SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART** **41M**

Justice

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KEVIN KNIGHT, CAROLINE O'HARA

Plaintiff,

- v -

FAMILY ENERGY INC.,

Defendant.

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INDEX NO. 650903/2023

MOTION DATE 08/25/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for COMPEL ARBITRATION.

Upon the foregoing documents, it is

Defendant, Family Energy Inc. ("Defendants" or "Family"), now seeks an order, pursuant to CPLR § 7503(a), to compel individual arbitration of the breach of contract, N.Y. Gen. Bus. Law § 349 and § 349-d, and unjust enrichment claims asserted by Plaintiffs Kevin Knight ("Knight") and Caroline O'Hara ("O'Hara") (collectively, "Plaintiffs").

Factual Background:

The underlying conflict arises from a breach of contract dispute between Plaintiffs and Defendant. Family Energy is an independent energy service company which sells and supplies electricity and/or natural gas to end-use customers (NYSCEF Doc. No. 1; 9). On January 21st, 2020, O'Hara spoke with sales representative Luis Deleon, who was marketing Family's services to prospective customers in Syracuse, New York (NYSCEF Doc. No. 50). O'Hara signed Family's pre-printed Residential Natural Gas & Electricity Supply Agreement ("Agreement"), agreeing to the terms, and selecting a Fixed Plan to set a monthly fixed rate for natural gas and electricity supply (*Id.*). After O'Hara had signed the Agreement, Deleon then tore off and gave O'Hara a carbon copy of the signed paper (NYSCEF Doc. No. 50 at 3). On this copy, some but not all of the "Terms and Conditions" of the Agreement were attached (NYSCEF Doc. No 53; 54; 58). The document in plaintiff's possession contains only the first page of the Terms and Conditions, which are printed on the back of the carbon copy (the "One-Page Terms") (NYSCEF Doc. No. 53). However, there are three subsequent pages of Terms and Conditions (the "Four-Page terms") which were not attached to this document (NYSCEF Doc. No. 48; 53 ¶ 8). After signing the Agreement and agreeing to the services, Plaintiffs received bills which were over the contracted rate and included additional sur-

charges and/or taxes. Plaintiffs then brought this action against Family as a proposed class action, alleging claims for breach of contract, unjust enrichment, and violations under N.Y. Gen. Bus. Law § 349.

Discussion:

Family now moves to compel arbitration, claiming that the Agreement contains a mandatory arbitration clause, and that Plaintiffs are bound by the entire Agreement-including the individual arbitration and class action waiver provisions therein. Under CPLR § 7503(a), the Court shall grant a motion to compel arbitration and direct the parties to arbitrate "[w]here there is no substantial question whether a valid agreement was made or complied with". In New York State Courts, the standard of review for CPLR § 7503(a) motions is limited to three threshold questions: (1) whether the parties made a valid agreement to arbitrate; (2) whether the agreement has been complied with; and (3) whether the claim sought to be arbitrated would be time-barred if it were asserted in state court (*Matter of Smith Barney, Harris Upham & Co., Inc. v Luckie*, 85 NY2d 193, 202 [1995]; *Collins Bros. Moving Corp. v Pierleoni*, 155 AD3d 601, 602 [2d Dept 2017]).

Thus, the threshold question here is "whether the parties made a valid agreement to arbitrate" (*Rural Media Group, Inc. v Yraola*, 137 AD3d 489, 490 [1st Dept 2016]). Such burden of proof is on the party seeking arbitration (*Marben Realty Co. v Sweeney*, 87 AD2d 561, 562 [1st Dept 1982], citing *Layton-Blumenthal, Inc. v Jack Wasserman Co.*, 280 AD 135, 135 [1st Dept 1952]).

Defendant first contends that because the Agreement involves interstate commerce, federal law, specifically the Federal Arbitration Act's ("FAA") presumption of arbitrability, applies to enforcement of the arbitration provision. However, "arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (*AT&T Tech., Inc. v Communications Workers of Am.*, 475 US 643, 648, 106 S Ct 1415, 1418, 89 L Ed 2d 648 [1986]). Therefore, the FAA's presumption of arbitrability does not apply to disputes involving the threshold issue of whether the parties entered into a binding agreement to arbitrate in the first instance (*Benihana of Tokyo, LLC v Benihana Inc.*, 73 F Supp 3d 238, 248 [SDNY 2014]; *Applied Energetics, Inc. v NewOak Capital Mkts., LLC*, 645 F3d 522, 526 [2d Cir 2011]).

Accordingly, as the burden of proof falls on the party seeking to compel arbitration, Family must first prove that a valid agreement to arbitrate exists (*Marben Realty Co*, 87 AD2d at 562). As a general matter, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally ... should apply ordinary state-law principles that govern the formation of contracts," (*First Options of Chicago, Inc. v Kaplan*, 514 US 938, 944, 115 S Ct 1920, 1924, 131 L Ed 2d 985 [1995]) and "ascertain and implement the reasonable expectations of the parties who undertake to be bound by its provisions" (*Spear, Leeds & Kellogg v Central Life Assurance Co.*, 85 F3d 21, 28 [2d Cir 1996]). Under New York law, for an arbitration agreement to be valid, the agreement must be clear, explicit, and unequivocal, meaning

it should not depend on implication or subtlety (*Sutphin Retail One, LLC v Sutphin Airtrain Realty, LLC*, 143 AD3d 972, 973 [2d Dept 2016]).

Defendant asserts that a valid agreement to arbitrate exists as Plaintiffs signed a complete copy of the Agreement and agreed to the full Terms and Conditions contained therein. However, O'Hara asserts that she did not agree to the full Terms and Conditions of the Agreement or arbitration as the Agreement she received only consisted of the One-Page Terms and the One-Page Terms do not include a mandatory arbitration clause or class-action waiver (*see* NYSCEF Doc. No. 54). While Defendant alleges that Plaintiff received the full Four-Page terms, and not the One-Page terms, it fails to submit any evidence to establish this claim. In fact, Family submits several sworn declarations, namely, an attorney affirmation from its counsel and affidavits from Family employees Tamara Sinson-Banton and Luis Deleon, which Defendant, in the affirmations/affidavits in reply, later admitted contained incorrect information and apologized for the confusion. Accordingly, as Defendant has not sufficiently shown that O'Hara did in fact receive the complete Four-Page terms rather than the One-Page terms, they have not shown that a valid agreement to arbitrate exists by signing the Agreement.

Family argues that even if O'Hara only received the One-Page Terms, by signing the Agreement she agreed to the entirety of the Four-Page Terms. However, a party may not be bound to arbitration if they did not receive the section of the contract containing the arbitration provision (*Eis Group/Cornwall Hill Dev. Corp. v Rinaldi Constr.*, 154 AD2d 429 [2d Dept 1989]). Especially considering that a party cannot be required to submit to arbitration any dispute which "he has not agreed so to submit" (*AT&T Tech., Inc. v Communications Workers of Am.*, 475 US 643, 648, 106 S Ct 1415, 1418, 89 L Ed 2d 648 [1986]).

Defendant next argues that even in the case O'Hara did not receive the entire Agreement or have actual notice of the provision, she is still bound by the arbitration provision because references to subsequent sections of the Agreement placed her on inquiry notice or were incorporated-by-reference. This argument is similarly unavailing, as the concepts of inquiry notice and incorporation-by-reference are both inherently implicit ones.

Under New York law, "inquiry notice" of certain contract terms is actual notice of circumstances sufficient to put a prudent person upon inquiry (*Wu v Uber Techs., Inc.,* 186 NYS3d 500, 529 [NY Sup Ct, 2022], *aff'd,* 219 AD3d 1208, 197 NYS3d 1 [2023]). Inquiry notice assumes a reasonable person would recognize the need to investigate based on surrounding circumstances within the contract, including subtleties, therefore creating an expectation of knowledge without explicit disclosure. This presumed duty to inquire makes inquiry notice fundamentally implicit, as it does not involve direct communication or clear notice and instead relies on indirect awareness. Incorporation-by-reference is also, by nature, implicit rather than explicit. Incorporation-by-reference provides that "the paper to be incorporated into a written instrument by reference must be so referred to and described in the instrument that the paper may be identified beyond all reasonable doubt" (*Cnty. of Rockland v New York State Pub. Emp. Rels. Bd.,*

225 AD3d 944, 948 [3d Dept 2024]). The referenced terms are understood to be part of the agreement only through indirect mention.

Both inquiry notice and incorporation-by-reference are inherently implicative doctrines, and as discussed previously, an arbitration clause "must not depend upon implication or subtlety" (*Sutphin Retail One, LLC v Sutphin Airtrain Realty, LLC*, 143 AD3d 972, 973 [2d Dept 2016]; see also *Waldron v Goddess,* 61 NY2d 181, 184 [1984], citing *Matter of Riverdale Fabrics Corp. [Tillinghast-Stiles Co.],* 306 NY 288, 289 [1954], *Matter of Doughboy Ind.* [*Pantasote Co.*], 17 AD2d 216, 218-19 [1st Dept 1962]). Therefore, because agreement to an arbitration clause cannot depend on implication, but rather must be clear, explicit and an unequivocal agreement to arbitrate, both the inquiry notice and incorporation-by-reference arguments fail (*see Matter of Fiveco, Inc. v Haber*, 11 NY3d 140, 144 [2008]).

Nonetheless, even in the case that inquiry notice would apply, the Court is not persuaded that a reasonably prudent offeree in these circumstances would have known of the existence of the arbitration terms. In determining whether there was inquiry notice of contract terms, courts typically look to whether the term was obvious, called to the offeree's attention, or presented clearly and concisely (*Starke v SquareTrade, Inc.*, 913 F3d 279, 289 [2d Cir 2019]). "[R]eceipt of a physical document containing contract terms or notice thereof is frequently deemed, in the world of paper transactions, a sufficient circumstance to place the offeree on inquiry notice of those terms" (*Specht v Netscape Communications Corp.*, 306 F.3d 17 [2d Cir 2002]).However, the references to subsequent sections of the Agreement "did not carry an immediately visible notice" of an agreement to arbitrate claims (*Specht,* 306 F.3d at 31; NYSCEF Doc. No. 66). Additionally, the fact that Plaintiffs may have been aware of additional terms to the Agreement does not mean that they reasonably should have concluded that this portion would or did contain an arbitration clause (*Id.* at 32.)

Therefore, Family has not demonstrated that Plaintiffs clearly, explicitly, and unequivocally agreed to arbitration when O'Hara signed the Agreement as Family improperly depends upon implication or subtlety (*Sutphin Retail One, LLC v Sutphin Airtrain Realty, LLC,* 143 A.D.3d 972, 973 [2nd Dept. 2016]). Additionally, CPLR § 4544 applies and further bars relying on the incorporation language to bind the parties to mandatory arbitration. CPLR § 4544 states: "The portion of any printed contract or agreement involving a consumer transaction … where the print is not clear and legible or is less than eight points in depth … may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement, or who caused said agreement or contract to be printed or prepared."

The Agreement contains type above the signature line which reads, "By signing below, I agree to purchase [energy] from Family and acknowledge that I have read this document and understand and agree to the Terms and Conditions of the Agreement(s)". Plaintiffs allege that the type is printed in seven-point font and is a legal nullity under CPLR § 4544. Defendants argue that CPLR § 4544, a state statute, is preempted by the FAA, a federal act. Defendants rely on *Kurz v. Chase Manhattan Bank USA*, N.A., 319 F Supp 2d 457 [S.D.N.Y. 2004], *Tsadilas v. Providian Nat. Bank*, No. 113833/03, 2004

WL 5641675, slip op. at 6 [Sup. Ct., N.Y. Cnty. Feb. 19, 2004], *aff'd*, 13 AD3d 190 (1st Dept 2004), and *AT&T Mobility LLC v. Concepcion*, 563 US 333 [2011]. Plaintiffs argue that the statute is not preempted, citing *Kindred Nursing Centers Ltd. P'ship v Clark*, 581 US 246 [2017].

