COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2251 **Cir. Ct. No. 2012CV010920**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

JOSEPH R. CINCOTTA,

PLAINTIFF-APPELLANT,

V.

BMO HARRIS BANK, N. A.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: JANE V. CARROLL, Judge. *Affirmed*.

Before Curley, P.J., Brennan and Blanchard, JJ.

¶1 BRENNAN, J. Joseph R. Cincotta appeals from a judgment dismissing his claims against BMO Harris Bank N.A. Cincotta argues that: (1) BMO violated the Wisconsin Consumer Act when it unilaterally changed

the terms of his Reserve Loan Account and began imposing a $10 advance fee; and (2) the $10 advance fee is unconscionable. We disagree and affirm.

BACKGROUND[1]

¶2 Nearly twenty years ago, in October 1994, Cincotta opened a Reserve Loan Account with M&I Bank. The Reserve Loan Account was funded by the Bank, not Cincotta, was attached to his personal checking account, and provided Cincotta with overdraft protection. In order to open the Reserve Loan Account, Cincotta executed a Personal Reserve Account Agreement with M&I. The Personal Reserve Account Agreement stated, in part, "[w]e may change these regulations from time to time by sending you advance written notice, and your use of [Reserve Loan Account] credit thereafter will indicate your agreement to those changes."

¶3 Under the Reserve Loan Account, M&I agreed to make "[a]utomatic advances" or "[l]oans" to Cincotta's checking account whenever the account was overdrawn in the exact amount of the overdraft. After Cincotta made a new deposit in his primary checking account, the Bank would then automatically pay back or "sweep" the advance made from the Reserve Loan Account without any additional action from Cincotta. In exchange for this service, Cincotta agreed to pay a $15 annual membership fee, as well as the amount of any advance and the interest on any advance balance.

[1] The circuit court dismissed Cincotta's claims against BMO in response to BMO's motion to dismiss. As such, the facts herein are those set forth in Cincotta's second amended complaint, as well as in the documents attached to and referenced in the second amended complaint. *See* ***Peterson v. Volkswagen of Am., Inc.***, 2005 WI 61, ¶15, 281 Wis. 2d 39, 697 N.W.2d 61 (When reviewing a motion to dismiss, we consider only the facts set forth in the complaint and any other documents attached to the complaint.).

¶4 BMO purchased M&I in 2011. In the summer of 2012, Cincotta received a letter from BMO notifying him that the terms of his Personal Reserve Account Agreement would change effective October 6, 2012. Among other things, BMO was eliminating the $15 annual fee and, instead, implementing a $10 charge for each advance from the Reserve Loan Account made to pay an overdraft. One $10 advance fee would be charged at the end of each business day if one or more overdrafts triggered an advance. Further, advances would no longer be made in the exact amount of the overdraft, but "made in multiples of $10.00," and the "overdraft protection sweep payment feature," whereby any advance was automatically paid from any deposits made in the primary checking account, was discontinued. The letter notified Cincotta, in bold lettering, that he could choose to opt out of the Reserve Loan Account before the changes took effect, stating:

> You have the right to decline these changes by completing, signing and returning the enclosed Opt-Out Authorization Form ("Form") to us. **To opt-out you must return the completed and signed Form to** BMO Harris Bank N.A., … and **the Form must be received by us on or before October 1, 2012.**

¶5 On July 27, 2012, Cincotta wrote a letter to BMO requesting its legal department reply with a full written explanation in understandable terms of the impact of the initial notice. In the letter, Cincotta noted, "This is not my notice of an 'opt-out' and I am not opting out at this time." On August 21, 2012, counsel for BMO responded to Cincotta, explaining that the changes were the result of the migration of M&I accounts to the BMO operating system and were meant to standardize products and services. Counsel also included a copy of the original Personal Reserve Account Agreement between Cincotta and M&I, provided a brief explanation of the changes to be made, and reiterated that Cincotta could

elect to opt out of the changes. Opting out of the changes would have terminated the overdraft protection for Cincotta's checking account.

