

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1371-15T3

ALEXANDER DEFINA, a minor, by  
his parents and guardians ad  
litem, MICHAEL DEFINA and  
DAHINA DEFINA,

Plaintiff-Appellant,

v.

GO AHEAD AND JUMP 1, LLC,  
d/b/a SKY ZONE INDOOR  
TRAMPOLINE PARK,

Defendant-Respondent.

---

Argued May 17, 2016 – Decided July 12, 2016

Before Judges Yannotti and St. John.

On appeal from Superior Court of New Jersey,  
Law Division, Bergen County, Docket No. L-  
5751-15.

David K. Chazen argued the cause for  
appellant (Chazen & Chazen, LLC, attorneys;  
Mr. Chazen, on the briefs).

José D. Roman argued the cause for  
respondent (Powell & Román, LLC, attorneys;  
Aisha Farraj, on the brief).

PER CURIAM

Plaintiffs Alexander Defina, a minor, by his parents and  
guardians ad litem, Michael Defina and Dahina Defina, appeal

from an order entered by the Law Division on October 23, 2015, which required plaintiffs to submit any disputes with defendant Go Ahead and Jump 1, LLC, to arbitration, and staying further proceedings in this matter. Plaintiffs also appeal from an order entered by the court on December 4, 2015, which denied reconsideration of the October 23, 2015 order. For the reasons that follow, we reverse.

I.

Defendant owns and operates the Sky Zone Indoor Trampoline Park (SZITP) in Pine Brook. Defendant requires all of its customers to sign a document entitled, "Participation Agreement, Release and Assumption of Risk" (the Agreement) before using the facility.

The Agreement provides in pertinent part that, in consideration of SZITP allowing participation

in trampoline games or activities, I for myself and on behalf of my child(ren) and/or legal ward, heirs, administrators, personal representatives, or assigns, do agree to hold harmless, release and discharge SZITP of and from all claims, demands, causes of action, and legal liability, whether the same be known or unknown, anticipated or unanticipated, due to SZITP's ordinary negligence; and I, for myself and on behalf of my child(ren) and/or legal ward, heirs, administrators, personal representatives, or any assigns, further agree that except in the event of SZITP's gross negligence and willful and wanton misconduct, I shall not bring any claims, demands, legal actions and

causes of action, against SZITP for any economic and non-economic losses due to bodily injury, death, property damage sustained by me and/or my minor child(ren) that are in any way associated with [defendant's] trampoline games or activities. Should SZITP or anyone acting on [its] behalf be required to incur attorney's fees and costs to enforce this Agreement, I for myself and on behalf of my child(ren), and/or legal ward, heirs, administrators, personal representatives or assigns, agree to indemnify and hold them harmless for all such fees and costs.

The Agreement includes an arbitration clause, which states:

If there are any disputes regarding this agreement, I on behalf of myself and/or my child(ren) hereby waive any right I and/or my child(ren) may have to a trial and agree that such dispute shall be brought within one year of the date of this Agreement and will be determined by binding arbitration before one arbitrator to be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. I further agree that the arbitration will take place solely in the state of Texas and that the substantive law of Texas shall apply. If, despite the representations made in this agreement, I or anyone on behalf of myself and/or my child(ren) file or otherwise initiate a lawsuit against SZITP, in addition to my agreement to defend and indemnify SZITP, I agree to pay within 60 days liquidated damages in the amount of \$5,000 to SZITP. Should I fail to pay this liquidated damages amount with the 60 day time period provided by this Agreement, I further agree to pay interest on the \$5,000 amount calculated at 12% per annum.

In addition, the Agreement included the following statement, which was printed in bold type:

By signing this document, I acknowledge that if anyone is hurt or property is damaged during my participation in this activity, I may be found by a court of law to have waived my right to maintain a lawsuit against SZITP on the basis of any claim from which I have released them herein. I have had sufficient opportunity to read this entire document. I understand this Agreement and I voluntarily agree to be bound by its terms.

The Agreement also contains a severability clause, which states that, "I agree that if any portion of this agreement is found to be void or unenforceable, the remaining portions shall remain in full force and effect."

On February 8, 2014, Michael Defina signed the Agreement electronically on defendant's website. He certified that he was the legal guardian of two participants: Alexander Defina, who was then nine years old, and another child.

On June 18, 2015, plaintiffs filed a complaint in the Law Division. They alleged that on February 8, 2014, Alexander was a business invitee at SZITP and was injured while participating in various activities in the facility, including "Ultimate Dodgeball." Plaintiffs alleged that defendant failed to provide adequate warnings and instructions regarding the dodgeball activity; was negligent and careless in creating, advertising and promoting an ultra-hazardous and dangerous dodgeball game; and failed to properly supervise, attend to, control or regulate

the conduct of other invitees over whom defendant had supervisory responsibility, thereby rendering the dodgeball game unsafe and ultra-hazardous for persons participating in that game.

Plaintiffs also asserted claims of gross negligence, and alleged that defendant acted in a willful and wanton manner in creating, advertising and promoting an inherently dangerous game. They further alleged that defendant knew or should have known that statements in the Agreement were false, inaccurate and contrary to established New Jersey case law, and the Agreement should be reformed or rescinded.

In addition, plaintiffs alleged that defendant's use of the Agreement was an unconscionable commercial practice in violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -184, and the New Jersey Truth in Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to -18. Among other relief, plaintiffs sought compensatory and punitive damages, interest, attorney's fees, and costs of suit.

## II.

On September 2, 2015, defendant filed a motion to compel arbitration and stay proceedings in the lawsuit. On September 29, 2015, plaintiffs opposed defendant's motion and filed a cross-motion to rescind the Agreement. The motion judge heard

oral argument on October 23, 2015, and thereafter entered an order compelling arbitration and staying this action. In a rider to the order, the judge stated that Michael Defina had validly agreed to arbitration on behalf of his minor child, and there was no evidence that he had been coerced into signing the Agreement. The judge found that the arbitration clause was enforceable.

The judge noted that defendant had chosen not to enforce the forum selection clause in the Agreement, and had agreed that the arbitration could be conducted in New Jersey or New York, with New Jersey choice of law and a New Jersey arbitrator. The judge found that New Jersey was the proper forum for this matter. The judge also determined that the Agreement's attorney's fees provision, the liquidated damage provision, and the waiver clause limiting claims to conduct involving more than ordinary negligence were against public policy and not enforceable.

Plaintiffs thereafter filed a motion for reconsideration. After hearing oral argument by the attorneys, the judge entered an order dated December 4, 2015, denying the motion. In the rider attached to the order, the judge stated that plaintiffs had not provided any basis for reconsideration of the October 23, 2015 order. The judge rejected plaintiffs' contention that

the arbitration clause clearly and unambiguously placed the person signing it on notice that he was waiving the right to a trial and agreeing that any disputes would be determined by binding arbitration. The judge also rejected plaintiffs' claim that the severability clause in the Agreement was void. This appeal followed.

Plaintiffs argue that: (1) the motion judge erred by enforcing a contract that is invalid, fraudulent, and unconscionable; (2) enforcement of the Agreement was erroneous because it does not apply to personal injury claims arising from conduct greater than ordinary negligence; (3) severance of the arbitration clause is contrary to N.J.S.A. 56:12-16; (4) the arbitration clause is not enforceable; (5) the forum selection clause and choice of law provision of the Agreement are not enforceable; and (6) the court erred by reforming the arbitration clause, which requires the arbitration to take place in Texas, in accordance with Texas law.

### III.

Plaintiffs argue that the trial court erred by enforcing the arbitration clause in the Agreement. We agree.

The question of whether an arbitration clause is enforceable is an issue of law, which we review de novo. Atalese v. U.S. Legal Servs. Group, L.P., 219 N.J. 430, 445-46 (2014).

We owe no deference to the trial court's "interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty v. Twp. Comm., 140 N.J. 366, 378 (1995).

New Jersey has a strong public policy in favor of arbitration as a means of dispute resolution. Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006). "An arbitration agreement is a contract and is subject, in general, to the legal rules governing the construction of contracts." McKeeby v. Arthur, 7 N.J. 174, 181 (1951).

Pursuant to "the Uniform Arbitration Act, N.J.S.A. 2A:23B-1 to -32, an arbitration 'agreement is . . . valid, enforceable, and irrevocable except upon a ground that exists in law or equity for the revocation of the contract.'" Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276 (2013) (quoting N.J.S.A. 2A:23B-6). When reviewing an order to compel arbitration, courts must take into account the strong public policy both at the state and federal levels favoring arbitration agreements. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013).

