FILED
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ELIZABETH A. BROWN
CLERK OF SUPREME COURT

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARIE DUFRESNE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Appellant, vs. GREATER NEVADA CREDIT UNION, Respondent.	No. 91171-COA

ORDER OF REVERSAL AND REMAND

Marie Dufresne appeals from a district court order granting a motion to dismiss in a breach-of-contract putative class action. First Judicial District Court, Carson City; Hon. Kristin Luis, Judge.

Dufresne maintains a checking account with respondent Greater Nevada Credit Union (Greater Nevada). Dufresne filed this putative class action alleging that in March 2023 and March 2024, Greater Nevada improperly charged $35 overdraft fees on debit card transactions that were authorized when her account held sufficient funds but later settled against a negative balance, a practice she labels "Authorize Positive, Settle Negative" or "APSN" transactions. The complaint pleaded breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and violation of the Nevada Deceptive Trade Practices Act (NDTPA). In support of these claims, Dufresne attached the contract materials she contended governed her account at the time of the overdrafts, including an undated "Terms and Conditions" agreement and an undated "What You Need to Know About Overdrafts and Overdraft Fees" opt-in form.

Greater Nevada moved to dismiss the putative class action complaint pursuant to NRCP 12(b)(5). In its motion, Greater Nevada contended that the operative agreements were a July 2022 agreement and a December 2023 agreement, both of which Greater Nevada attached to its motion to dismiss. Greater Nevada further contended that those agreements unambiguously tied an overdraft determination to the time a debit card transaction is presented by a merchant for payment rather than the time a debit card transaction is authorized. Thus, Greater Nevada argued Dufresne's APSN theory was contradicted by the agreements' plain terms. Greater Nevada did not authenticate the two agreements appended to its motion, but subsequently provided an affidavit from its vice president of risk and operations with its reply attesting to the agreements and their effective dates, and further asserting that the contract materials Dufresne attached to her complaint did not apply to the transactions at issue. Although the affiant stated that the opt-in form Dufresne attached to the complaint was a model form and was not created by Greater Nevada, she acknowledged that the credit union's opt-in forms "are similar" to the one Dufresne attached to her complaint.

In responding to the motion to dismiss, Dufresne asserted the agreement appended to her complaint was the operative agreement. Dufresne further asserted that agreement was ambiguous and, pointing to provisions tying the available-balance determination to "the time of the purchase" and to the debit-authorization "hold," argued that a debit card transaction authorized on sufficient funds could not later overdraw the account at settlement. Dufresne further argued that the district court could not credit Greater Nevada's versions of the agreement as controlling or resolve the parties' factual dispute over which agreement applied through review of an NRCP 12(b)(5)

motion to dismiss, and that discovery was needed to determine which agreement(s) governed and what documents Greater Nevada gave Dufresne when she opened her account. Dufresne also defended the unjust enrichment claim as pleaded in the alternative in the event the agreement was deemed unenforceable.

After briefing on the motion to dismiss was finished, the district court entered an order requiring additional information because "the parties appear to disagree on what contract documents control." Reasoning that, on a contract-based motion to dismiss, it "must first determine what the language is and, then, determine if the terms are clear and unambiguous," the court directed Dufresne to advise: (a) which, if any, of the filed documents was the controlling contract in March 2023 and March 2024; (b) if she agreed Greater Nevada's documents controlled, whether she stood by her complaint, her opposition, and her request for injunctive and declaratory relief; (c) whether the $70 in overdraft charges was the monetary damages she sought and whether the court had jurisdiction over that amount; and (d) whether she had standing under the NDTPA and, if so, the authority for it. In her submission, Dufresne represented without an accompanying affidavit that she believed the agreement attached to her complaint was the controlling agreement and argued that discovery was needed to determine what documents were provided to her at account opening and what they stated about overdraft fees.

The district court subsequently entered an order granting Greater Nevada's motion and dismissing all Dufresne's claims with prejudice. The court found that Greater Nevada's authenticated 2022 and 2023 Agreements "clearly were the controlling contracts," because Dufresne "did not provide proof to counter the sworn affidavit" and could not survive the motion by asserting that other, unproduced documents might control. Turning to the

contract language, the court rejected Dufresne's APSN theory, holding that "the governing agreement makes a clear distinction between authorization and payment and links the assessment of [overdraft] fees to the time of payment, not authorization." On that basis, the court dismissed Dufresne's breach of contract claim, including the good-faith-and-fair-dealing component, reasoning that Greater Nevada "did not violate the covenant of good faith and fair dealing by acting in accordance with the express terms" of the agreement. The court also dismissed the unjust enrichment claim because the dispute was governed by enforceable contracts and dismissed the NDTPA claim on the ground that "charging a fee in accordance with an express agreement between the parties cannot constitute a deceptive trade practice" and that Dufresne had not sufficiently pleaded that claim. The court also expressed doubt that Dufresne's individual damages met the amount needed to vest jurisdiction in that court and concluded that jurisdiction existed only because Dufresne had requested declaratory and injunctive relief. This appeal followed.

On appeal, Dufresne primarily argues the district court committed two errors in dismissing her claims. First, Dufresne contends the court improperly weighed facts by crediting Greater Nevada's versions of the agreements as controlling because the question of which agreement governs her claims is a disputed fact the court could not resolve on a motion to dismiss. Second, Dufresne asserts that, regardless of which agreement controls, the agreements are ambiguous as to whether overdrafts are determined at authorization or settlement because the agreements tie overdraft fee decisions to Greater Nevada's exercise of discretion and to the account's "available balance," and because the debit-authorization "hold" can reasonably be read to keep sufficient funds reserved so that an APSN transaction cannot overdraw the account.

We rigorously review a district court order granting an NRCP 12(b)(5) motion to dismiss, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A complaint should be dismissed for failure to state a claim "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. Nevada is a notice-pleading jurisdiction, *see* NRCP 8(a), and a complaint need only set forth a short and plain statement with sufficient facts to demonstrate the necessary elements of a claim for relief so that the opposing party "has adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992); *see also Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. 291, 308-09, 468 P.3d 862, 878-79 (Ct. App. 2020) (discussing Nevada's liberal notice pleading standard).

Although whether ambiguity exists is a legal question, the presence of ambiguity can preclude dismissal. *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 149-50 (2d Cir. 1993); *cf. Margrave v. Dermody Props., Inc.*, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994) (concluding that ambiguity necessitating extrinsic evidence to ascertain the meaning of a contract precluded summary judgment). A contract "is ambiguous if its terms may be reasonably interpreted in more than one way, but ambiguity does not arise simply because the parties disagree on how to interpret their contract." *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) (internal citation omitted). "Rather, an ambiguous contract is an agreement

obscure in meaning, through indefiniteness of expression, or having a double meaning." *Id.* (internal quotation marks omitted).

The supreme court recently applied these principles to a materially similar APSN claim in *Vial v. Great Basin Federal Credit Union*, No. 88195, 2025 WL 1156510 (Nev. Apr. 17, 2025) (Order of Reversal and Remand). As in this case, the accountholder in *Vial* alleged that a credit union charged overdraft fees on debit card transactions which had been previously authorized against sufficient funds. *Id.* at *1. The supreme court concluded that where an agreement contains discretionary overdraft provisions and does not unambiguously fix the overdraft determination at settlement rather than authorization, the agreement "may reasonably be interpreted in more than one way and is therefore ambiguous." *Id.* at *2. Given the conclusion that the parties reasonably disputed the meaning of the agreement's overdraft provisions, the supreme court determined that the district court "erred in making the leap that Vial failed to state a claim where the four corners of the [agreement] failed to unambiguously support either side." *Id.*

The same conclusion follows here. Accepting the allegations in the complaint as true and drawing all inferences in Dufresne's favor, the agreements at issue do not unambiguously foreclose her interpretation. Even assuming the 2022 and 2023 agreements govern Dufresne's claims, those agreements commit overdraft decisions to Greater Nevada's discretion, define the account's "available balance" to exclude funds already held for authorized transactions, and describe a debit authorization hold that can reasonably be understood to reserve sufficient funds to settle the very transaction for which the hold was placed. Because the agreements are susceptible to more than one reasonable interpretation on the question of whether overdraft fees may be assessed on APSN transactions, that ambiguity cannot be resolved against

