

O'Brien v Trooper Fitness LLC
2019 NY Slip Op 30319(U)
February 8, 2019
Supreme Court, New York County
Docket Number: 157090/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 157090/2017

KRISTEN O'BRIEN,

Plaintiff,

MOTION SEQ. NO. 001

- v -

TROOPER FITNESS LLC and CLASSPASS INC.,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 10, 15, 16, 22, 23, 24, 25

were read on this motion to/for DISMISS

Upon the foregoing documents, it is ordered that the motion is granted.

In this personal injury action, defendant Class Pass Inc. moves, pursuant to CPLR 3211, to dismiss the complaint for failure to state a cause of action and based on documentary evidence or, in the alternative, to compel arbitration pursuant to CPLR 7501 et seq. Plaintiff Kristen O'Brien opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff claims that she was injured on February 4, 2016 while exercising at a gym ("the gym") owned, operated, managed and maintained by defendant Trooper Fitness LLC in Manhattan ("Trooper"). Doc. 1 at pars. 4-5, 9-10. She alleged that she was at the premises pursuant to a

subscription she had with defendant Class Pass Inc. (“Class Pass”), which “provided access, via an [a]pp, to its members and/or subscribers, to a variety of [g]ym locations,” including the gym in question. Id. at par. 6.

On January 10, 2016, plaintiff became a member of Class Pass, which “owns and operates an e-commerce platform through which subscribed members can enroll in health and fitness classes offered by independent studios, gyms, and fitness centers”, by creating an account with the company. Doc. 4 at pars. 2, 4. Only members of Class Pass were permitted to sign up for classes at Trooper through the Class Pass app. Doc. 4 at par. 5. Before plaintiff could join Class Pass, she was required to accept the company’s Terms of Use. Docs. 4-5; Doc. 24 at par. 8. The Terms of Use provide, inter alia, that:

1. “By accessing and/or using the [s]ite, you accept and agree to be bound by [the Terms of Use], just as if you had agreed to these terms in writing. If you do not agree to these [t]erms do not use the [s]ite.” Doc. 5 at par. 1(a);
2. “Class Pass itself is not a gym, fitness studio or service provider and does not own, operate or control any of the classes, services or facilities accessible through the [s]ite.” (Doc. 5 at par. 2[a]);
3. “You understand that Class Pass is not a gym or fitness studio or other service provider and the classes you take or services you use are operated and delivered by the [gym] and not by Class Pass.” (Doc. 5 at par. 15); and
4. “[T]o the fullest extent permitted by law, you release, indemnify, and hold harmless Class Pass . . . from any and all responsibility, claims, actions, suits procedures costs, expenses, damages and liabilities arising out of or in any way to your participation in or use of your Class Pass membership, including with respect to bodily injury, physical harm, illness, death or property damage.” (Doc. 5 at par. 15).

The Terms of Use also required that all disputes between Class Pass and one of its members had to be resolved by arbitration unless the member opted out of arbitration in the manner prescribed in the agreement. Doc. 5 at par. 20. Further, Class Pass members seeking to bring a claim against the company were required to provide written notice of such a claim in order to afford Class Pass an opportunity to resolve the dispute before it was litigated or arbitrated. Doc. 5 at par. 20(b).

On August 8, 2017, plaintiff commenced the instant action alleging, inter alia, that, prior to the date of the accident, she reserved access to the gym by means of the Class Pass app. Doc. 1 at par. 7. She claimed that Trooper and Class Pass negligently caused her accident since they either created a dangerous condition at the gym or had actual and/or constructive notice of a dangerous condition at the premises and failed to address it. *Id.* at pars. 10-12.

On September 11, 2017, Class Pass moved, pursuant to CPLR 3211(a)(1) to dismiss the complaint based on documentary evidence or, in the alternative, to compel arbitration pursuant to CPLR 7501 et seq. Docs. 3-6. In support of the motion, Class Pass argues that the complaint must be dismissed because plaintiff's acceptance of the Terms of Use constituted a waiver of her personal injury claims against the company and that she failed to provide Class Pass with notice of the claim as required by the Terms of Use, thereby failing to comply with a condition precedent to suit. Doc. 6 at 4-5. Alternatively, Class Pass argues that, in the event the complaint is not dismissed, plaintiff must be compelled to arbitrate her dispute pursuant to CPLR 7501 and the Terms of Use. Doc. 6 at 5.

At the outset of his affirmation in opposition to the motion, plaintiff's counsel concedes that plaintiff subscribed to Class Pass on January 10, 2016 and accessed the gym on the day in question by using her Class Pass app. Doc. 15. Counsel then asserts that the arbitration provisions

were “buried” in the lengthy Terms of Use, which “require[d] an additional click or scrolling to display”, and such language should thus be unenforceable as a matter of public policy. Doc. 15 at pars. 5-7.

In an affidavit in opposition to the motion, plaintiff maintains that “at no time during the process [of signing up for Class Pass] did [she] see any language on the website or App where [she] agreed to waive her right to trial in favor of [a]rbitration” and that she had “no specific recollection of seeing any disclaimers or waivers to that effect.” Doc. 16, at par. 4. She further states that “[a]t no time did [she] specifically review [the Terms of Use] during the sign up process or subsequent to the sign up process before working out at the gym on the date in question.” Id. at par. 5.