In Hojnowski, the Court held that an agreement by a parent to arbitrate claims of a minor child arising out of a commercial recreation contract was enforceable. Hojnowksi, supra, 187 N.J. at 341-46. The Court stated that, in the absence of any



allegations of fraud, duress, or unconscionability in the execution of the agreement, or a showing that the agreement to arbitrate was not written "in clear and unambiguous terms," the "parent's agreement to arbitrate is valid and enforceable against any tort claims asserted on the minor's behalf." Id. at 346.

Here, plaintiffs do not claim that Michael Defina was fraudulently induced to execute the Agreement, or that he did so under duress. Plaintiffs argue, however, that the arbitration clause is not enforceable because it is not clear and unambiguous. They assert that the arbitration clause fails to inform the consumer he is giving up his right to bring a lawsuit in court and have the claim decided by a jury.

In Hojnowski, the arbitration clause stated that the person signing the agreement was giving up the right to sue the recreational facility in a court of law, and the right to a jury trial. Id. at 328. However, the arbitration agreement at issue in Atalese stated that either party may submit any dispute to binding arbitration, a single arbitrator shall resolve the dispute, and the arbitrator's decision shall be final and may be entered as a judgment in a court of competent jurisdiction. Atalese, supra, 219 N.J. at 437.

The Court in Atalese held that the arbitration clause was not enforceable because the clause did not clearly and unambiguously explain that the plaintiff was waiving the right to seek relief in court for a breach of statutory rights under the CFA and TCCWNA. Id. at 446-47. The Court stated that

[t]he provision does not explain what arbitration is, nor does it indicate how arbitration is different from a proceedings in a court of law. Nor is it written in plain language that would be clear and understandable to the average consumer that she is waiving statutory rights. The clause has none of the language that our courts have found satisfactory in upholding arbitration provisions – clear and unambiguous language that the plaintiff is waiving her right to sue or go to court to secure relief.

[Id. at 446.]

The Court noted that arbitration clauses had been upheld because they "explained that arbitration is a waiver of the right to bring suit in a judicial forum." Id. at 444. The Court provided examples of enforceable arbitration agreements. Id. at 444-45.

In Martindale v. Sandvik, Inc., 173 N.J. 76, 82-82 (2002), the agreement stated that the plaintiff had agreed to waive her right to a jury trial, and have all employment-related disputes decided by an arbitrator. Similarly, in Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div. 2010), the

agreement stated that, by agreeing to arbitration, the parties were "waiving their rights to maintain other available resolution processes, such a court action or administrative proceeding, to settle their disputes." In addition, in Curtis v. Cellco P'ship, 413 N.J. Super. 26, 31 (App. Div.), certif. denied, 203 N.J. 94 (2010), the arbitration provision stated

Instead of suing in court, we each agree to settle disputes (except certain small claims) only by arbitration. The rules in arbitration are different. There's no judge or jury, and review is limited, but an arbitrator can award the same damages and relief, and must honor the same limitations stated in the agreement as a court would.

The Atalese Court stated that "Martindale, Griffin, and Curtis show that, without difficulty and in different ways, the point can be made that by choosing arbitration one gives up the 'time honored right to sue.'" Id. at 445 (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001)). The Court added, however,

We do not suggest that the arbitration clause has to identify the specific constitutional or statutory right guaranteeing a citizen access to the court 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.]

We are convinced that the arbitration clause at issue in this matter did not clearly and unambiguously inform plaintiff that he was giving up his right to bring claims arising out of the participation in activities at SZITP in a court of law and have a jury decide the case. The arbitration clause states that the person signing the agreement waives any right to a "trial" and agrees that any dispute shall be determined "by binding arbitration before one arbitrator to be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures."


Although the clause refers to a "trial", there is no "clear and unambiguous statement that the person signing the Agreement is waiving [his] right to sue or go to court to secure relief." Id. at 446. Indeed, there is no reference in the clause to a court or a jury. The Agreement also does not explain how arbitration differs from a proceeding in a court of law. We conclude that the Agreement did not clearly and unambiguously inform Michael Defina that he was "giving up his right to bring [his] claims in court and have a jury resolve the dispute." Id. at 447 (footnote omitted).

Accordingly, we conclude that the trial court erred by finding that arbitration clause in the Agreement is enforceable. We therefore reverse the order compelling arbitration and staying further trial court proceedings. In view of our

decision, we need not address the other issues raised by plaintiffs. We remand the matter to the trial court for further proceeding on plaintiffs' claims.

Reversed and remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION