Class Action / Arbitration

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MELISSA WESTENDORF on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	C.A. No. 16913
GATEWAY 2000, INC.,	)	
Defendant.	)	

Submitted: November 17, 1999
Decided: March 16, 2000

MEMORANDUM OPINION

Kevin Gross and Jeffrey S. Goddess of Rosenthal, Monhait, Gross & Goddess, Wilmington, Delaware. OF COUNSEL: Deborah R. Gross of the Law Offices Bernard M. Gross, P.C., Philadelphia, PA; Max Berger and Seth Lesser of Bernstein Litowitz Berger & Grossmann, New York, NY. Attorneys for Plaintiff.

Allen M. Terrell, Jr. and Robert J. Steam, Jr. of Richards, Layton & Finger, Wilmington, Delaware. OF COUNSEL: Robert M. Rader and Robert A. Berger of Winston & Strawn, Washington, D.C. Attorneys-for Defendant.

STEELE, V.C.

Melissa Westendorf ("Plaintiff') bought her friend a Gateway computer, which at plaintiffs request, Gateway delivered directly to her friend. Several months later, the same friend purchased a Gateway computer, which he requested be delivered directly to plaintiff. Plaintiff received and retained that computer.

As part of its computer package, Gateway offers Internet access through its Gatewaynet service. The software needed for Gateway.net access comes with the computers, and only Gateway owners can utilize the service. After registering for Gateway.net service, plaintiff and many other Gateway customers allegedly began experiencing numerous and serious difficulties when attempting to use the service. Citing those problems, plaintiff brings this purported class action arguing that she and the members of purported class paid for services they did not receive.

With the relevant computer shipments, Gateway included its Standard Terms and Conditions Agreement, which contains an arbitration clause. Plaintiff argues she is not bound by the arbitration clause because as a non-purchasing user of the computer she never expressly agreed to arbitration. Alternatively, she claims that because a second agreement relating to software service does not include an arbitration clause she is not required to submit her claims to arbitration. Conversely, Gateway argues plaintiff is bound by the arbitration clause and, as such, she can not properly bring this claim in this Court.

Because plaintiff, as an intended beneficiary of her friend's computer purchase, accepted the benefits of that purchase and otherwise met the requisite conditions for the agreement to become effective, I find she is bound by the arbitration clause. The existence of a second agreement that fails to mention arbitration does not prevent me from reaching this conclusion because I find that that agreement relates to and therefore must be read in conjunction with the standard agreement. Accordingly I dismiss this action.

I. Legal Standard

In evaluating defendant's motion to dismiss, I assume the truthfulness of all well-pleaded, nonconclusory allegations found in the complaint and extend the benefit of all reasonable inferences that can be drawn from the pleading to the non-movant, plaintiff.[1] A claim cannot be dismissed unless under no reasonable interpretation of the facts alleged in the complaint (including reasonable inferences) could the plaintiff state a claim for which relief might be granted.[2] Notwithstanding Delaware's permissive pleading standard, I am free to disregard

[1] *Loudon v. Archer-Daniel.+Midland Co.,* Del. Supr., 700 A.2d 135, 140 (1997).
[2] *Delaware State Troopers Lodge v. O'Rourke,* Del. Ch., 403 A.2d 1109, 1110 (1979) ("A complaint should not be dismissed upon such a motion unless it appears to a certainty that under no set of facts which could be proved to support the claim would the plaintiff be entitled to relief.")

mere conclusory allegations made without specific allegations of fact to support them.[3]

II. Facts

Gateway 2000, Inc.("Gateway"), a Delaware corporation, is a seller and manufacturer of computers and computer products. It also provides Internet access with the computers it sells. Gateway invites Gateway computer purchasers to register for Internet access through a Gateway.net account that includes one e-mail address, 24-hour technical support, and full Internet access. Only owners of Gateway computers are eligible for the full Gatewaynet service. Plaintiff and the purported class members elected to subscribe to Gateway.net.[4]

Gateway began marketing Gatewaynet to its customers in November 1997. Shortly thereafter, Gateway began to receive customer complaints regarding connection difficulties, receipt of bills for long distance calls made without customer knowledge, and inability to access e-mail. Plaintiff claims these problems arose because: (a) Gateway's access numbers were constantly busy or unavailable; (b) Gateway lacked the capacity to adequately handle registrations of new customers; and (c) Gateway neither designed nor maintained the net in accordance with generally accepted industry standards. Plaintiff argues that she

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[3] ***Wolf v. Assaf***, Del. Ch., C.A. No. 15339, mem. op., 1998 Del. Ch. LEXIS 101, at ***3-4,** Steele, V.C. (June 16, 1998).

[4] The purported plaintiff class consists of all persons in the United States who purchased Gateway's Internet access service since January 1, 1998.

and members of the purported class therefore paid for services that they did not receive.

Plaintiff came to own her Gateway computer in a manner that is likely unique within the purported class. On or about December 9, 1997, plaintiff ordered a personal computer and accessories from Gateway. Plaintiff requested that she be billed for this purchase at her Philadelphia, Pennsylvania address, but that her order be shipped directly to Brian Pawlak at his address in Milwaukee, Wisconsin. Gateway included numerous documents with the computer and accessories it shipped to Pawlak. Most notable for our purposes is that Gateway's Standard Terms and Conditions Agreement ("Standard Terms and Conditions") was included in that shipment.

Several months later, on August 3, 1998, Pawlak separately ordered another Gateway computer and accessories, and also ordered the Gateway.net Internet service. Pawlak placed this order from his Milwaukee address, but requested that Gateway ship these products to plaintiff at her Philadelphia address. It is not entirely clear what motivated plaintiff and Pawlak to buy and "exchange" computers in the manner in which they did.

In any event, plaintiff received the computer paid for by Pawlak, and used Pawlak's account number to register for Gateway.net service on August 24, 1998. Despite using Pawlak's account number, plaintiff registered under her own name,

which was substituted on the billing account. Importantly, the computer Pawlak sent to plaintiff also included Gateway's Standard Terms and Conditions -- Agreement.

Gateway claims it routinely includes its Standard Terms and Conditions Agreement with each computer sold and shipped to its customers. Plaintiff does not dispute that claim, nor does she argue that she did not receive the agreement in the shipment paid for by Pawlak. The Standard Terms and Conditions Agreement provides that the Gateway customer may, at his or her option, return the computer to Gateway, for any reason, for a full refund (less shipping charges) within thirty days of receipt. The agreement also states that retention of the computer beyond the thirty-day period of free trial use equates to an acceptance of Gateway's proposed terms and conditions? Plaintiff retained the computer beyond thirty days after delivery.

Paragraph ten of Gateway's Standard Terms and Conditions Agreement constitutes a dispute resolution clause. It reads, in pertinent part, "[a]ny dispute or controversy arising out of or relating to this Agreement, its interpretation or any related purchase shall be resolved exclusively and finally by arbitration."

With her computer, plaintiff received a second "Terms and Services" agreement that pertained to purchasers, like plaintiff, who elected to sign up for the

[5] ***See Hill v. Gateway 2000, Inc, 105*** F.3d ***1147*** (7th Cir.), ***cert. denied, 522*** U.S. 808 (1997).

Gateway.net Internet access service ("Service Terms and Conditions Agreement").[6] This agreement does not mention arbitration nor does it incorporate the Standard Terms and Conditions Agreement by reference.

Plaintiff did not submit her claim to arbitration; instead, she filed a complaint in this Court on January 22, 1999 alleging breach of contract and violations of the Delaware Consumer Fraud Act.[7] Plaintiff asks this Court to enjoin Gateway from accepting new customers for its Gateway.net Internet services and to order Gateway to refund payment of the purported class's Gateway.net Internet access services fees. Gateway argues that plaintiffs filing in this Court violated the parties' agreement to arbitrate claims of the sort now at issue. In response, plaintiff argues she did not purchase the second computer therefore the agreement does not cover her. She also argues that the Service Terrns and Conditions Agreement, which does not include an arbitration clause, trumps the Standard Terms and Conditions Agreement.

[6] Plaintiff also tells the Court that software from Gateway and third parties is included in Gateway computers, with each separate software application subject to its own "Terms and Conditions." Pl.'s Br. at 6 n.5. It seems, therefore, that plaintiffs Gateway computer came in a box that also included several other agreements the terms of which were not discussed in detail by the parties.

[7] *6 Del. C.* §§ *25* 1 l-2526.

III. Analysis

A. *Preliminary findings regarding the Standard Terms and Conditions Agreement.*

In a separate action, with different underlying facts, a Gateway customer challenged the enforceability of the arbitration clause in the Standard Terms and Conditions Agreement arguing that it was not binding on him because he was not aware of it when he ordered the computer. The 7th Circuit rejected that argument, however, and found the agreement enforceable as written.* Judge Easterbrook, writing for the unanimous panel, noted "[b]y keeping the computer beyond 30 days, the [buyers] accepted Gateway's offer, including the arbitration clause."[9] Undeniably, plaintiff in the present case retained the computer and accessories for more than thirty days. The same rationale, therefore, applies to this plaintiff as in the case before the 7th Circuit.

Further, I find that the Internet access service is a "related purchase" falling within the scope of the agreement's arbitration clause. The arbitration clause broadly covers "[a]ny dispute or controversy arising out of or relating to [the Standard Terms and Conditions Agreement], its interpretation or *any related*

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[8] *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir.), cert. *denied*, *522* U.S. 808(1997).
[9] *Id.* at 1150.

purchase." [10] Since Gateway made its Internet access service available only to Gateway computer owners this service was directly tied to the initial purchase of the computer and accessories.

B. Delaware Law and Federal Law hold there is a presumption favoring arbitration.

The United States Supreme Court has held there is a presumption favoring arbitration unless: "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."' [11] Likewise, the Delaware Supreme Court has stated that "the public policy of this state favors the resolution of disputes through arbitration."[12] The Court of Chancery has noted that "there is a presumption in favor of arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[13] Accordingly, Delaware's Uniform Arbitration Act is consistent with the Federal Arbitration Act, and its "strong federal policy in support of arbitration."[14]

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[10] Emphasis added.

[11] ***United Steelworkers of America v. Warrior Gulf Navigation Co., 363*** U.S. 574, 582-83 (1960) (cited and quoted with approval in ***Worthy v. Payne,*** Del. Ch., C.A. No. 16027, ltr. op. at ***2,*** Steele, V.C., (Feb. 12, 1998); ***United Engineers & Constructors, Inc. v. IMO Indus., Inc.***, Del. Ch., C.A. ***No.*** 12611, mem. op. at 14, Hartnett, V.C (Feb. 11, 1993), and ***Action Drug Co. v. R Baylin*** Co., Del. Ch., C.A. No. 9383, mem. op. at 6, Berger, V.C. (June 19, 1989)).

[12] ***Worldwide Insur. Group*** v. ***Klopp,*** Del. Supr., 603 A.2d 788,790 (1992).

[13] ***Worthy v. Payne,*** Del. Ch., C.A. No. 16027, ltr. op. at 2, Steele, V.C., (Feb. 12, 1998).

[14] ***Steinberg v. Prudential-Bathe Sec., Inc.,*** Del. Ch., C.A. No. 8173, 1986 WL 5024 at *4, Jacobs, V.C. (April 30, 1986).

C. Plaintiff is bound by the arbitration clause because she knowingly accepted the benefits of Pawlak's 1998purchase and contract made on her behalf.

Gateway argues that plaintiff as Pawlak's donee beneficiary takes Pawlak's obligations along with his rights. To support this argument, Gateway cites three Delaware cases. After reviewing those cases, it is not patently clear to me that a donee beneficiary necessarily takes the donor's obligations along with his rights. The cases that Gateway cites all involve clarification of third party beneficiary rights, but none discuss third party beneficiary obligations.[15] Despite Gateway's urging to do so, I am unwilling to conclude that those cases require that an intended third party beneficiary must assume the donor's contract obligations along with his rights in every instance:

In this case, however, specific facts exist that warrant both the passing of the donor's rights ***and*** the donor's obligations to the donee. "[O]ne who knowingly accepts the benefits intended as the consideration, coming to him or her under a contract voluntarily made by another in his or her behalf, becomes bound by

[15] ***Foreign Mart, Inc. v. Brinton,*** Del. Ch., C.A. No. 5475, 1978 WL 8415 at *3, Marvel, C. (July 27, 1978) (finding that plaintiff may enforce by injunction the restrictive language contained in lease it was not a party to because it was a third party beneficiary of that lease); ***Farmers Bank of the State of Delaware v. Howard,*** Del. Ch., 276 A.2d 744, 745 (1971) (holding that a contract made for the benefit of a third party is enforceable in Delaware and that a third party may sue to enforce a promise made for his benefit, even though he is a stranger to both the contract and the consideration); ***Znsituform of North America, Inc. v. Chandler,*** Del. Ch., 534 A.2d 257,270 (1987) (explaining that to create a benefit in favor of third party, benefit must be intended and material part of contract's purpose).

reason of such acceptance to perform his or her part of the contract."[16] That logic applies here. I do not know why plaintiff and Pawlak "exchanged" computers as they did, but it is clear that plaintiff knowingly accepted the computer and accessories delivered to her. She promptly used the computer and signed up for Internet access in her own name. In every way, plaintiff asserted ownership over that computer and her Gateway.net account.

Specifically regarding arbitration clauses, Professor Williston writes, "[w]here the contract contains an arbitration clause which is legally enforceable, the general view is that the beneficiary is bound by it to the same extent that the promisee is bound."[17] There is nothing unique about this case that would justify departure from that general rule.

