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A Bronx Tale: A New York State Trial Judge Calls Out New York State's Long-Standing Heightened Standard of Proving the Making of an Agreement to Arbitrate

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The Bronx, where I came of age and grew into young adulthood, is well-known for the scrap of its residents. That can also be said of its judiciary. On December 20, 2022, in *Wu v. Uber Techs., Inc.*, the New York State Supreme Court, Bronx County (the Court), a New York State trial court, enforced the arbitral provisions of Uber's terms that plaintiff click-wrapped over two months after she filed a lawsuit against Uber for personal injuries she sustained while exiting a vehicle she had hailed using her Uber app. The Court's opinion is a *tour de force* and is especially noteworthy for the Court's gutsy decision, possibly in *dicta* but in the face of controlling legal authority to the contrary, that the 1993 holding of the U.S. Court of Appeals for the Second Circuit (the Second Circuit), in *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, had, in cases falling under the long-reach of the Federal Arbitration Act (the FAA), displaced the heightened burden to prove the making of an agreement to arbitrate that New York law imposes on a party who seeks arbitration. Instead, the Court decided, after a thorough analysis, that the preponderance of the evidence standard that applies under New York law to prove the making of agreements generally applies also to proving the making of an agreement to arbitrate in state court actions falling under the FAA, as the Second Circuit held in *Progressive*.

The Facts of the Case

On January 15, 2021, about two months after plaintiff Emily Wu filed her lawsuit for alleged personal injuries, she, along with millions of other Uber customers, received an e-mail from Uber with the subject line "Changes to our Terms of Use on January 18," which the court called the "January 2021 Email."

The January 2021 Email expressly advised recipients both that changes to Uber's Terms of Use would go into effect on January 18, 2021 (the court called these changes the "January 2021 Terms") and that the January 2021 Terms included, *inter alia*, "changes to the Arbitration Agreement … and procedures and rules for filing a dispute against Uber." A blue hyperlink in the otherwise black text of the January 2020 Email allowed its recipients to review the January 2021 Terms. Plaintiff admitted that she received the January 2021 Email. However, the court concluded that she did not review the January 2021 Terms.

The January 2021 Email also stated that beginning on January 18, 2021, users of the Rider App would be presented with an in-app "blocking" pop-up screen bearing the heading, "We've updated our terms." The court called this the "January 2021 Pop-Up."

The January 2021 Pop-Up encouraged users to read the January 2021 Terms in full and linked to those Terms via a contrasting blue hyperlink titled "Terms of Use." Additionally, the January 2021 Pop-Up contained a checkbox and, to its right, expressly stated: "By checking the box, I have reviewed and agreed to the Terms of Use and acknowledge the Privacy Notice." The term "blocking," the court explained, meant that the user could not advance past the screen and continue using the Rider App until the checkbox was checked and the "Confirm" button pressed.

Uber's records showed that plaintiff checked the box and clicked the "Confirm" button in the January 2021 Pop-Up on January 25, 2021. Uber's records also show that, in the months that followed, plaintiff used the Rider App to hail rides more than 50 times, 19 of which occurred after Uber demanded arbitration (more below).

The Court's Decision

In response to Uber's motion to compel arbitration, plaintiff took an everything-but-the-kitchen-sink approach to advocacy. She posited that her claims fell outside the scope of the agreement to arbitrate. She contended that she was entitled to the judicial resolution of her challenges to the formation and validity of the January 2021 Terms. She asserted that the January 2021 Terms were both procedurally and substantively unconscionable. She submitted that the agreement to arbitrate was void under New York State public policy because the right to a jury trial is guaranteed by the New York State Constitution, and section 4102(c) of New York State's Civil Practice Law and Rules sets forth certain procedures that must be, but were not, followed in order to waive that right in a pending action. Plaintiff argued also that even assuming that the January 2021 Terms were neither unconscionable nor a contract of adhesion, nor void as against public policy, *etc*., she never assented to them.

The Court held that it was for the court, not the arbitrators, to decide if plaintiff had entered an agreement to arbitrate and that, under the delegation clause of the arbitral provisions of the January 2021 Terms, it was for the arbitrators to determine the plethora of other issues plaintiff raised.

With respect to the making of the agreement to arbitrate, the Court decided that Uber had carried its burden to prove plaintiff's entry into the agreement to arbitrate in the January 2021 Terms. The court observed that "the January 2021 Pop-Up requires a user to take not one, but *two* (emphasis in original) affirmative steps to move beyond the screen and continue use of the Rider App." The Court then found that the January 2021 Terms put plaintiff on "inquiry notice" of the agreement to arbitrate in those Terms. Accordingly, the Court concluded plaintiff "was on inquiry notice of both the January 2021 Terms and the Arbitration Agreement, assented to both through conduct that a reasonable person would understand to constitute assent (*i.e.,* by clicking the checkbox and the 'Confirm' button), and, therefore, is bound to them."

