IN THE SUPREME COURT OF OHIO

Gary Szewczyk,	:	
	:	Case No. 2022-0827
Appellant,	:	
	:	On Appeal from the Cuyahoga County
v.	:	Court of Appeals, Eighth Appellate District
	:	
Century Federal Credit Union,	:	Court of Appeals
	:	Case No. 110822
Appellee.	:	

APPELLEE CENTURY FEDERAL CREDIT UNION'S MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLANT GARY SZEWCZYK

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EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This is a plain and simple breach of contract case and the Eighth District Court of Appeals correctly stated and applied well-established and ordinary Ohio law, ruling that Gary Szewczyk failed to allege a cause of action for breach of contract against Century Federal Credit Union. In so ruling, the Eighth District relied solely on the allegations in Szewczyk's own Complaint and the four corners of the Century contract attached as an exhibit to that Complaint. Szewczyk's contention before this Court that the Eighth District relied on "facts [and assumptions] outside the pleadings" is false, as a simple reading of the Eighth District's opinion amply demonstrates. Indeed, it is *Szewczyk* who attempts to rely here on "facts" never alleged in his Complaint, instead referring to allegations made for the first time in his Reply Brief in the Court of Appeals rather than in the Complaint.

Furthermore, Szewczyk fails to demonstrate why the implications of the Eighth District's decision are of any public or "great" general interest rather than limited to the unique facts alleged in Szewczyk's own Complaint. Szewczyk effectively concedes the Eighth District accurately stated Ohio law. Indeed, Szewczyk now *admits* that the Eighth District correctly ruled that the Contract unambiguously provided that "the balance used to determine overdrafts 'can' be less than the amount of money actually in the member's account." (Pl.'s Memo, p. 7.) Szewczyk instead offers only misstatements in support of his insulting suggestion that the Eighth District's application of that law was so obviously wrong that it supposedly flipped the law "on its head". In any event, Szewczyk fails to offer any reason to believe that the Eighth District's opinion will have any impact on any other case much less somehow cause any Ohio court to misapply such routine and ordinary law to different facts.

Finally, Szewczyk's misleading assertion to this Court that this case is about whether Century charges overdraft fees even when both the actual and available balances are positive is cynical and disingenuous. Szewczyk knows that such a contention is false. Indeed, Szewczyk admits in Paragraph 15 of his Complaint that Century did ***not*** commit any such error – whether intentionally or not: "The improper fees charged by Century were not 'errors'." Class Action Complaint ("Complaint" or "Compl."), 9/14/2020. The actual Contract uses the terms "discrepancies" and "irregularities." Compl. Ex. A ¶ 25b.

In other words, Szewczyk knows that Century did not mistakenly assess a fee when there were "*available* funds . . . sufficient to pay" an item. Instead, as his counsel has alleged in hundreds of such cases across the country, the plaintiff's contention is that Century's contract was ambiguous about whether it would determine there was an overdraft based on the amount of "available funds" in the account rather than the "actual balance," *not* that Century erroneously assessed fees even when the available balance was positive. But the Eighth District in this case rejected any such claim of ambiguity as to which balance was used to determine an overdraft, as Szewczyk now admits was correct. Memorandum in Support of Jurisdiction, 7/5/22, p. 7 ("Memorandum" or "Memo.").

If, as Szewczyk would have this Court believe, he supposedly understood that the balance on his account statement represented the amount of "available funds" in his account, then he knew at the time that the charging of a fee when the available balance was positive was indeed an "error." Accordingly, as Szewczyk admitted in Paragraph 16 of his Complaint, he would have had a duty to report the fees to Century as "errors" or discrepancies or irregularities within 33 days of issuance of the account statement in order to pursue this case.

In simple terms, Szewczyk is trying in this Court to resurrect his case by throwing a disingenuous "Hail Mary" pass based on a false premise. Consequently, it would be a useless exercise of the Court's jurisdiction to accept this case for further appeal.

STATEMENT OF THE CASE AND FACTS

Szewczyk's Statement of the Case and Facts is argumentative, incomplete, and grossly misrepresents the record on appeal and the Eighth District's decision. The relevant facts of this case are undisputed. Accordingly, Century sets forth its own Statement of Facts as follows, and incorporates by reference the statement of facts set forth in the Eighth District's decision.

