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IN THE COURT OF APPEALS OF INDIANA

Tonia Land, individually and on behalf of all others similarly situated,

Appellant-Plaintiff,

v.

IU Credit Union,

Appellee-Defendant.

December 30, 2022

Court of Appeals Case No. 22A-CP-382

Appeal from the Monroe Circuit Court

The Honorable Holly M. Harvey, Judge

Trial Court Case No. 53C06-2103-PL-562

Baker, Senior Judge.

[1] Tonia Land sued IU Credit Union ("IUCU") on behalf of a putative class, claiming IUCU had wrongfully assessed overdraft fees against her and other customers. IUCU moved to compel arbitration, arguing Land had already agreed via contract that her claims would be addressed out of court.

[2] The trial court granted IUCU's motion. In this interlocutory appeal, Land claims the purported agreement to arbitrate is invalid. We reverse and remand.

Issue

[3] Land raises three issues, which we consolidate and restate as: whether the trial court erred when it granted IUCU's Motion to Compel Arbitration.

Facts and Procedural History

[4] Land has several accounts with IUCU, including a checking account with a debit card. When she became an IUCU customer, she received a "Membership & Account Agreement" ("The Agreement"). Appellant's App. Vol. II, p. 36. Among other provisions, the Agreement discusses IUCU's methods for processing Land's expenditures from her account, as well as overdraft policies. The Agreement provides, in relevant part:

> **Notice of Amendments:** Except as otherwise prohibited by law, the terms of this Agreement are subject to change at any time. The Credit Union will notify you of any changes in terms, rates, or fees as required by law.
>
> * * * *

> **Effect of Notice:** Any written notice you give to the Credit Union is effective when it is actually received by the Credit Union. Any written notice the Credit Union gives you is effective when it is deposited in the U.S. Mail, postage prepaid and addressed to you at your statement mailing address. If you agreed to receive notices electronically, receipt is effective when an email to your address on file with the Credit Union, advising that a new notice is available for your review through Online Banking, is sent.

Id. at 43.

[5] Land later registered for online banking. IUCU sent to Land via electronic means an "Online Banking, Mobile Banking and Text (SMS) Message Banking Agreement and Disclosure" ("the Disclosure"). *Id.* at 112. According to the Disclosure, Land agreed that IUCU could send notices to her electronically. Further, the Disclosure stated, "[IUCU] may modify the terms and conditions applicable to the Services from time to time. We may send any notice to you via email, and you will be deemed to have received it three days after it is sent." *Id.* at 118. Finally, the Disclosure provided that Land would accept the terms and conditions by clicking an "Accept" button. *Id.* at 119.

[6] In 2019, IUCU sought to require its members to arbitrate any claims they may have against IUCU and to waive their right to participate in class actions against IUCU. It prepared a one-page document entitled "ADDENDUM TO THE MEMBERSHIP & ACCOUNT AGREEMENT" ("the Addendum"). *Id.* at 127. In summary, the Addendum provides: (1) either party may require any dispute to be resolved by arbitration without the other party's consent; and (2) Land and other customers cannot initiate or join a class action in any

arbitration or court proceeding between the parties. Further, the Addendum states:

> RIGHT TO REJECT THIS RESOLUTION OF DISPUTES BY ARBITRATION PROVISION: You have the right to opt out of this agreement to arbitrate if You tell Us within 30 days of the opening of Your account or the receipt of this notice, whichever is later. To opt out, send Us written notice at the following address: [].
>
> Otherwise, this agreement to arbitrate will apply without limitation.

Id.

[7] IUCU attempted to mail the Addendum to each member, enclosed at the end of their July 2019 account statements. The first page of the account statement included the following language:

> ADDENDUM TO THE MEMBERSHIP & ACCOUNT AGREEMENT
>
> The Indiana University Credit Union's Membership and Account Agreement has been updated as of July 25, 2019. See the 'Addendum to the Membership & Account Agreement' at the end of your statement to review the added language.

Id. at 123. As for IUCU members who had enrolled in electronic banking services, IUCU attempted to email them to inform them about the Addendum.

[8] With respect to Land in particular, IUCU mailed the Addendum to the address she had given the credit union, along with an account statement, but: (1) the Addendum was included in an account statement for an account other than Land's checking account; and (2) Land does not recall receiving the new terms.

[9] Further, IUCU claims to have sent Land an email stating: "You have a new eStatement to retrieve in Online Banking." *Id.* at 178. If she had clicked on a link in the email, it would have directed her to the account statement and the Addendum. Land does not recall receiving that email, but its language is identical to other notifications she receives when a new monthly banking statement is available for review, and would not have alerted her that IUCU was attempting to impose new terms on their banking relationship. In any event, Land did not send IUCU a notice that she chose to opt out of the Addendum's arbitration requirement.

