10-7-2008

Carroll v. MBNA American Bank Respondent's Brief Dckt. 34765

IN THE SUPREME COURT OF THE STATE OF IDAHO

MIRIAM G. CARROLL, Plaintiff-Appellant, vs. MBNA AMERICA BANK, Defendant-Respondent.	Docket No. 34765
MBNA AMERICA BANK, Plaintiff-Respondent, vs. DAVID F. CAPPS, Defendant-Appellant.	

RESPONDENT'S BRIEF

Appeal from the District Court of the Second Judicial District of the State of Idaho, In and For the County of Idaho

HONORABLE JOHN H. BRADBURY
District Judge Presiding

MIRIAM G. CARROLL, *pro se*
DAVID F. CAPPS, *pro se*
Residing at 104 Jefferson Dr., Kamiah, Idaho 83536,
For Appellants.

JEFFREY M. WILSON, WILSON & McCOLL
Residing at 420 W. Washington, P.O. Box 1544, Boise, Idaho 83701,
For Respondent.

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STATEMENT OF THE CASE

The National Arbitration Forum issued two separate awards against each Appellant. Subsequently, suit was initiated by Appellants and Respondent moved to confirm the awards. All claims were eventually consolidated into Case No. CV 36747.

On August, 10, 2006, the trial court held an evidentiary hearing on the applicability of the parties' arbitration clause. At said hearing, Respondent presented evidence that Delaware law applied to the agreement; that Appellants were given notice pursuant to Delaware law that if Appellants failed to reject the amendment by a certain date in writing, the arbitration provision would become effective; that said notices were mailed to Appellants; and that Respondents did not receive an opt-out letter as required. As a result, the trial court confirmed the awards pursuant to its September 14, 2006 Memorandum Decision and Order. Notably, Appellants conceded that Delaware law applied to the parties' agreement through this time. After an exhaustive amount of briefing relating to Appellants' Motion for Reconsideration, the trial court upheld its confirmation through its November 9, 2007 Amended Memorandum Decision and Order.

Only considering the arguments raised below, Appellants' appeal is based on upon the theories that Idaho law, not Delaware law, applies to the parties' agreement; that there was never a meeting of the minds regarding the arbitration provision; and that the arbitration agreement is unconscionable. Pursuant to the argument below, the trial court's confirmation of awards must stand.

ADDITIONAL ISSUES ON APPEAL (REQUEST FOR ATTORNEY'S FEES)

If found to be the prevailing party, Respondent requests an award of attorney's fees on appeal pursuant to I.A.R. 41, I.A.R. 35(b)(5), I.C. § 12-120(3) and I.C. § 12-121.

STANDARD OF REVIEW

When reviewing the district court's decision to vacate or modify an award, this Court is limited to determining whether any grounds for relief stated in the Idaho Uniform Arbitration Act exist. Barbee v. WMA Secs., Inc., 143 Idaho 391, 394, 146 P.3d 657, 660 (Idaho 2006). An arbitrator's rulings on questions of law and fact are binding, even where erroneous, unless one of the enumerated statutory grounds is present. *Id.* Under the UAA, a district court may vacate an arbitrator's award only where: (1) the award was procured by corruption, fraud or other undue means; (2) there was evident partiality by an arbitrator; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing to the prejudice of a party; or (5) there was no arbitration agreement and the party did not participate in the hearing without objecting. Moore v. Omnicare, Inc., 141 Idaho 809, 815, 118 P.3d 141, 147 (Idaho 2005). If a district court makes additional findings of fact the proper standard of review as to the findings is substantial and competent evidence. *Id.*

An interpretation of a statute is a question of law over which the Court exercises free review. Barbee, 143 Idaho at 394.

The trial court has broad discretion in the admission of evidence at trial and its decision to admit such evidence will be reversed only when there has been a clear abuse of that discretion. Empire Lumber Co. v. Thermal-Dynamic Towers, 132 Idaho 295, 304, 971 P.2d 1119, 1128

(Idaho 1998).

ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN FINDING THAT DELAWARE LAW APPLIED.

Appellants' first argues that the trial court erred in finding that the Delaware law applied in confirming the arbitration provisions relating to this action. Appellants' arguments is based upon the theory that the Delaware choice of law provision in the parties' agreement is against the public policy of Idaho pursuant to Idaho Code Section 28-41-201(8) and because it is the public policy of Idaho not to allow unilateral amendments to contracts. The argument below will establish that the trial court did not err in finding that Delaware law applied. Further, in the event it is determined that Idaho law applies in this case, amendment was allowed pursuant to the Idaho Credit Code.

1. IDAHO CODE SECTION 28-41-201(8) DOES NOT APPLY TO THE PARTIES' AGREEMENT.

"Business activities of national banks are controlled by the National Bank Act." Watters v. Wachovia Bank, N.A., 127 S.Ct. 1559, 1564, 167 L. Ed. 2d 389 (2007). The "laws of the States *in which national banks or their affiliates are located* govern matters the NBA (National Bank Act) does not address." Id. at 1572 (emphasis added); Nagle v. Herold, 30 F. Supp. 905, 906 (W.D. New York 1939) ("The Seneca National Bank of West Seneca is a national bank. Insofar as its contracts are concerned it is subject to the laws of the State of New York, in which it is located."); ;Smiley v. Citibank (South Dakota) N.A., 517 U.S. 735, 737, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996) (finding Citibank (South Dakota) N.A. to be located in South Dakota

and applying South Dakota law). Pursuant to Watters, contracts made by national banks are governed by State law. Watters, at 1567.

MBNA America Bank, N.A., was at all relevant times a national bank. See generally, John M. Floyd & Assocs. v. Star Fin. Bank, 489 F.3d 852, 854 (7th Cir. 2007); FIA Card Servs., N.A. v. Klinzing, 2008 U.S. Dist. LEXIS 66421, 3 (W.D. Wis. 2008); Kelly v. MBNA American Bank, 2007 WL 4233671 (D. Del. 2007); Spark v. MBNA Corp., 178 F.R.D. 431 (D. Del. 1998); Copeland v. MBNA Am., N.A., 820 F. Supp. 537 (D. Colo. 1993). Further, MBNA America Bank, N.A., is located in the State of Delaware. [Tr., August, 10, 2006, Exhibits 1 & 2]; FIA Card Servs., N.A. v. Klinzing, 2008 U.S. Dist. LEXIS 66421, 3 (W.D. Wis. 2008); Coleman v. Assurant, Inc., 508 F. Supp. 2d 862, 866 (D. Nev. 2007) (Delaware has a substantial relation with the transaction because that is where headquarters of MBNA is located). Accordingly, the trial court did not err in concluding that Delaware law applied.

2. APPLYING THE CHOICE-OF-LAW PROVISION IS NOT AGAINST THE PUBLIC POLICY OF IDAHO.

Appellants first argue that there is a public policy in Idaho against the unilateral amendment of contracts. Yellowpine Water User's Ass'n v. Imel, 105 Idaho 349, 670 P.2d 54 (1983) ("One party cannot unilaterally change the terms of a contract and attempts to add terms without the consent of all parties are ineffectual."). However, the facts in Yellowpine are distinguishable from those in this case. In Yellowpine, the relationship between the parties rested in an implied contract. Id. at 352. At that time, the agreement did not allow for a fee for involuntary disconnection for nonpayment of a water bill, which was charged. Id. Because the

parties did not consent to the disconnection fee, said fee was not allowed. Id.

In this case, there can be no doubt that Appellants consented to the amendment of the parties' agreement to include arbitration. While, silence or failure to reject an offer usually is not evidence of intent to accept the offer, an offer may be accepted by silence if the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer. Eimco Div. Envirotech Corp. v. United Pacific Ins. Co., 109 Idaho 762, 764, 710 P.2d 672 (Idaho Ct. App. 1985). Unlike Yellowpine, there was evidence that Appellants were mailed notices regarding the amendment of the parties' agreement to include arbitration. [Tr., August, 10, 2006, Exhibits 1]. Pursuant to said notices, if Appellants failed to reject the amendment by a certain date in writing, the arbitration provision would become effective. Id. As found by the trial court, no opt-out letter was received by Respondent. [R. 107]. Therefore, there was in fact consent to the arbitration amendment. The amendment of the parties' agreement to include arbitration cannot be said to be against the public policy of Idaho as there was not a unilateral change the terms without the consent of the parties.

Next, Appellants argue that there is a public policy in Idaho against the forming of contracts without a meeting of the minds. "It long has been settled that no enforceable contract exists unless it reflects a meeting of the minds and embodies a distinct understanding common to both parties." Gulf Chem. Employees Fed. Credit Union v. Williams, 107 Idaho 890, 893, 693 P.2d 1092 (Idaho 1984). "The contract must be specific enough to show that the parties shared a mutual intent." Id. "In general, a contract also must create a mutuality of obligation." Id.

Here, there is no argument that Delaware law allows for an agreement to be amended without a meeting of the minds, and is therefore against the public policy of Idaho. The argument set forth by Appellants is that there was in fact no meeting of the minds. Nevertheless, the record fails to establish that there was a lack of mutuality of obligation, contract specificity or a distinct understanding shared by the parties. As articulated above, there was evidence that Appellants were mailed notices regarding the amendment of the parties' agreement to include arbitration. [TR., August, 10, 2006, Exhibits 1]. The notices specifically stated that if Appellants failed to reject the amendment by a certain date in writing, the arbitration provision would become effective. Id. An opt-out letter was not received by Respondent. [R. 107]. Therefore, there was in fact consent and a meeting of minds to the arbitration amendment. The amendment of the parties' agreement to include arbitration cannot be said to be against the public policy of Idaho.

3. THE IDAHO CREDIT CODE SPECIFICALLY ALLOWS FOR THE AMENDMENT.

In the event it is determined that Idaho law applies in this case, amendment was allowed pursuant to the Idaho Credit Code, which reads:

> 28-43-203. CHANGE IN TERMS OF OPEN-END CONSUMER CREDIT ACCOUNTS. Whether or not a change is authorized by prior agreement, a creditor may change the terms of an open-end consumer credit account applying to any balance incurred before or after the effective date of the change.

Idaho Code Section 28-43-203. Idaho Code Section 28-41-301 defines open-ended credit agreement as an arrangement which:

> (a) A creditor may permit a debtor, from time to time, to purchase on credit from the creditor or pursuant to a credit card, or to obtain loans from the creditor or pursuant to a credit card;
> (b) The amounts financed and the finance and other appropriate charges are debited to an account;
> (c) The finance charge, if made, is computed on the account periodically; and
> (d) Either the debtor has the privilege of paying in full or in installments or the creditor periodically imposes charges computed on the account for delaying payment and permits the debtor to continue to purchase on credit.

Idaho Code Section 28-41-301.

The agreement between the parties matches the definition of an open-end credit agreement as set forth above. As a result, Respondent was allowed to amend its agreement with Appellants, which, as established above, was properly accomplished.

B. THE DISTRICT COURT DID NOT ERR IN FINDING THAT THERE WAS AN AGREEMENT TO ARBITRATE AS A MEETING OF THE MINDS CLEARLY EXISTED.

The Appellants do not provide further argument regarding the issue of whether there was a meeting of the minds other than that which was provided in their first argument. As argued and established above, the record fails to establish that there was a lack of mutuality of obligation, contract specificity or a distinct understanding shared by the parties. The trial court did not err in finding that there was an agreement to arbitrate as a meeting of the minds clearly existed.

