IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CAPITAL ONE BANK (USA), N.A., a
national banking association,

Plaintiff/Appellee,

v.

ALENA SYGAL DAVEY and MICHAEL
DAVEY, wife and husband, and
individually,

Defendants/Appellants.

No. 1 CA-CV 13-0109
FILED 12-19-2013

Appeal from the Superior Court in Maricopa County
No. CV2011-014280
The Honorable Mark H. Brain, Judge

REVERSED IN PART, AFFIRMED IN PART

COUNSEL

Hammerman & Hultgren PC, Phoenix
By Jon R. Hultgren and Allan R. Draper

Counsel for Plaintiff/Appellee

Alena Sygal Davey and Michael Davey

Defendants/Appellants In Propria Persona

MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Patricia K. Norris joined.

J O N E S, Judge:

¶1 Alena Sygal-Davey and Michael Davey, wife and husband, appeal from the grant of summary judgment adjudging them liable to Capital One Bank (Capital One) for unpaid credit card charges. Specifically, the Daveys argue the trial court erred in granting summary judgment as there is a genuine issue of material fact regarding the applicability of an arbitration provision within the underlying contract and, as to Michael, the Daveys assert Capital One was not entitled to judgment as a matter of law. For the following reasons, we reverse in part, affirm in part, and remand to the trial court.

FACTS AND PROCEDURAL HISTORY

¶2 In December 2003, and prior to her marriage to Michael, Alena applied for a Capital One credit card and was issued one shortly thereafter. Alena used the card regularly for approximately six and a half years. During that time period, Alena and Michael married.

¶3 On August 4, 2011, Capital One brought suit to collect an alleged unpaid balance of $14,610.98, plus accrued interest of $873.76, "plus accruing interest at the contract rate of 14.65%" from June 22, 2011. Capital One attached three documents to its complaint: 1) the "Mail-In Invitation" (application) Alena signed in opening the account; 2) Alena's December 24-January 23, 2011 billing statement illustrating the previous balance on the card being $14,356.05, a charge of $254.93 for "Fees and Interest," and a new balance of $14,610.98; and 3) a Capital One litigation support representative's affidavit stating that Capital One issued a card to Alena, the card was used in accordance with the Customer Agreement governing the account, and that the Daveys had breached the Customer Agreement by failing to make required payments.

¶4 The Daveys answered[1] on November 4, 2011, admitting Alena had entered into the contract and that they had defaulted on the account, denying the amount owed on the account, and arguing the debt obligation was solely Alena's as she had contracted with Capital One prior to her marriage to Michael. The Daveys also asserted, as an affirmative defense, their intention to enforce the arbitration provision which was a part of the contract between the parties at the time Alena initially applied for the card.

¶5 Along with their answer, the Daveys filed two motions. Initially, the Daveys moved jointly to dismiss or stay the action until contractually mandated arbitration had taken place between the parties. Further, Michael moved independently to dismiss the claim against him, arguing he was not a proper party to the lawsuit as Alena had contracted for the card prior to their marriage and the complaint failed to assert that the debt was a community obligation. In its response to the motion to dismiss/stay the action, Capital One denied the account was subject to an arbitration clause, stating the Daveys failed to provide evidence that supported their contention. In their reply, the Daveys notified the trial court they had filed a request for production of documents asking Capital One to produce all documents related to the existence of the arbitration provision in their contract and requested the trial court defer ruling on the motion until after the filing of Capital One's response. When the Daveys failed to supplement their motion with the exact arbitration provision language, the trial court denied both motions.

¶6 On July 9, 2012, Capital One moved for summary judgment. Capital One contended Alena had breached the parties' contract by failing to make required payments. The motion further asserted that the debt was a community obligation as the account balance was paid to $0 following the Daveys' marriage; as such, the sum owing at the time of the breach had accrued during the marriage. Capital One argued it had made

[1] The Daveys originally failed to timely answer the complaint. Capital One submitted an application for entry of default on September 13, 2011. On September 22, the Daveys responded to the application for entry of default by filing a motion to vacate the judgment arguing they had not received service of the complaint. At that time, no judgment had been entered. Capital One replied to the motion to vacate requesting the trial court set a new deadline for the Daveys' answer to be filed. The answer was thereafter filed.

a prima facie showing that no genuine issue of material fact existed, and that the Daveys had failed to controvert Capital One's assertion. With its supporting statement of facts, Capital One attached Alena's credit card application, the same affidavit it had attached to its complaint, and Alena's account statements ranging in date from October 2004 through July 2007 and February 2010 through April 2011.

¶7 The Daveys filed a response to the motion for summary judgment in which they again asserted the original contract contained an arbitration provision, and contended Capital One had failed to provide a copy of the arbitration language despite their request for production of documents. The Daveys also argued that judgment should be denied because Capital One did not separately allocate those sums of interest charged against the marital community from those incurred by Alena individually.

¶8 Capital One replied, arguing the Daveys failed to state any genuine issue of material fact negating their contractual liability. Capital One again argued it was clear from the account statements the Daveys' debt was incurred after the marriage.

¶9 Capital One implicitly admitted for the first time, however, that an arbitration provision had existed at the time Alena had applied for the credit card but that it had been later removed from its customer agreements as the result of a class action lawsuit. Capital One further asserted, for the first time, the Daveys had agreed to the removal of the arbitration provision by continuing the use of their card following the effective date of the settlement of the class action litigation. In addition, Capital One stated it sent a revised Customer Agreement to the Daveys in January 2010 that did not contain an arbitration provision and also reminded the Daveys of this change on their April 2010 account statement.

¶10 On October 24, 2012, the trial court granted Capital One's motion for summary judgment and entered judgment for Capital One on December 13, 2012. The Daveys filed a timely appeal. We have jurisdiction under Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (West 2013).

DISCUSSION

¶11 A trial court properly grants summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c). On appeal, we determine de novo whether any genuine question of material fact exists

and whether the trial court properly applied the law. *L. Harvey Concrete, Inc. v. Argo Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). In consideration of the matter, we construe all facts and reasonable inferences in the light most favorable to the opposing party. *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 393, ¶ 51, 276 P.3d 11, 27 (App. 2012).

¶12 The Daveys contend summary judgment was improper for two reasons. First, they argue a genuine issue of material fact exists regarding the existence and applicability of an arbitration provision. Second, they argue Capital One was not entitled to judgment as a matter of law against Michael as the debt was Alena's separate pre-marital obligation. In regard to the first issue, we conclude there is a genuine issue of material fact precluding the entry of summary judgment. As to the second, we find the debt was properly characterized as a marital obligation.

I. Arbitration Provision

¶13 A party moving for summary judgment has the initial burden of showing there are no genuine issues of material fact and explaining why it is entitled to judgment as a matter of law. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115, ¶ 14, 180 P.3d 977, 980 (App. 2008); *see* Ariz. R. Civ. P. 56(a). The "moving party's responsibility to persuade the trial court that there is no genuine issue of material fact for a reasonable jury to find is often referred to as the moving party's initial burden of persuasion." *Thruston*, 218 Ariz. at 115, ¶ 15, 180 P.3d at 980. This burden is a "'heavy' one: all reasonable inferences from the evidence are made in the non-moving party's favor." *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 17, 292 P.3d 195, 199 (App. 2012). "Where the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper." *Thruston*, 218 Ariz. at 116, ¶ 17, 180 P.3d at 981 (quoting *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990)). We will affirm summary judgment if the facts produced in support of a claim or defense have so little probative value that no reasonable person could find for its proponent. *Cal X-Tra*, 229 Ariz. at 393, ¶ 51, 276 P.3d at 27.

¶14 The Daveys, within their answer to the complaint and their response to Capital One's motion for summary judgment, have continually maintained that this dispute is governed by an arbitration provision. In support of their contention, they directed the trial court's attention to the language of the credit card application Alena signed, and

Capital One attached to its complaint, which stated, "I have read and agree to the Important Disclosures and Terms of Offer enclosed, including the provision relating to Arbitration." This language illustrates, at the very least, that the Daveys' credit card account originally contained an arbitration provision. Although the Daveys have not produced the arbitration provision language, drawing all reasonable inferences in their favor, it follows that unless there is evidence demonstrating the terms of the Daveys' contract have changed, a provision relating to arbitration of some sort is a part of the Daveys' contract with Capital One.

¶15 Capital One first implicitly admitted the existence of an arbitration provision within its reply memorandum in support of its motion for summary judgment,[2] where it argued that the arbitration provision had been removed in early 2010 in response to a class action lawsuit and that the Daveys had agreed to the new terms by using the card following the effective date of the class action settlement. Without otherwise establishing any foundation for the documents, Capital One attached to that reply a copy of the class action settlement order from the United States District Court for the Southern District of New York (Order), a document entitled "Notice of Proposed Settlement and Application for Attorneys' Fees," a document entitled "notice plan," and a customer agreement copyrighted 2010. Even assuming the evidence introduced in Capital One's reply was properly submitted,[3] a material question of fact remains as to whether the Daveys received proper notification of, and accepted, the removal of the arbitration language as a material provision of their contract.

A. District Court Order

¶16 Capital One contended in the trial court that the dispute is not subject to arbitration because the Daveys continued to use the card after the effective date of the Order, which mandated certain credit

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[2] Prior to its reply memorandum, Capital One merely denied the action was subject to arbitration without further explanation. In its response to the Daveys' motion to dismiss/motion to stay, Capital One stated, "Defendants simply contend that the credit card account is subject to an arbitration clause; however, this is not the case and they have provided no evidence which would support their contention."

[3] We note that it is improper to attach new evidence with the reply memorandum. *See Wells Fargo, N.A.*, 231 Ariz. at 214 n.3, ¶ 20, 292 P.3d at 200 n.3.

lenders remove mandatory arbitration provisions from their existing and pre-existing cardholder agreements. This contention is incorrect. The Order was filed on July 22, 2010. The account statements Capital One submitted with its motion show the Daveys' final payment on the account was made on June 18, 2010, and their final purchase with the card was made on July 16, 2010. The next month's billing statement indicates the Daveys' account was suspended by Capital One. There was no overlap from the date the Order was filed and the Daveys' use of the card or the account.

B. Customer Agreement and Account Notification

¶17 Capital One also asserted it sent a revised customer agreement to the Daveys in January 2010 that did not contain an arbitration provision, and that it included a notification of the removal of the arbitration provision on the Daveys' account statement for April 2010. However, the unauthenticated evidence attached in support of this claim does not demonstrate, beyond all reasonable inferences, the Daveys either received or accepted the removal of the arbitration provision from their contract.

¶18 There is no evidence in the record that the revised customer agreement was actually received by the Daveys prior to the beginning of this litigation. The unauthenticated customer agreement does not contain a mailing address or any indication it was sent to the Daveys, nor does it contain information regarding when it was originally created. The only sign it was even created in 2010 is its copyright. Further, there is no affidavit in the record to verify the customer agreements were sent to customers in early 2010, let alone sent to the Daveys.[4] In addition, the Daveys do not admit receiving the document outside of discovery. Because there is no evidence the Daveys received the revised Customer Agreement, we cannot conclude that the Daveys assented to its terms with their subsequent credit card use.

[4] In an appendix to its answering brief filed with this Court, Capital One submitted an affidavit, dated June 17, 2013, by a Capital One Services, LLC, employee averring Capital One's records show it provided the Daveys with the revised customer agreement, sans arbitration provision, in January 2010. However, this affidavit was not provided to the trial court so we do not consider it here. *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) ("An appellate court's review is limited to the record before the trial court.").

¶19 As to the notification given on the Daveys' April 24-May 23, 2010 billing statement, the reminder was placed in a section labeled "Transactions Continued" and reads, "Please note that in your newly revised Customer Agreement, issued in early 2010, the Arbitration Agreement has been removed." Although Capital One notified the Daveys of the deletion of the arbitration provision on their account statement, the record reflects Capital One did not follow its own published guidelines for changing the terms of the Daveys' contract. The 2010 customer agreement contains a section entitled "Changes to Your Agreement"[5] that reads:

> At any time, [Capital One] may add, delete or change any term of this Agreement unless the law prohibits us from doing so. We will give you notice of any changes as required by law. If we do notify you of changes, we will send you a separate notice or inform you on your *Statement*. . . . Our notice will tell you when and how the changes will take effect and describe any rights you have in connection with the changes.

There is no evidence in the record that Capital One provided the Daveys with information regarding when the changes would take effect or what their rights were in connection with the changes as required by Capital One's own agreement. For example, nothing in the record indicates Capital One offered the Daveys the option to cancel their account if they disagreed with the changes or informed them of their ability, if any, to reject the proposed changes.

¶20 In Arizona, to effectively modify a contract, "there must be: (1) an offer to modify the contract, (2) assent to or acceptance of that offer, and (3) consideration." *Demasse v. ITT Corp.*, 194 Ariz. 500, 506, ¶ 18, 984 P.2d 1138, 1144 (1999); *see Angus Med. Co. v. Digital Equip. Corp.*, 173 Ariz 159, 164, 840 P.2d 1024, 1029 (App. 1992) ("One party to a written contract cannot unilaterally modify it without the assent of the other party."). A

[5] The Court's knowledge of the customer agreement's modification process is limited to the record before us. There have been no previous iterations of the customer agreement introduced by either party and the only change argued by either party to the 2010 customer agreement is the removal of the arbitration provision. Therefore, we look to the revised 2010 customer agreement to determine the requirements for modifying the customer agreement.

modification is merely an offer for a revised contract and cannot bind both parties until it is accepted. *See Goodman v. Physical Res. Eng'g, Inc.*, 229 Ariz. 25, 28, ¶ 7, 270 P.3d 852, 855 (App. 2011). An offer cannot be accepted unless the offeree actually knows of the offer's existence. *Douglas v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 495 F.3d 1062, 1066 (9th Cir. 2007). Conduct, such as the Daveys' continued use of the card following the notifications, can be sufficient to manifest acceptance of an offer or acquiescence in a modification. *Ancell v. Union Station Assocs., Inc.*, 166 Ariz. 457, 460, 803 P.2d 450, 453 (App. 1990). However, because Capital One has not shown that the Daveys received the new agreement or that it followed its own guidelines for supplying adequate notice of a change in terms to their customer agreement, a genuine issue of material fact exists as to whether the Daveys' had proper notice of the proposed changes to assent to the removal of the arbitration provision through their actions. *See Hill-Shafer Part. v. Chilson Family Trust*, 165 Ariz. 469, 473, 799 P.2d 810, 814 (1990) (noting that assent cannot be given if all parties do not have a common understanding of all material terms and a contract cannot be formed where there has not been a meeting of the minds); *Cf. Demasse*, 194 Ariz. at 508, ¶ 24, 984 P.2d at 1146 (stating an employee cannot manifest consent "without legally adequate notice of the modification").

¶21 We conclude a genuine issue of material fact exists regarding the applicability of an arbitration provision to the current dispute and that summary judgment was improper. *See WB, The Bldg. Co. v. El Destino, LP*, 227 Ariz. 302, 309, ¶ 17, 257 P.3d 1182, 1189 (App. 2011) (stating that the trial court properly considered a motion for summary judgment only after correctly finding the arbitration provision at issue was unenforceable). Therefore, we remand to the trial court to determine the existence and scope of the arbitration provision.

II. Marital Debt

¶22 In the event this case remains a judicial action, we address whether the debt at issue is a marital obligation.

¶23 The Daveys contend the trial court erred by denying Michael's motion to dismiss for failure to state a claim. Specifically, they argue the debt is solely Alena's, save for the amount potentially owed under A.R.S. § 25-215(B), and Capital One failed to craft its complaint to support a claim of relief against Michael. Capital One argues the pre-marriage debt was paid *in toto* subsequent to the Daveys' marriage, the remaining balance is due to charges incurred following the marriage, and

no genuine issue of material fact exists on this point. We agree with Capital One.

¶24 One spouse's separate property will not be liable for the separate debts of the other spouse absent an agreement to the contrary. A.R.S. § 25-215(A). "A premarital debt of one spouse can be recovered from community property, but only to the extent of the value of the debtor spouse's contribution to the community." *Arab Monetary Fund v. Hashim*, 219 Ariz. 108, 111, ¶ 17, 193 P.3d 802, 805 (App. 2008) (citing A.R.S. § 25-215(B)). However, either spouse may contract debts for the benefit of the community, A.R.S. § 25-215(D), and a debt incurred by a spouse during marriage is presumed to be a community obligation absent clear and convincing evidence to the contrary. *Hrduka v. Hrudka*, 186 Ariz. 85, 91-92, 919 P.2d 179, 186-87 (App. 1995).

¶25 In this case, it is undisputed that Alena opened the credit card account approximately three years prior to her marriage. However, the account statements introduced by Capital One demonstrate that any pre-marital debt on the card was paid off a few months *after* the Daveys' wedding in February 2007. The April 18-May 17, 2007 billing statement shows the balance on the credit card account as $41.42. The next billing statement, for the billing period of May 18-June 23, 2007, shows a payment made by the Daveys in the amount of $41.42, thereby satisfying the remainder of Alena's pre-marital debt. Any charge made on the card during the Daveys' marriage is presumed to be a marital obligation, and the remaining balance on the account resulted entirely from charges made following the Daveys' marriage. Further, the Daveys did not introduce any evidence to rebut this presumption. In fact, they recognize that the balance due on the account was "incurred largely after the marriage." Therefore, we conclude that the debt was properly classified as a marital obligation and Capital One has a valid claim against Michael, as a member of the marital community. *See Flexmaster Aluminum Awning Co. v. Hirschberg*, 173 Ariz. 83, 88, 839 P.2d 1128, 1133 (App. 1992) ("A creditor must join both spouses as defendants before the creditor may obtain and execute a judgment against the community.").

CONCLUSION

¶26 Based upon the foregoing, we affirm the trial court's determination that the debt at issue is marital debt. Further, we reverse the grant of summary judgment for the reasons stated, herein, and remand the matter to the trial court for such further proceedings as are appropriate and consistent with this Court's decision. Because Capital

One is not the prevailing party, we deny Capital One's request for attorney's fees on appeal. Further, because we reverse the grant of summary judgment, Capital One is no longer entitled to an award of its costs.