[10] On March 18, 2021, Land filed a Class Action Complaint, alleging IUCU had wrongfully assessed overdraft fees on accounts that were not overdrawn. In particular, she claimed that on October 3, 2018, IUCU wrongfully assessed a $30 overdraft fee against her on a $4.31 debit card transaction, even though IUCU had previously authorized the transaction on sufficient funds. Land further claimed that IUCU's actions amounted to breach of contract, breach of a duty of good faith and fair dealing, unjust enrichment, and violation of Indiana's Deceptive Consumer Sales Act.

[11] On June 15, 2021, IUCU filed a Motion to Compel Arbitration, claiming the Addendum required that Land's claims be submitted to arbitration.[1] Land responded to the motion, and IUCU filed a reply in support of its motion. The

[1] IUCU also moved in the alternative to dismiss Land's claims under Indiana Trial Rule 12(B)(6), but that alternative motion is not at issue in this appeal.

trial court held a hearing on the motion and later granted it, concluding "an enforceable agreement to arbitrate exists between the parties." *Id.* at 10. Next, Land requested and received permission from the trial court and this Court to pursue an interlocutory appeal, and this appeal followed.

Discussion and Decision

[12] Land argues the trial court erred in determining her claim against IUCU was subject to mandatory arbitration, claiming the alleged contract was invalid due to lack of reasonable notice and, in addition, she never accepted the offer. In response, IUCU argues the parties validly contracted to submit all claims to arbitration.[2] The parties agree that this appeal raises questions of law, which we review de novo. *See Doe v. Carmel Operator, LLC*, 160 N.E.3d 518, 521 (Ind. 2021) (decisions on motions to compel arbitration reviewed de novo).

[13] Before imposing arbitration, a trial court must determine whether the arbitration agreement between the parties is valid. *Novotny v. Renewal by Andersen Corp.*, 861 N.E.2d 15, 20 (Ind. Ct. App. 2007). A valid agreement is a prerequisite because arbitration is a matter of contract, and a party cannot be required to submit to arbitration unless the party has agreed to do so. *Homes By Pate, Inc., v. DeHaan*, 713 N.E.2d 303, 306 (Ind. Ct. App. 1999). The party seeking to compel arbitration must demonstrate the existence of an enforceable

[2] During trial court proceedings, IUCU had claimed that the Addendum merely amended the original Agreement between IUCU and Land. On appeal, IUCU abandons that claim and instead argues the Addendum stands on its own as a validly-executed contract.

arbitration contract. *Precision Homes of Ind., Inc. v. Pickford*, 844 N.E.2d 126, 130 (Ind. Ct. App. 2006), *trans. denied*.

[14] When determining whether the parties have agreed to arbitrate a dispute, we apply ordinary contract principles governed by state law. *Showboat Marina Casino P'ship v. Tonn & Blank Constr.*, 790 N.E.2d 595, 598 (Ind. Ct. App. 2002). The basic requirements for a contract are offer, acceptance, consideration, and a meeting of the minds of the contracting parties. *Mueller v. Karns*, 873 N.E.2d 652, 657 (Ind. Ct. App. 2007). The meeting of the minds between the parties "is essential to the formation of a contract." *Ind. Dep't of Corr. v. Swanson Servs. Corp.*, 820 N.E.2d 733, 737 (Ind. Ct. App. 2005), *trans. denied*.

I. Reasonableness of Notice

[15] Land argues there was no meeting of the minds with respect to the Addendum because it was not communicated to her in a reasonable manner. We turn for guidance to a recent decision by a panel of this Court in *Decker v. Star Financial Group, Inc.*, 187 N.E.3d 937 (Ind. Ct. App. 2022), *vacated on transfer*. The Indiana Supreme Court has vacated the Court of Appeals' decision through the grant of transfer, but we find the reasoning in that case persuasive.

[16] In *Decker*, a couple sued their bank, claiming it had improperly assessed overdraft fees against them and a putative class. The bank claimed the Deckers had agreed to arbitrate their claims via an addendum to their original banking agreement. The bank further claimed it had notified the Deckers via email of the Addendum. The email advised the Deckers only that a new monthly

banking statement was available, without mentioning the addendum, which the Deckers could have accessed by clicking on a link in the email.

[17] The trial court granted the bank's motion to compel arbitration, but a panel of this Court reversed. The *Decker* panel determined the bank's proposed addendum was invalid because it was not sent in a manner "reasonably calculated to reach the intended audience." *Id.* at 945. Specifically, the bank's email did not reference the added arbitration terms and placed the new terms at the back of the statement. In addition, the email and the first page of the statement both failed to note that the Deckers were facing a time-sensitive deadline to avoid being bound by the addendum.

