IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

AMANDA FERRELL,
JOHN STIGALL,
MISTY EVANS,
Plaintiff,

v.

Civil Action No. 11-C-1426
Judge Paul Zakaib, Jr.

U-HAUL CO. OF WEST VIRGINIA,
a West Virginia corporation,

Defendant.

ORDER DENYING MOTION TO COMPEL ARBITRATION

Pending before the Court is Defendant U-Haul Co. of West Virginia's Motion to Compel Arbitration and Dismiss or Stay the Case. The Court, having fully considered the motion and supporting memorandum, the Plaintiffs' response, the Defendant's Reply, and the arguments and evidence presented at the hearing held on March 6, 2012, the Court DENIES the motion based upon the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This case is a consumer protection action brought by three individuals against U-Haul Co. of West Virginia ("U-Haul") alleging that U-Haul adds a $1.00 to $5.00 environmental fee to the rental contracts of its customers which while allegedly masquerading as a governmental fee which instead allegedly amounts to U-Haul surreptitiously shifting its overhead to its customers. *See* Complaint at ¶¶ 11-13.

2. The Defendant's motion to compel arbitration is based upon its inclusion of an arbitration clause in a document it entitles Rental Contract Addendum ("RCA"). U-haul has produced signed Rental Contracts ("RC") signed by each of the three plaintiffs. The RC contains the terms of the rental and states before the signature line: "I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum." Nothing on the face of the RC warns the customers that U-Haul is attempting to bind them to an arbitration clause not contained in the RC.

3. Each of the plaintiffs has filed an affidavit stating that the RCA was not provided to them prior to signing the RC. U-Haul has not contested these affidavits. Indeed, its affidavits seemingly confirm the plaintiffs' testimony by stating that the "routine business practice" of U-Haul was to provide the RCA to customers only "prior to receiving possession of any rental property." *See* Bowles Affidavit of 10-25-11 (Bowles I) at ¶ 16; Bowles Affidavit of 3-2-12 (Bowles II) at ¶ 10 (same); *see also* Bowles II at ¶ 12 (**signed** RC was folded and placed into RCA by U-Haul employee); Bowles II at ¶ 15 (copies of the RCA "are usually provided to customers after they sign the Rental Contract."). Based upon the record herein, the Court finds that the RCA was not provided to the plaintiffs prior to their signing the rental agreement.

4. At the hearing on Defendant's motion, Plaintiffs filed the March 5, 2012 Affidavit of Amanda M. Ferrell (Ferrell II). In this Affidavit, Ms. Ferrell stated that, after presenting her credit card and driver's license to the U-Haul

agent, she was directed to sign an "electronic box". Ferrell II at ¶¶ 3-4. Thereafter, she was provided, for the first time, a copy of the RC upon which was placed an electronic copy of her signature. *Id.* at ¶ 5.

5. At the hearing, defendant requested the right to respond to the affidavit. No further affidavits have been filed by the Defendant disputing Ms. Ferrell's statements. Indeed, Defendant's affidavit is consistent with this statement. *See* Bowles I at ¶ 10 (noting U-Haul uses electronic system to electronically capture "signatures affixed by its customers"). There is no evidence that the statement contained in the printed RC that the customer agreed to the terms and conditions of the RCA was ever provided to customers prior to their electronically signing the "electronic box".

6. The RC contains no statement warning the customer that, by signing the RC, the customer is agreeing to be bound by the terms of an arbitration clause.

7. As for the RCA, it is made of cardstock and is a multicolor document that is folded to serve as a document holder for the RC. On the front cover of the RCA, in bold large type appears the title: "RENTAL CONTRACT ADDENDUM" with the next line stating in bold and slightly smaller type "DOCUMENT HOLDER". A few small lines of text appear next stating: "Additional Terms and Conditions for Equipment Rental". These lines are followed by a large block of text in reverse type stating "RETURNING EQUIPMENT". The remainder of the front cover focuses on instructions for returning the rental equipment. The back cover of the folded RCA contains an advertisement for additional services offered by the

Defendant. An example of the RCA was introduced into evidence at the hearing as Plaintiffs' Exhibit 3.

8. The language making up Defendant's arbitration clause is contained inside the RCA. Nothing on the cover of the RCA notifies or alerts a customer that U-Haul is attempting to bind the customer to arbitration with language contained inside the RCA.

9. The Court finds that the Plaintiffs were not provided with either the RCA or the arbitration clause prior to contracting with the Defendant.

10. The Court finds that the Plaintiffs were not aware of the arbitration clause in the RCA prior to contracting with the Defendant.

11. The Court finds that the Plaintiffs did not agree to be bound by the arbitration clause prior to entering into a contact with the Defendant.

12. The Court finds that the Defendant's arbitration clause is a clause purporting to require mandatory arbitration of any claims against the Defendants. As that clause purports to waive significant rights to a jury trial and to appeal, this term is a material term.

13. The Court finds that the Plaintiffs did not agree to the inclusion of this material term requiring arbitration after contracting with the defendant.

CONCLUSIONS OF LAW

14. "When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006), the authority of the trial court is limited to determining the threshold issues of (1)

whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 717 S.E.2d 909, 917-18 (W.Va. 2011) (footnote omitted). The determination of whether a valid arbitration agreement exists between the parties is evaluated under state law principles of contract formation. *Id.* at 918.

15. In syllabus point 3, of *Board of Ed. of Berkeley County v. W. Harley Miller, Inc.*, 160 W.Va. 473, 236 S.E.2d 439 (1977), the Supreme Court of Appeals explained that "the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract." *See also Richmond American Homes,* 717 S.E.2d at 919 n. 29 (quoting *W. Harley Miller, Inc.*)

16. "The fundamentals of a legal 'contract' are competent parties, legal subject-matter, valuable consideration, and mutual assent." *See Wellington Power Corp. v CNA Surety Corp.*, 217 W.Va. 33, 37, 614 S.E.2d 680, 684 (2005). (1926)). "It is elementary that mutuality of assent is an essential element of all contracts. *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.,* 158 W.Va. 935, 216 S.E.2d 234 (1975). In order for this mutuality to exist, it is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other." *Ways v. Imation Enterprises Corp.*, 214 W.Va. 305, 313, 589 S.E.2d 36, 44

(2003) (quoting *Bailey v. Sewell Coal Co.,* 190 W.Va. 138, 140-41, 437 S.E.2d 448, 450-51 (1993)).

17. Once a contract has been made, a modification of the contract requires the assent of both parties to the contract as "mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract." *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 157 W.Va. 93, 97-98, 199 S.E.2d 308, 311 (W.Va. 1973) (citations omitted).

18. This is particularly the case when a party attempts to include an additional term into the agreement that is material. *See, e.g., Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135, 136 (4th Cir. 1979) (when a written confirmation form contains material terms in addition to those reached in the oral sales contract the additional terms do not become part of the contract absent assent).

19. Arbitration clauses are uniformly held to be material. In *Supak,* the Fourth Circuit concluded: "Moreover, courts of last resort of both states [New York and North Carolina] have held that the addition of an arbitration clause constitutes a *per se* material alteration of the contract . . . . Thus, under the law of either state, the arbitration clause did not become part of the contract." 593 F.2d at 136. (citations omitted); The Fifth Circuit reached the same conclusion on similar facts in *Coastal Industries, Inc. v. Automatic Steam Products Corp.*, 654 F. 2d 375, 379 (5th Cir. 1981) holding: "By requiring evidence of an express agreement before permitting the inclusion of an arbitration provision into the contract, a court

protects the litigant who will be unwillingly deprived of a judicial forum in which to air his grievance or defense."

