SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EUGENE J. LAKA, Plaintiff, -against- AFLAC NEW YORK and KENNETH MEIER, Defendants.	Index No. 651809/2018 Motion Sequence No. 001 Justice Ostrager

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

Plaintiff EUGENE J. LAKA ("Plaintiff"), by his undersigned counsel, opposes Defendants' motion to compel arbitration because AFLAC's arbitration agreement contained in the Associate's Agreement between Plaintiff and AFLAC (the "Agreement") is procedurally and substantively unconscionable and unenforceable.

I. Legal standards

"Whether or not the parties have agreed to arbitrate is a question of state contract law." Schnabel v. Trilegiant Corp., 697 F.3d 110, 119 (2d Cir. 2012). "The party seeking arbitration has the burden of establishing an agreement to arbitrate." Resorb Networks, Inc. v. YouNow.com, 30 N.Y.S.3d 506, 510 (N.Y. Sup. Ct. 2016)(citing Seneca Ins. Co. v. Secure-Southwest Brokerage, 741 N.Y.S.2d 690 (N.Y. App. Div. 2002); Allstate Ins. Co. v. Roseboro, 667 N.Y.S.2d 914 (N.Y. App. Div. 1998)). "[T]he court must draw all reasonable inferences in favor of the non-moving party." Nicosia

v. Amazon.com, Inc., 834 F.3d 220, 229 (2d Cir. 2016). If there is a genuine dispute of material fact regarding the making of an agreement to arbitrate, then a trial is necessary. Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003)(citing 9 U.S.C. § 4).

In Berkson v. Gogo LLC, 97 F. Supp. 3d 359 (E.D.N.Y. 2015), Judge Jack B. Weinstein has articulated an applicable test for the enforceability of contracts of adhesion such as the Agreement, which was reaffirmed in Starke v. SquareTRADE, Inc., No. 16-cv-7036, Slip Op. (E.D.N.Y. Aug. 2, 2017) as "favorably cited and applied by federal and state trial courts."[1] Aflac's Arbitration Agreement (the "Agreement") fails the Berkson test and is unconscionable and unenforceable.

"Courts do not enforce terms of agreements that are unconscionable," made upon "a showing that the contract was both procedurally and substantively unconscionable when made -- i.e., some showing of ***an absence of meaningful choice*** on the part of one of the parties together with contract terms which are ***unreasonably favorable*** to the other party." Berkson, 97 F. Supp. 3d at 391 (emphasis added throughout).

[1] Citing "Applebaum v. Lyft, Inc., No. 16-CV-7062 (JGK), 2017 WL 2774153, at *6 (S.D.N.Y. June 26, 2017); Meyer v. Kalanick, 200 F. Supp. 3d 408, 416-21 (S.D.N.Y. 2016); Resorb Networks, [Inc. v. YouNow.com, 30 N.Y.S.3d 506 (N.Y. Sup. Ct. N.Y. Cnty. 2016)] at 511; see also Kai Peng v. Uber Tech., Inc., __ F. Supp. 3d __, No. 16-CV-545 (PKC) (RER), 2017 WL 722007, at *9 (E.D.N.Y. Feb. 23, 2017) (distinguishing Berkson); Nancy S. Kim, Online Contracting, 72 Bus. Law. 243, 243 (2017) (citing Berkson as evidence that 'courts are taking a more sophisticated approach to assess what conspicuous notice means in the online context')." Id.

The Berkson test analyzes these two prongs on a "sliding scale": the stronger the showing of substantive unconscionability, the lesser the showing of procedural unconscionability would suffice to invalidate the contract, and vice versa. Id.

The Eleventh Circuit Court of Appeals has recently applied the same two-prong analysis in Larsen v. Citibank FSB, 871 F. 3d 1295, 1309-20 (11th Cir. 2017), holding a confidentiality provision in a consumer arbitration agreement (also present in Aflac's Agreement) unconscionable.

The Court stated in Larsen, 871 F. 3d at 1310: "The courts of both Washington and Ohio characterize procedural unconscionability as the absence of 'meaningful choice' as to the terms of the agreement in light of all the circumstances surrounding the transaction.". Factors include "the manner in which the contract was entered," "whether each party had reasonable opportunity to understand the terms of the contract," and "whether the 'weaker party' was able to protect his interests." Id.

II. The Agreement is procedurally unconscionable.

"Whether procedural unconscionability exists is determined by what led to the formation of the contract. 'Procedural unconscionability involves questions about the manner in which the agreement was reached: Did one party adequately explain the content of the agreement to the other? . . . Were there sharp practices or overreaching? Did one party take advantage of the

other's lack of experience or naivete?" Berkson, 97 F. Supp. 3d at 391. "Procedural unconscionability is broadly conceived to encompass . . . a lack of understanding and inequality of bargaining power." Id. (internal citations omitted). Aflac had not given its associates any "meaningful choice' as to the terms of the Agreement, or any meaningful opportunity to so much as review the Agreement before signing or clicking on it.

When Plaintiff commenced working for Defendant Aflac in 2005, "he was asked to sign a copy of the Associate's Agreement during a training event, being presented with it as a 'sign it now and let's get it over with' formality, without being given a copy of the Agreement or an opportunity to review it. On April 27, 2005, Plaintiff received a welcome letter from Defendant AFLAC's Vice President Mark Charrette telling Plaintiff that he was 'now appointed to represent the number one provider of guaranteed-renewable supplemental insurance,' and enclosing Plaintiff's writing number but not a copy of the Associate's Agreement." Complaint ¶51 n.3.

Indeed, until after his termination by Aflac in 2014, Plaintiff "had never been provided with a copy of his Associate's Agreement, had never seen Aflac's arbitration agreement included in it, and had no information or 'instructions, guidelines, time and cost requirements or any form of explanatory material as to

how [Plaintiff] must prepare for this arbitration and the rules and procedures under which it shall be conducted." Complaint ¶50.

Furthermore, as affirmed by other Aflac sales associates currently resisting Aflac's attempts to force them in arbitration in Aflac v. Baker, No. 1:17-CV-07054 (E.D.N.Y.) and Aflac v. Hubbard, No. 4:17-cv-00246 (M.D. Ga.), whichever manner of the contract execution Aflac uses -- whether on paper as in Plaintiff's case; online through its "producerexpress" platform; on electronic touchscreens; or electronic touchpads – Aflac conducts it invariably in an oppressive, rushed, obscure and procedurally unconscionable manner, taking clear advantage of its associates.[2]

III. The Agreement is substantively unconscionable.

"'Substantive unconscionability involves questions about the fundamental fairness of the agreement or clauses within the agreement.'" Berkson, 97 F. Supp. 3d at 391-92. In discussing the substantive unconscionability test, Judge Weinstein relied on Trompeter v. Ally Financial, Inc., 914 F. Supp. 2d 1067, 1073-76 (N.D. Cal. 2012), for its holding that an arbitration clause is "unenforceable . . . where minimal procedural unconscionability is

[2] Five former Aflac sales associates filed their affidavits in Aflac v. Hubbard, No. 4:17-cv-00246, ECF Nos. 18-1 – 18-5 (attached as Exhibits 1-5 to the Declaration of Dimitry Joffe dated May 16, 2018), demonstrating that Aflac's methods of having associates execute the Agreement do not give them any meaningful choice as to the terms of the Agreement or any meaningful opportunity to even review it before signing or clicking on it regardless of a particular execution method.

present – 'based on the adhesive nature of the form arbitration agreement and the lack of opportunity . . . to negotiate its terms' -- and substantive unconscionability is apparent due to arbitration requirement that leaves parties unequal in their ability to pursue their respective claims."[3]

First, the severe one-sidedness of the Agreement in Aflac's favor makes it substantively unconscionable. As a threshold matter, the Agreement carves out from its scope virtually all material contractual claims that Aflac may have against the associates -- while the associates have to arbitrate any and all of their claims against Aflac. See Agreement 10.1 ("Except for an action by Aflac to enforce provisions contained in Paragraphs 1.4 ["Aflac Intellectual Property"], 3 ["Confidential and Protected Information"], 8 ["Restricted Conduct"], 10.5 ["Injunctive Relief"] or 10.6 [Covenant Not to Sue"]."

Furthermore, the Agreement requires the associate to arbitrate any dispute not only with Aflac itself but also with any of Aflac's "past and present officers, stockholders, employees, associates, coordinators, agents and brokers of Aflac" and

[3] In Trompeter, the Court has found that (a) "the standardized nature of the contract and its presentation on a 'take it or leave it' basis establish a limited degree of procedural unconscionability in the present case"; and (b) "Trompeter has established that the imposition of substantial fees and costs in pursuit of an appeal under the arbitration agreement contributes to a finding of substantive unconscionability" -- even though the employer there was required to "advance up to a maximum of $1,500 for a party's [fees]." 914 F. Supp. 2d at 1076. Here, all of these factors are present -- and more, as set out above.

"regardless of whether Aflac is a party." Aflac's officers and other affiliates are not similarly bound to arbitrate any of their claims against the associate, making the Agreement even further one-sided and lacking mutuality.

Accordingly, as in Trompeter, 914 F. Supp. 2d at 1073-76, "substantive unconscionability is apparent due to arbitration requirement that leaves parties unequal in their ability to pursue their respective claims." If "the arbitration provision [is] severely one-sided in the substantive dimension, even moderate procedural unconscionability renders the arbitration agreement unenforceable." Berkson, 97 F. Supp. 3d at 392 (quoting Bragg v. Linden Research, 487 F. Supp. 2d 593 (E. D. Pa. 2007)).

Second, the cost-prohibitive nature of the Agreement makes it unconscionable. The Eleventh Circuit considered the "Arbitration Costs" factor at length in Larsen, 871 F. 3d at 1314-16, where the agreement at issue gave consumers a choice of a low-cost JAMS arbitration option; the Court stated that "[e]ven if the AAA rules imposed a prohibitive cost-allocation framework, the consumer deciding whether to pursue his claim would be empowered and properly incentivized to choose JAMS instead" because "the cost of using the JAMS arbitral forum is absolutely capped at the initial filing fee," and therefore "the cost-sharing aspects of the . . . Arbitration Provision cannot be characterized as harshly one-sided or prohibitive under Washington law. Cf., e.g., Gandee [v. LDL

Freedom Enters., Inc., 293 P.3d 1197 (Wash. 2003)] at 1200-01 (invalidating 'loser pay' provision because the risk that costs might shift to the consumer in the event his claim failed 'effectively chill[ed]' his willingness to bring suit; as a result, the provision was 'one-sided and overly harsh')."

The Agreement here saddles sales associates, including Plaintiff, with heavy arbitration costs, which are prohibitive for Plaintiff (and other Aflac sales associates). See Lisa A. Nagele-Piazza, Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker, 23 U. Miami Bus. L. Rev. 39, 46 (2014) (internal reference omitted):

> In arbitration, the employee may be required to pay fees in advance of the proceedings, as well as substantial costs at the conclusion of the process, which would be unheard of in a courtroom. For example, arbitrators charge the parties an hourly rate or per diem fee, whereas a judge's salary would never be invoiced to the parties. In addition to the arbitrator's fees, parties to an arbitration proceeding are required to pay for room rentals, stenography, administrative fees, and the arbitrator's travel expenses. By the time the matter is resolved, arbitration costs and fees can amount to thousands of dollars, as one estimate shows the average cost of arbitrating an employment claim is approximately $20,000.00. In contrast, while litigation can be expensive, there are no required fees beyond the initial filing fee, and thus employee-claimants likely will not experience the same cost barriers in litigation as they may in arbitration.

As the Complaint alleges, Plaintiff objected to these arbitration provisions when Aflac first attempted to compel arbitration in 2014, protesting that they "inflict substantive

unfairness on the weaker party, because their terms are not within the reasonable expectations of that party, and because their terms are clearly unduly oppressive, unconscionable, and contrary to public policy." Complaint ¶48.

Furthermore, "Plaintiff learned only in the fall of 2014 that he would have to pay his own arbitration costs, including significant arbitrator's fees (in addition to his legal fees), which were much higher than the costs he would have had to pay in any court action." Id. at ¶58. "Defendant AFLAC did not offer Plaintiff to pay for the arbitrator, or to advance or reimburse arbitration costs, making the arbitration process prohibitively expensive and burdensome for the 71-year-old cancer survivor whom Defendant AFLAC had ruthlessly and viciously fired after almost 10 years of impeccable service, and whom it further impoverished by cutting off his income stream from his earned renewal commissions." Id. at ¶59.