[18] The circumstances of Land's case closely parallel those discussed in *Decker*. Like the Deckers, Land received an email from her credit union, notifying her that a new statement was available for her review, without referring to the Addendum. In addition, the Addendum was placed at the back of the statement, with no reference at the front of the statement to a time-sensitive deadline for Land to respond.

[19] We find further persuasive support in *Gibbs v. Firefighters Community Credit Union*, 177 N.E.3d 294 (Ohio Ct. App. 2021), *appeal not accepted*. Gibbs and others sued their credit union, alleging the credit union had wrongfully assessed overdraft fees against them. The credit union sought to compel arbitration, claiming Gibbs had contracted to arbitrate their disputes because Gibbs had

failed to opt out of an arbitration clause. The credit union further claimed Gibbs was sent notice of the arbitration clause via email.

[20] The trial court denied the credit union's motion to compel, and the Ohio Court of Appeals affirmed the denial. The Ohio Court of Appeals noted the credit union had sent Gibbs and other members an email informing them that the terms of service had been updated, without explaining what the updates were, and that Gibbs would accept the updated terms by continuing to bank with the credit union. That court concluded the failure to describe the arbitration provision upfront, and the right to opt out, in the email did not provide clear notice of the contract being offered to Gibbs. As a result, there was no meeting of the minds, and no contract.

[21] Land's case is similar to Gibbs' case in that IUCU's email to Land, as well as the front page of the account statement, failed to explain that IUCU was imposing new arbitration and class action requirements upon Land. In addition, neither the email nor the first page of the statement explained that action was required in order for her to not be bound by the Addendum. Based on the email, there was no meeting of the minds.

[22] Of course, there is one major difference between this case, *Decker*, and *Gibbs*: IUCU also sent Land the Addendum by mail, attached to the end of her monthly statement for an account other than the checking account that is the subject of this lawsuit. But as we discuss below, under the circumstances of this

case, we conclude the mailed Addendum also failed to provide reasonable notice.

[23] We find persuasive guidance in *Kortum-Managhan v. Herbergers NBGL*, 204 P.3d 693 (Mont. 2009). In that case, the plaintiff, who we call KM, sued her credit card company, claiming it had inaccurately reported to credit bureaus that she had multiple accounts with the company, when in fact she had only one. The company moved to compel arbitration, alleging KM had agreed to arbitrate all disputes pursuant to an amendment to their contract. The company further alleged it had mailed the notice of change to KM along with a monthly account statement. KM denied receiving or noticing the change in terms, because the credit card company regularly included "junk mail" with her account statements. *Id.* at 696. As a result, KM reasoned she did not receive meaningful notice of the arbitration provision.

[24] The trial court granted the motion to compel arbitration, but the Montana Supreme Court reversed. That court determined the new arbitration clause, included as a "bill stuffer" with inconspicuous language, did not provide sufficient notice that KM was agreeing to waive her right to a trial by jury. *Id.* at 699.

[25] The *Kortum-Managhan* case and Land's case are similar in several crucial respects. KM and Land both asserted that they did not see the arbitration terms that were offered to them. And IUCU's notice on the first page of the account statement it mailed to Land did not advise her that the "added language"

included an arbitration provision, Appellant's App. Vol. II, p. 123, or that time-sensitive action on her part was necessary to avoid being bound by the new language. In addition, in both cases the financial institution did not require affirmative action by the customer to be bound by the new contract. KM supposedly agreed to be bound merely by continuing to use her credit card, and IUCU stated that Land's silence would equal assent to the new terms. Finally, in both cases, customers were not reasonably notified that they were being asked to waive their right to jury trial against their financial institutions.

[26] IUCU argues that the notices they sent Land by email and mail met the notice requirements set forth in the Agreement and the Disclosure. But fulfilling contractual notice obligations, that IUCU alone drafted, is not the same as establishing reasonable notice under the law. *Cf. Providian Nat. Bank v. Screws*, 894 So.2d 625, 628 (Ala. 2003) (trial court erred in denying motion to compel arbitration in dispute between bank and client; arbitration addendum enclosed in billing statement met the notice requirements set forth in Alabama banking statute).

[27] We conclude IUCU failed to provide reasonable notice to Land of the arbitration contract, and as a result there was no meeting of the minds. Although that conclusion is a sufficient basis to reverse the trial court's judgment, we will also address Land's claim that she did not validly accept IUCU's contract offer.

