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Do Good Things Come To Those Who Wait? By Raquel S. Lord, Esq.

Contrary to the old adage, good things do not always come to those who wait. In *Cole v. Jersey City Medical Center, et al.*, 2012 N.J. Super. LEXIS 42 (March 29, 2012), the Appellate Division reversed the trial court's granting of defendant Liberty Anesthesia Associates, LLC's ("Liberty") motion to compel arbitration and dismissal of plaintiff's complaint with prejudice. The appellate court held that Liberty waived its right to request arbitration when it waited for months after it was named in the lawsuit and three days before a jury trial was to begin to attempt to enforce an arbitration clause in an employment agreement with the plaintiff.

The Facts

Karen Cole was hired by Liberty as a full-time Certified Registered Nurse Anesthetist ("CRNA") at the Jersey City Medical Center (the "Medical Center") on October 1, 2004. Her employment agreement (the "Agreement") provided that Cole's employment could be terminated by either party upon 60 days' written notice. It also gave Liberty the right to terminate Cole's employment "automatically and immediately" if her staff privileges at any hospital were "suspended, revoked, restricted, limited or terminated."

The Agreement contained an arbitration clause that provided, in pertinent part, that, "any claim, controversy or dispute between you and [Liberty] . . . arising out of or relating to your employment, the cessation of your employment, or any matter relating to the foregoing . . . shall be submitted to and settled by arbitration" Both Cole and Liberty executed the agreement.

On May 1, 2007, Cole met with her immediate supervisor and several superiors to discuss misappropriation of medication and possible substance abuse by Cole. At the meeting, Cole was told that the pharmacy had noticed "large discrepancies in her accounting of controlled substances." The supervisors informed Cole that hospital policy required that she submit to drug testing under such circumstances. At the time, Cole was taking several medications for a medical condition and was afraid that the test results would be misconstrued. She therefore refused to submit for testing.

In response to her refusal, the Medical Center immediately suspended Cole's CRNA duties. Later that same day, Cole received a letter from Liberty terminating her employment as of the close of business that day due to the suspension of her privileges at the Medical Center. The letter referenced the provision of the Agreement that permitted Liberty to

terminate plaintiff's employment in the event her staff privileges at any hospital were suspended or revoked.

The Trial Court Proceedings

Cole filed suit against the Medical Center, alleging retaliatory discharge in violation of the Conscientious Employee Protection Act ("CEPA"), disability discrimination in violation of the New Jersey Law Against Discrimination ("NJLAD"), defamation, and tortious interference with contract. Cole claimed that the allegations of drug abuse were false and were made as a pretext to terminate her in retaliation for her expressions of concern about patient care violations she allegedly witnessed at the Medical Center.

Thereafter, the Medical Center impleaded Liberty as a third-party defendant. Cole subsequently filed an amended complaint naming Liberty as a direct defendant, alleging the same claims as those alleged against the Medical Center, but including an additional claim of termination in violation of public policy.

Liberty's answer to Cole's complaint included a list of 35 affirmative defenses. Noticeably absent from the lengthy list was any reference to the arbitration clause in the Agreement.

At the close of discovery, both Liberty and the Medical Center filed motions for summary judgment. Before the motions were heard, Cole settled with the Medical Center. Following oral argument on Liberty's motion on February 19, 2010, the trial court granted summary judgment for Liberty on Cole's defamation and termination in violation of public policy claims, but denied summary judgment on the CEPA and NJLAD claims. A trial date was subsequently set for March 22, 2010.

On March 19, 2010, Liberty filed a motion *in limine* to compel arbitration based on the clause in the Agreement between Cole and Liberty. Liberty claimed it had not sought arbitration sooner because the Medical Center was not a party to the Agreement and thus, Cole was entitled to a jury trial on her claims against the Medical Center. According to Liberty, it would not have made sense to compel arbitration of plaintiff's claims against Liberty in a bifurcated proceeding, because plaintiff's claims against the Medical Center and Liberty were nearly identical, and there would be a risk that an arbitrator might reach a different result than a jury. Once Cole settled her claims against the Medical Center, Liberty argued, that risk was eliminated, and arbitration was then appropriate.

Cole opposed the motion to compel arbitration, arguing that Liberty had waived its right to compel arbitration by failing to raise the issue as an affirmative defense in its answer. Liberty's failure to include the affirmative defense, coupled with its active participation in the litigation in Superior Court, Cole argued, should bar Liberty from requesting arbitration on the eve of trial. The trial court granted Liberty's motion to compel arbitration and dismissed Cole's amended complaint with prejudice.

The Appellate Division Reverses

On appeal, the Appellate Division reversed. The court began its analysis by acknowledging the public policy favoring arbitration as a means of dispute resolution. It noted that, although affirmative defenses not pled or otherwise raised in a timely manner are generally deemed to have been waived, further analysis is necessary when the affirmative defense in question is the existence of an agreement to arbitrate. Indeed, "[t]here is a presumption against waiver of an arbitration agreement, which can only be overcome by clear and convincing evidence that the

party asserting it chose to seek relief in a different forum." *Cole*, 2012 N.J. Super. LEXIS at *13 (quoting *Spaeth v. Srinivasan*, 403 N.J. Super. 508, 514 (App. Div. 2008)). The Appellate Division stated that, while there is no specific test to determine what conduct might result in a waiver of the right to enforce arbitration, the key to determining whether a waiver occurred is whether the party objecting to the arbitration has been prejudiced.

In determining that Liberty had waived its right to enforce the arbitration clause, the Appellate Division noted that Liberty could have moved to compel arbitration immediately after Cole amended her complaint to name Liberty as a defendant. Instead, as a matter of strategy, Liberty knowingly opted not to raise its right to arbitration because it wanted to avoid inconsistent outcomes.

The Appellate Division pointed out that Cole amended her complaint to name Liberty as a direct defendant approximately 20 months prior to the scheduled trial date. During that time, Liberty's conduct evidenced that it consented to proceeding in Superior Court, rather than by arbitration: it engaged in discovery, filed motions, and prepared the case for a jury trial. Furthermore, Liberty's actions prejudiced Cole because she relied on Liberty's conduct and likewise prepared for a jury trial. Liberty's attempt to compel arbitration three days before trial, the court noted, was precisely the sort of conduct the court had repudiated in prior cases. Under the *Spaeth* precedent, Liberty's actions, coupled with the prejudice to Cole, led the Appellate Division to conclude that Liberty had waived its right to enforce the arbitration clause. As such, the court reversed the trial court's order granting Liberty's motion to compel arbitration and its dismissal of plaintiff's complaint, and remanded the action for trial.

▶ LESSONS LEARNED FROM *COLE*

- Know the document. If you find yourself a party to a lawsuit involving a contract, review it promptly to determine whether it has a forum-selection clause.
- Be proactive. Think early and strategically about whether to seek to compel arbitration if your contract contains an arbitration clause.
- Do not let the other party sleep on its rights to your detriment. If the other party waits -- as Liberty did -- to compel arbitration after significant participating in litigation, you may have grounds to oppose the motion as in *Cole*.

The Porzio Employment Law Monthly is a summary of recent developments in employment law. It provides employers with an overview of the various legal issues confronting them as well as practical tips for ensuring compliance with the law and sound business practices. This newsletter, however, should not be relied upon for legal advice in any particular matter.
