

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00265-CV

IN RE EBAY, INC.

Original Proceeding

MEMORANDUM OPINION

The trial court refused to enforce a forum-selection clause contained in a contract between relator eBay, Inc. and real party in interest Roddy Mordecai Richards. The claims against eBay arise out of a contract that contains a valid forum-selection clause and Richards did not satisfy his burden to establish that enforcing the forum-selection clause would be unconscionable. We conditionally grant mandamus relief.

Richards alleges that in 2007 he purchased a vehicle through eBay in a transaction covered by eBay's Vehicle Protection Program. Richards never received the vehicle, and he later discovered that the purported seller, Dean E. Stull, was not the registered owner of the vehicle. Richards sued eBay, Stull, and the owner, Craig M. Mancin, in the county where Richards resides. eBay contends the User Agreement, to which Richards agreed

when he registered with eBay requires that suits against eBay must be filed in Santa Clara County, California. The Texas Supreme Court has held that “[f]orum-selection clauses are generally enforceable and presumptively valid.” *In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010). Mandamus relief may be granted if the trial court improperly refuses to enforce a forum-selection clause. *In re ADM Investor Servs., Inc.*, 304 S.W.3d 371, 374 (Tex. 2010).

Richards contends that the trial court did not abuse its discretion because eBay merely produced an exemplar User Agreement that is effective for all users as of September 29, 2009. However, the evidence before the trial court nevertheless established the existence of a forum-selection clause in eBay’s User Agreement with Richards.

The exemplar User Agreement provides that “any claim or dispute you may have against eBay must be resolved exclusively by a state or federal court located in Santa Clara County, California[.]” eBay submitted the exemplar User Agreement through the affidavit of David J. Mandella. According to Mandella, before using eBay’s services an individual must register and accept the User Agreement, and an individual’s acceptance of the User Agreement must be confirmed by entering a code supplied to the user through an e-mail. The User Agreement allows eBay to amend the User Agreement by posting the revised terms on its website. According to Mandella, “eBay’s User Agreement contains a dispute resolution provision requiring disputes arising out of the User Agreement or

eBay's services to be filed in an appropriate court in Santa Clara County, California[.]” Richards is a registered user of eBay's services.

Richards neither objected to Mandella's affidavit nor challenged the accuracy of the exemplar contract in his own affidavits. The affidavits Richards submitted to the trial court did not assert that his User Agreement varied in any material respect from the exemplar agreement, nor did the affidavits controvert the facts contained in Mandella's affidavit. Instead, Richards provided a supplemental affidavit in which he states “I was never aware that if I had a dispute with e-Bay that it would have to be resolved in Santa Clara County, California.” Richards did not question the existence of a forum-selection clause during the hearing, and by referring to a California case in which the court “looked at the very wording which is the exact same that is in the user agreement” at issue in this case, counsel for Richards focused on the unconscionability of the User Agreement. Because eBay's evidence establishes that its User Agreement with Richards contains a forum-selection clause, the trial court could not deny eBay's motion on the argument Richards advances before this Court that eBay's exemplar copy of the agreement failed to prove the existence of the forum-selection clause. Furthermore, “simply being unaware of a forum-selection clause does not make it invalid.” *In re Int'l Profit Assocs., Inc.*, 286 S.W.3d 921, 924 (Tex. 2009).

Richards also argues that eBay cannot rely on the forum-selection clause in the User Agreement because eBay denies that his purchase occurred on its website. In determining whether a forum-selection clause applies to a particular case, we consider the

language in the agreement and determine whether the substance of the plaintiff's claims fall within the scope of the forum-selection clause. *See In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 677 (Tex. 2009); *see also Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 (Tex. App.–Houston [14th Dist.] 2007, pet. denied). Richards alleges that eBay committed deceptive trade practices by representing to Richards that the sale of the vehicle was covered by the eBay Vehicle Purchase Protection, eBay breached the Vehicle Protection Program warranty, and eBay breached its contract by failing to reimburse Richards for the cost of the vehicle in accordance with its Vehicle Purchase Protection program. The forum-selection clause states that it covers “any claim or dispute you may have against eBay[.]” According to Richards’s own pleadings, the Vehicle Purchase Protection program is a service offered by eBay to consumers who purchase vehicles using eBay’s services. Thus, Richards’s claims fall within the scope of the forum-selection clause without regard to the defensive theories asserted by eBay.