¶6 Cincotta did not exercise the opt-out option, and BMO implemented the changes to his account. Cincotta alleges that BMO has subjected him to the new $10 advance fee, from which we infer that Cincotta has continued to overdraw on his checking account since BMO made changes to the Personal Reserve Account Agreement.

¶7 In October 2012, Cincotta filed a complaint against BMO. Thereafter, in May 2013, he filed a second amended complaint,[2] alleging that several of BMO's unilateral changes to the Personal Reserve Account Agreement violated the Wisconsin Consumer Act, *see* WIS. STAT. § 422.202(2m) and § 422.415 (2011-12),[3] and that the $10 advance fee was unconscionable.

¶8 Shortly thereafter, BMO filed a motion to dismiss, asserting that Cincotta's second amended complaint, as a matter of law, did not state a claim for which relief may be granted. The circuit court granted BMO's motion to dismiss and entered final judgment. Cincotta appeals.

[2] Cincotta's original complaint and first amended complaint set forth various other claims, including several claims based on federal statutes, which resulted in the temporary removal of this case to federal court. We do not detail the claims set forth in the original complaint and the first amended complaint because they are irrelevant to the issues presented to us on appeal.

[3] All references to the Wisconsin Statutes are to the 2011-12 versions unless otherwise noted.

DISCUSSION

¶9 Cincotta argues that the circuit court erred in dismissing his second amended complaint for failing to state a claim because Cincotta believes that: (1) the Wisconsin Consumer Act, specifically WIS. STAT. §§ 422.202 and 422.415, prohibits BMO from unilaterally changing the terms of his Reserve Loan Account to include the $10 advance fee; and (2) the $10 advance fee is unconscionable.[4] For the reasons stated below, we affirm.

¶10 A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint and presents a matter of law, which we review *de novo*. ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). For purposes of review, we accept the facts stated in the complaint, and all reasonable inferences that may be drawn from them in favor of stating a claim. ***Northridge Co. v. W.R. Grace & Co.***, 162 Wis. 2d 918, 923-24, 471 N.W.2d 179 (1991).

I. Cincotta fails to allege facts sufficient to demonstrate that the $10 advance fee violates the Wisconsin Consumer Act.

¶11 Cincotta first argues that his second amended complaint states a claim that WIS. STAT. §§ 422.202 and 422.415 prohibit BMO from unilaterally imposing a $10 advance fee for use of his Reserve Loan Account and that the circuit court erred in concluding otherwise. We disagree. According to the facts

[4] Before the circuit court, Cincotta also challenged other changes BMO made to the Personal Reserve Account Agreement, including making advances in $10 increments and discontinuing the automatic sweep function. However, the arguments in Cincotta's brief to this court are limited to whether he has stated a claim that the $10 advance fee violates the Wisconsin Consumer Act and whether that fee is unconscionable. All other claims are deemed abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the [circuit] court, but not raised on appeal, is deemed abandoned.").

set forth by Cincotta, BMO notified Cincotta at least ninety days prior to implementing the new fee; Cincotta agreed to the fee; and the fee is the type permitted by statute. Contrary to Cincotta's assertions, those facts demonstrate that the $10 advance fee complies with the Wisconsin Consumer Act. As such, we affirm.

¶12 Cincotta's challenge requires us to consider the statutory language of WIS. STAT. §§ 422.202 and 422.415. "The purpose of statutory interpretation is to discern the intent of the legislature. When we interpret a statute, we begin with that statute's plain language, as we assume the legislature's intent is expressed in the words it used." ***Juneau Cnty. v. Associated Bank, N.A.***, 2013 WI App 29, ¶16, 346 Wis. 2d 264, 828 N.W.2d 262 (internal citation omitted). If the meaning of the words in the statute is plain, the statute is unambiguous, and we will apply the language to the facts before us. ***Estate of Lamers v. American Hardware Mut. Ins. Co.***, 2008 WI App 165, ¶8, 314 Wis. 2d 731, 761 N.W.2d 38.

