STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0158
A13-0215

TEM Capital, LLC,
Respondent (A13-0158),

Livingston Financial, LLC,
as successor in interest to Chase Bank USA, N. A.,
Respondent (A13-0215),

vs.

Rodney E. Leonard,
Appellant.

Filed November 25, 2013
Affirmed
Stoneburner, Judge

Mille Lacs County District Court
File No. 48CV112341

Amy M. Goltz, Dan J. Bernhard, Gurstel Chargo, PA, Golden Valley, Minnesota; and

Andrew D. Parker, Mark J. Kiperstin, Parker Rosen, LLC, Minneapolis, Minnesota (for respondent TEM Capital)

Jonathan R. Septer, Derrick N. Weber, Messerli & Kramer, PA, Plymouth, Minnesota (for respondent Livingston Financial)

Karl W. Sonneman, Attorney at Law, Winona, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Stoneburner, Judge.

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

STONEBURNER, Judge

In these consolidated appeals, appellant challenges the grant of summary judgment in separate actions awarding amounts owed on appellant's two credit-card accounts that were assigned separately to respondent debt-collecting businesses. Appellant argues that (1) the assignment of his credit-card debts to respondents for a fraction of the amount he owes is unconscionable and unenforceable; (2) the evidence offered by respondents to prove the assignments is insufficient; and (3) collateral estoppel bars separate actions to collect the debts. Because (1) the assignments are not unconscionable; (2) the district court did not abuse its discretion by concluding that the foundation for evidence of the assignments is adequate and the evidence is sufficient to prove the assignments; and (3) the doctrine of collateral estoppel does not apply to respondents' separate actions to collect separate debts, we affirm.

FACTS

In 1985, appellant Rodney E. Leonard opened a credit-card account (the TEM account) with Chase Bank USA, N.A. (Chase). In 1986, appellant opened a second Chase credit-card account (the Livingston account). Leonard charged purchases to and made payments on the accounts until he defaulted on both accounts in 2008. After accelerating the balance due and charging off the accounts, Chase sold the accounts on the secondary market.

Chase sold the TEM account to HS Financial Group, LLC, which sold it to Mattia and Associates, Inc., which then sold it to respondent TEM Capital, LLC (TEM). Chase

sold the Livingston account to Turtle Creek Assets, Ltd., which then sold it to respondent Livingston Financial, LLC (Livingston). Leonard does not dispute that he received invoices and statements for both accounts from Chase while Chase owned the accounts and from TEM and Livingston, respectively, after the accounts were assigned. Leonard never objected to the statements and, at oral argument on appeal, stated that he does not dispute the amount owed on each account.

In separate actions, TEM and Livingston sued Leonard, seeking judgment for the amounts owed by Leonard as well as interest, costs, and disbursements. TEM and Livingston moved for summary judgment in the respective actions.

TEM supported its motion with the affidavit of a "member" who attested that he is an authorized agent of TEM, is familiar with and has full access to TEM's business records, and has knowledge of TEM's business-records retention practices. The affiant, in relevant part, referenced attached statements of account that Chase sent to Leonard from March 2008 through August 2009 and a bill of sale for each transfer of the TEM account from Chase to HS Financial Group, LLC, then to Mattia and Associates, Inc., and finally to TEM. The affiant attested to Leonard's failure to assert any disputes concerning charges on regular statements that were sent to him and asserted the current amount owed, including interest under the terms of the credit-card agreement.

Leonard opposed TEM's summary-judgment motion. Leonard challenged the basis of TEM's affiant's knowledge about TEM's business practices and ability to provide a foundation for the documents from Chase and the other assignors. Leonard

also asserted that "TEM is engaged in unconscionable and illegal conduct," essentially attacking all debt-collection businesses.

TEM responded, attaching an additional affidavit of its original affiant, attesting to the fact that (1) he is "an owner and managing member" of TEM; (2) TEM "integrates into its own records the records of the original credit issuers and assignors of its credit accounts in the ordinary course of business operations" and relies upon the accuracy of those documents; and (3) the documents in this action "were acquired as part of the purchase of [Leonard's] account and at all times have been maintained in the ordinary course of business."

