IN THE COURT OF APPEALS OF IOWA

No. 0-634 / 10-0019
Filed November 10, 2010

FRONTIER LEASING CORP.,
Plaintiff-Appellee,

vs.

WATERFORD GOLF ASSOCIATES, L.L.C.,
d/b/a WATERFORD LANDING GOLF CLUB,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Defendant appeals the district court's grant of summary judgment in favor of the plaintiff upon determining the defendant had breached an enforceable commercial equipment finance lease. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Billy J. Mallory and Allison M. Steuterman of Brick Gentry, P.C., West Des Moines, for appellant.

Edward N. McConnell and Aaron H. Ginkens of Ginkens & McConnell, P.L.C., Clive, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

This appeal is another in the string of cases that have arisen from the "Beverage Caddy Express Program." *See, e.g.*, *C&J Vantage Leasing Co. v. Outlook Farm Golf Club, L.L.C.*, 784 N.W.2d 753 (Iowa 2010); *Frontier Leasing Corp. v. Links Eng'g, L.L.C.*, 781 N.W.2d 772 (Iowa 2010). Under this program, Royal Links USA allegedly promised golf courses throughout the country, including Waterford Golf Associates, L.L.C., d/b/a Waterford Landing Golf Club, that they could obtain non-motorized snack and beverage golf carts for "free." The concept was that a leasing company would provide the cart at a certain monthly fee to the golf course, and Royal Links would make monthly payments sufficient to cover that fee, in return for the opportunity to place advertising on the cart. After five years, the golf course's payment obligation would end, but the golf course would continue to receive advertising payments from Royal Links. As in the other cases, Royal Links stopped making payments to the golf course, but the leasing company took the position that the golf course needed to keep making its payments. The leasing company asserted both that it was an independent entity from Royal Links and that the golf course was obligated to keep paying under the "hell or high water" clause in the lease agreement.

In this case, the golf course, i.e., Waterford, refused to keep making payments, and Frontier Leasing Corp., the leasing company's alleged assignee, sued. The district court granted summary judgment to Frontier. It specifically found Waterford had failed to raise a genuine issue of material fact that Royal Links was an agent of the leasing company. It also found as a matter of law the agreement between Frontier and Waterford was a lease and not a security

interest, the agreement was not unconscionable, and Waterford's remaining affirmative defenses and counterclaims were insufficient. The district court declined to reach certain other issues raised by the parties because it did not feel it was necessary to do so.

On Waterford's appeal, we hold as follows:

1. We affirm the dismissal of Waterford's unconscionability and Iowa Code chapter 535 (Supp. 2007) usury defenses.
2. Consistent with the holding of *Outlook*, 784 N.W.2d at 760, we find there is a genuine issue of material fact on agency.
3. Further applying the *Outlook* decision, 784 N.W.2d at 757, we conclude the agreement between Frontier and Waterford established a security interest, not a lease.
4. We find that Frontier is a real party in interest and, in any event, that Waterford waived this argument.
5. We decline to decide whether Frontier is a holder in due course, and whether Waterford's remaining defenses and counterclaims are valid. The district court did not reach these issues, and we believe the prudent course of action would be for it to address them in the first instance. Moreover, if the district court finds Frontier is a holder in due course, or that Royal Links was not an agent of the leasing company, the district court would not need to address the remaining defenses.

Accordingly, we reverse the summary judgment except as set forth herein and remand for further proceedings.

I. Background Facts and Proceedings

Viewing the evidence in the light most favorable to Waterford as the non-moving party, we discern the following facts from the record: Waterford operates a golf course in Georgia. Royal Links is an Ohio corporation that supplied beverage caddy express carts to golf courses across the country.

In early June 2004, Waterford was approached by a Royal Links representative about participating in the beverage caddy express program. According to Waterford, the representative stated the program would allow Waterford to receive a "no cost, free" beverage cart, in exchange for displaying advertising on the cart. The representative stated that under the program, Royal Links would agree to pay a monthly sum equal to the monthly cost to lease the cart, and Royal Links would locate and provide the leasing company. The representative further stated Royal Links would make all necessary arrangements for Waterford to receive the free beverage cart and all Waterford needed to do was execute a series of documents with Royal Links.

After the initial conversation, Waterford received from Royal Links a credit application and course profile. Waterford claims Royal Links stated these forms were needed for Royal Links' leasing experts to complete Waterford's lease. Listed at the top of the credit application were Royal Links' name, address, and contact information. The application also provided:

> The Undersigned authorizes the release of any credit reference information including loan, lease, checking, savings, financial statements and trade accounts to Royal Links USA and any of its affiliates and/or assigns. The Undersigned has contacted the references listed above authorizing the release of information to Royal Links USA or its representatives.

On June 22, 2004, Waterford executed and faxed the credit application to Royal Links in Ohio. Royal Links in turn faxed the application to the C&J leasing companies in Iowa on July 13, 2004. After the credit application had been approved, C&J Vantage Leasing Co. was assigned the lease internally and purchased the beverage cart from Royal Links so it could "lease" it to Waterford.

Meanwhile, Waterford received from Royal Links a packet for enrollment in the beverage caddy express program. The packet included an "Equipment Lease Agreement," a "Program Agreement," and a FedEx envelope to return the documents to Royal Links. Waterford states that after it received the packet, a Royal Links representative called to explain the documents and the offsetting payments under the agreements.

On August 4, 2004, Waterford signed the "Equipment Lease Agreement." The printed lease agreement had the Royal Links name on the top, but named C&J Leasing Corp. as the "lessor." (When the lease agreement was countersigned, "C&J Vantage Leasing Co." was handwritten in as the lessor.) By the terms of the lease agreement, Waterford was to make payments of $320 per month for sixty months for one cart. At the end of the sixty-month term, Waterford would then have the option to purchase the cart for one dollar. The "Equipment Lease Agreement" additionally provided:

> You have selected the equipment. The dealer [Royal Links] and its representatives are not our agents and are not authorized to modify the terms of this lease. . . . We make no warranties to you express or implied, as to the merchantability, fitness for a particular purpose, suitability, or otherwise we provide the equipment to you as is. We shall not be liable for consequential or special damages.

The "Equipment Lease Agreement" also contained a "hell or high water" clause stating:

> Your Payment obligations are absolute and unconditional and are not subject to cancellation, reduction or setoff for any reason whatsoever. . . .

The agreement further contained a "waiver of defenses" clause providing:

> You may not assign or dispose of any rights or obligations under this Lease or sub-lease the Equipment, without our prior written consent. We may, without notifying you, (a) assign this Lease or our interest in the Equipment; and release information we have about you and this Lease to the manufacturer, dealer or any prospective investor, participant or purchaser of this Lease. If we do make an assignment under subsection 13(a) above our assignee will have all of our rights under this Lease, but none of our obligations. You agree not to assert against our assignee claims, offsets or defenses you may have against us.

Under the additional terms and conditions, the agreement further provided:

> If you so request, and we permit the early termination of this Lease, you agree to pay a fee for such privilege. THE PARTIES INTEND This TO BE A "FINANCE LEASE UNDER ARTICLE 2A OF THE UNIFORM COMMERCIAL CODE. . . . YOU WAIVE ALL RIGHTS AND REMEDIES CONFERRED UPON A LESSEE BY ARTICLE 2A OF THE UCC.

Waterford also executed a "Program Agreement" with Royal Links. Under this agreement, Waterford agreed to permit Royal Links to display advertising on its beverage caddy express unit in exchange for a share of the advertising revenue. For the initial sixty-month period (i.e., for the time period when Waterford was committed to pay the leasing company $320 per month), Royal Links agreed to pay Waterford $320 per month for advertising rights. Thereafter, for the next sixty months, Royal Links would pay Waterford $2000 per year if Waterford would continue to display advertising. After the end of this second term, Royal Links had the option to purchase the beverage cart for one dollar.

Waterford received the cart on August 30, 2004. The "Delivery and Acceptance Certificate" signed by Waterford provided in bold:

> The undersigned acknowledges that Supplier [Royal Links] is not an employee or agent of C and J Leasing and Supplier [Royal Links] is not authorized to amend the terms of the Equipment Lease.

The following day, a C&J representative contacted Waterford directly and verified that Waterford received the equipment and understood the lease was non-cancellable.

