Brown v. Charter Communications, Inc.

2017 | Cited 0 times | E.D. California | December 14, 2017

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

Charter Communications seeks to compel arbitration for this action initiated by Teri Brown. (Doc. 19) Charter argues arbitration should be compelled pursuant to the Federal Arbitration Act, while Plaintiff contends the arbitration agreement does not apply to Plaintiff.

The motion was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1). (Doc. 20) The Court found the matter suitable for decision without oral arguments, and took the motion under submission pursuant to Local Rule 230(g). For the following reasons, the Court recommends be DENIED. I. Background Plaintiff alleges Charter Communications Inc., doing business as Spectrum, engaged in a

and prerecorded messages throughout the past year by calling her cell phone number numerous TERI BROWN, individually and on behalf of all others similarly situated, Plaintiffs, v. CHARTER COMMUNICATIONS, INC., Defendant.

Case No.: 1:17-cv-00670 - LJO - JLT FINDINGS AND RECOMMENDATIONS DENYING COMPEL ARBITRATION

(Doc. 19)

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times in attempts to market its service numerous phone numbers, including but not limited to (844) 207-1531, (855) 383-5891, and (203) 404- 6762, which phone number bel Id. at 4, ¶ 16) According to Plaintiff, when she

(Id. he Defendant and stated Id., ¶ 18)

She alleges that despite informing the company that she did not wish to receive phone calls, e number without prior express

Id., ¶ 20) In addition, she reports:

When the phone number (844) 207-1531 is called back, the caller is prompted to a pre- offers in your area. We will attempt to call you again in the near future. If you would

(Id. at 4-5, ¶ 21)

and prerecorded messages to call the Plaintiff on her cell phone at least five times from February 2017 dialing system and prerecorded messages to call the Plaintiff on her cell phone at least five times from

February 2017 to pId.

provided her cell phone number to Defendant or had any business, educational or personal relationship Id., ¶¶ 24-25) annoyed by refusing to cease its incessant calls despite [the] repeated pleas for the calls to

which include: ///

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a. Invasion of privacy;

c. Wasting Plain d. Risk of personal injury due to interruption and distraction when receiving unwanted telemarketing calls from Defendant;

(Id. at 6-7, ¶ 32) previously consented to receiving such calls within the four years prior to the filing of this Complaint through the use of automated phone systems. (Id. at 7-9, ¶¶ 34-35)

Based upon these facts, Plaintiff filed a complaint on behalf of herself and others similarly situated, asserting Defendant is liable for: (1) negligent violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq.; and (2) knowing and/or willful violations of the Telephone Consumer Protection Act. (Doc. 1 at 11-13) On August 31, 2017, Defendant filed its answer to the and conditions of [a] service agreement and subject to a valid and binding arbitration provision, wherein either party may without elect mandatory, binding arbitration for any claim, dispute, or controversy 13 at 7)

On October 23, 2017, Defendant filed its Plaintiff is party to a binding arbitration agreement that (1) is enforceable under the FAA, and (2) delegates all questions of arbitrability to the arbitrator 19 at 2) Plaintiff filed her opposition to the motion on November 8, 2017 (Doc. 22), to which Charter filed a reply on November 15, 2017 (Doc. 25). II. Legal Standard

valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the

A party seeking to enforce arbitration agreement may parties to proceed to arbitration in accordance with the

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arbitrate exists and, if so, whether the agreement encompasses Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004). To determine whether an arbitration agreement encompasses particular claims, the Court looks to the plain language of the e absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-86 (1960). r Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 475 (9th Cir. 1991).

A party opposing arbitration has the burden to demonstrate the claims at issue should not be sent to arbitration. Green Tree Fin. Corp.- Alabama v. Randolph, 531 U.S. 79, 81 (2000); see also Mortensen v. Bresnan Communications, LLC challenging the enforceability of an arbitration agreement bear the burden of proving that the provision be resolved in l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 that the arbitration clause is not susceptible AT&T Tech., Inc. v. Communs. Workers of Am., 475 U.S. 643, 650 (1986).

III. Terms of the Arbitration Provision Plaintiff was a Bright during -3 at 2, Flores Decl. ¶4) To receive these services, customers such

bscriber agreement known as the Agreement for Residential House. (Id., ¶ 5; see also Doc. 19-4 at 4-17) The Agreement includes an arbitration provision, stating:

(a) If you have a Dispute (as defined below) with BHN that cannot be resolved, you or BHN may elect to arbitrate that Dispute in accordance with the terms of this Arbitration Provision rather than litigate the Dispute in court. Arbitration means you will have a fair hearing before a neutral arbitrator instead of in a court by a judge or jury.

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(b) As used in this Provision, the term Dispute means any dispute, claim or controversy between you and BHN regarding any aspect of your relationship with BHN or the BHN Parties that has accrued or may thereafter accrue, whether based in contract, statute, regulation, ordinance, tort (including, but not limited to, fraud, misrepresentation, fraudulent inducement, negligence or any other intentional tort), or any other legal or equitable theory.

(Doc. 19-4 at 13) may opt-out of the arbitration provision by providing written notice to Bright House within thirty days from the date of receiving the Agreement. (Id. at 14) The Agreement also

BHN will not seek to enforce the arbitration provision above unless we have notified y (Id., emphasis omitted)

IV. Discussion and Analysis

A. Validity of the arbitration agreement When determining whether a valid and enforceable agreement to arbitrate has been established -law principles that govern the formation of contracts to decide whether the parties agreed to a First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Circuit City Stores v. Adams, 279 F.3d 889, 892

and regulations, including any applicable franchise agreement, in effect in the relevant jurisdiction(s) -4 at 16, ¶ 22) Because Plaintiff received services in California, the Court applies the stat

United States ex rel. Oliver v. Parsons Co., 195 F.3d 457, 462 (9th Cir. 1999) (citing Cal. Civ. Code § 1550; Marshall & Co. v. Weisel, 242 Cal. App. 2d 191, 196 (1966)). An arbitration agreement may be s fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 333 (2011); see also Cal. Code Civ. Proc. § 1281 (explaining an arbitration agreement may only be invalidated upon

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Under California law, an arbitration agreement may be invalidated for the same reasons as other contracts. , 485 F.3d 1066, 1072

-Stirlen v. Supercuts, Inc., 51 Cal.App.4th 1519, 1532 (1997) (citations omitted). Both forms of unconscionability must be present in order for a court to find a contract unenforceable, but it is not necessary that they be present in the same degree. Davis, 485 F.3d at 1072; Stirlen, less evidence of procedural

unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" Id. (quoting Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal.4th 83, 99 (2000)).

Plaintiff does not argue that the parties were not capable of consent, did not consent, or that there was not a lawful object to the contract. Further, Plaintiff does not argue there was insufficient cause or consideration for the Residential Services Agreement with Bright House Networks. Accordingly, the Court finds Plaintiff does not challenge the validity of the agreement.

B. Whether the arbitration agreement encompasses the disputes at issue Plaintiff argues the arbitration agreement may not be enforced because it does not encompass the disputes at issue. (See generally Doc. 22) In general, the party resisting arbitration bears the burden of showing that the arbitration agreement does not encompass claims at issue. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000). As noted above, to determine whether an arbitration agreement encompasses particular claims, the Court looks to the plain language of the agreement. any express provision excluding a particular grievance from arbitration . . . only the Warrior & Gulf Navigation Co., 363 U.S. at 584-86. 1. Arbitrability As an initial matter, the parties disagree regarding whether the issue of arbitrability is encompassed in the arbitration provision, and delegated to the arbitrator. Charter argues that under the

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estions concerning the arbitrability of a particular dispute including the existence, validity, enforceability, or scope of the Arbitration Provision -12) On the other hand, Plaintiff nowhere in the RSA is there any mention of who decides arbitrability, or of any delegation of that issue to an

The Supreme Court has determined the question of whether parties have submitted a particular dispute to arbitration judicial AT&T Technologies and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be

Id., citing Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960); Operating Engineers v. Flair Builders, Inc., 406 U.S. 487, 491 (1972). If the agreement is silent or ambiguous, the Court must determine whether an issue is arbitrable. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995).

