

Kaufman v RELX Inc.
2022 NY Slip Op 30025(U)
January 6, 2022
Supreme Court, New York County
Docket Number: Index No. 153256/2021
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN **PART** **58**

Justice

-----X

INDEX NO. 153256/2021

HERMAN KAUFMAN,

Plaintiff,

MOTION SEQ. NO. 003 and 004

- v -

RELX INC., RELX PLC, AUSTIN DUNN, MICHAEL DIXON,
and CHAD WIDENER,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 51, 52, 53, 58, 59, 60, 62, 65, 66, 68

were read on this motion to/for COMPEL ARBITRATION.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 44, 45, 46, 47, 48, 49, 50, 54, 55, 56, 57, 61, 63, 64, 67, 70

were read on this motion to/for COMPEL ARBITRATION.

Motion sequence numbers 003 and 004 are consolidated for disposition.

Defendants Austin Dunn, Michael Dixon, and Chad Widener move to compel arbitration and to stay the instant proceedings or, alternatively, to dismiss the amended complaint (motion sequence number 003). Defendants RELX Inc. and RELX PLC (collectively RELX) move for the same relief (motion sequence number 004).

Plaintiff attorney Herman Kaufman, appearing pro se, is a client of LexisNexis, a division of RELX. The individual defendants work for LexisNexis. Plaintiff's amended complaint alleges that he subscribed to LexisNexis's services pursuant to a contract made in March 2019 (the March 2019 Agreement), that defendants made false statements to induce him to replace the agreement with a new agreement in April 2020 (the April 2020 Agreement), and that defendants

then proceeded to bill him under both contracts.¹ Plaintiff is 79 years old and suffers from Parkinson's disease. He alleges abusive collection activities and harassment which caused extreme emotional distress which led to the worsening of his Parkinson's symptoms.

The complaint alleges that plaintiff has a law office in Brooklyn, that RELX Inc. is a Massachusetts company, that RELX PLC is a UK company with its principal executive office in Manhattan, and that the individual defendants reside in Ohio.

The complaint further alleges as follows. Kaufman is a sole proprietor. Due to the covid outbreak, around March 16, 2020, the New York State courts were closed for all nonessential functions. Effective March 22, 2020, New York State enacted "Matilda's Law," which required individuals 70 or older to stay home and limit visitation to immediate family members. Kaufman, a LexisNexis customer pursuant to the March 2019 Agreement, was affected by the shutdown. In April 2020, defendant Dunn reached Kaufman by telephone and told him about the "Coronavirus Small Firm Economic Impact Relief Program" offered by LexisNexis. Dunn told plaintiff he was contacting him because he has a solo practice, that Dunn could reduce the costs of his legal research, and that LexisNexis was reaching out to help those attorneys who might be financially impacted by the shutdown. Dunn called Kaufman several times thereafter pressuring him to take the proffered deal. Dunn sent Kaufman the 2020 Agreement three times on a program called DocuSign and called Kaufman urging him to sign it. Kaufman is not technically savvy and often receives assistance in using electronic documents. Dunn showed Kaufman how to sign the agreement online but not how to read it. Dunn directed him where to sign and initial. Dunn subsequently called plaintiff back and made sure that the latter had properly initialed the

¹ The March 2019 and April 2020 Agreements will be referred to collectively as "the Agreements."

April 2020 Agreement. Dunn set up a new username for Kaufman and helped him set up a password.

The complaint asserts causes of action for fraudulent inducement, negligence, willful misconduct, intentional infliction of emotion distress, and violation of New York's General Business Law § 349, and seeks declaratory relief in the form of an order declaring that plaintiff's claims are not subject to arbitration.

The relevant provisions of the Agreements are as follows. Initially, the Agreements provided that they would "be governed by and construed in accordance with the laws of the State of Ohio regardless of the law that might otherwise apply under applicable principles of conflicts of law" (Agreements, ¶ 6.1).