Although Royal Links initially made payments to Waterford under the "Program Agreement," in October 2004 Royal Links notified Waterford that it would no longer make these payments.[1] Soon thereafter, C&J Leasing Corp. sent a letter to Waterford stating that Royal Links' failure to make advertising payments had no effect on Waterford's obligation to make lease payments. On November 12, 2004, C&J Leasing Corp. sent a default letter to Waterford alleging failure to make the October and November 2004 lease payments. Waterford may have resumed making some payments, because it ultimately made a total of twelve monthly payments.

On April 8, 2005, C&J Vantage Leasing assigned its interest in the lease to C&J Special Purpose Corp., which immediately assigned its interest to Frontier. On September 21, 2005, C&J Leasing Corp. sent another default letter to Waterford. This default was not cured.

On June 11, 2008, Frontier filed a petition for breach of contract seeking the balance of payments due under the "Equipment Lease Agreement" totaling

[1] Royal Links is reported to have filed for bankruptcy.

$17,299.20. On September 29, 2008, Waterford filed an answer and asserted several affirmative defenses including estoppel, unconscionability, frustration of purpose, mutual mistake, fraud in the inducement, and lack of standing, as well as counterclaims for declaratory judgment, rescission, restitution, business opportunity violations under Iowa Code chapter 551A and usury violations under Iowa Code chapter 535. Waterford did not allege Frontier was not the real party in interest.

On May 26, 2009, Frontier moved for summary judgment and the dismissal of the counterclaims and affirmative defenses asserted by Waterford. Frontier argued the agreement was an enforceable finance lease and the "hell or high water" and "waiver of defenses" clauses of the agreement foreclosed Waterford's affirmative defenses and counterclaims. Waterford resisted and urged the agreement was a secured transaction disguised as a lease, and its affirmative defenses and counterclaims went to contract formation thus surviving the "hell or high water" and "waiver of defenses" clauses. Waterford further argued a fact question had been raised regarding whether Royal Links had apparent authority to act as an agent on Frontier's behalf. Waterford also briefed at length its affirmative defenses/counterclaims of unconscionability, chapter 535, and chapter 551A.

On October 5, 2009, the district court granted summary judgment in favor of Frontier and dismissed all affirmative defenses and counterclaims. Following a subsequent damages hearing, the court entered a judgment in favor of Frontier for $16,989.40 as well as attorney fees of $3000. At the damages hearing,

Waterford attempted to raise a real party in interest defense to liability for the first time. The court did not consider that defense in its damages ruling.

Waterford appeals. It asserts: (1) the "Equipment Lease Agreement" was unconscionable; (2) Waterford had valid counterclaims and defenses based on chapter 535, chapter 551A, and the common law; (3) there were genuine issues of material fact regarding whether Royal Link was acting as an agent for the leasing company; (4) its agreement to pay for the beverage cart involved an installment sale rather than a lease; and (5) Frontier was not the real party in interest.

II. Standard of Review

We review a district court's ruling on a motion for summary judgment for the correction of errors at law. *Links Eng'g*, 781 N.W.2d at 775. Summary judgment is only appropriate when

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.

Iowa R. Civ. P. 1.981(3). We review the record in the light most favorable to the nonmoving party and afford the nonmoving party every legitimate inference the record will bear. *Links Eng'g*, 781 N.W.2d at 775.

Waterford contends the district court should not have granted summary judgment. The parties' briefing is extensive, and covers a number of issues. We begin our analysis by discussing two specific defenses that were briefed by Waterford below and in this court.

III. Unconscionability

Waterford claims the "Equipment Lease Agreement" was procedurally and substantively unconscionable. The district court rejected Waterford's unconscionability defense. For the reasons stated herein, we agree with the district court's conclusions.

Unconscionability is a recognized defense to the enforcement of a contract. *Fed. Land Bank v. Steinlage*, 409 N.W.2d 173, 174 (Iowa 1987); *see also* Iowa Code § 554.2302. The burden of proving a particular provision or contract is unconscionable rests on the party claiming the invalidity unless it is unjust and unreasonable on its face. *In re Estate of Ascherl*, 445 N.W.2d 391, 392 (Iowa Ct. App. 1989). Whether a contract or provision is unconscionable is a question of law for the court. Iowa Code § 554.2302(1) & cmt. 3.

