[Cite as *U.S. Bank Natl. Assn. v. Johnson*, 2025-Ohio-4936.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

U.S. BANK NATIONAL ASSOCIATION DBA ELAN FINANCIAL SERVICES,	:	Case No. 24CA6
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
MELISSA JOHNSON,	:	
Defendant-Appellant.	:	

APPEARANCES:

Mark D. Tolles, II, Benson & Sesser, LLC, Chillicothe, Ohio, for appellant.

Brittany R. Fitzgibbon and Michelle L. Hatfield, Zwicker & Associates, P.C., Independence, Ohio, for appellee.

Smith, P.J.

{¶1} Appellant Melissa Johnson appeals two entries of the Pickaway County Common Pleas Court, entered March 14, 2024. Via these entries, the trial court denied Johnson's motion to compel arbitration and stay case and granted summary judgment in favor of appellee U.S. Bank National Association DBA Elan Financial Services, "U.S. Bank," on its action for breach of a credit card agreement. Johnson challenges the trial court's decision within two assignments of error. However, for the reasons which will follow, we find no merit to the arguments asserted within the assignments of error. Accordingly, both assignments of error are overruled and the judgment of the trial court is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} On December 6, 2022, U.S. Bank filed a complaint in the Circleville Municipal Court alleging default on a credit card agreement and demanding judgment in the amount of $6,863.42 and court costs permitted by law. On January 9, 2023, Johnson filed an answer and counterclaims for breach of contract and violations of the Ohio Consumer Sales Practices Act, R.C. 1345.01 et seq.; Fair Debt Collections Practices, 15 U.S.C. 1692 et seq.; Fair Credit Reporting Act, 15 U.S.C. 1681 et seq.; and fraud. Johnson also asserted affirmative defenses, which included an allegation that U.S. Bank's claims may be subject to arbitration. On February 2, 2023, U.S. Bank filed an answer to the counterclaims.

{¶3} On or about March 13, 2023, U.S. Bank issued a Combined First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions to Defendant by electronic mail. The matter came on for pretrial on March 17, 2023. Due to the counterclaims, on March 21, 2023, the case was transferred to the Pickaway County Common Pleas Court.

{¶4} On June 26, 2023, U.S. Bank filed a motion to compel discovery responses and production of documents. On July 31, 2023, the trial court ordered Johnson to provide responses to discovery requests no later than August 31, 2023. On August 21, 2023, the trial court scheduled a jury trial for February 29, 2024. The court also ordered that dispositive motions must be filed no later than 90 days prior to the jury trial.

{¶5} On December 1, 2023, U.S. Bank filed a motion for extension of time to file a dispositive motion which the trial court granted the same day. On January 18, 2024, U.S. Bank filed a motion for summary judgment. Attached to U.S. Bank's motion for summary judgment was an affidavit of the bank's representative, Timothy A. Harper. Two exhibits were attached to Harper's affidavit: Exhibit 1, copies of statements from Johnson's credit card account; and Exhibit 2, a copy of the applicable credit card agreement.

{¶6} On February 15, 2024, Johnson filed a motion to compel arbitration and stay proceedings. On February 23, 2024, U.S. Bank filed a motion for continuance of the February 29, 2024 trial. The bank's stated reason for the request was the fact of the outstanding motions.

{¶7} On February 29, 2024, U.S. Bank filed its response to the motion to compel arbitration and stay proceedings. On March 5, the trial court's entry granting the motion for continuance was entered into the record. The trial was rescheduled to May 30, 2024.

{¶8} However, on March 14, 2024, the trial court's entry was filed denying Johnson's motion to compel arbitration and stay case. By separate entry of the same date, the trial court granted summary judgment in favor of U.S. Bank on its claims and on Johnson's counterclaims. This timely appeal followed.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT MELISSA JOHNSON'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS PENDING ARBITRATION IN ITS MARCH 14, 2024 ENTRY.

II. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF U.S. BANK NATIONAL ASSOCIATION D/B/A/ ELAN FINANCIAL SERVICES' MOTION FOR SUMMARY JUDGMENT IN ITS MARCH 14, 2024 ENTRY.

