

# New Jersey Law Journal

VOL. 208 - NO 7

MAY 21, 2012

ESTABLISHED 1878

IN PRACTICE

## EMPLOYMENT LAW

### Last-Minute Arbitration Will Not Be Upheld

BY GERALD JAY RESNICK AND  
VINCENT A. ANTONIELLO

The enforceability of arbitration clauses in employment contracts has been a hotly contested issue in New Jersey for the last several years. The vast majority of litigation on the issue has focused on the fact-sensitive analysis of whether the arbitration clause at issue is substantively enforceable. Does it constitute a voluntary, clear and unmistakable waiver of the right to a jury trial, or alternatively, an unenforceable contract of adhesion? On March 29, however, the Appellate Division, in *Cole v. Jersey City Medical Center*, A-4914-09T1 (N.J. App. Div. Mar. 29, 2012), decided the issue from an entirely different perspective — litigation procedure and strategy.

Without even addressing the issue of substantive enforceability, the court held that an employer, Liberty Anesthesia Associates (Liberty), was equitably estopped from enforcing an

*Resnick is the founding partner of Resnick Law Group in Roseland and a certified civil trial attorney. He represents the plaintiff in Cole v. JCMC, the case discussed in this article. Antonello is senior counsel at the firm. Their practice is dedicated to all aspects of employment law.*

arbitration clause contained in an employment contract. Because Liberty actively participated in the litigation — and opted to wait until three days before trial to first invoke the arbitration clause — the court reasoned that, as a matter of equity, Liberty had “voluntarily and intentionally decided to relinquish its right to arbitration as a forum to adjudicate plaintiff’s claims as a matter of litigation strategy.” The plaintiff will indeed have her long-awaited day in court on her claims that the wrongful termination of her employment as a nurse anesthetist violated the Conscientious Employee Protection Act (CEPA) and the New Jersey Law Against Discrimination (LAD).

Karen Cole was a dedicated and highly regarded nurse anesthetist, employed by Liberty, which provided anesthesia care at Jersey City Medical Center (JCMC). After months of complaining about questionable, and what she believed to be unlawful, medical practices at the hospital, Cole was accused of making unauthorized withdrawals from a Pyxis machine, which dispenses narcotics in the operating rooms. When the hospital advised her that hospital privileges would be temporarily suspended pending an investigation, her employer, Liberty, fired her,

which then resulted in JCMC permanently terminating her services.

On Sept. 21, 2007, Cole filed a lawsuit against JCMC alleging, inter alia, that JCMC violated CEPA by firing her in retaliation for her objections about defendants’ fraud and violations of law, and violated LAD by firing her because of a disability. On June 3, 2008, Cole filed an amended complaint which included Liberty as a defendant. Although Liberty asserted 35 affirmative defenses, it failed to mention or set forth as an affirmative defense anything about an arbitration agreement in its answer.

Liberty participated extensively in discovery, and in January 2010, Liberty and JCMC each filed a motion for summary judgment. Prior to oral argument, Cole settled her claims against JCMC. The court denied Liberty’s motion with respect to Cole’s claims under CEPA and LAD, but granted Liberty’s motion with respect to the plaintiff’s common-law claims. As in its answer, Liberty failed to make any mention of arbitration in connection with its motion for summary judgment.

On Friday, March 19, 2010, one business day before the scheduled trial, Liberty filed numerous motions in limine, including a motion to compel arbitration of all of Cole’s claims, based on an arbitration clause in a standard contract signed by the plaintiff. This was the first time Liberty made any attempt to compel arbitration in the case.

Liberty’s explanation for not invoking the arbitration clause earlier in the litigation, was that arbitration was “inappropriate” until the plaintiff

settled her claims against JCMC. Liberty reasoned that, since JCMC was not a party to the employment agreement, the plaintiff had “an absolute right to have a jury trial with respect to all of the claims that she had brought” against JCMC. Accordingly, Liberty argued that “it would have not made sense to arbitrate” the plaintiff’s claims against Liberty, while simultaneously litigating virtually identical claims against JCMC, because of the potential risk of inconsistent findings.

