09-1071

United States Court of Appeals

for the

First Circuit

BENJAMIN LIGERI,

Plaintiff-Appellant,

– v. –

YOUTUBE, LLC; GOOGLE, INC.

Defendants-Appellees.

On Appeal from the United States District Court for the District of Massachusetts

APPELLEES' BRIEF

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FED R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants Appellees, by and through their undersigned counsel, state that:

YouTube, LLC is a wholly-owned subsidiary of Google Inc. YouTube, Inc. no longer exists as a corporate entity. Google Inc. is publicly traded on the New York Stock Exchange. No publicly traded company owns 10% or more of the stock of Google Inc.

Dated: May 21, 2009

/s/

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INTRODUCTION

This is a simple contract case. Appellee YouTube LLC ("YouTube") offers internet users around the world the opportunity to upload and share their videos across the internet. In order to offer this free service, YouTube requires that users agree to a limited set of terms and conditions governing the use of YouTube (the "Terms of Use"). Appellant Benjamin Ligeri ("Mr. Ligeri") accepted this agreement and took its benefits to make extensive use of YouTube's free service. Now, Mr. Ligeri wishes to avoid the provision he does not like – a mandatory forum selection clause that provides for exclusive jurisdiction in Northern California for disputes relating to the use of YouTube.

The district court refused to support Mr. Ligeri's attempts to "pick and choose what parts of the agreement" he wished to accept and dismissed the case because Mr. Ligeri brought his claims in the wrong court. App.299:19-21.[1] Because Mr. Ligeri is bound by his agreement, the district court's dismissal should be affirmed.

STATEMENT OF THE CASE

On July 22, 2008, Mr. Ligeri mailed a letter to a California process server attaching a copy of his complaint before filing it in a court of law. App.148-149. After receiving the copy, Google Inc. and YouTube LLC's ("Appellee's") outside

[1] Citations to Appellees' Appendix are referenced as "App.[page number]." Paragraph or lines numbers are included in the citation when applicable.

counsel contacted Mr. Ligeri on August 6, 2008 and specifically informed Mr. Ligeri of the existence of the choice of law provisions and the applicable forum selection clause in YouTube's Terms of Use. App.145 ¶ 4. Mr. Ligeri was informed that, pursuant to the Agreement, he was required to file his complaint in California. *Id*. Nevertheless, on the next day, August 7, 2008, Mr. Ligeri filed an unsigned copy of his complaint in the United States District Court for the District of Massachusetts. App.3, 7. He then submitted a signature page to the Complaint on August 26, 2008.[2] App.4, 124-125.

On October 31, 2008, Appellees filed a motion to dismiss, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, seeking to enforce the forum selection clause in the parties' agreement. After full briefing, the district court heard oral arguments on the motion on December 30, 2008. Ruling from the bench, the court stated, "the case is brought in the wrong court. It is to be brought in the court of competent jurisdiction in San Mateo County of California. It was not, and, for those reasons, may not properly proceed here." App.302:14-20. The district court offered Mr. Ligeri the opportunity to transfer the case to the Northern District of California. App.301:9-19. Mr. Ligeri did not accept this option, and

[2] YouTube LLC and Google Inc. agreed to accept service of Mr. Ligeri's Complaint on September 23, 2008. App.268. The motion to dismiss was brought on behalf of YouTube LLC and Google Inc. The other named defendants – business names that are not corporate entities or persons identified by their first names – have not been served and did not accept service of the Complaint.

consequently, the court granted Appellees' motion to dismiss. App.302:16-17. Mr. Ligeri's appeal followed.

STATEMENT OF FACTS

YouTube.com, launched by appellee YouTube in December 2005, is a website that allows users to view and upload video content, free of charge. App.127 ¶ 2. Users who wish to upload their own videos are required to sign up for a YouTube account. *Id*. at ¶ 3.

Appellant Benjamin Ligeri operates a number of accounts on YouTube, including his two primary channels, "Bennybaby" and "ProfessorCarlton," created in March 2006 and March 2007, respectively. App.8 ¶ 1.1(b); App.14 ¶ 3.8(a); App.270 ¶ 3. In addition to his two primary accounts, Mr. Ligeri has opened at least seven other accounts. App.53 ¶ 13.5.