ASSIGNMENT OF ERROR ONE

Standard of Review - Arbitration

{¶9} An appellate court reviews a trial court's decision to grant or deny a motion to compel arbitration or stay the proceedings under the abuse of discretion standard. *Alford v. Arbors of Gallipolis*, 2018-Ohio-4653, ¶ 9 (4th Dist.); *Primmer v. Healthcare Industries Corp*., 2015-Ohio-4104, at ¶ 8

(4th Dist.). However, a trial court's decision granting or denying a stay of proceedings pending arbitration is subject to de novo review on appeal on issues of law, which will commonly predominate because such cases generally turn on issues of contractual interpretation. *See Primmer, supra*; *McFarren v. Emeritus at Canton*, 2013-Ohio-3900, at ¶ 13 (5th Dist.).

Legal Principles

{¶10} Both the Ohio General Assembly and Ohio courts have expressed a strong public policy favoring arbitration. *See Alford, supra*, at ¶ 11; *Primmer, supra* at ¶ 10; *Hayes v. Oakridge Home,* 2009-Ohio-2054, ¶ 15, citing R.C. Chapter 2711. *See generally*, *Hay v. Summit Funding*, at ¶ 9. Arbitration is favored because it provides an expeditious and economical means of resolving a dispute and has the added benefit of lessening the burden on crowded court dockets. *Alford, supra; Primmer, supra.* The Ohio Arbitration Act sets forth a trial court's role in construing and enforcing arbitration agreements. *See Alford*, at ¶ 12; *Estate of Younce v. Heartland of Centerville*, 2016-Ohio-2695, at ¶ 34 (2d Dist.).

{¶11} R.C. 2711.01(A) provides:

> A provision in any written contract…to settle by arbitration a controversy that subsequently arises out of the contract, …shall be valid, irrevocable, and enforceable except upon grounds that exist at law or in equity for the revocation of any contract.

See also, Alford, supra, at ¶ 12; *Younce, supra*, at ¶ 35. R.C. 2711.02(B) further provides:

> If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration…shall upon application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement…

See Hay v. Summit Funding at ¶ 7 (4th Dist.).

Legal Analysis

{¶12} Johnson asserts that the credit card agreement contains a valid arbitration provision. Johnson further asserts that U.S. Bank's claim that she breached her contract due to alleged failure to make payments, along with her counterclaims, are all matters which fall within the purview of the arbitration provision of the credit card agreement. U.S. Bank has not disputed these facts. Thus, Johnson concludes, the trial court erred when it issued its March 14, 2024 decision denying her motion to compel arbitration and stay case.

{¶13} In response, U.S. Bank agrees that arbitration *may* have been applicable to this matter. However, U.S. Bank contends that Johnson waived her right to compel arbitration by acting in a manner inconsistent with a desire to arbitrate. The bank points out that Johnson filed an answer and counterclaim, yet she waited approximately 14 months after the case was filed, and approximately two weeks prior to jury trial, to assert her right to arbitrate. U.S. Bank concludes that the delay in requesting arbitration was unreasonable and prejudicial to the bank. Therefore, the trial court did not abuse its discretion in denying Johnson's motion.

{¶14} In reply, Johnson asserts that the totality of the circumstances does not indicate that she waived her right to arbitrate. She points out, correctly, that she asserted the affirmative defense of arbitration in her answer and did not file a jury demand. Furthermore, Johnson argues she was required to assert her compulsory counterclaims in case the claims were later determined to be outside the scope of the arbitration provision. This resulted in the transfer from municipal court to common pleas court, which in turn caused some of the delay.

{¶15} Johnson also points out that very little activity took place in the case between the filing of U.S. Bank's answer to the counterclaim on February 2, 2023 and December 1, 2023, when the bank filed a motion for extension of time to file a dispositive motion. During this time Johnson did not request discovery and her participation was minimal. Neither party took depositions. Importantly, Johnson points out that on February 22, 2024, days prior to trial, U.S. Bank requested the continuance. As such, Johnson argues that U.S. Bank cannot claim prejudice based on Johnson's requesting a stay so close to the original jury trial date.

{¶16} The right to arbitration may be waived just like any other contractual right. *See Blue Technologies Smart Solutions, L.L.C.,* 2020-Ohio-806, at ¶ 13 (8th Dist.); *Aljaberi v. Neurocare Ctr.,* Inc., 2019-Ohio-2181, at ¶ 22 (5th Dist.). To establish waiver, the party seeking waiver must demonstrate (1) that the party knew of its right to assert an argument or defense and (2) that the totality of the circumstances establishes that the party acted inconsistently with that right. *Blue Technologies*, at ¶ 13, citing *Gembarski v. PartsSource, Inc.,* 2019-Ohio-3231, ¶ 25.

{¶17} Factors that may be considered in determining whether the totality of the circumstances supports the finding of waiver include the following:

> (1) Whether the party seeking arbitration invoked jurisdiction of the trial court by filing a complaint, counterclaim, or third-party complaint without asking for a stay of proceedings; (2) the delay, if any, by the party seeking arbitration in requesting a stay of proceedings or an order compelling arbitration; (3) the extent to which the party seeking arbitration participated in litigation, including the status of discovery, dispositive motions, and the trial date; and (4) any prejudice to the non-moving party due to the moving party's prior inconsistent actions.

Blue Technologies, at ¶ 19, citing *Am. Gen. Fin. V. Griffin*, 2013-Ohio-2909, at ¶ 18 (8th Dist.).

{¶18} Because the question of waiver is usually a fact driven issue, an appellate court will not reverse a trial court's decision on whether a party waived its right to arbitration absent a showing of an abuse of discretion. *See Blue Technologies*, at ¶ 14, citing *Neel v. A Perrino Construc., Inc*, 2018-Ohio-1826, at ¶ 32 (8th Dist.). The trial court is in the best position to determine whether a party has waived its right to arbitrate. *See Midland Funding LLC v. Schwarzmer*, 2022-Ohio-4506, at ¶ 17 (8th Dist.), citing *Debois, Inc. v. Guy*, 2020-Ohio-4989, at ¶ 22 (8th Dist.). In this case, the trial court's March 14, 2024 entry denying Johnson's motion to arbitrate and stay case is rendered in summary fashion. However, based on our review of the record, we cannot find that the trial court abused its discretion.

{¶19} Under the totality of the circumstances, we find that the record supports the finding of waiver. The record shows that although Johnson asserted that her claims "may be subject to arbitration" in her answer filed January 9, 2023, she did not actually request arbitration and a stay. Johnson did not request arbitration and stay until February 14, 2024, nearly 14 months later.

{¶20} Johnson filed her April 11, 2023 answer and counterclaims via counsel. Johnson participated in the litigation via counsel inasmuch as it was counsel who U.S. Bank contacted in order to resolve the issue of the outstanding discovery matters between April and August of 2023. Yet, knowing of Johnson's ostensible right to compel arbitration, counsel did not file the motion to compel arbitration and stay case until two weeks prior to trial.

{¶21} Finally, Johnson dismisses any possible prejudice to U.S. Bank due to requesting arbitration two weeks away from trial. Johnson dismisses the bank's statement that it incurred significant additional costs and expenses, arguing that these expenses would have been the same no matter how Johnson presented her counterclaims. Johnson also points to the fact that U.S. Bank filed its own motion to continue the trial date and asserted that neither party would be prejudiced by the continuance if granted.

{¶22} While it appears that Johnson's argument regarding the expenses may be valid, we are not convinced that the fact the bank filed a motion to continue also means the bank was not prepared to go forward on the trial date. U.S. Bank's motion for leave to file a dispositive motion was filed December 1, 2023. Then its motion for summary judgment, with the attached affidavit, was filed on January 18, 2024. It appears that U.S. Bank marshaled the same evidence attached to its affidavit that it would have used at trial. Seemingly, U.S. Bank was prepared and ready to proceed to trial.

{¶23} Summary judgment is an efficient and economical method of adjudication. *See Haller v. Borror,* 107 Ohio App.3d 432, 440 (10th Dist. 1995); *Sain v. Roo,* 2001 WL 1263665, *9 (One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims, citing *Williams v. First United Church of Christ,* 37 Ohio St.2d 150 (1974)). Upon Johnson's request to arbitrate—which the record does not indicate had been the subject of any sort of ongoing discussion during the, albeit limited, pretrial hearings—U.S. Bank, which was in litigation mode, then had to stop and prepare a response to the arbitration motion. This may fairly be considered prejudicial to the bank in light of an impending trial date.

{¶24} Based on the foregoing, we find no merit to Johnson's argument that the trial court abused its discretion by denying her motion to compel arbitration and stay the matter pending arbitration. Accordingly, the first assignment of error is also without merit and is hereby overruled.

ASSIGNMENT OF ERROR TWO

Standard of Review - Summary Judgment

{¶25} " '[A]ppellate courts conduct a de novo review of trial court summary judgment decisions.' " *Kerns v. Hale*, 2024-Ohio-2061, at ¶ 7 (4th Dist.), quoting *Worthy v. Hawthorne*, 2021-Ohio-813, ¶ 12, citing *Snyder v. Ohio Dept. of Nat. Resources,* 2014-Ohio-3942, at ¶ 2. "This means 'an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision.' " *Kerns, supra*, quoting *Graf v. City of Nelsonville,* 2019-Ohio-2386, ¶ 35 (4th Dist.), citing *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105 (1996). "To determine whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law." *Hawthorne* at ¶ 12. "In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in favor of the nonmoving party." *State ex rel. Deem v. Pomeroy*, 2018-Ohio-1120, ¶ 16 (4th Dist.), citing Civ.R. 56(C).

Legal Principles

{¶26} Pursuant to Civ.R. 56(A), "[a]party seeking to recover upon a claim…may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action." Civ.R. 56(F) provides that "[s]upporting…affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." "If 'the moving party satisfies its burden, the nonmoving party bears a corresponding duty to set forth specific facts to show that a genuine issue exists.' " *Kerns, supra* at ¶ 10, quoting *Hawthorne* at ¶ 16, citing Civ.R. 56(E).

Analysis

{¶27} Johnson argues that given the motion to compel and stay proceedings, the trial court erred in even reviewing, much less granting U.S. Bank's motion for summary judgment. Johnson also argues that to the extent that U.S. Bank's motion for summary judgment suggested that the bank did not believe the credit card agreement contained a valid arbitration provision, or that said provision did not apply to the bank's claims, then the trial court would have implicitly concluded that there was no meeting of the minds between Johnson and U.S. Bank regarding the terms of the credit card agreement. Without a meeting of the minds as to the terms of the credit card agreement, then no valid and enforceable contract existed. Johnson concludes, therefore, that U.S. Bank would not have a valid breach of contract claim against her. As such, summary judgment was incorrect because a genuine issue of material fact existed between the bank and Ms. Johnson.[1] Johnson requests this court reverse the trial court's March 14, 2024 order granting summary judgment.

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[1] The same analysis would also apply to Johnson's counterclaims, Johnson argues.

{¶28} In response, U.S. Bank argues that it submitted admissible evidence with its motion establishing that Johnson breached the credit card agreement with the bank by failing to make timely and sufficient payments as required by the agreement. Therefore, U.S. Bank contends that summary judgment was properly granted. For the reasons which follow, we agree with U.S. Bank.

{¶29} " 'Pursuant to Ohio law, credit card agreements are contracts in which issuing and using a credit card create a legally binding agreement.' " *LVNV Funding LLC, v. Altahtamoni,* 2024-Ohio-2082, at ¶ 40, quoting *Ohio Receivables, L.L.C. v. Dallariva,* 2012-Ohio-3165, at ¶ 14 (10th Dist.). In support of summary judgment, U.S. Bank attached the affidavit of Timothy A. Harper to establish Johnson's credit card debt and payment history. Harper averred, in pertinent part, as follows:

> 1. I am an authorized agent of U.S. Bank National Association d/b/a Elan Financial Services….I am duly authorized by the Bank to make the statements and representations herein.
>
> 2. In my position, I am familiar with the business operations and practices of the Bank…I have personal knowledge of the business records and practices of the Bank to confirm the transmittal of account agreements, notices, billing statements, and other documents.
>
> 3. The billing statement and other documents referred to herein were created at either the time of the transactions/occurrences or the time the original

statements were made and have been kept by the Bank in the ordinary course of business.

* * *

7. That the above-referenced Account was opened on or about 02/01/12 by Melissa Johnson.

* * *

9. That pursuant to the terms and conditions of the Account, Melissa Johnson obtained extensions of credit by using the Account for purchases of goods and/or services and/or cash advances.

10. That the Bank's records reflect that it provided monthly billing statements to Account Holder.

11. That the Bank's records do not reflect the Account Holder ever asserted a valid unresolved objection to the balance shown as due and owing on the monthly statements provided to the Account Holder.

12. That at the time the Bank charged off the Account on or about 08/31/22 the balance showing on the books and records of the Bank was $6,863.42. After the Bank charged off the Account, there have been no additional payments or financial adjustments since the last statement and the balance as of the date of this affidavit is $6,863.42.

* * *

14. Attached hereto as Exhibit 1 are true and correct copies of statements from the Account Holder's Account reflecting account activity…Attached hereto as Exhibit 2 is a true and correct copy of the applicable Agreement for the account.

15. The information set forth therein is true and correct to the best of the undersigned's knowledge, information, and

> belief, and if called as a witness, I could competently testify thereto.

{¶30} In our view, the affidavit and documentation attached to the Harper affidavit by U.S. Bank demonstrated that the bank met its burden of production as to the existence of the credit card debt. Civ.R. 56(E) requires a party opposing a motion for summary judgment to respond in some fashion. " 'To survive summary judgment, the non-moving party must produce evidence showing that a genuine issue of fact exists concerning any issue for which the non-moving party bears the burden of proof.' " *Kerns, supra*, quoting *Watters v. Ross Cty. Children's Servs*., 2000 WL 228254, *3 (4th Dist.), citing Civ.R. 56(E). " ' "If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." ' " *Kerns, supra,* quoting *Graf, supra* at ¶ 39, quoting Civ.R. 56(E). *See also Bank of New York Mellon v. Bobo,* 2015-Ohio-4601, ¶ 13 (4th Dist.).

{¶31} Johnson did not produce any evidence in opposition to U.S. Bank's motion for summary judgment.[2] The evidence U.S. Bank submitted in support of the motion for summary judgment was both admissible in

[2] We are mindful that summary judgment is not the same as default judgment. *See Alberini v. Raptis,* 2024-Ohio-6004, ¶ 46 (11th Dist.). The moving party does not prevail on summary judgment simply because the other party fails to respond. *Id*. The law requires that the moving party establish the non-existence of any material factual issues, even where the non-moving party fails to file a response. *Id.,* citing *Forsythe Finance, LLC v. Austin,* 2022-Ohio-1996, at ¶ 14 (11th Dist.), citing *Morris v. Ohio Cas. Ins. Co.,* 35 Ohio St.3d 45, 47 (1988). It is thereby necessary to require the trial court to determine that there is no genuine issue of fact as to the basic elements of a claim before ruling in favor of a plaintiff on summary judgment. *Id*.

evidence had it been produced at trial, and sufficient to establish the existence of the credit card debt. Likewise, Johnson did not produce any evidence to support her counterclaims. Therefore, we hold the trial court did not err when it determined that there were no genuine issues of material fact and that U.S. bank was entitled to judgment as a matter of law on its breach of contract claims and on Johnson's counterclaims.

{¶32} Based on the foregoing, we find no merit to Johnson's second assignment of error. Accordingly, we overrule it and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and costs be assessed to appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hess, J. and Wilkin, J. concur in Judgment and Opinion.

For the Court,

____
Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.