¶13 WISCONSIN STAT. § 422.415 permits lenders to make unilateral changes to credit terms in certain circumstances. As relevant to this case, § 422.415(2)(c) permits the following:

> **(2)** A change that is adverse to the interests of the customer with respect to outstanding balances or that imposes or alters a charge permitted under s. 422.202(2m) may be made if any of the following conditions is met:
>
> ….
>
> (c) The creditor mails or otherwise delivers to the customer a written disclosure of the proposed change not less than 90 days prior to the effective date of such change.

WISCONSIN STAT. § 422.202(2m)(a) states:

> **(2m)** With respect to an open-end credit plan, regardless of when the plan was entered into:

> (a) A creditor may charge, collect and receive other fees and charges, in addition to the finance charge authorized under s. 422.201, that are *agreed upon by the creditor and the customer*. These other fees and charges may include periodic membership fees, *cash advance fees*, charges for exceeding a designated credit limit, charges for late payments, charges for providing copies of documents and charges for the return of a dishonored check or other payment instrument.

(Emphasis added.) In sum, when read together, §§ 422.202(2m)(a) and 422.415(2)(c) authorize a lender to charge any fees agreed upon by the lender and the customer of the type listed in § 422.202(2m)(a), including "cash advance fees," so long as the customer is given ninety days' notice under § 422.415(2)(c). Such is the case here.

¶14 First, Cincotta concedes that BMO gave him ninety days' notice of the changes to his account. He admits in his second amended complaint that BMO notified him by letter in the summer of 2012 that it was eliminating the $15 annual fee for his Reserve Loan Account and instituting a $10 charge per advance unless Cincotta chose to opt out.[5]

¶15 Second, the advance fee is the type of fee permitted by WIS. STAT. § 422.202(2m)(a). Cincotta disagrees, arguing that the list of permissible fees set forth in § 422.202(2m)(a) is exclusive and does not include an advance fee. He asserts that the advance fee is different from a "cash advance fee[]" because "the bank does not actually advance cash when it covers an overdraft." We disagree.

[5] While a copy of the letter Cincotta received from BMO during the summer of 2012 is attached to the second amended complaint, it is undated. However, Cincotta does not argue that the letter was not received ninety days prior to implementation of the $10 advance fee in October 2012. We infer from his lack of argument, that he concedes that he received the letter ninety days prior to the change.

¶16 Cincotta's argument that an advance made to cover an overdraft is not a cash advance defies common sense. When Cincotta overdraws his checking account, BMO loans Cincotta money, to wit, cash, to cover the balance until Cincotta can make a deposit and repay the advance. That BMO refers to the advance as an "advance loan" rather than a "cash advance loan" is irrelevant.

¶17 Moreover, even if the advance from the Reserve Loan Account is not a cash advance, the advance fee is plainly similar to a cash advance and is thereby the type of fee or charge that WIS. STAT. § 422.202(2m)(a) declares is permissible upon agreement of the parties. The list of permissible fees and charges in the statute is preceded by the phrase "[t]hese other fees and charges *may* include." (Emphasis added.) Use of the word "may" implies that the legislature did not intend for the list to be all inclusive but merely sets forth the types of fees and charges to which a customer can agree. *See* ***Forest Cnty. v. Goode***, 219 Wis. 2d 654, 663, 579 N.W.2d 715 (1998) (We have "characterized 'may' as permissive and 'shall' as mandatory unless a different construction is required by the statute to carry out the clear intent of the legislature.").

¶18 Third, the Personal Reserve Account Agreement, signed by Cincotta in 1994, stated that the lender could "change these regulations from time to time by sending you advance written notice, and your use of [Reserve Loan Account] credit thereafter will indicate your agreement to those changes." In 2012, after receiving notice from BMO that it was implementing the $10 advance fee, Cincotta continued to utilize the Reserve Loan Account, thereby agreeing to the new fee. Furthermore, Cincotta expressly stated in his letter to BMO's legal department that he was not opting out of the changes even though he had been given the opportunity to do so. As such, Cincotta agreed to the new fee.

¶19 Cincotta argues that he could not have agreed to the $10 advance fee by virtue of the terms of the Personal Reserve Account Agreement because WIS. STAT. § 422.415(3) states: "No term of a writing executed by the customer shall constitute authorization for a creditor to unilaterally make changes in the terms of the credit plan, which are otherwise prohibited by this section." However, as we have seen above, the $10 advance fee is not "otherwise prohibited by this section," in that BMO provided Cincotta with ninety days' notice of the change and the $10 advance fee is, at the very least, of the type permitted by WIS. STAT. § 422.202(2m)(a). To conclude that § 422.415(3) prohibits a customer from accepting a fee change in writing would render both §§ 422.202(2m)(a) and 422.415 superfluous because no customer could ever agree to a fee change. We are to avoid construing statutes in a manner that renders them superfluous. *See* ***Robin K. v. Lamanda M.***, 2006 WI 68, ¶16, 291 Wis. 2d 333, 718 N.W.2d 38.

¶20 In short, Cincotta's second amended complaint does not state that the $10 advance fee violates the Wisconsin Consumer Act. Consequently, the circuit court properly dismissed Cincotta's corresponding claim and we affirm.

II. Cincotta's second amended complaint does not set forth a claim that the $10 advance fee is unconscionable.

¶21 As an alternative, Cincotta argues that the $10 advance fee is unconscionable. Even assuming all well-pleaded allegations of fact contained in the second amended complaint are true, here too, he fails to state a claim.

¶22 "A contract is unconscionable when no decent, fair-minded person would view the result of its enforcement without being possessed of a profound sense of injustice." ***Foursquare Props. Joint Venture I v. Johnny's Loaf & Stein, Ltd.***, 116 Wis. 2d 679, 681, 343 N.W.2d 126 (Ct. App. 1983). For a

contract to be found unconscionable, it must exhibit both procedural and substantive unconscionability. ***Aul v. Golden Rule Ins. Co.***, 2007 WI App 165, ¶26, 304 Wis. 2d 227, 737 N.W.2d 24. As such, because it is plain that Cincotta has failed to allege sufficient facts to demonstrate substantive unconscionability, we need not determine whether he has properly alleged procedural unconscionability.

¶23 "Substantive unconscionability pertains to the reasonableness of the contract terms themselves." ***Aul***, 304 Wis. 2d 227, ¶26.

> Wisconsin courts determine whether a contract provision is substantively unconscionable on a case-by-case basis.
>
> No single, precise definition of substantive unconscionability can be articulated. Substantive unconscionability refers to whether the terms of a contract are unreasonably favorable to the more powerful party. The analysis of substantive unconscionability requires looking at the contract terms and determining whether the terms are "commercially reasonable," that is, whether the terms lie outside the limits of what is reasonable or acceptable. The issue of unconscionability is considered "in the light of the general commercial background and the commercial needs."

Wisconsin Auto Title Loans, Inc. v. Jones, 2006 WI 53, ¶¶35-36, 290 Wis. 2d 514, 714 N.W.2d 155 (footnotes omitted).

¶24 In his second amended complaint, Cincotta argues only that the $10 advance fee is unconscionable: (1) because the fee is "not based on any cost to BMO," has "no reasonable nexus to the services being provided by BMO," and is "in effect a liquidated damage and penalty"; and (2) because "Cincotta has no reasonable alternative in the market to avoid these charges." These allegations are hardly sufficient to demonstrate that the modest $10 advance fee charged when he

overdraws his checking account is "outside the limits of what is reasonable or acceptable." *See* ***Wisconsin Auto Title Loans***, 290 Wis. 2d 514, ¶36.

¶25 There is nothing inherently wrong with a bank charging a modest fee for overdraft protection based on the frequency of a customer's actual overdrafts. A "per use" fee encourages customers to be fiscally responsible. Furthermore, contrary to Cincotta's claim, customers can easily avoid the $10 advance fee by either: (1) keeping their checking accounts balanced; or (2) opting out of the fee and dealing with the consequences of an overdrawn checking account. In sum, nothing in Cincotta's second amended complaint suggests that imposition of the $10 advance fee results in "a profound sense of injustice." *See* ***Foursquare Props. Joint Venture I***, 116 Wis. 2d at 681. Consequently, we agree with the circuit court that Cincotta has failed to state a claim for unconscionability and affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.