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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0813**

Capital One Bank (USA), N. A.,
Respondent,

vs.

Monica Jones,
Appellant.

**Filed March 18, 2013
Affirmed
Collins, Judge***

Hennepin County District Court
File No. 27-CV-12-778

Jaime J. Hommerding, Derrick N. Weber, Messerli & Kramer, P.A., Plymouth, Minnesota (for respondent)

Monica Jones, Minneapolis, Minnesota (pro se appellant)

Considered and decided by Cleary, Presiding Judge; Hooten, Judge; and Collins, Judge.

UNPUBLISHED OPINION

COLLINS, Judge

On appeal from summary judgment, appellant contends that (1) respondent breached its contract by not arbitrating its claim; (2) the district court erred when it

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

granted summary judgment to respondent, awarded respondent fees, and determined that appellant's counterclaim was not properly before the district court; and (3) the district court denied her a fair hearing.¹ We affirm.

FACTS

In 2006 Respondent Capital One Bank (USA) N.A. issued a credit card to appellant Monica Jones. Jones used the credit card to purchase goods and services, but she eventually failed to make the required payment due on the account. Capital One served Jones with a summons and complaint. Jones's answer, dated August 6, 2010, was received by Capital One on August 9. Although the caption of the answer referenced a counterclaim, none was attached.

In 2012 Capital One moved for summary judgment. Jones served and filed a memorandum opposing summary judgment, to which an answer and a counterclaim were attached. The attached answer and counterclaim were both dated August 27, 2010. When the authenticity of the answer and the counterclaim dated August 27 were questioned, Jones suggested that Capital One had forged her signature and date on the answer dated August 6, and that her pleadings dated August 27 were authentic.

The district court granted summary judgment in favor of Capital One, determining as a matter of law that (1) the August 6, 2010 answer was Jones's original answer and a counterclaim was not attached; (2) Capital One did not forge Jones's signature; and

¹ Appellant also asserts that respondent's counsel's law firm "comingled their activities to avoid liability for various violations of the [Fair Debt Collections Practices Act.]" But because the law firm and its members are not parties in this action, we do not address this argument.

(3) Capital One’s counsel did not harass Jones. The district court concluded that Jones “raise[d] no credible or genuine issues of material fact relative to the credit card contract and collection issues” and entered judgment in favor of Capital One. This appeal followed.

D E C I S I O N

I.

Jones first argues that the district court lacked subject-matter jurisdiction to grant summary judgment because the credit-card contract contained an arbitration provision. The contract provides: “You and we agree that either you or we may, at either party’s sole election, require that any Claim . . . be resolved by binding arbitration,” and “[y]ou or we may elect arbitration under this Arbitration Provision with respect to any Claim, even if the Claim is part of a lawsuit brought in court.” Jones argues that by bringing the claim in district court rather than initiating arbitration, Capital One breached this contract with Jones.

As a preliminary matter, Jones may not have properly raised the arbitration issue to the district court in a pleading. Jones’s first clear assertion that Capital One breached the arbitration provision appears in her affidavit attached to the memorandum opposing summary judgment. The district court did not discuss the issue of arbitration in its order, and this court considers only those issues that the record shows were presented to and considered by the district court in deciding the matter before it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But even assuming the arbitration issue was considered

and rejected by the district court, Jones's claim of right to arbitration fails for two reasons: (1) the agreement provision permits, but does not mandate, arbitration, and (2) Jones waived such right.

When a contract is unambiguous, this court gives effect to the parties' intentions as expressed within the four corners of the instrument, and clear, plain, and unambiguous terms are conclusive of that intent. *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. App. 2003), *review denied* (Minn. Feb. 25, 2004). Here, the contract states that "[y]ou or we may elect arbitration under this Arbitration Provision with respect to any Claim," clearly rendering arbitration permissible, not mandatory. Thus, Capital One did not breach the contract with Jones by electing to bring the matter in district court, nor did the district court err by acting on it.

Moreover, Jones has waived her right to arbitrate. "Waiver of a contractual right to arbitration is ordinarily a question of fact and determination of this question, if supported by substantial evidence, is binding on an appellate court." *Fedie v. Mid-Century Ins. Co.*, 631 N.W.2d 815, 819 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). Waiver of the right to arbitrate requires a finding that a party voluntarily relinquished a known right and a finding of prejudice to the party opposing arbitration. *Id.* at 820.

[Minnesota courts] have held consistently that a party to a contract containing an arbitration provision will be deemed to have waived any right to arbitration if judicial proceedings based on that contract have been initiated and have not been expeditiously challenged on the grounds that disputes under the contract are to be arbitrated.

