfinkel v. Morristown Obs. & Gyn. Assocs., 168 N.J. 124, 127 (2001) (employment contract).[1] All these decisions reveal the Court's concern about the nonexistence of a waiver of the important

[1] Delaney v. Dickey, 244 N.J. 466, 471 (2020) involved an arbitration agreement between a law firm and a sophisticated businessman. That decision, however, turned on the law firm's professional and fiduciary obligations and not on the content of the agreement.

right to seek relief in a court of law in contracts involving consumers and employees, who are not "necessarily versed in the meaning of law-imbued terminology about procedures tucked into form contracts." Kernahan, 236 N.J. at 319 (citing Atalese, 219 N.J. at 442).

This concern for those not versed in the law or not necessarily aware of the fact that an agreement to arbitrate may preclude the right to sue in a court or invoke the inestimable right of trial by jury, on the other hand, vanishes when considering individually-negotiated contracts between sophisticated parties – often represented by counsel at the formation stage – possessing relatively similar bargaining power. Although our Supreme Court has not expressly declared it, and although we too have not said as much in any published opinion,[2] we are satisfied, as the court of appeals recognized in Remicade, 938 F.3d at 526 – and as we now so hold – that an express waiver of the right to seek relief in a court of law to the degree required by Atalese is unnecessary when parties to a commercial contract are sophisticated and possess comparatively equal bargaining power. The parties here were represented by counsel at all relevant stages of their negotiations and during the formation of the relevant contract

[2] We have, however, said so in unpublished opinions that lack precedential authority. R. 1:36-3.

documents over the course of their seventeen-year relationship and understood the difference between the right to seek relief in a court of law and being relegated to arbitration under AAA's commercial rules. We thus agree with the trial judge that the arbitration provision was enforceable notwithstanding its lack of an express waiver of the County's right to seek relief in a court of law.

II

The County poses two additional arguments about the enforceability of the arbitration provision. The first of these is its argument that Atalese's express waiver requirement should apply in this and all other settings because "state law [must] be arbitration neutral." We find insufficient merit in this argument to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

In the second, the County contends that the arbitration provision should not have been enforced because it was not contained in the parties' most recent agreement, only an earlier agreement. This, too, is without merit. The record reveals that the parties maintained a lengthy contractual relationship that commenced with their September 2002 agreement. After operating for seven years under that initial agreement, the parties executed in December 2009 a new Administrative Services Agreement (ASA) that contained the arbitration provision as well as a Schedule A, which reflected the annual costs associated

with the plan. For the ten years that followed, the parties never revisited the terms of the ASA; instead, Schedule A was updated and executed each year, and each updated Schedule A stated that it "incorporate[d] the terms and conditions of the [ASA]." We are satisfied – particularly when considering, once again, the sophistication of the parties and their reliance on counsel – that no Schedule A entered into after formation of the ASA conflicted with or overrode the arbitration provision contained in the ASA.

III

The County lastly argues that, as a result of being "intimidated" by Horizon's "unfounded threats" of judicial bias, the trial judge "adopt[ed] an overcompensating disposition favoring Horizon in order to be spared charges of bias." We reject this as well.

To explain, the record reveals that when counsel argued the motion to compel arbitration, the judge noted that a close relative was employed by the prosecutor's office[3] and was possibly covered by the health plan in question. Horizon's counsel stated that she "d[id]n't think there is any kind of conflict"

[3] The judge later advised he had served as acting prosecutor in Passaic County until June 30, 2009, during the period covered by the 2002 agreement between the parties, a period that the parties recognize is largely irrelevant to the issues raised in this suit.

and "doubt[ed] . . . there[] [are] going to be any issues" once she discussed it with her client. The judge responded that he would give Horizon's counsel the opportunity to consider the matter, although he did not think it would "affect [his] judgment one way or the other." The judge also then said that he had advised counsel of the possible conflict

> for the sake of transparency, to make sure that that's out there because I don't want anybody to come back later on and say that I was influenced by that fact. I know I won't be because it really doesn't involve individual claims. It's something more substantial than that, but I just wanted to be sure. Do the other sides have any problem with it?

The County's attorney immediately responded, "No, Judge, we don't."

Later, as part of the judge's invitation for the parties to express any concerns, Horizon's attorney advised that her client "does not believe" that the information provided about a possible conflict warranted the judge's recusal, although Horizon did state that it "reserve[d] its right in the future should any additional circumstances arise which may indicate a prejudice to Horizon due to venue in the County of Passaic." The County responded that Horizon's attempt to reserve its rights on this issue was improper and "offensive" because it left the recusal issue "hanging over the [c]ourt's head." In response to that, the next

time the motion was argued Horizon's attorney clarified Horizon's position that the "reservation" of its rights

> was about venue, it was not about Your Honor. It was not about any kind of judicial bias. It was just in relation to the County of Passaic, the issues with respect to employee benefits of County employees and the unforeseen future if the matter were to ever go to a jury and that's why the comment was about venue. It was not about judicial bias.
>
> [Emphasis added.]

Never once did the County ask the judge to step aside for any reason, including the reason now put forth: that Horizon bullied the judge about an accusation of bias and that the judge compensated for this by ruling in Horizon's favor. Having never sought the judge's recusal either before, during or after the judge ruled on the arbitration motion, it is inappropriate for the County to now argue that the judge may have been influenced by what Horizon said about possibly challenging the fact that the case had been venued in Passaic County. To the extent the law would recognize the County's "compensatory bias" theory, see State v. Holland, 449 N.J. Super. 427, 443 (App. Div. 2017) – a question we need not decide – the County should have raised that issue in the trial court and not, for the first time, here.

* * *

The order under review – insofar as it granted Horizon's motion to compel arbitration – is affirmed. That order, however, mistakenly dismissed the amended complaint rather than merely staying the action. See Antonucci v. Curvature Newco, Inc., 470 N.J. Super. 553, 567 (App. Div. 2022). We, thus, affirm and remand for entry of an order vacating the dismissal but staying the action pending the completion of the arbitration proceedings.

Affirmed and remanded. We do not retain jurisdiction.