The plaintiff opposed Liberty’s motion, arguing that Liberty had waived its right to compel arbitration by virtue of both its failure to raise the issue as an affirmative defense, and its active participation in the litigation up until trial. (The plaintiff also argued that the relevant arbitration clause was substantively unconscionable and unenforceable, but this issue was not addressed by the court.)

Though the parties were preparing for jury selection, the trial judge dismissed the case and ordered the matter to proceed to arbitration. A subsequent motion for reconsideration was denied. Cole appealed, and the Appellate Division agreed to hear the case.

The Appellate Division noted, early in its opinion, that “an arbitration agreement is construed and enforced under the same legal principles applicable to contracts in general.” It went on to say that the doctrine of waiver applies in the context of enforcing a contractual provision to arbitrate.

The court then emphasized facts that distinguished cases where defendants were held to have *not* waived their right to arbitration. It pointed out that, in *Spaeth v. Srinivasan*, 403 N.J. Super. 508, 516 (App. Div. 2008), the defendant filed its motion to compel ar-

bitration “well before any meaningful exchange of discovery — much less the discovery end date — and well in advance of fixing a trial date.” Moreover, it distinguished *Hudik-Ross v. 1530 Palisade Avenue Corp.*, 131 N.J. Super. 159, 166-67 (App. Div. 1974), on the grounds that in that case, the defendants raised the arbitration issue as an affirmative defense and filed their motion to compel arbitration only four months into the litigation.

The court also relied on *Farese v. McGarry*, 237 N.J. Super. 385, 394 (App. Div. 1989), in which a defendant was held to have waived his contractual right to arbitration where he amended his answer to allege the arbitration issue as a defense nine months after the complaint was filed and just two weeks before trial. The court further stated that “Liberty knowingly decided not to raise its rights to arbitration because, as a matter of litigation strategy, it wanted to avoid the risk of inconsistent findings by two separate fact-finders. Liberty’s actions operated to the detriment of plaintiff.”

In concluding its analysis, the court shifted its focus to the doctrine of equitable estoppel, applying the principles enunciated in *Lopez v. Patel*, 407 N.J. Super. 79 (App. Div. 2009). In *Lopez*, the defendants were equitably estopped from asserting their right to dismiss the complaint on collateral estoppel grounds because they unjustifiably waited until the morning of trial to raise the defense. Indeed, the court noted that:

[T]he [p]laintiffs relied on the trial dates set by the court and unchallenged by defendants with the expectation that their negligence claims would be tried .... [The p]laintiffs ... paid

thousands of dollars in fees for expert testimony and other services at the trial they expected to start on January 7, 2008.

The court in *Cole* reasoned that, “Our holding in *Lopez*, and the principles animating our analysis therein, apply with equal force here.” Thus, the court found that Liberty was equitably estopped from enforcing its arbitration clause in the contract with Cole. It reversed and remanded the trial court’s decision, noting that:

[G]etting a case ready for trial before a jury requires a great deal more preparation than presenting a case before a panel of arbitrators. During the twenty months leading to the scheduled trial date, plaintiff actively engaged in discovery and prepared the case for trial. Liberty’s decision to seek enforcement of the arbitration provision contained in plaintiff’s Employment Agreement three days before the trial date is precisely the type of conduct we repudiated in *Lopez*.

The decision in *Cole* speaks loudly and clearly to employers who seek to enforce arbitration agreements. As a matter of litigation strategy, employers simply cannot have it both ways — taking their chances at obtaining summary judgment after nearly two years of litigation, and when that fails, seeking to enforce an arbitration agreement, for the very first time, just days before trial. Equity will not stand for that sort of conduct. And, neither did Cole. ■