Bard v Cablevision Sys. Corp.

2013 NY Slip Op 34111(U)

April 22, 2013

Supreme Court, Nassau County

Docket Number: 602291/2012

Judge: Thomas P. Phelan

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

JOCLYN BARD and IRWIN BARD, individually and on behalf of all others similarly situated Plaintiffs,

Plaintiff(s),

ORIGINAL RETURN DATE: 03/18/2013

-against-

SUBMISSION DATE: 03/18/2013
Index No.: 602291/2012

MOTION SEQ.: # 2

CABLEVISION SYSTEMS CORPORATION, CSC HOLDINGS, LLC, CABLEVISION SYSTEMS LONG ISLAND CORPORATION, CABLEVISION SYSTEMS NEW YORK CITY CORPORATION, CABLEVISION SYSTEMS SUFFOLK CORPORATION, and CABLEVISION SYSTEMS HUNTINGTON CORPORATION,

Defendant(s).

The following papers read on this motion:

Notice of Motion	1
Affirmation	2
Memorandum	3, 4
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Motion by defendants (collectively referred to as "Cablevision") for judgment dismissing the second amended complaint, on the grounds that plaintiffs may seek relief only through arbitration, is granted.

In the second amended complaint plaintiffs allege claims against Cablevision that arise out of Cablevision's conduct in billing its customers in New York State for services it did not provide during, and in the aftermath of, superstorm Sandy, commencing on October 29, 2012. The claims for breach of contract, unjust

enrichment and injunctive relief seek the return of payments made for the period of and following the superstorm, during which no cable television, internet or telephone service was provided.

In this pre-answer motion Cablevision seeks dismissal of this action on the grounds that all of its agreements for services (Exs. A through H), identified by Cablevision as Terms of Service, contain an arbitration clause with a 30-day opt-out provision at the outset of the contract. The language at issue provides:

> "[A]ny and all disputes between You and Cablevision, or related to or arising from your relationship with Cablevision, including the validity, enforceability, or scope of this Arbitration Provision (with the exception of the enforceability of the class action waiver clause), shall be subject to binding arbitration in accordance with this Arbitration Provision.
>
> * * *
>
> IF YOU DO NOT WISH TO BE BOUND BY THIS ARBITRATION PROVISION, YOU MUST NOTIFY CABLEVISION IN WRITING WITHIN 30 DAYS OF THE DATE THAT YOU FIRST RECEIVE THIS AGREEMENT BY EMAILING US AT NO ARBITRATION @CABLEVISION.COM OR BY MAIL TO CABLEVISION RESEARCH & SUPPORT, 200 JERICHO QUADRANGLE, JERICHO, NY 11753 ATTN. ARBITRATION. YOUR WRITTEN NOTIFICATION TO CABLEVISION MUST INCLUDE YOUR NAME, ADDRESS, AND CABLEVISION ACCOUNT NUMBER AS WELL AS A CLEAR STATEMENT THAT YOU DO NOT WISH TO RESOLVE DISPUTES WITH CABLEVISION THROUGH ARBITRATION. YOUR DECISION TO OPT OUT OF THIS ARBITRATION PROVISION WILL HAVE NO ADVERSE EFFECT ON YOUR RELATIONSHIP WITH CABLEVISION OR THE DELIVERY OF CABLEVISION SERVICES TO YOU. IF YOU HAVE PREVIOUSLY NOTIFIED CABLEVISION OF YOUR DECISION TO OPT OUT OF ARBITRATION, YOU DO NOT NEED TO DO SO AGAIN" (Ex A, ¶ 30).

Cablevision argues that since plaintiffs did not opt out of the arbitration requirement in the initial 30-day period of their respective agreements, arbitration under the Federal Arbitration Act ("FAA"), 9 USC §1 *et seq*. became mandatory and this action is precluded.

In opposition, plaintiffs rely upon the recent Cablevision Agreement for Optimum TV posted on its website on December 18, 2012 (Ex. M, the "Amended Agreement"), which contains the same 30-day opt-out provision. By letter dated January 10, 2013 (Ex. J, the "opt-out letter"), plaintiffs' counsel advised Cablevision that on behalf of themselves and all other similarly situated customers they opted out of the arbitration provision in the Amended Agreement.

For the record, Cablevision's authority to amend its agreements unilaterally is found in the amendment clauses in all of its agreements, pursuant to which it:

> "may, it its sole discretion, change, modify, add or remove portions of this Agreement at any time. Cablevision may notify Subscriber of any such changes to this Agreement by posting notice of such changes on the Optimum website, using the features of the Cablevision's digital cable box, or sending notice via e-mail or postal mail. The Subscriber's continued use of the Services following notice of such change, modification or amendment shall be deemed to be the Subscriber's acceptance of any such modification" (Ex. A, ¶ 34; see also Ex. I, ¶ 34).

On this motion the parties vigorously dispute the effectiveness of the opt out letter, on behalf of the named plaintiffs and the alleged class, in opting out of the arbitration provision in the Agreements of all Cablevision customers. Defendants further argue that even if the opt out letter is effective, plaintiffs' claims herein are still subject to arbitration.

Defendants insist that their motion is not brought pursuant to CPLR 3211(a)(7), and this Court agrees. The issue is not whether the factual allegations in the second amended complaint state a cause of action but whether, pursuant to CPLR 3211(a)(1), the documentary evidence submitted by defendants conclusively establishes the exclusivity of arbitration as the forum for plaintiffs' redress (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Materials that qualify as "documentary evidence" for the purposes of CPLR 3211(a)(1) include "documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable'" (*Sands Point Partners Private Client Group v Fidelity Natl. Tit. Ins. Co.*, 99 AD3d 982, 984 [2d Dept 2012] quoting *Fontanetta v Doe*, 73 AD3d 78, 84-85 [2d Dept 2010]). The evidence must be "unambiguous and of undisputed authenticity" (*Fontanetta,* 73 AD3d at 86). Agreements qualify. Although letters do not usually suffice (*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713 [2d Dept 2012]), in this case the opt out letter is in the nature of a contractual document, and it meets the test of being unambiguous and of undisputed authenticity. Under these circumstances, the motion must be construed as one pursuant to CPLR 3211(a)(1) (see *Gomez v Brill Sec., Inc.,* 95 AD3d 32 [1st Dept 2012]).

Parties consenting to arbitration surrender many of their "normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent" (*Thomas Crimmins Contr. Co. v City of New York,* 74 NY2d 166, 171 [1989] quoting *Matter of Marlene Industries Corp.(Carnac Textiles)*, 45 NY2d 327, 334 [1978]). Where an arbitration clause in the parties' agreement is clear, explicit and unequivocal (*Shah v Monpat Constr., Inc.*, 65 AD3d 541, 543-544 [2d Dept 2009]) and all of the claims at issue fall within the broad scope of this arbitration clause, the arbitration clause will be enforced (*Nasso v Loeb & Loeb, LLP*, 19 AD3d 465 [2d Dept 2005] lv app dsmd 8 NY3d 827 [2007]).

Arbitration agreements are not unconscionable where a party had the opportunity to opt out without any adverse consequences (*Tsadilas v Providian Natl. Bank*, 13 AD3d 190 [1st Dept 2004], lv app den 5 NY3d 702 [2005]). A broad arbitration clause in an agreement survives and remains enforceable for the resolution of disputes arising out of that agreement subsequent to the termination thereof, even when the original agreement terminates in favor of a subsequent agreement without an arbitration clause (*Matter of Primex Intl Corp v Wal-Mart Stores*, 89 NY2d 594. 599 [1997]; *Remco Maintenance, LLC v CC Mgt. & Consulting, Inc.*, 85 AD3d 477 [1st Dept 2011]); *Excel Group, Inc. v. New York City Tr. Auth.*, 28 AD3d 708 [2d Dept 2006]).

It is undisputed that the arbitration provision in Cablevision's agreements,

covering "any and all" disputes, is clear, explicit and unequivocal. This wording is "inclusive, categorical, unconditional and unlimited" (*Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 46 [1997], quoting *PaineWebber Inc. v. Bybyk* 81 F.3d 1193, 1199 [2d Cir 1996]). It covers plaintiffs' claims herein, if the opt out letter is ineffective. Plaintiffs do not argue to the contrary.

Matter of Primex Intl Corp v Wal-Mart Stores required arbitration of claims arising under two earlier agreements between the parties where those earlier agreements contained broad arbitration clauses (89 NY2d 594 [1997]). That plaintiff therein had stricken the arbitration clause from the parties' third and then-current agreement did not warrant a different result.

Pursuant to *Primex*, the prevailing rule is that absent a clear manifestation to the contrary, it is presumed that the parties intended an arbitration forum for dispute resolution provided in an antecedent agreement will survive termination of that agreement as to subsequent disputes arising thereunder, even where the arbitration clause had been stricken from the current agreement between the parties.

Applying *Primex* to the facts herein, plaintiffs' opt-out letter in January 2013 cannot retroactively preclude arbitration for prior disputes arising in October and November 2012. In the absence of a clear manifestation to the contrary, of which this record contains none, this Court is required to presume that the parties intended to arbitrate "any and all" disputes arising under the earlier agreements.

At best, the opt-out letter may cover claims arising under the Amended Agreement, but even there the Amended Agreement is limited to customers of iO television service. Furthermore, the timing of the opt out letter, after the commencement of this action, is troubling. However, the Court need not rule on the effectiveness of the opt out letter generally. Suffice it to say that the opt out letter cannot retroactively be applied to plaintiffs' claims herein.

Plaintiffs' reliance upon *Williams v Dillon & Co.,* (243 AD2d 559 [2d Dept 1997]), *Johnson v Chase Manhattan Bank USA,* (2004 WL 413213 [Sup Ct, NYCty, 2004], affd 13 AD3d 322 [1st Dept 2004] and *Clark v Kidder, Peabody & Co., Inc.*, (636 F Supp 195 [SDNY 1986]) is misplaced. While a later broad agreement to arbitrate may be applied retroactively, a later provision rejecting arbitration will not be enforceable as to disputes arising under earlier agreements

that contain an arbitration clause (*Primex*). Further, as it does not concern arbitration, *Tejani v Allied Princess Bay Co.* (204 AD2d 618 [2d Dept 1994]) is inapposite.

Under these circumstances, the documentary evidence submitted on this record establishes that retroactive application of plaintiffs' opt out letter is not available for the claims at issue herein, namely, claims arising on October 29, 2013, and continuing into November 2013. The Court is compelled to find that these claims are subject to arbitration pursuant to the parties' agreements in effect at that time, complete with arbitration clauses. The remainder of the parties' arguments need not be addressed.

Based on the foregoing, defendants' motion must be granted.

This decision constitutes the order of the court.

Dated: April 22, 2013

THOMAS P. PHELAN, J.S.C.

ENTERED

APR 25 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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