Khowala v. Vivint Smart Home, Inc. et al Doc. 25

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Pratik Khowala,

Plaintiff,

-against-

Vivint Smart Home, Inc. and Vivint, Inc.,

Defendants.

23 Civ. 1068 (AT)

ORDER

ANALISA TORRES, District Judge:

Plaintiff, Pratik Khowala, brings this action against Defendants, Vivint Smart Home, Inc. and Vivint, Inc. (collectively, "Vivint"), alleging negligence, products liability, and breach of contract following a burglary at Khowala's home in which his "expensive watch collection" was stolen because "the security system installed by [] Vivint" failed to alert law enforcement. Compl. ¶¶ 1, 22–42, ECF No. 1; *see generally id.* Vivint now moves to compel arbitration and stay the proceedings pursuant to the Federal Arbitration Act (the "FAA"). Def. Mem. at 1, ECF No. 17.

For the reasons stated below, the motion to compel arbitration is DENIED without prejudice to renewal.

BACKGROUND

In August 2016, Khowala hired Vivint to install a security system in his home and to periodically inspect and maintain the security system. Compl. ¶¶ 10, 16. Khowala alleges that on July 7, 2022, his home was burglarized when it was broken into "via the glass door in the rear of [the] home," and that "the thieves were able to easily steal [his] watch collection." *Id.* ¶¶ 18–19. He further claims that the alarm system was properly turned on but failed to alert law enforcement because Vivint had negligently installed the glass-break detectors. *Id.* ¶ 18.

Vivint argues that the instant dispute is governed by two agreements between the parties: an August 2016 purchase and service agreement (the "2016 PSA") and a subsequent purchase and

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service agreement executed a week after the burglary on July 15, 2022 (the "2022 PSA"). Def. Mem. at 1–3. Both agreements mandate arbitration for claims, including tort claims, arising out of the parties' contractual relationship. *See* 2016 PSA ¶ 19, ECF No. 17-2; 2022 PSA ¶ 19, ECF No. 17-4.

Vivint has produced an executed copy of the 2022 PSA. However, it has not produced an executed copy of the 2016 PSA, and the parties dispute whether Khowala ever received or executed it. Khowala states that he "do[es] not have a copy of the 2016 PSA . . . and was never provided a copy of it when [he] first engaged Vivint to install [his] home security system in 2016 or any other time thereafter." Khowala Decl. ¶ 4, ECF No. 18-1. However, Bryan Brothers, Vivint's director of service revenue, claims that based on his "diligent review of [] Khowala's account history with Vivint" and his knowledge of Vivint's client-onboarding and system-installation processes, Khowala "received and executed a PSA identical to" the copy attached to Brothers's declaration. Brothers Decl. ¶ 10, ECF No. 17-1.

In 2016, at the time Khowala's system was installed, Vivint used a third-party call center to enroll new customers and schedule Vivint technicians to install their home security systems. *Id.* ¶ 9. During installations, technicians used a software called "Tech Genie," which "required the technicians to complete an installation task list." *Id.* One item on that list was "obtain[ing] a signed and executed PSA from the customer." *Id.* Having reviewed Khowala's account history, Brothers states that the third-party call center scheduled a Vivint technician to install Khowala's security system; that the Vivint technician assigned to install the home security system "completed the Tech Genie task list"; and that, therefore, "Khowala received and executed a PSA identical to the form attached" to his declaration. *Id.* ¶ 10.

DISCUSSION

I. Legal Standard

The FAA provides that arbitration agreements in contracts involving interstate commerce

"shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA reflects a "federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quotation marks omitted).

Under the FAA, parties can petition a district court for an order directing that "arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. The district court must stay proceedings once it is "satisfied that the parties have agreed in writing to arbitrate an issue or issues underlying the district court proceeding." *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74 (2d Cir. 1997) (quoting *McMahan Sec. Co. v. Forum Cap. Mkts. L.P.*, 35 F.3d 82, 85 (2d Cir. 1994)); *see* 9 U.S.C. § 3. The Court is required to "direct[] the parties to proceed to arbitration in accordance with the terms of the [arbitration] agreement[,]" provided that there is no issue regarding its formation or validity. 9 U.S.C. § 4; *Alfonso v. Maggies Paratransit Corp.*, 203 F. Supp. 3d 244, 246 (E.D.N.Y. 2016).

To determine whether parties have agreed to arbitrate a dispute, "courts consider two questions: (1) whether a valid agreement to arbitrate under the contract in question exists and (2) whether the particular dispute in question falls within the scope of that arbitration agreement." *Spinelli v. Nat'l Football League*, 96 F. Supp. 3d 81, 99 (S.D.N.Y. 2015). The initial question of whether a valid "agreement exists between the parties . . . is determined by state contract law." *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 73–74 (2d Cir. 2017).[1]

The party compelling arbitration "bears an initial burden of demonstrating that an agreement to arbitrate was made." *Zachman v. Hudson Valley Fed. Credit Union*, 49 F.4th 95, 101–02 (2d Cir. 2022). "This burden may be satisfied by the actual production of the arbitration agreement." *Roller*

[1] The parties agree that New York state law applies to the question of contract formation. *See* Def. Mem. at 5; Pl. Opp. at 3–4, ECF No. 18.

v. Centronics Corp., No. 87 Civ. 5715, 1989 WL 71200, at *2 (S.D.N.Y. June 22, 1989). "If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary." *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) (citing 9 U.S.C. § 4).

In deciding a motion to compel arbitration, the Court applies a "standard similar to that applicable for a motion for summary judgment." *Id.* "The summary judgment standard requires a court to consider all relevant, admissible evidence . . . [and] draw all reasonable inferences in favor of the non-moving party." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016) (cleaned up).

II. Analysis

A. 2016 PSA Contract Formation

Vivint, as the party seeking to compel arbitration, need not establish that "the agreement would be enforceable, merely that one existed." *Hines v. Overstock.com, Inc.*, 380 F. App'x 22, 24 (2d Cir. 2010). If Vivint makes such a prima facie showing, Khowala, as the party "seeking to avoid arbitration[,] [] bears the burden of showing the agreement to be inapplicable or invalid." *Harrington v. Atl. Sounding Co., Inc.*, 602 F.3d 113, 124 (2d Cir.2010) (*citing Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91–92 (2000)). Because Vivint has not produced an executed copy of the 2016 PSA, it must meet its initial burden by other means.

Vivint first argues that it has proffered sufficient evidence of an agreement to arbitrate based on the 2016 PSA. Def Mem. at 6–7. The Court disagrees. Vivint has produced Brothers's declaration and a certificate of installation (the "Installation Certificate") that it contends was provided to Khowala following the installation of the security system. *See* Brothers Decl.; Installation Cert., ECF No. 17-3. Nothing on the face of the Installation Certificate indicates whether Khowala signed the 2016 PSA. *See* Installation Cert. Brothers claims that he "know[s] that the Vivint technician who installed [] Khowala's home security system used Tech Genie and completed all required Tech Genie tasks for the installation." Brothers Decl. ¶ 10. However, Vivint has

produced neither the Tech Genie task list nor any independent evidence to verify the task list was completed. Because Khowala has "unequivocally den[ied] that [the parties] entered into an agreement to arbitrate" and has "offer[ed] at least some evidence to substantiate [his] factual allegations," the proffered documents are insufficient to prove that an agreement to arbitrate exists pursuant to the 2016 PSA. *Scone Invs., L.P. v. Am. Third Mkt. Corp.*, 992 F. Supp. 378, 381 (S.D.N.Y. 1998).

Next, Vivint argues that "Khowala accepted and assented to the terms of the 2016 PSA," including the arbitration provision, "when he activated his security system and account with Vivint." Def. Mem. at 7. Not so. Khowala's acceptance of the benefits of the parties' contract for home security services does not necessitate a finding that Khowala accepted *all* of the terms of the 2016 PSA. Khowala's "acceptance of the benefit of services may well be held to imply a promise to pay for them," but such acceptance does not extend beyond compensation where Khowala was not offered a reasonable opportunity to reject the services with "knowledge of the terms of the offer." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (citation omitted). Accordingly, the activation of the security system and Khowala's use of Vivint services does not require Khowala to submit to arbitration.