II. Acceptance – Offeree's Silence

[28] Land notes the Addendum provided that it would take effect unless she objected in writing within thirty days. She argues that her silence under the circumstances of this case was not a binding acceptance of IUCU's offer. We agree.

[29] In *Mueller*, 873 N.E.2d 652, an attorney consulted with Karns in the course of negotiating a lease for the sale of sand, gravel, and other material on Mueller's land. The attorney and Karns never formally agreed on how to calculate Karns' compensation for his consulting services. After the lease was negotiated, Karns sent the attorney a written consultation fee proposal, which the attorney orally rejected during a telephone call. The attorney later sent Karns a check to pay for his services, but Karns did not cash it, believing the amount to be inadequate.

[30] Eventually, Karns sued Mueller's estate, claiming his written proposal was a binding contract because the attorney failed to reject it in writing. A trial court determined the proposal was a binding contract. This Court reversed. The Court quoted the Restatement (Second) of Contracts on the question of when silence may be taken as acceptance of an offer to contract, as follows:

> (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
>
> (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.

> (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
>
> (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

Id. at 657-658 (quoting Restatement (Second) of Contracts § 69(1) (Am. L. Inst. 1981)).

[31] The Court determined that Karns' proposal did not explicitly state that silence equals acceptance, and it did not provide a mechanism for rejecting the proposal. Further, the attorney did not manifest assent by accepting services from Karns after receiving the proposal, because Karns had already performed his work when he sent the proposal. As a result, the attorney's failure to send a written rejection of the proposal did not function as acceptance of the offer, and there was no contract between the parties.

[32] We find further guidance in the drafters' comments to Section 69 of the Restatement. They stated, "Acceptance by silence is exceptional." Restatement (Second) of Contracts § 69(1) cmt. a. Further, when an offeror states that silence will constitute acceptance, that fact "does not deprive the offeree of his privilege to remain silent without accepting." *Id.* Instead, in such a circumstance the offeror may show that it relied on the silence as acceptance to enforce the contract. *Id.*

[33] In this case, as in *Mueller*, Land did not manifest acceptance of IUCU's offer by accepting the benefit of IUCU's services. The Addendum is separate from the Agreement and Disclosure which govern Land and IUCU's banking relationship and did not condition the continuance of the banking relationship upon Land's acceptance of the Addendum. Thus, her continuing use of IUCU's services does not constitute acceptance. *Cf. Meyer v. Nat. City Bank*, 903 N.E.2d 974, 976 (Ind. Ct. App. 2009) (trial court did not err in determining contract existed between credit card company and debtor; credit card agreement explicitly stated debtor's use of the card would constitute acceptance of the company's contract, and debtor used the card).

[34] In this case, unlike in *Mueller*, IUCU's offer did inform Land of how she could opt out of the Addendum's arbitration requirements. But, as the Restatement shows, it is not enough for the offeror to inform the offeree that silence will equal acceptance of the offer. It must also be shown that the offeror, in remaining silent, intended to accept the offer. Restatement (Second) of Contracts § 69(1) cmt. a. Land told the trial court that she was never aware of the offer and would not have accepted it. Further, IUCU does not demonstrate that it relied on Land's silence in continuing to do business with her.

[35] Finally, the record reveals nothing in the parties' course of dealing that reasonably would have allowed IUCU to accept Land's silence as agreement. In the past, when IUCU required Land to accept the Disclosure, acceptance was signified by clicking an "Accept" button, not by remaining silent and

inactive. Thus, IUCU could have offered the Addendum in such a way as to require Land to affirmatively accept its terms.

[36] IUCU cites *Weldon v. Asset Acceptance, LLC*, 896 N.E.2d 1181 (Ind. Ct. App. 2008), *trans. denied*, in support of its claim that Land's silence equaled acceptance of its offer, but that case is distinguishable. In *Weldon*, a customer of a credit card company argued the parties' contract, which contained an arbitration provision, was invalid because he did not sign the credit agreement. This Court determined that Weldon accepted the contract by his conduct, that is, the use of his credit card. By contrast, in Land's case IUCU did not state that her use of IUCU's banking services would constitute acceptance of the Addendum. To the contrary, IUCU, the drafter of the Addendum, stated only that Land's silence would constitute acceptance. We will not read terms into the Addendum's plain language.

[37] For these reasons, we conclude Land's silence did not constitute acceptance, and lack of acceptance is another ground for invalidating the Addendum's arbitration requirement.

Conclusion

[38] For the reasons stated above, we reverse the trial court's grant of IUCU's motion to compel arbitration and remand for further proceedings not inconsistent with this opinion.

[39] Reversed and remanded.

Bailey, J., and Robb, J., concur.