

**Jimenez v Revel Tr., Inc.**

2023 NY Slip Op 33834(U)

October 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 530126/2021

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 13<sup>th</sup> day of October, 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
GILBERT JIMENEZ,

Index No.: 530126/2021

Plaintiff,

-against-

**DECISION AND ORDER**

REVEL TRANSIT, INC.,

Defendant.  
-----X

The following papers considered herein:

	<u>NYSCEF Doc. Nos.</u>
Notice of Motion/Affirmation in Support/Exhibits Annexed.....	1-16
Notice of Cross-Motion/Affirmation in Opposition and in Support of Cross-Motion/Memorandum of Law/Exhibits Annexed.....	19-30
Reply Affirmation/Exhibit Annexed.....	31, 33
Affirmation in Reply and in Further Support of Cross-Motion/Exhibits Annexed.....	35-39

Plaintiff Gilbert Jimenez ("Plaintiff") moves for an order: (1) pursuant to CPLR 7503, permanently staying arbitration in this action; (2) pursuant to CPLR 7503, vacating Defendant Revel Transit, Inc.'s ("Defendant" or "Revel") demand for arbitration; and (3) pursuant to CPLR 3211, striking from Defendant's answer the 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 22<sup>nd</sup> and 23<sup>rd</sup> affirmative defenses (Mot. Seq. No.

1). Defendant cross-moves for an order denying Plaintiff's motion and compelling Plaintiff to attend binding arbitration pursuant to the terms of the Revel Rental Agreement and Terms of Use (Mot. Seq. No. 2).

This personal injury action arises out of an incident that occurred on June 5, 2021, while Plaintiff was using Revel's moped. Plaintiff commenced this action on November 23, 2021 and

Defendant filed an answer and demand for arbitration on January 24, 2022.<sup>1</sup> Defendant's demand is based on Section 11.0 of the Revel Rental Agreement<sup>2</sup> and Section 17 of its Terms of Use.<sup>3</sup>

In his motion, Plaintiff contends that (1) the Revel Rental Agreement and Terms of Use (collectively, the "Agreement and Terms") are barred by New York General Business Law 399-c[2][a]<sup>4</sup>; (2) the demand for arbitration is defective and thus has no legal force; (3) a valid arbitration agreement was not entered into between the Plaintiff and Defendant; and (4) proceeding with arbitration would risk inconsistent results and seriously prejudice the parties.

In its cross-motion, Defendant argues that its services affect interstate commerce pursuant to the Federal Arbitration Act, which supersedes New York General Business Law 399-c. Moreover, Defendant contends that Plaintiff did enter into a valid agreement by downloading the Revel mobile application, completing the "Sign-Up Flow"<sup>5</sup>, and accepting the Agreement and Terms. In his

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<sup>1</sup> Revel's answer contains 39 affirmative defenses (NY St Cts Elec Filing [NYSCEF] Doc No. 13). Plaintiff is seeking an order, in part, striking five of those affirmative defenses: (18) "The court lacks subject matter jurisdiction"; (19) "The within action is barred by the Revel Rental Agreement, Waiver of Liability, and Release and/or Revel's Terms of Use"; (20) "Plaintiff failed to fulfill the obligation of Initial Dispute Resolution as set forth in the Revel Rental Agreement, Waiver of Liability, and Release and/or Terms of Use and the within action is, therefore, barred in its entirety"; (22) "Plaintiff is obligated to defend, indemnify and hold Revel harmless based upon the provisions set forth in the Revel Rental Agreement, Waiver of Liability, and Release and/or Revel's Terms of Use"; and (23) "Any alleged defect in the product or equipment described in plaintiff's Verified Complaint developed as a result of unforeseeable misuse, improper application, and failure to heed instructions and warnings" (*id.*).

<sup>2</sup> Section 11.0 is titled "**DISPUTE RESOLUTION**" (emphasis in original) and contains the following clause: "Member and Revel agree to submit to the Dispute Resolution provisions of the Terms of Use, which are fully incorporated herein by this reference. Those provisions include a binding arbitration provision" (NYSCEF Doc No. 14 at 12).

<sup>3</sup> Section 17 is titled "**Dispute Resolution**" (emphasis in original) and is almost two-and-a-half pages long. The first two sentences under this heading are: "Please read this clause carefully. It may significantly affect your legal rights, including your right to file a lawsuit in court" (*id.* at 27). Under a subsection titled "**Agreement to Binding Arbitration**" there are two paragraphs in capital letters, which state, in part: "ALL DISPUTES ARISING OUT OF OR RELATED TO THE LEGAL TERMS, OR YOUR USE OF [INCLUDING ACCESS TO] THE PLATFORM OR ANY ASPECT OF THE RELATIONSHIP BETWEEN YOU AND COMPANY, WHETHER BASED IN CONTRACT, TORT, STATUTE, FRAUD, MISREPRESENTATION OR ANY OTHER LEGAL THEORY, WILL BE RESOLVED THROUGH FINAL AND BINDING ARBITRATION" (*id.*) (emphasis in original).

<sup>4</sup> New York General Business Law 399-c [2] [a] provides, in part, that "[n]o written contract for the sale or purchase of consumer goods, entered into on or after the effective date of this section, to which a consumer is a party, shall contain a mandatory arbitration clause" (General Business Law § 399-c).

<sup>5</sup> The "Sign-Up Flow" is Revel's registration process to allow individuals to utilize its mopeds, requiring users to navigate a series of screens on the mobile application (NYSCEF Doc No. 19, affirmation of defendant's counsel at ¶ 14). To move on to the second screen, a user must first toggle a button next to the sentence: "I accept the Terms of

affirmation in reply, Plaintiff asserts that Defendant's cross-motion is premature and should be denied because Plaintiff will be unable to conduct discovery. However, in opposition, Defendant claims that its motion is procedurally proper *because* it was made before discovery was exchanged to safeguard its right to arbitration. In addition, Defendant contends that Plaintiff would still be entitled to discovery under the JAMS arbitration rules.