Accordingly, "Plaintiff did not have the resources required to pay attorneys' fees and the prohibitive arbitration costs, including arbitrator's fees, and did not pursue arbitration because he could not afford to do so, both financially, physically, and emotionally particularly in Columbus, GA, where he was told and understood the arbitration to take place, and particularly considering his age and the chemotherapy-induced

peripheral neuropathy he was suffering from that prohibited him from walking normally or traveling." Id. at ¶60.

Finally, five other former sales associates whom Aflac also seeks to force into arbitration testified in their affidavits that they could not afford those arbitration costs either. See Joffe Decl. Exs. 1-5. "Unaffordable justice," indeed.

There is no alternative to this "prohibitive cost-allocation" provision in Aflac's Agreement comparable to the JAMS option that saved it in Larsen; accordingly, this feature of the Agreement deprives the associates of their "***substantive rights and a reasonable right of access to a neutral forum***," Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468 (D.C. Cir. 1997), rendering it substantively unconscionable under Berkson and its progeny, as well as under the more recent Larsen case.

In Cole, 105 F.3d at 1468, the D.C. Circuit held that "because public law confers both the substantive rights and a reasonable right of access to a neutral forum in which those rights can be vindicated . . . employees cannot be required to pay for the services of a 'judge' in order to pursue their statutory rights." And in Trompeter, 914 F. Supp. 2d at 1076, the Court has found that "the imposition of substantial fees and costs in pursuit of an appeal under the arbitration agreement contributes to a finding of substantive unconscionability" -- even though the

company in that case was required to advance the arbitration fees up until the appeal.

Third, the Eleventh Circuit invalidated as unconscionable the requirement to "keep confidential any decision of an arbitrator," which gave "obvious information advantage" to the employer. Larsen, 871 F. 3d at 1319. So is the case here, see Agreement at ¶10.2.

In sum, the Agreement is procedurally unconscionable, pervaded by substantively unconscionable terms, and should be declared void in its entirety.

IV. The Agreement is unenforceable Pursuant to *Gold v. New York Life.*

The New York Appellate Division, First Department, held recently in Gold v. New York Life Ins., 2017 NY Slip Op. 05695 (July 18, 2017), that the mandatory arbitration provisions with the class action waiver in employment context -- exactly like Aflac's -- are unenforceable as contrary to the National Labor Relations Act. This is currently, and until the U.S. Supreme Court's contrary ruling in Epic Systems, good law in New York and a controlling precedent here.

The First Department in Gold did not merely find the class waiver unenforceable -- the Court invalidated the mandatory arbitration agreement as a whole, implicitly rejecting the severance option. Indeed, the class/consolidated action bar is integral to the Agreement, as it affects the sales associates'

rights, potential claims, and access to a neutral forum in a fundamental way. Here, the bar precludes Plaintiff from pursuing him claims together with other similarly situated sales associates, whether on the class or consolidated basis, with the many advantages of such collective forms of action recognized by the courts and civil rules. Accordingly, the Aflac Agreement's bar on class or consolidated action is invalid under Gold and provides an additional basis for dismissing of Defendants' motion.

Finally, unconscionable terms such as the lack of a meaningful choice or an opportunity to review the Agreement, it severe one-sidedness in Aflac's favor, its prohibitive cost allocation, strict confidentiality and a bar on consolidated actions -- all heavily favoring Aflac -- "'pervade an arbitration agreement such that severance would 'significantly alter' the tone and nature of arbitration," and the Court should thus "declare the entire agreement void." Larsen, 871 F. 3d at 1320.

CONCLUSION

"Taken together, the lack of mutuality, the costs of arbitration, the forum selection clause, and the confidentiality provision that Linden unilaterally imposes . . . demonstrate that the arbitration clause is not designed to provide . . . an effective means of resolving disputes . . . . Rather, it is a one-sided means which tilts unfairly, in almost all situations, in Linden's favor. Through the use of an arbitration clause, Linden

'appears to be attempting to insulate itself contractually from any meaningful challenge to its alleged practices.'. . . Finding that the arbitration clause is procedurally and substantively unconscionable, the Court will refuse to enforce it." Bragg, 487 F. Supp. 2d 593 at 611. So too is Aflac's Arbitration Agreement, which this Court should likewise refuse to enforce.

May 16, 2018

Respectfully Submitted,

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