The district court granted TEM's motion for summary judgment, concluding that TEM's affiant was qualified and competent to lay foundation for the records submitted; TEM had shown sufficient evidence of ownership of the TEM account; and TEM established the amount owed under the doctrine of account stated. The district court rejected Leonard's argument that assignment of the debt to TEM was unconscionable, noting that, because Leonard was not a party to the assignment, he lacks standing to challenge the terms of the assignment and that Leonard had not alleged or established that his contract with Chase, which contained an assignment clause, was unconscionable.

Livingston's summary-judgment motion was supported with the affidavit of the custodian of Livingston's business records who attested that (1) during the transfer of accounts between Chase and Livingston, Chase regularly transmits electronic account information at the time an account is assigned; (2) Chase transmitted electronic account information for Leonard's account at the time it was assigned; and (3) Livingston also

obtained from Chase the terms and conditions and account statements for Leonard. The affiant described Leonard's account and account balance and the transfers of Leonard's account from Chase to Turtle Creek Assets, Ltd to Livingston. Livingston attached copies of the documents referenced in the affidavit as exhibits to the affidavit. Livingston also supported its motion with copies of discovery responses from Leonard.

Leonard responded, opposing Livingston's motion and relying on a Missouri case and a Minnesota district court case to challenge the sufficiency of the evidence of assignment as without foundation and incomplete. *CACH, LLC v. Askew*, 358 S.W.3d 58 (Mo. 2012); *Arrow Fin. Servs. LLC v. Chick*, No. 85-CV-09-1036 (Minn. Dist. Ct. Aug. 3, 2009). [Opinion not available on Westlaw.] Leonard also argued that the assignment was unconscionable and illegal and that Livingston was collaterally estopped from commencing an action against Leonard because of TEM's lawsuit. Leonard submitted his affidavit asserting that, because he had paid interest and fees to Chase, "Chase has received sums adequate to compensate it" for risk of default. Leonard also attached news articles critical of credit-card-debt-collection practices.

Livingston replied, arguing, in relevant part, that Minnesota law is contrary to the Missouri case cited by Leonard and that the facts of this case differ from the facts in the district court case relied on by Leonard. The district court granted summary judgment to Livingston, concluding that Livingston sufficiently established its ownership of Leonard's account and rejecting Leonard's unconscionable-conduct and collateral-estoppel arguments.

This court consolidated Leonard's appeals of these judgments.

D E C I S I O N

On appeal from summary judgment, this court's task "is to determine whether genuine issues of material fact exist, and whether the district court correctly applied the law." *Eng'g. & Const. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 704 (Minn. 2013) (quotation omitted). The district court properly grants summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . 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. We conduct a de novo review of the district court's summary judgment decision. *McKee v. Laurion*, 825 N.W.2d 725, 729 (Minn. 2013). We "view the evidence in the light most favorable to the party against whom summary judgment was granted." *Id.*

On appeal, Leonard argues that (1) assignments of his Chase credit-card debts are unconscionable and unenforceable; (2) his contracts with Chase were contracts of adhesion because his inferior bargaining position allowed Chase to unilaterally dictate the assignment terms in the contracts; (3) due process requires that he receive notice of any assignment of credit-card debt and that he be afforded the opportunity to purchase the debt on the same terms that the creditor offered an assignee; and (4) the doctrine of collateral estoppel bars Livingston's collection action. Leonard relies on an assortment of cases from other jurisdictions; he does not cite a single Minnesota authority to support his positions. We find no merit in any of his arguments.

I. Assignments of Leonard's credit-card debts were valid.

Generally, "a debtor has no standing to question the validity of an assignment which is accepted as valid between the creditor and his assignee." *Gen. Underwriters, Inc. v. Kline*, 233 Minn. 345, 350, 46 N.W.2d 794, 797-98 (1951). In *Kline*, the supreme court acknowledged exceptions to this rule: (1) "where that assignor or other parties deny the assignee's title" and (2) where "defendants are faced with conflicting claims to the debt." *Id.* In *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 270 (Minn. 2004), the supreme court reiterated that contract rights are generally assignable except where the assignment is prohibited by statute or the contract, or where the contract involves a matter of personal trust or confidence. Leonard has not asserted that his contracts fall under any of these exceptions. His contracts with Chase provide: "[Chase] may assign your account, any amounts you owe us, or any of our rights and obligations under this agreement to a third party. The person to whom we make the assignment will be entitled to any of our rights that we assign to that person."

Leonard's argument that his contract with Chase for the TEM account was an unconscionable contract of adhesion, making the assignment clause invalid, lacks merit.[1] A contract is unconscionable if it is "such as 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." *In re Estate of Hoffbeck*, 415 N.W.2d 447, 449 (Minn. App. 1987) (quoting *Hume v.*

[1] Leonard did not make this argument to the district court in Livingston's action, therefore the argument is waived as to Livingston. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (stating that generally, an appellate court will not consider matters not argued to and considered by the district court).

United States, 132 U.S. 406, 411, 10 S.Ct. 134, 136 (1889)). "A finding of unconscionability requires that one contracting party show that it had no meaningful choice but to accept the contract term as offered" and that the term was "unreasonably favorable to the other party." *Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc.*, 372 N.W.2d 412, 415 (Minn. App. 1985) (quotations omitted), *review denied* (Minn. Oct. 18, 1985).

An adhesion contract is "a contract generally not bargained for, but which is imposed on the public for *necessary* service on a 'take it or leave it' basis." *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 924 (Minn. 1982). But the mere fact that a contract is on a printed form and offered on a "take-it-or-leave-it" basis does not make it an adhesion contract. *Id.* Instead, "[t]here must be a showing that the parties were greatly disparate in bargaining power, that there was no opportunity for negotiation[,] *and* that the services could not be obtained elsewhere." *Id.* at 924-25.

Leonard has cited no authority to support his argument that the assignment clause in his credit-card contract with Chase is an agreement that no man in his right senses would make. In Minnesota, contract rights are generally assignable, and even without the clause, the contract would have been deemed assignable. *Travertine Corp.*, 683 N.W.2d at 270. And Leonard has not shown that his credit-card contract was a contract of adhesion. He does not assert that a credit-card account with Chase was a necessary service or that he could not obtain a credit card elsewhere. "[P]ublic policy requires that freedom of contract remain inviolate except only in cases when the particular contract violates some principle which is of even greater importance to the general public."

Christensen v. Eggen, 577 N.W.2d 221, 225 (Minn. 1998) (quotation omitted). There is no such violation here.

II. Due process does not require notice of assignment.

Leonard argues that due process requires notice of the assignments of his credit-card debt so that he might be afforded the opportunity to purchase the debt on the same terms that Chase gave to the assignees. But in Minnesota, it is well settled that notice to an obligor is not essential to the validity of an assignment as between an assignor and an assignee. *See Pillsbury Inv. Co. v. Otto*, 242 Minn. 432, 437, 65 N.W.2d 913, 916 (1954) (stating that until notice is given, the obligor may continue to regard the assignor as the owner of the thing assigned); *Vetter v. Sec. Cont'l Ins. Co.*, 567 N.W.2d 516, 521 (Minn. 1997) ("As a general rule, and in the absence of a contractual provision to the contrary, an obligor on a contract may assign all beneficial rights to another, or may delegate his or her duty to perform under the contract to another, without the consent of the obligee."). Leonard's assertion that he was entitled to notice of assignment for any purpose other than establishing to whom payments should be made is without merit.

III. Evidence of the assignments was sufficient.

Leonard argues that TEM and Livingston have not sufficiently substantiated their ownership of his credit-card accounts. Specifically, he contends that the affidavits submitted by TEM and Livingston do not satisfy the requirement of Minn. R. Civ. P. 56.05 that supporting affidavits be made on personal knowledge setting forth such facts as would be admissible in evidence. While we conduct a de novo review of a district court's summary judgment decision, *McKee v. Laurion*, 825 N.W.2d 725, 729 (Minn.

2013), "we review a district court's evidentiary rulings, including rulings on foundational reliability, for an abuse of discretion." *Doe 76C v. Archdiocese of St. Paul and Minneapolis*, 817 N.W.2d 150, 164 (Minn. 2012). Decisions on foundation are within the sound discretion of the district court, and a district court may allow a qualified witness other than the custodian of a business record to establish foundation for admissibility of another business's records. Minn. R. Evid. 803(6), 901(a); *Nat'l Tea Co. v. Tyler Refrigeration Co.*, 339 N.W.2d 59, 62 (Minn. 1983) (holding that district court should be guided by certain principles relating to whether evidence was prepared for presentation in case being tried, whether report was made by independent agency or hired agency, when report was made, and nature of organization preparing the report).

In this case, the district courts did not abuse discretion by accepting TEM's and Livingston's supporting affidavits and attached exhibits. Both district courts found that the affiants were qualified and competent to testify as to their respective company's business practices and records associated with the assignments of Leonard's credit-card accounts as well as Chase's records of the account balances. Each affiant attested that he was in a position to have personal knowledge of the matters referenced in his affidavit and was familiar with the business records associated with the relevant Leonard account.

Based on the affidavits and attached exhibits, the district courts correctly concluded that TEM and Livingston provided sufficient evidence of the assignment of the respective accounts and the details of each account assigned. *See Mountain Peaks Fin. Servs., Inc. v. Roth-Steffen*, 778 N.W.2d 380, 387 (Minn. App. 2010) (stating that documents showing successive assignments of a loan, submitted with an affidavit of an

agent of the ultimate assignee, who had knowledge of that assignee's business-records-retention policies, were admissible under Minn. R. Evid. 803(6)). Leonard failed to present any evidence contradicting TEM's and Livingston's ownership of his credit-card accounts. A party opposing summary judgment "may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05. "General assertions" are not enough to create a genuine issue of material fact. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). "In order to successfully oppose a motion for summary judgment, appellant must extract *specific*, admissible facts from the voluminous record and particularize them for the trial judge." *Kletschka v. Abbott-Northwestern Hosp., Inc.*, 417 N.W.2d 752, 754 (Minn. App. 1988) (emphasis added), *review denied* (Minn. Mar. 30, 1988). And Leonard does not challenge the accuracy of the balance of the accounts such that, even if he articulated a valid challenge to admission of the Chase account statements into evidence, any error in admitting these documents is harmless. Because Leonard has raised no genuine issue of material fact regarding ownership or the balance of either account, the district courts did not err by granting summary judgment to TEM and Livingston.[2]

[2] Because Leonard does not challenge the amount owed on either account, we do not address his arguments relating to the theory of account stated to establish those amounts.

IV. Collateral estoppel

Leonard asserts the judgment in favor of TEM estops Livingston from bringing an action to collect the debt owing on the Livingston account. But Leonard's argument that the two accounts represent "essentially the same debt" is simply not correct.

"A test for determining whether two successive suits involve the same claims is to inquire whether both actions arise from the same operative nucleus of facts." *Nitz v. Nitz*, 456 N.W.2d 450, 451 (Minn. App. 1990) (quotation omitted).

> Collateral estoppel prevents a party from relitigating issues if (1) the issue is identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party in the prior case; and (4) there was a full and fair opportunity to be heard on the issue.

In re Trust Created by Hill, 499 N.W.2d 475, 484 (Minn. App. 1993), *review denied* (Minn. July 15, 1993). Collateral estoppel does not apply where an issue has not been actually litigated and decided. We review whether collateral estoppel precludes litigation de novo. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004).

TEM's and Livingston's collection actions do not arise from the same operative nucleus of facts. Leonard entered into two separate credit-card contracts with Chase. He used separate credit cards for each account and was separately billed monthly for each account. Leonard defaulted on both accounts. The debts are separate, and the fact that they were owed to the same creditor before the creditor chose to assign the accounts to

separate parties does not make them the same debt. The separate lawsuits do not involve the same parties or the same debts. Collateral estoppel does not preclude Livingston's claim.

Affirmed.