The Court will first address whether the parties entered into a valid agreement to arbitrate. Where there is evidence of the parties' clear, explicit and unequivocal agreement to arbitrate, the parties will be compelled to arbitrate (*Waldron v Goddess*, 61 NY2d 181, 183 [1984]). Though a person may check off a box asserting that they have read and/or accepted the terms and conditions, this does not mean that they actually read them or even if they did, that they fully understood what they meant. One need only reflect on his or her own experience to know that is the truth. However, it has long been held that ignorance of the law is not an excuse or defense (*Williams v W. Union Tel. Co.*, 93 NY 162, 165 [1883]; *Molloy v City of New Rochelle*, 110 AD 895 [2d Dept 1905]; *Klein v Mechanics' & Traders' Bank*, 145 AD 615, 618 [2d Dept 1911]; *Klingenberg v City of New York*, 164 AD 718, 720 [2d Dept 1914]; *E.K. v State*, 235 AD2d 540, 541 [2d Dept 1997]).

A clickwrap agreement,<sup>6</sup> like the one at issue here, will still be enforceable if there is a reasonable indication of the existence of additional terms where the user is required to affirmatively assent to them (*Brooks v Yang*, 216 AD3d 505, 506 [1st Dept 2023] [internal citation omitted]). This is true even if the additional terms are not readily visible on the same page or screen. Where terms are accessible through hyperlinks, they may be binding and enforceable (*id.* at 506, citing *Meyer v Uber Tech., Inc.*, 868 F3d 66, 75–78 [2d Cir 2017]). New York courts have held that plaintiffs must proceed

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Use and Privacy Policy" (*id.* at ¶¶ 17-18). The words "Terms of Use" and "Privacy Policy" contain hyperlinks (*id.* at ¶ 18).

<sup>6</sup> The Eastern District of New York has defined clickwrap agreements as those online agreements that "require a user to affirmatively click a box on the website acknowledging awareness of and agreement to the terms of service before he or she is allowed to proceed with further utilization of the website" (*Berkson v Gogo LLC*, 97 F Supp 3d 359, 397 [ED NY 2015] [internal quotation marks and citations omitted]).

in accordance with the terms of Revel's Agreement and Terms. In *Weissman v. Revel Transit, Inc.*, the First Department determined that even if the plaintiff did not click on the hyperlinks, he was on inquiry notice and therefore bound by the mandatory arbitration provisions contained in the rental agreement and terms of use (*Weissman v Revel Transit, Inc.*, 217 AD3d 430, 430 [1st Dept 2023]). Similarly, other courts in this state have determined that a plaintiff was on inquiry notice of Revel's terms of use and was therefore, bound to arbitrate when he clicked to accept (*Garner v Revel Transit Inc.*, – NY3d –, 2023 NY Slip Op 23263, \*2 [Sup Ct, NY County 2023] [finding that Revel's notice of the terms and conditions was "reasonably conspicuous and plaintiff's manifestation of assent unambiguous"]; *Williams v Roman Cath. Diocese of Brooklyn & Queens*, 73 Misc 3d 1033, 1037 [Sup Ct, Queens County 2021]). Thus, even if Plaintiff did not click on the hyperlinks, he affirmatively accepted the agreement contained therein when he toggled the button and completed the registration process.

The Court will next address whether Revel's Agreement and Terms affect interstate commerce, making the Federal Arbitration Act applicable and General Business Law 399-c inapplicable in this action. The Federal Arbitration Act provides, *inter alia*, that an arbitration clause or provision in a "contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity" (9 USC § 2). On the one hand, Plaintiff contends that interstate commerce is not implicated here because a user who rents a moped in New York City is restricted from operating the moped in Revel's other service areas. On the other hand, Defendant claims that its contracts affect interstate commerce for several reasons: (1) Revel operates in multiple states; (2) through its internet-based mobile app, users can rent mopeds in different cities; (3) Revel provides cellular and GPS maps and tracking across the nation through its app; and (4) the mopeds are manufactured in China, distributed by an Illinois-based company, and leased to Revel by two companies located in different states.

The Court of Appeals has determined that a contract affects interstate commerce—and thus preempts General Business Law—where several entities or even equipment and services from different states are involved in the transaction (*Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]; see also *Allied-Bruce Terminix Companies, Inc. v Dobson*, 513 US 265, 282 [1995] [noting that interstate commerce is implicated where a business operates in multiple states and utilizes materials to carry out transaction from out-of-state]). This is true even if the parties did not anticipate the contract having an interstate commerce link (*Allied-Bruce*, 513 US at 281 [1995]). Here, the evidence proffered by Defendant is sufficient to establish that interstate commerce is affected (see *Williams v Roman Cath. Diocese of Brooklyn & Queens*, 73 Misc 3d 1033, 1037 [Sup Ct, Queens County 2021] [“Revel’s reliance on partners and suppliers outside the state is sufficient to demonstrate the interstate commerce involved when a customer rents a moped through the Revel App”]). Thus, the Court rejects Plaintiff’s argument that Revel’s mandatory arbitration clause is prohibited by state law.

Accordingly, it is hereby

ORDERED, that Plaintiff’s motion (Mot. Seq. No. 1) is denied in its entirety; and it is further

ORDERED, that Defendant’s motion (Mot. Seq. No. 2) is granted.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

  
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HON. INGRID JOSEPH, J.S.C.  
**Hon. Ingrid Joseph**  
**Supreme Court Justice**