[Cite as *FIA Card Servs., N.A. v. Ryan*, 2009-Ohio-6660.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FIA Card Services, N.A.,	:	
Plaintiff-Appellee,	:	
		No. 09AP-193
v.	:	(C.P.C. No. 08CVH01-1014)
James M. Ryan,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 17, 2009

Javitch, Block & Rathbone, LLP, William M. McCann, and *Greggory B. Elzey*, for appellee.

James M. Ryan, pro se.

APPEAL from the Franklin County Court of Common Pleas

PER CURIAM

{¶1} Defendant-appellant, James M. Ryan ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which denied his motion to dismiss and granted summary judgment in favor of plaintiff-appellee, FIA Card Services ("appellee"). For the following reasons, we reverse in part.

{¶2} Appellee filed a "complaint for common law confirmation of the arbitration award." The complaint alleged that appellee issued appellant a credit card, and

appellant failed to make the required minimum payments. Appellee accelerated the debt and demanded payment on the entire debt. Appellant did not liquidate the debt. Appellee submitted the matter to arbitration pursuant to a written credit card agreement. The arbitrator directed appellant to pay appellee $9,911. Appellee attached to its complaint a copy of its April 2001 revised "terms and conditions" on its "credit card agreement," which contained a mandatory arbitration provision. Appellee also attached a copy of the arbitrator's decision. The decision noted that appellant did not participate in the arbitration because he believed that there was no authority for the arbitration to proceed.

{¶3} Appellant filed a Civ.R. 12(B)(6) motion to dismiss. Appellant argued that the arbitration award is void because he withdrew from arbitration before the arbitrator issued a decision. The court denied the motion. Thereafter, appellant filed an answer to appellee's complaint. He denied the allegations and raised defenses, including the statute of frauds.

{¶4} Appellee filed a Civ.R. 56 motion for summary judgment. Appellee attached a copy of the arbitrator's decision and the revised credit card agreement. Appellant filed a memorandum opposing summary judgment. Appellant reiterated that the arbitration award was void because he withdrew from arbitration and also argued that mandatory arbitration was not part of his credit card agreement. He submitted his own affidavit stating that: (1) appellee did not require mandatory arbitration when appellant first obtained his credit card, and (2) appellee included mandatory arbitration in its credit card terms after it declined to renew appellant's credit card. Appellant

submitted appellee's March 8, 2001 letter informing him that his credit card was not being renewed. Appellant also disputed the amount awarded in arbitration and the account number mentioned in the arbitration award.

{¶5} The trial court granted summary judgment in appellee's favor and ordered appellant to pay the arbitration award. Appellant appeals, raising three assignments of error:

> First Assignment of Error
>
> The Trial Court erred in not granting Defendant Ryan's Motion to Dismiss as Plaintiff's complaint failed to state a claim upon which relief could be granted.
>
> Second Assignment of Error
>
> The Trial Court erred in finding: that James M. Ryan was contractually obligated to arbitrate as a matter of law, that the arbitration award was valid, that Plaintiff was entitled to Summary Judgment as a matter of law, by granting judgment in the amount of $9,911. The Court erred by failing to consider the genuine issue of material facts that a contract to arbitrate in fact does not exist between James M. Ryan and Plaintiff as well as that Plaintiff failed to produce any evidence that: 1. a contract between James M. Ryan and Plaintiff did exist 2. that James M. Ryan did sign or agree to an arbitration agreement 3. that a debt was owed by James M. Ryan to Plaintiff. The Trial Court also did not consider that Ryan withdrew from arbitration proceedings prior to the arbitrator issuing a decision. The failure of the Trial Court to consider these material facts resulted in error in its decision that there remained no genuine issues of material facts; from which reasonable minds could only come to but one conclusion and that conclusion being adverse to James M. Ryan and in support of Plaintiff's Motion for Summary Judgment.

Third Assignment of Error

> The Trial Court erred by not finding that the Plaintiff's arbitration Agreement violates Section 1335.05 Ohio Revised Code as the arbitration agreement must be signed by the party to be charged therewith, as the terms stated there in can not be performed within one year and in fact do extend indefinitely beyond the termination of the contract. The Trial Court failed to consider the genuine material fact that James M. Ryan did not execute the contract or arbitration agreement and that Plaintiff's [sic] failed to produce executed contracts they alleged were in their possession. The Trial Court erred by not finding that the arbitration agreements do not comply with the Statute of Frauds and are therefore unenforceable.

{¶6} In his first assignment of error, appellant argues that the trial court erred by denying his motion to dismiss. We disagree.

{¶7} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim is procedural and tests whether the complaint is sufficient. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. A trial court shall not rely on allegations or evidence outside the complaint when considering the motion. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 1997-Ohio-169. Rather, the trial court reviews only the complaint and dismisses the case only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling him to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. Moreover, the court must presume that all factual allegations in the complaint are true and draw all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. The court need not, however, accept as true unsupported legal conclusions in the complaint. *Morrow v. Reminger &*

Reminger Co., L.P.A., 183 Ohio App.3d 40, 2009-Ohio-2665, ¶7. We review de novo a judgment on a Civ.R. 12(B)(6) motion. *Perrysburg Twp. v. Rossford,* 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5.

{¶8} Appellant argues that the arbitration award is void because he withdrew from arbitration before the arbitrator issued a decision. Appellee's complaint recognizes that appellant withdrew from arbitration, but we analyze whether this withdrawal rendered the arbitration award void and required the trial court to grant appellant's motion to dismiss.

{¶9} Arbitration agreements are governed by either statute or common law. See *Warner v. CTL Engineering, Inc.* (1983), 9 Ohio App.3d 52, 54. Statutory arbitration requires a written contract in which the parties agree to settle a dispute by arbitration. R.C. 2711.01(A). Parties subject to statutory arbitration have no right to withdraw from arbitration "except upon grounds that exist at law or in equity for the revocation of any contract." R.C. 2711.01(A); *Garlikov v. E.M. Ellman & Assoc., Inc.* (Aug. 28, 1979), 10th Dist. No. 79AP-176. Common law principles apply in the absence of statutory arbitration. *Warner* at 54. Under common law, parties may withdraw their consent to arbitrate at any time prior to the announcement of the arbitrator's award. *Kelm v. Kelm* (1992), 73 Ohio App.3d 395, 401.

{¶10} Appellant contends that appellee initiated arbitration pursuant to common law because it sought to collect the arbitration award through common law. Appellant confuses principles governing arbitration with principles governing the enforcement of the arbitration award. Appellee sought enforcement of the award through common law

because of the expiration of the one-year time period for statutory enforcement of an arbitral award under R.C. 2711.09. See, e.g., *MBNA Am. Bank, N.A. v. Canfora*, 9th Dist. No. 23588, 2007-Ohio-4137, ¶15 (recognizing that a party "may seek enforcement of its arbitration award after one year by pursuing common law claims"). To determine whether statutory arbitration principles govern, we examine appellee's complaint to discern whether the arbitration occurred pursuant to a written contract. See R.C. 2711.01(A).

{¶11} Although appellant disputes the allegations in appellee's complaint, we presume their truth and draw all reasonable inferences in favor of appellee, the non-moving party. See *Mitchell* at 192. Appellee alleged in its complaint that (1) it issued appellant a credit card that he subsequently used, and (2) it engaged in arbitration pursuant to a mandatory arbitration provision in its written terms and conditions. Based on these allegations in appellee's complaint, we conclude that appellee initiated statutory arbitration pursuant to a mandatory arbitration provision in a written contract. Appellant had no right to withdraw from statutory arbitration. See R.C. 2711.01(A); *Garlikov*. Appellant's withdrawal from the statutory arbitration did not invalidate the arbitrator's award. See *Juhasz v. Costanzo*, 144 Ohio App.3d 756, 763, 2001-Ohio-3338 (concluding that a party's attempt to withdraw from statutory arbitration "was a nullity"). Therefore, the trial court did not err by denying appellant's motion to dismiss, and we overrule appellant's first assignment of error.

{¶12} We address together appellant's second and third assignments of error. In these assignments of error, appellant argues that the trial court erred by granting summary judgment in favor of appellee.

{¶13} We review a summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶14} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶15} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. Once the moving party meets its initial burden, the non-movant must set forth specific facts demonstrating a genuine issue for trial. Id. at 293. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, quoting *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶16} Appellant argues that the statute of frauds barred enforcement of the credit card agreement with the mandatory arbitration provision. Appellant did not raise this issue in response to appellee's summary judgment motion, and a party challenging summary judgment may not raise on appeal an issue that he did not raise in summary judgment proceedings. See *Hood v. Rose*, 153 Ohio App.3d 199, 2003-Ohio-3268, ¶9-11. It is irrelevant that appellant raised the statute of frauds defense in his answer to appellee's complaint. Civ.R. 56(E) states that a party opposing summary judgment may not rest upon its pleadings. *Todd Dev. Co., Inc. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, ¶14. The mere assertion of a defense in an answer is insufficient to preserve it on a summary judgment motion. *P.K. Springfield, Inc. v. Hogan* (1993), 86 Ohio App.3d 764, 770. It is also irrelevant that appellant mentioned the statute of frauds in a memorandum concerning his motion to dismiss, given appellant's responsibility to

preserve issues in summary judgment proceedings. Cf. *Rose* at ¶9-11. Accordingly, we decline to address appellant's statute of frauds issue.

{¶17} Appellant argues a genuine issue of material fact exists as to whether the arbitration award is valid. Appellant claims that he did not assent to the mandatory arbitration provision and that appellee adopted mandatory arbitration after it unilaterally decided not to renew his credit card. There are shortcomings in the evidence submitted by both appellant and appellee with respect to the motion for summary judgment.

{¶18} The evidence submitted by appellant includes a letter from MBNA Platinum Plus (a precursor to FIA Card Services, N.A.), dated March 8, 2001, terminating a credit card. Appellant also submitted his affidavit claiming that he never received a signed copy of the credit card agreement, and that appellee adopted the mandatory arbitration provision after his card was terminated. He included a copy of an undated MBNA credit card agreement that does not contain an arbitration provision. The copy is difficult to read as it appears to have been copied from a copy.

{¶19} A review of appellee's evidence shows that it submitted with its motion for summary judgment a nearly indecipherable document entitled "Credit Card Agreement Additional Terms and Conditions, Selected Sections." It too appears to be a copy of a copy and some words are cut off or absent. This agreement is marked as revised April 2001, and it is noteworthy that this document is dated *after* the letter terminating appellant's card. The April 2001 document is the only credit card agreement submitted by appellee and it contains a mandatory binding arbitration provision. However, this evidence shows only a generic credit card member agreement from MBNA and no

evidence that this agreement applied to appellant's account. There is no evidence of the original credit card agreement, or any application signed by appellant. There is no affidavit of anyone with personal knowledge stating that appellant assented to such an agreement. If appellant was not subject to the arbitration clause, appellee cannot enforce the arbitration award against him. See *Worldwide Asset Purchasing, LLC v. Easterling,* 10th Dist. No. 09AP-347, 2009-Ohio-6196, ¶10-12.

{¶20} Appellee has not met its threshold burden under *Dresher* showing that it is entitled to summary judgment. The April 2001 agreement is inadequate to establish that it has any relation to appellant or that he is bound by its arbitration clause. There is no evidence that the agreement applied to appellant, that it had ever been sent, or that he had ever assented to be contractually bound. Because the terms of the credit card agreement assented to by appellant are not in the record, there is no basis for concluding that appellee could unilaterally change the terms of the agreement without appellant's consent and valid consideration for the change.

{¶21} We are aware that in some circumstances an arbitration clause does not have to be signed by the parties to be valid. E.g. *Chase Manhattan Bank USA v. Myers*, 4th Dist. No. 07CA48, 2008-Ohio-965, ¶11. There is also case law in Ohio that credit card agreements are contracts whereby the issuance and use of a credit card creates a legally binding agreement. *Bank One, Columbus, N.A. v. Palmer* (1989) 63 Ohio App.3d 491, 493. Thus continued use of a credit card may constitute acceptance to an arbitration provision. *Chase Manhattan* at ¶3.

{¶22} Credit card companies sometimes accomplish a change in terms by sending the cardholder notice of a change in the terms of the agreement, with an indication that continued use of the card will be deemed to constitute assent to the change. *Discover Bank C/O DFS Servs., L.L.C. v. Lammers*, 2nd Dist. No. 08-CA-85, 2009-Ohio-3516, ¶33. If there was evidence that appellant used the credit card after receiving notice of the change in terms, it could be argued that appellant accepted the agreement and the arbitration clause under a theory of novation. Id. at ¶42.

{¶23} Here, appellee did not submit a signed credit card application, or the original credit card agreement. There is no evidence that the agreement contained an arbitration clause or a provision that continued use constituted assent to arbitration. Rather, the evidence indicates that appellant was unable to use his card after it was cancelled in March 2001. One can infer from this evidence that appellant was unable to agree to the revised April 2001 agreement.

{¶24} In other words, appellee has failed to meet its initial responsibility of informing the trial court of some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the absence of a genuine issue of material fact exists and that appellant has no evidence to support his claims. *Dresher* at 293. If the moving party fails to meet its initial burden, the burden never shifts to the nonmoving party.

{¶25} Therefore, construing the evidence in favor of the non-moving party leads us to conclude that there is a genuine issue of material fact as to the validity of the arbitration clause as it applies to appellant.

{¶26} In his remaining arguments, appellant also reiterates that he withdrew from arbitration, and he disputes the amount awarded in arbitration. Because appellee has not produced evidence that appellant was bound by an arbitration agreement, any resolution of those issues is premature.

{¶27} Appellant argues that the account number mentioned in the arbitration award differs from the one on the credit card he obtained. Appellant supported this claim with his affidavit, but did not corroborate it with Civ.R. 56 evidence. In his memorandum opposing summary judgment, appellant attached correspondence detailing credit card information, but appellant does not indicate that the correspondence contains his account number, and we can discern no account number from the correspondence. Appellant also attached to his memorandum a letter informing him that appellee was not renewing his credit card; the account number is redacted, however. To be sure, the number is not redacted in the copy of this letter that appellant attached to his appellate brief, and the number is different than the account number listed on the arbitration award. However, we are limited to the evidence submitted to the trial court, and we cannot decide the issue of the correct account number based on the letter appellant attached to his brief. See *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus.

{¶28} Given the state of the record before us, we conclude that it was error for the trial court to grant summary judgment in favor of appellee. Therefore, we sustain appellant's second assignment of error, and overrule assignments of error one and three.

{¶29} Based on the forgoing, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas and remand this case for further proceedings consistent with this decision.

Judgment affirmed in part, reversed in part; remanded for further proceedings..

TYACK and CONNOR, JJ., concur.
FRENCH, P.J., concurs in part and dissents in part.

FRENCH, P.J., concurring in part and dissenting in part.

{¶30} I agree with the majority's opinion regarding the first assignment of error. I disagree, however, with the majority's opinion regarding the second and third assignments of error. Appellant does not dispute that he carried a balance on the credit card after appellee included mandatory arbitration in its written terms and conditions. This continued affiliation with appellee constituted consent to appellee's credit card terms, including the mandatory arbitration provision. *MBNA Am. Bank, N.A. v. Jones*, 10th Dist. No. 05AP-665, 2005-Ohio-6760, ¶2. I would affirm the trial court's decision in all respects.
