[Cite as *Campinha-Bacote v. AT&T Corp.*, 2017-Ohio-5608.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Avonte D. Campinha-Bacote,	:	
Plaintiff-Appellant,	:	No. 16AP-889 (C.P.C. No. 16CV-3246)
v.	:	(REGULAR CALENDAR)
AT&T Corporation c/o CT Corporation System,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 29, 2017

On brief: *Avonte D. Campinha-Bacote, LLC*, and *Avonte D. Campinha-Bacote*, pro se.

On brief: *Edward L. Bettendorf*, for appellee. **Argued:** *Edward L. Bettendorf*.

APPEAL from the Franklin County Court of Common Pleas

BROWN, J.

{¶ 1} Avonte D. Campinha-Bacote, plaintiff-appellant, appeals from a judgment of the Franklin County Court of Common Pleas in which the trial court granted the motion to stay pending arbitration filed by AT&T Corporation ("AT&T"), defendant-appellee. Although AT&T questions whether they are the proper defendant, the trial court did not address the issue, and AT&T does not pursue the matter any further than bringing it to the court's attention; thus, we shall assume, for the purposes of this appeal, that AT&T is the proper defendant.

{¶ 2} On March 29, 2016, appellant, who resided in California, contacted Pacific Bell Telephone Company ("PacBell"), an entity related to AT&T, to install cable television and internet service at his house, and AT&T scheduled installation for April 4, 2016. Apparently, appellant contacted PacBell on March 30, 2016 and attempted to reschedule the installation for April 2, 2016. PacBell indicated it could not reschedule the appointment but appellant claimed PacBell sent him a notice on April 1, 2016 indicating that it could install the services on April 2, 2016, although PacBell has no record of this change of date.

{¶ 3} On April 2, 2016, AT&T failed to arrive at appellant's home to install the services. Appellant alleged that he called AT&T customer service but customer service representatives hung up on him multiple times. On the same day, April 2, 2016, appellant filed a complaint in Ohio in which he alleged breach of contract, promissory estoppel, negligent misrepresentation, ordinary negligence, and violation of the Ohio Consumer Sales Practices Act. AT&T installed the services at appellant's residence on April 4, 2016 and appellant registered with PacBell and commenced using the services.

{¶ 4} On May 9, 2016, AT&T filed a motion to dismiss appellant's complaint or, in the alternative, to stay the action pending disposition of arbitration. AT&T claimed that in registering for his new cable and internet services, he was required to accept the terms of service over the internet via a "clickwrap agreement." The terms of service required appellant to submit any prior or future dispute to arbitration or small claims court. Appellant countered that he had no knowledge of these terms of service and had not signed any contract or entered any internet "clickwrap agreement" containing an arbitration clause.

{¶ 5} On December 13, 2016, the trial court entered a journal entry in which it granted AT&T's motion to stay pending arbitration. The court found that the arbitration clause, which appellant was required to agree to during the registration and appointment process over the internet, was enforceable and not unconscionable. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

> THE TRIAL COURT ERRED IN CONCLUDING THAT THE ARBITRATION CLAUSE IS ENFORCEABLE.

{¶ 6} Appellant argues in his sole assignment of error that the trial court erred when it stayed his action pending arbitration. Appellate courts traditionally use the abuse of discretion standard of review when reviewing an appeal from a motion to dismiss or stay pending arbitration. *See Peters v. Columbus Steel Castings, Co.*, 10th Dist. No. 05AP-308, 2006-Ohio-382; *Pyle v. Wells Fargo Fin.*, 10th Dist. No. 05AP-644, 2005-Ohio-6478, ¶ 11. This court has held that the de novo standard of review is proper when the appeal presents a question of law. *Peters*, citing *von Arras v. Columbus Radiology Corp.*, 10th Dist. No. 04AP-934, 2005-Ohio-2562, ¶ 8; *Dunkelman v. Cincinnati Bengals, Inc.*, 158 Ohio App.3d 604, 2004-Ohio-6425, ¶ 18-20 (1st Dist.).

{¶ 7} Courts generally encourage arbitration as a method to settle disputes. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464 (1998). "A presumption favoring arbitration arises when the claim in dispute falls within the scope of the arbitration provision." *Id*. at 471. "An arbitration clause in a contract is generally viewed as an expression that the parties agree to arbitrate disagreements within the scope of the arbitration clause, and, with limited exceptions, an arbitration clause is to be upheld just as any other provision in a contract should be respected." *Id*. " 'An arbitration agreement will be enforced unless the court is firmly convinced that (1) the clause is inapplicable to the dispute or issue in question or (2) the parties did not agree to the clause.' " *Doe v. Vineyard Columbus*, 10th Dist. No. 13AP-599, 2014-Ohio-2617, ¶ 14, quoting *Estate of Brewer v. Dowell & Jones, Inc.*, 8th Dist. No. 80563, 2002-Ohio-3440, ¶ 7, citing *Ervin v. Am. Funding Corp.*, 89 Ohio App.3d 519 (12th Dist.1993).

