Feldman v. Google, Inc.

United States District Court
513 F. Supp. 2d 229 (E.D. Pa. 2007)

James T. Giles, J.

MEMORANDUM

I. Introduction

Before the court is Defendant Google, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint, or in the alternative, to Transfer, which motion the court converted to a Motion for Summary Judgment. Also before the court is Plaintiff Lawrence E. Feldman's Cross-Motion for Summary Judgment. The ultimate issues raised by the motions and determined by the court are whether a forum selection clause in an internet "clickwrap" agreement is enforceable under the facts of the case and, if so, whether transfer of this case to the Northern District of California is warranted. The court finds in the affirmative as to both issues and, therefore, denies Plaintiff's Motion for Summary Judgment, grants Defendant's Motion to Transfer, and transfers this case to the Northern District of California, San Jose Division. The reasons follow.

Defendant's motion seeks to enforce the forum selection clause in an online "clickwrap" agreement, which provides for venue in Santa Clara County, California, which is within the San Jose Division. In his original complaint, Plaintiff based his claims on a theory of express contract. In his Amended Complaint, however, Plaintiff offers a wholly new legal theory. He argues that no express contract existed because the agreement was not valid. Withdrawing his express contract allegations, Plaintiff advanced the theory of implied contract because he argues he did not have notice of and did not assent to the terms of the agreement and therefore there was no "meeting of the minds." Plaintiff also argues that, even if the agreement were controlling, it is a contract of adhesion and unconscionable, and that the forum selection clause is unenforceable.

The court will address these arguments in turn. . . .

II. Factual Background

a. general background

On or about January 2003, Plaintiff, a lawyer with his own law firm, Lawrence E. Feldman & Associates, purchased advertising from Defendant Google, Inc.'s "AdWords" Program, to attract potential clients who may have been harmed by drugs under scrutiny by the U.S. Food and Drug Administration.

In the AdWords program, whenever an internet user searched on the internet search engine, Google.com, for keywords or "AdWords" purchased by Plaintiff, such as "Vioxx," "Bextra," and "Celebrex," Plaintiff's ad would appear. If the searcher clicked on Plaintiff's ad, Defendant would charge Plaintiff for each click made on the ad.

This procedure is known as "pay per click" advertising. The price per keyword is determined by a bidding process, wherein the highest bidder for a keyword would have its ad placed at the top of the list of results from a Google.com search by an internet user.

Plaintiff claims that he was the victim of "click fraud." Click fraud occurs when entities or persons, such as competitors or pranksters, without any interest in Plaintiff's services, click repeatedly on Plaintiff's ad, the result of which drives up his advertising cost and discourages him from advertising. Click fraud also may be referred to as "improper clicks" or, to coin a phrase, "trick clicks." Plaintiff alleges that twenty to thirty percent of all clicks for which he was charged were fraudulent. He claims that Google required him to pay for all clicks on his ads, including those which were fraudulent.

Plaintiff does not contend that Google actually knew that there were fraudulent clicks, but alleges that click fraud can be tracked and prevented by computer programs, which can count the number of clicks originating from a single source and whether a sale results, and can be tracked by mechanisms on websites. . . .

Plaintiff alleges Google charged him over $100,000 for AdWords from about January 2003 to December 31, 2005. Plaintiff seeks damages, disgorgement of any profits Defendant obtained as a result of any unlawful conduct, and restitution of money Plaintiff paid for fraudulent clicks.

B. THE ONLINE AGREEMENT AND FORUM SELECTION CLAUSE

This cross-summary judgment battle turns entirely on a forum selection clause in the AdWords online agreement. It is undisputed that the forum selection clause provides: *"The Agreement must be* construed as if both parties jointly wrote it, governed by California law except for its conflicts of laws principles and *adjudicated in Santa Clara County, California."* (Def. Mot. to Dismiss, Ex. A, at P 7 (emphasis added).)

Annie Hsu, an AdWords Associate for Google, Inc., testified by affidavit that the following procedures were in place at the time that Plaintiff activated his AdWords account in about January 2003. (Hsu Decl. P 7). Although Plaintiff claims that the AdWords Agreement "was neither signed nor seen and negotiated by Feldman & Associates or anyone at his firm" (Pl. Opp. to Mot. to Dismiss at 2) and that he never "personally signed a contract with Google to litigate disputes in Santa Clara County, California" (Pl. Reply at 1). Plaintiff does not dispute that he followed the process outlined by Hsu.