1. Szewczyk's Breach of Contract Lawsuit.

On September 14, 2020, Szewczyk sued Century for breach of contract, including breach of the implied covenant of good faith and fair dealing, or, in the alternative, unjust enrichment. *See* Compl., *passim.* Szewczyk's claims are premised upon his allegations that Century improperly assessed an overdraft fee on his checking account when his account was "never actually overdrawn." *Id*. Szewczyk has a checking account with Century and opted into Century's standard overdraft practices, which Szewczyk expressly admits in his Complaint is governed by the Membership and Account Agreement and Disclosures ("Membership Agreement" or "Agreement"). Compl. ¶¶ 8-9; *see also* Compl. Ex. A. The Agreement provides, for example, information about the manner in which Century pays member transactions, when the member's account will be overdrawn, and when funds will be available to use. *Id.* Specifically, the Agreement states, in relevant part, that Century determines when a member's account has sufficient funds to pay a transaction based upon the "available funds" – i.e., the available balance. Compl. Ex. A at 5.

Specifically, to support his claims, Szewczyk complains that he was assessed an improper overdraft fee on an ATM withdrawal on November 27, 2015. Compl. ¶ 14. Szewczyk alleges that this charge breached the terms of the Agreement because, according to Szewczyk, the balance on his account statement (issued weeks after the transaction at issue) was not negative after the withdrawal and therefore, the transaction purportedly did not overdraw his account. *Id*. Critically,

Szewczyk did *not* allege in his Complaint that he had sufficient available funds – i.e., a positive available balance – at the time of the ATM withdrawal. *Id*. Likewise, he did not allege that his account statement reflected the available balance rather than the actual balance. *Id*, *passim.*

2. Based on Ohio's Rules of Contract Construction, the Trial Court and Eighth District Found the Agreement to be Clear and Unambiguous.

Century moved to dismiss Szewczyk's Complaint in its entirety pursuant to Ohio Civ. R. Rule 12(b)(6). Motion to Dismiss ("Motion" or "Mot."), 11/18/2020. Following briefing on the Motion, the trial court issued its ruling granting Century's Motion and dismissing all of Szewczyk's claims on the merits. Journal Entry, 8/13/2021, p. 1. In so doing, the trial court held that Century's Agreement provides "a clear roadmap" of how overdraft fees are assessed on the available balance. *Id*. at 8. Szewczyk appealed, making the same arguments that he makes here and raising for the first time on appeal a new theory of liability, alleging that his claim purportedly has nothing to do with the actual balance versus available balance theory of liability. *See* Appellant's Brief, 12/6/21; Appellant's Reply Brief, 2/7/2022; Appellee's Brief 1/26/2022. After briefing and a thorough review of the facts and law, the Eighth District affirmed the trial court's judgment dismissing Szewczyk's claims in their entirety. Journal Entry and Opinion, 5/19/22 ("Opinion").

Relying on Ohio's longstanding principles of contract interpretation and applying the Rule 12(b)(6) standard to the facts before it, the Eighth District found that Szewczyk failed to state a breach of contract claim and therefore, the trial court properly dismissed Szewczyk's Complaint. *Id*. ¶¶ 26, 29. The Eighth District first addressed Szewczyk's breach of contract claim. Even though the Agreement never defined the terms "available funds" or "available account balance," the Eighth District explained that it is clear from the four corners of the contract that "available funds" or "available funds balance" do not equate to the actual funds that may be in a member's account.

Id. ¶ 22. Construing the account documents as a whole, the Eighth District found that the Agreement is "clear and unambiguous" that "available funds" and "available account balance" are not synonymous with "actual" balance as Szewczyk's contends. *Id*. Rather, a member's available funds balance can be less than his or her actual balance. *Id*. The Eighth District provided the following example, "[t]hus, if a member makes an ATM deposit of $100 into his or her account, his or her actual balance may reflect that $100, but that $100 may not be included in the member's available balance." *Id*.

The Eighth District found this interpretation to be supported by the Truth in Savings Disclosure and Funds Availability Policy, which reiterated "that there is [a] distinction between available account balance and actual account balance." *Id*. ¶ 25. Thus, upon review of the contract as a whole, the Eighth District found that the Agreement unambiguously explains the concept "that a member will not have access to his or her funds immediately; that is, that the available balance can be less than the actual balance in a member's account." *Id*. ¶ 26.

Next, the Eighth District turned to Szewczyk's claim for breach of the implied covenant of good faith and fair dealing. *Id*. ¶ 27. Because that claim was based on the same allegations as his breach of contract claim, it necessarily failed as well. *Id*. As the trial court explained, a breach of the implied covenant "does not stand alone as a separate claim." *Id*. (citation omitted).

Finally, the Eighth District addressed Szewczyk's unjust enrichment claim. *Id*. ¶ 28. Recognizing that Szewczyk "does not challenge the validity or enforceability of the parties' agreement," the unjust enrichment claim failed as a matter of law. *Id*. For all these reasons, the Eighth District affirmed the trial court's dismissal of Szewczyk's Complaint. ¶ 29.

On July 5, 2022, Szewczyk filed his Memorandum in Support of Jurisdiction ("Memorandum" or "Memo."), relying almost entirely on extrinsic evidence.

ARGUMENTS IN OPPOSITION TO PROPOSITIONS OF LAW

Notably, Szewczyk's case is based on a breach of contract, but he spends little, if any time, on the actual contractual language. Indeed, Szewczyk *admits* that the Eighth District correctly ruled that the Contract unambiguously provided that "the balance used to determine overdrafts 'can' be less than the amount of money actually in the member's account." (Pl.'s Memo, p. 7.)

Instead, as he did in the Eighth District, Szewczyk focuses solely on the account statements rather than the actual contract between the parties that forms the basis of his breach of contract claim. But as the Eighth District aptly stated, "[a]t issue in this case is whether Century failed to fulfill its ***contractual*** obligations." Opinion ¶ 20 (emphasis added). Realizing that the plain and unambiguous language of the contract fatally undermines his theory of liability, Szewczyk instead tries to save his claim by arguing that the Eighth District supposedly failed to properly apply Ohio's standard on a motion to dismiss and failed to construe all ambiguities in the contract against Century. As discussed more fully below, both arguments fail as a matter of law.

1. Response to Szewczyk's First Proposition of Law.

For his First Proposition of Law, Szewczyk provides:

> All reasonable inferences on a motion to dismiss must be drawn in favor of the non-moving party, and so a complaint may not be dismissed based on factual assumptions that are prejudicial to the plaintiff.

Memo. at 6. In support of this proposition, Szewczyk "relied upon a series of unsupported factual allegations made by Century." *Id*. at 7. Szewczyk does not cite to any language in the Eighth District's opinion to support his contention and in truth it is grossly inaccurate.

As an initial matter, Szewczyk does not dispute that the Agreement provides that Century will determine overdrafts based on a member's "available funds" or "available account balance." Instead, he argues that the court must accept the Complaint's allegation that he always did have sufficient available funds in his account as true. Not so. To begin with, there is no allegation

anywhere in the Complaint that Szewczyk *had* sufficient "available" funds in his account. Instead, he only alleges the balance shown on his account statement was positive, but even then, he did not allege the account statement balance consisted of the available balance.

The court must accept only ***well-pleaded*** facts as true. *Jones v. Lucas Cty. Sheriff's Med. Dep't*, 6th Dist. Lucas No. L-11-1196, 2012-Ohio-1398, ¶ 12 ("Only well-pleaded facts must be taken as true"). Because the Agreement attached to and incorporated into the Complaint clearly contradicts any notion that Szewczyk had sufficient available funds in his account or that Century breached the contract, neither the trial court nor the Eighth District was required to take those allegations as true. *State ex rel. Washington v. D'Apolito*, 2018-Ohio-5135, 156 Ohio St. 3d 77, 80, 123 N.E.3d 947, 950–51 ("A court is not required to accept allegations in a complaint as true when they are contradicted by documents attached to the complaint"). Furthermore, where the court is required to draw only ***reasonable*** inferences in favor of plaintiff on a motion to dismiss, it would not have been reasonable for either the Eighth District or trial court to infer that Szewczyk had sufficient available funds in his account or that the account statements reflected the available balance. *See Ray v. Wal-Mart Stores, Inc.*, 2013-Ohio-2684, 993 N.E.2d 808, ¶ 35 (4th Dist.) (the court "may make reasonable inferences from facts shown with direct proof" but "may not, however, make inferences from a plaintiff's speculation as to what the facts are").

