IN THE UTAH COURT OF APPEALS

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Wells Fargo Bank Nevada, NA, Plaintiff, Counterclaim-defendant, and Appellee, v. Joseph L. Toronto and Cindy L. Toronto, Defendants, Counterclaim-plaintiffs, and Appellants.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070716-CA F I L E D (July 17, 2008) 2008 UT App 269

Third District, West Jordan Department, 050411369
The Honorable Robert Adkins

Attorneys: Joseph L. Toronto and Cindy L. Toronto, Draper, Appellants Pro Se
Mikel M. Boley, West Valley, for Appellee

Before Judges Greenwood, Billings, and Davis.

GREENWOOD, Presiding Judge:

Appellants Joseph L. and Cindy L. Toronto appeal from the trial court's ruling granting judgment in favor of Plaintiff Wells Fargo Bank Nevada, NA (Wells Fargo). More precisely, the trial court ruled that the Torontos were jointly and severally liable for sums owing related to a roughly twenty-year-old consumer credit card account that went into default in 2003. We affirm.

As both parties concede, "[t]his is a generic debt collection case on a[n] . . . old consumer credit card account." The Torontos raise several issues on appeal, most of which relate to the trial court's factual findings. We review challenges to a trial court's factual findings for clear error. See State v. Pena, 869 P.2d 932, 935 (Utah 1994). "For a reviewing court to find clear error, it must decide that the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." Id. at 935-36. In addition, the Torontos allege that the trial court erred in

dismissing their pretrial motion for partial summary judgment. "Utah case law suggests that we will entertain an appeal of a denial of a motion for summary judgment only if it involves a legal issue." Normandeau v. Hanson Equip., Inc., 2007 UT App 382, ¶ 13, 174 P.3d 1, cert. granted, No. 20071006, 2008 Utah Lexis 69 (Utah Mar. 7, 2008).[1]

First, the Torontos claim that the trial court erred in applying Utah's statute of frauds, see generally Utah Code Ann. § 25-5-4 (2007), and, in doing so, incorrectly decided that an enforceable credit contract existed between the Torontos and Wells Fargo. When reviewing a trial court's factual findings, we are mindful that in a bench trial, trial courts are explicitly vested with the responsibility to make credibility determinations and to weigh the evidence and find the determinative facts. See Utah R. Civ. P. 52(a).

The trial court heard evidence from both parties regarding whether the Torontos were provided with a copy of the terms and conditions of the credit agreement. Although neither of the Torontos could recall ever receiving the terms and conditions associated with the disputed account, Mr. Toronto admitted that it was possible that he received a copy of them but simply forgot. On the other hand, Wells Fargo conceded that no one could possibly know "for sure that wherever th[e Torontos'] Wells Fargo credit card came from a terms and conditions w[as] included." Nonetheless, Wells Fargo presented testimonial evidence that its normal business practice when issuing a new credit card is to include "a copy of the . . . customer terms and agreements" in the package with the credit cards. The trial court weighed this contradictory evidence and found that the

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1. Writing for the majority in Normandeau v. Hanson Equip. Inc., 2007 UT App 382, 174 P.3d 1, Judge Billings cited two somewhat divergent Utah Supreme Court decisions as well as case law from several sister jurisdictions in holding that Utah appellate courts will not review a pretrial denial of a fact-dependent summary judgment motion where the appealing party presented evidence and argued the issue at trial. See id. ¶ 13 & n.1. In his concurrence in part and dissent in part, Judge Orme noted that while appeals of such denials "will ordinarily be for naught as a practical matter," he disagrees with the Normandeau majority that these appeals present "a true jurisdictional bar." Id. ¶ 34 & n.2 (Orme, J., concurring in part and dissenting in part).

terms and conditions had more than likely been provided to the Torontos. We find no clear error in this finding.[2]

Next, the Torontos assert that the trial court erred in basing the above factual finding on the judge's personal experience. The court, in finding "that the terms and conditions . . . had [more than likely] been given to the [Torontos,]" stated:

> [O]n cross-examination [Mr. Toronto] did acknowledge that he could have received th[e terms and conditions] and simply had forgotten. In this case it would be, I think incredible for the Court to believe that . . . First Security and then Wells Fargo would send out the credit card and send out the monthly billing statements and not include in it the terms and conditions, <u>the Court finds that just to be incredible based on experience</u> that over that period of time that [the Torontos] would not have received that information from Wells Fargo.

