NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2433-21

JEFFREY SANTANA,

Plaintiff-Respondent,

v.

SMILEDIRECTCLUB, LLC,[1]

Defendant-Appellant.

APPROVED FOR PUBLICATION
April 3, 2023
APPELLATE DIVISION

Submitted February 28, 2023 – Decided April 3, 2023

Before Judges Messano, Gilson, and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3156-21.

Burns White LLC, attorneys for appellant (Stuart T. O'Neal and Peter A. Callahan, on the briefs).

Alexander Schachtel, attorney for respondent.

The opinion of the court was delivered by

MESSANO, C.J.A.D.

[1] SmileDirectClub, LLC was improperly pled as Smile Direct Club LLC.

Defendant SmileDirectClub, LLC (SDC) offers a telemedicine platform that enables affiliated dentists and orthodontists to provide clear-aligner treatment as an alternative to traditional orthodontic braces. To receive treatment and aligners via the internet, a user must create and register an account with SDC through an online registration process. Before users can create their account, they must affirmatively check a blank box that states, "I agree to SmileDirectClub's Informed Consent and Terms & SmilePay Conditions." The underlined text is printed in blue against a white background, clearly indicting each of the three phrases is a separate hyperlink. Each hyperlink takes the user to a new webpage revealing the full terms of the corresponding documents. SDC's hyperlinked "Informed Consent" document contained a mandatory arbitration agreement among other provisions.

Users must click and check the previously blank box indicating their agreement before they can click another button, "FINISH MY ACCOUNT," to receive SDC's services and products. Consumers are not required to submit any payment to register with SDC.

On March 4, 2020, plaintiff Jeffrey Santana purchased clear aligners from SDC using its telemedicine platform and registering an account on SDC's website. Plaintiff later filed a products liability action against SDC alleging he had suffered personal injuries resulting from his use of the clear aligners. SDC

filed an answer and, two months later, moved to dismiss the complaint, arguing plaintiff's complaint was subject to the mandatory arbitration agreement.

Plaintiff opposed the motion. He certified that he never saw "any language or terms online that required [him] to go to arbitration" and did not "recall viewing any links or being required to view any side links prior to agreeing to purchase [SDC's] service." In short, plaintiff claimed the arbitration agreement "was hidden from [his] view." Plaintiff also argued that SDC had waived its right to compel arbitration because it had engaged in preliminary discovery.

In a written opinion, the Law Division judge agreed with plaintiff. She noted the arbitration agreement was included within the hyperlinked "Informed Consent" document, and plaintiff would have had to scroll down several pages to review it. The judge also observed that the hyperlink print was not enlarged or in bold type, did not use the terms "arbitration" or "waiver of right to sue'" and that plaintiff could click on "I Agree" without ever viewing the hyperlinked documents. Relying almost exclusively on our decision in Wollen v. Gulf Stream Restoration & Cleaning, LLC, 468 N.J. Super. 483 (App. Div. 2021), the judge found "[t]he arbitration clause was not clearly or conspicuously presented to [p]laintiff and is thus not enforceable."

SDC moved for reconsideration, contending in particular that the facts here were distinguishable from those in Wollen, because its website utilized what is known in the e-commerce world as a "clickwrap" agreement, whereas Wollen involved a "browsewrap" agreement. The judge concluded any difference was insignificant and denied SDC's reconsideration motion. This appeal followed.

Before us, SDC reiterates the arguments made in the Law Division, contending the arbitration provision is enforceable and urging us to remand the matter with instructions to compel arbitration and dismiss the complaint.[2] Conversely, plaintiff urges us to affirm the Law Division's orders. Having considered the arguments in light of the record and applicable legal standards, we reverse.

We review a trial court's order granting or denying a motion to compel arbitration de novo because the validity of an arbitration agreement presents a question of law. Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020) (citing Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019)). As a result,

[2] SDC also argues that it did not waive its right to compel arbitration. The Law Division judge did not address the issue, and plaintiff has not reasserted the argument in opposing SDC's appeal. Nevertheless, considering the factors outlined by the Court in Cole v. Jersey City Medical Center, 215 N.J. 265, 280–81 (2013), we conclude SDC did not waive its right to compel arbitration of plaintiff's claims.

we "need not give deference to the [legal] analysis by the trial court." Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207 (2019) (citing Morgan v. Sanford Brown Inst., 225 N.J. 289, 303 (2016)).