20. Courts distinguish cases like this where the arbitration clause was presented after agreement. *See Electrical Box & Enclosure, Inc. v. Comeq, Inc.*, 626 So. 2d 1250, 1252 (Ala. 1993) (distinguishing *Coastal Industries* on the grounds that the arbitration clause was presented to Electrical Box during the negotiations of the contract). *See also Diskin v. J.P. Stevens & Co.*, 836 F. 2d 47 (1st Cir. 1987) (similar facts and same holding as in *Supak & Sons*); *N&D Fashions, Inc. v. DHJ Indus.*, Inc., 548 F.2d 722, 727 (8th Cir. 1977) ("we cannot say on this record that the District Court was clearly erroneous in holding that the arbitration provision in DHJ's acknowledgement form was a 'material alteration.'"); *Universal Plumbing and Piping Supply, Inc. v. John C. Grimberg Co.*, 596 F. Supp. 1383, 1385 (W.D. Pa. 1984) (similar facts and same holding as in *Supak & Sons* noting "[o]ther courts have held that an arbitration clause is a material alteration requiring the parties' assent."); *Fairfield- Noble Corp. v. Pressman-Gutman Co.*, 475 F. Supp. 899, 903 (S.D.N.Y. 1979) ("Thus, arbitration was a term 'additional to or different from' those agreed upon. As such, the arbitration provision, unilaterally inserted by the defendant, was a material alteration of the contract and accordingly did not become a part thereof."); *Duplan Corp. v. W.B. Davis Hosiery Mills, Inc.*, 442 F. Supp. 86 (S.D.N.Y. 1977) (similar facts and same holding as in *Supak & Sons*); *Valmont Indus. v. Mitsui & Co.*, 419 F. Supp. 1238, 1240 (D. Neb. 1976) (similar facts and same holding as in *Supak & Sons*); *John Thallon & Co. v. M&N Meat Co.*, 396 F.

Supp. 1239 (E.D.N.Y. 1975) (very similar facts and same holding as in *Supak & Sons* "the arbitration clause and the correlative forfeiture by plaintiff of its right to trial by jury in the courts, 'alter[ed] the original bargain' and involved an 'element of unreasonable surprise.'" (citations omitted)); *J&C Dyeing, Inc. v. Drakon, Inc.*, 93 Civ. 4283, 1994 U.S. Dist. LEXIS 15194 at *6, *8 (S.D.N.Y. 1994) ("it is clear that an arbitration clause is a material addition which can become part of a contract only if it is expressly assented to by both parties. . . . Although Drakon did not object to the arbitration clause, the mere retention of confirmation slips without any additional conduct indicative of a desire to arbitrate cannot bind Drakon, for it does not rise to the level of assent required to bind parties to arbitration provisions."); *DeMarco California Fabrics, Inc. v. Nygard International*, No. 90 Civ. 0461, 1990 U.S. Dist. LEXIS 3842 at *7 (S.D.N.Y. 1990) ("provision for arbitration is 'clearly a proposed additional term' to the parties' agreement which 'materially alters' the agreement . . . ."); *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 995, Cal. Rptr. 347, 352 (1972) ("it is clear that a provision for arbitration inserted in the acceptance or confirmation of an offer to purchase goods 'materially alters' the offer."); *Matter of Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 408 N.Y.S. 2d 410, 45 N.Y. 2d 325, 380 N.E. 2d 239 (1978) ("the inclusion of an arbitration agreement materially alters a contract for the sale of goods . . . . [B]y agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent"

(citation omitted)); *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 204 S.E. 2d 834, 842 (N.C. 1974) ("Beyond question, [the addition of an arbitration clause] would be a material alteration of [the contract]."); *Just Born, Inc. v. Stein Hall & Co.*, 59 D. & C. 2d 407 (Pa. D. & C. 1971) (similar facts and same holding as *Supak & Sons*) (cited in *Universal Plumbing*, 596 F. Supp. at 1385); *Stanley-Bostitch, Inc. v. Regenerative Environmental Equipment Co.*, 697 A.2d 323, 329 (R.I. 1997) ("We are of the opinion that a provision compelling a party to submit to binding arbitration materially alters the terms of the parties' agreement.").

