

SEPTEMBER 19, 2013

The New Jersey Supreme Court Provides Guidance On Waiver Of Right To Arbitrate

A. Introduction

The New Jersey Supreme Court has established a general standard for determining whether a defendant with whom the plaintiff has agreed to arbitrate disputes has waived its right to compel arbitration of the plaintiff's claims by virtue of the defendant's participation in the litigation. In *Cole v. Jersey City Medical Center*, 2013 N.J. LEXIS 830 (Aug. 14, 2013), the Court held that the defendant employer had waived its right to compel arbitration of claims brought by the plaintiff terminated employee where the defendant waited 21 months after being made a party to the lawsuit and three days prior to the trial date before moving to compel arbitration. Adopting a totality of the circumstances analysis, the Supreme Court held that the defendant had waived its right to arbitrate the plaintiff's claims because it had "engaged in all the usual litigation procedures for 21 months, and only on the eve of trial, invoked its right to arbitrate." *Cole*, 2013 N.J. LEXIS 830 at *35. Writing for a unanimous Court, Judge Cuff concluded that "[s]uch conduct undermines the fundamental principles underlying arbitration and is strongly discouraged in our state." *Id.*

The *Cole* Court's totality of the circumstances test requires the trial court to evaluate a comprehensive list of factors relating to the defendant's participation in the litigation in order to determine whether the defendant has waived its right to arbitrate the plaintiff's claims by virtue of its litigation conduct. While *Cole* provides useful guidance in terms of the types of factors

relating to the defendant's participation in the litigation that will result in a waiver of the right to arbitrate, it does not create any bright line test for determining how much participation in the litigation by the defendant is too much.

B. Defendant's Litigation Of Plaintiff's Claims For 21 Months And Motion To Compel Arbitration On The Eve Of Trial

Plaintiff Karen Cole ("Cole") was a certified registered nurse anesthetist ("CRNA"). Defendant Liberty Anesthesia Associates, LLC ("Liberty") was an independent contractor that provided anesthesia services at Defendant Jersey City Medical Center ("JCMC"), where Cole was working as a per diem CRNA. *Cole*, 2013 N.J. LEXIS 830 at *9-11. In September 2004, Liberty entered into an employment agreement with Cole to provide full-time CRNA services at JCMC. *Id.* at *11. This agreement contained an arbitration clause, providing in relevant part:

Except as set forth in sections 6, 7 and 9 hereof, any claim, controversy or dispute between you and [Liberty] (including without limitation [Liberty's] affiliates, shareholders, employees, representatives or agents) arising out of or relating to your employment, the cessation of your employment, or any matter relating to the foregoing (any "Controversy") shall be submitted to and settled by arbitration before a single arbitrator in a forum of the American Health Lawyers Association

Alternative Dispute Resolution Service (“AHLA ADRS”) ... It is agreed that if any party shall desire relief of any nature whatsoever from the other party as a result of any Controversy, it will institute such arbitration proceedings....

Cole, 2013 N.J. LEXIS 830 at **11-12. The agreement also provided that Liberty could terminate Cole’s employment “automatically and immediately” for a number of reasons, including “suspension, revocation, restriction, or limitation of her nursing license or her staff privileges at the hospital to which she was assigned.” *Id.* at *11.

JCMC suspended Cole’s staff privileges following its discovery in April 2007 of numerous discrepancies in her accounting of controlled substances and her subsequent refusal to submit to a drug test. Liberty thereupon terminated Cole’s employment contract, citing the suspension of privileges by JCMC. *Cole*, 2013 N.J. LEXIS 830 at *13.

Cole filed a Complaint in Superior Court against JCMC on September 21, 2007. JCMC thereafter impleaded Liberty. Cole filed an Amended Complaint adding Liberty as a direct defendant on June 3, 2008, alleging various state statutory and common law claims. *Cole*, 2013 N.J. LEXIS 830 at *14. Liberty filed an Answer to the Amended Complaint on August 20, 2008, asserting 35 affirmative defenses, none of which made reference to the arbitration provision contained in Cole’s employment agreement. *Id.*

The parties engaged in extensive discovery, including depositions of at least 12 witnesses, including Cole, who was deposed for six days. Discovery concluded on December 30, 2009; Liberty did not invoke the arbitration clause during the pendency of discovery. *Cole*, 2013 N.J.