New Jersey has a long-standing policy favoring arbitration as a means of dispute resolution. See Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 133 (2020) ("Like the federal policy expressed by Congress in the FAA,[3] 'the affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism of resolving disputes.'" (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 92 (2002))). "Although 'arbitration [is] a favored method for resolving disputes . . . [t]hat favored status . . . is not without limits.'" Gayles by Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 23 (App. Div. 2021) (alterations in original) (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., PA, 168 N.J. 124, 131–32 (2001)).

"An arbitration agreement must be the result of the parties' mutual assent, according to customary principles of state contract law." Skuse, 244 N.J. at 48 (citing Atalese v. U.S. Legal Servs. Grp., LP, 219 N.J. 430, 442 (2014)). "Thus, 'there must be a meeting of the minds for an agreement to exist before enforcement is considered.'" Ibid. (quoting Kernahan, 236 N.J. at 319).

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[3] FAA refers to the Federal Arbitration Act, 9 U.S.C. §§ 1–16.

However, "[a]n arbitration provision is not enforceable unless the consumer has reasonable notice of its existence." Wollen, 468 N.J. Super. at 498 (citing Hoffman v. Supplements Togo Mgmt., LLC, 419 N.J. Super. 596, 690 (App. Div. 2011)). But a party may not claim lack of notice or the terms of an arbitration provision for failure to read it. "[A]s a general rule, 'one who does not choose to read a contract before signing it cannot later relieve himself of its burdens.'" Skuse, 244 N.J. at 54 (quoting Riverside Chiropractic Grp. v. Mercury Ins. Co., 404 N.J. Super. 228, 238 (App. Div. 2008)); see also Kernahan, 236 N.J. at 321 (holding that "even in the consumer context, '[a] party who enters into a contract in writing, without any fraud or imposition being practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect.'" (alteration in original) (quoting Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353 (1992))).

"Consumer web-based contracts are no longer a novel concept. Indeed, New Jersey courts have recognized the validity of such contracts for decades." Wollen, 468 N.J. Super. at 495. "[T]he enforceability of an internet consumer contract often turns on whether the agreement is characterized as a 'scrollwrap,' 'sign-in wrap,' 'clickwrap,' or 'browsewrap'—or a hybrid version of these electronic contract types." Id. at 495–96 (citing Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 394–401 (E.D.N.Y. 2015) (explaining these terms)).

The internet contract at issue in Wollen was a "browsewrap-type agreement." Id. at 496. As we explained,

> a browsewrap agreement generally "exists where the online host dictates that assent is given merely by using the site." Unlike clickwrap agreements, "browsewrap agreements do not require users to expressly manifest assent." For that reason, the enforceability of browsewrap agreements may "turn[ ] on whether the terms or a hyperlink to the terms are reasonably conspicuous on the webpage."
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> [Ibid. (alteration in original) (emphasis added) (first quoting Berkson, 97 F. Supp. 3d at 394; and then quoting James v. Glob. Tel*Link Corp., 852 F.3d 262, 267 (3d Cir. 2017)).]

In Hoffman, for example, the defendant's website contained a forum selection provision that was not visible to the consumer "unless he or she scrolled down to a submerged portion of the webpage where the disclaimer containing the clause appeared." 419 N.J. Super. at 611. And "if a purchaser selected one of [the defendant's] products . . . advertised on the site, by clicking that item and adding it to his or her electronic 'shopping cart,' the webpage would skip ahead to new pages that do not contain the disclaimer." Ibid. We did not consider whether the "defendants were required, as a matter of law, to include a specific feature near the disclaimer asking purchasers to 'click' or otherwise manifest their assent to its terms." Id. at 612. Instead, we concluded the forum selection clause was "presumptively unenforceable" on

"more fundamental grounds: the absence of reasonable notice to consumers, and the manifestly unfair manner in which defendants' website was structured." Ibid.