At the time Mr. Ligeri created "Bennybaby" and "ProfessorCarlton" in 2006 and 2007, the YouTube sign-up screen required that, prior to creating a YouTube account, a prospective user must fill out certain user information, agree to YouTube's terms of use and privacy policy and then take an affirmative step of selecting a button to create a YouTube account. App.270 ¶ 5. More specifically, when Mr. Ligeri created his YouTube accounts, the account creation webpage contained two conditions just above the "Sign Up" button: "I certify I am over 13 years old" and "I agree to the terms of use and privacy policy." *Id*. The terms of

use and privacy policy were both underlined and contained hyperlinks that connected the prospective user directly to the Terms of Use and Privacy Policy then in effect. *Id*. at ¶ 4. Mr. Ligeri confirmed that this language was on the account creation page when he affirmatively created his YouTube accounts. App.297:1-16.

In addition, every time a user then uploads a video to his account, the user is reminded of their agreement by a warning stating, "By clicking 'Upload Video' you are representing that this video does not violate YouTube's Terms of Use." App.128 ¶ 6. Mr. Ligeri has uploaded over a thousand videos to his YouTube accounts. App.14 ¶ 3.7.

Since the inception of the website, the Terms of Use have included a mandatory forum selection clause that provides, "Any claim or dispute between you and YouTube that arises in whole or in part from the YouTube website shall be decided exclusively by a court of competent jurisdiction located in San Mateo County, California."[3] App.127 ¶ 4.

YouTube is a wholly owned subsidiary of Google Inc. ("Google"), which is also an Appellee in this action. *Id*. at ¶ 1.

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[3] The Terms of Use also contain a choice of law provision designating "the internal substantive laws of the State of California" as the governing body of law. App.134 ¶ 10; App.140 ¶ 14. Plaintiff has not identified any material differences between the laws of this forum and California. Without waiving the choice of law provision, appellees do not contest the choice of law solely for purposes of this appeal, and will cite to cases from both this forum and California when applicable.

SUMMARY OF ARGUMENT

Mr. Ligeri voluntarily accepted the Terms of Use when he created his online accounts. The Terms of Use contain a forum selection clause requiring that any dispute related to Mr. Ligeri's use of YouTube be decided in California, where YouTube is headquartered. This Court should therefore affirm the dismissal of Mr. Ligeri's claims because, under the forum selection clause in the Terms of Use, Mr. Ligeri initiated his action in the wrong forum.

ARGUMENT

A. Standard of Review

The dismissal of a claim under Fed R. Civ. Proc. 12(b)(6) is reviewed *de novo*. *Edwards v. John Hancock Mut. Life Ins. Co*., 973 F.2d 1027, 1028 (1st Cir. 1992). This same standard applies to actions dismissed under Rule 12(b)(6) based on a forum selection clause. *Lambert v. Kysar*, 983 F.2d 1110, 1112 (1st Cir. 1993). However, deference is accorded to the district court's findings of fact. *Yeboah-Sefah v. Ficco*, 556 F.3d 53, 80 (1st Cir. 2009) ("the trial court made several factual findings relevant to the instant claim to which, even when reviewing the legal issues *de novo*, we are nevertheless required to defer").

B. Discussion of Issues

a. The Terms of Use Constitute a Valid and Binding Agreement Between Mr. Ligeri and YouTube.

Because Mr. Ligeri accepted YouTube's offer for an online account, YouTube's Terms of Use govern the relationship between the parties. It is a basic tenet of contract law that "a contract is formed upon acceptance of an offer." *Alison H. v. Byard*, 163 F.3d 2 (1st Cir. 1998). Under Massachusetts law, "[w]here the wording of the contract is unambiguous, the contract must be enforced according to its terms." *Edmonds v. United States*, 642 F.2d 877, 881 (1st Cir.1981); *see also Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (plain language of contract should be given effect). Absent fraud, it is of little consequence whether the offeree actually read the terms of the agreement which he voluntarily signed. *Farrell v. Chandler, Gardner & Williams, Inc*., 252 Mass. 341, 345 (Mass. 1925) (plaintiff bound by agreement, given to her "folded over," which she signed but did not read); *Commerce Bank & Trust Co. v. Hayek*, 46 Mass. App. Ct. 687, 693 (1999) (co-signor on promissory note bound to note he voluntarily signed but did not examine); *see also Powers v. Dickson, Carlson & Campillo*, 54 Cal. App. 4th 1102, 1109 (Cal. App. 2 Dist. 1997) (plaintiff bound by arbitration agreement she did not read or fully understand).

