

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART IV

AMY MORTON, on behalf of herself)
and all others similarly situated,)
)
Plaintiffs,)
)
vs.)
)
GREENBANK,)
)
Defendant.)

NF
CASE NO. 11-0135-IV

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MEMORANDUM AND ORDER

This class action challenges Defendant GreenBank's debit card processing practices, including attendant disclosures. Specifically, Plaintiffs are claiming that Defendant's practice of processing checking account debits from highest amount to lowest amount ("high-to-low") and aggregating ("batching") debits initiated on weekends and holidays for processing on the next business day unfairly and unconscionably harms Plaintiffs by artificially inflating and maximizing the Bank's overdraft fees charged against them without adequate disclosures. Defendant's pending motion for summary judgment seeks to dispose of both remaining counts (Counts I and II) of Plaintiffs' Amended Class Action Complaint ("Amended Complaint"). Count I is Plaintiffs' claim that Defendant's challenged practices constitute breach of contract and breach of the covenant of good faith and fair dealing. Count II of the Amended Complaint challenges Defendant's practices under a theory of unconscionability. Plaintiffs are seeking declaratory relief, restitution of all overdraft fees, disgorgement, actual damages, and punitive and exemplary damages. This matter is before the Court on GreenBank's motion for summary judgment.

Introduction

On February 1, 2011, Plaintiff Amy Morton, a resident of Carter County, Tennessee filed a Class Action Complaint (“Complaint”) against GreenBank challenging certain overdraft and debit sequencing practices. The Class Action Complaint contained four counts: 1) breach of contract and breach of the covenant of good faith and fair dealing; 2) unconscionability; 3) conversion; and 4) unjust enrichment. On June 17, 2011, the Court entered a Memorandum and Order dismissing Plaintiffs’ claims for conversion and unjust enrichment as stated in the original Complaint. On or about July 8, 2011, Plaintiff filed an Amended Class Action Complaint (“Amended Complaint”) containing essentially the remaining counts (Counts I and II), but seeking to address and clarify concerns raised by the Court in the Memorandum and Order ruling on GreenBank’s motion to dismiss. Plaintiffs’ unconscionability claim, for example, was pled in the Amended Complaint as a claim solely for declaratory relief. On August 2, 2012, the Court entered its Agreed Order Granting Class Certification (“Class Certification Order”).

In the Class Certification Order, the Court certified a class consisting of two sub-classes. The first sub-class, referred to as the posting order subclass, consists of GreenBank customers asserting that the overdraft fees incurred as a result of GreenBank’s practice of posting weekend and holiday ATM and point-of-sale debit card transactions (“debit card transactions”) in order from the highest to lowest dollar amount unfairly and unconscionably harms them. The second sub-class, referred to as the batching subclass, consists of GreenBank customers seeking to recover overdraft fees incurred as a result of GreenBank’s practice of batching together weekend and holiday debit card transactions and then applying the bank’s high-to-low posting order

collectively to the batch. Both subclasses are claiming that these practices entitle them to relief under theories of breach of contract and unconscionability.

Defendant's Amended and Substituted Memorandum of Law in Support of GreenBank's Motion for Summary Judgment ("Defendant's Memo"), filed on July 18, 2014, asserts that GreenBank's Depositor Agreement adequately discloses the high-to-low posting order and the weekend and holiday batch processing practice, and that, in any event, the batching subclass has suffered no damages. GreenBank also asserts that the Depositor Agreement was not procedurally or substantively unconscionable. Plaintiffs counter, urging in Plaintiffs' Memorandum of Law in Opposition to Defendant's Amended and Substituted Motion for Summary Judgment ("Plaintiffs' Memo") that there were genuine issues of material fact on the adequacy of GreenBank's disclosures relating to its high-to-low posting order and batching process practice. Defendant also argued that GreenBank's high-to-low posting practice was not authorized by state or federal law and that GreenBank's expert failed to establish that the batching subclass suffered no damages. Similarly, Plaintiffs claim that GreenBank's agreement was procedurally and substantively unconscionable under Tennessee's common law.

Facts

The evidentiary record yields the following "summary judgment facts," or, facts that are undisputed and/or construed favorably to the non-movants for summary judgment purposes. Specifically, the Class Certification Order defined the Class, the two sub-classes, and key terms as follows:

For good cause shown, this Court finds that the case meets the requirements to proceed as a class action pursuant to Tenn. R. Civ. P.

