COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP151 **Cir. Ct. No. 2010CV823**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

DALE DROGORUB,

PLAINTIFF-RESPONDENT,

V.

THE PAYDAY LOAN STORE OF WI, INC., D/B/A PAYDAY LOAN STORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. The Payday Loan Store of WI, Inc., d/b/a Payday Loan Store (PLS) appeals a judgment awarding damages to Dale Drogorub under

the Wisconsin Consumer Act. The circuit court determined a number of loan agreements Drogorub entered into with PLS were unconscionable. The court also determined the arbitration provision in the contracts violated the consumer act by prohibiting Drogorub from participating in class action litigation or classwide arbitration. Finally, the court awarded Drogorub attorney fees, pursuant to WIS. STAT. § 425.308.[1]

¶2 We conclude the circuit court properly determined the loan agreements were unconscionable. However, the court erred by determining the arbitration provision violated the consumer act. We therefore affirm in part and reverse in part. Additionally, because Drogorub has not prevailed on his claim that the arbitration provision violated the consumer act, we remand for the circuit court to recalculate his attorney fee award.

BACKGROUND

¶3 On June 2, 2008, Drogorub obtained an auto title loan from PLS. Under the terms of the loan agreement, Drogorub received $994 from PLS and agreed to repay $1,242.50 on July 3, 2008. Thus, Drogorub's loan had a finance charge of $248.50 and an annual interest rate of 294.35%.

¶4 Drogorub failed to repay the entire balance of the loan when due. Instead, he paid the finance charge of $248.50, signed a new loan agreement, and extended the loan for another month. Drogorub ultimately made five more "interest only" payments, signing a new loan agreement each time and extending

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the loan for five additional months.[2] Each loan agreement provided for a finance charge of $248.50 and an annual interest rate of 294.35%. Drogorub defaulted on the loan in January 2009. All told, he paid $1,491 in interest on the $994 loan, and he still owed PLS $1,242.50 at the time of default.

¶5 Drogorub filed suit against PLS on August 20, 2010, asserting violations of the Wisconsin Consumer Act. Specifically, he alleged: (1) the loan agreements were unconscionable, in violation of WIS. STAT. § 425.107; (2) the loan agreements prohibited him from participating in class action litigation or classwide arbitration, contrary to WIS. STAT. §§ 421.106 and 426.110; and (3) PLS engaged in prohibited collection practices, in violation of WIS. STAT. § 427.104(1)(j). Drogorub sought actual damages, statutory damages, and attorney fees.

¶6 Drogorub subsequently moved for summary judgment, submitting his own affidavit in support of the motion. PLS opposed Drogorub's motion and also asserted that some of his claims were time barred by the relevant statute of limitations. The only evidence PLS submitted to the court on summary judgment was a transcript of Drogorub's deposition.

¶7 At his deposition, Drogorub testified he approached PLS about taking out an auto title loan because he and his wife needed money to purchase food and pay their rent. Before going to PLS, Drogorub contacted another title loan store, but that store refused to extend him credit because his vehicle was too old. Drogorub testified the transaction at PLS was "hurried[,]" and PLS "push[ed]

[2] Three of the subsequent loan agreements were actually signed by Drogorub's wife, Rachelle. Drogorub testified he authorized Rachelle to sign the loan agreements on his behalf.

it through pretty fast." While Drogorub understood that he had the right to read the contract, and he "read what [he] could in the time allotted," he did not read the entire contract because "they didn't really give [him] the time." Drogorub testified, "They just said, 'Here, initial here and sign here,' and that's it. They really didn't give me the time of day to say, 'Here, read this and take your time[.]'" He also stated PLS's employees were "hurrying me, rushing me. They had other customers waiting, so I felt it was take it or leave it."

¶8 Drogorub further testified he was fifty-six years old and had completed high school and one year of community college. He had previously worked at an electric supply company but had been out of work since 2001. He had not had a bank account since 2002. His previous experience borrowing money was limited to one car loan and one home equity loan. Drogorub had never borrowed money from a payday lender before, although PLS had given his wife an auto title loan at some point in the past.

¶9 The circuit court issued an oral ruling on Drogorub's summary judgment motion. First, the court dismissed Drogorub's claims stemming from the first three loan agreements on statute of limitations grounds. The court also dismissed Drogorub's claim that PLS engaged in prohibited collection practices. However, the court granted Drogorub summary judgment on his remaining claims. The court determined the loan agreements were both procedurally and substantively unconscionable, and it also concluded they violated the consumer act by requiring Drogorub to waive his ability to proceed as part of a class. The court entered a judgment awarding Drogorub $1,071.75 in actual and statutory damages and $4,850 in attorney fees. PLS appeals.

STANDARDS OF REVIEW

¶10 We review a grant of summary judgment independently, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶11 Whether a contract is unconscionable involves questions of fact and law. ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53, ¶25, 290 Wis. 2d 514, 714 N.W.2d 155. We will not set aside the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether the facts found by the court render a contract unconscionable is a question of law that we review independently. ***Id.***

¶12 Statutory interpretation also presents a question of law subject to our independent review. *See* ***Zellner v. Cedarburg Sch. Dist.***, 2007 WI 53, ¶16, 300 Wis. 2d 290, 731 N.W.2d 240. "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation begins with the language of the statute, and if the statute's meaning is plain, our inquiry goes no further. ***Id.***, ¶45.

DISCUSSION

I. Unconscionability

¶13 As a threshold matter, the parties dispute the proper test for unconscionability when a contract is alleged to be unconscionable under the

Wisconsin Consumer Act. The circuit court applied the common law test, under which an unconscionable contract must be both procedurally and substantively unconscionable. *See* ***Wisconsin Auto Title***, 290 Wis. 2d 514, ¶29. A contract is procedurally unconscionable if factors bearing upon the formation of the contract show that the parties did not have a real and voluntary meeting of the minds. ***Id.***, ¶34. The relevant factors include the parties' age, education, intelligence, business acumen and experience, their relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms would have been permitted by the drafting party, and whether there were alternative providers of the subject matter of the contract. ***Id.*** A contract is substantively unconscionable when its terms are unreasonably favorable to the more powerful party. ***Id.***, ¶36.

¶14 Drogorub argues the common law unconscionability analysis is inapplicable when a contract is alleged to be unconscionable under the consumer act. He points out that WIS. STAT. § 425.107, the section of the act dealing with unconscionability, lists nine factors a court "may consider … as pertinent to the issue of unconscionability[.]" *See* WIS. STAT. § 425.107(3). The statute does not require a finding of either procedural or substantive unconscionability. He also notes that, in ***Bank One Milwaukee, N.A. v. Harris***, 209 Wis. 2d 412, 419-20, 563 N.W.2d 543 (Ct. App. 1997), the court found a contract provision unconscionable under the consumer act after applying several of the factors set forth in § 425.107(3), without addressing procedural or substantive unconscionability. Thus, he contends a court should not apply the common law test for unconscionability when conducting an unconscionability analysis under the consumer act. We disagree.

¶15 WISCONSIN STAT. § 425.107(3) states that a court "may consider" certain factors in determining whether a contract is unconscionable. A court therefore has discretion to consider all of those factors, some of them, or none at all. *See* ***Rotfeld v. DNR***, 147 Wis. 2d 720, 726, 434 N.W.2d 617 (Ct. App. 1988) (The word "may" in a statute generally allows for the exercise of discretion, as opposed to the word "shall," which indicates mandatory action.). The last factor listed in the statute is "[d]efinitions of unconscionability in statutes, regulations, rulings and *decisions* of legislative, administrative or *judicial bodies*." WIS. STAT. § 425.107(3)(i) (emphasis added). "Definitions of unconscionability" in the "decisions" of "judicial bodies" plainly refers to the common law of unconscionability. Thus, § 425.107(3)(i) gives courts discretion to consider the common law of unconscionability when determining whether a contract is unconscionable under the consumer act. This explains why ***Harris*** found a consumer contract unconscionable without addressing procedural and substantive unconscionability, but other cases dealing with consumer contracts have applied the common law approach. *See, e.g.*, ***Wisconsin Auto Title***, 290 Wis. 2d 514, ¶76.

¶16 In this case, the circuit court determined the loan agreements Drogorub signed were procedurally unconscionable because: (1) Drogorub never read the contracts; (2) PLS did not explain the contract terms; (3) Drogorub felt rushed into signing the initial contract and had no opportunity to ask questions; (4) Drogorub could not get a loan anywhere else, so there was no alternative provider of the subject matter of the contracts; (5) Drogorub's bargaining position was weak because he needed money to purchase food and pay rent; (6) Drogorub had no opportunity to negotiate with PLS; (7) the loan agreements required Drogorub to use his vehicle—his only asset—as collateral; and (8) Drogorub had a high school education, had not worked since 2001, had no significant business

experience, and had relatively minimal experience taking out loans. These findings of fact are supported by Drogorub's deposition testimony and are not clearly erroneous. *See* ***id.***, ¶25. We agree with the circuit court that these facts support a finding of procedural unconscionability.

¶17 The court then determined that, under these circumstances, charging a 294% interest rate was unreasonably unfair to Drogorub, the weaker party, and was therefore substantively unconscionable. The court concluded PLS "[took] advantage of a very poor circumstance on the part of the borrower" by charging an exorbitant interest rate to someone who had no other access to funds, who was using his only asset as collateral, and who was trying to borrow a relatively small amount of money to pay day-to-day bills. The court noted Drogorub was "not getting much, but [was] paying a lot for the use of the funds."

¶18 PLS argues the court's substantive unconscionability finding is flawed because it relies on the fact that PLS charged an annual interest rate of 294%. PLS correctly states that, under WIS. STAT. § 422.201(2)(bn), consumer credit transactions entered into after October 31, 1984 are "not subject to any maximum limit on finance charges."[3] PLS then notes that, under WIS. STAT. § 425.107(4), "Any charge or practice expressly permitted by [the consumer act] is not in itself unconscionable[.]" Accordingly, because a 294% interest rate is permissible under § 422.201(2)(bn), PLS argues it cannot be unconscionable.

¶19 However, WIS. STAT. § 425.107(4) goes on to state that, "even though a practice or charge is authorized by [the consumer act], the totality of a

[3] Under the consumer act, the term "finance charge" includes interest. *See* WIS. STAT. § 421.301(20)(a).

creditor's conduct may show that such practice or charge is part of an unconscionable course of conduct." The circuit court essentially determined the 294% interest rate PLS charged was part of an unconscionable course of conduct, in which PLS preyed on a desperate borrower who had no other means of obtaining funds and rushed him into signing a contract without giving him the chance to ask questions or negotiate. The court concluded that, while a 294% interest rate is not per se unconscionable, it is unconscionable under the facts of this case. We agree with the court's analysis.

¶20 Moreover, we note that WIS. STAT. § 425.107(1) permits a court to strike down a transaction as unconscionable if "any *result* of the transaction is unconscionable." (Emphasis added.) Here, the result of the transaction was plainly unconscionable. Drogorub borrowed $994 from PLS, paid back $1,491, and still owed $1,242.50 at the time of default. Thus, in a seven-month period, Drogorub was required to pay $2,733.50 for a $994 loan.[4] As the circuit court aptly noted, Drogorub was "not getting much, but [was] paying a lot for the use of the funds." We agree with the circuit court that the result of this transaction was oppressive, unreasonable, and unconscionable.

¶21 PLS nevertheless argues the circuit court erred by granting summary judgment because it "rel[ied] exclusively on the deposition and affidavit of Dale Drogorub, in which he one-sidedly describe[d] his experiences in the PLS store."

[4] In addition, between January 12, 2009, when payment was due, and February 21, 2009, when PLS issued a notice of default, PLS charged Drogorub $320.65 in additional interest. The notice of default further provided, "Additional Interest after the date of this notice continues at **$8.02** / day until Obligation is paid in full." PLS demanded that Drogorub pay the entire amount due by March 8, 2009 and stated that, if he paid on that date, the amount owing would be $1,683.45.

However, Drogorub's deposition and affidavit were the only evidence before the court on summary judgment. It is therefore disingenuous for PLS to argue that the court erred by relying exclusively on Drogorub's version of events. PLS could have submitted evidence contradicting Drogorub's version—for instance, affidavits of the PLS employees who handled the transactions. Having failed to do so, PLS cannot now complain that the circuit court relied exclusively on Drogorub's undisputed testimony.

¶22 PLS also contends it should have been allowed to present evidence on procedural unconscionability at an evidentiary hearing. Yet, as Drogorub points out, PLS never requested an evidentiary hearing in the circuit court. PLS asked the court to deny Drogorub's summary judgment motion and "allow this matter to proceed to trial," but it never asserted the court should hold an evidentiary hearing before deciding Drogorub's motion. We do not ordinarily address issues raised for the first time on appeal, and we make no exception here. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). Furthermore, PLS cites no authority for the proposition that an evidentiary hearing is an available procedure on summary judgment. WISCONSIN STAT. § 802.08(2) anticipates judgment based on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," and does not explicitly authorize the court to hold an evidentiary hearing. Accordingly, we affirm that portion of the circuit court's judgment holding that Drogorub's loan agreements were unconscionable.

II. Arbitration provision

¶23 Each of the loan agreements Drogorub signed included an arbitration provision, which read, "Either BORROWER or LENDER can give written notice

to the other of an intention to require arbitration of the other party's Claim[.]" The provision went on to state, "If arbitration is chosen by either BORROWER or LENDER … all BORROWER'S claims must be arbitrated and **BORROWER MAY NOT PARTICIPATE IN A CLASS ACTION OR A CLASS-WIDE ARBITRATION, EITHER AS A REPRESENTATIVE OR MEMBER OF ANY CLASS**[.]" The circuit court determined this provision violated WIS. STAT. § 426.110, which gives consumers the right to bring class action lawsuits, and WIS. STAT. § 421.106, which states that consumers may not "waive or agree to forego rights or benefits under [the consumer act]." The court therefore awarded Drogorub $100 in statutory damages, or $25 per violation. *See* WIS. STAT. § 425.302(1)(a).

¶24 However, the United States Supreme Court recently held that the Federal Arbitration Act (FAA) preempts state laws that prohibit arbitration agreements from disallowing class actions and classwide arbitration. *See* ***AT & T Mobility LLC v. Concepcion***, 563 U.S. __, 131 S. Ct. 1740, 1753 (2011). The Court reasoned that § 2 of the FAA, which requires enforcement of arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract[,]" does not "preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." ***Id.*** at 1745, 1748; *see also* 9 U.S.C. § 2 (2011). The Court then determined that requiring the availability of classwide proceedings conflicts with the "overarching purpose" of the FAA—that is, "ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." ***Concepcion***, 131 S. Ct. at 1748. The Court therefore held the FAA preempts state laws that strike down arbitration provisions that prohibit classwide proceedings. *See* ***id.*** at 1753.

¶25 ***Concepcion***'s holding notwithstanding, Drogorub argues the FAA does not preempt the consumer act in this case because the contracts at issue specify they are governed by Wisconsin law, and, consequently, the FAA does not apply. We disagree. Contract language does not preclude application of the FAA unless the parties' intent to do so is "abundantly clear." *See* ***UHC Mgmt. Co. v. Computer Scis. Corp.***, 148 F.3d 992, 997 (8th Cir. 1998). A general choice-of-law clause does not make it abundantly clear that the parties intended to preclude the application of the FAA. *See* ***Porter Hayden Co. v. Century Indem. Co.***, 136 F.3d 380, 382-83 (4th Cir. 1998) (general choice-of-law provision does not demonstrate clear intent to displace federal arbitration law); *see also* ***Mastrobuono v. Shearson Lehman Hutton, Inc.***, 514 U.S. 52, 59-60 (1995) (holding that a choice-of-law provision opting for New York law was not sufficient to annul an arbitrator's award that was prohibited under New York law but allowed by the FAA). Thus, despite the choice of law clause in Drogorub's loan agreements, the FAA preempts the consumer act's requirement that the agreements allow classwide proceedings. The circuit court therefore erred by concluding the agreements violated the consumer act and by awarding statutory damages for the violations.

III. Attorney fees

¶26 The circuit court awarded Drogorub $4,850 in attorney fees pursuant to WIS. STAT. § 425.308, which provides that a court "shall" award attorney fees and costs "[i]f the customer prevails in an action arising from a consumer transaction." PLS argues Drogorub did not prevail because: (1) he asserted claims based on seven contracts, but his claims related to three of the contracts were dismissed; and (2) the court dismissed his claim that PLS engaged in prohibited collection practices. PLS therefore contends that, "[a]t maximum,

Drogorub prevailed on half of his total claims" and his attorney fee award should be reduced accordingly. *See* ***Footville State Bank v. Harvell***, 146 Wis. 2d 524, 539-40, 432 N.W.2d 122 (Ct. App. 1988) (A consumer who succeeds on some but not all issues recovers attorney's fees under § 425.308 "only as to the successfully litigated issues.").

¶27 In reply, Drogorub points out that the circuit court already reduced his attorney fee award by $1,000 to account for "the time spent in filing, briefing and arguing claims that were not successful in this matter[.]" Thus, he contends that, if we affirm the circuit court in all other respects, we should also affirm the attorney fee award. However, we have reversed that portion of the judgment concluding that the loan agreements' arbitration provision violated the consumer act. Accordingly, Drogorub has not prevailed on his claim regarding the arbitration provision. We therefore remand for the circuit court to review Drogorub's attorney fee award to account for the time spent filing, briefing, and arguing this additional unsuccessful claim.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded. No costs on appeal.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.