Additionally, the Agreements provided that "[e]xcept as provided in Section 5.4 below, any controversy, claim or counterclaim, arising out of or in connection with this Agreement will be resolved by binding arbitration under this Section 5 and the then-current American Arbitration Association ('AAA') Commercial Rules . . . The arbitration will be held in the United States headquarters city of the party not initiating the claim, however Subscriber may choose to participate in person, by telephone or document submission" (Agreements, ¶ 5.1). Article 5.4 provides that claims and controversies involving non-payment, among others, are not subject to arbitration, and that the parties agree to exclusive jurisdiction in federal or state courts in Montgomery County, Ohio.

The March 2019 Agreement provides this monthly payment schedule for Lexis Advance services: from 4/3/19 to 5/31/19 - \$0.00; 6/1/19 to 11/30/19 - \$50.00; 12/1/19 to 11/30/20 - \$250.00; 12/1/20 to 11/30/21 - \$257.50. The April 2020 Agreement charges less for Lexis

Advance: from 5/3/20 to 6/30/20 - \$0.00; 7/1/20 to 6/30/21 - \$29.00; 7/1/21 to 6/30/22 - \$178.00.

The April 2020 Agreement includes a section entitled Fixed Price Agreement for CourtLink Services, with these monthly charges: from 5/3/20 to 6/30/20 - \$0.00; 7/1/20 to 6/30/21 - \$21.00; 7/1/21 to 6/30/22 - \$127.00. This is not included in the March 2019 Agreement, which contains no mention of CourtLink.

This Court will apply Ohio law in order to construe the agreements. New York courts must enforce prima facie valid contractual provisions for choice of law and choice of forum (*Boss v American Express Fin. Advisors, Inc.*, 15 AD3d 306, 307 [1st Dept 2005], *affd* 6 NY3d 242 [2006]). To invalidate the clause, plaintiff must show that enforcement would be unreasonably unjust, in violation of public policy, or implicate fraud or overreaching (*id.*, 307-308; *Micro Balanced Prods. Corp. v Hlavin Indus.*, 238 AD2d 284, 285 [1st Dept 1997]). Plaintiff does not demonstrate any reason why the choice of law provisions should not be enforced.

Defendants move to stay this proceeding pending arbitration. Under Ohio's Arbitration Act, Revised Code § 2711.02 (A), a trial court, “upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial” until the arbitration has been held (*see Hyde v Sherwin-Williams Co.*, 2011-Ohio-4234, ¶ 17 [Ct App, 8th Dist, Cuyahoga County]). As a matter of public policy, Ohio law favors arbitration as a method of settling disputes, provided that the parties have made a valid agreement to arbitrate (*Owens Flooring Co. v Hummel Construction Co.*, 140 Ohio App 3d 825, 829, 749 NE2d 782, 785 [11th Dist, Portage County 2001]; *Teramar*

Corp. v Rodier Corp., 40 Ohio App 3d 39, 40, 531 NE2d 721, 723 [8th Dist, Cuyahoga County 1987]).

If the arbitration clause is valid, this Court must compel arbitration. Only if the arbitration clause itself is found to be invalid can this Court consider issues concerning the validity of the entire contract.

In determining whether an agreement contains an arbitration clause that is valid and that covers the parties' dispute, the first question is whether the arbitration clause in the contract is broad or narrow (*Jones v Carrols, LLC*, 2019-Ohio-211, ¶ 11, 119 NE3d 453, 460 [Ct App, 9th Dist, Summit County]). A clause that applies to "any controversy, claim or counterclaim, arising out of or in connection with this Agreement," as the arbitration clauses in this case provide, is a broad arbitration clause (*id.*; and see *Avery v Academy Invs., L.L.C.*, 2019-Ohio-3509, ¶ 10 [Ct App, 8th Dist, Cuyahoga County 2019]; *Alexander v Wells Fargo Fin. Ohio 1, Inc.*, 122 Ohio St 3d 341, 343, 911 NE2d 286, 288 [2009]). Where a contract contains a broadly worded arbitration clause, a claim that the arbitration clause itself is invalid on the ground of fraud in the inducement is decided by the court, while a claim that the entire contract is invalid must be submitted to arbitration (*Weiss v Voice/Fax Corp.*, 94 Ohio App 3d 309, 312, 640 NE2d 875, 877 [Ct of App 1st Dist Hamilton County 1994]; and see *Sebold v Latina Design Build Group, L.L.C.*, 2021-Ohio-124, ¶ 39, 166 NE3d 688, 696 [Ct App, 8th Dist, Cuyahoga County]; *Coble v Toyota Of Bedford*, 2004-Ohio-238, ¶ 9 [Ct App, 8th Dist, Cuyahoga County]).

