SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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INDEX NO. 150462/2021

MARIAN MILLER,
Plaintiff,

MOTION SEQ. NO. 001

- v -

DECISION + ORDER ON MOTION

REVEL TRANSIT INCORPORATED,
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44

were read on this motion to/for **STAY**.

In January 2021, plaintiff commenced this personal injury action against defendant relating to injuries she allegedly sustained in Brooklyn, New York, on May 10, 2020, while utilizing a moped owned and maintained by defendant (NYSCEF Doc. No. 1, *summons and complaint*). Defendant interposed a verified answer in this action, asserting several affirmative defenses, as well as, a counterclaim. (NYSCEF Doc. No. 3, verified *answer*).

On March 26, 2021, defendant served plaintiff with a demand for arbitration pursuant to CPLR 7503(c) before an arbitrator with Judicial Arbitration and Mediation Services, Inc. ("JAMS") (NYSCEF Doc. No. 4, *demand for arbitration*). The demand stated the claims were subject to arbitration insofar as the parties had entered into an arbitration agreement on August 2, 2019 contained in section 11.0 entitled, "Dispute Resolution" of the Revel Rental Agreement, Waiver of Liability, and Release, and section 16, entitled "Dispute Resolution" of the Terms of Use (collectively, "the Revel Rental Agreement and Terms of Use") (NYSCEF Doc. No. 5, *rental agreement and terms of use*).

Plaintiff now moves the court, pursuant to CPLR 7503, for an order staying and vacating the arbitration demanded by defendant, permitting plaintiff to prosecute the instant action in this court (NYSCEF Doc. No. 7, *notice of motion*). Defendant opposes the motion and cross-moves to compel plaintiff to attend binding arbitration pursuant to the terms of the Revel Rental Agreement and Terms of Use (NYSCEF Doc. No. 22, *notice of cross motion*).

By memorandum of law dated April 14, 2021, plaintiff argues, *inter alia*, that the Revel Rental Agreement and Terms of Use are inadmissible because they do not comply with CPLR 4544, in that the text within the contract is less than 8-point font. To this point, plaintiff submits the affidavit of Brett Taranda, co-owner of Sir Speedy Printer, who affirms that the terms in the Revel contract are printed in 7-point font or less (NYSCEF Doc. No. 11, *Taranda's affidavit*). Plaintiff also contends that the terms defendant are relying upon to compel arbitration only appear during the application process using hyperlinks. Inasmuch as it was not mandatory to click on the hyperlinks to complete the sign-up process, plaintiff argues a prospective rider is not

required to read either the terms of use or the rental agreement. She further claims that the language used by defendant in its May 29, 2019,[1] agreement and its terms of use was not clear, explicit, or reasonably conspicuous and, thus, that a reasonably prudent consumer would not have been put on notice of the arbitration terms contained within the hyper-link. Plaintiff also asserts that, by comparison, an updated rental agreement from defendant, dated January 27, 2021, reflects that defendant recently changed its rental agreement to clearly alert users of arbitration, supporting her contention that the May 2019 agreement was not clear, explicit, or reasonably conspicuous (NYSCEF Doc. No. 9, *memorandum of law*).

In support of her application, plaintiff submits, *inter alia*, an affidavit wherein she affirms that she never agreed to relinquish any rights to bring a claim in court or agreed to binding arbitration because, at no time during the sign-up process, when she registered as a user with defendant, was she required to click on any hyper-links that referred her to a binding arbitration agreement. (NYSCEF Doc. No. 10, *plaintiff's affidavit*). Plaintiff also furnishes, among other things, a "Safety Study" commissioned by Revel in June 2020 which she relies on to argue that several safety recommendations were made to defendant to prevent injuries from use of the mopeds, which defendant ignored until July 2020 (NYSCEF Doc. Nos. 8 ¶ 10-11, *Flanzig's affirmation*; 14, *safety study*).

In opposition to the motion and in support of its cross-motion, defendant argues that, by the admission of plaintiff's own purported expert, the text of the subject arbitration clause complies with the requirements of CPLR 4544 because the text of an agreement complies with CPLR 4544 so long as it is written in upper-case letters and at least five and one-half points in font size. Plaintiff also had the ability to increase the size of the text at any point, claims defendant. Defendant further contends that Taranda's affidavit is conclusory and lacks the requisite foundation to establish his opinions. According to defendant, plaintiff misstates the Safety Study commissioned by Revel and fails to establish the relevancy of defendant's alleged knowledge of its allegedly dangerous mopeds to the issues of assent and arbitration. Defendant also argues that contrary to plaintiff's argument, she was presented with the May 29, 2019 version of the agreement, not the May 29, 2020 version as argued in her memorandum. In any event, defendant asserts that the arbitration clauses within the rental agreement and terms of use were reasonably clear and conspicuous. (NYSCEF Doc. No. 24, *memorandum of law in opposition.*) Defendant incorporates by reference the affidavit of Eric Boelhouwer, Ph.D., CSP, CPE, who opines that "[f]rom a Human Factors perspective, the format, the presentation and the content of the subject Revel application (app) user interface is consistent, reasonable and appropriate. As it pertains to the Sign-Up Flow screens in the app, the use of toggle buttons and the consistent appearance and formatting of the subject statements the users must acknowledge would provide reasonable notice to prudent users of click wrap agreements." (NYSCEF Doc. No. 28 ¶ 11, *Boelhouwer's affidavit*).

In reply, plaintiff argues that she has not misstated the conclusions contained within the Safety Study commissioned by Revel; that General Business Law § 399-C(2)(b) prohibits mandatory arbitration clauses in written contracts for the sale of consumer goods; that the arbitration provisions detailed by defendant in its papers are not contained within the rental agreement entered into by plaintiff, but rather, that they are contained within the terms of use

[1] Although plaintiff's papers make reference to a May 29, 2020 agreement, this appears to be a typographical error.

which by its own terms pertains to the Revel platform; that defendant's attempt to use "expert" opinion to prove that plaintiff had a clear, explicit, and unequivocal understanding that her claims for negligence were subject to arbitration is inappropriate. She further argues that Revel continued to change the terms of its rental agreements to clarify to the consumer that the binding arbitration clause applied to negligence claims. Plaintiff also argues that any court decisions relied upon by defendant, finding that a Revel rental agreement was clear and unambiguous, is not instructive, unless it is shown that the rental agreement terms as they relate to binding arbitration were identical (NYSCEF Doc. No. 31, *reply affirmation in opposition to cross motion and in further support of motion*).[2]

New York has a strong policy favoring arbitration. (see *Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 49 [1997].) However, "[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 Assocs., LLP*, 6 NY3d 371, 374 [2006] [internal citation omitted].) Thus, "the court must first determine whether the parties made a valid arbitration agreement[.]" (*Harriman Group v Napolitano*, 213 AD2d 159, 162 [1st Dept 1995].) "The creation of online contracts 'has not fundamentally changed the principles of contract.'" (*Resorb Networks, Inc. v YouNow.com*, 51 Misc 3d 975, 980 [Sup Ct, NY County 2016], quoting *Register.com, Inc. v Verio, Inc.*, 356 F3d 393, 403 [2d Cir 2004].) "[T]here must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." (*Resorb Networks, Inc. v YouNow.com,* 51 Misc 3d at 980 [internal quotation marks and citation omitted].) "Where the supposed assent to terms is mostly passive, as it usually is online, courts seek to know whether a reasonably prudent offeree would be on notice of the term at issue . . ., and whether the terms of the agreement were reasonably communicated to the user." (*Id.* [internal quotation marks and citations omitted].) "Whether a reasonably prudent user would be on inquiry notice turns on the '[c]larity and conspicuousness of arbitration terms,' in the context of web-based contracts … clarity and conspicuousness are a function of the design and content of the relevant interface." (*Meyer v Uber Technologies, Inc.*, 868 F3d 66, 75 [2d Cir 2017].)

Here, plaintiff admits that when she registered with Revel as a user, she clicked to agree to the Revel "terms and conditions." (NYSCED Doc. No. 10, *plaintiff's affidavit*). Paul Suhey, co-founder and chief operating officer for defendant, confirms that in order to gain access to and rent a Revel moped, a user must complete a series of screens and queries before registering his or her account, also known as the "Sign-Up Flow", whereby a user is presented with an opportunity to read the arbitration clause in the Revel Rental Agreement and Terms of Use and is required to manifest his/her assent to the terms by clicking to activate the toggle buttons (NYSCEF Doc. No. 25, *Suhey's affidavit*). The fact that plaintiff did not read the arbitration clause prior to assenting to same is irrelevant (see *Charles S. Fields, Inc. v Am. Hydrotherm Corp.*, 5 AD2d 647, 649 [1st Dept 1958].) Upon this court's review of the subject arbitration agreement and, after giving due consideration to the arguments raised herein, this court adopts the reasoning of other courts that have analyzed similar Revel arbitration causes and have concluded that a reasonably prudent user would have been put on notice of the subject arbitration clause (see *Moeslein v Tong*, 2022 NY Slip Op 31709[U] [Sup Ct, NY County 2022] [Nervo, J.]; *Harrison v Revel Tr. Inc.*, 2022

[2] Although defendant submits a Reply affirmation to plaintiff's opposition to cross-motion to compel arbitration, this will not be considered insofar as defendant is not entitled to a Reply.

NY Slip Op 30430[U] [Sup Ct, Kings County 2022] [Silber, J.]; *Williams v R.C. Diocese of Brooklyn & Queens*, 73 Misc 3d 1033, 1036-1037 [Sup Ct, Queens County 2021] [Caloras, J.]; *Rodriguez v Revel Transit Inc.*, Index No. 150560/2021, 2021 WL 3677950 [Sup Ct, NY County 2021] [Tisch, J.]; *Weiss v Revel Transit Inc.*, Index No. 651018/2021, 2021 WL 288993 [Sup Ct, NY County 2021] [Perry, J.]; *Long v Revel Transit Inc.*, Index No. 150413/2021, 2021 WL 2457057 [Sup Ct, NY County 2021 [Nervo, J.]; *Vergel v Revel Tr.*, 2021 NY Slip Op 31590[U] [Sup Ct, NY County 2021] [Nervo, J.].) To the extent plaintiff argues the agreement fails to comport with CPLR 4544, this argument is equally unavailing insofar as CPLR 4544 applies to "printed" contracts. It is also undisputed here that the rental agreement and terms of use appear for the user on a mobile screen that allows for a user to "zoom in" to increase the size of the font. The font type is also in uppercase, belying plaintiff's contention that the 8-point font of CPLR 4544 applies. (see *Harrison v Revel Tr. Inc.*, 2022 NY Slip Op 30430[U] at **23.) Plaintiff's arguments raised for the first time in reply papers will not be considered. (see *Moshin v Port Authority of New York*, 83 AD3d 536, 536 [1st Dept 2011].) Based on the foregoing, defendant's cross-motion compelling plaintiff to arbitrate and staying this action is granted. Plaintiff's motion, pursuant to CPLR 7503, is denied as moot. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

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

ORDERED that defendant's cross-motion to compel arbitration and to stay this action is granted; and it is further

ORDERED that plaintiff shall arbitrate her claims against defendant in accordance with the terms of the Revel Rental Agreement and Terms of Use; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party 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 matter shall be scheduled for a status conference on May 31, 2023, for control purposes pending the arbitration proceedings.

This constitutes the decision and order of this court.

November 23, 2022

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	☐	**CASE DISPOSED**		☒	**NON-FINAL DISPOSITION**		
	☐	**GRANTED**	☐ **DENIED**	☒	**GRANTED IN PART**	☐	**OTHER**
APPLICATION:	☐	**SETTLE ORDER**		☐	**SUBMIT ORDER**		