IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN DAVIS v. **UBER TECHNOLOGIES, INC.,**	 **CIVIL ACTION** **NO. 16-6122**

Baylson J. **July 25, 2017**

MEMORANDUM RE: MOTION TO DISMISS

In this case, Plaintiff Brian Davis alleges that Defendant Uber Technologies, Inc. wrongfully terminated his employment in November 2015 due to disability-based discrimination. Plaintiff seeks damages to redress his injuries under:

(1) Americans with Disabilities Act ("ADA");

(2) Pennsylvania Human Relations Act ("PHRA"); and

(3) Philadelphia Fair Practices Ordinance ("PFPO").

Presently before the Court is Uber's Motion to Dismiss and compel arbitration pursuant to the Federal Arbitration Act ("FAA") and the contract entered into between Plaintiff and Uber ("Rasier Agreement"). Under the Supreme Court's decision in Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010), and the Third Circuit's decision in South Jersey Sanitation Co., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc., 840 F.3d 138 (3d Cir. 2016), Uber's motion is granted.

I. Facts and Procedural History

Taking Plaintiff's allegations as true, the factual background is as follows. Uber is a technology and car service company that connects available transportation providers who can be hailed and dispatched with riders through a mobile application ("Uber App"). (ECF 3, Uber Mot., Ex. 1 ¶ 3.) The uberX application, one of many products offered by Uber, connects riders to vehicles operated by private individuals. (Id., Ex. 1 ¶ 4.) Any ridesharing transportation provider who wishes to access the

uberX application must first enter into the Rasier Agreement. (Id., Ex. 1 ¶ 7.) Rasier-PA, LLC is a wholly owned subsidiary of Uber responsible for providing lead generation services to ridesharing transportation providers through uberX. (Id. at 2.) The Rasier Agreement contains an arbitration clause ("Arbitration Provision") that applies to "any dispute arising out of or related to [the Rasier] Agreement." (Id., Ex. C § 15.3(i).)

The Rasier Agreement does not require a driver to agree to the Arbitration Provision and provides a thirty-day time period during which a driver may opt out by notifying Uber through e-mail or mail. (Id., Ex. C § 15.3(viii) (stating that "[a]rbitration is not a mandatory condition of your contractual relationship with [Uber]").) In order to accept the Rasier Agreement, a transportation provider must log on to the Uber App, where he will be presented with a hyperlink to the agreement. (Id., Ex. 1 ¶ 9.) To advance past this screen, the transportation provider must click "YES, I AGREE" to the terms presented. (Id.) A second screen asks the transportation provider to "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS" by clicking "YES, I AGREE." (Id.) After the transportation provider confirms his acceptance, the agreement is immediately sent to his Driver Portal, where it can be accessed by the driver at any time. (Id., Ex. 1 ¶ 10.)

During the summer of 2015, Plaintiff initiated an application to sign up to become an Uber driver. (ECF 5, Am. Compl. ¶ 18.) Plaintiff's account was activated on October 19, 2015, and the following day he accepted the 2014 Rasier Agreement, through the Uber App. (Uber Mot., Ex. 1 ¶ 12.) In the thirty days following his acceptance of the Rasier Agreement, Plaintiff did not opt out of the Arbitration Provision. (Id., Ex. 1 ¶ 13.) Therefore, in November 2016 when Plaintiff filed the instant lawsuit, he was subject to the Arbitration Provision if it was enforceable.

Plaintiff filed suit against Uber on November 22, 2016 seeking back pay and front pay, punitive damages, liquidated damages, statutory damages, costs, and attorney's fees for allegedly wrongful termination that occurred in November 2015 (ECF 1). On February 27, 2017, Uber filed a Motion to

Dismiss pursuant to the Federal Arbitration Act (ECF 3). Thereafter, on March 10, 2017, Plaintiff amended his Complaint (ECF 5). Additionally, on March 14, 2017, Plaintiff filed a Response in opposition to Uber's Motion to Dismiss (ECF 6). On March 21, 2017, Uber filed a Reply in further support of its Motion to Dismiss, emphasizing Plaintiff's failure to address its claim that the Rasier Agreement committed the issue of arbitrability to the arbitrator (ECF 7).