In his memorandum of law, plaintiff argues that the arbitration clause is unenforceable as the clause itself was fraudulently induced and is procedurally and substantively unconscionable. However, plaintiff alleges in the complaint that the entire contract was fraudulently induced and does not make any specific allegations regarding the arbitration provision. Nonetheless, this

Court will examine plaintiff's claim about the arbitration clause, pursuant to the policy that, when determining a motion to dismiss, the court is to accord the complaint a liberal construction in a light that is most favorable to the plaintiff (*Slife v Kundtz Properties, Inc.*, 40 Ohio App 2d 179, 182, 318 NE2d 557, 560 [Ct App 1974]).

"A claim that the contract containing the arbitration clause was induced by fraud does not defeat a motion to compel arbitration unless the claimant can demonstrate specifically that the arbitration clause itself was fraudulently induced" (*Coble*, 2004-Ohio-238, ¶ 8 [citation and internal quotation marks omitted]; *ABM Farms, Inc. v Woods*, 81 Ohio St 3d 498, 502, 692 NE2d 574, 577 [1988]). One claiming that an arbitration clause is unconscionable must establish both procedural and substantive unconscionability (*Sebold*, 2021-Ohio-124, ¶ 13, 166 NE3d at 694).

The notion of unconscionability includes "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Taylor Bldg. Corp. of Am. v Benfield*, 117 Ohio St 3d 352, 358, 884 NE2d 12, 20 [2008] [internal quotation marks and citation omitted]; *Featherstone v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 Ohio App 3d 27, 33, 822 NE2d 841, 846 [9th Dist, Wayne County]). Substantive unconscionability exists when the terms of the contract are unfair and commercially unreasonable (*Olah v Ganley Chevrolet, Inc.*, 2006-Ohio-694, ¶ 14 [Ct App, 8th Dist, Cuyahoga County]). Procedural unconscionability exists when the contracting parties had no voluntary meeting of the minds when they made the contract (*id.*).

In determining whether a contractual clause is substantively unconscionable, courts consider the fairness of the terms, the charge for services, the industry standard, and the weaker party's ability to accurately predict future liability under the clause (*id.* at ¶ 15). As for procedural unconscionability, courts examine the factors affecting the parties' bargaining

positions, their age, education, business acumen, relative bargaining power, and whether the agreed upon terms were explained to the weaker party (*id.* at ¶ 16). Determination of unconscionability is an issue of law for the court (*Taylor*, 117 Ohio St 3d at 359).

Plaintiff has made no allegations tending to support the possibility of unconscionability in regard to the arbitration clause. As a practicing attorney, plaintiff must have at least some familiarity with contracts. Although he is a senior citizen, there is nothing in the motion papers suggesting that he has any difficulty with his cognitive ability. The fact that he had trouble finding the agreement online and figuring out how to sign it does not mean that he lacked the opportunity to read and/or the ability to understand it. A person's failure to read what he is signing does not make a contract unenforceable (*Columbia Gas Transmission Corp. v Ogle*, 51 F Supp 2d 866, 873 [SD Ohio 1997], *aff'd* 172 F3d 47 [6th Cir 1998]). Nothing indicates that the arbitration clause in the April 2020 Agreement, which is also in the March 2019 Agreement, was hidden from plaintiff. Nor does he allege that the terms of the arbitration provision unreasonably favored LexisNexis.

