

Zambrano v Acevedo
2021 NY Slip Op 32133(U)
November 5, 2021
Supreme Court, New York County
Docket Number: Index No. 154875/2021
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH **PART** **14**

Justice

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R. MARIANA ZAMBRANO,

Plaintiff,

- v -

JOHN A. ACEVEDO, UBER TECHNOLOGIES,
INC., RAISER, LLC, RAISER-NY, LLC

Defendants.

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INDEX NO. 154875/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36

were read on this motion to/for COMPEL ARBITRATION.

Plaintiff's motion to *inter alia* vacate defendants' notice of intent to arbitrate and to permanently stay any arbitration claims is granted in part and denied in part. The cross-motion by defendants Uber Technologies, Inc. Uber USA, LLC and Raiser-NY LLC (collectively, "Uber") to *inter alia* stay this case and compel plaintiff to arbitrate her claims is denied.

Background

This motor vehicle case involves injuries plaintiff claims she suffered while she was a passenger in a car driven by defendant Acevedo. Plaintiff maintains she got a ride with Acevedo through the Uber ride-share app. She argues that she was hurt when Acevedo suddenly drove off the highway in Walden, New York. Plaintiff insists Acevedo was later charged with operating a vehicle under the influence of alcohol and an investigation revealed he was not licensed to drive a car on the date of the accident.

The central question on this motion is whether plaintiff's claims against Uber must be handled in arbitration. Plaintiff claims that the user agreement does not require arbitration on its face and, even if it did, it should not be enforced because it compels plaintiff to give up certain rights, such as the right to punitive damages, without proper consideration. She also claims the notice of intent to arbitrate was not served properly and demands sanctions against Uber.

In opposition and in support of its cross-motion to compel arbitration, Uber argues that public policy favors arbitration and the agreement here clearly contains a provision requiring all disputes, including accident cases, to be handled in arbitration. Uber insists there is a valid arbitration provision governed by the Federal Arbitration Act and that plaintiff agreed to Uber's terms when she used the app. It insists that plaintiff was prompted to read the terms in full via an in-app pop up screen and that plaintiff checked the box indicating that she agreed to the terms.

Discussion

"It is of course for the court in the first instance to determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement" (*Sisters of St. John the Baptist, Providence Rest Convent v Phillips R. Geraghty Constructor, Inc.*, 67 NY2d 997, 998, 502 NYS2d 997 [1986]).

As an initial matter, the Court rejects plaintiff's argument that the agreement at issue does not apply to an individual seeking to sue Uber relating to an accident that occurred in car procured from the app. Plaintiff seems to suggest that the arbitration provision only applies to class actions. But that argument relies on a selective reading of the agreement. In fact, the agreement states that "you agree that you are required to resolve any claim that you may have against Uber on an individual basis in arbitration as set forth in this Arbitration Agreement" (NYSCEF Doc. No. 23, exh A, ¶2). Paragraph 2(a) specifically states that binding arbitration

will cover “incidents or accidents resulting in personal injury that you allege occurred in connection with your use of the Services” (*id.* ¶ 2[a][iii]).

However, the Court’s inquiry does not end there. There must be the “requisite clear and unambiguous expression that the parties intended to mandate arbitration of their dispute” (*Muriel Siebert & Co., Inc. v Intuit, Inc.*, 11 AD3d 415, 415, 783 NYS2d 566 [1st Dept 2004]). The context here is important. This is not a situation where two sophisticated parties enter into an agreement with the aid of legal counsel and manifest a clear intention to handle disputes in arbitration, each fully understanding that they waive their right to a jury trial and to appeal. Rather, it is a situation where someone, usually a consumer with a credit card and smart phone, simply wants a ride and is prompted to agree to all sorts of terms drafted by Uber.

Therefore, the Court must evaluate whether plaintiff actually intended to waive certain rights and to handle disputes via arbitration. The Second Circuit has held that when considering the effectiveness of online agreements, “Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility” (*Specht v Netscape Communications Corp.*, 306 F3d 17, 35 [2d Cir 2002]).

The Court also observes that the Supreme Judicial Court of Massachusetts, when considering Uber’s terms and the process for agreeing to these terms, found “that there was not reasonable notice of the terms, [and] a contract cannot have been formed here” (*Kauders v Uber Tech., Inc.*, 486 Mass 557, 579, 159 NE3d 1033, 1054 [2021] [concluding that the plaintiffs were not compelled to arbitrate under Uber’s terms of use]). Key to the Massachusetts’ court decision was a focus on the type of transaction at issue—the Court noted that “Users are registering through an app that will connect drivers and riders for future short-term, small-money

transactions” (*id.* at 575). “Reasonable users may not understand that, by simply signing up for future ride services over the Internet, they have entered into a contractual relationship. It is qualitatively different from a large business deal where sophisticated parties hire legal counsel to review the fine print. It is also not comparable to the purchase or lease of an apartment or a car, where the size of the personal transaction provides some notice of the contractual nature of the transaction even to unsophisticated contracting parties” (*id.*).

The Massachusetts Court also stressed that “As Uber is undoubtedly aware, most of those registering via mobile applications do not read the terms of use or terms of service included with the applications” (*id.* at 577). The plaintiff here asserts she had no expectation that she was giving up her right to a trial by jury simply by using the Uber app (NYSCEF Doc. No. 33).

The Court finds the *Kauders* case to be persuasive and grants plaintiff’s motion in part (and denies Uber’s cross-motion). The evidence submitted by Uber in opposition (NYSCEF Doc. No. 23, exhs A-C) shows that Uber users have to confirm that they agree to the terms of use by checking a box. There is a hyperlink to the terms of use and another link to the privacy notice as well as a message encouraging a user to read the updated terms (*id.*). However, the terms of use are not listed on this same screen (a user has to click the hyperlink) nor is there any indication on that screen that the user is waiving all manner of rights by checking the box. A user is not explicitly told, for instance, that he or she is waiving the right to take Uber to court in nearly every situation. It is equivalent to checking a box on the cover page of an agreement instead of initialing every page and signing the last page.

Simply put, the practical realities of using this ride-share app do not support Uber’s argument that there was a clear and unequivocal intention by plaintiff to be bound by the arbitration provision in the terms of use. In order to ascertain what rights she was giving up,

plaintiff had to click on the hyperlink and read a twelve-page single spaced agreement that granted Uber all sorts of rights. The terms of use are not just an arbitration agreement; they contain rules about using the app, making payments and even reference community guidelines about rider conduct.

This agreement does not contain any language, expressed in understandable terms, that emphasize that plaintiff was giving up significant legal rights. For example, the agreement does not state what a user is giving up in concise, stand-alone language (although many entire paragraphs are in all caps). The Court finds that this process (clicking on the hyperlink and having to read a long terms of use) does not constitute conspicuous notice of the terms of use to justify compelling arbitration of this dispute.

While the arbitration provision is undoubtedly included in the terms of use, a simple review of this document does not readily reveal what a user is accepting. To properly and fully appreciate what Uber is now urging this Court to conclude, plaintiff would have likely needed to consult an attorney. There is no reason, under the totality of the circumstances at issue here, why a user would think about every potential legal dispute that might arise when seeking a relatively inexpensive ride. Moreover, this is not a situation where the arbitration provision is limited in its scope. It did not, for instance, compel arbitration for certain fee disputes or other discreet disagreements. Instead, it mandated arbitration in nearly every situation (with a few exceptions) between a user and Uber. This Court is unable to find that plaintiff reasonably contemplated she was waiving so many rights – including the right to a trial by jury, even if Uber purportedly sends an unlicensed driver under the influence of alcohol to pick plaintiff up - in exchange for simply using the app.

To require every user of an app that provides relatively inexpensive services to devour and contemplate the potential legal disputes that might arise runs contrary to the reality of living in our modern technological era. Under Uber's view, anyone using an app must carefully consider every provision of the terms of use. That would result in every user spending hours and hours each time he or she considered using any app, regardless of how small the transaction. Any cost-benefit analysis would simply never justify that time investment in order to use an app. Put another way, why would someone spend hours thinking about the terms of use when seeking a \$20 Uber ride? That is simply not the way society works today.

And, of course, the consequences of finding that plaintiff is bound by the terms of use are not trivial. Uber is arguing that plaintiff gave up her right to a trial by jury, a constitutionally protected right, as well as certain types of potential damages (assuming plaintiff is successful). Especially when directed specifically at a consumer (no one actually thinks the consumer is going to consult an attorney), such a waiver must be unambiguous and not based on a dense contract drafted entirely by Uber for the exclusive purpose of protecting Uber. Plaintiff gets little from these terms of use except the right to use the app to pay for a future ride with a credit card.

The Court, however, finds that there is no basis for sanctions as requested by plaintiff. As stated above, there is an arbitration clause in Uber's terms of use that does, on its face, apply to the instant situation. Uber's arguments were not frivolous or wholly devoid of merit. The Court also finds that Uber properly served notice of its intent to arbitrate on plaintiff (NYSCEF Doc. No. 25).

Now that this Court has determined that the arbitration clause does not apply to these claimed facts (Uber allegedly sending a drunk unlicensed drivers to transport plaintiff), this

Court will transfer this case back to the Motor Vehicle Part (where the case was initially placed) as it is, in fact, a case involving a motor vehicle accident with alleged injuries.

Accordingly, it is hereby

ORDERED that the motion by plaintiff is granted only to the extent that the branch of the motion that seeks to vacate the notice of intent to arbitrate and that any arbitration initiated by Uber is permanently stayed and the motion is denied to the extent it sought sanctions; and it is further

ORDERED that the cross-motion by defendants Uber Technologies, Inc. Uber USA, LLC and Raiser-NY LLC to *inter alia* stay this case and compel plaintiff arbitrate her claims is denied; and it is further

ORDERED that this matter is remitted to the General Clerk’s Office for reassignment to I.A.S. part 22, the motor vehicle part in this county.

11/5/2021
DATE


ARLENE BLUTH, J.S.C.

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