

RENDERED: OCTOBER 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000380-MR

WILLIAM J. DUNGAN

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 08-CI-00763

DISCOVER BANK, ISSUER OF DISCOVER
CARD, DFS SERVICES, LLC

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: William J. Dungan appeals from the Pulaski Circuit Court's summary judgment in favor of Discover Bank in a breach of contract action. For the reasons stated herein, we affirm.

On May 19, 2008, Discover filed a complaint against Dungan alleging that he owed it a debt arising from his use of its credit card. Discover attached a

copy of its card member agreement and a billing statement in Dungan's name in the amount of \$13,753.77. On August 25, 2008, Dungan filed an answer alleging that he did not have sufficient evidence to admit or deny the allegation. His only denial was that he was not bound by the card member agreement.

On September 12, 2008, Dungan filed a motion for summary judgment arguing that the parties' contract was neither signed nor dated and that the billing statement was neither signed nor itemized. After Discover responded that KRS 371.010(9) exempted credit cards from the statute of frauds and that Dungan had not denied its allegations, the trial court denied Dungan's motion.

After the parties exchanged further discovery, Discover filed a motion for summary judgment contending Dungan had no defense to its action. On January 9, 2009, Dungan responded to Discover's motion for summary judgment by arguing the following: (1) the parties' contract was unconscionable; (2) the parties' contract was egregious; (3) the parties' agreement violated the "social contract" in callous disregard for society; (4) the parties' contract constituted fraud; and (5) the total amount due was not itemized. Subsequently, Dungan argued that the conscious of a jury would vindicate him because of the great disparity in the power between him and Discover Bank, a megacorporation.

Following a hearing, the trial court granted Discover's motion for summary judgment. The trial court found that Dungan had not denied the material allegations of the complaint and had no viable defenses to the breach of contract action. This appeal followed.

Duncan argues that the trial court erred by granting Discover's motion because his defenses established genuine issues of material fact precluding summary judgment. He further argues that the trial court failed to acknowledge his defenses to Discover's breach of contract claim. We disagree.

The standard of review of a trial court's grant of summary judgment is whether it correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Amos v. Clubb*, 268 S.W.3d 378, 380-81 (Ky.App. 2008). Summary judgments are reserved for cases where the moving party demonstrates that the non-moving party cannot prevail at trial under any circumstances. *Price v. Godby*, 263 S.W.3d 598, 601 (Ky.App. 2008). An appellate court reviews grants of summary judgment *de novo*. *Baker v. Weinberg*, 266 S.W.3d 827, 831 (Ky.App. 2008).

Dungan's answer stated that he did not have sufficient information to admit or deny Discover's claim. In his responses to Discover's request for admissions, Dungan had no specific memory of applying for, receiving, or using the credit card. When asked if he had ever disputed any billing statement from Discover, Dungan stated that he had no specific memory of disputing any statement. When asked if he had received a monthly statement, Dungan stated that he had no specific memory of receiving any of the statements.

Although Dungan disagrees, his answer and discovery responses did not create genuine issues of material fact precluding summary judgment. His defense was that he could not remember applying for, receiving, or using the credit

card. However, a complete lapse of memory is not sufficient to establish a genuine issue of material fact. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 798-99 (Ky. 2004) (plurality opinion). Dungan's other defenses were that the agreement was unconscionable, egregious, and constituted fraud. After reviewing these claims, the trial court found his unconscionability defense meritorious of detailed analysis but, ultimately, found it unpersuasive.

We begin with a general statement of the law of unconscionable contracts. "An unconscionable contract has been characterized as 'one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other.'" *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 342 (Ky.App. 2001) (quoting *Louisville Bear Safety Service, Inc., v. South Central Bell Telephone Company*, Ky.App., 571 S.W.2d 438, 439 (1978)). The doctrine of unconscionability has developed as a tool for courts to use to police the excesses of certain parties who impose one-sided, oppressive, and unfair contracts on others. *United Services Auto. Ass'n v. ADT Sec. Services, Inc.*, 241 S.W.3d 335, 339 (Ky.App. 2006).

In its summary judgment ruling, the trial court wrote the following:

Here, Dungan does not detail for the Court in what manner the credit card agreement is unconscionable other than general complaints that the contract is lengthy, printed in small font, utilizes "legalese," and is unilateral in the sense that the agreement favors Discover Bank.

The trial court further noted that the agreement thoroughly set out the obligations of both parties using precise language and was easily readable despite the small

font size. The trial court further observed Duncan's high level of education, having obtained a master's degree. Under these circumstances, the trial court did not find the agreement to be unconscionable. Likewise, we cannot conclude that the agreement was such that no sensible man would make and no fair and honest man would accept. *Conseco Finance Servicing Corp.*, 47 S.W.3d at 342.

We further agree with the trial court's rejection of Dungan's allegation that the agreement constituted fraud. In Kentucky, a party can show fraud by establishing: 1) a material representation; 2) which is false; 3) which is known to be false or made recklessly; 4) which was made with inducement to be acted upon; 5) which was acted in reliance thereon; and 6) which caused an injury. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). From a review of the record, Dungan did not make factual statements regarding the elements of a claim of fraud but simply made a general allegation of fraud. However, a properly supported summary judgment motion cannot be defeated unless there is at least some affirmative evidence showing that there is a genuine issue of material fact requiring trial. *Haney v. Monsky*, 311 S.W.3d 235, 239 (Ky. 2010). In this case, Dungan failed to present such affirmative evidence of fraud.

Dungan next argues that the trial court erred by rejecting his defense of unconscionability. He argues that this issue must be decided by a jury because unconscionability concerns the community's consensus of fairness. We disagree.

Kentucky courts have the authority to determine if a contract is unconscionable. *Valued Services of Kentucky, LLC v. Watkins*, 309 S.W.3d 256,

263 (Ky.App. 2009). While Dungan disagrees, the doctrine of unconscionability is a tool used by our courts to protect certain parties against oppressive and unfair contracts. *United Services Auto. Ass'n*, 241 S.W.3d at 339. Therefore, Dungan was not entitled to have this issue presented to a jury.

Dungan next argues that the trial court's use of CR 56.03 violated his right to a jury as provided in the Seventh Amendment to the United States Constitution. He argues that CR 56.03 unconstitutionally abrogates the right of individuals to obtain a jury trial in cases exceeding twenty dollar in value. We disagree.

Dungan did not argue to the trial court that CR 56.03 was unconstitutional and has not indicated how this argument was preserved. When a party makes a claim, it is fundamental that the trial court be allowed to consider the issue. *Richardson v. Rees*, 283 S.W.3d 257, 265 (Ky.App. 2009). Thus, an "issue not raised in the circuit court may not be presented for the first time on appeal." *Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 726 (Ky.App. 2008). Accordingly, we will not address this unpreserved issue.

Dungan next argues that the trial court improperly granted summary judgment because there was insufficient evidence to support the judgment. He further urges this Court to resolve his purported conflict between the U.S. Constitution and CR 56.03. Despite his reformulated arguments, we have adequately addressed Dungan's sufficiency of the evidence and constitutional claims.

For the foregoing reasons, the Pulaski Circuit Court's summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William J. Dungan, *Pro Se*
Somerset, Kentucky

BRIEF FOR APPELLEE:

James P. Dady
Newport, Kentucky