(Emphasis added.) The Torontos argue that this statement demonstrates that the trial court considered information outside the evidence--namely, the judge's own experience--in making a determinative factual finding. We disagree for two distinct reasons. First, we believe the trial court's statement meant that the court found the Torontos' position to be "incredible" based not on the court's experience with credit card mailers, but his experience in making a credibility determination. We see no error in that determination. Second, even if we were to read the court's statement consistent with the Torontos' position, we would not find any error. "Although litigants are entitled to a judge who will hear both sides and decide an issue on the merits of the law and the evidence presented, they are not entitled to a judge whose mind is a clean slate." <u>Madsen v. Prudential Fed. Sav. & Loan Ass'n</u>, 767 P.2d 538, 546 (Utah 1988). Moreover, "[i]n deciding a case tried without the aid of a jury, the court has great leeway in deciding what are the facts as presented by the evidence." <u>Salt Lake City v. United Park City Mines Co.</u>, 28 Utah 2d 409, 503 P.2d 850, 852 (1972). Thus, we conclude that the trial court did not clearly err under the facts and

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2. In holding that there was no clear error in the trial court's finding regarding receipt of the terms and conditions, we necessarily reject several of the Torontos' related and dependent arguments on appeal; arguments that we do not specifically address herein.

circumstances of this case by considering matters beyond the evidence in determining that the Torontos had more than likely been given a copy of the credit card terms and conditions.

Third, the Torontos argue that the trial court erred in applying Utah Code section 70C-7-107, see Utah Code Ann. § 70C-7-107 (Supp. 2007), to the trial evidence generally and the credit rating notices specifically. However, the trial court never applied this section to the trial evidence because, in large part, the Torontos never requested that the court do so. The Torontos included a brief argument related to section 70C-7-107 in their motion for partial summary judgment; which motion was denied prior to trial. Aside from this, the Torontos made no reference to the sufficiency of the credit rating notices and argue that we should review the issue solely because the credit rating notices were admitted as evidence at trial. We decline to do so. See State v. Holgate, 2000 UT 74, ¶ 11, 10 P.3d 346 ("As a general rule, claims not raised before the trial court may not be raised on appeal.").[3]

Finally, the Torontos argue that the trial court committed reversible error in denying their motion for partial summary judgment prior to trial. After a trial on the merits, a party will generally receive appellate review of an earlier denial of a motion for summary judgment only where the motion presented the trial court with purely legal issues such that the "denial of summary judgment amounted to a ruling of law." Normandeau v. Hanson Equip., Inc., 2007 UT App 382, ¶ 13, 174 P.3d 1 (internal quotation marks omitted), cert. granted, No. 20071006, 2008 Utah Lexis 69 (Utah Mar. 7, 2008). This is true especially where the appealing party had the opportunity, at trial, to completely litigate the issues raised in the summary judgment motion. See id. Therefore, we will review "only the legal issues decided by the denial of [a motion for partial] summary judgment that

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3. Moreover, even if we were to address this argument we would find the Torontos' position unavailing. Section 70C-7-107 of the Utah Code mandates that a creditor notify a debtor of its intention to report negative information to a third-party credit reporting agency prior to or within thirty days after so reporting. See Utah Code Ann. §§ 70C-7-107(2), (3)(a) (Supp. 2007). Although the credit rating notices provided to the Torontos did not take the same form as the sample notification language provided in this section, see id. § 70C-7-107(3)(c), we conclude that the trial court certainly could have determined that these notices provided the Torontos with sufficient notice that continued nonpayment of the Wells Fargo credit account might, and ultimately did, negatively affect their credit rating.

prevented a party from dealing with the [appealed] issue at trial." Id. (emphasis added).

At trial, the Torontos "'had the opportunity to fully litigate the issues raised in the[ir] summary judgment motion[].'" Id. (quoting Wayment v. Howard, 2006 UT 56, ¶ 19, 144 P.3d 147). Furthermore, there was a critical factual question of whether a copy of the terms and conditions of the credit agreement had been provided to the Torontos. Consequently, it is not apparent that the denial of the Torontos' motion for partial summary judgment prevented them from dealing with all issues at trial. See id. We therefore decline to further address the denial of the Torontos' motion for partial summary judgment.

Based on the foregoing, we affirm.

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Pamela T. Greenwood,
Presiding Judge

WE CONCUR:

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Judith M. Billings, Judge

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James Z. Davis, Judge