23.01 and 23.02(3) on behalf of the following Class:

All GreenBank customers in the United States who have one or more Accounts and who, between February 1, 2005

and January 31, 2011, inclusive, incurred an Overdraft Fee as a result of Green Bank's Debit Card Transaction processing method, including Debit Re-Sequencing, as defined below.

The Class shall consist of two sub-classes, defined as follows:

Weekend and Holiday High-to-Low Sub-class: All members of the Class who incurred an additional Overdraft Fee as a result of GreenBank's practice of Debit Re-sequencing all Debit Card Transactions received for settlement on any Saturday, Sunday, federal holiday, or weekday after GreenBank was closed, where the additional Overdraft Fee would not have been incurred if GreenBank had processed such transactions either chronologically or in order from lowest to highest dollar amount.

Weekend and Holiday Batch Processing Sub-class: All members of the Class who incurred an additional Overdraft Fee as a result of GreenBank's practice of processing together all Debit Card Transactions received for settlement on any Saturday, Sunday, federal holiday, or weekday after GreenBank was closed with all Debit Card Transactions received for settlement on the following business day, collectively in order from highest to lowest dollar amount, where the additional Overdraft Fee would not have been incurred had GreenBank processed all such Debit Card Transaction in order from highest to lowest dollar amount, separately in chronological date order based on the dates they were received for settlement.

For purposes of this Order, the following terms shall be defined as follows:

- a. "Overdraft Fee" means any fee assessed to a holder of an Account for items paid when the Account has insufficient funds to cover the item, even if all deposits had been considered available. Fees charged to transfer balances from other accounts are excluded.
- b. "Debit Card" means a card, sticker, tag, or other device issued or provided by GreenBank, including a debit card, check card, or automated teller machine ("ATM") card that can be used to debit funds from an Account by Point of Sale and ATM transactions
- c. "Debit Card Transaction" means any debit transaction effectuated with a Debit Card, including Point of Sale transactions (whether pinned or pinless) and ATM transactions.

- d. "Debit Re-sequencing" means GreenBank's former practice of ordering an Account's Debit Card Transactions during overnight processing in highest to lowest dollar amount.
- e. "Account" means any consumer checking account maintained by GreenBank in the United States that may be accessed by a Debit Card.

Class Certification Order, pp. 1-2.

Several documents form the challenged contract and practices. In brief terms, Plaintiffs are claiming GreenBank's "high-to-low" and "batching" practices allows GreenBank to improperly maximize overdraft fees, keep customers from accurately ascertaining and tracking their balances, use debit card and ACH holds¹ to maximize overdrafts even beyond the extent to which a customer may be in overdraft status, and employ automated procedures without giving the customer notice that an approved transaction at the point of sale or at an ATM, if completed, will generate overdraft fees. Additionally, Plaintiffs are mounting several inter-related challenges to the adequacy of notice. GreenBank asserts that its practices are appropriate and adequately disclosed. During the class period, the challenged practices remained fairly constant, with one notable exception.

During the class period, GreenBank provided customers with GreenBank's fifty-plus page Disclosure of Fees for Consumer Accounts (the "Depositor Agreement"). Customers signed a signature card, acknowledging receipt of the Depositor Agreement, which provided that it was "a contract that establishes rules which controls your accounts." It further provided that the customer agreed to the Depositor Agreement rules if they signed the signature card or if they agreed to open or continue to use the account.

¹ An ACH hold is when a debit card is used strictly as a debit card through the use of a PIN number, which could result on a hold being placed on the customer's checking in an amount larger than the actual transaction amount.

The Depositor Agreement contained the following provision addressing the sequence that GreenBank would follow in processing debit card transactions:

The Depositor Agreement provided that the Bank processed debit card transactions in order from largest to smallest dollar amount (i.e., “high-to-low”):

(E) Order of processing. GreenBank currently processes (i.e. “clears”) items on a daily basis in the order of largest dollar amount to smallest, with the exception of transactions made at the bank (since these in-bank items are available immediately, we process them at the time of their presentation). Otherwise, we pay items in order from largest to smallest including ATM transactions, Point of Sale Transactions, Electronic Transactions or Transfers and any checks or other debits. We pay all checks in largest to smallest order, because we believe that your largest debits are the ones most important to you.

(*Id.* ¶ 5 (emphasis added)). The Depositor Agreement also provided that the Bank did not process debit card transaction on weekends or holidays:

Business Days and Hours of Operation

[W]e only process transactions and update information on business days. Our business days are Monday through Friday. Transfers made after 10:00 p.m. EST will be processed on the next business day. Holidays are not business days.