In a footnote, the court in *Kurz* concluded that state laws invalidating arbitration clauses, such as C.P.L.R. § 4544, are preempted under the FAA (*Kurz,* 319 F.Supp.2d 457, 466 n.8). *Kurz* relies on *Doctor's Assocs., Inc. v Hamilton*, 150 F3d 157 [2d Cir.1998] as well as *Tsadilas Doctor's Assocs., Inc.* states that the FAA preempts all state laws that impermissibly burden arbitration agreements. However, it relies solely on *Southland Corp. v Keating,* 465 US 1 [1984)] in reaching this conclusion. *Southland* only held that forum selection clauses are preempted by the FAA, it did not invalidate all state laws concerning arbitration agreements. In *Tsadilas*, the court held that a Plaintiff who brought breach of contract claims against a credit card issuer could not invoke the type-size requirements of CPLR § 4544; however the CPLR's potential preemption by the FAA was not the deciding factor in the court's reasoning. Instead, the court found that the arbitration provision was printed in the same size type as the rest of the agreement, which did not violate the type-size requirements.

Defendants' reliance on cases like *Kurz* and *Tsadilas* is misplaced, as neither case provides a sound basis for arguing FAA preemption in this context. Because *Kurz* misinterprets *Doctor's Assocs., Inc.,* Defendants cannot rely on *Kurz* in their argument. And similarly, because *Tsadilas* did not bar application of CPLR § 4544 for state law reasons, Defendants also cannot rely on *Tsalidas*. Thus, Defendants cannot substantiate their argument that CPLR § 4544 is preempted by the FAA.

In *Kindred Nursing Centers*, the Supreme Court established that the FAA "preempts any state rule that discriminates on its face against arbitration or that covertly accomplishes the same objective by disfavoring contracts that have the defining features of arbitration agreements." *(Kindred Nursing Centers Ltd.,* 581 US at 247). *Kindred* relies on *AT&T Mobility LLC v. Concepcion* to come to this conclusion, stating that based on *Concepcion*, a law that relies on "the uniqueness of an agreement to arbitrate" as its basis would violate the FAA. (*Concepcion*, 563 US at 341). This Court is not convinced that CPLR § 4544 discriminates on its face against arbitration or disfavors contracts that have defining arbitration features. The text of CPLR § 4544 does not overtly or covertly target arbitration agreements; rather, it imposes type-size requirements on contract terms in general, applying equally to all agreements regardless of their content. CPLR § 4544 is often applied in breach of contract cases, demonstrating its broad applicability beyond the context of arbitration provisions. Furthermore, there is no indication that CPLR § 4544 was enacted to discourage or hinder arbitration specifically; instead, it serves to ensure clarity and readability in consumer contracts as a whole. Accordingly, the Court finds that CPLR § 4544 does not discriminate against arbitration and cannot be considered preempted by the FAA. Both parties have recognized that the type above the signature line binding Plaintiffs to the Terms and Conditions is printed in seven-point font. The print in the agreement in this case is clearly violative of the size and legibility requirements established by the

statute. CPLR § 4544 is applicable, and as is required, the type in question must be excluded from evidence.

As Defendant has failed to meet its burden on the threshold issue of whether a valid agreement to arbitrate exists, the Court need not reach a conclusion on the other issues or questions regarding arbitration. Additionally, because there is no unequivocal agreement to arbitrate, the Court need not reach the additional arguments of whether the Class Action Waiver is applicable, whether GBL § 349 is violated, or whether the Poison Pill is triggered.

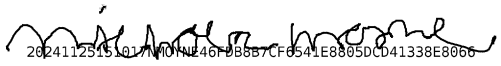
Accordingly. Family Energy Inc.'s motion for an order pursuant to CPLR 7503 (a) compelling Kevin Knight and Caroline O'Hara to arbitrate their claims against the company is denied. For the reasons set forth herein, it is hereby

ORDERED that the defendant's motion to compel arbitration is denied; and it is further

ORDERED that as set forth in the stipulation between the parties (NYSCEF Doc. No. 68) the defendant shall answer, move, or otherwise respond to the complaint within thirty (30) days of service of this order with notice of entry upon it; and it is further

ORDERED that the parties appear for a preliminary conference in Part 41, room 327 of the courthouse located at 80 Centre Street, New York, New York on February 6, 2025 at 2:15 PM.

This constitutes the decision and order of the court.



11/25/2024
DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE