At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of July, 2022.

PRESENT:

HON. CAROLYN E. WADE,
Justice.

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NEFIA WILLIAMSON,

Plaintiff,

- against -

Index No. 508671/21

JANET ALEXANDER, HOWARD ADAMS, ALFRED THORNE, AND UBER TECHNOLOGIES, INC.,

Mot. Seq. 1, 2

Defendant.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	13-23; 34-41
Opposing Affidavits (Affirmations)	46
Reply Affidavits (Affirmations)	58-60

Upon the foregoing papers, plaintiff Nefia Williamson (plaintiff) moves in motion (mot.) sequence (seq.) one for an order, pursuant to CPLR 7503 (c), staying the arbitration demanded by defendant UBER TECHNOLOGIES, INC. (hereinafter "Uber") by letter dated July 29, 2021. Uber cross-moves, in mot. seq. two, for an order compelling arbitration and staying the proceedings of this action during the pendency of the arbitration.

Background

On April 25, 2019, plaintiff was a passenger in the vehicle driven by defendant Alfred Thorne ("Thorne") when Thorne's vehicle allegedly collided with the vehicle owned and operated by defendants Janet Alexander ("Alexander") and Howard Adams ("Adams") near Linden Boulevard and Malta Street in Brooklyn, New York. Plaintiff alleges that she utilized the Uber application to connect with Thorne and that Uber was responsible for Thorne's actions at the time of the accident.

On April 13, 2021, plaintiff commenced this action seeking to recover for injuries allegedly sustained as a result of the subject accident. On or around July 29, 2021, plaintiff received Uber's Notice of Intention to Arbitrate by letter dated same (hereinafter "Arbitration Demand"). On August 16, 2021, plaintiff filed the instant motion seeking a stay of the arbitration.

Plaintiff's Motion to Stay Arbitration

In support of her motion to stay arbitration, plaintiff contends that the only portion of any alleged agreement between Uber and herself that has ever been provided to her is the snippet in Uber's Arbitration Demand. As such, plaintiff contends that Uber fails to establish the existence of an arbitration agreement because Uber fails to describe when and how plaintiff agreed to arbitrate her claims against Uber or how Uber's digital or clickwrap agreements were presented to plaintiff at the time of the purported agreement. Relying on the case of *Ramos v Uber Technologies. Inc.* (60 Misc3d 422 [Sup Ct, Kings County 2018]), plaintiff argues that Uber fails to demonstrate that plaintiff unequivocally agreed

to arbitrate her claims against Uber. In addition, plaintiff asserts that she should be afforded the opportunity to conduct discovery on this issue. Plaintiff also points out that the Arbitration Demand makes no mention of co-defendants, Alexander, Adams and Thorne and that arbitration should also be stayed for this reason as well.

Uber's Cross Motion to Compel

In opposition to plaintiff's motion and in support of its cross motion to compel arbitration, Uber argues that, on February 21, 2021, approximately two months before the filing of the instant action but after the date of incident, plaintiff consented to Uber's January 18, 2021 Terms of Use ("January 2021 Terms") which included a clear and unambiguous arbitration provision. Uber further contends that plaintiff's personal injury claims fall squarely within the scope of the arbitration provision.

In support, Uber proffers the affidavit of Ryan Buoscio ("Buoscio"), Senior Legal Manager of Program Operations and Insurance Litigation Analytics, who has been employed by Uber since 2016 (NYSCEF Doc No. 36, ¶ 2). Buoscio avers that Uber is a technology company that uses its proprietary technology to develop and maintain digital multi-sided platforms, one of which is the Rides platform (*id.* at ¶¶ 4, 5). Buoscio explains that riders download the rider version of the Uber application (hereinafter "App") while drivers download the driver version of the Uber application, and that together, these applications facilitate the connection of individuals in need of a ride with individuals willing to provide transportation services (*see id.* at ¶ 5). Buoscio also avers that, in the normal course of its business, Uber maintains records regarding when and how riders

register and the Terms of Use in effect and as amended from time to time, and that he has access to these records and are familiar with them (*id.* at ¶ 7).

According to Buoscio, on or about February 21, 2021, plaintiff was presented with an in-app blocking pop-up screen with the header "We've updated our terms" (*id.* at ¶ 8). He further asserts that the screen also stated in large type, "We encourage you to read our Updated Terms in full" and that underneath, the phrases "Terms of Use" and "Privacy Notice" were displayed, underlined and in bright blue text indicating a hyperlink (*id.*). The pop-up screen also expressly stated that: "By checking the box, I have reviewed and agreed to the Terms of Use and acknowledge the Privacy Notice" and that "I am at least 18 years of age" (*id.* at ¶ 9). Buoscio avers that plaintiff clicked the checkbox and tapped "Confirm" on February 21, 2021 (*id.*). Attached as exhibits to Buoscio's affidavit are: (1) a purported screenshot of the in-app blocking pop-up screen; (2) a data entry sheet reflecting plaintiff's rider account sign-up date as well as the date that plaintiff purportedly consented to the January 2021 Terms by clicking the checkbox and tapping "Confirm;" and (3) a copy of the January 2021 Terms albeit not in screenshot form (*see id.* at exhibits A-C).

Uber contends that because the hyperlinks were reasonably conspicuous and plaintiff clicked a checkbox confirming her assent to Uber's January 2021 Terms, plaintiff had reasonable inquiry notice of the binding arbitration provision, which is all that is required under the law. Uber also relies on the enforcement of the subject arbitration

provision in other jurisdictions outside of New York to argue that its January 2021 Terms and checkbox process were clear, conspicuous, and reasonable.

Regarding arbitrability, Uber argues that plaintiff's claims for personal injury fall unambiguously within the scope of its arbitration provision which states that:

> "...you and Uber agree that any dispute, claim or controversy in any way arising out of or relating to (i) these Terms and prior versions of these Terms, or the existence, breach, termination, enforcement, interpretation, scope, waiver, or validity thereof, (ii) your access to or use of the Services at any time, **(iii) incidents or accidents resulting in personal injury that you allege occurred in connection with your use of the Services, whether the dispute, claim or controversy occurred or accrued before or after the date you agreed to the Terms...**" (NYSCEF Doc No. 36, Exhibit C, Section 2(a) (emphasis added)).

Uber asserts that the foregoing language is clear and that its arbitration provision has been enforced multiple times, even where the incident at issue pre-dated the time of the agreement.

To the extent that there is an issue regarding arbitrability, Uber argues that said issue must be submitted to the arbitrator pursuant to the January 2021 Terms, which sets forth that:

> "The parties agree that the arbitrator ("Arbitrator"), and not any federal, state, or local court or agency, shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement, including any claim that all or any part of this Arbitration Agreement is void or voidable. The Arbitrator shall also be responsible for determining all threshold arbitrability issues, including issues relating to whether the Terms are applicable, unconscionable or illusory and any defense to arbitration, including waiver, delay, laches, or estoppel. If there is a dispute about whether this Arbitration Agreement can be enforced or applies to a dispute, you and Uber agree that the arbitrator will decide that issue" (*id.* at Exhibit C, Section 2(c)).

To the extent that plaintiff relies on *Ramos v Uber Techs., Inc., supra*, to support her position that she cannot be deemed to have agreed to arbitration, Uber argues that the court is not bound by the decision of a fellow trial level court and that *Ramos* is, in any case, on appeal. Notwithstanding the foregoing, Uber contends that *Ramos* and the instant matter are fundamentally dissimilar since the proof submitted in *Ramos* differs from the proof submitted herein, and more importantly, the presentation of information confronted by the plaintiff in *Ramos* on her mobile phone differs from that presented on plaintiff's phone. Thus, that the issue of conspicuousness that the *Ramos* court alluded to in its decision is inapplicable since plaintiff herein was provided with conspicuous notice with different colored hyperlinks and express notification that the changes related to, *inter alia*, arbitration.

Finally, Uber contends that the arbitration provision is enforceable against plaintiff regardless of the presence of other parties that are not bound by arbitration. Uber asserts that the necessity of litigating in multiple forums is not a basis to stay arbitration and that, in any case, the court has discretion to stay litigation among the non-arbitrating parties pending the outcome of the arbitration, which is contemplated by both federal and state statutes under 9 USC § 3 and NY CPLR 7503 (a).

Plaintiff's Reply and Opposition to Uber's Cross Motion

Plaintiff, in reply, argues that the arbitration agreement contained in the January 2021 Terms should not be retroactively applied to plaintiff's April 25, 2019 accident as a matter of public policy. In support, plaintiff relies on *Newton v LVMH Moet Hennessy Louis Vuitton Inc.* (192 AD3d 540, 541 [1st Dept 2021]), arguing that the First Department refused to retroactively apply CPLR 7515 to an incident that predated the statute out of public policy concerns. Plaintiff argues that allowing Uber to solicit accident victims to enter into an arbitration agreement after an accident takes place and then to use that against them is predatory and should be disallowed.

Secondly, plaintiff reiterates that Uber's arbitration provision, undisputedly in clickwrap form, lacks clarity and conspicuousness because: (1) plaintiff was not required to scroll through the agreement or actually click open the January 2021 Terms or Privacy Notice but, rather, was only encouraged to read them; (2) by relying solely on the "pop up" clickwrap form, Uber failed to provide plaintiff with an unambiguous method of accepting or declining the offer to arbitration and merely asked plaintiff to "agree" to its terms by tapping "Confirm"; and (3) the popup screen did not explicitly explain or identify that plaintiff was entering into a binding contract to arbitrate.

Lastly, if the court compels arbitration, plaintiff requests that the court order arbitration to proceed immediately. Further, plaintiff argues that no aspect of this case should be dismissed until the disposition of the arbitration and that the remaining claims

against the non-moving defendants should continue following the outcome of the arbitration.

Uber's Reply

In reply to plaintiff's opposition and in further support of its cross motion to compel arbitration, Uber maintains that the design and content of its in-app blocking pop-up screen placed plaintiff on inquiry notice of its updated terms because: (1) its pop-up screen was uncluttered; (2) the text stating that by checking the box, plaintiff was confirming that she had reviewed and agreed to the terms in full appeared directly after the hyperlink; (3) the hyperlink to the terms was easily located above the checkbox without scrolling; (4) the language confirming that she read the terms and agreed to them was clear and obvious with black font against a white background; (5) the hyperlink to the terms and privacy policy were set off in blue, larger font; (6) the language of the text "By clicking the checkbox, I have reviewed and agree to the Terms of Use and acknowledge the Privacy Notice" was clear; and (7) notice of plaintiff's assent was connected to her clicking the checkbox and tapping the "confirm" button at the bottom of the screen. In addition, Uber explains that its arbitration provision was not buried at the bottom of the January 2021 Terms but, rather, placed on the very first page in bold and all capitalized letters making it stand out from the rest of the text on that page and that the arbitration provision occupied the second provision in its January 2021 Terms.

Uber also contends that pursuant to *Nicosia v Amazon.com, Inc.* (815 Fed. Appx. 612 [2d Cir 2020]), plaintiff has repeatedly ratified her acceptance of Uber's January 2021

Terms by using the Uber App 204 times since the filing of her motion to stay arbitration on August 16, 2021. Uber represents that the *Nicosia* holding is in line with the just rationale that continued use of the Uber App invalidates any lack of notice argument.

Finally, as for whether retroactive application of its arbitration provision is unconscionable, Uber asserts that other federal courts, specifically *In re Currency Conversion Fee Antitrust Litig.* (265 F Supp2d 385, 407 [SDNY 2003]) and *TradeComet.com LLC v. Google, Inc.* (435 Fed. Appx. 31, 35 [2d Cir 2011]), have upheld similar arbitration provisions despite the fact that the incident accrued before the relevant provision went into effect. To the extent that plaintiff relies on *Newton v LVMH Moet Hennessy Louis Vuitton Inc., supra,* Uber asserts that such reliance is misplaced. According to Uber, the court in *Newton* held that CPLR 7515 – which prohibits the inclusion of a mandatory arbitration provision to resolve any allegation or claim of discrimination as a condition of obtaining remedies under a contract – was not retroactively applicable to arbitration agreements that were entered into preceding the enactment of the law. Unlike the *Newton* case, Uber argues that, here, there is no statute expressly prohibiting the inclusion in a contract of an arbitration provision that applies to claims that have already accrued and, in fact, that New York law allows such contracts.

Discussion

It is well established that "[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 Assoc., LLP, 6 NY3d 371, 374 [2006] [internal quotation marks omitted]). When one party seeks to compel the other to arbitrate any disputes between them, the court must first determine whether the parties made a valid arbitration agreement (*see Harriman Group v Napolitano*, 213 AD2d 159, 162 [1st Dept 1995]).

"[T]he enforceability of arbitration agreements is governed by the rules applicable to contracts generally" (*Sablosky v Gordon Co.*, 73 NY2d 133, 136 [1989]). "To form a binding contract there must be a 'meeting of the minds' such that there is a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016] [internal and external citations omitted]). Mutual assent may be manifested by written or spoken words, or by conduct (*Meyer v Uber Techs., Inc.*, 868 F3d 66, 74 [2d Cir 2017] [citations omitted]). "[W]here the purported assent is largely passive, the contract-formation question will often turn on whether a reasonably prudent offeree would be on notice of the term at issue" (*Schnabel v Trilegiant Corp.*, 697 F3d 110, 120 [2d Cir 2012]). "In other words, where there is no actual notice of the term, an offeree is still bound by the provision if he or she is on inquiry notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent" (*id.*). Inquiry notice is actual notice of circumstances sufficient to put a prudent person upon inquiry (*see Specht v Netscape Communs. Corp.*, 306 F3d 17, 31 [2d Cir 2002]). In making this determination, the "[c]larity and conspicuousness [of the term is] important . . . ." (*id.* at 30).

In *Berkson v Gogo LLC* (97 F Supp 3d 359, 394-403 [EDNY 2015]), Judge Weinstein identified the four general types of online consumer contracts as: (a) browsewrap; (b) clickwrap; (c) scrollwrap; and (d) sign-in-wrap. As explained by Judge Weinstein:

> "Browsewrap exists where the online host dictates that assent is given merely by using the site. Clickwrap refers to the assent process by which a user must click 'I agree,' but not necessarily view the contract to which she is assenting. Scrollwrap requires users to physically scroll through an internet agreement and click on a separate 'I agree' button in order to assent to the terms and conditions of the host website. Sign-in-wrap couples assent to the terms of a website with signing up for use of the site's services . . . ." (*id.* at 394-395)

Generally, courts find clickwrap agreements enforceable since they necessitate an active role by the user of a website (*id.* at 397). "By requiring a physical manifestation of assent, a user is said to be put on inquiry notice of the terms assented to" (*id.*). However, "[r]egardless of the nomenclature, the classification of an online agreement does not conclude the inquiry, nor does the fact a consumer may have clicked a box" (*Applebaum v Lyft, Inc.*, 263 F Supp 3d 454, 466 [SDNY 2017]). "The presentation of the online agreement matters: 'Whether there was notice of the existence of additional contract terms presented on a webpage depends heavily on whether the design and content of that webpage rendered the existence of terms reasonably conspicuous'" (*id. citing Nicosia v Amazon.com, Inc.*, 834 F3d 220, 233 [2d Cir 2016]). "Clarity and conspicuousness of arbitration terms are important in securing informed assent" (*id.* [citation omitted]).

"The proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue" (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007 [citation omitted]). The party seeking to avoid arbitration, conversely, bears the burden of showing that the agreement is inapplicable or invalid (*Applebaum v Lyft, Inc.*, 263 F Supp 3d at 464, *quoting Harrington v Atl. Sounding Co.*, 602 F 3d 113, 124 [2d Cir 2010]). "If a party refuses to arbitrate, arbitrability of the dispute hinges only on whether there is an agreement to arbitrate and, if so, whether the dispute falls within that agreement" (*id. quoting U.S. Fire Ins. Co. v Nat'l Gypsum Co.*, 101 F 3d 813, 816 [2d Cir 1996]).