Dufresne at the pleading stage. *Cf. Margrave*, 110 Nev. at 827, 878 P.2d at 293 ("Where the meaning of a contract is ambiguous and resort to extrinsic evidence is required to ascertain the intention of the parties, summary judgment is inappropriate in the face of contradictory or conflicting evidence."). Accordingly, we conclude the district court erred in dismissing Dufresne's complaint.

The district court's determination that Greater Nevada's 2022 and 2023 agreements were "the controlling contracts" compounds its error. The parties disputed which documents governed, and the court recognized that dispute before resolving it against Dufresne for failing to submit proof countering Greater Nevada's documents. While a court may consider a document central to the complaint and of undisputed authenticity without converting a motion to dismiss into one for summary judgment, *see Baxter v. Dignity Health*, 131 Nev. 759, 764, 357 P.3d 927, 930 (2015), that principle does not permit a court to resolve a genuine, disputed question of fact regarding which of several documents controls or to weigh an affidavit against the complaint's allegations on a motion to dismiss. Those determinations required the court to credit Greater Nevada's evidence over Dufresne's allegations, which is not permitted under NRCP 12(b)(5). *See Shoen v. SAC Holding Corp.*, 122 Nev. 621, 635, 137 P.3d 1171, 1180 (2006) (observing that district courts "must accept as true each of the complaint's particularized factual allegations and draw every fair factual inference flowing from those particularly alleged facts in favor of the nonmoving party").

Dufresne's remaining claims were dismissed as derivative of the contract ruling and we reverse the dismissal of those claims for the same reasons. The district court dismissed the implied covenant of good faith and fair dealing claim based on the premise that Greater Nevada acted "in

accordance with the express terms" of the agreements. The court's premise, however, necessarily depended on its decision to credit Greater Nevada's interpretation of the agreements over Dufresne's interpretation. In addition, the district court dismissed Dufresne's alternative claim of unjust enrichment based on its conclusion that enforceable agreements govern the parties' disputes. Because the operative agreement and its import are not established on the pleadings, the court's dismissal of Dufresne's alternative unjust enrichment claim was premature. *See* NRCP 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."). Finally, the court's dismissal of Dufresne's NDTPA claim on the grounds that a fee charged in accordance with the agreement cannot be deceptive was likewise based on its erroneous decision to credit Greater Nevada's interpretation of the agreements over Dufresne's interpretation. *See Shoen*, 122 Nev. at 635, 137 P.3d at 1180.

Given our conclusion that, consistent with the supreme court's reasoning in *Vial*, the agreements here are ambiguous and that the district court erred in resolving disputed factual and interpretive questions on a motion to dismiss, we need not reach the parties' remaining contentions, including those concerning the district court's observations regarding whether Dufresne's individual damages met the amount needed to vest jurisdiction. We note, however, that Dufresne's complaint was a putative class action. Class action suits "allow representatives of a numerous class of similarly situated people to sue on behalf of that class in order to obtain a judgment that will bind all." *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 846, 124 P.3d 530, 537 (2005). Thus, in such actions, the representative party "may aggregate the value of the individual claims of all potential class members to establish district court jurisdiction over a class action." NRCP 23(b); *cf. A Cab, LLC v.*

Murray, 137 Nev. 805, 811, 501 P.3d 961, 970 (2021) (holding that in class actions brought before the justice court "the total damages sought by the class, rather than those sought by any individual class member, must be considered" in determining whether the justice court has jurisdiction).

In light of the foregoing, we

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for further proceedings consistent with this order.

Bulla, C.J.

Gibbons, J.

Westbrook, J.

cc: Hon. Kristin Luis, District Judge
Gabrielle Jeanne Carr, Settlement Judge
Gordon Rees Scully Mansukhani LLP/Charleston
Gordon Rees Scully Mansukhani LLP/Reno
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First District Court Clerk