STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0039

Wells Fargo Bank, N. A.,
Respondent,

vs.

Rong Meng,
Defendant,

Hui Wang,
Appellant.

Filed August 6, 2012
Affirmed
Schellhas, Judge

Washington County District Court
File No. 82-CV-10-4205

Charles F. Webber, Erin L. Hoffman, Faegre Baker Daniels LLP, Minneapolis, Minnesota (for respondent)

Krista M. Peach, Donald W. Kohler, White Bear Lake, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges summary judgment in favor of respondent-bank, arguing that the district court erroneously exercised its jurisdiction because the loan agreement between appellant and respondent included a "mandatory" arbitration clause. We affirm.

FACTS

Rong Meng and appellant Hui Wang executed a home-equity loan agreement in February 2006 and obtained a $150,000 credit line from respondent Wells Fargo Bank, N.A. In April 2010, upon Meng's and Wang's default, the bank sued to recover $147,858.81 plus interest. In June, after Meng and Wang failed to respond to the bank's summons and complaint, the district court entered default judgment against them in the amount of $159,132.11. Approximately four months later, they moved to vacate the judgment under Minn. R. Civ. P. 60.02(a), (d), alleging, among other things, that the loan agreement contained an arbitration clause that "required the Court to dismiss the Complaint." The district court denied the motion to vacate the judgment as to Meng but granted it as to Wang and vacated the judgment against him.

Through legal counsel, Wang interposed an answer to the bank's complaint on November 16, 2010, and alleged that the bank "waived" its right to bring a non-arbitration action through the arbitration clause in the loan agreement. On December 30, without mentioning the arbitration clause, Wang interposed an additional answer along with a counterclaim against the bank, demanding "judgment finding [the bank] guilty of violating the agreement and launching malicious litigation against [Wang and Meng], and

to make payment to [Wang and Meng] in the amount of $1,000,000 for damages." In January 2011, Wang's counsel withdrew.

In June 2011, the bank moved for summary judgment and Wang obtained new counsel. But Wang's new counsel withdrew in August and Wang did not respond to the bank's summary-judgment motion. Wang obtained new counsel, who appeared at the summary-judgment hearing on October 21. The district court granted summary judgment to the bank and dismissed Wang's counterclaim without addressing the arbitration clause in the loan agreement.

This appeal follows.

D E C I S I O N

On appeal from summary judgment, we ask whether any genuine issue of material fact exists and whether the district court erred in its application of the law. *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011).

Wang argues that the district court erroneously granted summary judgment to the bank because the loan agreement's arbitration clause "required the parties [to] submit to arbitration and therefore jurisdiction to hear [the bank's] claim did not exist." The bank argues that Wang waived the issue because he did not raise it before the district court. We agree with the bank. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." (quotation omitted)). Although Wang affirmatively alleged in his answer to the bank's complaint that the bank "waived its right to sue for any claims or causes of action arising out of the"

home-equity loan agreement because the agreement contained a "mandatory arbitration clause," Wang submitted nothing in writing in response to the bank's summary-judgment motion. And although Wang now claims that he orally argued to the court at the summary-judgment hearing that the loan agreement's arbitration clause "requir[ed] that all disputes arising under the contract be submitted to arbitration," he has failed to provide a hearing transcript to substantiate that assertion. *See Noltimier v. Noltimier*, 280 Minn. 28, 29, 157 N.W.2d 530, 531 (1968) (noting that it is the "appellant['s] . . . burden to provide an adequate record"). We therefore decline to review Wang's argument.

In any event, we note that Wang's argument is without merit. The arbitration clause in this case was permissive, not mandatory, providing,

> I agree that any disputes between me and the Bank, regardless of when it arises or arose, will be settled using the following procedures . . . . Either me [sic] or the Bank *may* submit a dispute to binding arbitration at any reasonable time . . . . To find out how to initiate arbitration, I can simply call any office of the [American Arbitration Association].

(Emphasis added.) *See Park Const. Co. v. Indep. Sch. Dist. No. 32, Carver Cnty.*, 209 Minn. 182, 186, 296 N.W. 475, 477 (1941) ("[A]n agreement to arbitrate . . . has no effect upon the jurisdiction of any court."); *Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 362 (Minn. App. 2001) ("A contractual agreement to arbitrate disputes does not strip the district court of its subject matter jurisdiction to resolve the dispute."). Moreover, Wang waived his right to arbitration by interposing a counterclaim against the bank. *See Koes*, 636 N.W.2d at 362 ("An arbitration agreement may create a right to arbitration, but that right can be waived."); *Milwaukee Mut. Ins. Co. v. Currier*, 310 Minn. 81, 85, 245

N.W.2d 248, 250 (1976) ("If plaintiff insurer had agreed with defendant insured to submit a counterclaim in the initial action on behalf of the insured, then such a submission would have constituted a waiver by the parties of their contractual right to arbitration.").

Wang also argues that the district court erred by "finding that the Federal Arbitration Act 9 U.S.C. § 1 et seq. did not pre-empt Minnesota State Law for breach of contract." The district court made no such finding, and, regardless, we decline to review Wang's argument because he failed to provide a record that he made any arguments to the district court regarding arbitration. *See Thiele*, 425 N.W.2d at 582; *Noltimier*, 280 Minn. at 29, 157 N.W.2d at 531 (noting that it is the "appellant['s] . . . burden to provide an adequate record").

Affirmed.