The party seeking to avoid the forum-selection clause bears the burden to establish that “(1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial.” *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231-32 (Tex. 2008). Richards contends the trial court resolved a factual dispute over whether enforcement of the forum-selection clause in this case is unreasonable or unjust. eBay

contends there was no evidence before the trial court to support a finding that enforcement was unreasonable or unjust.

In the trial court, Richards presented his own affidavits to support his argument that enforcing the forum-selection clause would be unjust. According to Richards, three of the parties and “most” of the witnesses are in Texas. He argues that “forcing a man of modest means to move an \$18,000 case to the other side of the country would be unfair and unjust.” He contends it will be impossible for him to find an attorney to represent him in California.

Texas law indicates that mere expense will not render enforcement of a forum-selection clause unjust. “By entering into an agreement with a forum-selection clause, the parties effectively represent to each other that the agreed forum is not so inconvenient that enforcing the clause will deprive either party of its day in court, whether for cost or other reasons.” *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d at 234.

The choice-of-law clause in the User Agreement provides that California law governs the agreement. Richards contends that the User Agreement is unconscionable under the precedent established in *Comb v. Paypal, Inc.*, a case in which the federal district court refused to enforce an arbitration clause under California law. 218 F. Supp. 2d 1165 (N.D. Cal. 2002).

In *Comb*, PayPal, Inc. sought to compel individual arbitration in a nationwide class action suit for injunctive relief concerning PayPal’s fraud investigation practices and procedures. *Comb*, 218 F. Supp. 2d at 1166-67. As a contractual defense,

unconscionability may apply to an arbitration provision. *Id.* at 1172. The district court held the User Agreement met the criteria for procedural unconscionability under California law because the amount of the average PayPal transaction was \$55.00 and there was a factual dispute as to whether PayPal’s competitors offered their services without requiring customers to enter into arbitration agreements. *Id.* at 1173. The district court ruled that substantive unconscionability was also shown by the lack of mutuality of remedies between PayPal and its customers, by a prohibition against consolidation of claims under circumstances where most claims will be too small to pursue individually, and because the arbitration clause required commercial arbitration and the \$5,000 cost of arbitration would be shared *pro rata*. *Id.* at 1173-76. The district court concluded that it would be unconscionable to require “individual consumers from throughout the country to travel to one locale to arbitrate claims involving such minimal sums.” *Id.* at 1177.

This case does not share the attributes used to support substantive unconscionability in *Comb*. For instance, the User Agreement in *Comb* permitted PayPal to unilaterally freeze accounts and retain funds that it alone determined were subject to dispute. *Id.* at 1175. No similar provision is found in eBay’s User Agreement. Additionally, Richards has not sought to consolidate his claims with the claims of other users, and his claim is not too small to pursue individually. Although Richards states that he is “not a wealthy man” and the expense of traveling to California would be more than he could afford, beyond these conclusory statements Richards provided no information about his available resources, the estimated expense of pursuing the case in California as

opposed to pursuing the same case in Texas, or his efforts to obtain counsel in California. Although attending a trial in California would obviously add to Richards's expense in pursuing his claims, the amount in controversy is at least \$18,000, and other than his conclusory statements, nothing in the mandamus record suggests that any unrecoverable increased costs he may incur that are associated with pursuing the case in a California forum would consume his potential recovery.

We hold that Richards failed to overcome the presumption of validity of the forum-selection cause, and that Richards did not demonstrate that enforcement of the forum-selection clause would be unconscionable under either Texas or California law. *See In re Lyon Fin. Servs., Inc.*, 257 S.W.3d at 231-32. Under these circumstances, the trial court was not authorized to refuse eBay's request to enforce the parties' contract. Accordingly, we conditionally grant mandamus relief. We are confident that the trial court will promptly vacate its order of March 11, 2010, and that the trial court will proceed to enforce the parties' forum-selection clause in accordance with this opinion. The writ of mandamus shall issue only if the trial court fails to comply within a reasonable time.

PETITION CONDITIONALLY GRANTED.

PER CURIAM

Submitted on June 17, 2010
Opinion Delivered July 8, 2010
Before Gaultney, Kreger, and Horton, JJ.