A claim of fraud in the inducement arises when a party is induced to enter into an agreement through fraud or misrepresentation. For fraudulent inducement to preclude arbitration, the party must demonstrate that the arbitration provision itself was fraudulently induced (*Smith v Nationwide Mut. Ins. Co.*, 2018-Ohio-3758, ¶ 30, 120 NE3d 72, 81 [Ct App, 10th Dist, Franklin County]). Plaintiff alleges that defendants told him that LexisNexis was helping attorneys affected by the pandemic by lowering the monthly payments on their legal research subscriptions. However, plaintiff claims that LexisNexis had no intention of offering him a discount and instead intended to have him sign up for a new subscription while

simultaneously enforcing the existing one. These allegations do not support a claim that plaintiff was fraudulently induced to agree specifically to the arbitration clause.

Since the arbitration clause in this case is enforceable, whether the entire contract was fraudulently induced is for the arbitrator to consider (*see Weiss*, 94 Ohio App 3d at 312, 640 NE2d at 877), provided that the parties' particular controversy is arbitrable (*Divine Constr. Co. v Ohio-American Water Co.*, 75 Ohio App 3d 311, 316, 599 NE2d 388, 391 [Ct App, 10th Dist, Franklin County 1991]).

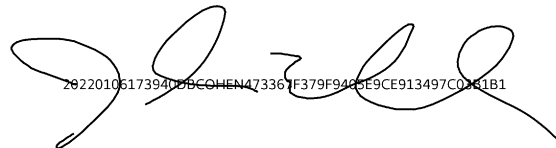
Under the Agreements, disputes about non-payment are not arbitrable. Defendants contend that plaintiff's claims do not involve non-payment. Rather, they assert that the claims arise from the formation of the contracts, alleged breaches of those contracts, and enforcement of the contracts, and thus fall within the scope of the arbitration provisions. Plaintiff argues that the dispute is about non-payment, since there would be no dispute if defendants had not overcharged him and harassed him for payment.

Under Ohio law, where a contract provides that the arbitration will be conducted under AAA rules, it means that the parties have delegated the question of arbitrability to the arbitrator (*TN3 LLC v Jones*, 2019-Ohio-2503, ¶ 27, 139 NE3d 473, 479-480 [Ct App, 11th Dist, Geauga County], citing *Henry Schein, Inc. v Archer & White Sales, Inc.*, ___ US ___, 139 S Ct 524, 528 [2019]; *von Arras v Columbus Radiology Corp.*, 2005-Ohio-2562, ¶ 15 [Ct App, 10th Dist, Franklin County]). New York follows the same law (*Matter of Flintlock Constr. Servs., LLC v Weiss*, 122 AD3d 51, 54 [1st Dept 2014]; *Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 496 [1st Dept 2009]). Hence, the arbitrator must decide whether the claims are arbitrable.

Some of the claims may not be arbitrable. When an action involves both arbitrable and non-arbitrable claims, the entire proceeding must be stayed until the issues that are subject to arbitration are resolved (*Mascher v Basement Care, Inc.*, 2020-Ohio-3582, ¶ 32 [Ct App, 7th Dist, Columbiana County]; *Stoner v Salon Lofts L.L.C.*, 2014-Ohio-796, ¶ 33 [Ct App, 10th Dist, Franklin County]; see *County Glass & Metal Installers, Inc. v Pavarini McGovern, LLC*, 65 AD3d 940, 940 [1st Dept 2009]).

Accordingly, it is hereby:

ORDERED that the motion of defendants Austin Dunn, Michael Dixon, and Chad Widener (motion sequence number 003) and the motion of defendants RELX Inc. and RELX PLC (motion sequence number 004) to compel arbitration and to stay the instant proceedings are granted, and the parties are hereby directed to proceed to arbitration and to serve a copy of this decision and order upon the arbitral tribunal.



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1/6/2022
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: