

Sullivan v Uber Tech., Inc.

2023 NY Slip Op 32897(U)

August 15, 2023

Supreme Court, New York County

Docket Number: Index No. 653207/2022

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Carrie Sullivan and Abigail McCann,

INDEX NO. 653207/2022

- v -

MOT. DATE

Uber Technologies, Inc., Raiser-NY, LLC, and Raiser, LLC

MOT. SEQ. NO. 001

The following papers were read on this motion to/for petition and x-motion

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). <u>1-16</u>
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). <u>20-31</u>
Replying Affidavits	NYSCEF DOC No(s). <u>32, 34, 35-37</u>
Transcript	NYSCEF DOC No(s). <u>39</u>
Surreplies	NYSCEF DOC No(s). <u>40-41, 42-43, 44</u>

This is a CPLR Article 75 proceeding. In their petition, petitioners request pursuant to CPLR 7503(b) and 7503(c) that Uber's Notice of Intention To Arbitrate be vacated and the arbitration be permanently stayed as no valid agreement to arbitrate was made and Uber waived its right to arbitration by its affirmative acceptance of the judicial forum. Respondents Uber Technologies, Inc., Raiser-NY, LLC, and Raiser, LLC (Uber) oppose the petition and cross-move to compel arbitration and stay the proceedings of this action during the pendency of the arbitration. For the reasons that follow, the petition is granted and the cross-motion is denied.

As a way of background, in September 2022, plaintiffs Sullivan and McCann commenced a personal injury action titled *Sullivan and McCann v. Virgilio Rodriguez, Tika R. Pun, Rigo Limo-Auto Corp., Uber Technologies, Inc., Rasier, LLC and Raiser-NY, LLC*, in the Supreme Court, Kings County, index number 501218/22. Defendant Uber, in its Answer to plaintiffs' complaint in the Kings County Action, contends "... this dispute is subject to an arbitration agreement, such that this matter is properly brought before a qualified arbitrator rather than in the instant Court" (see 14th Affirmative Defense). Further, all parties have conducted discovery in the Kings County Action and plaintiff was directed to file a note of issue on or before May 10, 2024.

In this proceeding, petitioners allege in their petition the following. On November 6, 2021, petitioners were the backseat passengers in an Uber vehicle that was involved in a motor vehicle accident with another vehicle. Both petitioners were seriously injured with petitioner Carrie Sullivan sustaining multiple cervical spine fractures and damage to her spinal cord rendering her a quadriplegic. By letter dated August 15, 2022, respondent Uber sent the Notice of Intention to Arbitrate to petitioners, which was

Dated: 8/15/23



HON. LYNN R. KOTLER, J.S.C.

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

[* 1]

received on August 18, 2022. Petitioners allege that their petition is timely as it was brought within the 20-day period after service of the Notice of Intention. Petitioners contend that they never intended to waive their rights to a jury, their day in court nor to resolve this dispute through arbitration and that Uber waived any right it may have had to arbitration by affirmatively accepting the judicial forum.

In its cross-motion to stay and compel arbitration Uber, contends that plaintiffs were put on inquiry notice of the governing Terms and agreed to the arbitration agreement when each of them was presented with an in-app blocking pop-up screen with updated terms and that the in-app blocking pop-up screen provided "By checking the box, I have reviewed and agreed to the Terms of Use and acknowledge the Privacy Notice." It also states that: "I am at least 18 years of age." and that both plaintiffs clicked the checkbox and tapped "Confirm" on two separate occasions. Uber argues that because the hyperlinks were reasonably conspicuous and plaintiffs clicked a checkbox confirming her assent to Uber's Terms, plaintiffs had reasonable inquiry notice of the binding arbitration provision. Uber further contends that it properly and preserved and demanded its right to arbitrate.

In reply, petitioners argue that respondents' cross-motion contains an incorrect caption and index number and therefore should be considered a nullity and further assert that Uber's request to stay this action until after the arbitration between plaintiffs and defendants Uber is completed is not available here pursuant to CPLR 7503. Petitioners further argue that Uber waived its right to arbitrate and stay the tort action by interposing crossclaims and availing itself of the discovery available and finally, that there was no valid agreement to arbitrate.

While this matter was *sub judice*, the court received correspondence from Uber dated June 26, 2023 notifying the court of the First Department's Decision issued on May 16, 2023 in *Brooks v. Lang Yang*, 216 AD3d 505. The court then received a letter from counsel for petitioner Carrie Sullivan which improperly attempts to raise new arguments and otherwise attempts to distinguish *Brooks* from the instant case by claiming, for the first time, that "petitioner Carrie Sullivan did not use her Uber app to arrange the ride leading to the collision that forms the basis for the underlying action." Uber's counsel then submitted another letter dated July 12, 2023 claiming that Sullivan's letter is an improper surreply and requesting that "[t]o the extent that this Court will entertain Plaintiff's impermissible sur-reply attempting to revisit the substance of the motion, Uber simply states that any production of materials and participation in discovery has been solely at the direction of two Kings County Orders for the production of materials. Uber has not willingly participated in the litigation and has been left no choice to do so by a valid Court Order while we await this Court's determination on the issue of arbitration. These Orders are attached for the Courts review as Exhibit "A". We apologize that the Court is forced to read an impermissible sur-reply, but for purposes of Appellate Practice, Plaintiff has forced Uber to respond, so if the Court does consider the impermissible sur-reply, Uber's arguments against it are not being raised for the first time on Appeal."

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 that parties' clear, explicit and unequivocal agreement to arbitrate". *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc., LLP*, 6NY3d 371 [2006] 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 v. Napolitano Group*, 213 AD2d 159 [1st Dept 1995])

"It is of course for the court in the first instance to determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement". *Sisters of St. John the Baptist, Providence Rest Convent v Phillips R. Geraghty Constructor, Inc.*, 67 NY2d 997, 998, 502 NYS2d 997 [1986].

There must be the "requisite clear and unambiguous expression that the parties intended to mandate arbitration of their dispute" (*Muriel Siebert & Co., Inc. v Intuit, Inc.*, 11 AD3d 415, 415, 783 NYS2d 566 [1st Dept 2004]).

In *Brooks, supra* at 506, the First Department held that Uber had demonstrated the existence of a valid and enforceable arbitration agreement because the plaintiff "had agreed to be bound by the arbitration when he affirmatively indicated and confirmed, by taking two separate actions, that he had reviewed and agreed to Uber's updated terms of use, which were overtly hyperlinked as part of the pop-up screen and sufficient to form a binding contract."

This holding is dispositive of petitioners' claims that they cannot be bound by the underlying arbitration agreement because they were unaware of it when they registered for the Uber app on their respective cell phones and never intended to waive their right for a trial by a jury or handle disputes via arbitration. However, the issue raised by Carrie Sullivan in her counsel's surreply, that she did not arrange the ride that led to the collision, but rather, co-petitioner Abigail McCann did, means that there was no valid, enforceable agreement to arbitrate between Uber and Sullivan applicable to the underlying accident as it pertains to the injuries that Sullivan sustained, only. Uber does not assert that merely agreeing to Uber's terms of service in general means that any time you get into an Uber car, including one that you did not hail, you are bound by Uber's terms of service. To the extent that this argument has been improperly raised for the first time in a surreply after the motion was marked submitted, the court could afford the parties an opportunity to brief this issue in an exercise of the court's discretion. The court notes that when this proceeding was commenced, both petitioners were jointly represented by the same counsel and it was only after Uber filed its cross-motion that Sullivan obtained a new attorney and is now separately represented.

However, this issue is of no moment, because the court agrees with petitioners that Uber waived its right to arbitrate the underlying dispute since it affirmatively participated in the Kings County personal injury action. Uber's Notice of Intention to Arbitrate is dated August 15, 2022. Meanwhile, the Kings County Action was commenced on January 13, 2022 and Uber joined issue by filing an answer on March 14, 2022. While Uber's answer clearly preserved its defense that petitioners' personal injury claims were subject to an arbitration agreement, Uber availed itself of the Kings County Supreme Court in several significant ways: [1] Uber filed crossclaims against codefendants Virgilio Rodriguez, Tika R. Pun and Rigo Limo-Auto Corp. along with its answer [2] Uber filed a Request for Judicial Intervention and made a motion on May 11, 2022 for a so ordered subpoena requiring production of certified copies of certain documents maintained by the New York City Police Department; and [3] in an order dated April 17, 2023 by the Honorable Rachel E. Freier, Uber was directed to provide discovery by responding to Sullivan's Notice of D&I and Combined Demands on or before May 15, 2023.

As the Court of Appeals explained in *De Sapio v. Kohlmeyer*, a parties' right to enforce an arbitration agreement is not absolute and may be waived by participating in a plenary action (35 NY2d 402 [1974]). While simply filing an answer does not waive a defendant's right to submit a dispute to arbitration, a defendant's assertion of a counterclaim, filing notice of trial (a note of issue analogue) and procurement of an order to take a deposition in preparation for trial does constitute waiver (*id* discussing *matter of Zimmerman v. Cohen*, 236 NY 15 [1923]).

In reply, Uber mischaracterizes its participation in the underlying arbitration proceeding. This isn't a situation where Uber merely filed crossclaims. Rather, Uber filed an RJI, made a motion and did in fact engage in discovery in the context of the Kings County action. Thus, this court finds that Uber's actions were "clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration" (*Stark v. Mold Spitz De Santis & Stark P.C.*, 9 NY3d 59, 66 [2007]).

Accordingly, the petition is granted in its entirety.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the petition is granted and the notice of intent to arbitrate is vacated and that the arbitration initiated by Uber is permanently stayed; and it is further

ORDERED that the cross-motion to stay this proceeding and compel arbitration is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 8/15/23
New York, New York

So Ordered:
[Signature]
Hon. Lynn R. Kotler, J.S.C.