To the contrary, Szewczyk's Complaint *precluded* any inference that the account statement balance reflected the amount of "available funds." Szewczyk admitted in Paragraph 15 of the Complaint that the fees were *not* assessed in "error," necessarily meaning that Century did not mistakenly assess a fee when the amount of available funds was sufficient to pay the item.

Szewczyk argues that he "alleged that he reasonably understood that the account balance on his monthly statements was the same balance used to determine overdrafts." Memo. at 8. This

is blatantly false. Szewczyk's Complaint contains no such allegation. Indeed, Szewczyk did not allege ***any*** facts in his Complaint establishing that the account statements reflected the available balance. Likewise, Szewczyk did not offer anything to support his position in his opposition to Century's Motion to Dismiss. As Century demonstrated to the Eighth District, there is nothing in the record to support Szewczyk's position. Instead, Szewczyk improperly raised this argument for the first time on appeal and thus, it was forfeited. *See Maynard v. Norfolk S. Ry.*, 4th Dist. Scioto No. 08CA3267, 2009-Ohio-3143, ¶ 2 ("Because [plaintiff] failed to make this argument to the trial court and properly preserve the issue for appellate review, he also forfeited the right to raise this issue on appeal"); *see also* Appellee's Br. at 10-11.

Szewczyk states that, "[t]he Eighth District, like the Trial Court, failed to consider Mr. Szewczyk's argument (premised on a factual allegation) that consumers reasonably understand that the balance displayed on their monthly statements reflects the funds available to the member as of the statement date." Memo. at 8-9. Notably, Szewczyk only cites to his appellate briefs and not the Complaint itself in support of these allegations. That is because Szewczyk ***made no such factual allegations in his Complaint***. *See* Compl., *passim.* Indeed, the inference – that the account statement reflects the available balance – is outside the four corners of the Complaint, and was therefore properly disregarded by the Eighth District. *Covington v. Lucia*, 151 Ohio App. 3d 409, 2003-Ohio-346151, 784 N.E.2d 186, ¶ 18 ("courts may not use extrinsic evidence to create an ambiguity; rather, the ambiguity must be patent, i.e., apparent on the face of the contract"). As Szewczyk himself admits, a court cannot consider "unverified statements or evidence that are outside the complaint" on a motion to dismiss. Memo. at 6 (citing *State ex. Rel. Fuqua v. Alexander*, 1997-Ohio-169, 79 Ohio. St. 3d 206, 207, 680 N.E. 2d 985). Yet, throughout his brief, Szewczyk repeatedly relies on extrinsic evidence – the monthly account statements – to establish

that his account was purportedly never overdrawn. Memo., *passim.* But the account statements are not a contract, much less a contract governing Century's relationship with its members. Szewczyk himself concedes that the applicable governing contract here is the Agreement. Compl. ¶¶ 8-9.

Even if the account statements were relevant to the Motion to Dismiss (they are not), it does not alter the ultimate conclusion reached by the Eighth District that overdraft fees applied to the available balance and not the actual balance. As the Eighth District noted, "it is clear . . . a member's available funds balance can be less than his or her actual balance." Opinion ¶ 24. Therefore, when Szewczyk refers to the account statement balance, he, too, acknowledges that the account statement's reflection of a positive balance does not – and cannot – reflect the same balance that Century utilizes to determine whether an overdraft occurred. Otherwise, under his theory, the assessment of a fee on a positive balance was in error, which is not what his allegations claim. Rather, by admitting that "[t]he improper fees…were not 'errors'" (Compl. ¶ 15), Szewczyk admits that he was aware that Century's assessment of overdraft fees was based on a balance that was not reflected on the statements, i.e., the account's available balance, as the Agreement discloses. Thus, contrary to Szewczyk's contention that the Eight District "simply assumed" that an overdraft occurred, in reality, the Eight District accepted as true the well-pleaded facts of the Complaint to conclude that Szewczyk did not have sufficient available funds in his account at the time he was assessed the challenged overdraft fee.

Indeed, Szewczyk's theory of liability – that Century breached the Agreement by assessing overdraft fees on "transactions that did not overdraw an account" – ***only*** makes sense if Szewczyk is alleging that Century breached the agreement by using the available balance to determine overdrafts instead of the "actual" balance, i.e., all of the money in the account, without deductions for holds on pending transactions or on deposits. In accepting all of the Complaint's ***well-pleaded***

facts as true and drawing all ***reasonable*** inferences in favor of Szewczyk, the Eighth District correctly concluded that Szewczyk's theory contradicts the plain and unambiguous language of the Agreement.

In sum, the Eighth District correctly articulated the proper standard for a motion to dismiss in analyzing the facts and law governing Szewczyk's claim. Szewczyk's entire premise for his appeal rests upon consideration of allegations, issues and arguments which did not appear anywhere in his Complaint. Szewczyk's attempt to bootstrap such non-existent facts, issues and arguments for review by this Court is wholly improper and must be rejected. Examination of the four corners of Szewczyk's Complaint affords no support for any of his arguments or allegations of facts or issues which might support an allegation of error by the Eighth District in affirming the trial court's order granting Century's Motion. Accordingly, this Court should deny jurisdiction to hear Szewczyk's appeal under his First Proposition of Law.

2. Response to Szewczyk's Second Proposition of Law.

Szewczyk's Second Proposition of Law provides that, "[t]he drafter of an adhesion contract may not benefit from ambiguities in the contract that it drafted." The fundamental premise underlying Szewczyk's Second Proposition of Law is flawed.[1]

Specifically, Szewczyk's second proposition of law is based on the doctrine of *contra proferentem* – the rule that ambiguities are resolved against the drafter. Szewczyk argues that the Eighth District somehow construed the Agreement in favor of Century, the drafter, when it should

[1] In a puzzling move, Szewczyk spends an entire paragraph discussing that Century's Agreement is a contract of adhesion that Century "imposed" on its members. Memo. at 9-10. This discussion is completely irrelevant to the issues presented here. Moreover, contrary to Szewczyk's rhetoric, a "standardized form contract" like Century's Agreement is not unenforceable or invalid simply because it supposedly is a contract of adhesion. *Newland v. AEC S. Ohio Coll. L.L.C.*, 2016-Ohio-675, ¶ 19, 47 N.E.3d 231, 235; *see also see also Cicle v. Chase Bank USA*, 583 F.3d 549, 555 (8th Cir.2009).

have been construed against Century. That is not what happened. The construction rule that Szewczyk invokes, *contra proferentem,* is a rule of "last resort" or a "secondary rule of contract construction" that applies ***only*** when a contract is ambiguous or internally inconsistent. *See e.g., Cadle v. D'Amico,* 2016-Ohio-4747, 66 N.E.3d 1184, ¶ 33 (7th Dist.); *Reida v. Thermal Seal, Inc.*, 10th Dist. No. 02AP-308, 2002-Ohio-6968, at ¶ 29. Because the Agreement here is clear and unambiguous, Szewczyk's reliance on a secondary rule of contract interpretation is misplaced.

The Eighth District did not need to reach this last resort because Ohio's most preferred canons of construction effectively resolved any purported ambiguity in the Agreement. Opinion ¶¶ 20-26. Reading the contract as a whole (as it must be), the Eighth District found that the overdraft fee that Century charged Szewczyk was not a breach of the contract's terms because the Agreement unambiguously provides "that a member will not have access to his or her funds immediately; that is, that the available balance can be less than the actual balance in a member's account." *Id*. ¶ 26. Put simply, the Agreement clearly explains that an overdraft fee will be assessed if Szewczyk exceeds the available funds – i.e., the available balance – in his account. That is precisely what happened here. Accordingly, the Eighth District properly applied Ohio's rules of contract construction and affirmed dismissal of Szewczyk's alleged claim for breach of contract. *See Molnar v. Castle Bail Bonds*, 4th Dist. Ross No. 04CA2808, 2005-Ohio-6643, ¶ 1 ("Because we find the intent of the parties with regard to the notice provision is readily ascertainable from the four corners of the document, we decline to employ the secondary rule of contract construction that requires a court to construe any ambiguity strictly against the drafter of the contract"). Similar to his First Proposition of Law, Szewczyk's Second Proposition of Law likewise has no merit.

CONCLUSION

Szewczyk has failed to present to this Court any reason why this is a case of public or great general interest. Further, the Eighth District correctly ruled that Szewczyk failed to state a breach

of contract claim. It is therefore respectfully submitted that this Honorable Court should decline to exercise jurisdiction in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 4, 2022, a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO JURISDICTION** was served by email and via the e-filing system to all counsel of record.

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