

Rakofsky v Airbnb, Inc.
2020 NY Slip Op 33638(U)
November 3, 2020
Supreme Court, New York County
Docket Number: 101570/2019
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

JOSEPH RAKOFSKY,

Plaintiff,

- v -

AIRBNB, INC., LULU DOE, DOMINIC DOE

Defendant.

-----X

INDEX NO. 101570/2019

MOTION DATE 08/11/2020,
08/11/2020

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 38, 39, 40, 41, 42, 43

were read on this motion to/for COMPEL ARBITRATION.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 44, 45

were read on this motion to/for JUDGMENT - DEFAULT.

Upon the forgoing documents, defendant's motion to compel arbitration and stay the instant action is granted, and plaintiff's motion to vacate a stipulation and for sanctions is denied, for the reasons set forth herein.

On or about October 8, 2019, plaintiff, Joseph Rakofsky, commenced this action against defendants, Airbnb, Inc. ("Airbnb"); Lulu "Doe;" and Dominic "Doe;" seeking to hold defendants responsible for a parade of horrors that ensued when plaintiff was unable to access an accommodation he had booked through Airbnb's platform, which ultimately led to plaintiff spending the night on a park bench where he was assaulted. The complaint apparently alleges the following eight causes of action, to wit, fraud in the inducement; fraud by concealment; violations of New York General Business Law § 350; violations of New York General Business Law § 349; civil assault and battery; negligence; negligent misrepresentation; and breach of contract.

Plaintiff alleges that on or about October 24, 2019, the summons and complaint were served upon defendants via delivery to Bernie B., a security guard at Airbnb's headquarters in San Francisco. On or about January 23, 2020, plaintiff moved for a default judgment against defendants, as they had not appeared or responded to the complaint.

Airbnb's attorney, Isaac B. Zaur, alleges that it was not until June 15, 2020 that he became aware of the instant suit, claiming that defendants never received process. Once Mr. Zaur found out about the instant action, and before Airbnb formally retained him, he reached out to plaintiff to

discuss the pending motion for a default judgment. Plaintiff alleges that on June 16 and 17, 2020, Zaur offered and/or represented that should Airbnb retain him, defendants would agree to “litigate” the instant matter in Court if plaintiff were willing to vacate the default entered against defendants. Subsequently, the parties entered into a stipulation dated June 18, 2020 (“the Stipulation”) whereby plaintiff agreed to withdraw his motion for a default judgment and Airbnb was given thirty days in which to respond to the complaint.

On July 17, 2020, Airbnb moved to compel arbitration pursuant to the Terms of Service (“TOS”) that plaintiff agreed to when he created his Airbnb account and booked his accommodation. Plaintiff opposes the motion and has made a separate motion to vacate the Stipulation on the ground that it was obtained fraudulently based upon Mr. Zaur’s misrepresentation that the parties would litigate the matter in court.

Plaintiff maintains that he only agreed to enter into the Stipulation and withdraw the motion for a default judgment in exchange for the parties “litigating the matter in court,” as opposed to arbitration. As plaintiff asserts that he was induced to enter into the Stipulation by a fraudulent promise to litigate, he argues that the Stipulation should be vacated. This Court disagrees.

“Stipulations are favored by the courts and will be set aside only upon a showing of good cause sufficient to invalidate a contract, such as fraud, collusion, mistake, or accident.” Banana Kelly Union HDFC v Chambers, 51 Misc3d 149(A), *1 (1st Dept App Term 2016). Here, the Stipulation is clear and binding. See CPLR 2104. This Court finds that plaintiff has failed to make a sufficient evidentiary showing that the Stipulation was based upon a fraudulent misrepresentation, as there is no evidence that Mr. Zaur promised not to proceed to arbitration. Furthermore, there is evidence that plaintiff, an attorney representing himself pro se, had negotiated the terms of the Stipulation and even edited the Stipulation prior to its execution; if plaintiff had wished to prohibit Airbnb from arbitrating the claims at issue, then plaintiff should have included language to that end.

Having dealt with the validity and enforceability of the Stipulation, this Court will now focus its attention on the parties’ disagreements about whether this matter must proceed to arbitration.

One of the very first paragraphs of the version of the TOS to which plaintiff consented to prior to booking his accommodation expressly notified plaintiff, in bold typeface, that the TOS contained an arbitration clause. That paragraph states, in pertinent part:

Section 19 of these Terms contains an arbitration clause and class action waiver that applies to all Airbnb members. If your country of residence is the United States, this provision applies to all disputes with Airbnb ... It affects how disputes with Airbnb are resolved. By accepting these Terms, you agreed to be bound by this arbitration clause and class action waiver. Please read it carefully.

(NYSCEF Doc. 12).

Section 19.4 of the TOS states:

***Agreement to Arbitrate.* You and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the applicability, breach, termination, validity, enforcement or interpretation thereof, or to the use of the Airbnb Platform, the Host Services, the Group Payment Services, or the Collective Content (collectively, “Disputes”) will be settled by binding arbitration (the “Arbitration Agreement”). If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue.**

(NYSCEF Doc. 12).

CPLR 7503(a) states:

A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

Airbnb argues that, pursuant to the TOS arbitration clause cited above, the instant action should be stayed pending arbitration.

In opposition to Airbnb’s motion, plaintiff argues that no valid agreement to arbitrate was ever made. Plaintiff contends that the contract is unenforceable, arguing that Airbnb users are forced to consent to the TOS before having an opportunity to read them. For example, if a user wishes to review earlier versions of the TOS, they must first consent to the latest version of Airbnb’s TOS. Plaintiff also argues that the agreement is ambiguous, as the arbitration provision within the TOS does not have a separate signature or initial space; leading plaintiff to conclude that such absence was equivalent to an “unsigned signature block” and therefore was merely a proposal for arbitration. In support of his proposition that no agreement to arbitrate ever existed, plaintiff also argues that the original agreement executed on July 28, 2015 (when plaintiff first became a registered user of Airbnb’s platform and consented to the TOS) terminated thirty days after execution pursuant to section 15.1 of the TOS; and the agreement made in August 2019 (when plaintiff consented to Airbnb’s updated TOS when he booked the subject accommodation) was cancelled in September of that year by virtue of Airbnb refusing to perform its obligations.

To determine whether claims are subject to arbitration, this Court must consider “(1) whether the parties have entered into a valid agreement to arbitrate, and if so, (2) whether the dispute at issue comes within the scope of the arbitration agreement. If these two conditions are met, the

[Federal Arbitration Act] ‘mandates that ... courts shall direct the parties to proceed to arbitration.’” Plazza v Airbnb, Inc., 289 F Supp 3d 537, 547 (SDNY 2018) (citations omitted).

Here, the TOS provides that California law shall apply (see NYSCEF Doc. 12, at section 21.1); thus, California law governs the question of whether the parties entered into a valid agreement to arbitrate. Under California law, “[t]o form a contract, there must be ‘[m]utual manifestation of assent, whether by written or spoken word or by conduct.’” Meyer v Uber Techs., Inc., 868 F 3d 66, 74 (2d Cir. 2017) (citations omitted). “A person can manifest assent to contractual terms even without actual notice of those terms.” Plazza v Airbnb, Inc., at 548 (“Plaintiffs can still be bound by contractual terms if there is inquiry notice of the terms...”) (citations omitted).

Airbnb has demonstrated that plaintiff was on inquiry notice and thus, assented to the terms of the TOS, including the arbitration provision. When plaintiff utilized the Airbnb website to book the accommodation that is the subject of this litigation, he was presented with the updated TOS, either in a scroll-box or via a hyperlink, and he had the option to click a button indicating that he agreed to be bound by the updated TOS. The button, which plaintiff clicked, thereby signaling his assent to the TOS, was accompanied by text indicating that he was accepting the updated TOS. Plaintiff was clearly provided notice and an opportunity to review the terms of the TOS, including section 19, relating to arbitration, prior to clicking a button signaling his acceptance of them. These facts illustrate that plaintiff assented to being bound by the arbitration provision contained in the TOS.

All in all, this case is a classic example of a modified “clickwrap” presentation of a contract wherein a website user is provided notice and an opportunity to review terms of service prior to acceptance via a hyperlink to the terms of service. Cases dealing with these types of contracts have held them to be sufficient to put a plaintiff on notice of the terms of service to which he or she is assenting. See generally Swift v Zynga Game Network, Inc., 805 F Supp 2d 904, 912 (N.D. Cal. 2011) (“Plaintiff’s argument that she was not provided with sufficient notice of the contractual terms she was assenting to because of Zynga’s modified clickwrap presentation, and therefore is not bound by any arbitration provision, fails in light of recent caselaw holding that clickwrap presentations providing a user with access to the terms of service and requiring a user to affirmatively accept the terms, even if the terms are not presented on the same page as the acceptance button, are sufficient.”).

Given that the arbitration clause requires the arbitrator to determine issues of arbitrability, this Court need not inquire whether plaintiff’s claims fall within the scope of the arbitration agreement. Henry Schein, Inc. v Archer & White Sales, Inc., 139 S Ct 524, 529 (2019) (“Applying the [FAA], we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also ‘‘gateway’’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.”) (citations omitted).

The Court has considered plaintiff’s remaining arguments and finds them unavailing and/or non-dispositive.

Conclusion

For the reasons set forth herein, plaintiff's motion is denied and defendant's motion is granted. The instant action is hereby stayed pending arbitration.

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11/3/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE