

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

Andrea Greer,

Plaintiff,

v.

Abercrombie & Kent USA, LLC, Abercrombie & Kent
Travel, Inc., Abercrombie & Kent, Inc., Abercrombie &
Kent International, Inc., Affinity Insurance Services, Inc.
d/b/a/ Aon Affinity, and Aon Risk Services, Inc. d/b/a
Aon Affinity,

Defendants.

No. 22 L 2016

MEMORANDUM OPINION AND ORDER

An agreement to resolve a dispute by arbitration is enforceable as any other contract. A third party may claim a beneficiary status to an arbitration provision only if such status is evident from the terms and conditions of the agreement and its execution. Here, the arbitration provision contained in one defendant's agreement with the plaintiff is enforceable, but a second defendant is not a third-party beneficiary to that provision. For those reasons, the motion to stay proceedings is granted as to one defendant, but the second defendant's motion to dismiss must be denied.

Facts

On March 12, 2021, Andrea Greer, a New York resident, purchased through Abercrombie & Kent¹ a package to travel to Tanzania and climb Mount Kilimanjaro. On that day, an Abercrombie & Kent agent advised Greer to familiarize herself with the package's terms and conditions that were available by hyperlink on Abercrombie & Kent's website. The agent later sent Greer a copy of her preliminary documents, including a copy of the package's terms and conditions.

The preliminary documents contained an exculpatory clause that stated, in part:

¹ Abercrombie & Kent, USA, LLC, Abercrombie & Kent Travel, Inc., Abercrombie & Kent, Inc., and Abercrombie & Kent International Inc. are related companies and are collectively referred to here as "Abercrombie & Kent." Abercrombie & Kent USA, LLC is a Delaware corporation with headquarters in Downers Grove, Illinois.

There are many inherent risks in adventure travel of the type involved here, which can lead to illness, injury, or even death. These risks are increased by the fact that these trips take place in remote locations, far from medical facilities. Guests assume all such risks associated with participating in these trips.

If you decide to participate in . . . high altitude treks, climbing. . . (“Activities”), then you fully understand and acknowledge that Activities carry with them various inherent risks, including serious illness, injury or death and you take complete responsibility for your own health and safety and agree to assume all risks of injury, illness or death, whether foreseen or unforeseen, that may befall you as a result of participating in any Activities and agree to release the A&K Parties from any liability whatsoever related thereto.

Further, as consideration for being permitted to participate in the Activities; you release the A&K Parties, whether known or unknown, from, and agree not to sue or make claim against the A&K Parties for . . . illness, negligent rescue operations or procedures, personal injury, or death arising out of your participation in the Activities, and any activity related thereto, including transportation to and from the site of the Activities, regardless of whether such property damage, illness, personal injury, or death results from the negligence of the A&K Parties and/or from any defect in equipment.

The preliminary documents also contained an “Arbitration Agreement” section that stated:

Any controversy or claim arising out of or relating to these **Terms and Conditions**, to the **Limits on A&K’s Responsibility** clause, to any A&K brochure, or to any information regarding any A&K journey, service or package, or to any A&K-related trip, activity, service or package, shall be settled in the first instance by binding arbitration before one (1) arbitrator in Chicago, Illinois. Any party or their representative may appear for the arbitration by telephone or video conference. Each party shall bear its own fees, costs and expenses and an equal share of any arbitrator and administrative fees; however, the prevailing party shall be entitled to full recovery of all such costs and fees. Disputes shall be arbitrated on an individual basis, with there being no right or authority for any disputes to be arbitrated on a class action basis or in a purported representative capacity on behalf of the general public, other travel suppliers or other entities similarly situated.

Abercrombie and Kent's terms and conditions also contained a provision addressing the issue of insurance coverage through a guest protection program. As explained, "Abercrombie & Kent has partnered with Aon Affinity . . . to provide our guests with travel protection." The terms and conditions explicitly provided that:

Travel insurance is not included in the price of the journey and is recommended. You may purchase A&K's Guest Protection Program administered by AON . . . for an additional fee. . . . Additional terms apply. . . . For more information visit affinitytravelcert.com/abk. Insurance coverages are subject to terms, limitations and exclusions in the plan. . . .

The record shows that Greer accepted Abercrombie & Kent's terms and conditions on four separate occasions. In one of those acknowledgements, Greer clicked "Yes" to confirm "that the information provided above is true and correct and I have received and accept the Terms and Conditions which I have read and understood."

