SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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GINA VERGEL,

Plaintiff,

-against-

REVEL TRANSIT INCORPORATED,

Defendant.

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DECISION AND ORDER

Index Number

150020/2021

NERVO, J.:

Plaintiff seeks to permanently stay arbitration proceedings pursuant to CPLR § 7503. Defendant opposes and cross-moves to compel arbitration.

New York has long favored arbitration, as a matter of public policy (*Matter of Smith Barney Shearson v. Sacharow*, 91 NY2d 39, 49 [1997]). Notwithstanding, the right to seek arbitration can be waived (*Stark v. Molod Spitz De Santis & Stark, P.C.*, 9 NY3d 59 [2007]) and such waiver is ascribed to a party who commences a lawsuit (*De Sapio v. Kohlmeyer*, 35 NY2d 402 [1974]). Plainly, this assumption that a party who commences an action generally waives its right to submit the issue to arbitration does not apply to a defendant (*id.*). However, this is not to say a defendant's right to compel arbitration is absolute, as a defendant's increasing participation in an action will militate

against compelling arbitration (*id.*; *Matter of Zimmerman v. Cohen*, 236 NY 15 [1923]; *Ryan v. Kellogg Partners Inst. Servs.*, 58 AD3d 481 [1st Dept 2009]).

"A party to an agreement may not be compelled to arbitration its dispute with another unless the evidence establishes the parties' clear, explicit and unequivocal agreement to arbitrate" (*God's Battalion of Prayer Pentecostal Church, Inc., v. Miele Assocs., LLP*, 6 NY3d 371, 374 [2006]). A party's signature is not required (*id.*).

As an initial matter, defendant has participated in this forum to the extent of serving an answer, opposing plaintiff's motion to stay arbitration, and cross-moving to compel arbitration. Defendant's right to submit this matter to arbitration is not waived by such limited participation (*see De Sapio*, *supra*; *see also Matter of Zimmerman*, *supra*).

Defendant operates a business by which users register for its service and then are permitted to rent electric mopeds. There is no dispute that plaintiff registered for this service and used defendant's mopeds. However, plaintiff

contends, in essence, that she was never apprised of the arbitration provisions in defendant's terms of use at the time of her registration with defendant. Consequently, she seeks to permanently stay enforcement of the arbitration provisions. Following an alleged accident while using defendant's mopeds, plaintiff filed the instant lawsuit seeking damages for personal injuries. The following month, defendant served its notice of intent to arbitrate.

In registering for defendant's service, plaintiff was required to "toggle" a button through the phone application next to "I accept the Terms of Use and Privacy Policy" (*see* NSYCEF Doc. No. 25 at ¶ 19). Both "Terms of Use" and "Privacy Policy" appear as blue hyperlinks (*id.*). An attempt to proceed without selecting the toggle results in a message "Please review and accept our Terms of Use and Privacy Policy" (*id.* at ¶ 21). Furthermore, plaintiff was required to toggle a separate button on the "Confirm Terms" page of the registration process agreeing that: "I have read, understand, and accept Revel's Rental Agreement" (*id.* at ¶ 22).

Plaintiff's affidavit that she did not click on the hyperlinks to view the policies while registering, and therefore should not be bound by the arbitration

agreement contained therein, is belied by her toggling buttons to the contrary. In any event, her failure to read the contract before assenting to same is irrelevant. It has long been established that a party's failure to read a contract before signing is not a basis to excuse performance under the contract; "An alleged lack of knowledge of the arbitration clause will not excuse it, for the law does not relieve a person merely because [one] has failed to read a document which [one] has executed" (*Charles S. Fields, Inc., v. American Hydrotherm Corp.*, 5 AD2d 647 [1st Dept 1958]). Put differently, "[one] who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents, and to assent to them, and there can be no evidence for the jury as to [the] understanding of its terms" (*Metzger v. Aetna Ins. Co.*, 227 NY 411 [1920]; *see also Humble Oil & Refining Co. v. Jaybert Esso Service Station, Inc.*, 30 AD2d 952 [1st Dept 1968]). This principle is no less applicable in the digital age. Providing a hyperlink at the time of registration, and the users assent to register, is sufficient notice to the user that their registration is subject to contractual terms (*see Meyer v. Uber Tech., Inc.*, 868 F3d 66 [2d Cir. 2017]). "While it may be the case that many users will not bother reading the additional terms, that is the choice the user makes; the user is still on inquiry notice" (*id.* at 79).

To the extent that plaintiff's assent to arbitration is predicated upon the reasonability of placing users on notice by defendant's highlighting the hyperlinked terms and conditions in blue and requiring users toggle that they have reviewed same, the Court finds defendant's notice of the terms and conditions applicable to plaintiff's use of defendant's mopeds was reasonably conspicuous and plaintiff's manifestation of assent unambiguous, as a matter of law (*see id.*; *see also Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 [2d Cir, 2002]).

Accordingly, it is

ORDERED the motion to stay arbitration is denied; and it is further

ORDERED that the cross-motion to compel arbitration is granted; and it is further

ORDERED that the matter is dismissed.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: May 11, 2021

ENTER:

Hon. Frank P. Nervo, J.S.C.