It is undisputed that advertisers, including Plaintiff, were required to enter into an AdWords contract before placing any ads or incurring any charges. (Hsu Decl. P 2.) To open an AdWords account, an advertiser had to have gone through a series of steps in an online sign-up process. (Hsu Decl. P 3.) To activate the AdWords account, the advertiser had to have visited his account page, where he was shown the AdWords contract. (Hsu Decl. P 4.)

Toward the top of the page displaying the AdWords contract, a notice in bold print appeared and stated, "Carefully read the following terms and conditions. If you agree with these terms, indicate your assent below." (Hsu Decl. P 4.) The terms and conditions were offered in a window, with a scroll bar that allowed the advertiser to scroll down and read the entire contract. The contract itself included the pre-amble and seven paragraphs, in twelve-point font. The contract's pre-amble, the first paragraph, and part of the second paragraph were clearly visible before scrolling down to read the rest of the contract. The preamble, visible at first impression, stated that consent to the terms listed in the Agreement constituted a binding agreement with Google. A link to a printer-friendly version of the contract was offered at the top of the

contract window for the advertiser who would rather read the contract printed on paper or view it on a full-screen instead of scrolling down the window. (Hsu Decl. P 5.)

At the bottom of the webpage, viewable without scrolling down, was a box and the words, "Yes, I agree to the above terms and conditions." (Hsu Decl. P 4.) The advertiser had to have clicked on this box in order to proceed to the next step. (Hsu Decl. P 6.) If the advertiser did not click on "Yes, I agree . . . " and instead tried to click the "Continue" button at the bottom of the webpage, the advertiser would have been returned to the same page and could not advance to the next step. If the advertiser did not agree to the AdWords contract, he could not activate his account, place any ads, or incur any charges. Plaintiff had an account activated. He placed ads and charges were incurred. . . .

III. Legal Standard for Summary Judgment

[The court noted that summary judgment is appropriate under the federal rules of civil procedure if there is no genuine issue as to any material fact and the moving party is entitled to a summary judgment as a matter of law. — Eds.]

IV. Discussion

A. CHOICE OF LAW

Defendant argues that the court must apply California law. The AdWords Agreement contains a choice of law clause, specifying that the Agreement must be governed by California law. (Def. Mot. to Dismiss, Ex. A, at P 7.) Defendant and Plaintiff both rely upon Pennsylvania and California substantive law in their briefs and arguments. . . .

Most [federal] circuit courts, however, have found that federal, and not state law, applies in the determination of the effect given to a forum selection clause in diversity cases. . . . The Third Circuit has held that federal law controls because "questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature." Jumara v. State Farm Ins. Co., 55 F.3d 873, 877 (3d Cir. 1995) (quoting [Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir.1990)]) . . . . Thus, this court follows the Third Circuit precedent set out in *Jumara* and applies federal law in determining the validity of the forum selection clause at issue here.

B. THE ONLINE ADWORDS AGREEMENT IS A VALID EXPRESS CONTRACT.

1. The Clickwrap Agreement is Enforceable.

Plaintiff contends that the online AdWords Agreement was not a valid, express contract, and that the law of implied contract applies. In support of this contention, Plaintiff argues that he did not have notice of and did not assent to the terms of the Agreement. Implying that the contract lacked definite essential terms, but failing to brief the issue, Plaintiff argues that the contract did not include fixed price terms for services. He further argues that the AdWords Agreement presented does not set out a date when Plaintiff may have entered into the contract. As to the latter argument, the unrebutted Hsu Declaration states that the AdWords Agreement and online process presented went into effect at the time that Plaintiff activated his AdWords account. (Hsu Decl. P 7.) Plaintiff has not presented any evidence to the contrary, nor does he allege that

any agreement he made was different from the one presented through the Hsu Declaration. Thus, there is undisputed evidence that the AdWords Agreement presented is the same that Plaintiff activated with Defendant. . . .

The type of contract at issue here is commonly referred to as a "clickwrap" agreement. A clickwrap agreement appears on an internet webpage and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction.[1] Specht v. Netscape Comms. Corp., 306 F.3d 17, 22 (2d Cir. 2002); . . . . Even though they are electronic, clickwrap agreements are considered to be writings because they are printable and storable. See, e.g., In Re RealNetworks, Inc., Privacy Litigation, No. 00-c-1366, 2000 U.S. Dist. LEXIS 6584, at *8-11, 2000 WL 631341, at *3-4 (N.D. Ill. May 11, 2000).

To determine whether a clickwrap agreement is enforceable, courts presented with the issue apply traditional principles of contract law and focus on whether the plaintiffs had reasonable notice of and manifested assent to the clickwrap agreement. See, e.g., Specht, 306 F.3d at 28-30; Forrest v. Verizon Communications, Inc., 805 A.2d 1007, 1010 (D.C. Cir. 2002); Barnett v. Network Solutions, Inc., 38 S.W.3d 200 (Tex. App. 2001); . . . . Absent a showing of fraud, failure to read an enforceable clickwrap agreement, as with any binding contract, will not excuse compliance with its terms. See, e.g., Specht, 306 F.3d at 30; Lazovick v. Sun Life Ins. Co. of Am., 586 F. Supp. 918, 922 (E.D. Pa. 1984); Barnett, 38 S.W.3d at 204.

a. There was Reasonable Notice of and Mutual Assent to the AdWords Agreement.

Plaintiff claims he did not have notice or knowledge of the forum selection clause, and therefore that there was no "meeting of the minds" required for contract formation. In support of this argument, Plaintiff cites *Specht v. Netscape Comms. Corp.*, in which the Second Circuit held that internet users did not have reasonable notice of the terms in an online agreement and therefore did not assent to the agreement under the facts of that case. 306 F.3d at 20, 31.

The facts in *Specht,* however, are easily distinguishable from this case. There, the internet users were urged to click on a button to download free software. Id. at 23, 32. There was no visible indication that clicking on the button meant that the user agreed to the terms and conditions of a proposed contract that contained an arbitration clause. Id. The only reference to terms was located in text visible if the users scrolled down to the next screen, which was "submerged." Id. at 23, 31-32. Even if a user did scroll down, the terms were not immediately displayed. Id. at 23. Users would have had to click onto a hyperlink, which would take the user to a separate webpage entitled "License & Support Agreements." Id. at 23-24. Only on that webpage was a user informed that the user must agree to the license terms before downloading a product. Id. at 24. The user would have to choose from a

1. A clickwrap agreement is distinguishable from a "browsewrap" agreement, which "allow[s] the user to view the terms of the agreement, but do[es] not require the user to take any affirmative action before the Web site performs its end of the contract," such as simply providing a link to view the terms and conditions. James J. Tracy, Case Note, Legal Update: Browsewrap Agreements: Register.com, Inc. v. Verio, Inc., 11 B.U. J. Sci. & Tech. L 164, 164-65 (2005).

list of license agreements and again click on yet another hyperlink in order to see the terms and conditions for the downloading of that particular software. Id.

The Second Circuit concluded on those facts that there was not sufficient or reasonably conspicuous notice of the terms and that the plaintiffs could not have manifested assent to the terms under these conditions. Id. at 32, 35. The Second Circuit was careful to differentiate the method just described from clickwrap agreements which do provide sufficient notice. Id. at 22 n.4, 32-33. Notably, the issue of notice and assent was not at issue with respect to a second agreement addressed in *Specht*. Id. at 21-22, 36. In that clickwrap agreement, when users proceeded to initiate installation of a program, "they were automatically shown a scrollable text of that program's license agreement and were not permitted to complete the installation until they had clicked on a 'Yes' button to indicate that they had accepted all the license terms. If a user attempted to install [the program] without clicking 'Yes,' the installation would be aborted." Id. at 21-22.

Through a similar process, the AdWords Agreement gave reasonable notice of its terms. In order to activate an AdWords account, the user had to visit a webpage which displayed the Agreement in a scrollable text box. Unlike the impermissible agreement in *Specht*, the user did not have to scroll down to a submerged screen or click on a series of hyperlinks to view the Agreement. Instead, text of the AdWords Agreement was immediately visible to the user, as was a prominent admonition in boldface to read the terms and conditions carefully, and with instruction to indicate assent if the user agreed to the terms. . . .

A reasonably prudent internet user would have known of the existence of terms in the AdWords Agreement. Plaintiff had to have had reasonable notice of the terms. By clicking on "Yes, I agree to the above terms and conditions" button, Plaintiff indicated assent to the terms. Therefore, the requirements of an express contract for reasonable notice of terms and mutual assent are satisfied. Plaintiff's failure to read the Agreement, if that were the case, does not excuse him from being bound by his express agreement.

b. The AdWords Agreement is Enforceable Despite Its Lack of a Definite Price Term.

Plaintiff's argument that the AdWords Agreement is unenforceable because of failure to supply a definite, essential term as to price is without merit. Under California and Pennsylvania law, the price term is an essential term of a contract and must be supplied with sufficient definiteness for a contract to be enforceable. . . . If the parties, however, have agreed upon a practicable method of determining the price in the contract with reasonable certainty, such as through a market standard, the contract is enforceable. See, e.g., Portnoy v. Brown, 430 Pa. 401, 243 A.2d 444 (1968); 1 Witkin Sum. Cal. Law Contracts §142 (2006) ("[T]he complete absence of any mention of the price is not necessarily fatal: The contract may be interpreted to mean the market price or a reasonable price.").

The AdWords Agreement does not include a specific price term, but describes with sufficient definiteness a practicable process by which price is determined. . . . The court concludes that the AdWords Agreement is enforceable because it contained a practicable method of determining the market price with reasonable certainty.

[The court proceeded to find that neither the AdWords Agreement nor its terms, including the forum selection clause, were unconscionable and therefore unenforceable.—Eds.]

V. Conclusion

For the foregoing reasons, Defendant's motion to transfer is granted and Plaintiff's motion for summary judgment is denied. An appropriate Order follows.

Notes and Questions

1. *Relevant legal standards.* You will soon study in more specific detail the law of contract formation and the meaning of the phrase "meeting of the minds." At this point does it appear to you that the courts in *Allen* and *Feldman* applied the same legal standard concerning the making of an enforceable agreement? Would you expect that the technological evolution that occurred between 1923 and 2007 would require that there be changes in the law as well?

2. *Assessing the merits of the customers' claims.* Both *Allen* and *Feldman* involve customers or buyers who were unhappy with the price charged and the product or service ultimately provided by the seller. How often do you think customers enter into a contract without knowing precisely what performance will be provided by the seller or the exact price to be paid? Should the courts be sympathetic to such customers?

3. *Applying an equitable resolution.* The customer in *Allen* stated repeatedly that the report held no value for it and proposed at one point in the correspondence to pay the seller some reduced price ostensibly to cover expenses. Do you think the court should have been open to some compromise solution short of requiring that the full price be paid?

4. *Questions of merit and procedure.* Note that the court in *Feldman* did not attempt to resolve the actual merits of the customer's claim. Rather, the court was deciding in what forum those claims would be resolved. Does it seem fair to you that a plaintiff in Pennsylvania could be required to travel to the Silicon Valley in California to have a dispute with Google addressed?

5. *Theoretical perspectives.* As the introductory text indicated, you will find throughout these materials excerpts and summaries of scholarly perspectives on various issues of contract law. Presently you have been given only brief descriptions of these scholarly outlooks, but one way to distinguish among them is to consider the kinds of questions or concerns that a disciple of a particular scholarly method might raise about a court decision or holding. For example, a legal realist might ask for articulation and critical consideration of the social values a decision or rule promotes. Adherents of the economic approach to law will typically ask whether a decision or rule promotes or impedes efficiency. A supporter of relational contract theory will focus on whether the parties were engaged in either a discrete transaction or a long-term relationship and whether the existence of such a relationship should affect the decision in the case. Finally, a critical theorist might ask which social groups are benefitted or disadvantaged by a supposedly neutral rule. Would any of these questions seem helpful in understanding the decisions in *Allen* or *Feldman*?