In reply, Class Pass argues that plaintiff is bound by the Terms of Use, whether she read them or not, since she clicked on a link agreeing to accept them. Doc. 23 at 2-3. It further maintains that the Terms of Use establish two defenses to plaintiff’s claim, i.e., waiver and failure to satisfy a condition precedent, thereby warranting dismissal against it. Doc. 23 at 3.

LEGAL CONCLUSIONS:

This Court rejects plaintiff’s arguments regarding the Terms of Use and finds that the documentary evidence submitted by Class Pass warrants its entitlement to dismissal pursuant to CPLR 3211(a)(1).

"The creation of online contracts 'has not fundamentally changed the principles of contract.'" *Resorb Networks, Inc. v. YouNow.com*, 51 Misc. 3d 975 (Sup Ct NY County 2016) quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004). "Where the supposed assent to terms is mostly passive, as it usually is online, courts seek to know 'whether a reasonably prudent offeree would be on notice of the term at issue', and whether the terms of the agreement were 'reasonably communicated' to the user." *Id.* quoting *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012). Surveying the federal courts' interpretation of New York law, *Resorb* identified "three general principles" guiding the enforceability of online agreements: first, the website must place a "reasonably prudent user" on "inquiry notice" of the agreement's terms; second, "the design and content of the website must encourage the user to examine the terms clearly available through hyperlinkage"; and third, agreements will not be enforced "where the link to the agreement is buried at the bottom of a webpage or tucked away in obscure corners of the website." *Id.* at 511 (quotation marks omitted).

Armstead v Starbucks Corp., 2017 US Dist LEXIS 190748, at *6-7 (SDNY Nov. 17, 2017, No. 17-CV-1163).

Plaintiff admits that she was at the gym on the day of her accident through the use of her Class Pass membership. Doc. 15. However, plaintiff could not have joined Class Pass without agreeing to its Terms and Conditions, which were accessible through a hyperlink on the sign in page and which she accepted by clicking on a box on the said page. Doc. 24 at pars. 5-8; Doc. 25. By agreeing to the Terms and Conditions, she is now bound by them. *See Centrifugal force, Inc. v Sofinet Communications, Inc.* 2011 US Dist LEXIS 20536, at *19 (SDNY March 1, 2011, No. 08 Civ. 5463).

As Class Pass asserts, plaintiff, by her acceptance of the Terms and Conditions, waived any personal injury claim against the company. Doc. 5 at par. 15. "Absent a statute or public policy to the contrary, a contractual provision absolving a party from its own negligence will be enforced." *Deutsch v Woodridge Segway, LLC*, 117 AD3d 776 (2d dept 2017) citing *Sommer v Federal Signal Corp.*, 79 NY2d 540, 553 (1992).

Additionally, the Terms and Conditions required plaintiff to provide notice of her claim to the company prior to commencing litigation or arbitration and she failed to do so. Thus, plaintiff failed to satisfy a condition precedent to suit pursuant to the Terms and Conditions. *See MCC Development Corp. v Perla*, 81 AD3d 474 (1st Dept 2011).

Plaintiff's submissions do not warrant a contrary result. She essentially opposes the motion by arguing that information such as the Terms and Conditions is "often contained in hyperlinks that generally require an additional click or scrolling to display" and that, even if a user accesses such information, it is too "onerous to actually read through from start to finish." Doc. 15 at par. 5. However, she speaks only in generalities and does not address the Terms and Conditions at issue herein. Additionally, she admits that she "never read" the Terms and Conditions and "has no specific recollection of even seeing [them] when she signed up for Class Pass." Doc. 15 at par. 6. Thus, she does not deny that the Terms and Conditions existed or that she was able to access them. Further, plaintiff cites no legal authority whatsoever for the foregoing arguments, or for her contention that the Terms and Conditions are unenforceable as against public policy.

Finally, this Court notes that, although not raised by Class Pass, the complaint fails to state a claim against the company. See CPLR 3211(a)(7). Plaintiff alleges that Trooper, not Class Pass, owned, operated, managed, and maintained the gym. Doc. 1 at par. 5. Indeed, the Terms and Conditions, which were accessible to plaintiff, specifically state that "Class Pass itself is not a gym, fitness studio or service provider and does not own, operate or control any of the classes, services or facilities accessible through the [s]ite." Doc. 5 at par. 2(a). Although plaintiff claims that Class Pass was negligent, she does not allege any facts which would even suggest that the company had a duty to her merely because it facilitated her use of the gym through an app. *See Stepkowski v Holy Trinity Diocesan High School*, ___ AD3d ___, 2019 App Div LEXIS 922 (2d

Dept 2019) (“[a] property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition”) citing *Kellman v 45 Tiemann Assocs.*, 87 NY2d 871, 872 (1995); *Basso v Miller*, 40 NY2d 233, 241 (1976).

Given the result above, this Court need not address Class Pass’ alternative argument that plaintiff must be compelled to arbitrate.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion of defendant Class Pass Inc. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further


ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision and order of the court.

2/8/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	