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United States District Court,
D. Maryland.

Elizabeth Varon, individually, and on behalf of all others similarly situated, Plaintiff
v.
Uber Technologies, Inc. and Raiser, LLC, Defendants.

CIVIL ACTION NO. MJG-15-3650
|
Signed 05/03/2016

MEMORANDUM RE: ARBITRATION

Marvin J. Garbis, United States District Judge

***1** The Court has before it Defendants' Motion to Dismiss, to Compel Individual Arbitration, and to Strike Class Allegations [ECF No. 12] and the materials submitted relating thereto. The Court has reviewed the exhibits and considered the materials submitted by the parties. The Court finds a hearing unnecessary.

I. INTRODUCTION

A. Procedural Background

In this putative class action, Plaintiff Elizabeth Varon ("Varon") sues Defendants Uber Technologies, Inc. ("Uber") and a subsidiary, Rasier, LLC [1] ("Rasier"). On September 22, 2015, Varon, an Uber driver, filed suit in the Circuit Court for Baltimore County asserting claims set forth in seven Counts:

- Count I – Tortious Interference with Contract & Business Relations (relating to gratuities);
- Count II – Breach of Contract (relating to gratuities not paid to drivers);
- Count III – Unjust Enrichment (relating to gratuities not paid to drivers);
- Count IV – Conversion (relating to gratuities not paid and driving expenses not reimbursed);
- Count V – Unfair Competition (relating to misappropriation of gratuities and driving expenses);
- Count VI – Fraud and/or Intentional or Negligent Misrepresentation (relating to gratuities, cancellation fees, and discounted gas cards);
- Count VII – Violations of Maryland Labor Law (relating to Uber's treating drivers as employees but not paying them as employees).

Defendants removed the case to this Court on November 30, 2015 pursuant to 28 U.S.C. § 1332. On December 7, 2015, Defendants filed the instant motion. While the motion was pending, a plaintiff in a similar case sought to have the instant case, and 6 others, joined in a Multidistrict proceeding. On February 3, 2016, the United States Judicial Panel on Multidistrict Litigation rejected the effort. Order Denying Transfer, ECF No. 19.

The Court herein addresses the instant motion.

B. Factual Setting

At all times relevant hereto, Rasier offered a smartphone application ("the Uber App") that connects riders looking for transportation to transportation providers ("Drivers") who are looking for riders. The app also provides the opportunity to become an Uber driver. On or about April 8, 2015, Varon used the Uber App to sign up to become an Uber driver. Varon's account as an Uber driver was activated on June 13, 2015. On June 18, 2015, she accepted – through the Uber App – the November 10, 2014 Rasier Software License and Online Services Agreement ("the Rasier Agreement").

The Rasier Agreement contains an arbitration clause ("the Arbitration Provision"). Briefly stated, [2] the Arbitration Provision applies to "any disputes arising out of or related to [the Rasier Agreement]." Decl. Ex. C at 26, § 15.3, ECF No. 12.2.

The provision states:

> Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. 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.

***2** Id. at 25.

The Arbitration Provision further states:

> IMPORTANT: This arbitration provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis pursuant to the terms of the Agreement unless you choose to opt out of the arbitration provision. This provision will preclude you from bringing any class, collective, or representative action against the Company or Uber. It also precludes you from participating in or recovering relief under any current or future class, collective, or representative action brought against the Company or Uber by someone else.

Id. at 24.

In addition, the Arbitration Provision delegates to the arbitrator, any dispute regarding the scope of issues subject to arbitration, stating in this regard:

> [Disputes within the scope of the agreement] 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.

Id. at 25-26.

The Rasier Agreement does not require a Driver applicant to agree to the Arbitration Provision and provides a 30-day period during which the Driver may opt out. Varon agreed to the Rasier Agreement on June 20, 2015 and did not opt out of the Arbitration Provision within 30 days (by July 20, 2015). Therefore, on September 22, 2015, when Varon filed the instant law suit, she was subject to the Arbitration Provision if it was enforceable.

The issue presented by the instant motion is whether Defendants can enforce the Arbitration Provision to require dismissal of the instant case and, thereby, require Plaintiff to proceed in arbitration.

II. LEGAL SETTING

The Federal Arbitration Act ("FAA") reflects a strong federal policy favoring arbitration, and courts are thus required "rigorously [to] enforce agreements to arbitrate." Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987). However, this liberal policy does not operate to compel arbitration of issues that do not fall within the scope of the parties' arbitration agreement.

