ORIGINAL

IN THE SUPREME COURT OF OHIO

Penny J. Young, Appellant, v. FIA CARD SERVICES, N.A. Formerly known as MBNA AMERICA BANK, N.A. 2727 Paces Ferry Road, #1400 Atlanta, GA 30339, Appellee.	: : : : : : : : : : : : :	On Appeal from the Knox County Court of Appeals, Fifth Appellate District Court of Appeals Case No. 09-1053

MOTION OF APPELLANT PENNY J. YOUNG TO STRIKE APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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JUL 21 2009
CLERK OF COURT
SUPREME COURT OF OHIO

MOTION TO STRIKE

COMES NOW, Appellant Penny J. Young, to move this Supreme Court of Ohio to enter an Order striking, in its entirety, the Appellee's memorandum in opposition to jurisdiction filed in this court on July 10, 2009, on the following grounds:

A. APPELLEE'S ARGUMENTS ARE WITHOUT MERIT

1) Appellee continues to argue merits of the alleged credit card agreement. These matters have never been before any court for determination. The appeal brought in the Ohio Fifth District Court of Appeals, Case No. 08CA22, and this instant case in the Supreme Court of Ohio, by Appellant was NOT on the merits of the alleged credit card agreement, rather said appeal was brought on errors and other matters that resulted in actions perpetrated against Appellant in clear violation of her constitutionally secure rights of due process of law and equal protection of the law.

2) Appellant demonstrated in her pleadings, through argument and acknowledgements by the Appellee, that the National Arbitration Forum (NAF) had usurped jurisdiction to execute arbitration proceedings when, prior to said proceedings, Appellant had perfected a clear and controlling challenge against the validity of the alleged arbitration award upon which the NAF relied in awarding the subject arbitration award for which the Appellee sought confirmation.

3) The actions of the Appellee and NAF violated Appellant's rights of due process and equal protection of the law by proceeding with arbitration proceedings without obtaining a decision from a court of competent jurisdiction as to the validity of the alleged arbitration agreement.

4) Neither personal nor subject matter jurisdiction were ever answered or perfected by the Appellee upon challenge by the Appellant.

5) The trial court and said Court of Appeals failed to address and decide on the question regarding the validity of the alleged arbitration agreement and relevant arbitration award.

6) The said Court of Appeals misinterpreted the pleadings of the Appellant by implying that the Appellant was seeking findings of fact and law from the arbitration forum proceedings, when in fact and as was clearly stated, the Appellant was seeking findings of fact and law from the trial court upon which it relied in granting the subject confirmation in light of the fact that the relevant arbitration award was null and void.

7) Appellee's arguments and replies have focused solely on the merits of the alleged arbitration agreement, such merits which have never been opened to argument by the Appellant – Appellant's arguments have maintained, from the beginning, that her protections clearly established in state and federal law have been set aside by the NAF, the trial court, and the Court of Appeals, resulting in injury to Appellant.

8) Appellant argues that the conduct of the Ohio judiciary and NAF, in these instant matters, reflects negatively upon the integrity of the judiciary and has resulted in fraud being brought into the court, without opposition.

9) WHEREFORE, Appellant contends that the arguments presented in the Appellee's memorandum in opposition to jurisdiction are without merit and do not constitute a proper defense to said appeals, and should be struck from record.

B. DECEPTION AND MISLEADING OF THE COURT

1) Appellee contends that the Appellate Court's Opinion complied with the Rules of Civil Procedure and is supported by case and statutory law. (Appellee's Opposition, pg. 3, para. 1)

   Appellant argues that said statement is false. The said opinion of the Appellate Court violated Civ.R. 12(B)(1), Civ.R. 12(B)(2), Civ.R. 12(H)(3), Ohio Constitution, Art. I, Sections 2 and 16, and the federal Constitution, Article Amendments 5 and 14. Further, the court failed to acknowledge and take judicial notice of relevant and controlling facts presented by Appellant, and failed to adhere to clearly established law set forth at 9 USC § 4 and its corresponding state provisions. Appellant argues that deprivation of her constitutionally secured rights by any element of the judiciary is, in fact, a constitutional issue whereupon a challenge may be heard in this Supreme Court of Ohio.

2) Appellee contends that Appellant Young filed a response to the arbitration claim. (Appellee's Opposition, pg. 3, para. 2)

   Appellant contends that this statement is false and misleading. Appellant had challenged the validity of the alleged arbitration agreement BEFORE arbitration proceedings were ever executed. Appellant did not reply to the arbitration notice in a manner to challenge the merits of the credit card agreement, rather Appellant simply NOTICED the NAF that a challenge existed as to the validity of the alleged arbitration agreement, whereby the NAF should have suspended all further proceedings until such time that said challenges had been decided by a court, pursuant to 9 USC § 4.

