DEFENDANTS" MOTION TO COMPEL ARBITRATION AND WAIVE THE JURY DEMAND MUST BE DENIED BECAUSE THE CONTRACT WAIVER SIGNED WAS NOT EXPLICIT IN ITS TERMS, DOES NOT PROVIDE PLAINTIFF WITH THE SAME RIGHTS PURSUANT TO THE NJLAD LAWS, WAS MADE BASED UPON COERCION, DURESS, AND FALSE PRETENSE, PROVIDES NO ADDITIONAL CONSIDERATION, AND IS CONTRARY TO PUBLIC POLICY

Plaintiff was hired by CBC in January 2001. In the matter at bar, Defendants have submitted Exhibit "A" which is purported to be an "Employment Agreement" dated March 14, 2003. Specifically within the Employment Agreement there is a provision which provides:

> **"I agree that all disputes relating to my employment at CBC National Inc. or termination thereof shall be decided by and (sic) arbitrator through the Labor Relations Section of the American Arbitration Association."**

The "Employment Agreement" also provides that:

> **"I understand that I am waiving my right to a jury trial voluntarily and knowingly, and free from duress and coercion. I understand that I have a right to consult with a person of my hosing, including an attorney, before signing this document."**

Defendants' brief correctly points out that extraneous documents should not be submitted in a motion to dismiss, unless "undisputedly authentic." Such is not the case in the matter at bar, as there clearly is not authentication of the document identified as "Exhibit A," i.e., the Employment Contract.

In Ackerman v. The Money Store, 321 N.J.Super. 308 (Law Div. 1998) the court held that *an employer could not compel current employee to sign an arbitration agreement*. [emphasis added]. Ackerman is directly on point and is a sufficient legal basis to deny Plaintiff's claim of dismissal.

Plaintiff relies upon Garfinkle v. Morristown Obstetrics and Gynecology Assoc., 168 NJ 124 (2001) for the proposition that CBC can require an employee to waive its employment claims in consideration of arbitration. First, the Garfinkle Court held that the company could not enforce the waiver provision. The Garfinkle employment agreement (pre-employment) stated that: "any controversy or claim arising out of, or relating to, this Agreement or the breach thereof shall be settled by arbitration."

The Trial Court and the Appellate Division granted the defendant's motion to dismiss, and the Supreme Court granted certification. The State Supreme Court noted that an agreement to arbitrate should be read liberally in favor of arbitration, but that only those issues may be arbitrated which the parties have agreed shall be enforceable. Specifically, the court held that a party's waiver of statutory rights "must be clearly and unmistakably established and contractual language alleged to constitute a waiver will not be read expansively."

The Supreme Court held unanimously that the clause that stated "any controversy or claim" that arises from the agreement or its breach shall be settled by arbitration was not sufficiently clear to give rise to a waiver. [emphasis added]. The Court found that language to suggest only that the parties intended to arbitrate only those disputes involving a contract term, a condition of employment, or some other element of the contract itself. It noted that the language did not mention, either expressly or by general reference, statutory claims redressable by the LAD.

The Court added that "to pass muster," a waiver of rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. It should also reflect the employee's general

understanding of the type of claims included in the waiver, e.g. workplace discrimination claims. The Court approved the observation of the Appellate Division in Alamo Rent-A-Car Inc. v. Galarza, 306 N.J. Super. 384 (1997) where that Court wrote, "the better course would be the use of language reflecting that the employee in fact knows that other options such as federal and state administrative remedies and judicial remedies exists. That the employee also knows by signing the contract, those remedies are forever precluded; and that, regardless of the nature of the employee's complaint, he or she knows that it can only be resolved by arbitration."

The Supreme Court found that principles of judicial economy favored trying the plaintiff's common law claims in the Law Division, along with the LAD claim, rather than resolving them separately by arbitration, and to compel arbitration, the waiver language must be clear and unmistakable.

In Safrit v. Cone Mills Corp. 248 F.3d 306 (4th Cir. 2001) the court ruled that to enforce a waiver provision, there must be a "clear and unmistakable" waiver, which can occur in two ways: "(1) the agreement can contain an explicit arbitration clause stating that all federal causes of action must be submitted to arbitration; or (2) a general arbitration clause can be coupled with a provision "which makes unmistakably clear that the discrimination statutes at issue are part of the agreement."

In determining whether the parties have agreed to arbitrate, state law contract principles apply. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995). In interpreting such clauses in the context of CEPA and LAD claims, New Jersey courts have been careful to honor the parties' intentions as set forth in the language of their arbitration agreement. Alamo Rent A Car, Inc., *supra*, 306 N.J. Super. at 391. Therefore,

while affording the liberal view of arbitration contracts, "it is equally true that the duty to arbitrate, and the scope of arbitration are dependent solely on the parties' agreement." Cohen v. Allstate Ins. Co., 231 N.J. Super. 97, 101 (App. Div.), *certif. denied*, 117 N.J. 87 (1989). Our courts have warned against rewriting "a contract to broaden the scope of arbitration [because] parties may agree to shape and limit the scope of arbitration in their contract." Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc., 240 N.J. Super. 370, 374 (App. Div. 1990). Thus, "[i]n the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute. Subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be." In re Arbitration between Grover and Universal Underwriters Ins. Co., 80 N.J. 221, 228-29 (1979).

Further, a contractual provision in which a party elects arbitration as the exclusive remedy must be read in light of its effect on the person's right to sue. Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993). "A clause depriving a citizen of access to the courts should clearly state its purpose," especially where the choice is to arbitrate disputes rather than litigate them. *Ibid*. "The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time honored right to sue." *Ibid*. Thus, to be given effect, any waiver of a statutory right "must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively." Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High School Board of Educ., 78 N.J. 122, 140 (1978).

Despite the general rule that arbitration clauses are to be liberally construed, courts have not hesitated to apply the common-law rule that "a court should construe

ambiguous language against the interest of the party that drafted it." Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995); Caldwell v. KFC Corp., 958 F.Supp. 962, 973 (D.N.J. 1997). In such a circumstance, the drafter of the language should not be rewarded "with a favorable, expansive interpretation." Caldwell, *supra*, 958 F.Supp. at 974.

In the matter at bar, there are no references in the employment agreement/arbitration clause identifying statutory claims arising out of and redressable by the LAD or other discrimination laws. Indeed, the waiver clause is no more inclusive than the arbitration clause in Alamo Rent A Car, Inc., *supra*, 306 N.J. Super. at 391-92, which the court had held to be inadequate to constitute a waiver of plaintiff's statutory remedies under the LAD.

Issues such as fraud, duress, unconscionability and the like will be decided under applicable state law. *See* Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 at 227, 228 (3d Cir.), *cert. denied* 522 U.S. 915 (1997). A contract obtained by duress can be set aside at the option of the person against whom the duress was directed. A contract is deemed obtained by duress if the person against whom the charge of duress is asserted has used threats, moral compulsion, physical force or psychological pressure to overbear the other party to the contract and thereby deprive the other party of the exercise of free will. McBride v. Atlantic City, 146 N.J. Super. 498 (Law Div. 1974*), aff'd* 146 N.J. Super. 406 (App. Div. 1975), *aff'd*, 72 N.J. 201 (1976); Rubenstein v. Rubenstein, 20 N.J. 359 (1956); Konsuvo v. Netzke, 91 N.J. Super. 353 (Ch. Div. 1966).

The "waiver" in the matter at bar failed to advise Romanik that by signing the Employment Agreement, she waived her rights to statutory claims arising out of her

employment, failed to apprise Romanik of the claims to be waived, specifically of workplace harassment, discrimination and retaliation, there was no identification of how to file an arbitration claim, she was not provided an opportunity to review the Employment Agreement with her attorney, she was forced to sign the agreement immediately or be terminated, and finally, it is contrary to public policy to force Plaintiff to sign the waiver as a part of her continued employment.

In the matter at bar, Plaintiff suffered from a serious illness and needed the medical benefits to survive, however, to continue with her employment CBC forced her to sign the waiver.