LEXIS 830 at **14-15. Both defendants moved for summary judgment in January 2010. Cole thereafter settled her claims against JCMC. *Id.* at *15. Following oral argument on Liberty’s motion on February 19, 2010, the trial court granted summary judgment in favor of Liberty on the common law claims, but denied summary judgment on the statutory claims. *Id.*

The trial court set March 22, 2010 as the trial date for Cole’s statutory claims. The Rule 4:25-7(b) pre-trial information exchange that Liberty filed on March 11, 2010 made no reference to filing any motion to compel arbitration. *Cole*, 2013 N.J. LEXIS 830 at *15.

On March 19, 2010, three days prior to the trial date, Liberty filed a motion to compel arbitration of Cole’s statutory claims. *Cole*, 2013 N.J. LEXIS 830 at **15-16. Liberty asserted that it did not move to compel arbitration at an earlier time due to the fact that JCMC was not a party to the arbitration agreement, explaining that “it did not want to risk disparate results from a jury and an arbitrator.” *Id.* Opposing the motion, Cole argued *inter alia* that Liberty “waived its right to compel arbitration by failing to raise the issue in a timely fashion and by actively participating in the litigation.” *Id.* at *16. The trial court granted Liberty’s motion to compel arbitration. Observing that “prejudice is the touchstone of a waiver determination,” the trial court concluded that Cole had “suffered none.” *Id.* The trial judge reasoned that “the discovery that occurred between Cole and JCMC would have taken place regardless of an arbitration proceeding between Liberty and Cole, that Liberty did not purposely abuse the litigation process, that participation by a non-signatory to the employment agreement justified failure to exercise the arbitration provision by Liberty, and that Liberty acted shortly after it learned of the JCMC settlement.” *Id.* at

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**16-17. The Appellate Division reversed the trial court's order. *Id.* at *17. Holding that "[t]he key to determining waiver is the absence or presence of prejudice to the party objecting to the arbitration," the panel concluded that "'Liberty's actions operated to the detriment of [Cole]' when, instead of immediately moving to arbitrate, it 'knowingly decided not to raise its rights to arbitration' in order 'to avoid the risk of inconsistent findings by two separate fact-finders.'" *Cole v. Jersey City Medical Center*, 425 N.J. Super. 48, 57-59 (App. Div. 2012). The Appellate Division also concluded that Liberty was equitably estopped from invoking the arbitration provision, finding that "Cole had relied on Liberty's conduct when 'Liberty voluntarily and intentionally decided to relinquish its right to arbitration as a forum to adjudicate Cole's claims as a matter of litigation strategy.'" *Id.* at 61.

C. The Supreme Court's Decision In Cole

The New Jersey Supreme Court affirmed the Appellate Division's order reversing the trial court's order granting Liberty's motion to compel arbitration, concluding that Liberty had waived its right to invoke the arbitration provision in Cole's employment contract based on its litigation conduct. *Cole*, 2013 N.J. LEXIS 830 at *10. Judge Cuff began her analysis of whether Liberty had waived its right to compel arbitration by noting the general principles that "[w]aiver is never presumed" and that "an agreement to arbitrate a dispute 'can only be overcome by clear and convincing evidence that the party asserting it chose to seek relief in a different forum.'" *Id.* at **22-23 (quoting *Spaeth v. Srinivasan*, 403 N.J. Super. 508, 514 (App. Div. 2008)). Since "waiver is the voluntary and intentional relinquishment of a known right," New Jersey law requires that the party charged with waiving its right to arbitrate "'have full knowledge of [its] legal rights and intent to surrender those rights.'" *Cole*, 2013 N.J. LEXIS 830 at *23 (quoting *Knorr v. Smeal*, 178 N.J.

