NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4697-06T2

BANK OF AMERICA,

Plaintiff-Respondent,

v.

PHILIP KUSHNER ASSOCIATES,

Defendant-Appellant.

Argued January 9, 2008 - Decided June 18, 2008

Before Judges R. B. Coleman and Lyons.

On appeal from the Superior Court of New Jersey, Chancery Division, Warren County, C-16005-07.

Richard L. Zucker argued the cause for appellant (Lasser Hochman, L.L.C., attorneys; Mr. Zucker, of counsel and on the brief; Bruce H. Snyder, on the brief).

Craig L. Steinfeld argued the cause for respondent (Riker, Danzig, Scherer, Hyland & Perretti, LLP, attorneys; Anthony J. Sylvester, of counsel and on the brief; Mr. Steinfeld, on the brief).

PER CURIAM

Defendant Philip Kushner Associates (PKA) appeals from a March 29, 2007 order of the Chancery Division, Warren County, compelling it to arbitrate claims asserted by its tenant, plaintiff Bank of America (the Bank). Although the Bank

ultimately seeks reimbursement of sums expended for repairs following a fire that damaged the leased premises, the sole issue on this appeal is the propriety of the trial court order compelling arbitration. After reviewing the record in light of the arguments advanced on appeal, we affirm.

On September 1, 1989, the Bank's predecessor entered into a lease agreement with PKA for space in a two-story condominium unit located in Hackettstown. The Bank is the current lessee of the premises. The clause relating to arbitration provides as follows:

> 30. Arbitration. (a) Any controversy, claim or dispute arising out of or relating to this Lease, or the breach thereof, shall be settled and determined by arbitration and, except as provided herein, by the statutes and laws of the State of New Jersey pertaining to Arbitration and Award.
>
> (b) Each party shall name an arbitrator within fifteen (15) days after a demand for arbitration by the other party.

In addition, the lease contains the following pertinent clauses:

> 12. Limitation of Liability: (a) Landlord shall not be held responsible for and is hereby expressly relieved from any and all liability by reason of injury, loss or damage to any person or property in the Leased Premises due to any cause whatsoever and whether the loss, injury or damage be to the person or property of Tenant . . . .
>
> . . . .

> 13. Insurance. (a) Tenant, at Tenant's sole cost and expense, shall maintain and keep in effect throughout the term of this Lease:
>
> (i) Insurance against loss or damage to all of Tenant's improvements upon the Leased Premises, as well as Tenant's trade fixtures and other contents of the Leased Premises, by fire . . . .
>
> . . . .
>
> Tenant shall deliver certificates of insurance evidencing the insurance coverages referred to above.
>
> 14. Damage, Fire or Other Casualty. (a) In case of any damage to or destruction of the Leased Premises or any part thereof, Tenant shall promptly give written notice thereof to Landlord.
>
> . . . .
>
> (c) In the case of damage to the Leased Premises, the Building or any part thereof which can, in the reasonable opinion of Landlord's architect, be repaired within ninety (90) days from the occurrence thereof, Landlord shall enter and restore the Leased Premises or Building with all reasonable speed to substantially their condition prior to such occurrence, but in any event within such ninety (90) day period.

On March 1, 2003, a fire caused substantial damage to the building and the leased premises. The Bank promptly undertook the repair and remediation of the building, allegedly without consulting with PKA and without PKA's consent. Some time later,

after the repairs had been completed, the Bank demanded in a letter dated August 10, 2006, "arbitration with respect to its claim for reimbursement of $635,316.20 in expenses and costs the Bank directly incurred as a result of the substantial damage to both [PKA's] building and the Leased Premises from a fire that occurred at [PKA's] building on or about March 1, 2003." PKA asked for an extension of time to respond to the Bank's demand for arbitration. The Bank initially extended the period of time to respond to September 18, 2006 and once again to November 9, 2006. On November 9, 2006, the Bank named an arbitrator.

In a letter of that same date, PKA's counsel informed the Bank that it would not be naming an arbitrator unless the Bank addressed several issues. It was PKA's position that the Bank had breached the terms of the lease and that PKA was not bound to arbitrate unless and until certain issues were resolved to its satisfaction. Specifically, PKA asserted that the Bank violated Paragraph 13 of the lease by having failed to provide proof of insurance during its occupancy. Also, PKA asserted that over the past three years, the Bank had not communicated with PKA regarding the fire or resulting damages, and that the Bank had only provided PKA with a total dollar amount and a spreadsheet without substantiation of the extent of the damages. Finally, PKA asserted that the Bank had failed to give written

notice of any damage or destruction in violation of Paragraph 14 of the lease and had chosen to repair the premises without PKA's authorization or consent. PKA sent separate letters to the Bank declaring that the Bank was in default of the terms of the lease for violations of Paragraphs 13 and 14.

Over the course of the next few months, the parties continued to exchange letters through their respective counsel, but the matter could not be resolved. On March 1, 2007, the Bank filed a Verified Complaint to Compel Arbitration. On March 29, 2007, the court entertained oral argument, and at the conclusion of the hearing, found that the matter was "ripe and appropriate for arbitration." Accordingly, the court issued the order compelling PKA to arbitrate the Bank's claims and requiring PKA to name an arbitrator within fifteen days. The court supplemented its ruling with a written memorandum of decision, which stated in pertinent part:

> As a preliminary matter, this Court is only concerned with whether the parties may be compelled to arbitrate their claims. The merits of any claim or defense are beyond the scope of this Court's inquiry.
>
> . . . .
>
> New Jersey statute authorizes summary proceedings to compel arbitration[:]
>
> a. On filing a summary action with the court by a person showing an agreement to arbitrate and alleging another person's

> refusal to arbitrate pursuant to the agreement:
>
> . . . .
>
> (2) if the refusing party opposes the summary action, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.
>
> [N.J.S.A. 2A:23B-7(a).]
>
> The contents of the underlying claim clearly implicate the parties' relationship under the lease agreement. Defendant does not dispute the validity of the lease agreement nor its applicability to the instant dispute. The matter is the subject of arbitration.

