IN THE COURT OF APPEALS OF IOWA

No. 2-774 / 12-0178
Filed October 31, 2012

DAVIS MOBILE HOMES, L.L.C.,
Plaintiff-Appellant,

vs.

U.S. BANK NATIONAL ASSOCIATION,
Defendant-appellee.

Appeal from the Iowa District Court for Henry County, Mary Ann Brown, Judge.

Davis Mobile Homes appeals a district court's grant of summary judgment dismissing its claims against U.S. Bank. **AFFIRMED.**

Peter C. Riley and James K. Weston II of Tom Riley Law Firm, Iowa City, for appellant.

Jason M. Steffens of Simmons, Perrine, Moyer & Bergman, P.L.C., Cedar Rapids, for appellee.

Artemio Santiago of Reding & Santiago, P.L.C., Fort Madison, for appellee Patrick James.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

A bank customer asks us to decide if his bank can enforce the one-year limitation on filing legal actions contained in the deposit account agreement. Because Iowa law charges the customer with knowledge of the information contained in his bank statements, the customer cannot prevail on his claim that he lacked notice of the limitation. The customer also falls short of showing the time-bar provision was unconscionable. Accordingly, we affirm the grant of summary judgment to the bank.

I. Background Facts and Proceedings

In 1972, Donald Davis founded Davis Mobile Homes, a Mount Pleasant business that sells and services manufactured homes.[1] For more than thirty years, the company maintained a checking account with a local bank, which in recent years was purchased by U.S. Bank.[2] On a monthly basis, U.S. Bank mailed itemized account statements to its customers, including Davis Homes. When it periodically updated the account agreement, U.S. Bank would include a notice at the bottom of customers' monthly statements. In support of its summary judgment motion, U.S. Bank offered the following example from the March 2004 statement received by Davis Homes:

> Please note, our account Terms and Conditions brochure has been updated as of February 1, 2004. You may obtain a current copy from any U.S. Bank branch, have it mailed to you by calling 24 Hour Banking and Financial Sales at the number on this statement, or view it on-line at www.usbank.com.

---

[1] In 2008, Donald Davis transferred the business to his son, Sidney Davis, but Donald continues to work for the business as a consultant.

[2] The record does not provide an exact date when U.S. Bank took over the operations.

Davis Homes employed five people in 2005 when the mobile home manufacturer hired Robin Patrick. Her job duties entailed interacting with customers, running errands, and helping display homes. She also organized the office; worked in QuickBooks, a business accounting software program; and handled the company's mail. She was not authorized to write checks or have access to Davis Homes' bank accounts.

Between April 26, 2006, and December 6, 2006, Patrick stole blank business checks from Donald's desk, forged his signature, and obtained cash from the Davis Homes' account. All told, she negotiated sixty-three checks totaling more than $340,000. She hid her embezzlement by intercepting the monthly U.S. Bank statements from the company's mail and secreting them in her garage. Donald noticed he was not receiving account statements in April or May 2006. Donald visited the bank in June and again in July of 2006, but received only a print-out showing the current balance in the account. Only after a meeting with bank officers on December 6, 2006, did Donald receive copies of the cancelled checks and discover the forgeries. Patrick received a federal prison sentence for her criminal actions.

On December 3, 2008, Davis Homes sued Patrick, her husband, and U.S. Bank. The claims alleged against U.S. Bank included conversion, breach of contract, negligence, and a violation of Article IV of the Uniform Commercial Code. U.S. Bank filed a motion for summary judgment on June 11, 2010, arguing the Davis Homes' suit was time barred because their 2006 account agreement contained a one-year limitation to file suit against the bank.

In support of its motion for summary judgment, the bank submitted copies of the Deposit Account Agreements that were effective February 1, 2005, and February 13, 2006. Both agreements contained more than forty pages outlining the terms applicable to all deposit accounts. Just after the table of contents, both agreements stated the following in bold type:

> Please read this carefully. This brochure is revised periodically, so it may include changes from earlier revisions.
>
> By signing a signature card, opening, or continuing to hold an account with us, you agree to the most recent version of this Agreement, which is available to you at your local U.S. Bank branch, at www.usbank.com, or by calling U.S. Bank 24-Hour Banking at a number listed on the back of this booklet.

The agreements also included the following provision:

> CHANGES TO OUR AGREEMENT WITH YOU
> We may change any term of this Agreement. We will give you reasonable notice in writing or by any method permitted by law. You agree that in any event 30 days written notice is reasonable.
> If we notify you that the terms of your account have changed and you continue to have your account after the effective date of the change, you have agreed to the new terms.

At page 19 of the 2005 agreement and at page 22 of the 2006 agreement, the following paragraph was included:

> You agree to waive any rights to recovery you may have against us if you do not provide notice to us in the manner and within the time required by this Agreement. You may not start a legal action against us because of any problem unless: (a) you have given us the above notice and (b) the legal action begins within one year after we send or make your statement available to you.

After hearing oral arguments on the matter, the district court granted U.S. Bank's motion for summary judgment and dismissed all claims against the bank.[3] Davis Homes now appeals.

II. Scope and Standard of Review

We review the grant of summary judgment for correction of legal error. Iowa R. App. P. 6.907; *Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 771 (Iowa 2009). We limit our review to whether a genuine issue of material fact appears on record and whether the court correctly applied the law. *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 434 (Iowa 2008). The burden rests on the moving party to show the nonexistence of a material fact. *Converse*, 772 N.W.2d at 771. We afford the nonmoving party every legitimate inference that can reasonably be deduced from the record; if reasonably minds could differ on an issue's resolution, a factual question exists and summary judgment is not appropriate. *Bank of the West v. Kline*, 782 N.W.2d 453, 456–57 (Iowa 2010).

III. Analysis

Davis Homes' argument on appeal is two-fold. The bank customer asserts the one-year limitation should not be enforced because Donald never received the deposit account agreement or consented to the term. Alternatively he argues that even if the agreement controlled the bank-customer relationship, the one-year limitation (reduced from the statutory term of three years under Iowa Code section 554.4111 (2007)) was unconscionable. We address each argument in turn.

---

[3] U.S. Bank subsequently dismissed its counterclaims earlier filed against Davis Homes to recover for costs and fees under the parties' account agreement.

A. Did the One-Year Limitations Clause in the 2006 Deposit Account Agreement Bar the Present Action?

Davis Homes argues the limitation should not be enforced because neither the company nor Donald Davis received or consented to the terms of the deposit account agreement in effect in 2006 when Patrick embezzled the funds. Davis Homes had been a customer of U.S. Bank's predecessor, Firstar Bank. U.S. Bank did not present any evidence that it provided a copy of the account agreement to Firstar customers when it took over the operations. But to prove Davis Homes had access to the account agreement, U.S. Bank offered a March 2004 bank statement sent to the customer that indicated the "account Terms and Conditions brochure had been updated" and provided three options available to obtain a current copy of the document. The two-sentence notice did not indicate what terms or conditions in the forty-plus page brochure had been unilaterally changed by the bank in March 2004.

The summary judgment record does not reveal when the one-year limitation went into effect. The exhibits offered by U.S. Bank show only that the limitation was described in both the 2005 and 2006 account agreements.

Davis Homes first contends the deposit account agreement should not apply because Davis did not receive notice or agree to its terms. U.S. Bank responds that this challenge is inconsistent with Davis Homes' own petition stating U.S. Bank breached its "bank-customer" agreement.

Davis Homes next argues that even if the account agreement was valid, the one-year limitations period should not apply because it was "buried in the

middle of a twenty-two-line paragraph in near-microscopic print, almost half way through a forty-nine-page document." U.S. Bank counters that Davis Homes cites no authority for the proposition that a term may be disregarded even if it is "buried" in an agreement.

While U.S. Bank presented no evidence that Davis Homes signed a deposit account agreement with U.S. Bank, the agreement available to the customer indicated that continued use of the account would be deemed acceptance of its terms. Davis Homes continued to maintain the deposit account after receiving the March 2004 bank statement offered into the record. That statement provided three options for the customer to view the agreement. Donald Davis said he never reviewed the agreement. The agreements in place in 2005 and 2006 both contained the one-year limitations provision.

The bank-customer relationship is one based on contract. *Clinton Nat'l Bank v. Saucier*, 580 N.W.2d 717, 719 (Iowa 1998); *see also Peterson v. Carstensen*, 249 N.W.2d 622, 624 (Iowa 1977) (noting bank deposit creates a valid contract between depositor and bank). "Absent an express agreement of the parties to the contrary, the provisions of Article 4 of the Uniform Commercial Code (UCC) governing bank deposits and collections are made express provisions of the depositor's contract with the bank." *Saucier,* 580 N.W.2d at 719 (noting our state's adoption of Article 4). Official Comment 2 to UCC rule 4-103, adopted in Iowa Code section 554.4103 (2011), provides guidance on what provisions govern the depositary agreement between a bank and its customer.

Comment 2 explains so long as the standards are not manifestly unreasonable, parties are bound to the deposit agreement language modifying the default provisions of the UCC if "they are parties to the agreement or are bound by adoption, ratification, estoppel or the like." This includes not only general agreements between the depositor and depositary bank, but documents such as "[l]egends on deposit tickets, collection letters and acknowledgements of items, coupled with action by the affected party constituting acceptance, adoption, ratification, estoppel or the like," if such documents meet the definition of agreement in section 1-201. U.C.C. § 2-314 cmt. 2. "Agreement" is defined as "the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade . . ." Iowa Code § 554.1201(2)(c) (embracing UCC definition of agreement in rule 1-201).

Because Davis Homes maintained its deposit account with U.S. Bank after the bank took over its predecessor, there existed a deposit agreement—contractual in nature—between the two. *See Saucier*, 580 N.W.2d at 719. While section 554.4111 limits the time to enforce an obligation, duty, or right under Article 4 to three years, Davis Homes does not argue the reduced one-year limitation to file suit is unreasonable.[4] Indeed, our supreme court has held such a limitation to suit to be an enforceable contract provision. *See Douglass v. Am.*

[4] Recognizing Davis Homes did not argue one year to be an insufficient amount of time, the district court reasoned because section 554.4406(4) provides only a sixty-day window to notify a bank of an unauthorized signature or alteration of a check, a one-year limitations period would not be an unreasonable time constraint. We agree with this reasoning.

Fam. Mut. Ins. Co., 508 N.W.2d 665, 666 (Iowa 1993) (overruled in part on other grounds by *Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d 775, 779 (Iowa 2000)); *Nicodemus v. Milwaukee Mut. Ins. Co.*, 612 N.W.2d 785, 787 (Iowa 2000) ("The basic rule was established in *Douglass*: a contractual limitations provision is enforceable if it is reasonable.").

Iowa law charges a customer with knowledge of the information contained in bank statements, regardless of whether the customer relies on its own employee to examine the monthly statements. *Dow City Cemetery Ass'n v. Defiance State Bank*, 596 N.W.2d 77, 82 (Iowa 1999). A customer's duty to examine the monthly bank statements would include the imputed knowledge of the language at the bottom of the statement alerting customers that the bank had "updated" the terms and conditions and providing three means to examine them.

It is worth noting the language used by U.S. Bank to signal a change in the agreement is not a model of clarity. A prudent customer examining his or her bank statement may not comprehend that an updated "brochure" is the same as a modified account agreement. Further, it would be far more forthcoming for the bank to explain what was actually changed in the agreement rather than leaving the customer to comb through forty-plus pages of fine print, comparing the previous agreement with the modified version to unearth the new contract terms. *See DIRECTV, Inc. v. Mattingly*, 829 A.2d 626, 631 (Md. 2003) (holding customer did not constructively assent to arbitration provision when modification provision of original contract was not followed). But Davis Homes does not

directly address the reasonableness of that notice, and so we are unable to grant relief on that ground.

The question of reasonable notice is also complicated by the lack of information about when the one-year limitations period became part of the account agreement. While U.S. Bank offered evidence that Davis Homes received notice in its monthly statement that the agreement was updated in March 2004, it is not clear that the limitations-to-suit term was a 2004 change.

But regardless of when U.S. Bank first included that term in its account agreement with Davis Homes, the customer's continued use of the account after being offered access to the terms of the agreement constituted "acceptance, adoption, ratification, or the like" of U.S. Bank's terms. *See Douglaston Elec. Sales, Inc. v. Royal Bank of Canada*, 419 N.Y.S.2d 94, 101 (N.Y. App. Div. 1979) (holding language on the reverse side of multiple collection notices allowing for use of local currency in collecting drafts was enforceable under UCC Comment 2); *Rapp v. Dime Sav. Bank of New York*, 408 N.Y.S.2d 540, 545 (N.Y. App. Div 1978) (citing Comment 2 in holding language printed on reverse side of collection agreement bound plaintiffs who implicitly agreed to terms by voluntarily opening account and continuing to deposit checks therein); *Colorado Nat'l Bank v. First Nat'l Bank & Trust Co.*, 459 F. Supp. 1366, 1373 n.15 (W.D. Mich. 1978) (noting section 4-103 of the UCC "provides that agreements, in the form of operating circulars, may alter the provisions of the UCC").

