

**Claussen v Online Diamonds Int'l Corp.**

2021 NY Slip Op 30028(U)

January 5, 2021

Supreme Court, New York County

Docket Number: 653615/2019

Judge: Melissa A. Crane

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA ANNE CRANE PART IAS MOTION 15EFM

Justice

-----X

CLAUSSEN, SAMUEL

Plaintiff,

- v -

ONLINE DIAMONDS INT'L CORP.

Defendant.

-----X

INDEX NO. 653615/2019
MOTION DATE N/A
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

MELISSA CRANE, J.S.C.:

In this dispute over a diamond ring, defendant Joshua Niamehr, moves pursuant to CPLR 3211 to dismiss the complaint in lieu of an answer. Plaintiff, Samuel Claussen, opposes.

BACKGROUND

On April 25, 2019, plaintiff placed an order online through defendants' website for a custom-made ring, totaling \$35,310 (complaint, NY St Cts Elec Filing [NYSCEF] Doc No. 1, ¶¶ 10, 11). On April 30, 2019, plaintiff wired the full amount to defendants (id., ¶ 13). Defendants, by email, corresponded with plaintiff regarding the status of the ring between May and June 2019, stating that the ring would be completed shortly (id., ¶ 14). However, by June 11, 2019, defendants stopped responding to plaintiff's emails regarding his purchase (id., ¶¶ 15, 16). Thereafter, on June 20, 2019, defendant Online Diamonds International Corp. filed for Chapter 7 bankruptcy (affidavit in support of motion, NYSCEF Doc No. 6, ¶ 3). Neither the ring nor the \$35,310 has been returned to plaintiff.

## ARGUMENTS

Self-represented defendant Niamehr moves to dismiss the causes of actions sounding in fraud, breach of contract, constructive trust, and money had and received. He contends that plaintiff's fraud claim must fail because it fails to plead with particularity. Niamehr also requests the dismissal of the remaining causes of actions, less that for an order for an attachment, arguing that plaintiff "has not provided any basis to pierce the corporate veil of Online Diamonds International Corp. d/b/a Enchanted Diamonds" (NYSCEF Doc No. 6, ¶ 11).

Shortly after submitting the initial moving papers, Niamehr submitted an amended affidavit in support, wherein he argues that plaintiff's entire claim must be dismissed due to the arbitration clause outlined in the terms and agreements of Enchanteddiamonds.com (amended affidavit in support of motion, NYSCEF Doc No. 8). It states in part,

"Any and all controversies, disputes, demands, counts, claims, or causes of action (including the interpretation and scope of this clause, and the arbitrability of the controversy, dispute, demand, count, claim, or cause of action) between you and Enchanted Diamonds or Enchanted Diamonds' employees, agents, successors, or assigns, will exclusively be settled through binding and confidential arbitration"

(*id.*, ¶ 6). Thus, Niamehr contends that this court is not the proper venue and all claims must go before an arbitrator.

Plaintiff, in opposition, argues that he has sufficiently pled the fraud because it alleges that Niamehr "made or caused to be made five separate material misrepresentations of fact, each of which was knowingly false when made, with the intent that Claussen would rely on them," and was damaged in the amount of \$35,310 (plaintiff's memorandum of law in opposition to motion to dismiss, NYSCEF Doc No. 12 at 1). Moreover, plaintiff contends that "the facts stated within the four corners of the complaint plainly and sufficiently plead that Niamehr used Enchanted Diamonds to perpetrate a fraud against Claussen, thus satisfying the fundamental

element of a claim to pierce the veil in New York” (*id.* at 4). Plaintiff also submits an affidavit stating that he “did not recall seeing any arbitration agreement at the time [he] purchased the diamond ring [which he] never received, nor [does he] recall checking any box or otherwise agreeing to any terms of service that would prevent [him] from having [his] day in court” (aff of Samuel Claussen in opposition to motion to dismiss, NYSCEF Doc No. 14, ¶ 3).

Niamehr, in reply, now through his counsel, attached an affidavit and screenshots of the terms and services at the time plaintiff purchased the ring and an example of what the “Order Summary” page would have depicted at plaintiff’s time of purchase (Niamehr supplemental aff, NYSCEF Doc No. 17 at 4). Below the “Total Price” calculation is a “Back” and “Place Order” button (*id.*). Directly beneath the buttons, in smaller font, it states “By placing your order, you agree to EnchantedDiamond.com’s privacy policy and terms of service” (*id.*). “Privacy policy” and “terms of service” are in blue font, presumably because they are hyperlinked, whereas the rest of the sentence is in black font (*id.*).

### DISCUSSION

“[W]hether a controversy is properly subject to arbitration is initially one for the courts to determine” (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]). “A party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties’ clear, explicit and unequivocal agreement to arbitrate” (*God’s Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006] [internal quotation marks and citation omitted]). “The proponent of arbitration bears the burden of demonstrating that the parties agreed to arbitrate” (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C.*, 44 AD3d at 583). The party seeking to avoid arbitration, conversely bears the burden of showing that the agreement is inapplicable or invalid (*Applebaum*

*v Lyft, Inc.*, 263 F Supp 3d 454, 464 [SD NY 2017], quoting *Harrington v Atl. Sounding Co.*, 602 F 3d 113, 124 [2d Cir 2010]). “If a party refuses to arbitrate, arbitrability of the dispute hinges only on whether there is an agreement to arbitrate and, if so, whether the dispute falls within that agreement” (*Applebaum*, 263 F Supp 3d at 464, quoting *U.S. Fire Ins. Co. v. Nat’l Gypsum Co.*, 101 F 3d 813, 816 [2d Cir 1996]).

Plaintiff does not contest that his claims would come within the ambit of the arbitration clause. What he disputes is that he ever agreed to arbitrate in the first place.

Even with the advent of online contracts, the court relies upon the basic principles of contract interpretation to determine the threshold matter of whether the parties here agreed to arbitrate (*Katz v Feinberg*, 167 F Supp 2d 556, 566 [SD NY 2001], *affd* 290 F3d 95 [2d Cir 2002]; *see also Register.com, Inc. v Verio, Inc.*, 356 F 3d 393, 403 [2d Cir 2004]). “[I]n the context of agreements made over the internet, New York courts find that binding contracts are made when the user takes some action demonstrating that they have at least constructive knowledge of the terms of the agreement, from which knowledge a court can infer acceptance” (*Hines v Overstock.com, Inc.*, 380 Fed Appx 22, 25 [2d Cir 2010]). The Court in *Berkson v Gogo LLC* (97 F Supp 3d 359, 394–403 [ED NY 2015]), outlined the four general types of online consumer contracts, identified as: (a) browsewrap; (b) clickwrap; (c) scrollwrap; and (d) sign-in-wrap.

“Browsewrap exists where the online host dictates that assent is given merely by using the site. Clickwrap refers to the assent process by which a user must click “I agree,” but not necessarily view the contract to which she is assenting. Scrollwrap requires users to physically scroll through an internet agreement and click on a separate “I agree” button in order to assent to the terms and conditions of the host website. Sign-in-wrap couples assent to the terms of a website with signing up for use of the site's services” (*id.* at 394–395; *see Applebaum*, 263 F Supp 3d at 465).

For an arbitration agreement to be enforceable, assent to arbitration need not be express; but “there must be evidence that the offeree knew or should have known of the terms and understood that acceptance of the benefit would be construed by the offeror as an agreement to be bound” (*Meyer v Uber Techs., Inc.*, 868 F 3d 66, 79 [2d Cir 2017] [internal citations omitted]). The court in *Berkson* (97 F Supp 3d at 384), listed four indicia of assent to web-based agreements: (1) the user was provided with adequate notice of the existence of terms; (2) the user had a meaningful opportunity to review terms; (3) the user had adequate notice that taking a specified action manifests assent to terms; and (4) the user takes the action specified in the latter notice. The case of *Nicosia v Amazon.com, Inc.* (384 F Supp 3d 254, 266 [ED NY 2019], *affd* 815 Fed Appx 612 [2d Cir 2020]), is instructive in determining the type of agreement presented to plaintiff in this matter. The Court in *Nicosia* labeled the type of online consumer contract that we see here as a “hybridwrap,” defining it as a website that “prompts the user to manifest their assent to particular terms by engaging in some dual-purpose action,” such as executing a purchase order. The Court explained, that to be enforceable,

“the focal point of [a hybridwrap] inquiry is whether ‘a reasonably prudent offeree would know that the [terms and conditions] governed,’ such that their performance of the action (such as creating the account or executing the purchase) ‘manifested implied assent to the additional terms.’ . . . Courts will give effect to hybridwrap terms where the button required to perform the action manifesting assent (e.g., signing up for an account or executing a purchase) is located directly next to a hyperlink to the terms and a notice informing the user that, by clicking the button, the user is agreeing to those terms. . . . The more the hybridwrap design diverges from the basic layout- such as by placing the notice further away from the action button, cluttering the screen with potentially distracting content, or omitting the language explicitly saying that by performing the action the user agrees to be bound by the terms- the less likely courts are to find that inquiry notice has been provided”

(*id.* [citations omitted]).

For example, in *Bernardino v Barnes & Noble Booksellers, Inc.* (2017 WL 7309893, at

\*9 [SD NY Nov. 20, 2017, No. 17-CV-04570 (LAK/KHP)], *report and recommendation*

*adopted as modified*, 2018 WL 671258 [SD NY Jan. 31, 2018, No. 17-CV-4570 (LAK)]), the court upheld the arbitration clause in Barnes & Noble Booksellers, Inc.’s terms of use, by considering the following: (1) the “Submit Order” page was uncluttered; (2) the text alerting the user to the existence of the terms of use appeared directly below the “Submit Order” button; (3) the hyperlink to the terms of use also was easily located under the registration button without scrolling; (4) the language alerting the user to the terms of use was clear and obvious with black font against a white background and the blue font indicated a hyperlink to the terms; (5) the language of the text was clear, stating “[b]y making this purchase you are agreeing to our Terms of Use and Privacy Policy;” and (6) notice of one’s assent to the terms of use was connected to an action by the user- the submission of a purchase order. Having examined a screenshot of *Berkson’s* Barnes & Noble Booksellers, Inc.’s “Submit Order” page, in comparison to the “Order Summary” page here, there is virtually no difference. That plaintiff swears he does not recall seeing any arbitration agreement, checking any box or otherwise agreeing to any terms of service that would bind him to compulsory arbitration is of no consequence (*Starke v. SquareTrade, Inc.*, 913 F 3d 279, 289 [2d Cir 2019] [when there is no evidence that the user had actual knowledge of the agreement, the validity of the agreement turns on whether a reasonably prudent user was put on inquiry notice of the terms of the contract]). As explained in *Starke v Gilte Groupe, Inc.* (2014 WL 1652225, \*2 [SD NY Apr. 24, 2014, No. 13 CIV 5497 (LLS)]), “[r]egardless of whether he actually read the contract’s terms, [the plaintiff] was directed exactly where to click in order to review those terms, and his decision to click the “Shop Now” button represents his assent to them.”

Accordingly, the arbitration provision meets the key aspects of being reasonably conspicuous by virtue of the format and design of the “Order Summary” page and plaintiff was

on inquiry notice as to the terms of service, including the arbitration clause. Thus, plaintiff's claims against Niamehr must go before an arbitrator.

CONCLUSION

Based upon the foregoing, it is

ORDERED that the action is severed and continued as against defendant Joshua Niamehr in light of the chapter 7 bankruptcy stay against defendant Online Diamonds International Corp. d/b/a Enchanted Diamonds; and it is further

ORDERED that plaintiff Samuel Claussen, shall arbitrate his claims against defendant Joshua Niamehr in accordance with the terms and services on www.enchanteddiamonds.com; and it is further;

ORDERED that all proceedings in the action against Joshua Niamehr are hereby stayed, expect for an application to vacate or modify the stay; and it is further

ORDERED that either plaintiff or defendant Joshua Niamehr may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration; and it is further

ORDERED that the clerk is directed to stay this action.

Melissa Anne Crane signature

20210105 130133 MACRANE99CB7EA4BD9A40ACB75CB440835AFCC0

1/5/2021 DATE

MELISSA ANNE CRANE, J.S.C.

Form with checkboxes for case disposition: CASE DISPOSED, GRANTED, DENIED, NON-FINAL DISPOSITION, GRANTED IN PART, SUBMIT ORDER, FIDUCIARY APPOINTMENT, OTHER, REFERENCE.