II. Legal Standard

The FAA, which governs the arbitration and arbitrability of disputes, provides that as a matter of federal law, "[a] written provision" in a commercial contract evidencing an intention to settle disputes by arbitration "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. Because the FAA is reflective of a strong federal policy favoring arbitration, courts must "rigorously enforce agreements to arbitrate." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985). The FAA places arbitration agreements on equal footing with respect to other contracts; therefore, arbitration agreements can be invalidated by "'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996)). In Rent-A-Center, the Supreme Court held that when a party challenges an arbitration agreement as a whole, rather than specifically contests the delegation of authority to the arbitrator, the enforceability and applicability of the arbitration clause is to be decided by the arbitrator. Rent-A-Ctr., 561 U.S. at 72.

The Third Circuit has interpreted Rent-a-Center in two precedential opinions. First, in Quilloin v. Tenet HealthSystem Philadelphia, Inc., 673 F.3d 221 (3d Cir. 2012), the court considered an arbitration agreement that "constitute[d] an agreement to arbitrate employment issues generally," but did not include a specific provision delegating the issue of arbitrability to the arbitrator. Id. at 229. This difference from Rent-a-Center, where there was an additional agreement to arbitrate threshold issues of arbitrability, compelled the conclusion in Quilloin that it was proper for the court to decide

the matter of arbitrability. Id. Next, in South Jersey Sanitation, the Third Circuit held that, notwithstanding the plaintiff's characterization of his argument as a challenge to the agreement to arbitrate specifically, it was actually a challenge to the contract as a whole. S. Jersey Sanitation, 840 F.3d at 144. Therefore, the court enforced the agreement to arbitrate, holding that the gateway issue of arbitrability was for the arbitrator to decide, as provided by the agreement. Id. at 143-144.

Most recently, in a case decided by this Court, the defendant's motion to dismiss in favor of arbitration was granted because neither of the arguments made by the plaintiff challenged the agreement to arbitrate issues of arbitrability. Pocalyko v. Baker Tilly Virchow Crouse, LLP, No. 16-3637, 2016 WL 6962875, at *4 (E.D. Pa. Nov. 29, 2016). This Court applied the principles set forth in Rent-a-Center and South Jersey Sanitation, and held that a party challenging an arbitration provision as unconscionable must specifically argue the unconscionability of the particular provision of the agreement committing issues of arbitrability to the arbitrator. Id.

III. Discussion

We must determine whether under Rent-a-Center, this Court should decide the gateway issue of arbitrability before compelling arbitration, given that Plaintiff argues that the Rasier Agreement is unconscionable.

An agreement to arbitrate a gateway issue such as arbitrability is an antecedent agreement that must be enforced under the FAA; it is additional to the other issues the parties have committed to arbitration. Rent-A-Ctr., 561 U.S. at 70. For example, in Rent-a-Center, this type of agreement was evidenced by a delegation provision giving the arbitrator the "exclusive authority to resolve any dispute relating to the … enforceability … of this [a]greement." Id. at 71. Here, under § 15.3(i) of the Rasier Agreement, the parties agreed as follows:

> "This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action. **Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the**

Arbitration Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge."

(Uber Mot., Ex. C § 15.3(i) (emphasis added).). The language of this Arbitration Provision in the Rasier Agreement is very similar to the quoted language of the delegation provision of the contract at issue in Rent-a-Center, which the Supreme Court found to commit the issue of arbitrability to the arbitrator.

Moreover, multiple district courts across the country, including ones in this Circuit, have considered the exact language of the Rasier Agreement in connection with the question of whether the FAA requires arbitration, and have answered the inquiry in the affirmative. See, e.g., Singh v. Uber Techs. Inc., No. 16-3044, 2017 WL 396545, at *12 (D.N.J. Jan. 30, 2017) (holding that the delegation provision of the Rasier Agreement reserved issues of arbitrability for the arbitrator); Micheletti v. Uber Techs., Inc., 213 F. Supp. 3d 839, 849 (W.D. Tex. 2016) (reasoning that because the delegation provision of the Rasier Agreement represented a valid and enforceable agreement to delegate questions of arbitrability to the arbitrator, dismissal was warranted); Suarez v. Uber Techs., Inc., No. 16-166, 2016 WL 2348706, at *4 (M.D. Fla. May 4, 2016) (finding that the delegation provision of the Rasier Agreement was clear and unmistakable in its intention to commit issues of decisional authority to the arbitrator); Varon v. Uber Techs., Inc., No. 15-3650, 2016 WL 1752835, at *6 (D. Md. May 3, 2016) (holding that the delegation provision of the Rasier Agreement was clear, unmistakable, and not unconscionable, and affirming that the arbitrator had exclusive authority to resolve any dispute related to the enforceability of the delegation provision); Sena v. Uber Techs. Inc., No. 15-2418, 2016 WL 1376445, at *4 (D. Ariz. Apr. 7, 2016) (concluding that the "plain language" of the delegation provision of the Rasier Agreement demonstrated that the parties clearly and unmistakably intended to arbitrate questions of arbitrability).

In summary, the language of the Arbitration Provision of the Rasier Agreement plainly commits authority over gateway issues such as arbitrability to the arbitrator. As a result, under Rent-a-

Center, it is severable from the rest of the contract. If Plaintiff's challenge focuses exclusively on the severed arbitration provision, the court may decide the merits of that challenge. Rent-A-Ctr., 561 U.S. at 70-71. If, however, the challenge encompasses the contract as a whole, the arbitrator must decide the matter. Id. at 72; S. Jersey Sanitation, 840 F.3d at 143. For the reasons discussed below, the Court finds that Plaintiff's challenges do not relate to the specific issue of arbitrability, and therefore they are matters for the arbitrator to decide.

Here, Plaintiff raises two challenges: (1) the Rasier Agreement is unconscionable because it forces him to forgo substantive statutory rights to which he is entitled; and (2) the Rasier Agreement does not encompass his claim. (ECF 6, Pl.'s Resp. at 5-9.) Plaintiff's first challenge is based on alleged coercion to enter into the Rasier Agreement. Specifically, Plaintiff argues that Uber imposed a "take it or leave [it]" arbitration agreement on Plaintiff that contained "oppressive and unlawful provisions meant to disadvantage [Plaintiff]." (Id. at 7.) This argument is unpersuasive for three reasons. First, and most importantly, a challenge to the validity of the contract as a whole is a matter for the arbitrator to decide. Rent-a-Ctr., 561 U.S. at 70-71; S. Jersey Sanitation, 840 F.3d at 143. Because the issue of the alleged unconscionability that Plaintiff faced in deciding whether or not to accept the terms of the Rasier Agreement concerns the validity of the entire contract, as opposed to the validity of the particular provision of the Rasier Agreement that commits the issue of arbitrability to the arbitrator, this matter is reserved for the arbitrator.

In addition, all of the cases that Plaintiff cites in support of the proposition that courts routinely deem entire agreements unenforceable when multiple provisions are unconscionable are not binding on this Court, predate Rent-a-Center, and do not address the question controlling this case—whether the parties have committed the specific gateway issue of arbitrability to the arbitrator. See, e.g., Plaskett v. Bechtel Int'l, Inc., 243 F. Supp. 2d 334, 345 (D.V.I. 2003) (finding that arbitration section of contract, which concerned arbitration of employment issues generally but did not include a provision committing the issue of arbitrability to the arbitrator, was unconscionable and therefore

unenforceable); Schwartz v. Alltel Corp., No. 86810, 2006 WL 2243649, at *6 (Ohio Ct. App. June 29, 2006) (affirming denial of motion to stay pending arbitration because the arbitration clause, which did not specifically address the issue of whether the arbitrator would have authority to decide the issue of arbitrability, was substantively and procedurally unconscionable). Therefore, they are inapposite.

Plaintiff's second challenge, relating to the scope of the Arbitration Provision, contends that the instant case is not covered by the agreement between the parties. (Pl.'s Resp. at 8-9.) However, as described above, the arbitrability of the dispute, including whether Plaintiff's claims are encompassed by the Arbitration Provision, is an issue for the arbitrator to decide. See Singh, 2017 WL 396545, at *12 (holding that the determination as to whether the plaintiff's claim fell within the scope of the arbitration agreement was reserved for the arbitrator "because the parties have agreed to permit the arbitrator to decide issues of arbitrability under the [a]greement's delegation clause"). Therefore, Plaintiff's argument on this front, too, must fail.

Under Rent-a-Center and South Jersey Sanitation, unless a party specifically challenges the unconscionability of the delegation clause that reserves the power to decide gateway issues of arbitrability to the arbitrator, then these gateway issues are properly decided by the arbitrator. Applying this animating principle to the instant case, because the Arbitration Provision of the Rasier Agreement plainly commits the issue of arbitrability to the arbitrator, and because neither of Plaintiff's challenges focus exclusively on the validity of the severed arbitration provision, arbitration must be compelled.

IV. Conclusion

For the foregoing reasons, Uber's Motion to Dismiss is granted.

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