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RULING ON CLAIMANT'S MOTION TO REMAND CASE AND TO DETERMINE ARBITRABILITY OF CLAIMS

Case Number: 01-19-0001-4766

Ronald G. DeNicolo, Jr.
-vs-
The Hertz Corporation

Pursuant to the Consumer Arbitration Rules of the American Arbitration Association (AAA), Claimant's Motion for Remand (and to determine arbitrability of claims) ("Motion") came on for hearing before Arbitrator Carolyn Samiere on November 8, 2019 at the AAA San Francisco offices.

Appearing for Claimant:

Leland Belew, attending in person
Andrus Anderson LLP

Christopher Hack, attending in person
Krislov & Associates, Ltd.

Clinton Krislov, attending by telephone
Krislov & Associates, Ltd.

Appearing for Respondent:

John Ward Jr., attending in person
Jenner & Block LLP

Adam Schloss, attending by telephone
The Hertz Corporation

Following oral argument of the parties heard at the Motion hearing and further briefing, the following Order is now in effect:

Background

Claimant filed a motion in this arbitration to determine whether the arbitration clause in the Hertz auto rental agreement at the center of this motion ("Rental Agreement") requires Claimant's claims to be brought in arbitration. Claimant requests a finding that the arbitration clause does not mandate that its claims be arbitrated and that the arbitration clause is unconscionable. Claimant initially filed an action in federal district court alleging claims relating to alleged damage to a Hertz rental car rented by Claimant through Hertz. Upon motion by Respondent (defendant in the federal district court action) the federal district court ordered the case to arbitration for determination as to whether Claimant's claims must be heard in an arbitration proceedings.

The Rental Agreement contains an arbitration clause requiring arbitration of any disputes between itself and a renter, excluding "claims for property damage, personal injury or death." Claimant's Memorandum of Law in Support of Remand to Court, Exhibit A. Respondent did not provide any evidence to explain the rationale for this exclusion. The arbitration clause also states that arbitration applies to "any claims arising from or relating to this Agreement (the Hertz Rental Agreement) or any aspect of the relationship or communications between us, whether

based in contract, tort, statute, fraud, misrepresentation, equity, or any other legal theory." Respondent's Opening Brief, p. 5 citing to Exhibit A at 6 (parenthetical added).

Claimant argued that the arbitration provision excludes from mandatory arbitration claims relating to all property damage, including those relating to damage to rental cars, regardless of the party purportedly causing damage, claiming recovery for alleged damage, or defending against claims of damage to rental cars. Claimant argued additionally that Respondents apply the arbitration clause exclusion unilaterally for its own benefit and to the detriment of customers, and for that reason the arbitration clause should be declared an adhesion clause, unconscionable and invalid.

Respondent argued that Claimant has filed contract claims which are subject to the arbitration provisions, and not property claims subject to the arbitration clause. Respondents further urged that the arbitration clause, as a whole, was constructed broadly and intended to mandate arbitration for Claimant's claims.

Findings

The first determination is the validity of the arbitration clause. Given the findings below, the limited discovery allowed by the Arbitrator, and the narrow scope of this Motion, I do not find the arbitration clause to be unconscionable on its face in so far as it relates to the issues presented by the Motion. However, nothing in this finding precludes a different finding by another forum or arbitration considering different issues or additional evidence on Respondent's application of the clause.

Analysis of the Rental Agreement arbitration clause is integral to determining Claimant's Motion, and the analysis begins with the inquiry whether Claimant has alleged property damage claims. This Arbitrator finds that Claimant seeks resolution of property damage claims. Claimant's argument on this issue is credible and supported by the record in this matter: Claimant's federal lawsuit and this arbitration resulted from the actions of Viking Client Services, Inc. ("Viking") to recover money damages from Claimant based on purported damage to the subject rental car. The rental transaction itself was not problematic -- Claimant did not challenge operation of the Rental Agreement relating to the mutually agreed upon car rental, which concluded smoothly Claimant does not challenge the Rental Agreement's provisions requiring payment for validated rental car damage; Claimant instead challenges Respondent's alleged practices of pursuing rental customers for nonexistent damage to the rental cars. Had Viking not initiated collection activity, there would be no reason for Claimant's lawsuit. The gravamen of Claimant's lawsuit, then, is property damage liability, and Claimant's claims (causes of action in the federal lawsuit) are for property damage pursued by Viking. Based on the analysis above, Claimant's claims for property damage are excluded from mandatory arbitration.

Respondent's position, that the physical damage to rental cars pursued by Viking and challenged by Claimant is not the type of property damage excluded from mandatory arbitration in the Rental Agreement, is not consistent with contract interpretation and arbitration principles. As part of a consumer contract, the term "property damage" found in the Rental Agreement arbitration clause exclusion needs no further interpretation beyond its common, everyday meaning. *See Lewis v. UBS Financial Services, Inc.*, 818 F. Supp 2d 1161, 1168 (N.D. Cal. 2011); Consumers at a hurried rental car counter cannot be expected to anticipate that Respondent intended a different meaning of the term, and they are certainly not expected to parse nuanced legal distinctions in the contract's terms and conditions if Respondent did not define or qualify the term. Cal. Civil Code §1634. Consumers are incapable of agreeing to arbitration terms of which they are unaware. *See In re Holl*, 925 F.3d 1076, 1083 (9th Cir. 2019); *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 992 (1972). Further, the AAA Consumer Due Process Protocol (National Consumer Disputes Advisory Committee), Principle No. 11, *Agreement to Arbitrate* provides that consumers should be given "clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character." There is no evidence showing that Claimant was provided notice of Respondent's intent not to exclude from arbitration the type of rental car damage that Claimant challenges in its federal court lawsuit and this arbitration.

Based on the evidence in this matter, the alleged damage to the Hertz rental car at issue in Claimant's claims

constitutes "property damage" as used in the arbitration clause. On this basis, Claimant's claims are excluded from mandatory arbitration under the Rental Agreement arbitration clause exclusion because the parties did not agree to arbitrate Claimant's claims, which are for property damage.

Ruling

Claimant's claims, which are primarily for property damage, are excluded from mandatory arbitration pursuant to the arbitration clause in the Rental Agreement. This matter is remanded to the federal district court for adjudication of Claimant's class action natter. Nothing in this ruling is intended to resolve any issues beyond the issues presented in the Motion.

No costs of arbitration are awarded to either party.

This Order shall remain in full force and effect until further notice.

Date: December 6, 2019

Carolyn Samiere, Arbitrator