NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3611-04T5

WILLIAM KAUFMAN and SHORE AREA OBSTETRICIANS-GYNECOLOGISTS, P.A.,

Plaintiffs-Respondents,

v.

MASSIMO MARESCA and MARESCA KAUFMAN REALTY ASSOCIATES, LLC,

Defendants-Appellants.

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Submitted December 5, 2005 - Decided January 3, 2006

Before Judges Cuff and Parrillo.

On appeal from the Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. MON-C-335-04.

McCarter & English, attorneys for appellants (Thomas J. Goodwin, of counsel; Mr. Goodwin and Matthew H. Sontz, on the brief).

Goldring & Goldring, attorneys for respondents (Eric J. Goldring, on the brief).

PER CURIAM

We granted leave to appeal to consider the limited issue of whether the underlying dispute between the parties must be submitted to arbitration pursuant to an agreement governing

their business partnership. We now affirm the order of the General Equity Part denying the motion to compel arbitration.

The procedural history is somewhat involved. Plaintiff, William Kaufman, and defendant, Massimo Maresca, are physicians who practiced together in Little Silver as Shore Area Obstetricians-Gynecologists, P.A. (Shore Area). As equal partners, they also formed Maresca & Kaufman Realty Associates LLC (LLC) on September 25, 1995, to purchase, operate and lease units in an office condominium, for the use of their Shore Area medical practice. In other words, Shore Area was a tenant of LLC.

LLC's operating agreement vested the two partners with complete control and management of the business. All decisions, other than those made day-to-day and in the ordinary course, required a 75% ownership vote. There were, however, certain major business actions that could not be taken without the written consent of both members, one of which was "submit[ting] a Limited Liability Company claim or liability to arbitration." Both members were also prohibited from "do[ing] any act which would make it impossible or unreasonably difficult to carry on the ordinary business of the [company]." Another provision set out a procedural mechanism for resolution of business disputes:

> In the event that a dispute arises which cannot be resolved between the managing co-members, the dispute shall be

> resolved by a majority vote of the members. If there is an even number of member interests and they are evenly divided, the dispute shall be submitted to Arbitration in Monmouth County in accordance with the rules of the American Arbitration Association.

By July 2004, Maresca had since retired from the medical practice but was still active in the LLC. Apparently, a dispute arose between the parties involving the distribution of partnership profits from LLC, as mandated by paragraph 8 of the operating agreement, and the amount of rent due from Shore Area under the leasing arrangement. According to Kaufman, Maresca unilaterally suspended the July 2004 distribution so Kaufman redirected to himself the $6500 in rent due for that month, because it represented the same amount as the distribution he considered wrongfully withheld. As a result, on August 31, 2004, Maresca, purportedly on behalf of LLC, and without the consent of Kaufman, filed a summary dispossess action in the Special Civil Part, seeking Shore Area's eviction for nonpayment of rent. Simultaneously, Maresca also filed a Law Division action, again on behalf of LLC and without Kaufman's consent, seeking damages against Shore Area for alleged breach of the leasing agreement.

Consequently, on November 1, 2004, Kaufman instituted the present action against Maresca and LLC (defendants) in the Chancery Division by verified complaint and order to show cause

seeking to, among other things, restrain Maresca from taking any further action on behalf of LLC; expel Maresca from LLC; dissolve LLC; and consolidate the two pending lawsuits filed by Maresca with the present action. On the return date, December 3, 2004, the court secured the parties' consent to adjourn the hearing and stay all matters pending a settlement conference, which ultimately took place on January 20, 2005. That same day, the court granted Kaufman's motion to consolidate, issued a case management order, and set trial for June 22, 2005. On February 2, 2005, Maresca moved to compel arbitration, stay the proceedings, and transfer the remaining claims to the Law Division. On March 4, 2005, the court denied all such relief and on defendants' subsequent application, we granted their motion for leave to appeal.

The exclusive issue is whether the parties' agreement compels arbitration of the matters asserted in Kaufman's lawsuit. Even if we assume, without deciding, that Kaufman's equitable claims fall within the scope of the arbitration provision and, further, that the agreement allows arbitration without the partners' mutual assent, the unique circumstances with which we are confronted militate against compelling arbitration in this case. After all, the decision as to whether an arbitration provision should apply is a matter for the trial court. United Steelworkers of Am. v. Warrior & Gulf Navigation

Co., 363 U.S. 574, 582-83, 80 S. Ct. 1347, 1353, 4 L. Ed. 2d 1409, 1417 (1960); Clifton Bd. of Educ. v. Clifton Teachers Ass'n, 154 N.J. Super. 500, 504 (App. Div. 1977). For reasons that follow, we have no quarrel with its decision in this instance.

In our view, the essence of the dispute is the parties' disagreement over the distribution of LLC's profits and the amount of rental expenses charged to Shore Area. These two matters are, quite obviously, inextricably bound, because LLC's distributable profits are tied to its income and expenses which, in turn, are determined, in substantial part, by the base rental amount charged its tenant, Shore Area. These claims not only underlie Maresca's lawsuits for eviction and breach of the lease agreement, but also form the very basis of Kaufman's equitable action for restraints, expulsion and partnership dissolution. Despite the naming of Shore Area as a defendant in the former, there is nevertheless a substantial identity of parties and issues in both lawsuits. Due to the significant overlap between parties and issues, the resolution of some of the claims asserted cannot, in our view, be fairly and justly had without resolution of all. Yet that is precisely what defendants seek by splintering these claims and compelling those raised in the Chancery Division to proceed to arbitration while the others

remain in litigation, but stayed pending the arbitrator's resolution.

Defendants' insistence on arbitrating some claims and litigating others is misguided. "[O]ur responsibility is to proceed in a manner that will 'secure a just determination, simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.'" Elizabethtown Water Co. v. Watchung Square Assoc., LLC, 376 N.J. Super. 571, 578 (App. Div. 2005) (citing R. 1:1-2). The "'problem of adjudication in arbitration and in the courts of factual and legal rights arising out of the same transaction has haunted the courts for years.'" Id. at 577 (quoting Manchester Tp. Bd. of Educ. v. Thomas P. Carney, Inc., 199 N.J. Super. 266, 280 (App. Div. 1985)). "Obviously, fragmentation of litigation when some matters are subject to arbitration, while others are not, is inconsistent with the purposes of the entire controversy doctrine." Ibid. (citing Wm. C. Blanchard Co. v. Beach Concrete Co., Inc., 150 N.J. Super. 277, 292-94 (App. Div.), certif. denied, 75 N.J. 528 (1977)). Although "such fragmentation . . . [may be] unavoidable when arbitration and litigation rights [absolutely] conflict", ibid., litigation should not be severed when proceeding piecemeal would unduly increase the cost of justice, delay expedient resolution, create confusion and possible inconsistent results, or cause other hardship to the

parties. Rosenthal v. Berman, 14 N.J. Super. 348, 352 (App. Div. 1951).

Governed by these principles, we conclude that the simplest and fairest manner in which to proceed is that chosen by the General Equity judge. Paramount considerations of judicial economy and efficiency, fairness in administration, and fundamental principles underlying the entire controversy doctrine all dictate that these matters remain consolidated in the Chancery Division, where the predominant claims of injunctive relief and partnership dissolution are particularly well suited for resolution.

This result is also dictated by defendant Maresca's own actions in foregoing the very dispute resolution mechanism he now seeks to enforce in favor of instituting dual lawsuits in the Law Division. On this score, we note that the "'duty to arbitrate, and the scope of arbitration are dependent solely on the parties' agreement.'" Quigley v. KPMG Peat Marwick, LLP, 330 N.J. Super. 252, 270-71 (App. Div.), certif. denied, 165 N.J. 527 (2000) (quoting Cohen v. Allstate Ins. Co., 213 N.J. Super. 97, 101 (App. Div), certif. denied, 117 N.J. 87 (1989)). Here, however, by initiating litigation on behalf of LLC against his former medical practice in which plaintiff maintains an interest, without plaintiff's consent, defendant ignored the

very terms of the operating agreement on which he relies to compel arbitration.

Nonetheless, defendants argue that they sued Shore Area, which is not a signatory to LLC's operating agreement. But this agreement misses the point. Maresca's decisions to sue Shore Area for eviction, increase the tenant's base rental amount, and suspend distribution of partnership profits, were not his exclusively to make. Rather, these are business decisions which, under LLC's operating agreement, require, at the very least, consultation with plaintiff and, at the very most, a super majority when not made in the ordinary course. Consequently, plaintiff has claimed that Maresca's actions, in apparent contravention of the operating agreement, made it "impossible or unreasonably difficult to carry on [LLC's] ordinary business", leading, in large measure, to the irretrievable break-down of the parties' business relationship and, resultingly, to plaintiff's chancery suit seeking the break-up of their partnership.

We are satisfied that defendant's deliberate bypass of the agreement's dispute resolution procedure should not enable him to avoid the legal consequences of his own conduct. Although defendant's conduct in this instance may not rise to the level of affecting the legal validity of the operating agreement or of having waived any of its provisions, equity may nevertheless

refuse him the affirmative relief of compelling arbitration because of his otherwise "inequitable" conduct, involving the very subject matter of the lawsuit and the transaction in controversy. Heuer v. Heuer, 152 N.J. 226, 238 (1998); Neubeck v. Neubeck, 99 N.J. Eq. 167, 170 (E. & A. 1922). This is especially so where, as here, equity is best equipped to adjust the rights and obligations of these parties to conform to the original intent of their operating agreement.

We recognize, of course, that public policy in New Jersey favors arbitration as a means of dispute resolution, County Coll. of Morris Staff Ass'n v. County Coll. of Morris, 100 N.J. 383, 390 (1985); Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 186 (1981); Littman v. Morgan Stanley Dean Witter, 337 N.J. Super. 134, 148-49 (App. Div. 2001); Young v. Prudential Ins. Co. of Am., Inc., 297 N.J. Super. 605, 617 (App. Div.), certif. denied, 149 N.J. 408 (1997), and that agreements to arbitrate are read liberally to that end. Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993); Caruso v. Ravenswood Developers, Inc., 337 N.J. Super. 499, 504 (App. Div. 2001); Alamo Rent A Car, Inc. v. Galarza, 306 N.J. Super. 384, 389 (App. Div. 1997). Yet the presumption fades upon closer scrutiny of the facts and posture of this case. Where, as here, the party seeking enforcement of an arbitration clause does so with less than clean hands, where arbitration will not fully

resolve the entire controversy, and where equity jurisprudence is particularly adapted to do complete justice in the situation, we conclude the optimal course is that chosen by the trial judge, namely, to allow the consolidated matter to proceed to conclusion in the chancery court.

Affirmed.