Despite his current contentions to the contrary, Mr. Ligeri entered into a valid contract with Appellees, and thus he should be held to its terms.[4] In 2006 and 2007, when Mr. Ligeri created his primary YouTube accounts, the sign up process explicitly required agreement to the Terms of Use before hitting the "Sign Up" button. App.270 ¶ 4 ("both the March 2006 and March 2007 account creation pages expressly require the account holder to 'agree to the terms of use and privacy policy' in order to create a YouTube account") (underline in original). Thus, when Mr. Ligeri initiated his accounts, he voluntarily entered into a contract with YouTube, embodied in the Terms of Use.

Even Mr. Ligeri's own statements at the district court hearing affirmed the existence of a binding contract between the parties. Mr. Ligeri acknowledged that he signed up for YouTube accounts. App.297:1-13; *see also* App.8 ¶ 1.1(b). He further conceded that "I agree to the terms of use" is on the sign-up screen. App.297:1-16. Finally, he admitted that "you have to click the signup button" to proceed further with creating an account and submitting videos. App.298:12-19. Given Mr. Ligeri's own admissions, the district court was entirely correct to state,

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[4] Online agreements are subject to traditional interpretations of contract law. *See Register.com Inc. v. Verio, Inc*., 356 F.3d 393 (2d Cir. 2004) ("While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract. It is standard doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of terms, which accordingly become binding on the offeree.").

"[f]rankly, I can't see any way to say that you're not subject to the terms of use here." App.299: 3-5. Thus, Mr. Ligeri should be held to the requirements of the contract that require the case to be adjudicated in California.

b. Mr. Ligeri's Claims That He Did Not Accept the Contract Lack Merit.

Mr. Ligeri's opening appellate letter protests the district court's decision on various grounds, each of which lack merit. Mr. Ligeri claims that he should not be bound to the contract because he did not read the Terms of Use before creating his multiple accounts. Appellant's Opening Brief (AOB) at 1-2; *see also* App.297:21-23. However, failure to read an agreement does not exempt a party from his obligations. *Commerce Bank, supra*, 46 Mass. App. Ct. at 693; *Stewart v. Preston Pipeline, Inc.*, 134 Cal. App. 4th 1565, 1587 (Cal.App. 6 Dist. 2005) ("Plaintiff's opposition – based upon nothing more than his claim that he had not read or understood the agreement before signing it – raised no triable issue on the question of mutual assent."); *see also Feldman v. Google, Inc*, 513 F.Supp.2d 229 (E.D. Penn. 2007) ("failure to read an enforceable clickwrap agreement, as with any binding contract, will not excuse compliance with its terms").

Mr. Ligeri also suggests that the Terms of Use were hidden from him and that he was forced to "click it without reading it." AOB at 2. This allegation also lacks merit. It was rejected by the District Court and contradicts Ligeri's statements at the hearing in which he admitted that the express language signifying

agreement to the Terms of Use was on the account creation screen when Mr. Ligeri chose to create his accounts. App.297:1-16.[5] Additionally, the unrebutted evidence shows that a hyperlink to the "terms of use" was just above the "Sign Up" button when Mr. Ligeri created his accounts and that this link directly connected the user to the Terms of Use in effect. *See* App.270 ¶ 4 ("The code for the account creation pages as of March 2006 and March 2007 provides a link to the then-existing Terms of Use. The Terms of Use are linked to from the phrase "terms of use" on the account creation page."). The unrebutted evidence also shows that a user cannot create a YouTube account without first going through the account creation page and without first having to "agree to the terms of use." *Id*. ("As shown by Exhibit A and B, both the March 2006 and March 2007 account creation pages expressly require the account holder to "agree to the terms of use and privacy policy" in order to create a YouTube account"). And, there are no allegations or evidence that Mr. Ligeri was coerced into creating YouTube accounts. Rather, all Mr. Ligeri's allegations suggest that he willingly, even enthusiastically, created YouTube accounts and submitted the video content that is the subject of his claims against YouTube. App.14 ¶ 3.7; App.17 ¶ 3.18.

[5] At the hearing, after admitting that the hyperlink connecting a prospective user to the Terms of Use was on the relevant sign-up screen, Mr. Ligeri then averred that he could not recall whether the language was on the screen when he signed up for his account. App.297:14-20. The Court concluded that it was. App.297:21-23.