Brothers Jurewicz, Inc. v. Atari, Inc., 296 N.W.2d 422, 428 (Minn. 1980). In one such case, the supreme court concluded that a party waived the right to require arbitration by answering on the merits and participating in litigation for nearly one year without moving the court to compel arbitration. *Id.*

Here, the contract contains clear provisions regarding the right to elect arbitration. Instead, Jones answered the complaint on the merits in August 2010, and did not assert that the case should be arbitrated until March 2012. Although the word “arbitration” appears in her pleading, it was not employed to trigger arbitration. Accordingly, even if the district court considered whether the case should be arbitrated, the contractual arbitration provision is merely permissive, and Jones waived her right to elect it.

II.

Jones argues that the district court erred when it granted summary judgment because (1) the district court made credibility determinations; (2) Capital One’s billing is erroneous; (3) the contract violates usury laws; and (4) the contract is unconscionable and an adhesion contract. We address each argument in turn.

Summary judgment is appropriate when “the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted). When reviewing a summary judgment, we determine whether any genuine issue of material fact exists and whether the district court erred in its application of the law. *Id.* But “there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a

metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *Id.* While we view the evidence in the light most favorable to the party against whom summary judgment was granted, the party resisting summary judgment must do more than rest on mere averments. Minn. R. Civ. P. 56.05; *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

A.

Jones argues that the district court improperly made credibility determinations. "Weighing the evidence and assessing credibility on summary judgment is error." *Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 320 (Minn. 2007). However, the very purpose of summary judgment is to "prevent the assertion of unfounded claims or the interposition of specious denials or sham defenses." *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365 (8th Cir. 1983) (quotation omitted).

The district court found Jones "made several claims which the court finds lack credibility" and that she "raises no credible or genuine issues of material fact." In employing the word "credibility" the district court was assessing whether the claims brought forth were sufficiently meritorious to withstand summary judgment. In making such determinations, the district court was analyzing whether "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *See DLH*, 566 N.W.2d at 69 (quotation omitted). There is no error shown here.

B.

Jones challenges the validity of the charges on her account, specifically the over-limit, past-due, and finance charges. At the district court hearing, Jones expressed unhappiness with the annual fees, claimed the contract is unreadable, and asserted she was not told there would be fees. But the contract contains clear information regarding these charges, including the credit limit (Capital One may charge to the purchase segment of the account an “overlimit charge if your account exceeds any . . . assigned credit limit”), making payments (“you promise to pay us all amounts due resulting from the use of your account, including any finance charges and other charges due under the terms of this agreement”), detailed information regarding the calculation of finance charges, and the fact any membership fee is billed to the purchase segment of the account. Jones’s allegations do not demonstrate how, exactly, Capital One’s billing contained (in her words) “bogus figures” or a “grossly flawed” balance. Because Jones does not demonstrate the billing is erroneous or improper and such claims are not apparent from our review, her arguments regarding billing inaccuracies fail.

C.

Jones asserts that Capital One’s interest rate violates usury laws. Capital One is incorporated in Virginia and the contract provides that the contract is governed by federal law and Virginia law. Federal law provides that a national bank may charge out-of-state credit-card customers an interest rate allowed by the bank’s home state, even when that rate is higher than what is permitted by the state in which the cardholder resides.

Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 308, 99 S. Ct. 540, 545 (1978). Virginia does not limit charges imposed by banks and savings institutions under contracts for credit, allowing charges “at such rates and in such amounts . . . as may be agreed by the borrower.” *Perez v. Capital One Bank*, 522 S.E.2d 874, 876 (1999). Jones offers no evidence that the relevant law does not apply to her contract with Capital One. Therefore, her assertion that the interest rate is usurious is without merit.

D.

Jones argues the contract is unconscionable and one of adhesion. An unconscionable contract is one that “no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.” *Kauffman Stewart, Inc. v. Weinbrenner Shoe Co., Inc.*, 589 N.W.2d 499, 502 (Minn. App. 1999) (quotation omitted). An adhesion contract is one drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere. *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 924 (Minn. 1982). A contract on a printed form and offered on a “take it or leave it” basis is not necessarily an adhesion contract. *Id.* at 924. Instead, there must be a showing of disparity in bargaining power between the parties, that there was no opportunity for negotiation, and that the services could not be obtained elsewhere. *Id.* at 924-25.

Jones has not demonstrated that the contract is unconscionable or one of adhesion. To support her claims that she was deceived, she relies on her own affidavit and contends she did not get what she bargained for. Such bare assertions are not sufficient to support a finding that “no man in his senses” would enter into such a contract. *See Kauffman*, 589 N.W.2d at 502 (quotation omitted). Nor does Jones demonstrate that this is an adhesion contract; in particular, she fails to show that she could not have obtained similar credit services elsewhere. Therefore, this argument also fails.

III.

Jones next challenges the district court’s award of attorney fees to Capital One. “Attorney fees are recoverable if specifically authorized by contract or statute.” *Horodenski v. Lyndale Green Townhome Ass’n*, 804 N.W.2d 366, 371 (Minn. App. 2011) (quotation omitted). We will not reverse a district court’s award or denial of attorney fees absent an abuse of discretion. *Northfield Care Ctr., Inc. v. Anderson*, 707 N.W.2d 731, 735 (Minn. App. 2006).

Here, the contract provides: “To the extent permitted by law, you agree to pay all court costs and collection expenses incurred If you default and we refer your account for collection to an attorney . . . you agree to pay reasonable attorneys fees.” Jones contracted with Capital One to pay reasonable attorney fees, and we see nothing suggesting that the district court abused its discretion in granting such an award.

IV.

Jones argues that the district court erred by finding that her counterclaim was not timely served on Capital One. Pursuant to Minn. R. Civ. P. 13.01, Jones was required to file her counterclaim with her answer. The district court highlighted the discrepancy between Jones's answers (one dated August 6, 2010 and served in 2010; the other dated August 27, 2010 and served in 2012), as well as the discrepancy between the dates on Jones's certified mail receipts and the August 27, 2010 answer and counterclaim.

In March 2012, Jones attached certified mail receipts to her memorandum opposing summary judgment. The certified mail receipts reflect that Jones sent her answer on August 7, 2010, which was received by Capital One on August 9, 2010. This aligns with the answer that Capital One produced and claims is the original, which was signed and dated by Jones on August 6, 2010. However, the answer and the counterclaim Jones attached to her memorandum opposing summary judgment were both dated August 27, 2010. Capital One asserts it was not served with such counterclaim until 2012.

After initially discounting the discrepancy as a mere "technical error," Jones since contends that the August 27th answer and counterclaim were the originals and that Capital One forged her signature and the date on the August 6, 2010 answer. But if this were true, the certified mail receipts that Jones submitted as proof of service also would be unsustainable. On appeal, Jones does not explain the discrepancy between the certified mail receipts she submitted and the August 27, 2010 answer and counterclaim. Nor does she offer other factual support for her claim. It is evident that the August 6,

2010 answer was the original and that the August 27, 2010 answer and counterclaim were not properly before the district court. We see no error in the district court's finding that the August 6, 2010 answer was the original and that no counterclaim was attached.

V.

Finally, Jones argues that the district court did not afford her a fair hearing and that she suffered “unnecessary ridicule and humiliation by [Capital One’s] attorney and the [district] court.” A district court judge is presumed to discharge judicial duties in each case with neutrality and objectivity; such presumption is overcome only if the party alleging bias provides evidence of favoritism or antagonism. *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008). A judge “shall be dignified, courteous, respectful and considerate” of each party, and “shall maintain absolute impartiality, and shall neither by word or sign indicate favor to any party to the litigation.” Minn. R. Gen. Pract. 2.02(a), (c). Similarly, lawyers “should at all times uphold the honor and maintain the dignity of the profession, maintaining at all times a respectful attitude toward the court.” Minn. R. Gen. Pract. 2.03(a).

A review of the transcript does not reveal any improprieties by the district court or Capital One’s attorney. Jones points to particular portions of the transcript, such as (1) when the district court curtailed her discussion of issues not properly before the district court; (2) regarding the answer-dates discrepancy, the district court stated “there’s one idea that [Capital One’s attorney] suggested, and it is not one that would be very favorable to you[;]” and (3) the district court inquired as to whether Jones had an attorney

assist her with the pleadings because “they look like they’re a little bit cut and pasted somewhat, meaning . . . I think I kind of have the gist of what you’re saying, but I’m going to let [you respond].” Nothing Jones cites demonstrates favoritism or antagonism on the part of the district court, nor does she support her claim of being harassed or ridiculed by Capital One’s attorney.

Jones also argues the district court erred because she was not permitted to call expert witnesses to testify and because she did not have a jury trial. Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. Thus, a motion for summary judgment does not invite an evidentiary hearing and, when granted, summary judgment precludes a jury trial.

Affirmed.