Here, plaintiff does not dispute that her personal injury claims fall within the ambit of the subject arbitration clause. Plaintiff only disputes that she ever agreed to arbitrate her claims in the first place. Based on the evidence, however, the court finds that the design, layout and language used in the pop-up screen notifying plaintiff of Uber's updated terms as well as plaintiff's manifestation of assent by clicking the checkbox and "Confirm" button placed plaintiff on inquiry notice of Uber's terms and, as such, plaintiff is therefore bound by them. Specifically, the court finds that the relevant pop-up screen was uncluttered and that the text for Uber's "Terms of Use" and "Privacy Notice" were conspicuous insofar as they were located in the center of the screen, in bulleted format and in underlined, blue font indicating that the text were hyperlinked. Additionally, below the hyperlinks was the checkbox with language confirming that "[b]y checking the box," the

user has "reviewed and agree to the Terms of Use...," which plaintiff had to affirmatively click as well as click the "Confirm" button at the bottom of the screen to proceed.

In addition, the arbitration provision itself is reasonably conspicuous because the arbitration clause/warning is located within the very first section of the January 2021 Terms and in all capitalized letters, whereas the surrounding text is not capitalized. Thereafter, the actual section dedicated to arbitration, and its sub-clauses, occupy the very next section, under section two.

Even if plaintiff was not deemed to have been on inquiry notice of Uber's January 2021 Terms based on the above reasoning, plaintiff has since assented to those terms by her continued use of the Uber App since the filing of her motion and receiving Uber's Arbitration Demand (*see Nicosia v Amazon.com, Inc.*, 815 Fed. Appx at 614 [finding that plaintiff received notice and assented to the arbitration clause no later than September 2014, when Amazon filed a motion in this litigation raising the arbitration clause as a ground for dismissal, and plaintiff proceeded to make at least twenty-seven purchases through Amazon.com since that date]), a fact that plaintiff does not dispute.

Finally, plaintiff fails to demonstrate that the subject arbitration provision should not apply to plaintiff's action because said action accrued prior to the agreement. Plaintiff agreed to the January 2021 Terms two months prior to commencing the instant litigation. Although the motor vehicle accident occurred in 2019, two years prior, Uber's January 2021 Terms clearly state that Uber's arbitration provision applies to claims that accrue before the date that the user actually agrees to the terms. Plaintiff fails to demonstrate that

such language in a contract is void for public policy considerations or that it should not otherwise be enforced. As represented by Uber, plaintiff's reliance on *Newton v Lvmh Moet Hennessy Louis Vuitton, supra,* is misplaced. *Newton* dealt with CPLR 7515's prohibition of agreements compelling arbitration of discrimination claims and found that CPLR 7515 did not apply to the agreement at issue because (1) said agreement predated the enactment of CPLR 7515 and (2) CPLR 7515 expressly applied only to contracts entered into "on or after the effective date of this section" (*see* CPLR 7515[b][1]; *see also Altman v Salem Media of N.Y., LLC,* 188 AD3d 515, 516 [1st Dept 2020]).

Based on the foregoing, plaintiff's claims against Uber must go before an arbitrator. Although the other defendants are not subject to the arbitration clause, the need for bifurcated litigation is not a bar to enforcement of an arbitration agreement (*see Brown v V & R Advertising, Inc.*, 112 AD2d 856, 861 [1st Dept 1985] [*citing Dean Witter Reynolds Inc. v Byrd*, 470 US 213, 220-21 [1985]). However, to the extent that Uber seeks to arbitrate plaintiff's claims, the arbitration should proceed immediately, as a protracted delay in the instant litigation could become prejudicial to plaintiff and the remaining defendants.

Conclusion

For the reasons stated above, Uber established that an agreement to arbitrate exists and that its mandatory arbitration clause is enforceable. Thus, plaintiff's motion to stay arbitration is denied and Uber's cross-motion to compel plaintiff to arbitrate her claims against Uber is granted. Plaintiff and Uber are directed to proceed to arbitration forthwith.

The instant litigation is stayed pending outcome of the arbitration or upon further order of the court.

Any arguments not explicitly addressed herein were considered and deemed to be without merit.

This constitutes the Decision and Order of the court.

ENTER,

J. S. C

HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT