

Williams v Wenzhao Liu
2022 NY Slip Op 30431(U)
February 4, 2022
Supreme Court, Kings County
Docket Number: Index No. 519236/2021
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 519236/2021
Motion Date: 12-6-21
Mot. Seq. No.: 1, 2

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WAKEMA WILLIAMS,

Plaintiff,

-against-

DECISION/ORDER

WENZHAO LIU and UBER TECHNOLOGIES, INC.,

Defendants.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 11-18, 22-39, 44-47, the motions are decided as follows:

In this action to recover damages for personal injuries arising out of a motor vehicle accident, the plaintiff, WAKEMA WILLIAMS, moves for an Order permanently staying the arbitration demanded by defendant UBER TECHNOLOGIES, INC. ("Uber") (**Mot. Seq.# 1**). Defendant Uber moves by Order to Show Cause for an order (1) compelling and directing the plaintiff to arbitrate her claims alleged in the action against Uber pursuant to CPLR 7503, (2) dismissing the plaintiff's complaint and any cross-claims asserted against Uber on the basis of the arbitration defense, or alternatively, staying the action and any cross-claims asserted against Uber until after the arbitration between the plaintiff and Uber at the American Arbitration Association is complete (**Mot. Seq.# 2**). The two motions are consolidated for disposition.

Plaintiff, Wakema Williams, commenced this action seeking to recover damages for personal injuries she suffered as a result of a motor vehicle accident that occurred on November 22, 2020, at the intersection of the Van Wyck Expressway (I-678) and N. Conduit Avenue, Queens, New York. Plaintiff was the passenger in a livery vehicle operated by defendant WENZHAO LIU ("Liu") when the Liu vehicle collided with another vehicle. Mr. Liu, a livery driver, acquired the plaintiff as a passenger when the plaintiff asked for a ride through the Uber Rider App operated by Uber. Plaintiff named both Mr. Liu and Uber as defendants.

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Following receipt of the summons and complaint, Uber served plaintiff with a demand to arbitrate her claims. Uber maintains that on April 17, 2021, the plaintiff, an Uber account holder, agreed online to Uber's April 14, 2021 Terms of Use, which included the following arbitration provision:

By agreeing to the Terms, 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. This will preclude you from bringing any class, collective, or representative action against Uber, and also preclude you from participating in or recovering relief under any current or future class, collective, consolidated, or representative action brought against Uber by someone else. For the avoidance of doubt, this precludes you from bringing or participating in any kind of any class, collective, coordinated, consolidated, representative or other kind of group, multi-plaintiff or joint action against Uber.

A party is not obligated to arbitrate unless he or she consented to do so (*Matter of Robert Stigwood Org. [Atlantic Recording Corp.]*, 83 A.D.2d 123, 126, 443 N.Y.S.2d 726). When one party seeks to compel the other to arbitrate their disputes, the court first determines whether the parties made a valid arbitration agreement (*Harriman Group v. Napolitano*, 213 A.D.2d 159, 162, 623 N.Y.S.2d 224). The party seeking arbitration has the burden of establishing an agreement to arbitrate (*Matter of Allstate Ins. Co. v. Roseboro*, 247 A.D.2d 379, 380, 667 N.Y.S.2d 914; see *Seneca Ins. Co. v. Secure-Southwest Brokerage*, 294 A.D.2d 211, 212, 741 N.Y.S.2d 690). The creation of online contracts "has not fundamentally changed the principles of contract" (*Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 [2d Cir.2004]).

"To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Matter of Express Indus. & Term. Corp. v. New York State Dept. of Transp.*, 93 N.Y.2d 584,

589, 693 N.Y.S.2d 857, 715 N.E.2d 1050 [1999]). There must be an offer followed by an acceptance (*id.*). “The question of whether there is agreement to accept the terms of an on-line contract turns on the particular facts and circumstances (*Scotti v. Tough Mudder Inc.*, 63 Misc. 3d 843, 849, 97 N.Y.S.3d 825, 831). As stated in *Scotti*:

Courts generally look for evidence that a website user had actual or constructive notice of the terms by using the website (*see Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 [2d Cir. 2012]). Where the person's alleged consent is solely online, courts seek to determine whether a reasonably prudent person would be put on notice of the provision in the contract, and whether the terms of the agreement were reasonably communicated to the user (*id.* at 120; *see Fteja v. Facebook, Inc.*, 841 F.Supp.2d 829, 833, 835 [S.D.N.Y. 2012]; *Starke v. Gilt Groupe, Inc.*, 2014 WL 1652225, *2, *3, 2014 U.S. Dist. LEXIS 58006, *6–7 [S.D.N.Y. 2014]; *Jerez v. JD Closeouts, LLC*, 36 Misc. 3d 161, 168, 943 N.Y.S.2d 392 [Nassau Dist. Ct. 2012]). In *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002), the court emphasized that “[r]easonably 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” (*id.* at 35; *see Starke v. Squaretrade, Inc.*, No. 16-CV-7036 [NGG], 2017 WL 3328236, at *5 [E.D.N.Y. Aug. 3, 2017], *affd* 913 F.3d 279 [2d Cir. 2019]).

(63 Misc. 3d 843, 849–50, 97 N.Y.S.3d 825, 831).

Here, the record before the Court raises triable issue of fact as to whether the plaintiff assented to the arbitration provision.

Accordingly, it is hereby

ORDERED that the two motions shall be held in abeyance pending an evidentiary hearing on the issues of whether the notice of the arbitration provision in the electronic contract at issue was reasonably conspicuous and whether there was a manifestation of assent to the provision by the plaintiff that was unambiguous as a matter of law. These issues are hereby referred to a Special Referee/JHO to hear and report with recommendations, or with the parties' consent, to hear and determine. This action shall be stayed pending a final determination of the motions.

This constitutes the decision and order of the Court.

Dated: February 4, 2022

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

KINGS COUNTY CLERK
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