Before compelling an unwilling party to arbitration, a court must "engage in a limited review to ensure that the dispute is arbitrable – i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." Murray v. United Food and Commercial Workers Int'l Union, 289 F.3d 297, 302 (4th Cir. 2002). The party seeking to arbitrate must establish only two facts: "(1) [t]he making of the agreement and (2) the breach of the agreement to arbitrate." Mercury Constr. Corp. v. Moses H. Cone Mem'l Hosp., 656 F.2d 933, 939 (4th Cir. 1981). The Court must particularly "avoid reaching the merits of arbitrable issues." Id. (citing Drivers, Chauffeurs, etc. v. Akers Motor Lines, 582 F.2d 1336, 1342 (4th Cir. 1978)).

III. DISCUSSION

***3** If enforced against Plaintiff, the Arbitration Provision would require dismissal of the instant case and require Plaintiff to pursue her claims in an arbitration proceeding, with all issues regarding the interpretation of the agreement delegated to an arbitrator. The Arbitration Provision provides that the parties agreed to "delegate to arbitration threshold issues related to the enforceability and validity of the arbitration agreement." Mot. Mem. 2, ECF 12-1.

As pertinent to the instant motion, [3] Varon contends that:

- The Arbitration Provision is unenforceable as unconscionable.

- The Arbitration Provision did not clearly and unmistakably delegate threshold issues to an arbitrator and, if it did, that delegation was unconscionable.

Opp'n 3, ECF No. 16.

At the threshold, the Court must determine whether the Court or an arbitrator shall decide the enforceability and validity of the Arbitration Provision.

A. The Arbitration Provision is Enforceable

"Whether an arbitration agreement exists depends on 'state-law principles that govern the formation of contracts.' " Baker v. Antwerpen Motorcars Ltd., 807 F. Supp. 2d 386, 389 (D. Md. 2011)(quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995)). But "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46 (2006). "The 'heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.' " Levin v. Alms & Assocs., Inc., 634 F.3d 260, 266 (4th Cir. 2011)(quoting Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989)).

1. Maryland Law Applies

"A federal court sitting in diversity is required to apply the substantive law of the forum state, including its choice-of-law rules." Francis v. Allstate Ins. Co., 709 F.3d 362, 369 (4th Cir. 2013) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938); Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496 (1941)). As to a contract claim, Maryland applies the law of the state where the contract was made ("lex loci contractus"), unless the parties to the contract agreed to be bound by the law of another state. See, e.g., Am. Motorists Ins. Co. v. ARTRA Group, Inc., 659 A.2d 1295, 1301 (1995). "Where the contract is made is defined as where the last act is performed which makes the agreement a binding contract." Francis, 709 F.3d at 370 (citation omitted). Varon agreed to the Arbitration Provision as part of the Rasier Agreement in Maryland.

The Rasier Agreement contains a California choice of law provision. However, "[a]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." (Buckeye Check Cashing, 546 U.S. at 445). The Arbitration Provision, severable from the other provisions in the Rasier Agreement, has no choice-of-law provision. Accordingly, with regard to the Arbitration Provision, a separate contract formed in Maryland, the Court shall apply Maryland law. [4]

2. The Arbitration Provision is not Unconscionable

"Under Maryland law, an unconscionable contract is void." Rose v. New Day Fin., LLC, 816 F. Supp. 2d 245, 256 (D. Md. 2011) (citing Walther v. Sovereign Bank, 872 A.2d 735, 743 (Md. 2005)). To find a contract unconscionable, the Court must find both procedural and substantive unconscionability. See id. ("Maryland courts require that a showing of procedural unconscionability—one party's lack of meaningful choice in making the contract—and substantive unconscionability—contract terms that unreasonably favor the more powerful party—to void the contract."); see also Holloman v. Circuit City Stores, Inc., 894 A.2d 547, 560 (2006) ("The prevailing view is that procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." (citations omitted)).

a. It is Not Procedurally Unconscionable

***4** Varon contends that the Arbitration Provision is procedurally unconscionable because it is a contract of adhesion. Opp'n 16-19, ECF No. 16. Varon states that "she had no meaningful opportunity to negotiate any terms" and was required to "either wholly accept the agreement, or not work for Uber." Id. at 19.

"A contract of adhesion is not automatically deemed per se unconscionable." Walther, 872 A.2d at 746. Rather, a court will take special care in its review of the contract and its terms. Id. at 746-47. In any event, the Arbitration Provision is not a contract of adhesion.

An applicant is not required to agree to the Arbitration Provision as a condition to becoming a Driver pursuant to the Rasier Agreement. Indeed, after entering into the Rasier Agreement the driver – but not Rasier or Uber – may opt-out of the Arbitration Provision within 30 days. This option is clearly stated, with a notice in larger font in the first section of

the Arbitration Provision, entitled "Important Note Regarding this Arbitration provision":

> IMPORTANT: This arbitration provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis pursuant to the terms of the Agreement unless you choose to opt out of the arbitration provision.

Decl. Ex. C at 24, § 15.3, ECF No. 12.2 (emphasis added). The last paragraph of that section is in large font, bold, and uppercase, stating:

> WHETHER TO AGREE TO ARBITRATION IS AN IMPORTANT BUSINESS DECISION. IT IS YOUR DECISION TO MAKE, AND YOU SHOULD NOT RELY SOLELY UPON THE INFORMATION PROVIDED IN THIS AGREEMENT AS IT IS NOT INTENDED TO CONTAIN A COMPLETE EXPLANATION OF THE CONSEQUENCES OF ABRITRATION. YOU SHOULD TAKE REASONABLE STEPS TO CONDUCT FURTHER RESEARCH AND TO CONSULT WITH OTHERS – INCLUDING BUT NOT LIMITED TO AN ATTORNEY – REGARDING THE CONSEQUENCES OF YOUR DECISION, JUST AS YOU WOULD WHEN MAKING ANY OTHER IMPORTANT BUSINESS OR LIFE DECISION.

Id. at 25.

Moreover, in a later section entitled "viii. Your Right to Opt Out of Arbitration," the Arbitration Provision states:

> Arbitration is not a mandatory condition of your contractual relationship with the Company. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration Provision by notifying the Company in writing of your desire to opt out of this Arbitration Provision, either by (1) sending, within 30 days of the date this Agreement Is executed by you, electronic mail to optout@uber.com, stating your name and Intent to opt out of the Arbitration Provision or (2) by sending a letter by U.S. Mail, or by any nationally recognized delivery service (e.g, UPS, Federal Express, etc.), or by hand delivery to: [Rasier's Legal Department address.]
>
> In order to be effective, the letter under option (2) must clearly indicate your Intent to opt out of this Arbitration Provision, and must be dated and signed. The envelope containing the signed letter must be received (if delivered by hand) or post-marked within 30 days of the date this Agreement is executed by you. Your writing opting out of this Arbitration Provision, whether sent by (1) or (2), will be filed with a copy of this Agreement and maintained by the Company. Should you not opt out of this Arbitration Provision within the 30-day period, you and the Company shall be bound by the terms of this Arbitration Provision. You have the right to consult with counsel of your choice concerning this Arbitration Provision. You understand that you will not be subject to retaliation if you exercise your right to assert claims or opt-out of coverage under this Arbitration Provision.
>
> ***5** Id. at 28-29 (emphasis added).

This Arbitration Provision, with a clearly-stated opportunity to opt-out without retaliation, is not procedurally unconscionable. See Freedman v. Comcast Corp., 988 A.2d 68, 86 (Md. Ct. Spec. App. 2010) (rejecting the argument that an arbitration provision was procedurally unconscionable because customers could reject the arbitration provision with "no effect on the rest of the agreement." (emphasis in original)).

b. It is Not Substantively Unconscionable

"Substantive unconscionability is concerned with the fairness of the terms in the contract. It is present when the terms of the contract are so one-sided as to be overly oppressive or unduly harsh to one of the parties." [5]

Varon contends that the Arbitration Provision, and specifically the delegation clause, is substantively unconscionable because she "would be subject to hefty fees to arbitrate...because the arbitration fee provisions require costs to be shared...." Opp'n 19, ECF No. 16.

There are two fee-splitting clauses. The first states:

> Unless the law requires otherwise, as determined by the Arbitrator based upon the circumstances presented, you will be required to split the cost of any arbitration with the Company.

Decl. Ex. C at 24, § 15.3, ECF No. 12.2. The second, in a section entitled "vi. Paying For The Arbitration" states:

> Each party will pay the fees for his, her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law (i.e., a party prevails on a claim that provides for the award of reasonable attorney fees to the prevailing party). In all cases where required by law, the Company will pay the Arbitrator's and arbitration fees. If under applicable law the Company is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned equally between the Parties or as otherwise required by applicable law. Any disputes in that regard will be resolved by the Arbitrator.

Id. at 28.

Like the Plaintiff in Sena, Varon has not adequately presented alleged facts supporting a contention that the fee-splitting provision would require her to bear costs that would be prohibitively expensive for her. See, e.g., Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 556 n. 5 (4th Cir. 2001) (rejecting argument that arbitration clause containing a fee-splitting provision which required employee to share the arbitration costs and pay half the arbitrator's fee rendered the arbitration agreement per se unenforceable).

Varon also contends that the class action waiver is substantively unconscionable. Opp'n at 23, ECF No. 16. This Court agrees with the "[n]umerous courts, both federal and state, [that] have rigorously enforced no-class-action provisions in arbitration agreements and found them to be valid provisions of such agreements and not unconscionable." Walther, 872 A.2d at 750.

Finally, the Court observes that if Varon truly believed that any aspect of the Arbitration Provision was unconscionable or otherwise not to her liking, she had no obligation whatever to agree to it.

3. The Delegation Clause is Enforceable

***6** The Arbitration Provision includes a delegation clause providing that "all [disputes within the scope of the Arbitration Provision] shall be decided by an Arbitrator and not by a court or judge." Decl. Ex. C at 26, § 15.3, ECF No. 12.2. The parties to an arbitration agreement may delegate such decisions to an arbitrator. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 69-70 (2010). However, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." Kaplan, 514 U.S. at 944 (1995) (citations omitted).

Varon contends that the Arbitration Provision did not clearly and unmistakably delegate the decisional authority at issue to an arbitrator. She further contends that the delegation clause is unconscionable.

As discussed herein, the Court finds that delegation clause is a valid and enforceable agreement that was clearly and unmistakably communicated and is neither procedurally nor substantively unconscionable. Accordingly, the arbitrator has exclusive authority to resolve any dispute related to the enforceability of the Arbitration Provision.

a. The Clause is Clear and Unmistakable

The Arbitration Provision, limited to its "four corners," provides clear and unmistakable delegation of arbitrability to the arbitrator. For example, it states that "[t]his Arbitration Provision requires all such disputes to be resolved only by an arbitrator...." Decl. Ex. C at 25, § 15.3, ECF No. 12.2. It further specifies:

> 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.

Id. at 25-26.

The delegation clause within the Arbitration Provision is neither hidden nor buried. It is included under the heading "i. How This Arbitration Provision Applies." Id. at 25.

Varon contends that a difference between the scope of the California choice-of-law provision in the Rasier Agreement and the scope of the delegation clause renders the delegation clause unclear. Opp'n 15, ECF No. 16. The Court, agreeing with the Sena court, finds that the plain language of the delegation clause, severed from the Rasier Agreement, clearly and unmistakably provides for the threshold issue of arbitrability to be determined by the arbitrator. See Sena v. Uber Techs. Inc., et al., No. CV-15-02418 (D. Ariz. April 7, 2016) [Ex. A, ECF No. 22] (applying strict severability principles and confining its analysis to the discrete agreement to arbitrate, the court concluded that similar delegation language has been deemed sufficiently clear and unmistakable).

b. The Delegation Clause is not Unconscionable

The Court has heretofore addressed Varon's contention that the Arbitration Provision is unconscionable and found that it was not. Varon has presented no additional reason to find that the delegation clause, separate from the Arbitration Provision, is unconscionable.

IV. CONCLUSION

For the foregoing reasons:

1. Defendants' Motion to Dismiss, to Compel Individual Arbitration, and to Strike Class Allegations [ECF No. 12] is GRANTED.

2. Judgment shall be entered by separate Order.

SO ORDERED, on Tuesday, May 3, 2016.

APPENDIX

Tabular or Graphical Material not displayable at this time.

***7** Tabular or Graphical Material not displayable at this time.

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All Citations

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Footnotes

1 Rasier, LLC was misspelled in Plaintiff's Complaint as Raiser.

2 See the Appendix for the full text of the Arbitration Provision.

3 Presenting the threshold question of whether the Court or an arbitrator decides issues regarding the enforceability of the Arbitration Provision.

4 The Court finds immaterial that in cases involving the Rasier Agreement, presenting disputes between California citizens and a contract formed in California, the district court applied California law to the Arbitration Provision. Mohamed v. Uber Techs., Inc., No. C-14-5200 EMC, 2015 WL 3749716 (N.D. Cal. June 9, 2015) and (O'Connor v. Uber Techs., Inc., No. 13-cv-03826-EMC, 2015 WL 8292006 (N.D. Cal. Dec. 9, 2015)). In those cases, California law would be applicable with, or without a California choice-of-law provision in the Rasier Agreement.

5 Sena v. Uber Techs. Inc., No. CV-15-02418 (D. Ariz. April 7, 2016) [Ex. A, ECF No. 22] (citations omitted).