By contrast, courts will "enforce[] unexecuted agreements to arbitrate, where traditional indicia, such as conduct in the course of [parties'] transactions, demonstrate the existence of a [] contract and the parties' assent to such a contract." *Scone Invs., L.P.*, 992 F. Supp. at 380–81. The Second Circuit has held that a party's conduct demonstrates an agreement to arbitrate when it chooses "a committee to represent [it] in the arbitration," withdraws "funds from the bank account set up to cover its [arbitration] expenses," or selects arbitration counsel. *Gvozdenovic v. United Air Lines*, Inc., 933 F.2d 1100, 1105 (2d Cir. 1991). Conduct also rises to the level of acceptance where a party fails to seek judicial relief or object to the arbitration process. *Id.*; *see Opals on Ice Lingerie v. Bodylines*

Inc., 320 F.3d 362, 368 (2d Cir. 2003); *Parrella v. Orange Rabbit, Inc.*, 20 Civ. 9923, 2021 WL 4462809, at *10 (S.D.N.Y. Sept. 29, 2021). Because Khowala has not actively and voluntarily participated in arbitration proceedings, and instead has "repeatedly" and "forcefully" objected to arbitration, the existence of an agreement to arbitrate cannot be deduced from his conduct. *Opals on Ice Lingerie*, 320 F.3d at 368–69.

Lastly, Vivint argues that Khowala agreed to arbitrate under the 2016 PSA because the Installation Certificate "notified him that his system was subject to the terms and conditions of the 2016 PSA." Def. Mem. at 7. Under New York law,

> [w]here an offeree does not have actual notice of certain contract terms, he is nevertheless bound by such terms if he is on inquiry notice of them and assents to them through conduct that a reasonable person would understand to constitute assent. In determining whether an offeree is on inquiry notice of contract terms, New York courts look to whether the term was obvious and whether it was called to the offeree's attention. This often turns on whether the contract terms were presented to the offeree in a clear and conspicuous way.

Zachman, 49 F.4th at 102 (citations and quotation marks omitted). For example, a party is not "bound by clauses printed on the reverse side of a contract unless it is established that they were properly called to his or her attention and that he or she assented to them." *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 289 (2d Cir. 2019) (quoting 22 N.Y. Jur. 2d Contracts § 29) (emphasis omitted). Likewise, courts have refused to "enforce contract terms that were inconspicuously placed in 'small type and in parenthesis' on the back of a confirmation order." *Id.* (quoting *Arthur Philip Export Corp. v. Leathertone, Inc.*, 87 N.Y.S.2d 665, 667 (App. Div. 1949)).

Here, the Installation Certificate did not adequately call attention to the 2016 PSA's arbitration provision in order to put Khowala on inquiry notice. The reverse side of the Installation Certificate states that the "Installation Certificate is subject to terms and conditions of the Alarm System & Installation Agreement between you and Vivint." Installation Cert. at 2. It is not clear

whether the Installation Certificate's mention of an "Alarm System & Installation Agreement" refers to the 2016 PSA or to another agreement between the parties. *Id.* The 2016 PSA, as produced by Vivint, does not contain a document title at all.[2] But, even if the language did refer to the 2016 PSA, this broad language is insufficient to put Khowala on notice of the 2016 PSA's arbitration provision. Therefore, the Court finds that Khowala and Vivint did not form a contract to arbitrate based on the 2016 PSA.

B. Effect of 2022 PSA on Pre-Contractual Events

Vivint also argues that the 2022 PSA, executed a week after the burglary, governs the parties' dispute because pursuant to the agreement's merger clause, the 2022 PSA "supersedes any prior agreements" between the parties. Def. Mem. at 10. In other words, Vivint contends that the 2022 PSA's merger clause makes the 2022 PSA's arbitration provision retroactive. The merger clause states that "[t]he entire and only agreement between [Vivint and Khowala] is written in this Agreement [and] . . . replaces any earlier oral or written understanding or agreements." 2022 PSA ¶ 20. Although a merger clause "limit[s] the universe of the parties' contractual obligations to the text of the contract itself," it "does not come into play until the existence of an enforceable written agreement has been shown." *FIH, LLC v. Found. Cap. Partners LLC*, 920 F.3d 134, 143 (2d Cir. 2019). Because Vivint has failed to show the existence of a prior agreement to arbitrate, the 2022 PSA's merger clause does not "make the arbitration clause[] retroactively applicable to the [parties'] pre-agreement conduct." *Nantucket Indus., Inc. v. Varon*, No. 93 Civ. 6766, 1997 WL 113828, at *1 (S.D.N.Y. Mar. 13, 1997), *aff'd*, 129 F.3d 114 (2d Cir. 1997). Furthermore, an "agreement cannot be held to have a retroactive effect unless by its express words or necessary implication it clearly appears to be the parties' intention to include past obligations." *Envy Branding, LLC v. William Gerard Grp., LLC*, No. 20 Civ. 3182, 2024 WL 869156, at *11 (S.D.N.Y. Feb. 29, 2024) (quoting

[2] The 2022 PSA does not include this title, either; it is titled "System Purchase and Services Agreement." 2022 PSA.

Kane Mfg. Corp. v. Partridge, 533 N.Y.S.2d 948, 949 (App. Div. 1988)). The 2022 arbitration clause neither expressly states nor necessarily implies that it applies retroactively.[3]

To determine the temporal scope of the 2022 PSA's arbitration provision, the Court must "assess whether the parties intended for the arbitration clause to cover the present dispute." *Holick v. Cellular Sales of New York, LLC*, 802 F.3d 391, 398 (2d Cir. 2015). In *Holick*, the Circuit found that the arbitration clause in question could not be applied retroactively because it applied to disputes "arising out of, or in relation to" the employment contract between the parties. *Id.* The arbitration clause in the 2022 PSA contains comparable language limiting the scope of the clause to disputes "arising out of, relating to, or in connection with" the 2022 PSA. 2022 PSA ¶ 19. The Court, therefore, finds no evidence that the 2022 PSA's arbitration clause governs the parties' dispute stemming from the burglary, which occurred prior to the execution of the 2022 PSA.

C. Limited Jurisdictional Discovery

Vivint requests that, if the Court determines that a fact issue exists as to arbitrability, the Court order "narrow discovery on that fact issue before summarily deciding it." Def. Reply at 7, ECF No. 19. Courts have permitted limited discovery into the validity of an arbitration agreement when the party opposing arbitration comes forth with evidence that it did not intend to be bound by the arbitration agreement. *See Moton v. Maplebear Inc.*, No. 15 Civ. 8879, 2016 WL 616343, at *4 (S.D.N.Y. Feb. 9, 2016). "Significantly, the requested information will not intrude into the substantive matters that would be subject to arbitration if the Court were to dismiss or stay the federal action in favor of arbitration, and the nature and the quantity of discovery sought does not exceed that

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[3] Requiring the later-in-time contract to expressly state that its arbitration provision has retroactive effect is consistent with decisions in this Circuit that have held the converse to be true. *See, e.g. Gen. Motors Corp. v. Fiat S.p.A*, 678 F. Supp. 2d 141, 148 (S.D.N.Y. 2009) (holding that "the general language of a merger clause is insufficient to establish any intent of the parties to revoke retroactively their contractual obligations to submit disputes arising under an earlier agreement to arbitration.") (cleaned up); *Zendon v. Grandison Mgmt.*, Inc., No. 18 Civ. 4545, 2018 WL 6427636, at *2 (E.D.N.Y. Dec. 7, 2018) (citing precedent in which a merger clause "in an August 2013 employment contract did not revoke retroactively the parties' July 2013 arbitration agreement, because the August 2013 contract contained no express denial of the agreement to arbitrate") (cleaned up).

ordinarily permitted as a preliminary matter when jurisdictional discovery is permitted." *Golightly v. Uber Techs., Inc.*, No. 21 Civ. 3005, 2021 WL 3539146, at *4 (S.D.N.Y. Aug. 11, 2021).

Based on the evidence before the Court, including Khowala's declaration, the 2022 PSA, and Vivint's failure to produce an executed copy of the 2016 PSA, the Court finds that limited discovery is warranted into whether Khowala signed the 2016 PSA.

CONCLUSION

For the reasons stated above, Vivint's motion to compel arbitration is DENIED without prejudice to renewal. The Clerk of Court is directed to terminate the motion at ECF No. 17.

By **September 30, 2024**, the parties shall complete the targeted discovery authorized by the Court. By **October 7, 2024**, Vivint shall inform the Court, in writing, whether it intends to renew its motion to compel arbitration.

SO ORDERED.

Dated: August 1, 2024
New York, New York

ANALISA TORRES
United States District Judge