Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
**Justice**

----------X Index No. 713925/2019

MARK S. ANDERSON,

Plaintiff,

-against-

Motion
Date: December 11, 2019

Motion Cal. No.: 3

Motion Sequence No.: 3

VERIZON COMMUNICATIONS, INC.; CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS; XINYI GAO; WALMART INC.; TRACFONE WIRELESS, INC.,

Defendants.

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The following efile papers numbered 28-33, 47-52, 56 submitted and considered on this motion by defendants Verizon Communications Inc. and Cellco Partnership d/b/a Verizon Wireless (hereinafter "Verizon") seeking to compel arbitration pursuant to Civil Practice Law and Rules (CPLR) 7503 and the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*

| | Papers Numbered |
|---|---|
| Notice of Motion-Affidavits-Exhibits-Memorandum of Law..... | EF 28-33 |
| Affirmation in Opposition-Affidavits-Exhibits..... | EF 47-51 |
| Reply-Affidavits-Exhibits..... | EF 52 |
| Stipulation of Discontinuance..... | EF 56 |



**Facts and Relevant Procedural History**

Plaintiff Mark S. Anderson commenced this action on or about August 13, 2019. The action arises from the alleged unlawful use by defendant Xinyi Gao (hereinafter "Gao") of plaintiff's cellular telephone. On or about August 7, 2019, plaintiff, a Verizon Wireless customer, cellular telephone was allegedly unlawfully and without authorization "ported". On August 7, 2019, plaintiff

realized that he did not have any functional use of his cellular telephone and could not make or receive calls or properly access his applications. Plaintiff discovered that his telephone had been ported and that its data and the telephone number had been transferred to a cellular telephone purchased by Gao. Plaintiff claims that he attempted to contact the Verizon defendants with respect to the porting however they refused to rectify the situation and therefore Gao was not prevented from continuing to use his telephone and access all of its data. Due to the unauthorized porting plaintiff's identity was stolen and his privacy was violated and his business was placed at risk. Plaintiff claimed that he incurred significant financial expenses in attempting to regain his cellular telephone number, that he was forced to close all of his bank accounts and open new ones and missed time from work due to the negligence of the Verizon defendants. Verizon filed an answer on October 2, 2019, denying the plaintiff's claims and asserting cross-claims and affirmative defenses, including its nineteenth affirmative defense that the plaintiff's claims are barred due to an arbitration clause. Gao has not appeared in this action. A Stipulation of Discontinuance with prejudice was executed by plaintiff and co-defendants Walmart, Inc. and TracPhone Wireless, Inc. dated December 20, 2019.

Verizon now seeks to compel arbitration pursuant to CPLR 7503 and the Federal Arbitration Act, 9 U.S.C. 1 *et seq*. (hereinafter "FAA".) Verizon claimed that Plaintiff agreed and consented to have this dispute sent to arbitration pursuant to an arbitration clause contained in the agreement in the terms and conditions. As set forth in the affidavit of its Senior Analyst, Adrienne Foehsel dated October 22, 2019, plaintiff purchased an iPhone at an authorized Verizon retailer. He also signed an Installment Loan Agreement which required him to maintain service with Verizon under a Customer Agreement. The Verizon Installment Loan Agreement also incorporates by reference the Verizon Wireless Customer Agreement. Plaintiff agreed to resolve disputes "only by arbitration or small claims court." During the transaction plaintiff received a receipt styled "Customer Agreement" which was associated the cellular service plan which was selected. Verizon stated that on the second page of the document the following language appears in bold language in relevant part:

> I AGREE TO THE CURRENT VERIZON WIRELESS CUSTOMER AGREEMENT.... INCLUDING THE TERMS AND CONDITIONS OF MY PLAN AND ANY OPTIONAL SERVICES I HAVE AGREED TO PURCHASE AS REFLECTED ON THE SERVICE SUMMARY, ALL OF WHICH I HAVE HAD THE OPPORTUNITY TO REVIEW. I UNDERSTAND THAT I AM AGREEING TO ... SETTLEMENT OF DISPUTES BY ARBITRATION INSTEAD OF JURY TRIALS, AND OTHER IMPORTANT TERMS IN THE CUSTOMER AGREEMENT. I AM AWARE THAT I CAN VIEW THE CUSTOMER AGREEMENT ANYTIME AT VERIZONWIRELESS.COM OR IN MY VERIZON ACCOUNT.