This Court previously explained that Beard v. Santander Consumer USA, Inc., 2012 WL 1292576 (E.D. Cal. Apr. 16, 2012), quoting

Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 221 (3d Cir.2007); see also Momot v. Mastro, 652 F.3d 982, 987 (9th Cir. 2011) (explaining whether the parties have agreed to arbitrate the questi For example, in Momot, the unmistakable

Id., 652 F.3d at 988 (internal quotations omitted).

Under the RSA, the customer is informed that disputes subject to arbitration include dispute, claim or controversy between you and BHN regarding any aspect of your relationship with

BHN or the BHN Parties that has accrued or may hereafter accrue, whether based in contract, statute, -

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y and unmistakably demonstrates Id., citing Trinity Christian Center of Santa Ana, Inc. v. Koper, 2013 WL 3200578 at *3 (C.D. Cal. June 21, 2013); LaCross v. Knight Transp. Inc., 2016 U.S. Dist. LEXIS 129676 at *6-8 (D. Az. Sept. 22, 2016)) However, it appears the arbitration provision before this Court must be distinguished from those considered in LaCross and Trinity Christian Center

In LaCross, the arbitration agreement provided that claims subject to arbitration include any Id., 2016 U.S. Dist. LEXIS referred to arbitration in accordance with the National Rules for Resolution of Commercial Disputes (including Mediation and Id. Because the Ninth Circuit ration of the AAA rules [in an arbitration agreement] constitutes clear and district court found at the issue of arbitrability was delegated to an arbitrator. Id. at *8-11, citing Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. jurisdiction, including any objections with respect to the . . . validit). In

contrast, here, there is no provision indicating that AAA Rules are incorporated to the arbitration agreement, or that that the dispute is referred to arbitration with the application of the AAA Rules.

In Trinity Christian Center, Id., 2013 WL 3200578 at *1. Under the terms of the arbitration

rbitrator must decide all disputes that may arise rise out of the employment context.... Included within the scope of this Agreement are all disputes, whether they be based in tort, contract, Id. at *3 (internal quotation marks omitted). The court noted

Id., citing Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distrib. Co., 832 F.2d 507, 510-11 (9th Cir.1987). Based in part upon this interpretation of Brotherhood of Teamsters, the court determined that because

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arbitration agreement include[d] an extremely broad arbitration and the issue of arbitrability arbitrability was delegated to the arbitrator. Id., 2013 WL 3200578 at *3.

Significantly, in Brotherhood, the issue before the court was whether there was a collective bargaining agreement containing an arbitration provision or had been terminated. Id. The Ninth Circuit noted it was not being asked to determine clause provides, or what its scope is Id. affecting the mutual relations of the Emp

clause encompassed the dispute at issue. Id. at 508, 511. In contrast, here, there is a dispute regarding the scope of the arbitration provision. Further, Plaintiff identifies a provision of the arbitration clause that indicates the claims of a California customer, and argues her claims are expressly excluded from arbitration.

Moreover, as the Ninth Circuit acknowledged in Brotherhood could be drafted in such a manner as to authorize an arbitrator to resolve disagreements over the scope

of the clause (as well as the merits of the contractual disputes), courts do not ordinarily construe Id., 832 F.2d at 509. The Court reement over the scope or coverage of the arbitration clause itself, it is unclear whether the parties have contracted for arbitration of the Id. Here, there is clearly a dispute over the scope of the arbitration provision, and the the arbitrator should decide gateway issues, such as the jurisdiction of the arbitrator, the scope of the agreement, validity, or arbitrability. See Momot, 652 F.3d at 987-88; Loewen v. Lyft, Inc., 129 F. Supp.

an arbitrator is evidence that the parties clearly and unmistakably have referred the arbitrability question to the arbitrator). Accordingly, the Court must decide the arbitrability of the dispute at issue. See AT&T Technologies, 475 U.S. at 649; Kaplan, 514 U.S. at 944-45.

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2. Disputes in issue

a. Parties entitled to seek arbitration The a with BHN that cannot be resolved, you or BHN may elect to arbitrate that Dispute in accordance of the terms of this Arbitration -4 at 13, emphasis added) As defined in th Bight House Networks- affiliated cable operator that is providing the Services over its cable system, or - N and its corporate parents, affiliates and subsidiaries and their respective

Id.)