21. U-Haul argues that the doctrine of incorporation by reference allows it to impose its arbitration clause on the plaintiffs. First, unlike the cases cited by the Defendant, the contract at issue here does not use the phrase "incorporation by reference" or any similar language. While West Virginia recognizes the doctrine, *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc.*, 186 W.Va. 613, 616-617, 413 S.E.2d 670, 673 - 674 (1991), incorporation by reference still requires offer and acceptance of the terms of the incorporated contract. *Id.* Indeed, in *Art's Flower Shop, Inc.,* the terms of a prior contract were incorporated by reference. There was no argument that the disputed terms had not been previously communicated **and** accepted by the parties. Similarly, in *Rashid v. Schenck Const. Co., Inc.*, 190 W.Va. 363, 367, 438 S.E.2d 543, 547 (1993), there was no dispute that the contracts incorporated by reference had not been communicated to the parties sought to be charged prior to agreement. The cases cited by U-Haul involve documents incorporated that were provided prior to agreement, *Art's Flower*

Shop, Inc. v. Chesapeake and Potomac Tel. Co. of W.Va., Inc., 186 W.Va. 613, 616-17, 413 S.E.2d 670, 673-74 (1992), *Rashid v. Schenck Construction Co., Inc.*, 190 W.Va. 363, 438 S.E.2d 543 (1993); sophisticated parties, *Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC,* --- F.Supp.2d ---2012 WL 171375, at *4 (S.D. W.Va. Jan. 20, 2012), or documents that specifically put the customer on notice that an arbitration clause was being incorporated into the document *In re Raymond James & Associates, Inc.,* 196 S.W.3d 311, Tex.App. – Houston [1 Dist.], 2006; *CompuCredit Corp. v. Greenwood,* 132 S.Ct. 665, U.S., 2012. These cases are distinguishable. They are also distinguishable to the extent that the purported agreement to incorporate the RCA was not provided until after the customer electronically "signed" the RC.

22. Finally, U-Haul argues that the lack of assent to the RCA is a challenge to the entire contract. Under the severability rule, U-Haul contends that the Court is limited to considering arguments that challenge only the arbitration clause. According to U-Haul, because the plaintiffs' challenge to the RCA would also invalidate the language in RCA relevant to optional insurance coverage, the challenge violates the severability rule. The Supreme Court of Appeals described the severability rule as follows:

> The doctrine of severability means this: If a party challenges the enforceability of the entire contract (including the arbitration clause)—that is, the party does not sever the arbitration clause from the rest of the contract and make a "discrete challenge to the validity of the arbitration clause"—then the court is completely deprived of authority and only an arbitrator can assess the validity of the contract, including the validity of the arbitration clause.

Richmond American Homes, 717 S.E.2d at 918. Significantly, the Court rejected the argument that severability required the Court to limit its review to the arbitration clause. *Id.* at 919 (noting that "the law of this state—and virtually every other state—is that [a]n analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract *as a whole*") (emphasis in original; citation, footnote, and internal quotation omitted)).

23. In this case, while there are other purported provisions in the RCA, the plaintiffs do not challenge those provisions. The disputed environmental fee is contained in the RC, not the RCA. Moreover, unlike the arbitration clause which appears only in the RCA, the optional insurance coverages appear in the in the RC. Finally, the severability doctrine seeks to bar judicial challenges to an entire contract masquerading under the guise of a challenge to an arbitration agreement. In this case, the issue raised by the Plaintiffs is whether the parties actually agreed to arbitrate not whether the arbitration clause is enforceable. The Defendant has not cited a case holding that failure to assent to additional contractual language containing an arbitration clause and other provisions not at issue in the cases constitutes a violation of the severability doctrine. Under *Richmond American Homes, supra,* the Court can look at the circumstances surrounding the execution of the contract *as a whole.* The Court's conclusion that the arbitration clause contained in the RCA is not part of the contracts at issue here is consistent with this authorization.

24. Because, the Defendant has failed to meet its burden of establishing the existence of an agreement to arbitrate, the Court must deny and hereby does deny the Motion to Compel Arbitration and Dismiss or Stay the Case. The remaining motions to bifurcate and for a protective order are denied as moot.

25. The Court hereby directs the parties to contact the Court to obtain a date for a scheduling conference so that a scheduling order may be entered in this matter.

26. The objections of all parties to adverse rulings are noted and preserved.

27. The Clerk is directed to send a certified copy of this Order to all counsel of record.

ENTERED: March 27, 2012

JUDGE PAUL ZAKAIB, JR.

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 28TH DAY OF MARCH 2012
CLERK
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