

Decided on December 28, 2005

APPELLATE TERM OF THE SUPREME COURT, FIRST DEPARTMENT

PRESENT: McCooe, J.P., Davis, Gangel-Jacob, JJ
570315/05.

Russell Scarcella, Plaintiff-Respondent,

against

America Online, Inc., Defendant-Appellant.

Defendant appeals from (1) an order of the Small Claims Part of the Civil Court, New York County (Debra Rose Samuels, J.), dated September 8, 2004, which denied its motion to dismiss the action; and (2) an order, same court and Judge, dated March 28, 2005, which granted its motion for reargument, and upon reargument, adhered to its prior determination.

PER CURIAM:

Orders (Debra Rose Samuels, J.), dated September 8, 2004 and March 28, 2005, affirmed, without costs.

Civil Court properly concluded that the forum selection clause set forth in the electronic AOL membership agreement, which required that any dispute against AOL be litigated in Virginia, was unenforceable in the limited context of this small claims case. Plaintiff made a sufficient showing that enforcement of the forum selection clause in the parties' "clipwrap" agreement would be unreasonable in that he would be deprived not only of his preferred choice to litigate this \$5,000 controversy in the Small Claims Part, but, for all practical purposes, of his day in court (*see British West Indies Guaranty Trust Co., Ltd. v Baque Internationale A Luxembourg*, 172 AD2d 234 [1991]). This is particularly so in view of the costs and inconvenience attendant to litigating this claim in Virginia; the \$2,000 monetary limit of the Virginia Small Claims Court (*see Va Stat Ann* § 16.1-122.3), which would preclude plaintiff from seeking the full amount of his \$5,000 claim; and perhaps most importantly, defendant's unqualified right to transfer the matter out of the Virginia Small Claims Court (*see Va Stat Ann* § 16.1-122.4). [*2]
Enforcement of the forum selection provision in these circumstances would frustrate the stated legislative goal of providing a "simple, informal and inexpensive procedure" for the disposition of small claims (*see CCA 1802. Rosenbaum v Gateway*, 4 Misc 3d 128A (2004), relied upon by defendant, does not compel a contrary result since it involved the enforceability of a threshold agreement to arbitrate not shown to be onerous or unfair.

This constitutes the decision and order of the court.

Decision Date: December 28, 2005