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| Swipe Ice Corp, Inc. v UPS Mail Innovations, Inc. |
| 2018 NY Slip Op 30178(U) |
| February 1, 2018 |
| Supreme Court, Kings County |
| Docket Number: 517343/17 |
| Judge: Sylvia G. Ash |
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of February, 2018.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

-X-----

SWIPE ICE CORP, INC.

Plaintiff(s),

- against -

UPS MAIL INNOVATIONS, INC. UPS
EXPEDITED MAIL SERVICES, INC., and
UNITED PARCEL SERVICE, INC.,

Defendant(s).

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The following papers numbered 1 to 3 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

1

Opposing Affidavits (Affirmations) _____

2

Reply Affidavits (Affirmations) _____

1

Statement of Facts

This is an action whereby Swipe Ice Corp, Inc. (hereinafter "Plaintiff") commenced an action for breach of contract alleging that UPS Mail Innovations, Inc., UPS Expedited Mail Services, Inc. and United Parcel Service, Inc. (hereinafter "Defendants") failed to otherwise adequately perform or deliver services for which they were retained and agreed to perform on

Plaintiff's behalf. Defendant files a notice of motion (Mot. Seq. No. 1) seeking to dismiss the complaint based upon the forum selection clause of their agreement with Plaintiffs.

Defendants' Motion to Dismiss

Defendant seeks to dismiss Plaintiff's action by enforcing a forum selection clause referenced in a shipment control form (hereinafter "The Agreement") signed by Plaintiff. Section 1 of The Agreement states in pertinent part that "[t]he services to be performed by UPS-MI hereunder are governed by the terms and conditions contained on this Shipment Control Form and the Service Terms and Conditions, which are incorporated herein by this reference. The Service Terms and Conditions are published on the Internet at <http://www.upsmailinnovations.com>." Section 11 of the service terms and conditions set forth on <http://www.upsmailinnovations.com> state in pertinent part:

Except where governed by mandatory treaty, national law, or U.S. federal law, the Agreement shall be governed by and construed in accordance with the laws of the state of Georgia, without giving effect to the conflict of law rules thereof. Any legal suit, action or proceeding arising out of or relating to this Agreement shall be commenced in the U.S. District Court for the northern District of Georgia, or in state court in the County of Fulton, Georgia, and each party hereto irrevocably submits to the jurisdiction and venue of such courts in any such suit, action or proceeding.

Defendants, therefore, argues that any actions stemming from The Agreement must be commenced in Georgia.

In opposition, Plaintiff seeks to have the contract deemed ambiguous with respect to whether it properly incorporates the forum selection clause. Plaintiff argues that the clause is ambiguous because it was not clear whether the terms and conditions which are displayed on the UPS-MI service terms and conditions page were properly incorporated into The Agreement. Plaintiff alleges that the service terms and conditions page was hard to find, as The Agreement did not provide a direct link to the terms and services page and that the forum selection clause was inconspicuous within the actual terms and conditions.

Discussion

The creation of online contracts “has not fundamentally changed the principles of contract” (*Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 [2d Cir.2004]). “To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms” (*Matter of Express Indus. & Term. Corp. v. New York State Dept. of Transp.*, 93 N.Y.2d 584, 589, 693 N.Y.S.2d 857, 715 N.E.2d 1050 [1999]). There must be an offer followed by an acceptance (*id.*). In regard to online contracts, courts look for evidence that a website user had actual or constructive notice of the terms of using the website (*Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 [2d Cir.2012]). Where the supposed assent to terms is mostly passive, as it usually is online, courts seek to know “whether a reasonably prudent offeree would be on notice of the term at issue” (*id.*), and whether the terms of the agreement were “reasonably communicated” to the user (*Resorb Networks, Inc. v YouNow.com*, 51 Misc 3d 975, 980 [Sup Ct 2016]).

Courts have held that there are three general principles regarding the enforceability of internet contracts. First, the website must be designed such that a “reasonably prudent user” will be placed on “inquiry notice” of the terms of using the website. Second, the design and content of the website must encourage the user to examine the terms “clearly available through hyperlinkage”. Third, agreements will not be enforced where the link to the agreement is “buried at the bottom of a webpage or tucked away in obscure corners of the website” (*Resorb Networks, Inc. v YouNow.com*, 51 Misc 3d 975, 981 [Sup Ct 2016]).

In the present case, the court finds that the forum selection clause is unenforceable, as the online service terms and conditions were not reasonably communicated to Plaintiff. The facts indicate that The Agreement referenced a website hyperlink that contained terms not presented to the offeree at the time of acceptance. Furthermore, the hyperlink referenced in The Agreement was not a direct link to the service terms and conditions, instead, The Agreement provided a hyperlink to the general site that the user would have to scroll through to find the actual terms and conditions hyperlink at the bottom of the page. The court reasons that this type of design does not encourage the user to examine the terms, as they are not clearly available through the hyperlink referenced in The Agreement. Therefore, the court finds the forum selection clause to be unenforceable because

a reasonably prudent offeree would not be on notice of the terms that were buried at the bottom of the web page in a manner that did not encourage the user to examine such terms and conditions.

Accordingly, Defendant's motion to dismiss is hereby DENIED. This constitutes the decision and order of the court.

E N T E R,



SYLVIA G. ASH, J.S.C.