

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PROFESSIONAL SPORTS TICKETS & TOURS, INC., DEBORAH Z. SNYDER, Plaintiffs,	:	CIVIL ACTION NO. 01-991
	:	
v.	:	
	:	
BRIDGEVIEW BANK GROUP, NATIONAL BANKCARD CORP., Defendant	:	

MEMORANDUM

Giles, C.J.

September , 2001

I. Introduction

Professional Sports Tickets & Tours, Inc. (“PSTT”) and Deborah Snyder (“Snyder”), the president of PSTT, claim compensatory and punitive damages against Bridgeview Bank Group (“Bridgeview”) and National Bankcard Corp. (“National”), for alleged violation of the Federal Bank Fraud Act and for state law fraud and breach of contract. Both defendants have moved to stay judicial proceedings and to compel arbitration, alleging that the contract between the parties includes a valid arbitration provision which precludes suit in a judicial forum. For the reasons that follow, the motions are granted.¹

II. Factual Background

The material facts in the light most favorable to plaintiffs are as follows:

¹ Although National expressly adopts the arguments set forth in Bridgeview’s papers and joins Bridgeview’s Motion to Stay Proceedings and Compel Arbitration, (National’s Mem. in Supp. of Mot. to Stay ¶1), the court will address the agreement and duty to arbitrate that PSTT has with each defendant because different issues arise in determining whether PSTT is bound to arbitrate its dispute with each defendant.

A. *Merchant Account Agreement Between PSTT and National*

PSTT is in the business of selling sports packages which include tickets to major sporting events, hotel accommodations, rental cars, parties, and transportation. (Compl. ¶9.) Snyder is the president of PSTT.

Bridgeview and National are corporations that provide merchant bank accounts. (Id. ¶10.) PSTT wanted a merchant bank account so that it could transact business by receiving payments from consumers using credit cards. Plaintiffs engaged National to obtain for them a merchant account for credit card processing on June 20, 2000. (Id. ¶11.) To begin the procurement process, National provided plaintiffs with a Card Processing Agreement Application (“Card Processing Application”).² (Id.)

National’s Card Processing Application consists of four pages. The first page solicits information about the contracting merchant. (Card Processing Application at 1.) The second, entitled Merchant Services and Related Fees, includes a clause which recites that the entire agreement between National and the merchant will consist of the Card Processing Agreement, Manuals/Instructions, and the Card Processing Application, as well as a Debit Agreement or an Equipment Agreement, if either the Debit Agreement or the Equipment Agreement applies. (Id. at 2.) The third page, entitled Business Certification and Site Verification, states that PSTT represented to National that it would have an annual volume of \$60,000 in credit card transactions. (Id. at 3.) Page four lists the equipment necessary to process the credit card transactions. (Id. at 4.)

² The Card Processing Application is attached to Bridgeview’s Memorandum in Support of Motion to Stay as Exhibit A.1 .

The first two pages of the application were completed and signed by Snyder. (Id. at 1-2.) The third page, which contains the anticipated annual volume, was completed by Phyllis Starling, an employee of National. (Id. at 3.)

The Card Processing Agreement contains the following arbitration provision:

If the parties disagree as to any matter governed by this Agreement, the parties shall promptly consult with one another in an effort to resolve the disagreement. If such effort is unsuccessful, any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof...any arbitration hereunder shall be governed by the Federal Arbitration Act. (Card Processing Agreement ¶17.)³

PSTT paid National a \$295.00 fee to procure a merchant account. (PSTT's Mem. in Supp. of Resp. to Bridgeview's Mot. to Stay, McPartland Aff., Ex. Merchant Receipt Form.) National had a business arrangement with Bridgeview by which National would routinely transfer to Bridgeview credit card accounts that National did not want to service. (National's Mem. in Supp. of Mot. to Stay at 2.)