Verizon annexed a copy of the full Verizon Customer Agreement in effect as of July 17, 2017. The Arbitration Clause in the agreement states the following:

> YOU AND VERIZON BOTH AGREE TO RESOLVE DISPUTES ONLY BY ARBITRATION OR IN SMALL CLAIMS COURT. YOU UNDERSTAND THAT BY THIS AGREEMENT YOU ARE GIVING UP THE RIGHT TO BRING A CLAIM IN COURT OR IN FRONT OF A JURY.
>
> THE FEDERAL ARBITRATION ACT APPLIES TO THIS AGREEMENT. EXCEPT FOR SMALL CLAIMS COURT CASES, ANY DISPUTE THAT IN ANY WAY RELATES TO OR ARISES OUT OF THIS AGREEMENT OR FROM ANY EQUIPMENT, PRODUCTS AND SERVICES YOU RECEIVE FROM US (OR FROM ANY ADVERTISING FOR ANY SUCH PRODUCTS OR SERVICES), INCLUDING ANY DISPUTES YOU HAVE WITH OUR EMPLOYEES OR AGENTS, WILL BE RESOLVED BY ONE OR MORE NEUTRAL ARBITRATORS BEFORE THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR BETTER BUSINESS BUREAU ("BBB").

Verizon stated that plaintiff used its services, receiving billing invoices from on or about November 2016 to July 2019. Based upon the agreements, plaintiff agreed to have this dispute resolved in arbitration. Plaintiff entered into a written agreement to arbitrate his claims. The

Supreme Court of the United States of America has consistently held that the FAA requires courts to compel arbitration where the plaintiff has entered into a written agreement to arbitrate her or his claims. *(See AT &T Mobility. LLC v Concepcion*, 563 US 333, 344 [2011]; *Am. Exp. Co. v Italian Colors Rest.*, 570 US 228, 233 [2013]). Verizon argued that the Installment Loan Agreement by itself established Anderson's agreement to arbitrate all disputes, it also binds him to the Verizon customer agreement. When an agreement incorporates by reference and agreement to arbitrate, it will be enforced as long as the intent is clear, explicit and unambiguous (*see Navillus Tile. Inc. v Bovis Lend Lease LMB. Inc.*, 74 AD3d 1299 [2d Dept 2010]; *see also Aerotech World Trade Ltd. v Excalibur Sys.. Inc.*, 236 AD2d 609 [2d Dept 1997] *lv denied* 90 NY2d 812 [1997]; *Matter of Alliance Masonry Corp. v Corning Hosp.*, –AD3d–, 2019 NY Slip Op 09348 [3d Dept 2019]).

In opposition, plaintiff claimed that the very language of the arbitration clause the actions which are the subject of the instant litigation, namely torts, negligence and illegal porting are not covered by the Verizon arbitration agreement. The arbitration only covers "any disputes under this agreement" namely the Verizon Wireless Customer Agreement, which would service issues and contractual breaches, for example. Therefore, the Arbitration Clause is not a general arbitration clause, which would cover "all disputes whatsoever" and is inapplicable. Moreover, plaintiff asserted that the arbitration clause is also procedurally and substantively unconscionable and should not be enforced, citing *Gilman v Chase Manhattan Bank*, 73 NY2d 1, 10 (1988). In *Gilman*, the Court of Appeals held that the contract terms contained in a security agreement executed on behalf of a corporation by its president who applied for a letter of credit from the defendant bank was not procedurally unconscionable. "An unconscionable contract has been defined as one which is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforcible (sic) according to its literal terms. The doctrine, which is rooted in equitable principles, is a flexible one and the concept of unconscionability is intended to be sensitive to the realities and nuances of the bargaining process. A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made- i.e. some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonable favorable to the other party."

(*Gilman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988]; [internal quotations omitted]). Plaintiff also maintained that this action is not a dispute between plaintiff and any individual Verizon employee. He contended that the arbitration clause is procedurally unconscionable because among other things, it is a "take it or leave it" proposition, and that further, it is substantively unconscionable because it favors Verizon, and would allow the arbitration of claims involving negligence, torts, and illegal porting if enforced by the Court. Additionally, plaintiff argued that the contract is one of adhesion, that the arbitrator is likely to be favorable to Verizon, and that the only neutral arbiter of the facts would be the Court.

In reply, Verizon argued that the arbitration clause clearly covers the issues herein, and that plaintiff's defense related to unconscionability lacks merit. Plaintiff does not dispute the fact that he is a Verizon customer, that he expressly consented to the Verizon Wireless Customer Agreement, and that he subscribed to a Verizon plan for wireless services for the iPhone he purchased from Verizon in which the customer agreement states that claims should be resolved by arbitration. Plaintiff's claims that Verizon allowed a stranger, Gao, to access his Verizon account for the purposes of closing it and porting his cellular telephone service to another carrier which would fall under the scope of the agreed upon arbitration provision. There is no carve out or limitation in the arbitration provision for tort claims; any dispute relating to either the customer Agreement or Verizon equipment, products or services sounding in contract or tort must be arbitrated under the agreement. Regarding Plaintiff's back-up argument related to unconscionability, any suggestion that the Plaintiff is an unsophisticated individual who was coerced into signing the agreement is belied by the fact that he is a practicing litigator and named partner in a law firm. The contention has been argued before the Supreme Court of the United States in the case *AT & T Mobility v Concepcion v*, 563 U.S. 333 (2011), where the Supreme Court held that the argument that an arbitration clause is unconscionable because it deprives a consumer of the right to litigate in court is preempted by the Federal Arbitration Act. Also, the argument fails on the assertions of substantive and procedural unconscionability. Plaintiff failed to demonstrate that he lacked a meaningful choice in service providers; there was nothing preventing him from seeking another provider and entering into a contract with it, therefore, he cannot demonstrate that the contract is one of adhesion. Thus he failed