3) Appellee's reference to *Ohio Labor Council v. Perry County Comm'rs* is misleading and irrelevant. (Appellee's Opposition, pg. 4, para. 3)

Said case, as articulated by Appellee, implies that the Appellate Court may not review the original arbitration proceedings. This is not at issue, for the Appellant never requested such a review. Appellee attempts to misapply this case law to the issue that the Appellate Court has no authority to decide that the NAF never acquired proper jurisdiction. This is a false conclusion, as supported in case law presented by Appellant in the Aaron Kay's case (888 N.E.2d 288) and Loretta Credit case (132 P.3d 898).

4) Appellee's reference to R.C. § 2711.09 is misleading. (Appellee's Opposition, pg. 5, para. 1)

Said provision of the Ohio Revised Code ONLY APPLIES when there exists a valid arbitration award. Since the subject arbitration award was necessarily void (NAF lacked jurisdiction to render award due to challenge of invalidity of the arbitration agreement), then said provision is moot.

5) Appellee's reference to R.C. § 2711.12 is misleading. (Appellee's Opposition, pg. 5, para. 2)

Appellant argues that the trial court lacked *in rem* and subject matter jurisdiction, because the thing in controversy (arbitration award) was, in fact, a legal nullity. Therefore, the trial court was in want of jurisdiction and authority to render a decision as mandated by R.C. § 2711.12 and 2711.09. Said mandates ONLY APPLY when jurisdiction has been perfected.

6) Appellee's reference to R.C. § 2711.13 is misleading. (Appellee's Opposition, pg. 5, para. 4)

The provisions of R.C. § 2711.13 ONLY APPLIES, again, when there is a valid arbitration award before the court. Said provision timing does not begin to toll until there is a valid arbitration agreement upon which the toll to attach.

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2008-Ohio-2877

> {¶ 37} The Supreme Court of Montana determined, **"the arbitration agreement at issue, by its terms, is not governed by Montana's arbitration statutes but by the FAA (9 U.S.C. §§ 1-16)."** The court noted, **"Under the FAA, where parties have not agreed to arbitrate, or where the arbitration does not follow the format provided for in the arbitration agreement, the arbitration award is invalid *ab initio*.** *See MCI Telecommunications Corp. v. Exalon Industries, Inc., I138 F.3d 426, 430, (1st Cir. 1998), and [Bank of America v. Dahlquist*, **2007 MT 32, 336 Mont. 50, 152 P.3d 718]**. In *MCI*, the First Circuit determined that, **for a party to be subject to the FAA's three-month time limitation, a written arbitration agreement must be `in effect' *and* the party must be `bound by [the] conditions' of the agreement**. *MCI*, **138 F.3d at 430**. - [Emphasis added]

Appellant argues that since the challenge to the validity of the alleged arbitration agreement was never determined by a court, then the said arbitration agreement is without legal force or effect for purposes of the three-month time limitation set forth in R.C. § 2711.13.

7) Appellant deems Appellee's entire argument in Section B of its opposition to be moot on the basis that, upon challenge to jurisdiction, Appellee never presented any of the stated information in support of the same. Further, said arguments recites 12 USC § 24, implying the said section grants to National Banks extraordinary rights to the courts. Careful evaluation of said provision clearly states "as fully as natural persons". Also, it does not suggest that federal law, in

this instance, applies to state courts. Whereas said provision is federal law, unless specifically providing otherwise by some provision to be applicable against the states, it applies only in federal jurisdiction. For purposes of Ohio law, National Banks are foreign corporations/associations/entities not exempted from Ohio's licensing provisions. Appellee's conclusion in this instant matter is without merit and unsubstantiated in law specifically addressing the issue – it relies on a stretched interpretation unsupported by any decision by the courts.

8) Appellee again misapplies jurisdiction by referencing R.C. § 2711.09. (Appellee's Opposition, pg. 7, para. 2)

As clearly evidenced and argued in the Appellant's brief in the Court of Appeals, interstate commerce (as clearly stated in the alleged arbitration award) is the controlling issue of the alleged credit card agreement. The said agreement proclaims to be subject to the jurisdictions of federal and Delaware laws, without provision to be heard by any Ohio court. As a matter of contract, if in deed it were binding, then settlement of all controversies against the alleged arbitration agreement would, by necessity, have to be heard in either a federal or Delaware court. Appellant contends that Appellee's attempts to attach and apply said alleged credit card and arbitration agreements to Appellant are arbitrary and contrary to the contract it is trying to enforce and the rule of law. Appellant further argues that Appellee never perfected jurisdiction and standing when challenged on numerous occasions in the trial and appellate courts. In fact, the Appellee remained silent on the issue until the appellate court presented its Opinion referencing 12 USC § 24.

9) Appellee's contention that Appellant alleges that use of arbitration is a violation of her rights, is preposterous and without merit. (Appellee's Opposition, pg. 7, para. 4)

Appellant wonders if anyone, the Appellee and the courts included, ever read, in detail, the arguments presented. Again, Appellee twists words for purposes of deceiving this court. Appellant comprehends that arbitration has become and is accepted as a legitimate form for settling contract disputes. That is not the point to be taken, here, by Appellant. Appellant argues that Appellee and NAF violated strict provisions of law, particularly 9 USC § 4, that requires that a challenge to the validity of an arbitration agreement must be determined so by a court BEFORE arbitration can proceed. This is a significant and controlling matter. Appellant was preparing to litigate the validity of the alleged arbitration award in federal court, where said determination is proper. However, Appellee and NAF elected to negate this protection of law to the Appellant and proceed in violation thereto. Such conduct by the Appellee and NAF demonstrates a clear disrespect for the rule of law and Appellant's rights of due process and equal protection of the law. It cannot be more plainly evidenced. The bottom line is the Appellant attempted to exercise her remedies in law, and the Appellee and NAF and trial court and appellate court all denied her rights clearly set forth in the law. There can be no argument, whatever shape and form, which defeats this claim by Appellant. It is a matter of record, and it has been properly presented and argued by the Appellant. It is the duty of the judiciary to protect the rights of the people in accordance with the law, and that protection has been denied the Appellant.

The arbitrator had no authority to determine the validity of the arbitration agreement. By relying on such a determination by the arbitrator, the NAF usurped jurisdiction where such jurisdiction did not exist.

C. CONDUCT BY NAF NOT UNIQUE TO THE INSTANT CASE

1) Conduct by the NAF similar to that perpetrated against the Appellant is not unique or isolated to the instant case. Sufficient acts have been presented with regard to NAF misconduct that the Minnesota Attorney General has filed suit against the NAF on July 14, 2009 for consumer fraud. Said conduct has been going on for years, and has been proven to constitute allegedly unfair practices against consumers and conflicts of interest in favor of creditors. The suits against NAF have resulted in the NAF discontinuing all further business relating to the settlement of disputes pertaining to "credit cards debt as well as new lines of business the NAF has moved into, such as arbitrating consumer debts in healthcare, telecommunications, utilities, mortgages, and consumer leases." I offer, as prima facie evidence, articles published by *Business Week* magazine and posted on the internet in the following three (3) segments, posted June 5, 2008; July 14, 2009; and July 19, 2009, respectively.

http://www.businessweek.com/magazine/content/08_24/b4088072611398.htm

http://www.businessweek.com/bwdaily/dnflash/content/jul2009/db20090714_952766.htm

http://www.businessweek.com/investing/wall_street_news_blog/archives/2009/07/big_arbitration.html

2) Appellant contends that the presented articles by *Business Week* magazine demonstrates that arbitration provides an opportunity and atmosphere for abuse against consumers by prejudicing the rights of consumers in favor of creditors.

3) Appellant contends that said information is directly applicable in verifying the arguments presented by Appellant throughout the course of proceedings with the instant case. Likewise, the cases involving Aaron Kay and Loretta Credit, *supra.*, also demonstrate similar circumstances of which the Appellant contends. Not only was NAF involved in those cases, but those cased demonstrate a history of abuse perpetrated by MBNA America Bank N.A. (predecessor to Appellee) against consumers.

WHEREFORE, for the reasons set forth herein, Appellant respectfully demands this Supreme Court of Ohio issue an Order to render the Appellee's said memorandum in opposition to jurisdiction as moot and stricken from the record.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Penny J. Young, do hereby declare, under penalty of perjury, that a true, correct, and legible copy of this motion has been served upon the Appellee's attorney of record, as stated on the attached cover page, by standard USPS mail, postage prepaid, on this 21st day of July, 2009.

Penny J. Young, Declarant

Michael Alan Young 07/21/2009
Michael Alan Young - Witness