

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

CITIBANK (SOUTH DAKOTA) N.A.,)	
)	
Plaintiff-Appellee,)	Supreme Court No. 20080218
)	
vs.)	
)	
SARAH REIKOWSKI,)	District Court No. 04-C-00510
)	
Defendant-Appellant.)	
)	

APPEAL FROM THE DISTRICT COURT OF STUTSMAN COUNTY,
THE HONORABLE MIKAL SIMONSON, PRESIDING

APPELLEE’S SUPPLEMENTAL BRIEF

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1 STATEMENT OF THE ISSUES

- 2 I. Whether the trial court erred when it denied Defendant-Appellant's motion to vacate the court's order which vacated its prior order staying proceedings pending arbitration.
- 3 II. Whether the trial court erred when it denied Defendant-Appellant's motion to vacate summary judgment.

4 ARGUMENT

5 **I. The trial court did not err when it denied Defendant-Appellant’s motion to vacate the court’s order which vacated its prior order staying proceedings pending arbitration.**

6 Ms. Reikowski argues that Judge Simonson was compelled by law to stay proceedings pending arbitration following her motion to stay. However, she did not make those legal arguments in her September 22, 2007 motion to stay, relying instead upon the cardmember agreement only. [Appendix to Appellant’s Brief (“App.”) 15; Docket 71]. She also did not make that argument in response to Citibank’s June 10, 2008 motion to vacate the stay. [App. 21; Docket 80-82] The docket does not indicate that Ms. Reikowski even filed a brief in opposition to Citibank’s motion to vacate the stay. Citibank is in possession of a brief served upon it by Ms. Reikowski’s then-attorney, but even so, the arguments now being made were not presented in the brief, which was the proper opportunity to make the arguments.

7 Finally, Ms. Reikowski did not raise these arguments in her July 14, 2008 motion to vacate the order vacating the stay [App. 24; Docket 90-92], which was denied in a November 14, 2008 order by the district court, pursuant to the Supreme Court’s direction. [Docket 107-108]. Ms. Reikowski does make an ambiguous reference to the Federal Arbitration Act in a supplemental brief in support of her motion. [App. 28; Docket 94]. However, she did not lay out the argument that she now presents to the Supreme Court, and, additionally, the North Dakota Rules of Civil Procedure make no provision for filing a supplemental brief prior to the opposing party filing a brief in opposition. See N.D.R.Ct. 3.2(a)(2). She never made an argument concerning arbitration under the North Dakota Century Code prior to her appeal, and moreover, the cardmember agreement upon which she

relies states that South Dakota law governs the terms and enforcement of the agreement. It is inappropriate to appeal a decision by a district court judge, arguing that he misapplied the law, when the legal argument was never properly placed before the judge. See Jundt v. Jurassic Res. Dev., 2004 ND 65, 6-7, 677 N.W. 2d 209, 212-13 (N.D. 2004)(discussing the law of the case doctrine).

8 Notwithstanding Ms. Reikowski's failure to timely present her arguments, Judge Simonson found merit in Citibank's motion to vacate the stay, as final judgment had already been entered, per his July 7, 2008 order. [App. 23; Docket 89]

9 **II. The trial court did not err when it denied Defendant-Appellant's motion to vacate summary judgment.**

10 Ms. Reikowski argues that her September 22, 2007 motion to stay proceedings pending arbitration was properly before the court. However, as noted in Judge Simonson's November 14, 2008 Order, Citibank filed its Motion for Summary Judgment on August 15, 2007. [Docket 108]. Rule 56(c) of the North Dakota Rules of Civil Procedure provides, in part, as follows:

The adverse party shall have 30 days after service of a brief within which to serve and file an answer brief and supporting papers. Judgment *shall be rendered* forth-with if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. (Emphasis added.)

11 Ms. Reikowski did not file a brief in opposition to the motion for summary judgment until, as noted by the district court, 218 days later. [Docket 108]. Moreover, even Ms.

Reikowski's motion to stay proceedings was not timely as it was not filed within 30 days after service of the motion for summary judgment and supporting documents.

Although Citibank did not oppose the motion to stay proceedings pending arbitration at the

time the motion was filed, Judge Simonson was correct in entering the ruling awarding summary judgment to Citibank, as the pleadings, discovery responses, and affidavits on file within 30 days of service of the motion for summary judgment showed that no genuine issue of material fact existed, and that Citibank was entitled to judgment as a matter of law.

12 The motion for summary judgment was based in part upon the requests for admissions which were deemed admitted pursuant to N.D.R.Civ.P. 36, as Ms. Reikowski refused to answer the requests for admission, and she never moved to withdraw or amend her deemed admissions. The motion for summary judgment was also based upon an affidavit of a Citibank employee confirming Ms. Reikowski's indebtedness to Citibank, which included as an exhibit the credit card statements for the entire history of the credit card account, from an opening balance of zero to the final balance which Citibank alleged was owing in its Complaint against Ms. Reikowski, or \$13,612.45.

13 Nothing will be gained by Ms. Reikowski should summary judgment against her be vacated on procedural grounds, as Citibank will be able to file a new motion for summary judgment, for the same reasons as the August 13, 2007 motion for summary judgment, and Citibank will again be entitled to summary judgment in its favor as no genuine issue of material fact will exist. In addition to the deemed admissions, affidavit, and credit card statements in support of Citibank's claim, Ms. Reikowski herself admits that a credit card agreement exists between the parties when she invokes the arbitration provisions.

[Appellant's Brief at ¶ 6, 15]. Ms. Reikowski also has no defenses to assert against Citibank. All of her claims and defenses were brought in arbitration, a hearing was held on those claims on November 21, 2008, and her claims were dismissed with prejudice. Citibank can confirm the arbitration award in the district court to preclude her use of those

defenses in district court, and judgment will again be entered against Ms. Reikowski. In the interest of judicial economy, Citibank submits that such an outcome is unnecessary and unwarranted by the facts in this matter.

14 CONCLUSION

15 Rule 1 of the North Dakota Rules of Civil Procedure provides that the rules of civil procedure “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” This action is, in Judge Simonson’s words, “a simple collection case” that began in 2004. [Docket 108]. Ms. Reikowski, through her numerous meritless appeals and motions, has caused this action to proceed in a manner which contravenes Rule 1 and which constitutes an abuse of process. See, e.g., Farm Credit Bank v. Zierbarth, 485 N.W. 2d 788, 791 (N.D. 1992), cert denied, 506 U.S. 988, 113 S. Ct. 501, 121 L. Ed. 2d 437 (1992)(repeated notices of removal and endlessly delaying proceedings is an abuse of process, undermines the North Dakota Rules of Civil Procedure, and violates congressional intent).

16 Judge Simonson stated in his November 14, 2008 that Ms. Reikowski attempts to revive her rights for appeal by filing untimely motions after issues have already been decided by the court, and that she should not be allowed to do so. Citibank agrees. Judge Simonson did not err in denying Ms. Reikowski’s motions to vacate summary judgment and to vacate the order vacating the stay of proceedings, and Citibank asks that the Supreme Court affirm the district court’s decisions.

Dated: December 12, 2008

Respectfully Submitted,

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