(*Id.* ¶ 6). In addition, the Depositor Agreement contained provisions indicating that weekend and holiday transactions would be processed on the following business day:

- We will treat and record all transactions received after our “daily cutoff time” on a business day we are open, or received on a day we are not open for business, as if initiated on the next business day that we are open. (*Id.* ¶ 7.)
- Business day means all calendar days except Saturdays, Sundays, and legal public holidays. (*Id.* ¶ 8.)
- Our policy is to make funds from your deposits

available to you on the first business day after the day we receive your deposit. Electronic deposits will be available on the day we receive the deposit. For determining the availability of your deposits, every day is a business day except Saturdays, Sundays, and federal holidays. If you make a deposit by closing time on a weekday that we are open, we will consider that to be the day of your deposit. However, if you make a deposit on a weekday after we are closed or on a Saturday, Sunday or a day we are not open, we will consider your deposit to have been made on the next business day we are open. (*Id.* ¶ 9.)

- You must have enough available collected funds or credit in any account from which you instruct us to make a payment or transfer. If the date you schedule a payment to be made is not a business day, funds must be available in your account the following business day. (*Id.* ¶ 10.)
- Payments can be entered, edited, or deleted at any time but payments are only processed on normal business days. (*Id.* ¶ 11.)

During the class period, GreenBank processed all deposits and other credits before processing any debit card transactions, checks or other debits. (*Id.* ¶¶ 12, 25.)

Applicable Standard

Tennessee Rule of Civil Procedure 56, which was adopted in 1970, allows parties to obtain a partial or full judgment before trial if the moving party is able to “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Tenn. R. Civ. P. 56.04. The summary judgment mechanism was designed to fill a then-existing procedural gap “for disposition of a case in the trial courts without an actual trial on the merits if the case could not be disposed of on demurrer or plea in abatement.” Tenn. R. Civ. P. 56 advisory commission comment. The Commission, therefore, described the rule as “a substantial step forward to the end that litigation may be accelerated, insubstantial issues removed, and trial confined only to genuine issues.” *Id.* Rule 56, consistent with corresponding rules adopted for the federal

system and by other states, contemplates that litigants would have an adequate opportunity to develop the evidentiary record (through discovery and other means) before the case, or issues in a case, may properly be decided by summary judgment. *See* Tenn. R. Civ. P. 56.03, 56.04, 56.06, 56.07; *Craven v. Lawson*, 534 S.W.2d 653, 655 (Tenn. 1976).

It is now well-settled that a court may grant summary judgment if it determines that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). In the summary judgment context, the court's consideration of the facts is record driven. *See McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 894 (Tenn. 1996). The parties, therefore, should not attempt to establish or refute liability under Tenn. R. Civ. P. 56 by merely resting on general allegations in the pleadings. *See* Tenn. R. Civ. P. 56.06; *Byrd*, 847 S.W.2d at 215; *McCarley v. West Quality Food Serv.*, 948 S.W.2d 477 (Tenn. 1997).

In determining whether there are genuine issues of material fact, the court is required to construe the facts in the light most favorable to the nonmoving party. *See Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). Simply put, "summary judgment should be granted if the nonmoving party's evidence at the summary judgment stage is insufficient to establish the existence of a genuine issue of material fact for trial." *Rye v. Women's Care Ctr. Of Memphis*, 477 S.W.3d 235, 265 (Tenn. 2015).² In ruling on a summary judgment motion, Rule 56 does not require the court to make findings of fact and conclusions of law, but, rather Rule 56 requires the court to "state the legal grounds upon which the court denies or grants the motion." Tenn. R. Civ. P. 56.04.

² As far as the Court can determine, the *Rye* standard is consistent with the statutory standard (Tenn. Code Ann. § 20-16-101) adopted by the Tennessee General Assembly in 2011.

Analysis and Rulings

The Court will address the issues raised by GreenBank's summary judgment in approximately the same order as they were set out in GreenBank's Amended and Substituted Memorandum of Law in Support of GreenBank's Motion for Summary Judgment. The Court will first address Plaintiffs' breach of contract claims. Next, the Court will address Plaintiffs' unconscionability claim.

Breach of Contract

A binding contract requires a meeting of the minds of the parties in mutual assent to the terms, legally sufficient consideration, and sufficiently definite terms. *See Higgins v. Oil, Chem. & Atomic Workers Int'l Union, Local No. 3-677*, 811 S.W.2d 875, 879 (Tenn. 1991). A breach of contract claim requires the plaintiff to prove the existence of an enforceable contract, a failure to perform that amounts to a breach of the contract, and damages caused by the breach of the contract. *See ARC LifeMed, Inc. v. AMC-Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005). The contract must be sufficiently explicit for the court to ascertain the respective obligations of the parties. *See Higgins*, 811 S.W.2d at 880.

As an integral aspect of Plaintiffs' breach of contract theory, Plaintiffs assert that GreenBank's practices breached the implied covenant of good faith and fair dealing included in the contract between GreenBank and members of the class. Under Tennessee common law, a duty of good faith is implied in the performance of every contract. *See Wallace v. National Bank of Commerce*, 938 S.W.2d 684, 686 (Tenn. 1996). This duty requires good faith and fair dealing in the performance and enforcement of contracts. *See id.* As pointed out by GreenBank, Plaintiffs cannot assert a free-standing breach of covenant of good faith and fair dealing claim. A separate, viable breach of contract

claim, therefore, is the predicate for a breach of the covenant of good faith and fair dealing claim.

Under Tennessee law, breach of contract damages are designed to place the plaintiff, as nearly as possible, in the same position he or she would have been in had the contract been fully performed and had there been no breach. *See Wilhite v. Brownsville Concrete Co.*, 798 S.W.2d 772, 775 (Tenn. Ct. App. 1990); *Hawkins v. Reynolds*, 467 S.W.2d 791, 795 (Tenn. Ct. App. 1971). Accordingly, damages that flow from the breach that are reasonably within the contemplation of the contracting parties or are the normal and foreseeable result of the breach are recoverable. *See Sholodge Franchise Sys., Inc. v. McKibbin Bros., Inc.*, 919 S.W.2d 36, 42 (Tenn. Ct. App. 1995)(citing *Hawkins v. Reynolds*, 467 S.W.2d 791, 795 (Tenn. Ct. App. 1971)). Although the burden of proving damages by a preponderance of the evidence falls squarely on the plaintiff, the law does not require absolute exactness in computing damages. *See Cummins v. Brodie*, 667 S.W.2d 759, 765 (Tenn. Ct. App. 1983). Choosing the measure of damages is a question of law; determining the amount of damages is a factual inquiry. *See Beaty v. McGraw*, 15 S.W.3d 819, 827 (Tenn. Ct. App. 1998).

After construing the facts favorably to Plaintiffs, the Court concludes that GreenBank is not entitled to judgment as a matter of law on Plaintiffs' breach of contract claim. GreenBank's high-to-low practices and the batching practices, although ostensibly for the purpose of paying the customer's most important payments and for processing efficiency, could very well have an adverse, not fully disclosed impact on customers. *See Amended Complaint*, ¶¶ 64-77. This impact may be shown at trial to breach the contract and the implied covenant of good faith and fair dealing between GreenBank and its customers. Plaintiffs' assertion that GreenBank's failure to make additional disclosures about point-of-transaction notice of insufficient funds created potential liability for

breach of contract. Similarly, enforcement of the high-to-low and batching procedures, after a fully evidentiary hearing, might be shown to violate the implied covenant of good faith and fair dealing. The record yields questions of fact on whether that the disclosures were clear and adequate, found in one, readily understandable document, made clear by specific references to other documents, or generally straightforward, particularly as they existed before Regulation E became effective. Additionally, although the opting in practice is an improvement to the pre-Regulation E opting out practice, presenting customers with dozens of pages in relating small print raises question of fact regarding the only way of the disclosure. The confusion, for example, about “daily” versus “business day” creates a question of fact on an independent breach of contract ground. Under the circumstances presented here, Defendant is not entitled to judgment as a matter of law.

One complexity in this case involves ascertaining the members of each sub-class in a way that would allow the Court to examine representative concrete examples, which might be helpful. The Court recognizes that this is difficult in the summary judgment context. Additionally, because certain members of the posting sub-class had overdraft protection, GreenBank might well have been obligated to pay the customers’ mortgage and coffee shop transactions regardless of the posting sequence. In other words, posting a coffee shop transaction before posting a mortgage payment might not actually increase the potential for someone’s mortgage payment being honored if the customer had overdraft protection. GreenBank’s stated rationale of making sure a customer’s most important bills are paid first in support of the high-to-low practice, therefore, has less persuasive force for customers with overdraft protection. This is especially true for the period of time when all customers were enrolled in the overdraft protection program unless they opted out.