B. Amended Merchant Agreement Between PSTT and Bridgeview

In accordance with its arrangement with Bridgeview, National transferred PSTT's merchant account to Bridgeview to process PSTT's credit card transactions for Visa and Mastercard. (Compl. ¶14.) PSTT avers that all negotiations involving the merchant account, including the transfer, were handled through National. (PSTT's Mem. in Resp. to Bridgeview's Mot. to Stay at 1.) Although plaintiffs claim that there was no direct negotiation between PSTT and Bridgeview, they nevertheless, assert that on June 20, 2000, they inquired whether a yearly or

³ The Card Processing Agreement is attached to Bridgeview's Memorandum in Support of Motion to Stay as Exhibit A.3.

monthly volume limitation existed and were assured by both National and Bridgeview that no such limitation existed. (Id. ¶¶12-13.)

On June 25, 2000, PSTT executed an Amendment of Merchant Agreement and Substitution of Parties (“Amended Merchant Agreement”) with Bridgeview which substituted Bridgeview for National as the party who would process PSTT’s merchant account. (Id. ¶¶14-15.) The Amended Merchant Agreement, which PSTT initialed or signed on every page, authorized National to transfer card processing responsibilities to Bridgeview. (Amended Merchant Agreement, ¶B & ¶1.) Specifically, the Amended Merchant Agreement states that the merchant understands that National may elect not to enter into the merchant agreement and instead may refer the merchant account to Bridgeview. (Id.) It further states that upon Bridgeview’s execution of the Amended Merchant Agreement, Bridgeview would become substituted for National in the Card Processing Agreement and that Bridgeview, not National, would be considered the contracting party in the Merchant Agreement with PSTT. (Amended Merchant Agreement ¶2.)⁴

On June 29, 2000, Bridgeview began processing credit card transactions for PSTT. (Compl. ¶16.) During PSTT’s first month of operation, July 2000, PSTT engaged in 72 transactions totaling \$33,000. Bridgeview authorized each transaction. (Id. ¶39.) However, Bridgeview has not paid over to PSTT any sum that is claimed to be due and owing. (Id. ¶40.)

⁴ The Amended Merchant Agreement is attached to Bridgeview’s Memorandum in Support of Motion to Stay as Exhibit A.2. The court notes that while it does not appear that Bridgeview signed this copy of the Amended Merchant Agreement, all of the parties’ moving and responding papers demonstrate that Bridgeview did replace National and processed credit card transactions for PSTT.

On July 26, 2000, PSTT requested that National place PSTT's account with another merchant bank and take steps to ensure that Bridgeview complied with the Amended Merchant Agreement until another merchant bank assumed the card processing responsibilities. (Id. ¶¶41-42.)

On August 3, 2000, without prior notice, Bridgeview discontinued processing PSTT's merchant account (Id. ¶44.) Bridgeview then told Plaintiffs that the merchant account had a \$5,000 per month limit and that it was not permitted to process credit card transactions in excess of \$5,000 per month. (Id. ¶54.)

III. Discussion

A. The Federal Arbitration Act

The Federal Arbitration Act ("FAA") governs the arbitration provision in the contract between the parties. Indeed, the Card Processing Agreement expressly states that the FAA governs the arbitration between the parties. (Card Processing Agreement ¶17.) The FAA, also, governs an arbitration provision if the provision is contained in a contract involving interstate commerce. See Towers, Perrin, Forster & Crosby, Inc. v. Brown, 732 F.2d 345, 347 (3d Cir. 1984).⁵ The FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate..." See John Hancock Mutual Life Ins. Co. v. Olick, 151 F.3d

⁵ The Amended Merchant Agreement between PSTT and Bridgeview involves interstate commerce. PSTT is a Pennsylvania corporation which has a contract with Bridgeview, an Illinois corporation. Bridgeview's services encompass the processing of credit card transactions that PSTT submitted through its merchant account, obtaining funds from the credit card holders, and distributing these funds to PSTT, minus a service fee. (Bridgeview's Mem. in Supp. of Mot. to Stay at 6.) These credit card transactions involve commerce over state lines. Similarly, although National transferred PSTT's merchant account to Bridgeview, National provides the same services. Thus, the FAA governs the arbitration agreement between National as well as PSTT.

132, 136 (3d Cir. 1998) (quoting Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983)). Questions of construction and enforceability of arbitration agreements governed by the FAA are controlled by federal substantive law. See Cost Brothers Inc. v. Travelers Indemnity Co., 760 F.2d 58, 60 (3d Cir. 1985). Therefore, the issue of whether the arbitration provision in the Card Processing Agreement is incorporated into the Amended Merchant Agreement between Bridgeview and PSTT is governed by federal law. See W&S Erectors, Inc. v. Metro Steel, Indus., CIV.A.No.99-8094, 2000 WL 533094, *1 (E.D.N.Y. April 27, 2000)(Weinstein, S.J.).