C. APPELLANTS' THIRD ARGUMENT WAS NOT RAISED BELOW AND SHOULD NOT BE CONSIDERED ON APPEAL.

"Issues not raised below but raised for the first time on appeal will not be considered or

reviewed." Highlands Dev. Corp. v. City of Boise, 188 P.3d 900, 909, (Idaho 2008). At all times before the trial court's September 14, 2006 Memorandum Decision and Order, Appellants conceded and affirmatively stated that Delaware law applied. [R. 107]. Further, at no time between the trial court's September 14, 2006 Memorandum Decision and Order and November 9, 2007 Amended Memorandum Decision and Order did Appellants object to the application of Delaware law based upon Idaho Rules of Evidence 1002, 1003 and 1004. Accordingly, Appellants' third argument cannot be considered or reviewed.

D. APPELLANTS' FOURTH ARGUMENT WAS NOT RAISED BELOW AND SHOULD NOT BE CONSIDERED ON APPEAL.

"Issues not raised below but raised for the first time on appeal will not be considered or reviewed." Highlands Dev. Corp. v. City of Boise, 188 P.3d 900, 909, (Idaho 2008). Appellants argue that Respondent's Application for Confirmation of Arbitration Award was defective when filed pursuant to 9 U.S.C. § 13. However, such argument was never raised below, and therefore, cannot be considered or reviewed.

E. THE PARTIES AGREEMENT TO INCLUDE ARBITRATION WAS NOT UNCONSCIONABLE.

The law regarding whether contracts are unconscionable is best outlined in Lovey v. Regence Blueshield of Idaho:

> When reviewing an unconscionability determination made by the trial court, we must accept the factual findings made by the trial court, as long as they are supported by substantial, competent evidence. Whether, under those facts, a contractual provision is unconscionable is a question of law over which this Court exercises free review. It is not sufficient, however, that the contractual provisions appear unwise or their enforcement may seem harsh.

> For a contract or contractual provision to be voided as unconscionable, it must be both procedurally and substantively unconscionable. Procedural unconscionability relates to the bargaining process leading to the agreement while substantive unconscionability focuses upon the terms of the agreement itself.
>
> Procedural unconscionability may arise when the contract "was not the result of free bargaining between the parties." Indicators of procedural unconscionability generally fall into two areas: lack of voluntariness and lack of knowledge. Lack of voluntariness can be shown by factors such as the use of high-pressure tactics, coercion, oppression or threats short of duress, or by great imbalance on the parties' bargaining power with the stronger party's terms being nonnegotiable and the weaker party being prevented by market factors, timing, or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all. Lack of knowledge can be shown by lack of understanding regarding the contract terms arising from the use of inconspicuous print, ambiguous wording, or complex legalistic language, the lack of opportunity to study the contract and inquire about its terms, *Id.*; or disparity in the sophistication, knowledge, or experience of the parties.
>
> Substantive unconscionability focuses solely upon the terms of the contract or provision at issue. The contract or provision is substantively unconscionable if it is a bargain that no person in his or her senses and not under delusion would make on the one hand and that no honest and fair person would accept on the other. Factors to consider include whether the contract or provision is one-sided or oppressive. When determining whether a contractual provision is unconscionable, the court must consider the purpose and effect of the terms at issue, the needs of both parties and the commercial setting in which the agreement was executed, and the reasonableness of the terms at the time of contracting.

Lovey v. Regence Blueshield of Idaho, 139 Idaho 37, 42-43, 72 P.3d 877 (Idaho 2003).

Delaware law applies the same principles. As stated in Progressive Int'l Corp. v. E.I. du Pont de Nemours & Co.:

> For a contract clause to be unconscionable, its terms must be "so one-sided as to be oppressive." Put another way, "unconscionability has generally been

> recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Courts have been reluctant to apply the doctrine, recognizing among other things that the parties' "bargaining power will rarely be equal."

Progressive Int'l Corp. v. E.I. du Pont de Nemours & Co., 2002 Del. Ch. LEXIS 91, 37 (Del. 2002)[1].

Notably, Appellants do not provide any legal authority to determine whether a contract is unconscionable. Further, it does not appear that Appellants are basing their argument on "substantive" unconscionability, but rather "procedural" unconscionability. However, lack of voluntariness and lack of knowledge have not been established. There is nothing in the record evidencing high-pressure tactics, coercion, oppression, duress, or a great imbalance in bargaining power. There is nothing in the record evidencing a lack of understanding regarding the contract terms arising from the use of inconspicuous print, ambiguous wording, or complex legalistic

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1 In Graham v. State Farm Mutual Automobile Insurance Company, 565 A.2d 908 (Del. 1989), the Supreme Court of Delaware held that for a contract to be void due to an imbalance of bargaining power or "unconscionability," the terms of the contract must be so one-sided as to be oppressive or there must be such superior bargaining power in one party that it clearly takes advantage of the other. The Court went on to hold that mere disparity between bargaining power of parties to contract will not support a finding of unconscionability. Id., at 912. Therefore, it follows that, absent evidence of inequality in bargaining power and/or inherent unfairness, the Agreement is valid and enforceable under Delaware law. Appellants have offered no evidence of any inequity in bargaining power. Furthermore, the Delaware Supreme Court has expressly held "the fact that a contract is adhesive does not give rise to a presumption of unenforceability." Id. at 912. The Court went on to note "the adhesion factor is an aid in contract interpretation." Id. The Court reasoned that "because [the defendants] have not argued that [the contract clause] is ambiguous, we have no occasion to apply this rule of construction." The Court further reasoned that "a party to a contract cannot silently accept its benefits and then object to its perceived disadvantages, nor can a party's failure to read a contract justify its avoidance." Id. at 913.

language, the lack of opportunity to study the contract and inquire about its terms, or disparity in the sophistication, knowledge, or experience of the parties. Rather, the record shows that Appellants were mailed notices regarding the amendment of the parties' agreement to include arbitration. [TR., August, 10, 2006, Exhibits 1]. The notices specifically stated that if Appellants failed to reject the amendment by a certain date in writing, the arbitration provision would become effective. Id. An opt-out letter was not received by Respondent. [R. 107]. Nothing in the record suggest that the agreement in question was unconscionable.

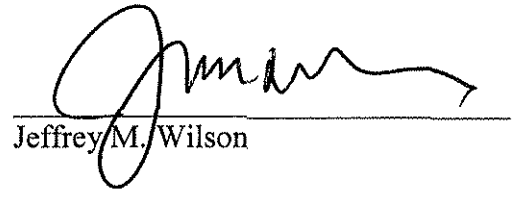
F. BECAUSE THE TRIAL COURT DID NOT ERR IN FINDING THAT A VALID ARBIRTATION AGREEMENT EXISTED, THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANTS WAIVED THE RIGHT TO A JURY TRIAL.

Appellants' last argument is based on their argument that a valid arbitration agreement did not exist between the parties. For all the reasons articulated above, the trial court did not err in finding that such agreement existed and was valid. Accordingly, the trial court did not err in finding that Appellants waived the right to a jury trial.

CONCLUSION

It is urged that the Judgment appealed from be confirmed.

DATED this 7 day of October, 2008.



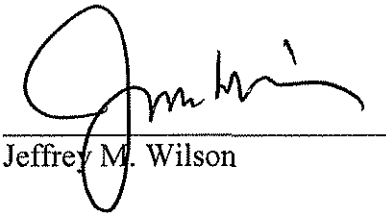
Jeffrey M. Wilson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7 day of October, 2008, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by hand delivering two (2) copies or causing to be placed two (2) copies thereof in the U.S. Mail, postage prepaid, addressed to:

HONORABLE JOHN BRADBURY
c/o Idaho County Clerk of the Court
320 W. Main
Grangeville, Idaho 83530

David Capps
Miriam Carroll
104 Jefferson Dr.
Kamiah, Idaho 83536-9410



Jeffrey M. Wilson