Equity requires the same result. "There are times when a court of equity must look at the entire relationship between 'all' parties, a logical construct of that relationship and the parties' suggestion of a fair mechanism for resolving disputes.""[18] Plaintiffs argument that she is not bound by the arbitration clause

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[16] 17B C.J.S. § 631 (1999) (citing ***Shelter Ins. Companies v. Frohlich,*** Neb. Supr., 498 N.W.2d 74 (1993) (finding that Frohlich, a passenger injured in a car accident who became a third party beneficiary of the driver's insurance policy, was bound by a subrogation clause contained in the insurance policy because Frohlich accepted a contractual benefit)).

[17] SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS, § 37:24, at 154 *(4"* ed. 2000).(citing ***Borsack v. Chalk & Vermillion Fine Arts, Ltd.,*** 974 F. Supp. 293 (S.D.N.Y. 1997) (the right of a third person for whose benefit a promise is made is affected with all the infirmities of the agreement as between the parties; thus, language limiting application of such clauses to nonsignatories so long as such persons were intended beneficiaries of the contract).

[18] ***Worthy v. Payne,*** Del. Ch., C.A. No. 16027, ltr. op. at 2, Steele, V.C., (Feb. 12, 1998).

because she is not a "purchaser" strikes me as somewhat disingenuous. Given the relationship between Gateway and plaintiff – plaintiff bought a Gateway computer in December of 1997, and received a Gateway computer in August of 1998, which she quickly used and retained over thirty days – equity dictates that plaintiff be bound by the arbitration clause just as someone who actually bought, received and retained the same computer is bound. Accordingly, I find plaintiffs argument that she was not a "purchaser" amounts to mere semantics, and hold that she is bound by the arbitration clause.

D. The absence of an arbitration clause in of Gateway's Service Terms and Conditions Agreement does not somehow undo the arbitration clause present in Gateway's Standard Terms and Conditions.

Plaintiff argues that the Service Terms and Conditions Agreement is controlling, and since that agreement has no arbitration clause, plaintiff is not required to arbitrate her disputes. I find that this suggested result would run contrary to the intended interrelationship between the two agreements, and would contradict explicit public policy to interpret broadly arbitration clauses.

In defining the scope of an arbitration clause, "the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."[19] "[A]rbitration should be ordered unless it may be said with positive assurance that

[19] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473* **U.S. 614,626 (1985).**

the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[20]

When evaluating the effect of an arbitration clause that is present in only one agreement of a series of related agreements, courts have examined "the totality of circumstances," while also recognizing the policy concerns favoring arbitration.[21] Applying that analysis to this case, I find that Gateway was not required by law to include an arbitration clause in each separate agreement. "Where an arbitration clause is broad enough to encompass the disputed question, the court has no choice but to refer the controversy to arbitration in the agreed manner."[22] In this case, the arbitration clause is sufficiently broad enough to cover the dispute. In reaching this conclusion I examined the totality of the circumstances, and considered the manner in which plaintiff came to own her Gateway computer, the fact that she

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[20] *McMahan Securities Co. L.P. v. Forum Capital Markets L.P.*, *35* F.3d 82, 88 (2d Cir. 1994) (quoting *S.A. Mineracao Da Trindale-Samitri v. Utah Int'l, Inc.*, *745* F.2d 190, 194-95 (2d Cir. 1984).

[21] *Corn-Tech Associates v. Computer Assoc.,.* 753 F. Supp. 1078 (E.D.N.Y. 1990), *aff'd by 938* F.2d 1574 (1991) (finding dispute arbitrable where the arbitration clause contemplated arbitration of disputes "in connection with, or in relation to" the relevant partnership agreement). *See also Reliance Nat'l Insur. Co. v. Seismic Risk Insur. Services, 962* F. Supp. 385 (S.D.N.Y. 1997) (holding that arbitration clause in program manager agreement between parties under which broker was to solicit, underwrite, and bind earthquake insurance on behalf of insurer governed claims under related profit commission agreement even though that latter agreement contained no arbitration clause).

[22] *U.S. Titan, Inc. v. Guangzhou Men Hua Shipping Co., Ltd., 182* F.R.D. 97, 101-02 (S.D.N.Y. 1998) (also adding that "it has been repeatedly held that ***even*** a dispute regarding the satisfaction of a condition precedent to a contract will be referred to arbitration if it may reasonably be said to come within the scope of an arbitration clause" (citations omitted)).

retained it for over thirty days, and the language in the arbitration clause expressly stating the clause covered "any related purchase" especially telling.

IV. Conclusion

A long-standing equitable maxim states that equity looks to the intent rather than to the form. While examining the totality of circumstances in this case, I kept that maxim in mind. Accordingly, I find that plaintiff is bound by the arbitration clause at issue. Therefore, this action is dismissed.

IT IS SO ORDERED.

Vice Chancellor