

Hayblum v Life Alert Emergency

2016 NY Slip Op 32227(U)

October 28, 2016

Supreme Court, New York County

Docket Number: 150698/2016

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMOND
J.S.C. Justice

PART 35

Hayblum, IRITH
-v-
LIFE ALERT Emergency, et al.

INDEX NO. 150698/2016
MOTION DATE 10.24.2016
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Pursuant to the Court's August 11, 2016 and September 15, 2016 *interim* orders, a hearing on the validity of the Arbitration Agreement (the "Agreement") was held on October 24, October 26 and October 27, 2016 (Court Reporter, Denise Williams). The purpose of the hearing was to determine whether plaintiff was fraudulently induced to execute the Agreement in that (1) Audrey Landau ("Landau"), an assistant sales managers at defendant Life Alert, presented the Agreement to plaintiff with the intent to deceive plaintiff; and (2) plaintiff did not have an opportunity to read the Agreement at any time prior to signing it, and plaintiff's husband's receipt of the Agreement prior to plaintiff's receipt did not provide an opportunity for her to review the Agreement.

As to plaintiff's claim of fraud, the elements of a fraud claim are: a material misrepresentation of fact, made with knowledge of its falsity, with the intent to deceive, justifiable reliance and damages (*Channel Master Corp. v Aluminum Limited Sales*, 4 NY2d 403, 406-407, 176 NYS2d 259, 151 NE2d 833; *Lanzi v Brooks*, 54 AD2d 1057, 1058, 388 NYS2d 946, *aff'd* 43 NY2d 778, 402 NYS2d 384, 373 NE2d 278). According to plaintiff, Landau called the Agreement "unimportant" and opened it to the last page for plaintiff to sign. Plaintiff claims that she did not know the contents of the Agreement and would not have signed it since she was contemplating a lawsuit against defendants.

Pursuant to that hearing, the Court finds as follows.

Dated: _____, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

WITNESSES

Plaintiff, Irith Hayblum

First, there is a concept in law called "Falsus in Uno" That is, according to PJI 1:22, as to any witness that has wilfully testified falsely as to any material fact, that is as to an important matter, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything. The fact finder is not required, however, to consider such a witness as totally "unbelievable." The fact finder may accept so much of his or her testimony as one deems true and disregard what is believed as false. The fact finder, by the processes as described, is the sole judge of the facts, decides which of the witnesses to believe, what portion of his or her testimony to accept and what weight to give to it.

In this case, the plaintiff's naivete with respect to understanding concepts like "arbitration" "litigation" and document execution are "material." Plaintiff's claim, that she had no idea what she was signing, strains credulity. The plaintiff's testimony shows, among other things, that she:

1. has business expertise as a "Director of Marketing" for a business
2. has litigated sufficiently to understand the concept of litigation
3. is astute in business sufficiently to be a "whistle blower" and cooperating source with the FBI in an investigation.

Second, there is another concept "Weighing the Testimony/Credibility," described in PJI 1:8 as follows: The law does not, however, require the fact finder to accept all of the evidence admitted. In deciding what evidence to accept the fact finder must make her own evaluation of the testimony given by each of the witnesses, and decide how much weight to give to that testimony. The testimony of a witness may not conform to the facts as they occurred because he or she is intentionally lying, because the witness did not accurately see or hear what he or she is testifying about, because the witness' recollection is faulty, or because the witness has not expressed himself or herself clearly in testifying. There is no magical formula by which one can evaluate testimony. But the fact finder brings with himself or herself all of the experience and background of one's life. In everyday affairs one decides for oneself the reliability of things people say. The same tests which are applied in one's everyday dealings are the tests which are applied in deliberations, including the interest of any witness in the outcome of the case, the bias or prejudice of a witness, if there by any, the age, the appearance, the manner in which the witness gives testimony on the stand, the opportunity that the witness had to observe the facts about which he or she testifies, the probability or improbability of the witness' testimony when considered in the light of all of the other evidence in the case, are all items to be considered in deciding how much weight, if any, to give to that testimony. And if there appears to be a discrepancy in the evidence the fact finder will have to consider whether the apparent discrepancy can be reconciled by fitting the two stories together. If that is not possible, the fact finder will have to decide which of the conflicting stories to accept.

In this case, plaintiff's lack of forthrightness and truthfulness weigh against her. For example, her testimony in the following areas rendered her less than credible:

1. filing with the IRS other than as "Married filing Separate"
2. marital status testimony
3. personal litigation history

Leon Hayblum

When a witness testifies with a clear, sharp recollection as to the details at issue, and has "no recollection" and/or an inability to testify in a direct, forthright manner as to every other aspect of examination over the course of hours, the credibility of that witness is called into question. For example, Mr. Hayblum

1. could not recollect if he has/had a social security number
2. when presented with documents to refresh his recollection, reflecting a ss#, could not recall if that was it

Also, this witness demonstrated an express bias as against the defendants, clouding the credibility of his testimony [*see* exhs. D, E and F in evidence].

And, admitting that he sent an e-mail critical of defendants' lodging accusations, including that defendants were anti-semitic, to recipients including defendants' employees, (1) using plaintiff's e-mail address and (2) electronically signing the e-mail as if it came from plaintiff: "Sincerely," followed by plaintiff's electronic signature to the e-mail without her consent or knowledge (see transcript) reflects on the trustworthiness of this witness' testimony.

A final factor weighing against the credibility of this witness and casting a pale on his entire testimony was the statements in his book, I Have To Tell This Story, *to wit*: the discussion therein to the effect that "He is the father of the grand-daughter of Pope John Paul II."

The witnesses called by defendants were employees of LifeAlert. The court considered whether the fact that they were and still are employed by defendants and their continued relationship with defendants affected their testimony.

The witnesses called by defendants testified in a clear, concise and credible manner.

Loretta Joseph Louisy testified that she

1. was allowed to take the arbitration agreement home
2. was not told that she had to immediately sign it
3. took the document home to get a better understanding of what she would be signing.
4. advised by Ms. Landau that this is paperwork that she needed to read and sign

Ms. Karen Weissman Bates

1. advised by Ms. Landau that "this is a document you need to read, return and sign"
2. she was given time to review the agreement, but did not review it with anyone
3. signed the arbitration agreement voluntarily

Ms. Zita Silverman

1. was not told that the agreement had to be signed immediately
2. read it and asked if she could have someone go over it with her
3. reviewed it by phone with her attorney [this appears to be contradicted by her affidavit]

Gabriel Gonen [a defendant herein]

This witness/defendant testified in a clear, concise convincing manner. He was forthright admitting facts concerning the receipt and dissemination of the Arbitration Agreement to the employees.

Audrey Landau

This witness was firm and definitive in her assertions concerning the dissemination of the Arbitration Agreement and lack of falsity with respect to its presentation to employees.

With respect to the witnesses identified on defendants' witness list in this case, e-mails critical of the defendants herein sent by plaintiff's husband to witnesses identified by defendants, and defendants' employees and associates, after these individuals were identified as witnesses in this case, raise the spectre of potential "witness tampering" and appear to be an effort to intimidate the witnesses in this case as against defendants.

Except for the plaintiff, all of the witnesses, including plaintiff's husband, testified that they were advised or had knowledge (either by reading the document him/herself or by being told by Landau) that the document presented to them for signature was an agreement to arbitrate. None of the witnesses, before the court, except for plaintiff, signed the document without knowing what it was in advance.

Plaintiff is the sole person to claim that she did not know what the Agreement was when she signed it, and to testify that Landau did not tell her it was an agreement to arbitrate; plaintiff is the sole witness to testify that she was told that it was unimportant.

No witnesses were called to corroborate the misrepresentation of the presentation of the arbitration agreement except the plaintiff's husband, who in fact points out that he was given an opportunity to review and chose not to sign it because it was an arbitration agreement.

Notably, plaintiff rested and did not call as witnesses any individuals who did not sign the Arbitration Agreement. And, if it were a pattern of misinformation or deception for employees to sign the Agreement, the Court would have expected plaintiff to call corroborating witnesses.

Accordingly, based on the proceedings, and testimony and "clear and convincing" evidence presented at the hearing, it is hereby

ORDERED that plaintiff failed to establish fraud or fraudulent inducement to execute the Arbitration Agreement; and it is further

ORDERED that the Arbitration Agreement is valid and enforceable, and the parties are directed to proceed with arbitration; and it is further

ORDERED that any temporary stay of this action remains in effect; and it is further

ORDERED that Petitioner shall, within 20 days of entry, serve a copy of this Order with notice of entry upon all parties.

This constitutes the decision and order of the Court.

Dated 10/28/14 ENTER  J.S.C. .

HON. CAROL R. EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE