

FTEJA v. FACEBOOK, INC.
United States District Court for the Southern District of New York
841 F. Supp. 2d 829 (S.D.N.Y. 2012)

Plaintiff Mustafa Fteja alleges that defendant Facebook, Inc. (“Facebook”), the social networking website, disabled his Facebook account without justification and for discriminatory reasons. Non-party Dimitrios Fatouros has moved to join the action. Facebook opposes that motion and has moved to transfer this action pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Northern District of California. In the alternative, Facebook moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the action for failure to state a claim for which relief can be granted or, in the alternative, for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e). For the following reasons, Facebook’s motion to transfer is granted and this case is transferred to the Northern District of California.

* * * [T]he parties devote substantial attention to the forum selection clause contained in the terms and conditions that govern Facebook users’ accounts, known as the Terms of Use at the time that Fteja signed up for an account. That clause provides as follows:

You will resolve any claim, cause of action or dispute (“claim”) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating all such claims.

As an initial matter, Fteja argues that “[t]here is no proof that [he] agreed to a forum selection clause” and that he does “not remember agreeing to [the] forum selection clause or agreeing to any Facebook agreement.” Impossible, says Facebook: “a putative Facebook user cannot become an actual Facebook user unless and until they have clicked through the registration page where they acknowledge they have read and agreed to Facebook’s terms of use. . . .”

As a matter of logic, Facebook appears to be correct. Declarations filed by Facebook employees, screenshots submitted by Fatouros, and Facebook’s current website of which the Court takes judicial notice suggest that the Facebook sign-up process works as follows. A putative user is asked to fill out several fields containing personal and contact information. See <http://www.facebook.com>. The putative user is then asked to click a button that reads “Sign Up.” After clicking this initial “Sign Up” button, the user proceeds to a page entitled “Security Check” that requires a user to reenter a series of letters and numbers displayed on the page. Below the box where the putative user enters that letter-number combination, the page displays a second “Sign Up” button similar to the button the putative user clicked on the initial page. The following sentence appears immediately below that button: “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service.” The phrase “Terms of Service” is underlined, an indication that the phrase is a hyperlink, a phrase that is “usually highlighted or underlined” and “sends users who click on it directly to a new location—usually an internet address or a program of some sort.” *United States v. Hair*, 178 Fed. Appx. 879, 882 n. 3 (11th Cir. 2006).

In order to have obtained a Facebook account, Fteja must have clicked the second “Sign Up” button. Accordingly, if the phrase that appears below that button is given effect, when Fteja clicked “Sign Up,” he “indicat[ed] [he] ha[d] read and agree[d] to the Terms of Policy.” * * *

Facebook’s Terms of Use are not a pure-form clickwrap agreement, either. While the Terms of Use require the user to click on “Sign Up” to assent, they do not contain any mechanism that forces the user to actually examine the terms before assenting. By contrast, in assenting to a clickwrap agreement, “users typically click an ‘I agree’ box after being presented with a list of terms and conditions of use . . .” Hines, 668 F.Supp.2d at 366 (emphasis added). * * *

Facebook’s Terms of Use are somewhat like a browsewrap agreement in that the terms are only visible via a hyperlink, but also somewhat like a clickwrap agreement in that the user must do something else—click “Sign Up”—to assent to the hyperlinked terms. Yet, unlike some clickwrap agreements, the user can click to assent whether or not the user has been presented with the terms.

What result follows? Have terms been reasonably communicated where a consumer must take further action not only, as in a clickwrap agreement, to assent to the terms but also, as in a browsewrap agreement, to view them? Is it enough that Facebook warns its users that they will accept terms if they click a button while providing the opportunity to view the terms by first clicking on a hyperlink?

In answering that question, it is tempting to infer from the power with which the social network has revolutionized how we interact that Facebook has done the same to the law of contract that has been so critical to managing that interaction in a free society. But not even Facebook is so powerful. As the Second Circuit has reminded us, “[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.” *Register.com*, 356 F.3d at 403. To make that point, the Court of Appeals has used a rather simple analogy. “The situation might be compared to one in which” Facebook “maintains a roadside fruit stand displaying bins of apples.” *Id.* at 401. For purposes of this case, suppose that above the bins of apples are signs that say, “By picking up this apple, you consent to the terms of sales by this fruit stand. For those terms, turn over this sign.”

In those circumstances, courts have not hesitated in applying the terms against the purchaser. Indeed, in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587 (1991), the Supreme Court upheld a forum selection clause in fine print on the back of a cruise ticket even though the clause became binding at the time of purchase, and the purchasers only received the ticket some time later. See *id.* * * *

There is no reason why that outcome should be different because Facebook’s Terms of Use appear on another screen rather than another sheet of paper. What is the difference between a hyperlink and a sign on a bin of apples saying “Turn Over for Terms” or a cruise ticket saying “SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT—ON LAST PAGES 1, 2, 3”? *Shute*, 499 U.S. at 587. The mechanics of the internet surely remain unfamiliar, even obtuse to many people. But it is not too much to expect that an internet user whose social networking was so prolific that losing Facebook access allegedly caused him mental anguish would understand that the hyperlinked phrase “Terms of Use” is really a

sign that says “Click Here for Terms of Use.” So understood, at least for those to whom the internet is in an indispensable part of daily life, clicking the hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else. Whether or not the consumer bothers to look is irrelevant. “Failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract.” See *Centrifugal Force, Inc. v. Softnet Commc’n Inc.*, No. 08 Civ. 5463, 2011 WL 744732, at *7 (S.D.N.Y. Mar. 1, 2011) (enforcing clickwrap agreement in breach of contract action). Here, Fteja was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences. That was enough.

Several other courts have reached a similar conclusion on similar facts. [The court discusses four examples.]

For the reasons discussed above, the Court concludes that Fteja assented to the Terms of Use and therefore to the forum selection clause therein. If that is so, Fteja agreed to litigate all disputes regarding his Facebook account “exclusively in a state or federal court located in Santa Clara County,” California.