In considering a claim of unconscionability, we examine the following factors: (1) assent, (2) unfair surprise, (3) notice, (4) disparity of bargaining power, and (5) substantive unfairness. *Gentile v. Allied Energy Prods., Inc.*, 479 N.W.2d 607, 609 (Iowa 1991). An agreement is substantively unfair "if it is 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'" *Casey v. Lupkes*, 286 N.W.2d 204, 207 (Iowa 1979) (citations omitted).

> The basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.

Iowa Code § 554.2302 cmt. 1 (citation omitted).

Waterford contends that C&J (1) "used Royal Links and the sales representative to secure Waterford's signature on the Lease and now disavows any responsibility for the representations that were used to secure the execution of the contract"; (2) "masqueraded the sale of the Cart through the use of an alleged 'finance lease' in an effort to conceal the interest rate imposed"; and (3) "used a credit application that specifically stated it would only be shared with Royal Links affiliates and/or assigns to have Waterford execute the contract." Waterford also states, in passing, the amount it was charged was disproportionate to the actual value of the cart.

Yet, Waterford does not deny having read the entire agreement before signing it. Waterford also signed a one-page acknowledgment and went through a telephonic verification regarding some of the key terms of the lease. Waterford does not claim it failed to understand the terms and conditions of the "Equipment Lease Agreement." *See Home Fed. Sav. & Loan Ass'n v. Campney*, 357 N.W.2d 613, 619 (Iowa 1984) (analyzing the factors and finding a contract provision to not be unconscionable). In addition, although Waterford alludes to a disparity between the cart's value and the value of the payments it was required to make, it presented no evidence pertaining to the cart's actual value. The record indicates C&J Vantage Leasing actually paid Royal Links $12,500 for the cart. The record also indicates Waterford operated a golf course and had been in business for six years at the time of executing the lease agreement.

Therefore, we uphold the district court's determination that Waterford failed to show the "Equipment Lease Agreement" was unconscionable.

IV. Chapter 535—Usury

Waterford argues it had a valid usury defense based on chapter 535. We disagree. Waterford agreed in writing to the specific monthly payments at issue, and written loan agreements for "business or agricultural purposes" are generally exempt from the usury limit. Iowa Code § 535.2(2)(a)(5). Waterford complains that the agreement did not separately disclose an interest rate, but this argument cannot succeed because section 535.2 is not a "disclosure" law. It requires the parties to memorialize their agreement in writing, if they are entering into a business loan with a rate of interest above five percent, *see id*. § 535.2(2)(a)(5), but it does not require a specific form of disclosure (as does the federal Truth in Lending Act, *see* 15 U.S.C. § 1632, for example). Thus, it is sufficient that the due dates and amounts of the payments were spelled out in writing, and that Waterford agreed to them. We affirm the dismissal of this defense.

V. Agency

Waterford claims there is a genuine issue of material fact as to whether Royal Links was acting as an agent for the C&J entities. Waterford does not argue that Royal Links had actual authority to act on C&J's behalf, but instead insists C&J allowed Waterford to believe Royal Links was its agent and thereby created apparent authority. *See Links Eng'g*, 781 N.W.2d at 776 ("An agency relationship can be established through the agent's actual or apparent authority to act on behalf of the principal."). "For apparent authority to exist, the principal must have acted in such a manner as to lead persons dealing with the agent to believe the agent has authority." *Outlook*, 784 N.W.2d at 759. The existence of agency is ordinarily an issue of fact. *Id*. at 760.

Waterford contends that apparent authority exists here because, until the lease agreement was signed on August 4, 2004, (1) all of its contacts were with Royal Links, (2) the leasing agreement had Royal Links' logo and name at the top, (3) the contracted payment from Royal Links was equal to the lease payment due to C&J, and (4) the credit application stated the release of credit information would only be made to "Royal Links USA and any of its affiliates and/or assigns."

Frontier counters that no agency existed because the C&J entities and Royal Links were separate and independent, and the documentation signed by Waterford specifically acknowledged Royal Links was not an agent.

This is essentially the same record that was present in *Outlook*. Although the contract may state Royal Links is not an agent of C&J, "such a contractual statement is not necessarily conclusive as to the non-existence of such a relationship." *Outlook*, 784 N.W.2d at 760 (quotations omitted). Drawing all inferences in favor of Waterford, and following the supreme court's guidance in *Outlook*, we find the record here raises a genuine issue of material fact that requires the agency question to be resolved by trial. Accordingly, we reverse the district court on this point.

VI. Finance Lease or Sale with a Security Interest

Waterford also disputes the district court's finding that its agreement with C&J was a finance lease rather than an installment sale with a retained security interest. The district court placed considerable emphasis on the unequivocal language "declaring the contract to be a lease."

In *Outlook*, the supreme court wrote on this subject at some length, although it ultimately did not decide the issue. 784 N.W.2d at 756-58. According

to the supreme court, the language in section 1-201(37) of the Uniform Commercial Code (now codified at Iowa Code section 554.1203) should be followed in determining the status of a transaction as a lease or a security interest. *Id*. at 757. "Whether a transaction in the form of a lease creates a security interest is determined by the facts of each case." Iowa Code § 554.1203(1). To be considered a finance lease, the transaction must first qualify as a lease. *See id.* § 554.13103(1)(g). But, since the definition of a lease excludes agreements that create a security interest, *see id*. § 554.13103(1)(j) (stating "a sale . . . or retention or creation of a security interest is not a lease"), it is necessary to apply section 554.1203's definition of security interest. Notably, the "form" of the transaction does not prevail, because even a transaction "in the form of a lease" may be deemed a creation of a security interest. *Id*. § 554.1203(1).

> A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and
>
> (a) the original term of the lease is equal to or greater than the remaining economic life of the goods;
>
> (b) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
>
> (c) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement; or
>
> (d) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

Id. § 554.1203(2).

Section 554.1203(2) establishes a two-part test whereby "[a]n agreement is a security transaction if (1) it is not subject to termination by the lessee, and (2) it meets one of the criteria listed in section [554.1203(2), subsections a through d]." *Outlook*, 784 N.W.2d at 757. This two-part test is referred to as a "bright-line or per se rule," meaning "[i]f the two-part test is satisfied, the agreement is a security interest and cannot be a lease or a finance lease." *Id*. (citing *In re Pillowtex, Inc.*, 349 F.3d 711, 717 (3d Cir. 2003)). Accordingly, courts interpreting this statute "'have found it to mandate a finding of a security interest if the two-part test is satisfied.'" *Id*. (quoting E. Carolyn Hochstadter Dicker & John P. Campo, *FF&E & the True Lease Question: Article 2A & Accompanying Amendments to UCC Section 1-201(37)*, 7 Am. Bankr. Inst. L. Rev. 517, 546, 546 n.101 (1999) (citing cases)).

In the present case, we believe the two-part test has been met. It is not disputed that the "lease" was noncancellable. Iowa Code § 554.1203(2). In addition, Waterford had an option to buy the beverage cart from the leasing company at the expiration of the sixty-month lease for a nominal sum, one dollar. *Id*. § 554.1203(2)(d); *see also Corporate Ctr. Assocs. v. Total Group Servs. of Iowa, Inc*., 462 N.W.2d 713, 714-15 (Iowa Ct. App. 1990) (holding the existence of an option to purchase equipment for one dollar at the end of a lease term resulted in the creation of a security interest). It is true that *Royal Links* had a separate option to buy the cart from Waterford for one dollar at the expiration of the second sixty-month period. But this does not negate Waterford's status as owner of the cart at the end of the first sixty-month period. And no one disputes

that Royal Links and the leasing company were distinct legal entities; at most, Waterford maintains Royal Links was acting as an agent of C&J.