{¶ 8} The court must first determine whether the parties agreed to submit a matter to arbitration, a question typically raising a question of law for the court to decide. *Id*. Arbitration is a matter of contract and a party cannot be required to submit a dispute to arbitration when it has not agreed to do so. *Academy of Med. v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, ¶ 11. Thus, a court must " 'look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.' " *White v. Equity, Inc.*, 191 Ohio App.3d 141, 2010-Ohio-4743, ¶ 19 (10th Dist.), quoting *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

{¶ 9} A valid and enforceable contract requires an offer by one party and an acceptance of the offer by another party. *Huffman v. Kazak Bros.*, 11th Dist. No. 2000-L-

152 (Apr. 12, 2002), citing *Camastro v. Motel 6 Operating, L.P.*, 11th Dist. No. 2000-T-0053 (Apr. 27, 2001). There must be a meeting of the minds to create a proper offer and acceptance. *Id*. "In order for a meeting of the minds to occur, both parties to an agreement must mutually assent to the substance of the exchange." *Miller v. Lindsay-Green, Inc.*, 10th Dist. No. 04AP-848, 2005-Ohio-6366, ¶ 63. Thus, the parties must have a " 'distinct and common intention which is communicated by each party to the other.' " *Huffman* quoting *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt.*, 87 Ohio App.3d 613, 620 (8th Dist.1993). Therefore, " '[i]f the minds of the parties have not met, no contract is formed.' " *Id*.

{¶ 10} In the present case, appellant argues the trial court's decision relies on the fact that he received a copy of the terms of service, had knowledge of the terms of service, and/or agreed to the terms of service. However, appellant asserts, he had no knowledge of the terms of service and never agreed to the terms of service prior to, during, or after registering for service with AT&T. He alleges that AT&T failed to provide the trial court with any evidence that he received, electronically or otherwise, the terms of service at any time before or during the registration process. Thus, appellant asserts, because he never agreed to any contractual terms, the trial court's decision must be reversed.

{¶ 11} We disagree with appellant's arguments. Initially, there is no dispute that the broad language in the terms of service requires arbitration for any claims arising out of or relating to any aspect of the relationship between the parties both before and after the agreement, and we need not quote the extensive provisions in the agreements herein. Suffice it to say, the terms of service are clear, and several warnings appear in all-capital, bold print that explain the agreement requires the use of arbitration or small claims court to resolves disputes, rather than trials or class actions, and the customer must accept the terms of service as a condition of enrolling in, activating, using, or paying for voice, internet, and TV services.

{¶ 12} AT&T attached to its brief in support of its motion to dismiss or stay an affidavit from its assistant secretary and in-house counsel, in which AT&T's counsel averred that he had worked closely for over 30 years with AT&T's telecommunications services, including its internet and TV services. He averred that appellant would have been required to accept AT&T's terms of service in registering over the internet to access

AT&T's voice, internet, and TV services. Counsel further averred that appellant would not have been able to access the services without accepting the terms of service during registration. Appellant admitted in his own affidavit attached to his brief in opposition to AT&T's motion to dismiss or stay that he remembered completing the registration process online.

{¶ 13} Ohio courts have held that clicking a "clickwrap agreement" is an acceptable method to manifest assent to the terms of an agreement. *Ranazzi v. Amazon.com, Inc.*, 6th Dist. No. L-14-1217, 2015-Ohio-4411, ¶ 12 (granting motion to stay pending arbitration based on an arbitration clause found in a clickwrap agreement), citing *Hancock v. AT&T Co.,* 701 F.3d 1248, 1256 (10th Cir.2012), citing *Smallwood v. NCSOFT Corp.*, 730 F.Supp.2d 1213, 1226 (D.Haw.2010). Courts have also upheld such agreements where the disputed terms were contained in a hyperlink. *Id*. at ¶ 13, citing *Fteja v. Facebook, Inc.*, 841 F.Supp.2d 829 (S.D.N.Y.2012). This is so even where the user has failed to actually review the terms of use prior to manifesting assent. *Id*., citing *Fteja* at 838.

{¶ 14} Here, appellant's affidavit attached to his brief in opposition to AT&T's motion to dismiss or stay does not compel a conclusion that he did not assent to the terms of service. Although appellant averred in his affidavit that, to the best of his knowledge and recollection, he never had an opportunity to review the terms of service prior to or during the registration process, he also averred that he remembered completing the registration process online. Appellant admitted in his brief in opposition that, especially because he is an attorney, he is very aware of "clickwrap agreements" and makes it a point to read the terms of service of any service he signs up for, yet he claims he was not presented with an opportunity to review the terms of service in the present case during his online sign up. However, appellant's lack of knowledge or memory in agreeing to the terms of service is disproven by the affidavit of AT&T's attorney that appellant would not have been able to register or access his services without accepting the terms of service during registration. Appellant's self-serving affidavit, without any other supporting evidence, is insufficient. For these reasons, we find the trial court did not err when it granted AT&T's motion to stay pending arbitration. Therefore, appellant's assignment of error is overruled.

{¶ 15} Accordingly, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and HORTON, JJ., concur.
