NOT TO BE PUBLISHED WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

BRIAN GRIFFOUL and ANANIS GRIFFOUL, individually and on behalf of the proposed class, Plaintiffs, vs. NRG RESIDENTIAL SOLAR SOLUTIONS, LLC d/b/a NRG HOME SOLAR; and NRG ENERGY, INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-1503-17 CIVIL ACTION OPINION

Argued: July 7, 2017
Decided: July 14, 2017

Honorable Robert C. Wilson, J.S.C.

Arthur M. Owens, Esq., appearing for the Plaintiffs, Brian Griffoul and Ananis Griffoul, (from the law offices of Lum, Drasco & Positan LLC).

Thomas J. O'Leary, Esq., appearing for the Defendants, NRG Residential Solar Solutions d/b/a NRG Home Solar and NRG Energy, Inc., (from the law offices of Connell Foley LLP).

FACTUAL BACKGROUND

On or about February 24, 2014, Griffoul and NRG Residential entered into a Solar Power System Lease (the "Lease Agreement"). NRG Residential agreed to install a solar system on Griffoul's property, which would provide electricity to their home and also be interconnected with the utility's electrical transmission grid. Pursuant to "Box A" on page 1 of the 11 page Lease Agreement, Griffoul agreed to make a down payment of $51.55 followed by 239 monthly lease payments which totaled $16,453.96. The Lease Agreement contains a broad form arbitration clause in which Griffoul agreed to arbitrate "any" claim "arising out of" or "in connection with"

the Lease Agreement of the solar system and also agreed that he would not participate in any class or representative proceeding:

> 12.1 Arbitration of Claims; Waiver of Jury Trial. Unless prohibited by State law, any dispute, disagreement or claim between you and NRG RSS arising out of or in connection with this Lease, or Solar System, which cannot be amicably resolved by the parties shall be submitted to final and binding arbitration in a location that is a convenient distance from the Property for you, in accordance with Commercial Arbitration Rules of the American Arbitration Association including Supplementary Procedures for Consumer-Related Disputes, if applicable (the "***AAA Commercial Rules***"), except as provided in Section 12.7. This agreement to arbitrate is governed by the Federal Arbitration Act. While a dispute, disagreement or claim is being resolved under this Section 12, both parties shall continue to perform their obligations under this Lease. The arbitration shall be conducted by one arbitrator appointed in accordance with the AAA Commercial Rules. YOU AND NRG RSS AGREE THAT BY ENTERING INTO THIS LEASE, YOU AND WE ARE WAIVING THE RIGHT TO A JURY TRIAL. IN ADDITION, EACH PARTY MAY BRING CLAIMS AGAINST THE OTHER ONLY IN ITS INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. OTHER RIGHTS THAT YOU OR NRG RSS WOULD HAVE IN COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.

The Lease Agreement also informed Griffoul that the arbitration award would be conclusive, final and binding upon the parties and would be there sole and exclusive remedy:

> 12.2 Finality of Award. Unless prohibited by State law, the parties agree that the award of the arbitrator (the "***ARBITRATION AWARD***"): (i) shall be conclusive, final, and binding upon all parties; and (ii) shall be the sole and exclusive remedy between the parties regarding any and all claims and counterclaims presented to the arbitrator. The judgment on the Arbitration Award may be entered in any appropriate court as necessary to pursue judgment.

On or about February 28, 2017, Griffoul filed a two-count putative class action Complaint against the NRG Defendants. The Complaint asserts two statutory causes of action, specifically claims for violation of the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. §§ 56:8-1, *et seq*.,

and the Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. §§ 56:12-14 to -18. The Complaint defines the proposed class as "[a]ll persons who, at any time within the class period, entered into a Solar Energy Installation Agreement [] with the NRG Defendants for property or residence in New Jersey with terms the same as or substantially similar to the Agreement signed by Plaintiff Griffoul."

The CFA claims are based upon alleged misrepresentations and false statements by the NRG Defendants in connection with the marketing of the solar energy installation and the resulting Lease Agreement. The TCCWNA claim contends that at least six provisions of the Lease Agreement violate clearly established rights under New Jersey law, specifically: (1) 4.2 Access Rights; (2) 10.2 Remedies; (3) 11.3 Indemnity; (4) 11.5 No Consequential Damages; (5) 11.14 Limitation of Liability; and (6) Statute of Limitations. On or about June 8, 2017, the NRG Defendants filed a Motion to Compel Arbitration and to Dismiss the claims with prejudice.

MOTION TO DISMISS STANDARD

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id.

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1513

(2016) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

RULE OF LAW AND DECISION

1. The Arbitration Provision of the Lease Agreement Does Not Encompass Griffoul's Right to Bring Statutory Claims in Court.

"Arbitration provisions are commonplace in consumer contracts." Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 435 (2014). Such provisions must clearly state their purpose, and be "sufficiently clear to a reasonable consumer." Id. at 436. However, "[n]o particular form of words is necessary to accomplish a clear and unambiguous waiver of rights." Id. at 444. With that in mind, "the affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism of resolving disputes." Id. at 440. (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 92 (2002)).

However, the preferential status for arbitration agreements "is not without limits." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001). In determining whether the parties agreed to arbitrate, courts should generally apply state-law contractual principles. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995). Courts may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." Martindale, 173 N.J. at 85. Because arbitration involves a waiver of the right to pursue a case in a judicial forum, courts take particular care "in assuring the knowing

assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 425 (App. Div. 2011). Mutual assent to an agreement "requires that the parties have an understanding of the terms to which they have agreed." Atalese, 219 N.J. at 442.