Even if we did not find the two-part test had been met, we would reach a similar conclusion under the specific facts of this case. *Outlook*, 784 N.W.2d at 758 (explaining "[a]n agreement which does not meet the two-part test may still be considered a transaction which creates a security interest based on the specific facts of the agreement"). This case-by-case approach focuses on the "economics of the transaction." *Id*. (quoting *In re Taylor*, 209 B.R. 482, 484-85 (Bankr. S.D. Ill. 1997)). Here, Waterford not only had the opportunity to buy the beverage cart at the conclusion of the lease term in return for a nominal residual, but it would have already paid the entire cost of the beverage cart during the lease term. *See Pillowtex*, 349 F.3d at 719 (noting "the aggregate rental payments . . . had a present value equal to or exceeding the cost of the [leased property]"). The monthly lease payments due from Waterford to the leasing company total $19,200. Even allowing for a present value discount, this is substantially more than the $12,500 that C&J paid Royal Links for the cart.

Also, even the language of the "Equipment Lease Agreement" is somewhat Janus-like. It refers to the transaction being a lease, but at the same time it provides that Waterford "shall have title to the Equipment immediately upon delivery." That is a strange provision for a purported lease agreement to contain and it suggests the transaction was not a lease at all.

Notably, Frontier does not really deny at this point that the transaction should be characterized as an installment sale subject to a security interest. In

its appellate brief, it concedes, "Frontier understands how one could describe the lease as a secured transaction."

VII. Real Party in Interest

Waterford argues that Frontier was not the real party in interest because it took its assignment from C&J Vantage Leasing Co. (via C&J Special Purpose) rather than from C&J Leasing Corp. Frontier claims that C&J Leasing actually was Waterford's lessor. Since Frontier took assignment from the "wrong" leasing company, Waterford urges that Frontier does not own the rights on which it brought suit. For the following reasons, we disagree.

The record here shows that Waterford's printed lease form stated C&J Leasing was the lessor, but a handwritten notation was made thereon indicating that *C&J Vantage Leasing* was the lessor. In addition, C&J Vantage Leasing, not C&J Leasing, issued the check to Royal Links for the beverage cart in question. Other documentation, including the UCC-1 filed with the Georgia Secretary of State's Office, the "Delivery and Acceptance Certificate," and the default letters, bore the name of C&J Leasing rather than C&J Vantage Leasing.

Waterford did not contest Frontier's status as the real party in interest until after the district court had already granted summary judgment to Frontier on liability and was in the midst of its hearing on damages. While the damages ruling was pending, both parties submitted briefing on the real party in interest issue. Frontier filed an affidavit from the CEO of the C&J entities that explained the following: (1) this lease was initially put in the name of C&J Leasing, but was reassigned to C&J Vantage Leasing because of better funding terms from the bank; (2) C&J Vantage Leasing paid Royal Links for the cart covered by this

lease; (3) C&J Leasing was a servicing agent and handled certain collection activities, but funds received were appropriately credited to C&J Vantage Leasing; (4) C&J internal records show the lease was held by C&J Vantage Leasing until it was assigned to C&J Special Purpose and then to Frontier. Waterford did not submit any affidavits or other evidence rebutting these points. The district court then issued a final ruling that awarded damages to Frontier but did not address real party in interest. Waterford did not ask for the findings to be enlarged or amended under Iowa Rule of Civil Procedure 1.904(2).

This record establishes Frontier was the real party in interest. The handwritten portion of the "Equipment Lease Agreement" indicated C&J Vantage Leasing was the lessor; Frontier, for the most part, explained under oath why certain documents bore C&J Leasing's name rather than C&J Vantage Leasing's name; and, perhaps most important, C&J Vantage Leasing—not C&J Leasing—purchased the beverage cart.

In any event, Waterford waived the "real party in interest" issue. Waterford notes that it pled "lack of standing" as an affirmative defense in its answer, but standing and real party in interest are two different things. *Pillsbury Co., Inc. v. Wells Dairy, Inc*., 752 N.W.2d 430, 434-35 (Iowa 2008). The former has to do with whether the plaintiff has an "actual demonstrable injury"; the latter concerns whether the party is the "true owner of the right sought to be enforced." *Id.* Regardless, Waterford failed to argue either a lack of standing or that Frontier was not the real party in interest until summary judgment had already been entered in Frontier's favor on liability. That was too late.

VIII. Holder in Due Course

We have found the "Equipment Lease Agreement" was really an installment sale subject to a security interest, and there is an issue of fact whether Royal Links was acting as C&J's agent. We have concluded the agreement was not unconscionable or usurious and Frontier was the real party in interest.

This leaves open Waterford's remaining defenses and counterclaims based on Iowa Code chapter 551A (business opportunities), fraud in the inducement, estoppel, mutual mistake, and no meeting of minds. All of these defenses implicate the representations allegedly made by Royal Links to Waterford. Thus, all of them depend on a finding that Royal Links was C&J's agent.

Apart from the question of agency as between Royal Links and C&J, Frontier argued below that it was a holder in due course. Thus, in Frontier's view, even if the "Equipment Lease Agreement" was actually a sale subject to a security interest, Frontier's holder in due course status – combined with the agreement's waiver of defenses - foreclosed Waterford's defenses and counterclaims *as to Frontier*. The agreement stated, "If we do make an assignment . . . our assignee will have all of our rights under this Lease, but none of our obligations. You agree not to assert against our assignee claims, offsets or defenses you may have against us." Frontier urged that under Article 9 of the U.C.C., this waiver of defenses clause was enforceable because it took assignment of the agreement from C&J in April 2005 for value, in good faith, without notice of a claim or defense. *See* Iowa Code § 554.9403(2).

When an assignee takes an assignment under the circumstances described in section 554.9403(2), it is deemed a holder in due course and only "real" as opposed to "personal" defenses may be raised against it. *See id.* § 554.3305(1); *see also* 2 James J. White & Robert S. Summers, *Uniform Commercial Code* § 17-10 (5th ed. 2007) [hereinafter "White & Summers"]. The defenses that can be raised are limited to infancy, duress, lack of legal capacity, "illegality of the transaction which, under other law, nullifies the obligation of the obligor," discharge, and "fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms." Iowa Code § 554.3305(1)(a); *see also* 2 White & Summers § 17-10. The illegality must be such as to render the obligation entirely null and void, rather than merely voidable. *See* Uniform Commercial Code § 3-305 cmt. 1 ("If under the state law the effect is to render the obligation of the instrument entirely null and void, the defense may be asserted against a holder in due course. If the effect is merely to render the obligation voidable at the election of the obligor, the defense is cut off."). The only fraud that can be asserted is so-called "fraud in factum," i.e., a deception that deprives the signer of the opportunity to know the essential terms of what he or she is signing. *Nat'l Loan Investors, L.P. v. Martin*, 488 N.W.2d 163, 167-68 (Iowa 1992).

None of the remaining defenses fall into the "real" defense category; they are all "personal" defenses. Waterford does not allege "fraud in factum" but rather fraud in the inducement. *See* 2 White & Summers § 17-10. Waterford's business opportunities claim is not the kind of illegality claim that would render the agreement void *ab initio*. Rather, a finding of a chapter 551A violation simply

authorizes rescission of the agreement and other remedies. Iowa Code § 551A.8(1). Thus, if Frontier were a holder in due course, those remaining defenses would be cut off.

We decline to decide the holder in due course issue at this time. Although the parties briefed it below, and we believe we could decide it notwithstanding *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (holding an appellate court will not address arguments that were not presented to the district court), that would not be a prudent course here. The district court did not decide whether Frontier was holder in due course, and it has not been briefed to us. Although it appears undisputed that Frontier paid value for the "Equipment Lease Agreement," there also seems to be evidence that Frontier learned of the default in October 2004, prior to the April 2005 assignment, and the record does not indicate whether that default was cured. We believe the proper course would be for the district court to address the holder in due course issue in the first instance.

Since either a finding that Frontier was a holder in due course or a finding that Royal Links was not C&J's agent would eliminate Waterford's remaining defenses and counterclaims, and since the district court did not specifically address those remaining defenses and counterclaims, we also believe it would be wiser for us not to address them. Further development of the chapter 551A defense at the district court level, if it needs to be reached, would be helpful.

Thus, we reverse the grant of summary judgment, except as to Waterford's defenses and counterclaims based on unconscionability, chapter 535, and real party in interest where summary judgment is affirmed. We hold the transaction was an installment sale subject to a security interest and not a lease.

We find there is an issue of fact on agency. An ultimate finding that Frontier was not a holder in due course or Royal Links was not C&J's agent would eliminate Waterford's remaining defenses and counterclaims, but otherwise those defenses and counterclaims need to be considered and decided. We remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.