Although Donald Davis did not review the terms and conditions and did not expressly agree to them, we charge the customer with knowledge from the

notice on the bank statement and his continued use of the account as an agreement to the terms. *See* Iowa Code § 554.1201(2)(c). Therefore, the 2006 deposit account agreement controls. *See S. Trust Bank v. Williams*, 775 So. 2d 184, 190–91 (Ala. 2000) (holding because "[a]mendments to the conditions of unilateral-contract relationships with notice of the changed conditions are not inconsistent with the general law of contracts," customer's continued use of account constituted agreement where bank notified customer via including terms in monthly account statement, despite customer's failure to review or expressly assent thereto).

B. Was the One-Year Limitation to File Suit Unconscionable?

Davis Homes contends even if the 2006 agreement controls, the one-year limitation is unconscionable because the bank "in unilaterally creating this document, has apparently made every effort to ensure none of its customers become aware of its attempt to reduce the statute deadline."

At the outset, U.S. Bank argues Davis Homes did not preserve error on its unconscionability argument because it did not cite any case law or mention the doctrine before the summary judgment ruling. In its ruling, the district court considered whether Davis Homes assented to the contractual term at issue and applied the analysis from *Home Federal Savings & Loan Association of Algona v. Campney*, 357 N.W.2d 613, 618 (Iowa 1984). *Campney* addressed the issue of "assent" as one of five factors to determine whether a contract provision is unconscionable. *See id.* (listing factors of unconscionability as "assent, unfair surprise, notice, disparity of bargaining power, and substantive unfairness").

Because the district court addressed the unconscionability test in its ruling, we find the issue preserved for appeal. *See State v. Paredes*, 775 N.W.2d 554, 561 (Iowa 2009) (holding "where a question is obvious and ruled upon by the district court, the issue is adequately preserved").

The doctrine of unconscionability is a defense recognized under Iowa's UCC. *See* Iowa Code § 554.2302. Because of its equitable purpose, the term has not received a precise definition. *Smith v. Harrison*, 325 N.W.2d 92, 94 (Iowa 1982). Our supreme court has recognized a bargain as unconscionable "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." *Id.* (quoting *Casey v. Lupkes*, 286 N.W.2d 204, 207 (Iowa 1979). The factors to consider include "assent, unfair surprise, notice, disparity of bargaining power, and substantive unfairness." *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.,* 227 N.W.2d 169, 181 (Iowa 1975).

In *In re Marriage of Shanks*, our supreme court embraced the Restatement (Second) of Contracts explanation of unconscionability:

> A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. *But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party has no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair term."*

758 N.W.2d 506,515 (Iowa 2008) (adding emphasis to Restatement (Second) of Contracts § 208 cmt. d (1980) (emphasis added)). The court goes on to list

factors in the restatement that may contribute to a finding of unconscionability in the bargaining process:

> [1] belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract;
> [2] knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract;
> [3] knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.

Id.

Unconscionability includes both procedural and substantive elements. *C & J Vantage Leasing Co. v. Wolfe*, 227 N.W.2d 65, 81 (Iowa 2011). Procedural unconscionability involves the advantaged party's exploitation of the disadvantaged party's unequal bargaining power, lack of understanding, and the use of convoluted language and fine print. *Id.* Substantive unconscionability focuses on the one-sided, harsh, and oppressive terms of the contract. *Shanks*, 758 N.W.2d at 515.

1. Substantive Unconscionability

Davis Homes claims the district court did not properly apply the five elements of unconscionability. With regard to assent, Davis Homes argues the district court erred in failing to differentiate between the circumstances in *Campney*, wherein the party received and signed the contract without reading it, and Davis Homes' failure to review or sign the agreement.

We believe the distinction is immaterial. As discussed above, U.S. Bank alerted Davis Homes, through its monthly statements, to the existence of the agreement and how to review it when the agreement was periodically updated.