169, 177 (2003)). Moreover, the Court continued, waiver of a right need not be express, and instead "can occur implicitly if 'the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference.'" *Cole*, 2013 N.J. LEXIS 830 at *23 (quoting *Knorr*, 178 N.J. at 177). Such an implicit waiver "must be done 'clearly, unequivocally, and decisively.'" *Cole*, 2013 N.J. LEXIS 830 at *23 (quoting *Knorr*, 178 N.J. at 177).

The Supreme Court reviewed decisions on the subject of implicit waiver of the right to arbitrate issued by the Appellate Division, federal courts and a number of other state courts, observing that such courts employ "fact-sensitive analyses" or "totality of the circumstances" approaches in deciding whether a defendant's litigation conduct resulted in its waiving the right to arbitrate the plaintiff's claims. *Cole*, 2013 N.J. LEXIS 830 at **24-29. The *Cole* Court adopted this approach, holding that "any assessment of whether a party to an arbitration agreement has waived that remedy must focus on the totality of the circumstances," an assessment which is "by necessity, a fact-sensitive analysis." *Id.* at *29. Observing that the waiver analysis "concentrate[s] on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute," the *Cole* Court cited multiple factors that a court should evaluate in determining whether a defendant has implicitly waived its right to arbitrate. *Id.* at *30. Those factors are:

- (1) the delay in making the arbitration request;
- (2) the filing of any motions, particularly dispositive motions, and their outcome;
- (3) whether the delay in seeking arbitration was part of the party's litigation strategy;

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(4) the extent of discovery conducted;

(5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense or provided other notification of its intent to seek arbitration;

(6) the proximity of the date on which the party sought arbitration to the date of trial; and

(7) the resulting prejudice suffered by the other party, if any.

Cole, 2013 N.J. LEXIS 830 at *30. While cautioning that “[n]o one factor is dispositive,” the Court held that an arbitration agreement should be considered waived “if arbitration is simply asserted in the answer and no other measures are taken to preserve the affirmative defense.” *Id.*

Applying the foregoing factors to Liberty’s motion to compel arbitration, the Supreme Court concluded that “Liberty engaged in litigation conduct that was inconsistent with its right to arbitrate the dispute with its former employee.” *Cole*, 2013 N.J. LEXIS 830 at *31.

1. *Liberty’s Delay In Asserting Its Right To Arbitrate*

First, the Court held that Liberty’s 21 month delay before moving to compel arbitration “is substantial, particularly in light of the fact that Liberty otherwise failed to provide notice of its intent to seek arbitration.” *Cole*, 2013 N.J. LEXIS 830 at *31. As noted above, Liberty did not include arbitration as one of its 35 affirmative defenses in its Answer. *Id.* The *Cole* Court found the timing of the motion to compel arbitration to be “important here because it occurred three days prior to the

scheduled trial date.” *Id.* In the Court’s view, by this point, “as evidenced by the preparation and submission of proposed witness and exhibit lists, interrogatory and discovery readings, and motions in limine, the parties’ conduct reflected a commitment to try the case.” *Id.* at *32. Judge Cuff opined that “[i]nvolving an arbitration clause on the eve of trial has a detrimental impact on the litigation process” because up to that point, the parties had “invested considerable time in the lawsuit and anticipated a judicial determination in the near future...” *Id.* In that regard, at the time the motion to compel arbitration was filed, the parties had already “incurred substantial costs while preparing the case with an eye toward trial.” *Id.* Thus, “referral to arbitration further delayed the resolution of the case.” *Id.*

2. *Liberty’s Motion For Summary Judgment*

The *Cole* Court also found significant the fact that Liberty had moved for summary judgment, concluding that the “filing of a dispositive motion ... demonstrat[es] a submission to the authority of a court to resolve the dispute.” *Cole*, 2013 N.J. LEXIS 830 at 32. Noting that the trial court had granted Liberty summary judgment on *Cole*’s common law claims, the Supreme Court pointed out that “Liberty does not take the position that it would surrender that partial substantive dismissal if the matter proceeded to arbitration.” *Id.* at **32-33.

3. *Prejudice To Cole*

Declining to address directly the contention that “prejudice to the party resisting arbitration is simply a factor, and certainly not an indispensable factor, in a waiver analysis,” the Supreme Court held that if prejudice is defined as “the inherent unfairness -- in terms of delay, expense or damage to a party’s legal position -- [then prejudice]

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occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Cole*, 2013 N.J. LEXIS 830 at *33 (quoting *PPG Industries, Inc. v. Webster Auto Parts, Inc.*, 128 F. 3d 103, 107 (2d Cir. 1997)). Here, Cole was prejudiced because when Liberty "invoked its right to arbitrate their employment dispute, Cole was on the verge of a judicial resolution of her complaint." *Cole*, 2013 N.J. LEXIS 830 at *33. In other words, "after 21 months, Cole was directed to start over in a different forum under different rules." *Id.*

Acknowledging that "the extensive discovery in which all parties engaged may have occurred even if Liberty had invoked its right to arbitrate the employment dispute with Cole as soon as she joined Liberty as a direct defendant," the Supreme Court nonetheless found that "[i]t is just as likely ... that the Superior Court action would have been stayed to permit the arbitration to proceed." *Cole*, 2013 N.J. LEXIS 830 at **33-34. In any event, the Court found that "Liberty deliberately elected not to invoke arbitration to avoid disparate results and only changed course on the eve of trial after JCMC reached a settlement with Cole," concluding that this "tardy change of course hindered no one but Cole, who faced further delay and cost to resolve her case." *Id.* at *34.

4. *Cole's Claims Against JCMC*

The *Cole* Court found further that its analysis was not impacted by the fact that Plaintiff had originally asserted claims against JCMC, which was not a party to the arbitration agreement. Since "waiver involves a fact-sensitive analysis," the Supreme Court concluded that it did not need to "adopt a separate framework for parties to preserve their right to arbitrate in a multi-party action." *Cole*, 2013 N.J. LEXIS 830 at *34. Rather, "[a] party that intends to invoke its right to arbitrate in a case where another party is a non-signatory

to the arbitration agreement may preserve its right by asserting arbitration in its answer as an affirmative defense, moving to compel arbitration in a timely manner, moving to stay the judicial proceeding, or notifying the other party to the arbitration agreement that its litigation conduct should not be considered as a waiver of its right to arbitrate the dispute." *Id.* at **34-35.

5. *Totality Of The Circumstances*

The Supreme Court's "evaluation of the totality of the circumstances" led it to the "inexorable conclusion that Liberty had waived its right to arbitrate during the course of litigation." *Cole*, 2013 N.J. LEXIS 830 at *35. In sum, Liberty had "engaged in all of the usual litigation procedures for twenty-one months and, only on the eve of trial, invoked its right to arbitrate." *Id.* The Supreme Court held that "[s]uch conduct undermines the fundamental principles underlying arbitration and is strongly discouraged in our state." *Id.* at *35. In light of its conclusion that Liberty had waived its right to arbitrate Cole's claims, the Supreme Court declined to address whether Liberty was barred from seeking to compel arbitration based on principles of equitable estoppel. *Id.*

D. Conclusion

While *Cole* provides clarity concerning the factors that are relevant to determining whether a defendant has waived its right to arbitrate the plaintiff's claims by virtue of its litigation conduct, it does not establish any bright line test as to how far a defendant can go with litigating those claims in court before it is deemed to have crossed the line and thereby waived arbitration. The conclusion in *Cole* that the defendant had waived its right to arbitrate was straightforward and fairly easy to reach in light of the facts with which the Supreme Court was presented. *Cole* is clear, however, that there need not be such an

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extreme set of circumstances for the trial court to find waiver of the right to arbitrate by the defendant. Thus, under the *Cole* Court's totality of the circumstances test, a combination of such factors as extensively engaging in discovery, in particular deposition discovery which is typically not available in arbitration, filing of dispositive motions and unjustified delay in moving to compel arbitration will likely lead to a finding of waiver by the trial court. Simply stated, the moral of the story under *Cole* is that the longer the defendant actively litigates the plaintiff's claims in a judicial forum, the less likely it is that the trial court will view such litigation conduct as being "consistent with [defendant's] reserved right to arbitrate the dispute." *Cole*, 2013 N.J. LEXIS 830 at *30. ■

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