On April 3, 2021, Greer separately purchased travel insurance through Aon² as part of Abercrombie & Kent's guest protection program. Part B of the benefit schedule explained coverage for medical expenses related to accidents and sickness as well as for emergency medical evacuation. The agreement provided a two-level grievance procedure, but did not contain an arbitration provision.

Greer arrived in Tanzania on July 5, 2021, and began her climb on July 8. On July 9 and 10, Greer progressively lost her appetite, became nauseous, dizzy, had difficulty breathing and walking, and was unable to sleep. On July 11, Greer's condition worsened and Abercrombie & Kent guides started to climb down with her. Greer's condition worsened, and the guides had to carry her for 15 hours down the mountain. At no time during the ascent or descent was Greer given oxygen.

After arriving at the base camp, Abercrombie & Kent guides drove Greer to a hospital about an hour away where she arrived in the early morning of July 12. Doctors at the hospital diagnosed Greer with high-altitude cerebral edema, pulmonary edema, and electrolyte imbalance. On July 14, Aon, through its agents, acknowledged that Greer required a higher level of care, but she was not transferred to the Aga Khan University Hospital in Nairobi, Kenya until July 16.

² Aon Affinity is the brand name for the brokerage and program administration operations of Affinity Insurance Services, Inc. Both are referred to here as "Aon."

On March 1, 2022, Greer filed a complaint against the defendants. Greer alleges that as a result of the defendants' delays in providing her with oxygen and other medical treatment, she suffered an anoxic brain injury that resulted in vision loss, memory loss, cognitive deficits, and post-traumatic stress disorder. Counts one through eight are directed against Abercrombie & Kent and raise causes of action for negligent hiring, willful and wanton conduct, negligent misrepresentation, fraud and deceptive business practices, vicarious liability, negligent undertaking, negligent placement of insurance coverage, and bad faith insurance practices. Counts nine through eleven are directed against Aon and raise causes of action for negligent undertaking, bad-faith insurance practices, and negligent misrepresentation. Greer alleges that Aon, despite knowing of her medical condition, delayed in providing medical assistance and evacuation that Greer had purchased under the guest protection coverage plan. Additionally, she alleges that Aon negligently misrepresented the services it was to provide under the plan.

Abercrombie & Kent filed a motion to dismiss or, in the alternative, to stay proceedings pending arbitration. Aon separately filed a motion to dismiss. Greer filed a response to Aon's motion, but did not respond to Abercrombie & Kent's motion. The parties supplied numerous exhibits to their pleadings.

Analysis

Abercrombie & Kent and Aon bring their motions pursuant to the Code of Civil Procedure. 735 ILCS 5/2-619. Section 2-619 authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). As has been stated: "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369.

Abercrombie & Kent's Motion to Dismiss

Abercrombie & Kent's motion to dismiss or to stay pending arbitration is grounded on the argument that the arbitration agreement contained in the Abercrombie & Kent terms and conditions is controlling and requires Greer to resolve her dispute through arbitration. A motion to dismiss a civil

complaint and compel arbitration is properly brought pursuant to section 2-619(a)(9). *Sturgill v. Santander Consumer USA, Inc.*, 2016 IL App (5th) 140380, ¶ 21; 735 ILCS 5/2-619(a)(9). A court's authority to dismiss a complaint and compel arbitration under section 2-619 derives from the Federal Arbitration Act. The statute provides, in part, that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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 Federal Arbitration Act authorizes a party that is “aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration” to petition a court “in a civil action . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 USCS § 4; *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 21 (2011) (petitions under Federal Arbitration Act may be brought in state court).

Illinois courts recognize that the Federal Arbitration Act governs the enforceability of arbitration agreements in contracts involving interstate commerce. *G3 Analytics, LLC v. Hughes Socol Piers Resnick & Dym Ltd.*, 2016 IL App (1st) 160369, ¶ 17. It is unassailable as a matter of law that arbitration is a matter of contract. *Arbogast v. Chicago Cubs Baseball Club, LLC*, 2021 IL App (1st) 210526, ¶ 18. Whether a contract exists is determined by state law contract formation principles. *Id.* Those principles center on the elements of offer, a strictly conforming acceptance of the offer, and consideration. *Martin v. Government Employees Ins. Co.*, 206 Ill. App. 3d 1031, 1035 (1st Dist. 1990).