Mr. Ligeri's theories that he should not be bound to the Terms of Use were soundly rejected in a similar case, *Feldman v. Google*, 513 F.Supp.2d 229 (E.D.Penn. 2007). In *Feldman*, the plaintiff claimed that a forum selection clause in Google's AdWords agreement was unenforceable because he did not assent to the terms of an online agreement. *Id*. at 235. To open an AdWords account, Feldman had to go through a series of steps in a sign-up process, which included agreement to a set of terms and conditions. *Id*. at 233. The court dismissed Feldman's argument that there was no meeting of the minds because "a reasonably prudent internet user would have known of the existence of terms in the AdWords Agreement." *Id*. at 238. Further, Feldman's "failure to read the Agreement, if that were the case, does not excuse him from being bound by his express agreement." *Id.* Thus the court enforced the forum selection clause in the AdWords agreement and transferred the case to the agreed-upon forum. *Id*. at 249.

Similarly, Ligeri had reasonable notice of the Terms of Use. The underlined hyperlink was just above the "Sign Up" button. *See* App.270-276. That Ligeri may have chosen not to read the applicable terms does not release him from abiding by the forum selection clause contained within that agreement. *See Feldman*, *supra*, 513 F.Supp.2d at 249.

By his own account, Mr. Ligeri has been able to share his videos with millions of viewers, free of charge, on YouTube.com. App.66 ¶ 13.52. Mr. Ligeri

has thus taken advantage of the benefits of his relationship with YouTube, and despite his current protests, he should be held to the Terms of Use governing that relationship.

c. The District Court Properly Dismissed Mr. Ligeri's Claims Based on the Forum Selection Clause

Because Mr. Ligeri accepted the Terms of Use, the district court was correct to enforce the forum selection clause contained within that agreement. Forum selection clauses are routinely enforced as long as the terms are reasonable. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (upholding the validity of a reasonable forum selection clause on the back of a passenger's ticket); *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385 (1st Cir. 2001) (enforcing boilerplate forum selection clause in employment contract that was not unreasonable nor unjust despite unequal bargaining power); *Hughes v. McMenamon*, 204 F.Supp.2d 178 (D.Mass. 2002) (dismissal of claims based on a reasonable forum selection clause in AOL's online agreement); *Smith, Valentino & Smith, Inc. v. Superior Ct.*, 17 Cal.3d 491, 496 (Cal. 1976) (forum selection clauses are valid and enforceable absent a showing that the clause is unreasonable).

Mr. Ligeri has not brought forth any evidence or allegations that the forum selection clause in the Terms of Use is unreasonable. Moreover, the Northern District of California provides a sufficient forum where Mr. Ligeri's claims could be fairly and adequately heard. *See Cambridge Biotech Corp. v. Pasteur Sanofi*

Diagnostics, 433 Mass. 122, 130-131 (Mass. 2000) ("[A]ction brought contrary to selected forum will generally be dismissed 'unless the plaintiff shows that the chosen forum is no longer available or could not be expected to grant him a fair hearing.'").

Furthermore, a number of other courts that have considered Appellees' mandatory forum selection clauses have dismissed or transferred actions where plaintiffs brought suits outside of California. *See Bowen v. YouTube*, No. C08-505 OFDB 2008 WL 1757578 (W.D. Wash. 2008) (dismissed action of pro se plaintiff based on same forum selection clause at issue here); *Person v. Google Inc.*, 456 F.Supp.2d 488 (S.D.N.Y. 2006) (transfer of complaint to Northern District of California based on Google's AdWords agreement); *Digital Envoy, Inc. v. Google Inc.*, 319 F.Supp.2d 1377 (N.D. Ga. 2004) (motion to transfer granted based on forum selection clause); *Feldman*, *supra*, 513 F.Supp.2d 229 (transferring matter to Northern District of California based on Google's AdWords agreement).

There is nothing materially distinguishable about the forum selection clause in this case. Like the cases cited above, the Terms of Use require Mr. Ligeri to file in the Northern District of California, which is the court of competent jurisdiction for San Mateo County. App.127 ¶ 4. The district court properly dismissed the case on this basis after Mr. Ligeri refused the opportunity to transfer his case to California.

CONCLUSION

Mr. Ligeri's opening appellate letter suggests that "the effect of Judge Woodlock's ruling at the Massachusetts trial court level would be to destroy all contract law issued by the United States Supreme Court and replace it with utter tyranny." AOB at 2. In fact, the district court did nothing more than uphold basic tenets of contract law that parties are bound by their agreements, regardless of whether they later decide that they do not like the terms. Appellees respectfully request that the Court follow those principles and affirm the district court's decision.

Respectfully submitted,

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Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

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Dated: May 21, 2009

Certificate of Service

I hereby certify that on May 21, 2009, a true copy of the foregoing was served on Plaintiff/Appellant Benjamin Ligeri via overnight mail. An additional copy was sent electronically addressed to admin@betterstream.com.

/s/

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