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<b>Ramos v Uber Tech., Inc.</b>
2018 NY Slip Op 28162
Decided on May 31, 2018
Supreme Court, Kings County
Rivera, J.
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Decided on May 31, 2018

Supreme Court, Kings County

<p><b>Elizabeth Ramos, Plaintiff,</b></p> <p><b>against</b></p> <p><b>Uber Technologies, Inc., Defendant.</b></p>
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Francois A. Rivera, J.

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion of defendant Uber Technologies, Inc.(hereinafter defendant or Uber) [\*2] filed on November 14, 2017, under motion sequence two, for an order pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq., and CPLR 7503 (a) compelling plaintiff Elizabeth Ramos (hereinafter plaintiff or Ramos) to arbitrate her claims against Uber and staying the action until arbitration is complete.

Notice of Motion

Memorandum of Law

Affirmation in Support

Exhibits A to C

Affidavit in Support

Exhibit A

Affidavit in Support

Exhibit A to B

## **MOTION PAPERS**

Uber's motion papers consists of a memorandum of law, an affirmation of its counsel, two affidavits and numerous annexed exhibits. The affirmation of Uber's counsel refers to three annexed exhibits labeled A through C. Exhibit A is a copy of the instant summons and complaint. Exhibit B is described as a copy of an order issued in the matter of *Lainer v Uber Techs., Inc.*, No. 15-CV-09925, Dkt. No.25 (C.D. Cal. May 11, 2016). Exhibit C is described as a copy of an order issued in the matter of *Ho v. Uber Techs., Inc.*, No. 2014 L-3219 (III. Cir. Ct. July 1, 2014).

The two affidavits are from Chris Brauchli, a technical lead manager at Uber, (hereinafter Brauchli) and from Rosemary Barajas, a managing litigation paralegal at Uber (hereinafter Barajas). Brauchli's affidavit refers to one annexed exhibit which he describes as the screenshots that an individual such as Ramos would necessarily have seen and used when registering for Uber's services. Barajas's affidavit refers to two annexed exhibits labeled A and B. Barajas describes exhibit A as a copy of Uber's terms and conditions for Uber riders in the United States that were in effect on November 4, 2015. Barajas describes exhibit B as the revised terms and conditions that were in effect for Uber riders in the United States as of January 2, 2016.

Ramos submitted a memorandum of law in opposition to Uber's motion. Uber submitted an affirmation of its counsel in reply.

## **BACKGROUND**

On July 29, 2016, Ramos commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's Office. The verified complaint alleges two causes of action. The first cause of action asserts a claim for violation of the New York State Executive Law § 296 (2) and Human Rights Law. Within the meaning of the [\*3] Executive Law, Uber is a public accommodation because it provides public conveyance services. The second cause of action asserts a claim for violations of the Administrative Code of the City of New York § 8-107 (4) and the New York City Human Rights Law based on Uber's failure to provide disabled passengers such as Ramos with accessible vehicles.

The verified complaint alleges the following salient facts. Uber is a technology company that maintains a software application available on smartphones that can be used by riders to request rides from third party transportation providers (hereinafter the Uber Rider App). Uber later launched another application called UberWAV (hereinafter UberWAV App), an expanded platform of the Uber Rider App that was intended to connect disabled passengers with existing accessible vehicles. On July 20, 2016, Ramos attempted to use the UberWAV App to hail an accessible vehicle from her home in Starrett City, Brooklyn. After an hour and three separate attempts to hail an accessible vehicle, the UberWAV App did not provide plaintiff with such a vehicle. Uber has not interposed an answer to the complaint.

## LAW AND APPLICATION

Ramos contends that she used the UberWAV App because it was purportedly designed to connect disabled riders with accessible taxicabs throughout New York City. Ramos claims that Uber violated the law of the State and the City of New York because it deprived her of on demand transportation services with the same service, response time, or convenience as those available to able-bodied New Yorkers.

Uber's instant motion seeks an order compelling Ramos to arbitrate her claims against it and to stay the instant action until arbitration is complete pursuant to Federal Arbitration Act, 9 U.S.C. § 1 et seq. and CPLR 7503 (a).

"The Federal Arbitration Act (hereinafter the FAA) (9 USC § 1 et seq.) applies to any arbitration agreement evidencing a transaction involving interstate commerce (*see* 9 USC § 2; *see also Highland HC, LLC v Scott, 113 AD3d 590* [2nd Dept 2014])." "The United States Supreme Court has interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power" (*Highland HC, LLC v Scott, 113 AD3d 590* [2nd Dept 2014], *citing Citizens Bank v Alafabco, Inc.*, 539 U.S. 52, 56 [2003][internal quotations omitted]).

CPLR 7503 (a) provides the procedure for a party to compel or stay arbitration as follows:

A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an [\*4] issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

"Arbitration is a favored method of dispute resolution in New York" ([\*Markowits v Friedman\*, 144 AD3d 993](#) [2nd Dept 2016]). "The threshold issue of whether there is a valid agreement to arbitrate is for the courts" (*Id.*). "Once it is determined that the parties have agreed to arbitrate the subject matter in dispute, the court's role has ended and it may not address the merits of the particular claims" (*Id.*).

The agreement to arbitrate must be clear, explicit and unequivocal, in order for the court to compel arbitration, and must not depend upon implication or subtlety ([\*Sutphin Retail One, LLC v Sutphin Airtrain Realty, LLC\*, 143 AD3d 972](#), 973 [2nd Dept 2016]). "Parties consenting to arbitration surrender many of their normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent" ([\*Navillus Tile, Inc. v Bovis Lend Lease LMB, Inc.\*, 74 AD3d 1299](#) [2nd Dept 2010] *citing Thomas Crimmins Contr. Co., Inc. v City of New York*, 74 NY2d 166, 171 [1989]).

There is no dispute that on November 4, 2015, Ramos registered an account with Uber using an Uber application on her mobile telephone. [\[EN1\]](#) Uber contends that by the process of registering, Ramos necessarily accepted Uber's terms and conditions which included an agreement to arbitrate. Uber also claims that Ramos' claims against Uber in the instant action falls within the scope of the arbitration agreement.

"A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration (CPLR 7503 [a])" ([\*Degraw Const. Group, Inc. v McGowan Builders, Inc.\*, 152 AD3d 567](#) [2nd Dept 2017]). "If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action" (*Id.* at 569). "Where there is no substantial question whether a valid agreement was made or complied with the court shall direct the parties to arbitrate" (*Id.*, *citing Sutphin Retail One, LLC v Sutphin Airtrain Realty, LLC*, [143 AD3d 972](#), 973 [2nd Dept 2016]). "Accordingly, on a motion to compel or stay arbitration, a court must determine, in the first instance ... whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement" (*Id.*, *citing Sisters of St. John the Baptist, Providence Rest Convent v Geraghty Constructor*, 67 NY2d 997, 998 [1986][internal quotation omitted]).

Uber's motion is supported by three sworn declarations, namely, the affirmation of its counsel, Kevin R. Vozzo and the affidavits of its employees, Chris Brauchli and Rosemary

Barajas.

### ***Kevin R. Vozzo's Affirmation***

The affirmation of Kevin R. Vozzo (hereinafter Vozzo) provides no facts or arguments in support of the instant motion. Rather, it provided a procedural history from the commencement of the action to the filing of the instant motion and refers to two annexed court orders. The two court orders involve actions against Uber as a defendant in other courts with different plaintiffs. Vozzo affirmed the following allegations of fact. The instant action was commenced on July 29, 2016. On or about September 14, 2016, Uber removed the instant action to Federal Court. On December 20, 2016, the Federal Court remanded the case. By stipulation of the parties Ramos' extended Uber's time to respond to the complaint. On January 25, 2017, Uber filed a motion in lieu of an answer to compel Ramos to submit her claims to arbitration. The motion was marked off the calendar. Thereafter the parties agreed that Uber would file the instant motion.

### ***Chris Brauchli's Affidavit***

Chris Brauchli described himself as a Technical Lead Manager at Uber whose responsibilities include developing, implementing and maintaining aspects of the rider account-creation process. He has also described himself as an engineering manager. Brauchli claimed that he has access to Uber's records regarding when and where riders create accounts. He also claimed familiarity with the manner in which these records were updated and maintained.

Brauchli's affidavit, however, did not state not how long he had been employed by Uber, whether he designed the Uber telephone application which Ramos purportedly used in November 2015, or whether he had personal knowledge of Uber's business practices and procedures in the creation of the business records of riders actual registration. Uber did not annex to its motion papers a copy of any of the business records pertaining to Ramos' registration for Uber services. Assuming such business records exist, they would probably have included her facebook or email account and her credit card or Paypal information that she would have imputed in the registration process.

"A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" (*HSBC Mortg. Services, Inc. v Royal*, 142 AD3d 952 [2nd Dept 2016], [citing \*Citibank, N.A. v Cabrera\*, 130 AD3d 861](#), 861 [2nd Dept 2015]). Without annexing Ramos' records pertaining to her registration for Uber services and without a claim by Brauchli that he had personal knowledge of the business practices and procedures by which Uber created such records, his statements regarding their content would be hearsay.

Brauchli annexed to his affidavit what he described as the screenshots that a person registering for Uber in November 2015, using an iOS operated smartphone would [\*5] have used during the registration process. The following analysis assumes for the sake of argument that Brauchli's description of the registration process utilizing the annexed screenshots is accurate.

First the registrant would download the IOS Rider App to their smartphone. Upon completing the download the individual would then click on the button denominated "REGISTER." This would bring up the first annexed screenshot. The first annexed screenshot displays step one in the registration process, and is denominated "CREATE AN ACCOUNT" where the individual may choose to connect the Uber account by using either Facebook or by manually typing in an email, mobile number and desired password. Below the input fields is the following text: "We use your email and mobile number to send you ride confirmations and receipts." After the registrant enters the requested data on the first screen the word "NEXT" becomes enabled in the upper right hand corner of the screen. The registrant would then click "NEXT" to advance to the second screenshot.

The second screenshot displays step two, denominated "CREATE A PROFILE" where the individual would type in their first and last name. After entering the first and last name on the second screenshot the word "NEXT" becomes enabled in the upper right hand corner of the screen. The registrant would then click "NEXT" to advance to the third and final screenshot.

The third screenshot displays the last step, denominated "ADD PAYMENT" where the applicant would input their credit card details or PayPal information. Below the input fields for the credit card information is the following text: "By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy." To finish the process the applicant must click

on a button labeled "DONE." The applicant could before clicking the button labeled "Done" review the Terms & Conditions.

Brauchli claims that the phrase "Terms & Conditions and Privacy Policy" on the third screenshot is displayed within a rectangular box. He further claims, without any explanation, that its placement inside the rectangular box indicates that it is a clickable button. If the button is clicked the individual would be taken to a screen that contains other clickable buttons, including buttons entitled "Terms & Conditions" and "Privacy Policy." If the Terms and Conditions button is clicked, the Terms & Conditions in effect at the time would be displayed.

It is noted that Brauchli did not annex a copy of the screenshot that would have been displayed if the phrase "Terms & Conditions and Privacy Policy" displayed in the rectangular box had been clicked. Nor did he provide a copy of the screenshots that would have appeared had the registrant clicked on any of the other clickable buttons that became visible after the phrase "Terms & Conditions and Privacy Policy" displayed in the rectangular box had been clicked.

Although Brauchli has claimed that Ramos registered for Uber services on November 4, 2015, he also did not annex a copy of the screenshot of the "Terms & [\*6]Conditions" that would have appeared had Ramos clicked the phrase "Terms & Conditions and Privacy Policy" displayed in the rectangular box.

The language in the last screenshot, which states that "By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy" is on its face ambiguous for the following reasons. A registrant may reasonably believe that the phrase Terms and Conditions pertains to letting Uber use the registrant's facebook account or email and mobile number for sending bills and receipts, as stated in the first screenshot. Additionally, the instructions on the third screenshot does not contain any language or any indication advising the applicant that clicking on the words "Terms & Conditions and Privacy Policy" will take the applicant to another screen purportedly containing Uber's terms and conditions. In fact, an applicant may complete the registration process after completing the third screenshot and hitting the "DONE" button without ever seeing or even being aware that a separate screen contains Uber's terms and conditions. The Court does not agree with Bauchli's contention that the framing of the phrase "Terms & Conditions and Privacy Policy" within a rectangular box gives reasonable notice to anyone that it is a clickable button.



### ***Barajas' Affidavit***

Uber has also submitted an affidavit from Barajas who described herself as a manager and litigation paralegal at Uber. Barajas's affidavit did not state how long she has been employed by Uber. Barajas has averred knowledge of Uber's policies and procedures for maintaining in its business records the agreements between Uber and riders. Barajas has also averred that she accessed these records and annexed as exhibit A a copy of Uber's terms and conditions for Uber riders in the United States that were in effect on November 4, 2015 and that she annexed as exhibit B the revised terms and conditions that were in effect for Uber riders in the United States as of January 2, 2016.

The Court finds after assuming the accuracy of Brauchli's claims regarding the registration process that a registrant may complete the process without seeing or even being aware that there are other clickable buttons leading to a screenshot containing Uber's terms and conditions, inclusive of the subject agreement to submit to arbitration. The above referenced screenshots and registration process do not compel the registrant to see the subject terms and conditions and does not compel the registrant to indicate in some fashion its acceptance of the subject terms and conditions, such as, by clicking an acceptance button.

The Court has assumed for the sake of argument that exhibit A and B annexed to Barajas' affidavit accurately reflects Uber's terms and conditions for the periods of time indicated. Barajas, however, did not mention Ramos or offer any evidence regarding Ramos' registration process. Accordingly, Barajas does not fill any of the gaps in Brauchli's affidavit.

Accordingly, Uber has not demonstrated that Ramos clearly, explicitly and unequivocally agreed to arbitration when she registered for Uber services. Uber's motion [\*7]improperly depends upon implication or subtlety in the interpretation of its ambiguous registration process ([\*Sutphin Retail One, LLC v Sutphin Airtrain Realty, LLC\*, 143 AD3d 972, 973 \[2nd Dept 2016\]](#)).

### **CONCLUSION**

Uber Technologies, Inc.'s motion for an order pursuant to Federal Arbitration Act, 9 U.S.C. § 1 et seq., and CPLR 7503 (a) compelling Elizabeth Ramos to arbitrate her claims

against it and staying the action until arbitration is complete is denied.

Uber Technologies, Inc. is directed to interpose an answer within 30 days of the date of this decision and order.

### Footnotes

**Footnote 1:** This fact is taken from the factual background statement contained in plaintiff's memorandum of law in opposition to Uber's motion.

[Return to Decision List](#)