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Starkey v. G Adventures, Inc. 796 F.3d 193 (2d Cir. 2015)

ANDREA LOVRINCEVIC*

BACKGROUND

Plaintiff Elizabeth Starkey brought a civil action against defendant G Adventures Inc., alleging that she was sexually assaulted by a crewmember while on vacation in the Galapagos Islands.[1] Starkey filed a negligence suit when she returned to the United States and claimed that G Adventures was liable for damages.[2] G Adventures moved for dismissal of the suit, contending that Starkey brought suit in the wrong forum. Thus, the issue for that court was whether Starkey was bound to the forum selection clause in the terms and conditions of her contract with G Adventures, sent to Starkey before the trip.

Starkey, a New York state resident, purchased a ticket for a tour of the Galapagos Islands with G Adventures. After purchasing her ticket, she received three documents electronically from the G Adventures: "a confirmation e-mail, a confirmation invoice, and [a] service voucher."[3]All three of these communications included a statement warning the purchaser that by buying the ticket(s), he or she had accepted the terms and conditions. Additionally, all three of these communications included an underlined hyperlink that the reader could click to take them to the terms and conditions "on a separate webpage."[4]

The terms and conditions stated that any legal actions brought against the G Adventures were subject to the jurisdiction of Canadian courts. Starkey contended that although she received each of the three communications containing the aforementioned hyperlinks, she never actually read the terms and conditions and did not click on any of the links.

On October 20, 2011, Starkey flew to Quito, Ecuador for the tour. She stated that on the night of October 26, 2011 she felt ill and stayed in her room while other group members were having dinner nearby. She claimed that the leader of the trip, Daniel Doe, entered her room on two separate occasions that night and touched her inappropriately. She claimed the she feared Doe would hurt her, but that she was able to escape both encounters

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1 Starkey v. Gap Adventures, Inc., 796 F. 3d 193, 195 (2d Cir. 2015).

2 *Id.*

3 *Id.*

4 *Id.*

safely.

Starkey originally filed a negligence suit against G Adventures, alleging negligent hiring of Daniel Doe. Starkey requested compensatory damages and attorney's fees totaling one million dollars. Then G Adventures filed an answer and a motion for judgment on the pleadings.

The district court considered the forum-selection clause listed in the terms and conditions and its enforceability and found for the defendant, holding that Starkey had to re-file in Ontario, Canada.

ISSUE

The United States Second Circuit Court of Appeals, primarily addressed one umbrella issue: whether, pursuant to 28 U.S.C. § 1406, "a hyperlink to a document containing a forum selection clause may be used to reasonably communicate that clause to a consumer."[5] The Second Circuit also addressed two sub-issues within the hyperlink matter: (1) whether the forum selection clause in the terms and conditions was communicated to Starkey; and (2) whether it was enforceable.

DECISION

The Second Circuit affirmed the district court's decision, holding that the forum selection clause was clearly communicated to Starkey, and was therefore enforceable against her. The court rejected all of Starkey's arguments against enforcement and concluded that her remarks were without merit.

REASONING

The Second Circuit first determined whether the district court properly dismissed the claim based on the doctrine of *forum non conveniens* by using a four-part *Martinez* test.[6] The Second Circuit found that the claim was properly dismissed and further elaborated on the focus of the inquiry, which was the first prong of the test: "whether the clause was reasonably communicated to the party resisting enforcement."[7] The court determined from precedent that a forum selection clause is reasonably communicated when "(1) its promotional brochure directs the traveler's attention to 'the terms and conditions printed on the Passenger Ticket Contract which may be inspected at any [of the company's] office[s],' and (2) the ticket contract itself set forth the clause clearly and unambiguously."[8]

First, the Second Circuit decided that G Adventures adequately directed Starkey's attention to the terms and conditions; the court cited the numerous e-mails Starkey received from the defendant, all three of which

5 *Id.*
6 Martinez v. Bloomberg LP, 740 F.3d 211, 228 (2d Cir. 2014).
7 *Id.* at 198.
8 Starkey v. G Adventures, Inc., 796 F.3d at 197.

included the words "**TERMS AND CONDITIONS**," in bold print and capitalized with hyperlinks.[9] The court held: "[the hyperlink method] serves the same function as the method of cross-referencing language in a printed copy promotional brochure and sufficed to direct Starkey's attention to the Booking Terms and Conditions."[10]

Second, the Second Circuit decided that the forum clause was clear and unambiguous, even though it was written in fine print. Furthermore, the court held that suits arising from the Booking Terms and Conditions would be subject to the jurisdiction of the Canadian courts. Therefore, the clause was reasonably communicated to Starkey, and the court found that it was presumptively enforceable.

The court then considered Starkey's arguments against enforcing the clause and stated that a forum selection clause would not be enforced if the clause was (1) included through fraud, (2) fundamentally unfair, (3) enforcement would "contravene public policy of the forum in which the suit is brought,"[11] or (4) that the selected forum is so inconvenient that the plaintiff is deprived of her "day in court."[12]

In consideration of the second argument (the first was not discussed), the court found that Starkey was not able to show that her hearing would be unfair in Canada. Furthermore, since G Adventures offered tours on every continent, it was reasonable for them to select a single venue for consumers' suits. For the second consideration the court pointed out that it is not a contravention of public policy in the U.S. to enforce a forum selection clause, even if the foreign law is less favorable than U.S. law.[13]

Starkey also argued that as a survivor of sexual assault the forum selection clause should not be enforced, but the court found no precedent to invalidate the clause because the court did not want to "draw a judicial line for such a clause that distinguished one set of victims from another."[14]

The court concluded that G Adventures had taken adequate measures to reasonably communicate to Starkey a document containing a forum selection clause via hyperlink and the inconvenience of litigating abroad and the other arguments described above are not persuasive.[15] Therefore, the district court's decision was affirmed.

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9 *Id.*

10 *Id.*

11 Starkey v. G Adventures, Inc., 796 F.3d at 198.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*