

Marinos v Brahaj

2023 NY Slip Op 34898(U)

April 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 506253/2022

Judge: Carolyn E. Wade

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS HON. CAROLYN E. WADE, J.S.C

-----X
GEORGE MARINOS as Administrator of the Estate of
ANDREAS N. BELLI-MARINOS, Deceased,
JOSEPHINE BELLI-MARINOS, as Administrator of the
Estate of ANDREAS N. BELLI-MARINOS, Deceased,
JOSEPHINE BELLI-MARINOS Individually, and
GEORGE MARINOS Individually,

Index No.: 506253/2022

Motion Seq. No. 1, 2, 3

**DECISION + ORDER ON
MOTION**

Plaintiffs,

-against-

ASTRIT BRAHAJ, FRANK REIG, PAUL SUHEY and
REVEL TRANSIT, INC.,

Defendants.
-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiffs' Motion and Defendants' Motion and Cross-Motion:

<u>Papers</u>	<u>NYSCEF #'s</u>
Order to Show Cause/Notice of Motion and	
Affidavits/Affirmations Annexed.....	18, 19, 22, 23, 58
Cross-Motion and Affidavits/Affirmations.....	42, 43, 44
Answering Affidavits/Affirmations.....	33, 34, 35, 45, 50, 60, 62
Reply Affidavits/Affirmations.....	64, 65

Upon the foregoing papers, and after oral argument, Plaintiffs, GEORGE MARINOS as Administrator of the Estate of ANDREAS N. BELLI-MARINOS, Deceased, JOSEPHINE BELLI-MARINOS, as Administrator of the Estate of ANDREAS N. BELLI-MARINOS, Deceased, JOSEPHINE BELLI-MARINOS Individually, and GEORGE MARINOS, Individually, ("Plaintiffs") move for an order permanently staying arbitration (Mot. Seq. No. 1).

Defendants Revel Transit Inc., Frank Reig and Paul Suhey ("Revel Defendants") cross-move, for an order, for an Order pursuant to CPLR §§ 501, 510(1) and 511, changing the place of trial of this action from Kings County to New York County (Mot. Seq. No. 2).

The Revel Defendants also move for an Order compelling Plaintiffs to arbitrate pursuant to its Terms of Use and Rental Agreement with decedent. Defendant, ASTRIT BRAHAJ (“Brahaj”) opposes arbitration (Mot. Seq. No. 3).

The underlying action arises out of a motor vehicle accident in which, Andreas N. Belli-Marinos (“Decedent”), while operating an electric motor scooter leased from Revel, was fatally struck by Brahaj’s motor vehicle. Plaintiffs-Administrators now seek to recover damages for negligence, pain and suffering, and wrongful death.

Plaintiffs’ Motion to Stay Arbitration and Defendant Revel’s Cross-Motion to Compel
Arbitration (Mot. Seq. 1 and 3)

In support of their motion to permanently stay arbitration, Plaintiffs contend that the Decedent did not sign Revel’s “Moped Rental Agreement, Waiver of Liability and Release” and Revel’s “Terms of Use” (the “Revel Documents”) (NYSCEF Doc. No. 20, Revel Documents, Plaintiffs’ Exhibit “A”). Plaintiffs further argue that as the parents of the Decedent, arbitration is improper because they did not sign the arbitration agreement. Moreover, Plaintiffs contend that they did not affirmatively assume any duties under the arbitration agreement.

In support of Plaintiffs’ motion, Defendant, Brahaj, argues that the arbitration should be stayed on the basis that he was not a party to the agreement, and cannot be bound by it. Brahaj further contends that he has asserted cross-claims against Revel, and is entitled to resolve said claims before this Court.