Like Campney, Davis Homes had adequate time to become aware of, and object to, the subject provision in the agreement. *See Campney*, 357 N.W.2d at 619.[5]

Davis Homes argues because U.S. Bank "buried" the one-year limitations in a section captioned "statements and notices," which appeared in the middle of a forty-nine-page document, it created unfair surprise. It criticizes the language as convoluted and in fine print. In response, U.S. Bank points out Donald Davis never reviewed the agreement, so any obscurity affecting the one-year limitation language should not play into the unconscionability analysis.

The account agreement provided a thirty-day window between notice and the effective date of an updated agreement, adding that any customer who continued to maintain an account after the effective date would be deemed have agreed to the terms. We believe thirty days is an adequate timeframe to review the agreement and raise any objection. *See id.* (holding Campney "had time to read the mortgage and ask questions about it" and although he "may indeed

---

[5] After recognizing a party's actual assent to a term does not end the analysis, the district court quoted a passage in *Campney* directing courts to consider whether a term that fails to gain assent is an unreasonable or indecent term, or eviscerates the terms of the agreement:

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement.

Campney, 357 N.W.2d at 618 (quoting *C&J Fertilizer, Inc.*, 227 N.W.2d, at 175) (internal quotations and alterations omitted). We agree with the district court's conclusion that a clause limiting the time to file suit to one year does not alter or eviscerate the purpose of a bank-customer deposit agreement.

have been surprised upon eventually reading paragraph 17, the surprise can hardly be called unfair"). Additionally, the purpose of the unconscionability doctrine is not to save a contracting party who fails to review the agreement based on the argument the clause would have been difficult to find. *See id*. at 617 (reasoning for purposes of reasonable expectation that "[d]efendants, by their own admission, did not read the mortgage before signing it, and so cannot be said to have had any actual intent" regarding a word in the subject provision).

On the notice factor, Davis Homes argues the notification of updated terms appearing at the bottom of U.S. Bank's monthly statements amounted to nothing more than "boilerplate language." But as discussed above, customers are charged with knowledge of the entire contents of their bank statements. *See Dow City*, 596 N.W.2d at 82.

Davis Homes also focuses on the disparity of bargaining power, citing the district court's finding the deposit agreement was "probably . . . a contract of adhesion." A contract of adhesion is not tantamount to unconscionability; it is merely a method to alert a court that such a finding may be justified. *Campney*, 357 N.W.2d at 619 (citing UCC comment that "[t]he principle is one of the prevention of oppression and unfair surprise and not disturbance of allocation of risks because of superior bargaining power"). Davis Homes must show something more. *See id.*

As for the "substantive unfairness" factor, Davis Homes complains the limitations provision—if enforced—will erase the customer's rights against the bank. Davis Homes further argues the bank has not shown why it would be

prejudiced by the customer filing suit more than a year after the discovered embezzlement. U.S. Bank contends prejudice has no bearing on whether the limitation period is enforceable. We agree that a contract term is not unconscionable simply because it turns out to disadvantage one of the parties. *See Wolfe*, 795 N.W.2d at 80 ("[T]he doctrine of unconscionability does not exist to rescue parties from bad bargains."). Because the 2006 deposit agreement was not unduly harsh or oppressive, it was not substantively unconscionable. *See Shanks*, 758 N.W.2d at 517.

2. Procedural Unconscionability

Procedural unconscionability focuses on one party's exploitation, lack of understanding, or unequal bargaining power. *Id.* None of the three *Shanks* factors listed above apply to the instant facts. *See id.* at 515 (quoting Restatement (Second) of Contracts § 208 cmt. d (1981)). Davis Homes was a sophisticated business entity, operating for more than thirty years, and had the opportunity to review the account agreement. *See Wolfe*, 795 N.W.2d at 81 (considering intelligence of business and time to review document in finding no procedural unconscionability). The bank's use of the brochure explaining the deposit account agreement—which notes that it was rewritten to avoid "legal jargon"—does not rise to the level of procedural unconscionability that would invalidate an otherwise enforceable agreement. *See id*.; *Shanks*, 758 N.W.2d at 519.

Because we conclude the 2006 deposit agreement between Davis Homes and U.S. Bank was neither substantively nor procedurally unconscionable, the

district court properly dismissed the customer's claims against the bank as untimely.

AFFIRMED.