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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2330**

RAB Performance Recoveries, LLC, as successor
in interest to Metris/Direct Merchants Bank,
Respondent,

vs.

Cora A. Culbert,
Appellant.

**Filed September 17, 2012
Affirmed; motion denied
Halbrooks, Judge**

St. Louis County District Court
File No. 69HI-CV-10-746

Jonathan R. Septer, Derrick N. Weber, Messerli & Kramer P.A., Plymouth, Minnesota
(for respondent)

Cara Culbert, Chisholm, Minnesota (pro se appellant)

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Pro se appellant Cora Culbert challenges the district court's denial of her motion to compel arbitration and award of summary judgment to respondent RAB Performance Recoveries, LLC. Because the district court did not err, we affirm.

FACTS

Appellant defaulted on a credit card from Direct Merchants Bank in 2004. Direct Merchants Bank eventually “charged off” \$15,122.49 of the debt. Respondent purchased the debt in 2009. On July 1, 2009, respondent served appellant with a summons and complaint, which appellant answered. In her answer, appellant admitted that she had once had a credit card account with Direct Merchants Bank, but denied that respondent owned the debt and denied that she owed the amount stated.

In January 2010, respondent served appellant with discovery, and appellant responded. On March 4, 2011, respondent moved for summary judgment with a hearing date of April 20, 2011. Appellant opposed respondent’s motion for summary judgment without requesting arbitration. On April 15, 2011, appellant moved to compel arbitration, based on the contract between her and Direct Merchants Bank, which allowed either party to elect arbitration.

The district court held a summary-judgment hearing on April 20, 2011, but did not rule on respondent’s motion because both parties claimed that they had insufficient responses to discovery. Instead, the district court extended the time for discovery by 30 days. With regard to appellant’s motion to compel arbitration, the district court stated:

The issue of whether—had this been diverted to arbitration at the beginning of the lawsuit or whether now—because of the time that has gone by, that forum is in effect “waived.” The issue of whether the defendant has other options here including bankruptcy, all of that is—has to be weighed in the light of the underlying issues; is there a debt owing and is the plaintiff entitled to judgment on it.

Appellant did not understand this to be a decision on her motion, but instead interpreted this statement by the district court as implying that the court would wait to rule on the merits of appellant's motion until after the "underlying issues" were better understood. Respondent, on the other hand, interpreted this statement by the district court as an oral ruling that appellant had waived her right to seek arbitration. Despite the disagreement about what this statement at the April 20 hearing was intended to convey, the district court did not clarify its ruling until after this appeal was filed.¹

Appellant continued to dispute respondent's ownership of the debt, based primarily on a demand from another debt-collection company received after respondent had allegedly purchased the debt. Appellant also continued to dispute the amount that she owed and continued to request an accounting of the debt. Appellant wanted documentation of how payments made after the charge-off in 2004 had been applied to the debt as well as how the interest had been calculated.

On October 31, 2011, the district court granted respondent's motion for summary judgment and entered judgment against appellant in an amount of \$20,386.44. This included the principal balance of \$15,122.49 minus \$2,000 that appellant disputed she owed, \$633 in costs and disbursements, \$4,362.58 in interest, and attorney fees of \$2,268.37. This appeal follows.

¹ After appellant appealed the district court's award of summary judgment and ordered a transcript of the April 20 hearing, respondent moved to amend the transcript of the hearing to correct grammatical and punctuation errors. The district court granted respondent's motion, and the transcript language quoted in this opinion reflects those changes. The district court also clarified that it orally denied appellant's motion to compel arbitration at the April 20 hearing.

DECISION

I.

Appellant argues that the district court erred by denying her motion to compel arbitration. Determining if a dispute is arbitrable is a question of contract interpretation reviewed de novo. *Johnson v. Piper Jaffray, Inc.*, 530 N.W.2d 790, 795 (Minn. 1995). “When considering a motion to compel arbitration, the court’s inquiry is limited to (1) whether a valid arbitration agreement exists, and (2) whether the dispute falls within the scope of the arbitration agreement.” *Amdahl v. Green Giant Co.*, 497 N.W.2d 319, 322 (Minn. App. 1993).