to demonstrate that the contract was unconscionable by offering evidence that he could not have chosen another service provider (*see Ranier v Bell Atl. Mobile*, 304 AD2d 353 [1st Dept 2003]). Plaintiff never contended that he signed the agreement under duress and he cannot establish either substantive unconscionability or procedural unconscionability which is required to invalidate a contract. Under New York law, "an unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." (*See King v Fox*, 7 NY3d 181, 191 [2006]).

**DISCUSSION**

Under the Federal Arbitration Act ("FAA"), there is a strong policy favoring enforcing arbitration agreements (*see* 9 USC § 1 et seq.). The applicable section, Chapter 1, §2, provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Whether an agreement to arbitrate is governed by the FAA depends on whether there is an enforceable agreement to arbitrate, and if there is, whether the agreement involves a transaction which affects interstate commerce (*see* 9 USC § 2; *see also Allied Bruce Terminix Cos. v Dobson*, 513 US 265 [1995]; *Matter of Diamond Waterproofing Sys v 55 Liberty Owners Corp.*, 4 NY3d 247 [2005]; *Cusimano v Schnurr*, CPA, 26 NY3d 391 [2015]; *Smith v Nobiletti Builders, Inc.*, 177 AD3d 807 [2d Dept 2019]). By enacting Section 2 of the FAA, Congress precluded State Courts from invalidating arbitration provisions in contracts except "upon such grounds as exist at law or in equity

for the revocation of any contract" (9 USC § 2; *see Doctor's Assocs., Inc. v Casarotto*, 517 US 681 [1996], [Ginsburg, J.]). Thus the Supreme Court of the United States ("U.S. Supreme Court") has held that the FAA preempts any State law which burdens an agreement to arbitrate (*see Marmet Health Care Center v Brown*, 565 US 530 [2012]; *Perry v Thomas*, 482 US 483 [1987]; *Southland Co. v Keating*, 465 US 1 [1984]).

Pursuant to the FAA, arbitration clauses are voidable under grounds which would suffice to set aside an agreement, such as fraud, duress, and unconscionability (*see Doctor's Assocs., Inc. v Casarotto*, 517 US 681 [1996]). Absent a specific statute or law or public policy consideration, an arbitration clause must be enforced. The U.S. Supreme Court has further held that issues related to the contract should be considered by the arbitrator, and not the Court. Whether the arbitration clause and/or the agreement are void or voidable is a consideration for the arbitrator, not the Court (*see Buckeye Check Cashing, Inc. v Cardegna*, 546 US 440 [2006]).

**CONCLUSION**

The Court finds that Plaintiff voluntarily accepted Verizon's terms and conditions in the Verizon Installment Agreement and the Verizon Wireless Customer Agreement. The Court finds that the parties entered into a valid agreement to arbitrate any issues arising out of the transaction (*see Highland HC, LLC v Scott*, 113 AD3d 590 [2014]). The Verizon Installment Loan Agreement alone established that plaintiff agreed to arbitrate all disputes and he is also bound by the Verizon Wireless Customer Agreement which was incorporated by reference in the Verizon Installment Loan Agreement. When an agreement incorporates by reference and agreement to arbitrate, it will be enforced as long as the intent is clear, explicit and unambiguous (*see Aerotech World Trade Ltd. v Excalibur Sys., Inc.*, 236 AD2d 609 [2d Dept 1997] *lv denied* 90 NY2d 812 [1997]; *Matter of Alliance Masonry Corp. v Corning Hosp.*, –AD3d–, 2019 NY Slip Op 09348 [3d Dept 2019]; *Navillus Tile, Inc. v Bovis Lend Lease LMB, Inc.*, 74 AD3d 1299 [2d Dept 2010]). Plaintiff has not established either substantive unconscionability or procedural unconscionability which is required to invalidate a contract (*see King v Fox*, 7 NY3d 181, 191 [2006]). Thus, this Court will enforce the

agreed upon bargain of the parties. Therefore it is

**ORDERED**, that the motion by defendants Verizon Communications Inc. and Cellco Partnership d/b/a Verizon Wireless seeking to compel arbitration pursuant to Civil Practice Law and Rules (CPLR) 7503 and the Federal Arbitration Act, 9 U.S.C. 1 *et seq*. is granted; and it is further

**ORDERED**, that this matter is **STAYED** pursuant to CPLR § 7503(a) pending the outcome of the arbitration proceeding.

The foregoing constitutes the decision and Order of the Court.

Dated: January 24, 2020

**Hon. Chereé A. Buggs, JSC**