As to the burden of proof that Uber had to meet, the court recognized that New York law applied to the determination of whether plaintiff had, in fact, agreed to arbitration. The Court acknowledged what it called "New York Rule," which, the Court explained, imposes on the party seeking to compel arbitration a heightened standard of proof of the existence of an agreement to arbitration. The Court explained also that, under the New York Rule, the proof that a party had entered an agreement to arbitrate " 'must be clear, explicit and unequivocal … and must not depend upon implication or subtlety'"; and the court then string-cited New York State court decisions, from the highest court to the lowest, and many of recent vintage, that supported this heightened standard of proof.

However, after pointing out that neither party had brought *Progressive* to the Court's attention, the Court determined that *Progressive* should control. The Court so held even though, as the Court expressly recognized, New York State's Appellate Division, First Judicial Department (the First Dept.), *the appellate court with direct authority over the Supreme Court, Bronx County*, had held pretty much to the contrary in *J.J.'s Mae, Inc. v. H. Warshow & Sons, Inc*.

As the Court acknowledged, in *J.J. Mae*, the First Department "ultimately concluded that the outcome of the dispute [before it] did not turn on whether *Progressive* applied, [but] nevertheless implied that it was skeptical that *Progressive* barred application of the New York Rule *per se* in all disputes involving interstate commerce (and thus governed by the

FAA)." The Court observed, however, that

> [t]his apparent conflict of federal and state law has not yet been squarely and explicitly addressed by a New York State appellate court. The Court is left confronting the question, therefore, of what it should do in light of (a) the Second Circuit's holding that the FAA preempts the New York Rule and (b) the conflicting existence of subsequently issued First Department decisions continuing to apply the New York Rule even while simultaneously acknowledging that the FAA governs.

In *Progressive*, the Second Circuit addressed that conflict as follows:

> We agree with the district court that New York law governs here. That law provides that parties will not be held to have chosen arbitration "in the absence of an express, unequivocal agreement to that effect." *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 408 N.Y.S.2d 410, 413, 380 N.E.2d 239 (1978) (citations omitted). …However, New York law requires that nonarbitration agreements be proven only by a mere preponderance of the evidence. *See*, *e.g.*, *Fleming v. Ponziani*, 24 N.Y.2d 105, 299 N.Y.S.2d 134, 139, 247 N.E.2d 114 (1969). Because *Perry* [*v. Thomas*, 482 U.S. 483 (1987)] prohibits such discriminatory treatment of arbitration agreements, the rule set forth in *Marlene Industries* is preempted. Accordingly, in determining whether the parties have agreed to arbitrate, we apply the ordinary preponderance of the evidence standard.

The Court added a parting-shot in a footnote: "[g]iven the well-settled law surrounding the Supremacy Clause of the U.S. Constitution and the preemption doctrine, it is unlikely a state court could overrule or disregard a federal appellate court on a matter of federal statutory preemption." *That's* intestinal fortitude.

What Next?

After its careful analysis, the court decided to hedge its appellate bet, concluding that the court "need not decide that issue or resolve the underlying conflict, however, as Uber demonstrates the existence of an agreement to arbitrate under either the New York Rule or the more lenient preponderance standard." Nonetheless, if this decision is appealed, how, if at all, the First Dept. grapples with *Progressive* will have considerable impact because the First Dept. 's decisions are controlling also in New York County, a/k/a Manhattan, and the FAA's reach is equal to that the Commerce Clause of the U.S. Constitution, which is far-reaching indeed.

Wu v. Uber Techs., Inc., 2022 N.Y. Misc. LEXIS 7910, 2022 NY Slip Op 22388 (N.Y. Sup. Bronx County Dec. 20, 2022).

For the benefit of those without familiarity with New York State's unique judicial system, New York State's Supreme Courts are actual trial courts established in each of the State's counties.

Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42 (2d Cir. 1993).

9 U.S.C. § 1, *et seq*.

CPLR § 4102(c), titled "Waiver," states as follows: "A party who has demanded the trial of an issue of fact by a jury under this section waives his right by failing to appear at the trial, by filing a written waiver with the clerk or by oral waiver in open court. A waiver does not withdraw a demand for trial by jury without the consent of the other parties. A party shall not be deemed to have waived the right to trial by jury of the issues of fact arising upon a claim, by joining it with another claim with respect to which there is no right to trial by jury and which is based upon a separate transaction; or of the issues of fact arising upon a counterclaim, cross-claim or third party claim, by asserting it in an action in which there is no right to trial by jury."

Wu, 2022 N.Y. Misc. LEXIS 7910 at *47-48 (citations omitted).

J.J.'s Mae, Inc. v. H. Warshow & Sons, Inc., 277 A.D.2d 128, 717 N.Y.S.2d 37 (N.Y. App. Div. First Dep't 2000).

Wu, 2022 N.Y. Misc. LEXIS 7910 at *48-51.

Id., at *51, n.11.

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).