

**Moeslein v Tong**

2022 NY Slip Op 31709(U)

May 26, 2022

Supreme Court, New York County

Docket Number: Index No. 450744/2021

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. FRANK NERVO PART 04**

*Justice*

-----X

EMILIE MOESLEIN,

Plaintiff,

- v -

FRANCIS TONG, REVEL TRANSIT INC.

Defendant.

-----X

INDEX NO. 450744/2021

MOTION DATE 04/22/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82

were read on this motion to/for STAY.

Plaintiff moves to stay arbitration pursuant to CPLR § 7503; defendants oppose and cross-move to compel arbitration pursuant to its rental agreement with plaintiff and the terms of use. As an initial matter, the Court notes that while its records indicate that this motion has not yet been submitted, the matter is fully briefed, and it appears that the failure to mark the matter submitted is merely a recording error. Accordingly, the Court deems the motion submitted and issues the instant decision and order.

Defendant operates a business by which users register for its service and then are permitted to rent electric mopeds. There is no dispute that plaintiff registered for this service and used defendant’s mopeds. However, plaintiff

contends, in essence, that she was never apprised of the arbitration provisions in defendant's terms of use at the time of her registration with defendant. Consequently, she seeks to permanently stay enforcement of the arbitration provisions. Following an alleged accident while using defendant's mopeds, plaintiff filed the instant lawsuit seeking damages for personal injuries in Kings County Supreme Court. Defendant Revel moved to change venue to New York County, in accordance with the rental agreement, and Kings County Supreme Court granted that motion. As a result of the transfer to New York County, the Court automatically issued a case scheduling order and, that same day, defendant Revel served its demand for arbitration

New York has long favored arbitration, as a matter of public policy (*Matter of Smith Barney Shearson v. Sacharow*, 91 NY2d 39, 49 [1997]). "A party to an agreement may not be compelled to arbitration 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 Assocs., LLP*, 6 NY3d 371, 374 [2006]). A party's signature is not required (*id.*). Notwithstanding, the right to seek arbitration can be waived (*Stark v. Molod Spitz De Santis & Stark, P.C.*, 9 NY3d 59 [2007]) and such waiver is ascribed to a party who commences a lawsuit (*De*

*Sapio v. Kohlmeyer*, 35 NY2d 402 [1974]). Plainly, this assumption that a party who commences an action generally waives its right to submit the issue to arbitration does not apply to a defendant (*id.*). However, this is not to say a defendant's right to compel arbitration is absolute, as a defendant's increasing participation in an action will militate against compelling arbitration (*id.*; *Matter of Zimmerman v. Cohen*, 236 NY 15 [1923]; *Ryan v. Kellogg Partners Inst. Servs.*, 58 AD3d 481 [1st Dept 2009]).

As an initial matter, defendant has participated in this forum to the extent of serving an answer, moving to change venue from Kings County to New York County pursuant to the parties' agreement, opposing plaintiff's motion to stay arbitration, and cross-moving to compel arbitration. Defendant's right to submit this matter to arbitration is not waived by such limited participation (*see De Sapio, supra*; *see also Matter of Zimmerman, supra*).

In registering for defendant's service, plaintiff was required to "toggle" a button through the phone application next to "I accept the Terms of Use and Privacy Policy" (*see* NYSCEF Doc. No. 63). Both "Terms of Use" and "Privacy Policy" appear as blue hyperlinks (*id.*). It is not possible for a

registrant to complete the process without selecting the toggle accepting the privacy policy and terms of use (*id.*). Furthermore, plaintiff was required to toggle a separate button on the “Confirm Terms” page of the registration process agreeing that: “I have read, understand, and accept Revel’s Rental Agreement” (*id.*). Plaintiff agreed to the terms via her mobile device on September 28, 2019 (*id.*).

Plaintiff’s affidavit that she did not click on the hyperlinks to view the policies while registering, and therefore should not be bound by the arbitration agreement contained therein, is belied by her toggling buttons to the contrary. In any event, her failure to read the contract before assenting to same is irrelevant. It has long been established that a party’s failure to read a contract before signing is not a basis to excuse performance under the contract; “An alleged lack of knowledge of the arbitration clause will not excuse it, for the law does not relieve a person merely because [one] has failed to read a document which [one] has executed” (*Charles S. Fields, Inc., v. American Hydrotherm Corp.*, 5 AD2d 647 [1st Dept 1958]). Put differently, “[one] who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents, and to assent to them, and there can be no evidence for the jury as to [the]

understanding of its terms” (*Metzger v. Aetna Ins. Co.*, 227 NY 411 [1920]; *see also Humble Oil & Refining Co. v. Jaybert Esso Service Station, Inc.*, 30 AD2d 952 [1st Dept 1968]). This principle is no less applicable in the digital age. Providing a hyperlink at the time of registration, and the user’s assent to register, is sufficient notice to the user that their registration is subject to contractual terms (*see Meyer v. Uber Tech., Inc.*, 868 F3d 66 [2d Cir. 2017]). “While it may be the case that many users will not bother reading the additional terms, that is the choice the user makes; the user is still on inquiry notice” (*id.* at 79).

To the extent that plaintiff’s assent to arbitration is predicated upon the reasonability of placing users on notice by defendant’s highlighting the hyperlinked terms and conditions in blue and requiring users toggle that they have reviewed same, the Court finds defendant’s notice of the terms and conditions applicable to plaintiff’s use of defendant’s mopeds was reasonably conspicuous and plaintiff’s manifestation of assent unambiguous, as a matter of law (*see id.*; *see also Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17 [2d Cir, 2002]).

Finally, to the extent that plaintiff contends the rental agreement and arbitration provision violate CPLR § 4544, in that the font size is smaller than allowed, such claim is belied by: (1) the electronic nature of the agreement which allows a user to change the font size and (2) plaintiff's own evidence that the all capitalized arbitration provision exceeds the 5 1/2 size font required by § 4544. The argument warrants no further discussion.


Accordingly, it is

ORDERED the motion to stay arbitration is denied; and it is further

ORDERED that the cross-motion to compel arbitration is granted; and it is further

ORDERED that the matter is dismissed.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

<u>5/26/2022</u> DATE			 HON. FRANK P. NERVO		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	J.S.C.
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input 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
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