In Wollen, we considered whether an arbitration provision embedded in the defendant's terms and conditions was enforceable. 468 N.J. Super. at 487. The defendant, an internet-based home improvement and maintenance referral service, "utilize[d] an online portal to provide consumers with 'free referrals' for local third-party service[s]." Ibid. To submit a service request, the plaintiff created an account, "navigating multiple webpages" and advancing by pressing the "Next" button. Id. at 488. The seventh and final webpage contained blank fields to input the user's contact information, followed by an orange button, entitled "View Matching Pros," and a single line of text that stated, "By submitting this request, you are agreeing to our Terms & Conditions." Ibid. "[T]he phrase 'Terms & Conditions' was offset in blue font and acted as a hyperlink to a separate seven-page document" that contained the arbitration agreement. Id. at 489. The hyperlink text was not underlined, emboldened, or enlarged, and there was no "electronic button requiring the user to 'click-to-accept' th[e] terms and conditions before returning to and clicking the 'View Matching Pros' button." Ibid. (emphasis added).

We concluded the hyperlink did not provide notice to the reasonably prudent internet user of the defendant's terms and conditions. Id. at 502. We found the hyperlink "vague, ambiguous and misleading" because there was no indication from the hyperlink's wording that the user was required to affirmatively assent, read, or acknowledge the terms and conditions before submitting his or her request for service professionals. Id. at 502–03. In short, the defendant "did not require [the] plaintiff to open, scroll through, or acknowledge the terms and conditions by 'clicking to accept' or checking a box that she viewed them before clicking the View Matching Pros submit button." Id. at 503.

Conversely, "[c]ontracts that require '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' are sometimes called 'clickwrap' agreements." Skuse, 244 N.J. at 55 n.2 (quoting Feldman v. Google, Inc., 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007)); see also James, 852 F.3d at 267 ("On the other hand, 'where the website contains an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound, courts have been more amenable to enforcing browsewrap agreements.'" (quoting Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2014))).

The parties agree that SDC's internet contract was a clickwrap agreement. "Such agreements are 'routinely enforced by the courts.'" Skuse, 244 N.J. at 55 n.2 (quoting HealthPlanCRM, LLC v. AvMed, Inc., 458 F. Supp. 3d 308, 334–35 (W.D. Pa. 2020); then citing Meyer v. Uber Techs., Inc., 868 F.3d 66, 75 (2d Cir. 2017); then citing Hancock v. AT&T Co., 701 F.3d 1248, 1258 (10th Cir. 2012) (citing Smallwood v. NCSOFT Corp., 730 F. Supp. 2d 1213, 1226 (Haw. 2010)); then citing Feldman, 513 F. Supp. 2d at 235–38; and then citing Specht v. Netscape Commc'ns Corp., 150 F. Supp. 2d 585, 594–95 (S.D.N.Y. 2001), aff'd, 306 F.3d 17 (2d Cir. 2002)).

In the context of clickwrap agreements, "[w]here there is no evidence that the offeree had actual notice of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent user would be on inquiry notice of the terms." Meyer, 868 F.3d at 74–75 (citing Schnabel v. Trilegiant Corp., 697 F.3d 110, 120 (2d Cir. 2012), and Nguyen, 763 F.3d at 1177). "[C]ourts have generally found clickwrap agreements enforceable because '[b]y requiring a physical manifestation of assent, a user is said to be put on inquiry notice of the terms assented to.'" Applebaum v. Lyft, Inc., 263 F. Supp. 454, 465 (S.D.N.Y. 2017) (alteration in original) (quoting Berkson, 97 F. Supp. 3d at 397). As Justice (then Judge) Sotomayor explained in Specht, "receipt of a physical document containing contract terms or notice

thereof is frequently deemed, in the world of paper transactions, a sufficient circumstance to place the offeree on inquiry notice of those terms." 306 F.3d at 31. Citing provisions of California's Civil Code § 19 defining the concept of notice inquiry, Justice Sotomayor wrote, "These principles apply equally to the emergent world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, scrollable documents, and urgent admonitions to 'Download Now!'" Ibid.

Considering website provisions in Caspi v. Microsoft Network, LLC similar to those used here by SDC, we explained the rationale regarding the general enforceability of clickwrap agreements. 323 N.J. Super. 118 (1999). In Caspi, the issue was whether a forum-selection clause contained in an on-line subscriber agreement with the defendant Microsoft Network (MSN), an on-line computer service, was enforceable. 323 N.J. Super. at 120. Before becoming an MSN member, a prospective subscriber was required to "view multiple computer screens of information, including a membership agreement . . . [which] appear[ed] . . . in a scrollable window next to blocks providing the choices 'I Agree' and 'I Don't Agree.'" Id. at 122. The forum-selection clause within the membership agreement was "the first item in the last paragraph of the electronic document." Id. at 125.