In Atalese, the New Jersey Supreme Court was concerned that some arbitration provisions may not reference the fact that arbitration is a substitute for the right to maintain an action in a court of law. Id. The Court noted that no particular form of words is necessary to accomplish a clear and unambiguous waiver of rights, but that they will "pass muster when phrased in plain language that is understandable to the reasonable consumer." Id. at 444. The plaintiff in Atalese brought statutory claims against the defendant, specifically for violations of the CFA and TCCWNA. The Court found the arbitration provision was unclear because "nowhere in the arbitration clause [was] there any explanation that plaintiff [was] waiving her right to seek relief in court for a breach of her statutory rights." Id. at 446. The arbitration provision specifically stated:

> **Arbitration**: In the event of any claim or dispute between Client and the USLSG related to this Agreement or related to any performance of any service of this Agreement, the claim or dispute shall be submitted to binding arbitration upon the request on the other party. The parties shall agree on a single arbitrator to resolve the dispute. The matter may be arbitrated either by the Judicial Arbitration Mediation Service or American Arbitration Association, as mutually agreed upon by the parties or selected by the party filing the claim. The arbitration shall be conducted in either the county in which the Client resides, or the closest metropolitan county. Any decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction. The conduct of the arbitration shall be subject to the then current rules of the arbitration service. The costs of arbitration, excluding legal fees, will be split equally or be born by the losing party, as determined by the arbitrator. The parties shall bear their own legal fees.

Id. at 437.

The Atalese Supreme Court decision stressed that "no prescribed set of words must be included in an arbitration clause to accomplish a waiver of rights." Id. at 447. However, there must be a clear and unambiguous statement that a consumer is opting to arbitrate disputes rather than resolving them in court.

Here, the arbitration provision of the Lease Agreement states "any dispute, disagreement or claim between you and NRG RSS arising out of or in connection with this Lease, or Solar System, which cannot be amicably resolved by the parties shall be submitted to final and binding arbitration." This is similar to the arbitration provision in Atalese, which made "any claim or dispute between Client and the USLSG related to this Agreement or related to any performance of any service of this Agreement" subject to binding arbitration. Id. at 437. Like the arbitration provision in Atalese, the Lease Agreement arbitration provision lacks an explanation that Griffoul was waving his right to seek relief in court for breach of his statutory rights, specifically violations of the CFA and TCCWNA. The Atalese Court held:

> We do not suggest that the arbitration clause has to identify the specific constitutional or statutory right guaranteeing a citizen access to the courts that is waived by agreeing to arbitration. But the clause, at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute.

Id. at 446-47.

In the instant case, the arbitration provision in the Lease Agreement does not encompass Griffoul's statutory consumer claims, specifically claims under the CFA and TCCWNA, as the Lease Agreement fails to mention that Griffoul was agreeing to submit his statutory causes of action to binding arbitration.

2. The Class Action Waiver in the Arbitration Provision of the Lease Agreement Is Invalid.

The U.S. Supreme Court has held that the FAA preempted a state's ability to nullify a class action waiver provision in an arbitration provision on public policy grounds. See AT&T Molbility LLC v. Concepcion, 563 U.S. 333, 344 (2011); see also NAACP of Camden Cty. E., 421 N.J. Super. at 426. The Court "rejected the consumers' argument that because the monetary stakes that could arise in disputes under the contract were small, state law could invalidate the class action waiver as unconscionable." NAACP of Camden Cty. E., 421 N.J. Super. at 426 (analyzing Concepcion).

Any potential challenge to a class action waiver is limited to state law principles that are generally applicable to all contracts. See 9 U.S.C. § 2. After Concepcion, the Third Circuit held that the FAA preempted the rule enunciated in Muhammed v. County Bank of Rehobath Beach, Delaware, 189 N.J. 1 (2006), cert. denied, 549 U.S. 1338 (2007), that class action arbitration waivers are unconscionable and unenforceable under New Jersey law. Litman v. Cellco P'ship, 655 F.3d 225, 231 (3d Cir. 2011), cert. denied, 565 U.S. 1115 (2012). In doing so, the Third Circuit held that "a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration 'is desirable for unrelated reasons.'" Id. (quoting Concepcion). As with arbitration provisions, "clarity is required" for class action waivers. See NAACP of Camden Cty. E., 421 N.J. Super. at 425 (quoting Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 37 (App. Div. 2010)).

Here, the class action waiver is affixed to the end of the arbitration provision of the Lease Agreement. It states: "EACH PARTY MAY BRING CLAIMS AGAINST THE OTHER PARTY ONLY IN ITS INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER

IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING." However, "words and phrases are not to be isolated but related to the context and contractual scheme as a whole…." Republic Bus. Credit Corp. v. Camhe-Marcille, 381 N.J. Super. 563, 569 (App. Div. 2005). When read in the context of the whole arbitration provision, this waiver is contradictory. The arbitration provision purportedly prevents Griffoul from bringing any claim against NRG in court. However, the class action waiver appears to allow Griffoul to bring claims in his individual capacity. Furthermore, given that "purported" is used to modify the allegedly waived right to a class action, it is unclear whether Griffoul is being instructed that class action claims can only be brought through the courts, or that the preclusive effect of this provision only applies to reputed class claims and not meritorious class claims.

The Court is not finding this waiver invalid on public policy grounds, which the U.S. Supreme Court disfavors. See Concepcion, 563 U.S. at 344. It is invalid due to its lack of consistency and clarity, which is required in these provisions. NAACP of Camden Cty. E., 421 N.J. Super. at 425. Therefore, the class action waiver is invalid.

As such, and for the foregoing reasons, the NRG Defendants' Motion to Compel Arbitration and Dismiss the claims with prejudice is **DENIED**.

It is so ordered.