On April 16, 2007, PKA named an arbitrator in accordance with the March 29, 2007 order. On May 14, 2007, PKA filed notice of the instant appeal. It raises the following issue for our consideration:

> THE TRIAL COURT ABDICATED ITS RESPONSIBILITY FOR DETERMINING WHETHER THE BANK'S PURPORTED "CLAIM" AROSE OUT OF OR RELATED TO THE LEASE AGREEMENT, AND THE JUDGMENT COMPELLING ARBITRATION MUST BE REVERSED.

PKA essentially argues that there is no claim arising out of or relating to the lease which could trigger the arbitration clause. This argument is plainly mistaken.

First, we note that "interpretation and construction of a contract is a matter of law for the court subject to de novo

review." Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998); see also Bradford v. Kupper Assoc., 283 N.J. Super. 556, 583 (App. Div. 1995), certif. denied, 144 N.J. 586 (1996) ("The construction of a contract such as the one before us is a matter of law.").

Second, the language of the arbitration clause is clear: "Any controversy, claim or dispute arising out of or relating to this Lease, or the breach thereof, shall be settled and determined by arbitration . . . ."

"Basic contract principles apply when a court interprets an arbitration clause." Caruso v. Ravenswood Developers, Inc., 337 N.J. Super. 499, 505 (App. Div. 2001). "Generally, [a court] determine[s] a written agreement's validity by considering the intentions of the parties as reflected in the four corners of the written instrument." Leodori v. Cigna Corp., 175 N.J. 293, 302 (2003). When interpreting a contract, "[i]t is not the real intent but the intent expressed or apparent in the writing that controls." Id. at 300. "[W]hen the terms of a contract are clear and unambiguous, there is no room for construction and the court must enforce those terms as written." Watson v. City of E. Orange, 175 N.J. 442, 447 (2003). In accordance with our general contract interpretations, we agree with the trial court, that the arbitration clause should be enforced as written,

requiring that the parties arbitrate the Bank's claim for "reimbursement of . . . expenses and costs [it] directly incurred as a result of a fire at the subject property in 2003."

New Jersey has endorsed arbitration as a favored means of dispute resolution. Martindale v. Sandvik, Inc., 173 N.J. 76, 84 (2002); Marchak v. Claridge Commons, Inc., 134 N.J. 275, 281 (1993) (arbitration is a favored form of relief, the Legislature has authorized parties to enter agreements to arbitrate, and arbitrators have support from the State); Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 186 (1981) (New Jersey courts favor arbitration because it offers many advantages to the parties). Generally, an agreement to arbitrate will be valid unless it violates public policy. Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006). Ultimately, "the duty to arbitrate and the scope of arbitration are dependent solely on the parties' agreement." Quigley v. KMPG Peat Marwick, 330 N.J. Super. 252, 270 (App. Div. 2000) (quoting Cohen v. Allstate Ins. Co., 231 N.J. Super. 97, 10 (App. Div.) certif. denied, 117 N.J. 87 (1989)).

According to N.J.S.A. 2A:23B-6:

> a. An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a

> ground that exists at law or in equity for the revocation of a contract.
>
> b. The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

PKA has not presented a satisfactory ground existing in law or equity for the court to invalidate the arbitration clause. The arguments set forth by PKA, that the Bank is in default for violating the terms of the lease and that the Bank breached various provisions of the lease, concern the merits of the underlying claim and do not pertain to whether the Bank's claim is ripe for arbitration. We are satisfied the trial court properly evaluated this case without consideration of the merits. It identified the question before it to be "whether the parties may be compelled to arbitrate their claims," adding: "The merits of any claim or defense are beyond the scope of this Court's inquiry." See Mach. Printers Beneficial Ass'n of U.S., Corp. v. Merrill Textile Print Works, Inc., 12 N.J. Super. 26, 32 (App. Div. 1951) (quoting Textile Workers Union of Am. v. Firestone Plastics Div., 6 N.J. 235, 237 (App. Div.), certif. denied, 4 N.J. 515 (1950)) ("[T]he court is not concerned with the merits of the alleged controversy. Its only concern is to determine whether this is an arbitrable question."); see also Moreira Constr. Co., Inc. v. Wayne, 98 N.J. Super. 570 (App.

Div.), certif. denied, 51 N.J. 467 (1968) ("When there is a dispute as to whether a grievance falls within the terms of the arbitration clause of the contract, it is the duty of the courts to determine whether the matter is arbitrable.").

PKA does not dispute the enforceability of the agreement, and we do not find any reason why the arbitration clause should not be enforced. PKA maintains that the Bank's claim does not arise out of or relate to the lease because the language of the lease bars such a claim. If in fact the Bank's claim is barred by the terms of the lease, this argument goes to the merits of the Bank's claim and should be considered by an arbitrator. To the extent that PKA argues that the claim is not related to the lease or the landlord-tenant relationship, we disagree. It is difficult to imagine a situation that is more illustrative of a claim arising from the landlord-tenant relationship and thus, the lease.

Finally, PKA's argument that the arbitrators might disregard the law and accord the Bank relief is speculative and without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.