In affirming the trial court's decision to enforce the forum-selection clause, we held that "the plaintiffs must be seen to have had adequate notice of the forum selection clause." Id. at 126. We reasoned that "[t]he plaintiffs . . . were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement." Id. at 125. In other words, the plaintiffs "ha[d] the option to click 'I Agree' or 'I Don't Agree' at any point while scrolling through the agreement." Id. at 122. Further, as in this case, registration could "proceed only after the potential subscriber . . . had the opportunity to view and . . . assent[] to the membership agreement, including MSN's forum selection clause." Ibid.

As in Caspi, where prospective members assented to the terms of the agreement by clicking on and checking the "I Agree" box, plaintiff manifested his assent to the contents of all three of SDC's hyperlinked documents by affirmatively clicking on and checking the box next to distinctive text stating, "I agree to SmileDirectClub's Informed Consent and Terms & SmilePay Conditions." And as in Caspi, where we concluded the plaintiffs were free to scroll through the various computer screens presenting the terms of their contracts before signifying their agreement, plaintiff was free to click on the hyperlinked agreements and read each by scrolling through them before checking the "I Agree" box signaling his assent.

Although none of SDC's hyperlinks included the word "arbitration" or a phrase such as "waiver of right to sue" in their titles, a fact deemed important by the motion judge, the context in which the "I Agree" checkbox appeared is significant. See Skuse, 244 N.J. at 61 (explaining that "the language immediately preceding 'CLICK HERE to acknowledge' used several other terms that denote[d] assent").

The arbitration agreement was located within a clearly hyperlinked document—the very first hyperlinked document on the screen entitled "Informed Consent." That document included not only the arbitration agreement but also explanations of the benefits and risks of using the aligners, representations by plaintiff regarding his oral health, and his consent to the treatment. The title of the hyperlinked document clearly put plaintiff on reasonable inquiry notice that when he checked the "I Agree" box next to the link, he was agreeing to something that specifically asked for his informed consent. Moreover, within the hyperlinked "Informed Consent" document, the title of the arbitration provision—"**AGREEMENT TO ARBITRATE**"—was the only fully capitalized and emboldened text, which would have alerted a consumer to the importance of the provision in relation to all others.

In Nguyen, which involved a browsewrap agreement, the Ninth Circuit addressed factors that "put[] a reasonably prudent user on inquiry notice of the

terms of the contract," including its arbitration provisions. 763 F.3d at 1177 (citing Specht, 306 F.3d at 30–31). The court said, "the conspicuousness and placement of the 'Terms of Use' hyperlink, other notices given to users of the terms of use, and the website's general design all contribute to whether a reasonably prudent user would have inquiry notice" of the agreement. Ibid.

Additionally, had plaintiff left the "I agree" box unchecked, the "Finish My Account" bar on the SDC website would not have functioned. Unlike Wollen, where the plaintiff did not need to indicate assent before being able to access the website's services, or Hoffman, where the consumer could make a purchase, advance on the website to other pages, and never see the "submerged" forum-selection clause, here SDC's website's bright purple "Finish My Account" bar was ineffective unless and until plaintiff checked the "I agree" box, signaling his informed consent to the medical procedures offered and his assent to the arbitration agreement. The sequence was as in Caspi, where registration for MSN internet services could only proceed after the potential subscriber had the opportunity to view the membership agreement and signal his or her assent to its forum selection clause.

We conclude that nothing in the structure of SDC's website denied plaintiff reasonable inquiry notice of the arbitration agreement, the contents of

which plaintiff has not challenged as deficient under Atalese or any of the Court's other decisions involving consumer sales.

Reversed and remanded for entry of an order compelling arbitration of plaintiff's claims and staying any further action in the Law Division. See Perez v. Sky Zone LLC, 472 N.J. Super. 240, 251 (App. Div. 2022) ("Under the FAA and the [New Jersey Arbitration Act], a court must stay an arbitrable action pending the arbitration." (citing 9 U.S.C. § 3; N.J.S.A. 2A:23B-7(g))). We do not retain jurisdiction.