Frankel v Citicorp Ins. Serv., Inc.
2008 NY Slip Op 32722(U)
September 26, 2008
Supreme Court, Queens County
Docket Number: 15516/08
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

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MARK FRANKEL, on behalf of himself and all others similarly situated,

Plaintiff,

-against-

Index No. 15516/08
Motion Date: 9/24/08
Motion Cal. No. 29

CITICORP INSURANCE SERVICES, INC., CITICORP VISA, INC., CITICORP MASTERCARD, INC., CITIBANK (SOUTH DAKOTA), N.A. and CITIBANK, N.A.,

Defendants.

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The following papers numbered 1 to 22 read on this motion by **CITICORP INSURANCE SERVICES, INC**. and **CITIBANK (SOUTH DAKOTA), N.A.** to compel arbitration and stay action pursuant to CPLR 7503(a); and cross-motion by plaintiff for an order staying arbitration.

	PAPERS NUMBERED
Amended Notice of Motion-Affidavit - Exhibits................	1- 4
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Upon the foregoing papers it is ordered that the motion by **CITICORP INSURANCE SERVICES, INC**. and **CITIBANK (SOUTH DAKOTA), N.A.** to compel arbitration and stay action pursuant to CPLR 7503(a); and cross-motion by plaintiff for an order staying arbitration are decided as follows:

Initially, the court notes that pursuant to a stipulation signed by plaintiff and defendants, plaintiff discontinued the Complaint, without prejudice, as against defendants **CITICORP VISA, INC., CITICORP MASTERCARD, INC., and CITIBANK, N.A.** This action involves plaintiff's allegations that Defendants improperly charged fees to his Citibank credit card account in connection with a "Voluntary Flight Insurance Program. Plaintiff commenced this class action for breach of contract, fraud and violation of the Consumer Protection Act, on

behalf of a class of all present and former credit cardholders who enrolled and received "Flight Insurance" each time they charged an airline ticket using a Citibank Visa or Mastercard account and who were damaged as a result of defendant unlawfully charging flight insurance premiums more than once for the same airline ticket purchased or were unlawfully charged when they purchased or used travel related services.

Defendants claim that plaintiff's Citibank credit card account is subject to a credit card agreement that contains a binding arbitration agreement which authorizes either party to elect arbitration of any disputes relating to the account. Consequently, defendants have made the instant motion seeking to compel arbitration on an individual basis of the claims asserted against them by plaintiff. According to defendants, the Arbitration Agreement is a valid and enforceable agreement to arbitrate under the Federal Arbitration Act, 9U.S.C. § 1, et seq., and South Dakota law (which applies due to a choice-of-law provision in the underlying Card Agreement), completely encompasses plaintiff's claims, and expressly requires that plaintiff's claims be arbitrated on an individual basis.

Defendants have submitted an affidavit of Cathleen Walters, a Senior Vice-President for Citicorp Credit Services, Inc., a servicing company for Citibank, and bank documents. Ms. Walters has access to the business records of Citibank relating to card member's accounts and is familiar with the business operations of Citibank. She states that plaintiff opened the Account in April 1987 and it was subject to a written card agreement. In October 2001, Citibank mailed plaintiff a Notice of Change in Terms along with his October 2001 account statement. The change was delineated "Notice of Change in Terms Regarding Binding Arbitration to Your Cardmember Agreement". Based on this change, the Card Agreement provided that disputes regarding the Account would be resolved through arbitration at either parties election. According to Ms. Walters and a submitted bank statement, a special message was printed on the face of the October 2001 statement, that advised plaintiff "to see the enclosed change in terms notice for important information about the binding arbitration provision we are adding to your Citibank Card Agreement".

The new terms read as follows:

ARBITRATION:

PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY AN ARBITRATOR

INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES.

Agreement to Arbitrate:

Either you or we may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between you and us (called "Claims").

• **What Claims are subject to arbitration?** All Claims relating to your account, a prior related account, or our relationship are subject to arbitration, including Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other sources of law; Claims made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise; and Claims made independently or with other claims. A party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party. Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis.

• **Whose Claims are subject to arbitration?** Not only ours and yours, but also Claims made by or against anyone connected with us or you or claiming through us or you, such as a co-applicant, authorized user of your account, an employee, agent, representative, affiliated company, predecessor or successor, heir assignee, or trustee in bankruptcy.

• **Broadest Interpretation.** Any questions about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced. This arbitration provision is governed by the Federal Arbitration Act (the "FAA").

• **Who can be a party?** Claims must be brought in the name of an individual party or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will not award relief for or against anyone who is not a party. If you or we require arbitration of a Claim, neither you, we, nor any other person may pursue the Claim in arbitration as a class action, private attorney general action or other representative action, nor may such Claim be pursued on your or our behalf in any litigation in any court. . . .

Printed on plaintiff's November statement was another special message regarding the notice about adding binding arbitration to his Citibank Agreement. The Arbitration Change-in-Terms contained an instructions on how plaintiff could opt out of the change by submitting a written request for exclusion to a Citibank office. There is no record of plaintiff opting out. Thereafter, plaintiff made charges to this account in December 2001, January 2002, February 2002 and March 2002. In January 2002, pursuant to a request by plaintiff, Citibank changed its pricing on plaintiff's account and sent him a statement indicating such, along with a complete Card Agreement that contained the same Arbitration Change-in-Terms sent in October 2001. In February 2005, Citibank sent plaintiff a Notice of Change-in-Terms for plaintiff's account that amended the arbitration provision, removing JAMS as an arbitration provider and revising the severability clause. The change contained instructions on how plaintiff could opt out of this change, but, there is no record of plaintiff doing so. Instead, plaintiff continued using the account, as reflected in statements for March and April 2005.

Plaintiff opposes this motion claiming that the purported agreements do not meet the requirements of CPLR 4544. According to plaintiff the agreements were not printed in the proper font. Plaintiff also claims Ms. Walter's affidavit is not admissible evidence since she does not have appropriate knowledge of the matters attested to in her affidavit. Plaintiff also claims that the Federal Arbitration Act does not apply, that South Dakota law does not apply, that compulsory arbitration is not part of the Arbitration Agreement, and discovery is needed for him to oppose this motion.

This court must decide whether to compel arbitration pursuant to the arbitration clause contained in the Agreement. The FAA mandates that agreements to arbitrate must be enforced on the same basis as other contracts. *See* 9 USC § 2; Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985.) Courts have recognized a strong federal and state policy favoring arbitration as an alternative means of dispute resolution. Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 76 (2d Cir1998.) As such, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); *see also* League of American Theatres & Producers, Inc. v. Cohen, 270 A.D.2d 43 (1st Dept 2000.) The factors that must be considered in determining whether to compel arbitration, pursuant to the FAA, include whether the parties agreed to arbitrate, and the scope of the arbitration agreement. *See* Norcom Electronics Corp. v. CIM USA, Inc., 104 F. Supp. 2d 198 (SD N.Y.2000.) In addition, CPLR 7503(a) directs that "where there is no substantial question whether a valid agreement was made or complied with . . . the court shall direct the parties to arbitrate." Id. Here, applying these factors and reviewing the arguments presented in opposition to the motion, it is clear that plaintiff's claims are subject to arbitration.

First, defendants have established the binding nature of the credit card agreement. It is peculiar to consumer credit card practices that the written agreement may be signed by the credit card issuer only (Personal Property Law § 413 [11] [c] ["the credit agreement may consist of an agreement … executed only by the financing agency"], [e] ["the financing agency delivers or mails … to the buyer a copy of the agreement executed by the financing agency"]). Defendants have shown that the unilateral contract is binding on plaintiff. Flores v Lower E. Side Serv. Ctr., Inc., 4 NY3d 363, 369 (2005.) (contract not signed by party to be charged is "enforceable, provided there is objective evidence establishing that the parties intended to be bound"); God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP, 6 NY3d 371, 374 (2006) objective evidence established by the petitioner's presentation of proof of the consumer's subsequent use of the credit line (Personal Property Law § 413 [11] [c] ["The credit agreement … shall not become effective unless and until the retail buyer … signs a sales slip or memorandum evidencing purchase or lease of property or services"]). If the arbitration clause is contained in an amendment, the same type of showing is required. Tsadilas v Providian National Bank, 13 AD3d 190, 191,[1st Dept 2004], lv denied 5 NY3d 702 (2005) ("Defendant sufficiently proved that it sent the arbitration provision to plaintiff. Plaintiff consented to it by failing to opt out and by continuing to use her credit cards".) (citations omitted.)

In the instant case, defendants have established that it sent the change in terms that contained binding arbitration to plaintiff. Contrary to plaintiff's claims regarding Ms. Walter's affidavit, where the petitioner is the issuer of the credit card, a simple affidavit of a person with personal knowledge may present the relevant documents and supporting proof. *See*, Countrywide Home Loans, Inc. v Brown, 305 AD2d 626 (2d Dept 2003.) Moreover, even if, arguendo, plaintiff could invoke the type-size requirements CPLR 4544 and it were not preempted by the Federal Arbitration Act (Tsadilas v Providian National Bank, *supra*.), Ms. Walter's affidavit in reply establishes that the type-size requirements of CPLR 4544 were met. Defendants' reply papers were properly considered because they directly responded to plaintiff's opposition papers. *Id*. Additionally, there is no basis for plaintiff's claims that the Federal Arbitration Act does not apply. Clearly, a credit card agreement between parties from different states that involves transactions in various states involves interstate commerce. Additionally, defendants' motion to compel arbitration is not procedurally improper since a motion compelling arbitration is all that is necessary after plaintiff initiated this action. CPLR 7503(a).

The Court notes that contrary to plaintiff's claims, the arbitration provision is enforceable even though it waives plaintiff's right to bring a class action. Under New York law, "a contractual proscription against class actions … is neither unconscionable nor violative of public policy" Tsadilas v Providian National Bank, *supra*. Similarly, any argument that the

credit card agreement as a whole is unconscionable is for the arbitrators, rather than this Court, to decide. In any event, the arbitration provision alone is not unconscionable because plaintiff had the opportunity to opt out without any adverse consequences. *Id.* It is also clear that the arbitration agreement covers plaintiff's claims and the arbitration agreement has a valid and enforceable South Dakota choice-of-law provision. The Court notes that plaintiff fails to specify any ground for not applying this choice-of-law provision. Finally, there is no basis to delay the deciding of this motion for plaintiff to obtain discovery.

Based on the above, the application by defendants for an order pursuant to CPLR 7503(a), staying the action and compelling arbitration is granted. The action is stayed and the parties are directed to proceed to arbitration, pursuant to the Credit Card Agreement. This arbitration is on an individual basis, not a class basis, as clearly set forth in the Agreement. Based on the granting of the motion to compel arbitration, the cross-motion by plaintiff for an order staying arbitration is denied.

A copy of this decision is being sent to the parties by means of facsimile transmission on September 26, 2008.

Dated: September 26, 2008 ....

ORIN R. KITZES, J.S.C.