Unconscionability

The doctrine of unconscionability addresses contract provisions which are so extreme and unfair that a court is permitted to treat them as not legally enforceable. In Tennessee and elsewhere, the inquiry is often couched in terms of procedural unconscionability and substantive unconscionability. See *Trinity Indus. Inc. v. McKinnon Bridge Co., Inc.*, 77 S.W.3d 159, 170-71 (Tenn. Ct. App. 2001). Procedural unconscionability examines the provisions and the context of the transaction at the time of formation to see if the party claiming unconscionability had any meaningful choice. In examining meaningful choice, courts examine factors such as whether there was a gross disparity in bargaining power and whether the party with less bargaining power had a reasonable opportunity to understand the agreement. See *Vintage Health Res., Inc. v. Guiangan*, 309 S.W.3d 448 (Tenn. Ct. App. 2009). Courts may find procedural unconscionability when it appears, in essence, that true mutual assent is lacking. See *Baptist Mem'l Hosp. v. Argo Const. Corp.*, 308 S.W.3d 337, 346 (Tenn. Ct. App. 2009).

Substantive unconscionability focuses on the challenged contractual provisions to determine whether “the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.” *Haun v. King*, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984)(citation omitted). This quoted language applies to the question of unconscionability generally, even if the “procedural” and “substantive” two-part approach is not the focal point of analysis. *Id.* In examining whether provisions of a contract are unconscionable, courts analyze whether the contract is characterized by oppression and unfair surprise. See *id.* *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004), *cert. denied*, 125 S. Ct. 1304 (2005). Under Tennessee law, it appears that a plaintiff must show procedural and substantive

unconscionability to establish a claim of unconscionability, even though courts have acknowledged that this two-step approach should not necessarily be rigidly applied. See *Hill v. NHC Healthcare/Nashville, LLC*, No. M2005-01818-COA-R3-CV, 2008 WL 1901198, At **12-17 (Tenn. Ct. App. April 30, 2008).

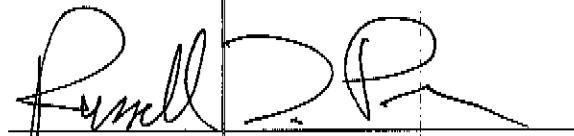
Examining the circumstances regarding formation, the Court concludes that GreenBank is not entitled to judgment as a matter of law upon Plaintiffs' claim that GreenBank's challenged practices (high-to-low and batching) are unconscionable. On the question of substantive unconscionability, the Court concludes that the application of GreenBank's practices may be shown at trial to be characterized by oppression and unfair surprise. On the question of procedural unconscionability, it appears that, in light of certain opt out and opt in features at various points in time, Plaintiffs may be able to show at trial that they were not left with a meaningful choice. There was inequality of bargaining position, but that, by itself, means very little. Here, the potential problem with the high-to-low practice is that GreenBank, while giving the impression in the applicable documents that it was looking out for the customers in its high-to-low sequencing practice, had a contractual duty of good faith to have practices that were, at minimum, neutral. Although it is common sense that aggregating debits over a weekend and then processing them from high-to-low has a likelihood of putting a customer in overdraft status quicker and causing more overdraft charges to accrue, it is through a trial that this practice will be appropriately tested. Similarly, although GreenBank offered summary judgment evidence to support its argument that the batching sub-class did not suffer any actual damages during the class period, this proof does not establish that no genuine issues of material fact exist, particularly, given for example, that GreenBank's expert proof may include customers who are not members of the batching sub-class.

Although unconscionability is arguably the weaker of Plaintiffs' claims, Plaintiffs have demonstrated to the Court that genuine issues of material fact exist. The totality of the circumstances, including the volume of documents, the font, the difficulty that the batching and high-to-low practices create for a customer in ascertaining his/her balance before making a purchase or withdrawal, and absence of point-of-sale and ATM notice opportunities to opt out of the transaction after being notified of the insufficient funds status of the account, all point in the direction of there being a contract that a reasonable person would decline to enter if the terms were fully and simply disclosed. Similarly, these and other facts indicate that customers in both sub-classes may not have had a meaningful choice in agreeing to these practices.

Conclusion

For the foregoing reasons, the Court hereby DENIES Defendant's motion for summary judgment. The Court requests that the parties submit a proposed Agreed Scheduling Order for the Court's consideration.

IT IS SO ORDERED.


RUSSELL T. PERKINS, CHANCELLOR

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