The Appellate Advocate:
A Recap of Recent Decisions by NJ's Appellate Courts

Trimline Finish Carpentry LLC v. Scarborough
No. A-2529-23

A judicial clerkship is the best way to learn the law before jumping from law school into a law firm. That is just my personal opinion. And a biased opinion, because I am a former clerk. But I have my reasons for it. At the Appellate Division, you learn every area of substantive law because the Appellate Division decides every type of appeal. You also learn tips and insights on trial practice. It is like watching film on a football team when you already know how the game ended (Go Birds), and you already know whether the coach's play-calling paid off (again, Go Birds). That is what drew me to this opinion.

At the heart of this dispute lies a conflict familiar to the American spirit—two parties, each pursuing their vision of enterprise, clashing over the boundaries of obligation and agreement. And more specifically, the boundaries of a putative arbitration agreement.

In 2022, Stephen T. Scarborough, a real estate developer, sought to complete a home he was building for himself. For this task, he engaged Trimline Finish Carpentry LLC, a firm that—you guessed it—specializes in carpentry.

Like a lot of relationships between homeowner and home improvement contractor, the relationship and scope first got hashed out via text messages. When Trimline's principal asked if Scarborough wanted a formal contract, Scarborough indicated he would provide one. The work went on for several months, and Trimline received $76,000 in payment. Yet a rift emerged: Trimline contended that Scarborough still owed $36,000 more.

Trimline, relying on their verbal and texted agreements, filed a breach-of-contract lawsuit. This is where the trial strategy caught my eye: In response, Scarborough (representing himself at the time) acknowledged drafting a contract but steadfastly denied that it was ever executed. His defense evolved into a counter-offensive—he alleged violations of New Jersey's Consumer Fraud Act.

The litigation followed its normal course familiar to all lawyers. Both sides exchanged documents, answered interrogatories, and pursued discovery. It was not until Scarborough retained legal counsel in December 2023—some 400 days after the complaint was filed—that he pivoted to a new strategy: seeking to compel arbitration based on the very contract he had previously disavowed.

And so now, the litigation pivoted to the application and standard familiar to commercial litigators: a motion to compel arbitration. With the framework established by Cole v. Jersey City Medical Center, the judge weighed seven factors to determine whether Scarborough had waived his right to arbitration. Each factor—especially Scarborough's prior denial of the contract's validity and his extensive participation in the litigation—tilted the scales against him. The trial court reasoned that one could not, in good faith, deny a contract's existence while simultaneously invoking its arbitration clause.

In a pointed rebuke, the trial judge remarked that Scarborough's position "bordered on silly and frivolous." That is not the ideal response from a judge to whom you have made a motion.

Here's your appellate guidance for the day: the denial of a motion to compel arbitration is immediately appealable as a matter of right. Unlike most interlocutory decisions, the aggrieved party can go straight to the Appellate Division. It is not as dramatic as storming up the courtroom steps for a building that says Appellate Division. In reality, it is just filing some PDFs—and auto-generating some forms—on the same government website that we use for filings in the trial court.

Also keep in mind, the denial of a motion to compel arbitration is reviewed de novo by the Appellate Division. This means they can review the record on their own. However, the trial court's fact findings are still entitled to deference. This is a big caveat because evaluating whether a party waived an arbitration provision is fact-sensitive, turning often on questions of "when" and "why" a party did what it did.

In any event, the Appellate Division affirmed the trial court's decision. The Appellate Division walked through each and every Cole factor, supplying thoughtful and instructive insight if any practitioner is looking to draft a future brief on this issue. And the Appellate Division ruled that, in light of the trial court's fact findings, Scarborough had indeed waived any right he may have had to compel arbitration.

About Thomas Cotton

Thomas Cotton is a litigation partner at Schenck Price, representing clients in trial and appellate courts throughout the United States. In addition to his practice, he authors *The Appellate Advocate*, a semi-weekly blog offering thoughtful yet accessible commentary on recent appellate rulings.

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