From the face of the agreement, only disputes with BHN Charter Communications, Inc. (Doc. 19-5 at 2) are encompassed within the arbitration agreement.

Further, the provision clearly sets forth that only the customer and BHN, which is not named as a defendant, are entitled to seek arbitration tionship -4 at 13) Thus, it is not clear from the face of the agreement that Charter is entitled to enforce the contract in general or the arbitration clause in particular. Nevertheless, for purposes of this motion, the Court will assume as the parties do not dispute this that this provision applies to Charter as it would to BHN.

b. Notice to California customers Plaintiff argues the arbitration provision clause related to California customers. (Doc. 22 at 6, emphasis omitted). Specifically, the arbitration

provision in the RSA providing:

IF YOU ARE A BHN CUSTOMER IN CALIFORNIA, BHN WILL NOT SEEK TO ENFORCE THE ARBITRATION PROVISION ABOVE UNLESS WE HAVE NOTIFIED YOU OTHERWISE. (Doc.

19-4 at 12) (emphasis in original). -

-out does not specify that it is limited to current Id. at 7, emphasis in original) Plaintiff

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Id. at 8) Given the lack of

notice, Plaintiff contends the arbitration agreement may not be enforced. (Id. at 8-11) In response, Charter argues that Plaintiff was not entitled to notice that the arbitration agreement would be enforced Plaintiff formerly was a BHN customer, but is not now a BHN customer, and Plaintiff does not dispute

that the Arbitration Provision remains in force today, the use of the present tense term are unambiguously establishes that Plaintiff does not fall within the scope of Section 14(f) Doc. 25 at 9) In support of this assertion, Charter refers the Court to its prior holding in Hodson v. Bright House Networks, LLC., in which the Court determined the California carve-out did not apply to a former customer. Id., 2013 WL 1091396 (E.D. Cal. Mar. 15, 2013) Significantly, the issue before the Court in Hodson related to the notice for California customers differs from the matter now before the Court. In Hodson, the plaintiff received services only in the state of Florida. Id., 2013 WL 1091396 at *1. Arguing he should not be compelled to arbitrate his claims, the plaintiff asserted the notice to California customers applied to him, because he was residing in California when he filed his lawsuit. Id. at *7. However, the Court found the

Id. In contrast, here, the Court is now faced with the question of whether notice must be given to a former customer who received services in California. Although the special notice provision does not distinguish between former and current customers, there is no evidence that a customer who entered the RSA agreement and was informed that notice would be given lost the right to receive notice upon termination of the RSA. The plain

unless we have would be

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provided prior to the customer entering the agreement, or contemporaneously with it. 1

To hold otherwise would render the term completely illusory. See Mohamed v. Uber Techs., Inc., 848 F.3d n on the freedom of the alleged promisor Plaintiff did not receive notice that Charter would seek to enforce the arbitration agreement until after the lawsuit was filed (Doc. 19 at 11, n. 2), several years after Plaintiff stopped receiving services from Bright House Networks. Under these circumstances, the Court cannot find notice was provided as required by the special notice provision.

V. Findings and Recommendations

In light of the special notice to California customers, the Court finds Plaintiff carries her burden to the claims raised in her complaint are expressly excluded from arbitration. See Randolph, 531 U.S. at 92; Warrior & Gulf Navigation Co., 363 U.S. at 584-86. Accordingly, the Court RECOMMENDS that motion to compel arbitration be DENIED.

These Findings and Recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within 14 days after being served with these Findings and Recommendations, any party may file written objections reply to the Objections shall be filed and served within 7 days of the date of

service of the objections. The parties are advised that failure to file objections within the specified time Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991); Wilkerson v. Wheeler, 772 F.3d 834, 834 (9th Cir. 2014).

IT IS SO ORDERED. Dated: December 14, 2017 /s/ Jennifer L. Thurston UNITED STATES MAGISTRATE JUDGE

1 Notably, customers are also informed that they have thirty days to choose to opt out of the arbitration provision. (Doc. 19-4 at 13) Seemingly, notice would have to be given in order for California customers to make an informed decision regarding whether to opt out of arbitration.

Using defendants rationale, plaintiff s refusal to agree to arbitration would like by determined to be a timely opt- out after the demand for arbitration was made.

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