Under the FAA, “a written provision in...a contract...to settle by arbitration a controversy thereafter arising out of such contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The FAA requires a court to stay an action that involves an arbitrable claim upon request of a party to an agreement which provides for arbitration in writing. 9 U.S.C. § 3. A claim is arbitrable if (1) there is an agreement to arbitrate; (2) there has been no waiver of the right to arbitrate; and (3) the claims fall within the scope of the agreement. See Laborer’s Int’l Union of North America, AFL-CIO v. Foster Wheeler Corp., 868 F.2d 573, 576 (3d Cir. 1989). In determining whether a claim is arbitrable, the court must apply “ordinary contractual principles, with a healthy regard for the strong federal policy in favor of arbitration.” Sena v. Gruntal & Co. LLC, No.CIV.A.99-3042, 1999 WL 732974, *2 (E.D. Pa. Sept. 21, 1999) (quoting Moses H. Cone Mem’l Hosp., 460 U.S. at 24).

PSTT does not dispute that its claims fall within its agreements with National and Bridgeview⁶ and that defendants have not waived their rights to arbitrate. (PSTT's Mem. in Supp. of Resp. to Bridgeview's Mot. to Stay at 4.) However, PSTT contends that there is no agreement to arbitrate in the contract between PSTT and Bridgeview and between PSTT and National.⁷

B. The Agreements to Arbitrate

1. Agreement to Arbitrate Between PSTT and Bridgeview⁸

Plaintiffs argue that the arbitration provision in the Card Processing Agreement is invalid and unenforceable because it was not physically attached either to the Merchant Agreement executed between PSTT and National or to the Amended Merchant Agreement entered into by PSTT and Bridgeview. (Id. at 4, 6.) Plaintiffs contend that since the Card Processing Agreement, with the arbitration provision, was not provided with any of the papers that PSTT

⁶ Bridgeview categorizes all of the plaintiffs' claims as two allegations which fall within the scope of the contract between the parties: (1) Bridgeview has failed to pay certain amounts for credit card transactions that Bridgeview was required to pay pursuant to its agreement with PSTT and (2) Bridgeview failed to inform PSTT that its account had a monthly limit and, had PSTT known of this limitation, it would not have entered into the agreement with Bridgeview. (Bridgeview's Mem. in Supp. of Mot. to Stay. at 8.) Plaintiffs do not object to this categorization.

⁷ **There is an issue whether PSTT's claims against National fall within the scope of the agreement and that will have to be resolved by an arbitrator.**

⁸ Although this is the second agreement to be entered chronologically, the court considers it first. An analysis of the Amended Merchant Agreement between PSTT and Bridgeview, informs whether PSTT and National remain bound by the Card Processing Agreement even after the Amended Merchant Agreement provides that Bridgeview's name is substituted for National's name throughout the Card Processing Agreement.

signed, the Card Processing Agreement cannot be part of the contract between the parties. (Id. at 6.)

Bridgeview cites a number of cases from various circuits for the well-acknowledged proposition that under federal law, an agreement incorporating an arbitration provision by reference binds a party to arbitrate its disputes as if the clause was written out in the agreement. (Bridgeview's Supplemental Br. at 2-4.) See Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328, 331-32 (7th Cir. 1995); United States Fidelity and Guar. Co. v. West Point Constr. Co., 837 F.2d 1507, 1507-08 (11th Cir.1988); Maxum Found., Inc. v. Salus Corp., 779 F.2d 974, 978-79 (4th Cir. 1985)(stating that "it is well settled that, under the Federal Arbitration Act, an agreement to arbitrate may be validly incorporated into a subcontract by reference to an arbitration provision in a general contract"); Exchange Mutual Ins. Co. v. Haskell Co., 742 F.2d 274, 274-76 (6th Cir. 1984).

While these cases clearly stand for the propositions that (1) federal law governs whether a contract validly incorporates an arbitration agreement when the arbitration provision is governed by the FAA and (2) under the FAA, an agreement to incorporate an arbitration clause by reference is valid and enforceable, none of the above cases addresses the precise factual situation at issue here; namely, PSTT's claim that there is no arbitration agreement because it was never provided in the documents given to PSTT.

Nevertheless, there is no genuine issue of material fact. Accordingly, this court finds Bridgeview is entitled to arbitration as a matter of law.

Contrary to PSTT's claim that this is a case of first impression, **this case is governed by well-established principles of contract law. First, consistent with federal substantive law**

discussed above, a party is bound by all of the provisions in the written agreement that it signs as well as the provisions that are expressly incorporated by reference into the contract. 72 Am. Jur. 2d Statute of Frauds § 372 (1974); accord W&S Erectors, 2000 WL 533094 at *2 (finding that under the FAA, an agreement to incorporate another agreement by reference which contains an arbitration clause, binds the parties to arbitrate).⁹ Second, ignorance of the contents of a contract expressed in a written instrument does not ordinarily affect the liability of one who signs it. 17A Am. Jur. 2d Contracts § 224 (1991).

Here, the contract documents incorporate by reference an agreement which contains an arbitration clause. PSTT's contention that it did not know that the arbitration clause was part of the contract is not material since a party is assumed to know the contents of any written agreement that it signs.

2. *Agreement to Arbitrate Between PSTT and National*

National states that any claim PSTT alleges against National arises from or relates to PSTT's application for a merchant account and the resulting Merchant Agreement, and thus is subject to arbitration. (National's Mot. to Stay ¶15.) PSTT offers no discussion whether the analysis should differ in determining if there is an agreement to arbitrate between National and PSTT, as opposed to an agreement to arbitrate between Bridgeview and PSTT; however, the court finds the analysis materially different.

⁹ In contrast, under New York state law, an arbitration clause is not enforceable unless there is an "express, unequivocal agreement to that effect." W&S Erectors, 2000 WL 533094 at *2 (quoting Marlene Indus. Corp. v. Carnac Textiles, Inc., 380 N.E.2d 239, 242 (N.Y. 1978)). New York law requires that a clear statement of an agreement to arbitrate be written into the agreement between the parties and not merely incorporated by reference.

National and PSTT executed a contract for a merchant account which contained an arbitration clause, discussed supra. The arbitration provision provides that arbitration between these parties will be in accordance with the Commercial Arbitration Rules of the American Arbitration Association. (Card Processing Agreement ¶17.)

Rule One of the Commercial Arbitration Rules of the American Arbitration Association (AAA) provides that, when parties specify that their dispute is to be settled by arbitration in accordance with the Commercial Arbitration Rules of the AAA, the parties are considered to have made the Commercial Arbitration Rules a part of their arbitration agreement and that the rules shall apply in the form in effect at the time the demand for arbitration is made. AAA Commercial Arbitration Rules R.1 (2000). Bridgeview demanded arbitration on March 26, 2001. The applicable Commercial Arbitration Rules are those made effective September 1, 2000.

Rule Eight of the applicable Commercial Arbitration Rules states that “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.” AAA Commercial Arbitration Rules R.8(a) (2000). Thus, it is for the arbitrator, and not this court, to decide whether the parties have an agreement for arbitration that encompasses the dispute between them.

Paragraph one of the Amended Merchant Agreement, executed between National and PSTT, provides that merchant, in this case PSTT, agrees that if National refers PSTT’s merchant account to Bridgeview, National is no longer a party to the Merchant Agreement and merchant holds National harmless as to any liability in connection with the Merchant Agreement or the referral. (Amended Merchant Agreement, ¶1.) Whether PSTT is still bound to arbitrate a

dispute with National pursuant to the arbitration provision in the Card Processing Agreement, in light of paragraph one of the Amended Merchant Agreement, is a question for the arbitrator.

IV. CONCLUSION

The court finds that PSTT entered a valid arbitration agreement with Bridgeview which mandates arbitration of all claims presented in the Complaint. Further, the court finds that the issue of continued existence of an arbitration agreement between National and PSTT is an arbitrable issue. For the above reasons, Defendants' Motions to Stay Proceedings and Compel Arbitration are granted. An appropriate order follows.