The parties do not dispute that the contract between them contains a valid arbitration clause and that this dispute falls within the scope of the agreement. But even if a contractual right to arbitration exists, this right may be waived. *Fedie v. Mid-Century Ins. Co.*, 631 N.W.2d 815, 819 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). “Waiver of a contractual right to arbitration is ordinarily a question of fact and determination of this question, if supported by substantial evidence, is binding on an appellate court.” *Id.* (quotation omitted). A reviewing court “should resolve any doubts concerning the scope of arbitrable issues in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Johnson*, 530 N.W.2d at 795 (quotation omitted).

“Waiver is the voluntary and intentional relinquishment of a known right.” *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 798 (Minn. 2004). This requires both (1) knowledge and (2) intent. *Id.* A party is deemed to have constructive

knowledge of the terms of a contract that she executes. *Bros. Jurewicz, Inc. v. Atari, Inc.*, 296 N.W.2d 422, 429 (Minn. 1980). Appellant argues that she asserted her right to arbitrate the dispute as soon as she became aware of this right and that she only became aware of it after locating a legible copy of the agreement. Although we agree with appellant that the copy of the contract supplied by respondent with its complaint is not legible, the fact that appellant is a party to this contract imparts constructive knowledge of its terms to her. *See id.*

With regard to appellant's intent to waive her right to arbitrate, the Minnesota Supreme Court has stated that "[c]ommencement of suit in a court rather than reliance upon arbitration, with answer by the opposing party upon the merits, is a waiver of the right to arbitrate by both parties." *Anderson v. Twin City Rapid Transit Co.*, 250 Minn. 167, 181, 84 N.W.2d 593, 602 (1957). At the time that appellant moved to compel arbitration, close to two years had passed since she was served with the complaint. And although appellant took no affirmative step in the litigation until her motion to compel arbitration, she had answered the complaint and responded to a discovery request, without asserting her right to arbitration.

The supreme court has also explained that "under th[e] modern view, action by the party seeking arbitration which is inconsistent with the right to arbitration is not enough to support a finding of waiver unless such action is accompanied by prejudice to the objecting party." *Fedie*, 631 N.W.2d at 820 (quoting *Bros. Jurewicz*, 296 N.W.2d at 429 n.8)). Respondent explained to the district court at the April 20 hearing that it had "filed this lawsuit in 2009 and . . . [appellant] has followed through on the litigation process to

the point where we've both generated a lot of resources to this method of litigation.” There is evidence, therefore, that respondent would have been prejudiced if the district court had allowed appellant to proceed with arbitration at that point.

Because the question of whether appellant waived her right to arbitrate this dispute is a factual question and because the district court's conclusion is supported by substantial evidence, we affirm.

II.

Appellant also argues that genuine issues of material fact exist that preclude summary judgment. On appeal from summary judgment, this court examines the record to determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). There is no genuine issue of fact that precludes granting summary judgment if “the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). This court views the evidence in the record “in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Appellant argues that respondent's affidavit submitted in support of its motion for summary judgment is insufficient evidence to prove the amount of debt owed or that respondent is the rightful owner of the debt. We disagree. Respondent produced bills of sale showing the chain of custody from the last statement from Direct Merchants Bank in

2004 until respondent initiated the lawsuit in 2009. The fact that appellant received a letter in 2009 from another debt collector regarding the same debt (after the date respondent purchased the debt), does nothing more than “create[] a metaphysical doubt” as to respondent’s rightful ownership of appellant’s account. *See DLH*, 566 N.W.2d at 71. This is insufficient to create a genuine issue of material fact.

Appellant also argues that there is a genuine issue of material fact with respect to the amount of money that she owes. The district court found that “[appellant] made a final payment on said account on June 30, 2006.” But the district court also found that “[t]here is a principal balance on said account that currently remains of \$15,122.49.” Because the principal balance found by the district court does not reflect payments made by appellant between 2004 and 2006, these two findings appear irreconcilable. But to resolve the fact that respondent was unable to produce records of appellant’s subsequent payments or an accounting of the debt owed, the district court accepted respondent’s stipulation to reduce the debt by \$2,000. Appellant stated in her memorandum in opposition to summary judgment that she continued to make payments “totaling nearly \$2,000.” We therefore conclude that respondent’s stipulation is sufficient to resolve any factual dispute regarding the amount of money owed by appellant.

Respondent made a motion to strike appellant’s brief and appendix. Because we have addressed the merits of the appeal, respondent’s motion is denied.

Affirmed; motion denied.