IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ROBERT P. MCKENZIE, SR. **Plaintiff,** **vs.** **MBNA AMERICA, N.A. and WOLPOFF & ABRAMSON, L.L.P.** **Defendants.**	**CV 06-68-BLG-RFC** **ORDER**

Defendants have moved for summary judgment with respect to all claims contained in Plaintiff's Application to Vacate Arbitration Award, Complaint, and Demand for Jury Trial. Defendants also request summary judgment with respect to Plaintiff's claim for punitive damages.

BACKGROUND

MBNA had an established debtor-creditor relationship with Leslie McKenzie, Plaintiff Robert McKenzie's father, who died on August 13, 2004. At the time of his death, Leslie McKenzie owned two businesses that were encumbered with debt, including the debt owed MBNA of over $86,000.

Robert McKenzie was named personal representative of the estate of Leslie McKenzie. On August 16, 2004, three days after his father's death, Robert McKenzie notified MBNA that his father had died. In a phone conversation lasting approximately eleven minutes, an MBNA intake person located in Delaware and working as part of the estate "recovery" unit took information from Robert. The next day, another MBNA person also talked to Robert. MBNA transferred Leslie's $86,000 debt to Robert through an oral contract between two MBNA employees and Robert, based upon their understanding of the two telephone conversations.

STANDARD OF REVIEW

Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150 (9th Cir. 1997) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). Even if the evidence is merely colorable or is not significantly probative, a grant of summary judgment is still appropriate. *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1288 (9th Cir. 1987). The party moving for summary judgment bears the initial burden of proof to identify the absence of a genuine issue of material fact.

Once the moving party has satisfied this burden, the opposing party must set forth specific facts showing there remains a genuine issue for trial, in order to defeat the motion. Fed.R.Civ.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Kaiser Cement Corp. v. Fischback & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir. 1986) (*cert. denied* 479 U.S. 949 (1986)).

ANALYSIS

I. Are Defendants Entitled to Summary Judgment on Count I – Breach of Contract?

Plaintiff alleges in his Complaint that "he has never entered into a contract with MBNA, to pay for his father's credit card bill or otherwise" and that ". . . MBNA had no contractual relationship with Mr. McKenzie." Plaintiff cannot simultaneously assert a "breach of contract" claim while also inconsistently asserting the nonexistence of a contract with that party. However, Defendants' attempt to construe Plaintiff's entire contract claim based on the title of the count ("breach of contract") instead of its substance is incorrect. Therefore, the Court shall consolidate Plaintiff's "breach of contract" count into Count IV (Montana Consumer Protection Act), as his allegations within the "breach of contract" count are repetitive of his claims that Defendants violated the Montana Consumer Protection Act.

II. Are Defendants Entitled to Summary Judgment on Count II – Uniform Arbitration Act?

Plaintiff's Count II relies on the Montana Uniform Arbitration Act, Mont. Code Ann. § 27-5-111, and contends that the NAF arbitrator lacked jurisdiction to enter an award because neither a contract nor an agreement to arbitrate existed. Defendants argue that they are entitled to summary judgment on Count II because the arbitration is subject to the Federal Arbitration Act (FAA), and the not the Montana Uniform Arbitration Act, Mont. Code Ann. § 27-5-111, and that MBNA was not required to provide a written agreement to arbitrate. Regardless of whether the Federal or State law controls, there must be a valid agreement to arbitrate.

Unless Defendants can prove that a valid arbitration agreement existed between MBNA and Plaintiff, Defendants are not entitled to summary judgment. In this case, there is a disputed

issue of material fact as to whether or not Plaintiff entered into an arbitration agreement with MBNA and whether the cardholder agreement containing the arbitration provision was sent to Plaintiff. Therefore, summary judgment on Count II is not appropriate.

III. Are Defendants Entitled to Summary Judgment on Count III – Fair Debt Collection Practices Act?

Plaintiff has alleged that Wolpoff & Abramson violated the Fair Debt Collection Practices Act (FDCPA) by attempting to collect a debt from him that he did not owe (15 U.S.C. §§ 1692e(2) and (1), and 1629f(1)), and then continuing to contact him directly even after he was represented by counsel (15 U.S.C. § 1692c(a)(2)). Defendants argue that they are entitled to summary judgment because the MBNA credit account offered to Plaintiff did not involve "debt" for purposes of the FDCPA because the debt did not consist of "[a]ny obligation or alleged obligations of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes. . ." 15 U.S.C. § 1692a(5).

Defendants argue that the debt at issues was used primarily for business purposes and not for "personal, family, or household purposes" so the collection actions undertaken by Defendants were not subject to the FDCPA. Defendants are obviously referring to the debt of Leslie McKenzie and his debt for business expenses incurred in the operation of the family's gasoline station and tire sales business. However, Plaintiff did not incur any debt through business transactions and there is a disputed issue of material fact as to whether the debt transferred to Plaintiff was "primarily for personal, family, or household purposes."

Also, if the Court were to look to Leslie McKenzie's use of the card, there remains the question of whether it was "primarily for personal, family, or household purposes." The card

could have been used by Leslie for personal and/or business purchases, particularly since the account was opened in 1995 and Leslie did not purchase the business in Big Timber until 1997 or 1998. Prior to Leslie's purchase of the business he was employed at Hewlett Packard in Colorado. It would be an issue of fact for the jury to determine what the card's primary use was.

IV. Are Defendants Entitled to Summary Judgment on Count IV – Montana Consumer Protection Act?

Plaintiff alleges that Defendanst violated the Montana Consumer Protection Act. Defendants make a similar argument in favor of summary judgment on this claim as they did on the FDCPA claim, that this is not a "consumer" transaction.

Montana's Consumer Protection Act prohibits "unfair methods of competition and unfair and deceptive acts or practices in the conduct of any trade or commerce." Mont. Code Ann. § 30-14-103. "Consumer" is defined at Mont. Code Ann. § 30-14-102(1) as "a person who purchases or leases goods, services, real property, or information primarily for personal, family or household purposes." "Trade or commerce" is defined as the "advertising, offering for sale, sale, or distribution of any services, any property, tangible or intangible, real, personal or mixed, or any other article, commodity or thing of value, . . . and includes any trade or commerce directly or indirectly affecting the people of this state. Mont. Code Ann. § 30-14-102(8).

There is a disputed issue of material fact as to whether the actions and policies of Defendants were unfair and deceptive and the nature of the alleged "transaction" which preclude summary judgment at this time.

V. Are Defendants Entitled to Summary Judgment on Count V – Negligence?

Defendants argue that summary judgment is appropriate on Plaintiff's negligence claim, based on the existence of a contract with MBNA because Plaintiff allegedly ratified and partially

performed the disputed oral contract. MBNA asserts Plaintiff entered into a valid and legally binding oral contract per Mont. Code Ann. § 28-11-105 to assume the business debt with his father in consideration of MBNA waiving any claim against his father's estate and reducing the interest rate. Plaintiff, on the other hand, asserts that he simply informed MBNA of his father's death and his intention to maintain the business as a going concern pending resolution of his father's estate.

There is a disputed issue of material fact as to whether Plaintiff expressed a desire to assume Leslie McKenzie's business and debts. It is a question best left to the jury as to whether Plaintiff ratified and partially performed the disputed oral contract.

VI. Are Defendants Entitled to Summary Judgment on Count VI – Punitive Damages?

Defendants argue that the punitive damages claim should be dismissed. However, Defendants fail to establish that there are no issues of material fact making the case susceptible to summary judgment and Plaintiff has met the particularity requirements of F.R.Civ.P. 9(b).

CONCLUSION

Based upon the foregoing, Plaintiff's Count I is consolidated into Count IV and Defendants' Motion for Summary Judgment is **DENIED**.

DATED this 20th day of September, 2007.

RICHARD F. CEBULL
U.S. DISTRICT COURT JUDGE