Greer did not file a responsive pleading to Abercrombie & Kent's motion; hence, Greer does not contest that her dispute as to Abercrombie & Kent is subject to arbitration.

Aon's Motion to Dismiss

Aon argues that Greer's dispute with Aon is also subject to arbitration based on Aon's role as a third-party beneficiary to the terms and conditions between Abercrombie & Kent and Greer. Under Illinois law, there are two types of third-party beneficiaries—intended beneficiaries and incidental beneficiaries. *Carlson v. Rehabilitation Inst. of Chicago*, 2016 IL App (1st) 143853, ¶ 14. Only intended beneficiaries have any rights under a

contract. *Id.* An intended third-party beneficiary is defined as “one whom the parties intended to directly benefit from the contract.” *Bank of Am. Nat’l Ass’n v. Bassman FBT, L.L.C.*, 2012 IL App (2d) 110729, ¶ 27. In contrast, an incidental third-party beneficiary merely receives an unintended benefit from a contract. *Id.* The parties’ intent to benefit a third party must be determined from the contract and its execution. *Advanced Concepts Chicago, Inc. v. CDW Corp.*, 405 Ill. App. 3d 289, 293 (1st Dist. 2010). The presumption against third-party-beneficiary status is so strong that an intent to benefit a third party must have “practically an express declaration.” *Barba v. Village of Bensenville*, 2015 IL App (2d) 140337, ¶ 22 (quoting *F.H. Paschen/S.N. Nielsen, Inc. v. Burnham Station, L.L.C.*, 372 Ill. App. 3d 89, 96 (1st Dist. 2007)). As another court explained: “Such intention must be shown by an express provision in the contract identifying the third-party beneficiary by name or by description of a class to which the third party belongs.” *Martis v. Grinnell Mut. Reinsurance Co.*, 388 Ill. App. 3d 1017, 1020 (1st Dist. 2009).

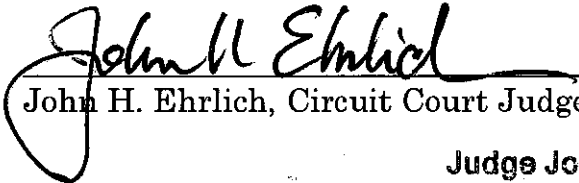
Aon is not an incidental beneficiary to the Greer-Abercrombie & Kent contract because that contract does not express any intent for Aon to reap any incidental benefit. Indeed, the Abercrombie & Kent terms and conditions merely indicate that guests may purchase travel insurance through Aon; there was no requirement that a guest had to make such a purchase. Further, the terms and conditions expressly state that the purchase of guest protection services was not included in the price of the journey, but could be purchased separately through a program administered by Aon. There is nothing in the record suggesting that Abercrombie & Kent received any financial benefit from a guest’s purchase of travel insurance from Aon; equally there is nothing to suggest that Aon received any financial benefit from a guest’s purchase of a travel package from Abercrombie & Kent. Most important, the travel insurance had to be purchased for an additional fee; in other words, the Greer-Aon agreement was supported by independent consideration.

It is also evident that Aon was not an intended third-party beneficiary to the Greer-Abercrombie & Kent agreement. First, Aon is not mentioned in Abercrombie & Kent’s terms and conditions other than to indicate that Aon was a source of travel insurance. Second, the terms and conditions expressly state that travel insurance is not included in the price of the Abercrombie & Kent package and that additional terms apply. Third, Aon is unable to explain why it should be permitted to claim the benefit of Abercrombie & Kent’s arbitration provision given the inclusion of a two-level dispute resolution provision contained in Aon’s agreement with Greer. Indeed, there is nothing in the record indicating that Aon sought to enforce that two-level grievance process.

Conclusion

For the reasons presented above, it is ordered that:

1. Abercrombie & Kent's motion to dismiss is entered and continued;
2. Abercrombie & Kent's motion to stay proceedings against it is granted;
3. Aon's motion to dismiss is denied;
4. This court orders that Greer and Abercrombie & Kent submit their dispute to arbitration pursuant to the terms and conditions in their contract;
5. The litigation between Greer and Aon will proceed separately; and
6. This matter shall be heard for case management on April 20, 2023 at 9:30 via Zoom.


John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

MAR 17 2023

Circuit Court 2075