In support of their cross-motion to compel arbitration and in opposition to Plaintiffs’ motion, Revel contends that the Revel Documents are enforceable under well-settled precedent. To wit, an “electronic click” is sufficient to constitute acceptance of a contract. Revel also argues that Plaintiffs, as Court appointed administrators of the Decedent’s estate, are now bound by the

terms of the arbitration agreement, as successors in interest. Finally, Revel contends that a stay of the of the underlying action would not prejudice Plaintiffs while the arbitration is pending.

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 their disputes, the court must first determine whether the parties entered into a valid arbitration agreement (*see Harriman Group v Napolitano*, 213 AD2d 159, 162 [1st Dept 1995]).

New York has long favored arbitration as a matter of public policy (*Matter of Smith Barney Shearson v. Sacharow*, 91 N.Y.2d 39, 49 [1997]). “A party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence established the parties’ clear, explicit and unequivocal agreement to arbitrate” (*God’s Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc., LLP*, 6 N.Y.3d 371 [2006]).

Generally, clickwrap agreements are enforceable since they necessitate an active role by the user of a website (*Wu v Uber Tech., Inc.*, ___ Misc 3d ___, 2022 NY Slip Op 22388, *20 [2022]). A party’s signature is not required. *Id.* “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]).

Here, Decedent, Andreas N. Marinos, used his mobile device to complete Revel’s sign up screen, which included the Revel Documents. As the Revel Defendants note, the Decedent was required to scroll through the entire rental agreement, and was presented with an opportunity to read the terms while signing up for a Revel rental. The Decedent had to activate toggle buttons to indicate his affirmative acceptance of the agreements to complete the sign up and gain access to Revel’s mopeds. No signature is required in the acceptance of online contracts, thus, Plaintiffs’ contention to this end is unavailing. Moreover, the Decedent was on inquiry notice of the Revel contracts, which required him to scroll through the rental agreement, and click toggle buttons. These actions constituted assent to their terms.

The Court finds that Plaintiffs’ argument that they are not bound by the requirement to arbitrate is unavailing. As the Decedent’s court-appointed administrators, the Plaintiffs have become “representatives of the decedent’s estate” and are thus bound by his agreements, and would also be bound by his debts and liabilities (*Wolf v. Wahba*, 164 A.D.3d 1405 [2d Dept. 2018]) (“[A]s the defendants correctly contend, [a] decedent’s agreement to arbitrate a controversy is binding on the representative of the decedent’s estate.”); quoting *Matter of Kalikow*, 58 A.D. 846 (2d Dept. 2009)). Therefore, Plaintiffs as the representatives of the Decedent’s estate are bound by the contracts and the agreement to arbitrate that Decedent entered into lawfully.

Based upon the foregoing, Plaintiffs’ motion to stay arbitration **DENIED**, and Defendant Revel’s cross-motion to compel arbitration is **GRANTED**.

As to Defendant Brahaj’s opposition, the Court credits his contentions that a non-signatory to an arbitration agreement can not be compelled to arbitrate. “Where the benefits are merely ‘indirect,’ a nonsignatory cannot be compelled to arbitrate a claim” (*Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626, 631 [2013]). Here, no benefit was derived to Defendant, Brahaj, as the agreement was entered into between Decedent and the Revel Defendants. As such, the claims as to Defendant Brahaj are **STAYED** pending the arbitration proceeding.

Lastly, Defendant Revel’s motion to change venue is **DENIED**. The Plaintiffs are compelled to arbitrate their claims; however, the forum selection clause of the Revel Agreement is unenforceable against Brahaj.

Accordingly, it is


ORDERED that Plaintiffs’ motion to stay arbitration is **DENIED** (Mot. Seq. No. 1); and it is further

ORDERED that Revel’s cross-motion to change venue is **DENIED** (Mot. Seq. No. 2); and it is further

ORDERED, Revel’s motion to compel arbitration is **GRANTED** (Mot. Seq. No. 3); and it is further,

ORDERED that this matter shall be marked “stayed” pending the arbitration proceeding. This constitutes the Decision and Order of the Court.

Date: April 20th 2023

ENTER


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