

Canellakis v Feminella Tile, LLC

2014 NY Slip Op 33018(U)

September 10, 2014

Sup Ct, Westchester County

Docket Number: 61984/2013

Judge: Francesca E. Connolly

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
MARTIN CANELLAKIS,

Plaintiff,

DECISION and ORDER

Sequence No.1

-against-

Index No. 61984/2013

FEMINELLA TILE, LLC,
HOMEADVISOR, INC.,

Defendants.

-----X
CONNOLLY, J.

The following papers were considered in connection with the defendant Homeadvisor Inc.'s motion to dismiss the complaint insofar as asserted against it:

Notice of motion, affidavit, exhibits, memo of law	1-7
Affirmation in opposition, affidavit	8-9
Reply memo of law, exhibit	10-11

According to the amended complaint, the plaintiff commenced this action to recover damages relating to the performance of a contract to, among other things, perform tile work at her home in Chappaqua, New York. The plaintiff retained the defendant Feminella Tile, LLC (hereinafter Feminella Tile) to perform the subject work through an online referral service operated by the defendant Homeadvisor, Inc. (hereinafter Homeadvisor). The plaintiff contends that the work performed by Feminella Tile was substandard and incomplete. The plaintiff alleges that Homeadvisor is paid a referral fee from contractors retained through its website and that Homeadvisor has a duty to provide contractors with the requisite skill to perform the work requested by the customer. Accordingly, the plaintiff seeks to recover from Homeadvisor under theories of breach of contract, unjust enrichment, breach of implied warranty, negligence, misrepresentation, quasi contract, and quantum meruit.

Homeadvisor now moves to the dismiss the complaint insofar as asserted against it pursuant to CPLR 3211 (a) (1) and (7). Homeadvisor contends that, in making a service request through its

website, the plaintiff agreed to be bound by its terms and conditions.¹ The terms and conditions in place at the time of the plaintiff's service request in July 2011² state, in relevant part:

2. **SERVICEMAGIC SERVICES.** . . . Although we take certain steps to examine the credentials of our listed service professionals, we make no guarantees or representations regarding the skills or representations of such service professional or the quality of the job that he or she may perform for you if you elect to retain their services. . . . No contractual arrangement is created based upon the quotes provided to you from Service Professionals (or your scheduling of an appointment with a Service Professional) via the ServiceMagic website. To contract with a Service Professional, you must work directly with the Service Professional. ServiceMagic does not endorse or recommend the services of any particular service professional. It is entirely up to you to enter into a direct contract or otherwise reach agreement with a service professional, and we do not guarantee or warrant their performance on the job or the outcome or quality of the services performed. The service professionals are not employees or agents of ServiceMagic, nor is ServiceMagic an agent of the service professionals. ServiceMagic does not perform, and is not responsible for, any of the services requested by you in your service request. Your rights under contracts you enter into with service professionals are governed by the terms of such contracts and by applicable federal, state, provincial and local laws. Should you have a dispute with any service professional, you must address such dispute with the service professional directly, **AND YOU HEREBY AGREE TO RELEASE SERVICEMAGIC (AND OUR OFFICERS, DIRECTORS, AFFILIATES, EMPLOYEES AND AGENTS) AND ANY OTHER PERSON, FIRM, OR ENTITY (INCLUDING OUR BUSINESS PARTNERS SUCH AS A PRODUCT MANUFACTURER OR SUPPLIER WHO MAY EMPLOY THE SERVICEMAGIC MATCHING UTILITY) FROM ANY DAMAGES OR CLAIMS (INCLUDING CONSEQUENTIAL AND INCIDENTAL DAMAGES) OF EVERY KIND OR NATURE, SUSPECTED AND UNSUSPECTED, KNOWN AND UNKNOWN, AND DISCLOSED OR UNDISCLOSED, ARISING OUT OF OR IN ANY WAY CONNECTED WITH SUCH DISPUTES AND YOUR DEALINGS WITH SERVICE PROFESSIONALS.**

(Homeadvisor Exhibit 1 ¶ 2 [capitalization in original]). Further, with respect to the pre-screening of any contractor:

8. SERVICE PROFESSIONAL PRESCREENING PROCEDURES AND

¹ At the time the plaintiff made the service request, Homeadvisor was known as Service Magic, Inc.

² Although the plaintiff alleges that the service request was made in December 2011, Homeadvisor contends that its records indicate that the request was made in July 2011. In opposition, the plaintiff assumes that Homeadvisor's records are accurate with respect to the date that the request was made (see Plaintiff's opposition affidavit ¶ 4).

DISCLAIMERS. Unless otherwise noted on the screening tab of a service professional's profile page, ServiceMagic.com uses the following criteria as part of its registration enrollment process ("registration") for new service professionals, with the exception of Corporate Accounts (as described below) and service professionals providing services in Canada (which are not screened) applying for membership in our network:

* * *

Insurance/Bonding -For certain categories of tasks, ServiceMagic confirms general liability insurance coverage, bonding information (maid services) or cargo insurance (movers) presented by member service professionals in their profiles at the time of their registration with ServiceMagic. ServiceMagic confirms such coverage via the service professional's insurance agent. ServiceMagic does not confirm general liability coverage for all categories of service professionals

* * *

DISCLAIMER: SERVICEMAGIC EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES, EXPRESS OR IMPLIED RELATING TO THE PRESCREENING PROCESS, CRITERIA, PROCEDURES, OR INFORMATION OBTAINED OR PRESENTED IN THE PRESCREENING PROCESS OR DISCLOSURES INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR USE, OR THAT THE SCREENING OR VERIFICATION PROCEDURES OR STANDARDS ARE SUFFICIENT OR THAT THE INFORMATION RECEIVED IN THESE SCREENING OR VERIFICATION PROCEDURES IS ACCURATE, TIMELY OR ERROR FREE.

(Homeadvisor Exhibit 1 ¶ 8 [capitalization in original]). Finally, the contract states in relevant part:

12. GENERAL PROVISIONS. You acknowledge and agree that the ServiceMagic services are provided to you on an "AS IS" basis without any warranty whatsoever EXCEPT AS EXPRESSLY SET FORTH HEREIN, SERVICEMAGIC EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTIES OF ANY KIND, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE These Terms and Conditions are governed by the laws of the State of Colorado as such laws are applied to agreements entered into and to be performed entirely in the State of Colorado and between Colorado residents. **You agree to submit to jurisdiction in Colorado and that any claim arising out of or related to these Terms and Conditions will be brought solely in a court in Denver County, Colorado.**

(Homeadvisor Exhibit 1 ¶ 12 [capitalization in original; bold emphasis added]).

Homeadvisor contends, as an initial matter, that the action must be dismissed based upon the

forum selection clause in paragraph 12 of the terms and conditions, in which the plaintiff agreed to submit to bring any claim arising out of or related to the terms and conditions in Denver County, Colorado. Alternatively, Homeadvisor contends that the plaintiff's claims are barred by the terms and conditions, which provide that Homeadvisor has no agency relationship with contractors obtained through its website, that Homeadvisor makes no representations as to the quality of work, that Homeadvisor disclaims any guaranty as to the quality of work or the qualifications of a contractor, and in which the plaintiff explicitly releases Homeadvisor from any such claim.

In opposition, the plaintiff contends that enforcement of the forum selection clause would be unreasonable and unjust, as it would be "seriously inconvenient" for the plaintiff to bring this action in Colorado. Given that the work was performed in Westchester County, the plaintiff contends that it would be easier for Homeadvisor to travel to New York, than for the plaintiff to travel to Colorado. With respect to the merits of the claim, the plaintiff cites to the "Insurance/Bonding" provision of paragraph 8 to the contract, claiming that, since there has been no discovery, there is no way of knowing whether Homeadvisor followed its policies and procedures, or whether Homeadvisor was required to confirm the existence of general liability coverage in this case.

In reply, Homeadvisor contends that the plaintiff has not established that enforcement of the forum selection clause would be unreasonable. Homeadvisor contends that the fact that it would be more expensive for the plaintiff to litigate in Colorado does not warrant disregarding the forum selection clause. With respect to the merits, Homeadvisor contends that the plaintiff has only offered speculation as to Homeadvisor's liability.

DISCUSSION/ANALYSIS

The action is dismissed pursuant to the forum selection clause. "Although once disfavored by the courts, it is now recognized that parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract. Such clauses are prima facie valid and enforceable unless shown by the resisting party to be unreasonable" (*Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]; see *Lifetime Brands, Inc. v Garden Ridge, L.P.*, 105 AD3d 1011, 1012 [2d Dept 2013]). "A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court" (*Lifetime Brands, Inc. v Garden Ridge, L.P.*, 105 AD3d at 1012 [internal quotation marks omitted]).

Here, the plaintiff failed to make the requisite "strong showing" that enforcement of the facially valid forum selection clause would be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court (see *Di Ruocco v Flamingo Beach Hotel & Casino, Inc.*, 163 AD2d 270, 272 [2d Dept 1990] ["Absent a *strong showing* that it should be set aside, a forum selection agreement will

control” (emphasis added)). The plaintiff’s averments that litigating in Colorado would deprive him of his day in court are unsupported and conclusory (see *Horton v Concerns of Police Survivors*, 62 AD3d 836, 836-837 [2d Dep’t 2009] [“[T]he plaintiff failed to make the requisite ‘strong showing’ that the forum selection clause in her employment agreement, which requires disputes to be decided in the courts of the State of Missouri, should be set aside. Although the plaintiff averred that she is a single mother who resides with her teenaged daughter in Dutchess County, New York, this claim was insufficient, standing alone, to demonstrate that enforcement of the forum selection clause would be unjust. The plaintiff offered no evidence that the cost of commencing a wrongful discharge action in Missouri would be so financially prohibitive that, for all practical purposes, she would be deprived of her day in court” (citations omitted)]; see also *Lifetime Brands, Inc. v Garden Ridge, L.P.*, 105 AD3d 1011, 1012 [2d Dep’t 2013] [“The plaintiff did not demonstrate that the forum selection clause was unreasonable, unjust, in contravention of public policy, or invalid due to fraud or overreaching, or that a trial in the selected forum would be gravely difficult”]; *KMK Safety Consulting, LLC v Jeffrey M. Brown Assoc., Inc.*, 72 AD3d 650, 651 [2d Dep’t 2010] [“The plaintiff’s vague and conclusory assertions that the forum selection clause is unconscionable and unreasonable are inadequate to defeat the defendants’ motion”]). Moreover, the plaintiff makes no claim that the forum selection clause was the result of fraud or overreaching (see *Couvertier v Concourse Rehabilitation & Nursing, Inc.*, 117 AD3d 772, 773 [2d Dep’t 2014]), or that she was effectively bound by the clause against his will (see *Lischinskaya v Carnival Corp.*, 56 AD3d 116, 120 [2d Dep’t 2008] [“the plaintiff did not assert before the Supreme Court that she was thereby effectively bound by that clause against her will”]; see also *Molino v Sagamore*, 105 AD3d 922, 923 [2d Dep’t 2013] [“the fact that the Rental Agreement containing the forum selection clause was presented to the plaintiffs at registration and was not the product of negotiation does not render it unenforceable”]).

Accordingly, since Homeadvisor is entitled to dismissal based on the forum selection clause (see CPLR 3211 [a] [1]), the Court need not reach the merits of whether the substantive terms of the contract bar the plaintiff’s causes of action.

Based upon the foregoing, it is hereby,

ORDERED that the branch of the motion of the defendant Homeadvisor Inc. which is to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211 (a) (1) based upon the forum selection clause is granted; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
September 10, 2014


HON. FRANCESCA E. CONNOLLY, J.S.C.