2011 IL App (1st) 093088 - U

FOURTH DIVISION
December 15, 2011

Nos. 1-09-3088 and 1-10-1320 (consolidated)

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

SHARON PERIK.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 09 L 2556
	)	
JP MORGAN CHASE BANK, U.S.A., N.A.,	)	Honorable
WASHINGTON MUTUAL BANK, and EARLY	)	James D. Egan,
WARNING SERVICES, L.L.C.,	)	Judge Presiding.
	)	
Defendants-Appellees,	)	
	)	
JP MORGAN CHASE BANK, U.S.A., N.A.,	)	
WASHINGTON MUTUAL BANK, EARLY	)	
WARNING SERVICES, L.L.C., and TCF	)	
NATIONAL BANK,	)	
	)	
Defendants.	)	

JUSTICE STERBA delivered the judgment of the court.
Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying plaintiff's motion to strike affidavits because defendant did not file the affidavits to support a dispositive motion.

The trial court did not err in finding that an arbitration agreement existed where a customer signed a signature card and the bank established its normal business practice included sending a notice to customers of a change in their account agreement. A bank that asserted its right to arbitration did not waive that right even though it filed dispositive motions during the ongoing litigation. The trial court did not err in granting a motion to enforce the stay of the action and compel arbitration where the underlying issues in the motion to enforce were related to a previous order granting a motion to stay the action and compel arbitration. The trial court did not abuse its discretion by not allowing plaintiff to file a written response to a motion to enforce the stay and compel arbitration because a hearing on the motion was held and plaintiff raised issues concerning the motion before the court. The trial court did not err in denying plaintiff's motion to strike a declaration on the basis that a referred to document was not attached since the unattached document was only a general document used to describe defendant's business. The trial court erred in granting a section 2-619 motion to dismiss where plaintiff sufficiently pled facts supporting an allegation of malice and whether defendant abused a qualified privilege raises a question of fact.

¶ 2 This consolidated appeal arises from plaintiff Sharon Perik's claim that JP Morgan Chase Bank, U.S.A., N.A., (Chase) and Early Warning Services, L.L.C. (Early Warning) made libelous statements imputing that she committed a crime associated with the theft and subsequent unauthorized negotiation of two checks. As to Chase, Perik claims that the trial court erred in denying her motion to strike two affidavits that Chase filed to support its motion to stay the action and compel arbitration. Perik also claims that the trial court erred in finding that she agreed to arbitrate her claim against Chase, and that Chase did not waive its right to arbitration when it filed motions during the ongoing litigation proceedings. Perik further claims that the trial court erred in finding that a mandatory arbitration agreement between Perik and Chase applies to claims she brought against Chase as successor in interest to Washington Mutual. Perik lastly claims that the trial court abused its discretion by not allowing Perik to respond to Chase's motion to enforce the stay of the action and compel arbitration.

¶ 3 As to Early Warning, Perik appeals the trial court's granting of Early Warning's motion to dismiss pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2008)) because a qualified privilege did not protect Early Warning's publication of the libelous statements, and the Federal Credit Reporting Act (FCRA) (15 U.S.C.A. § 1681, *et seq.*) does not apply to state law defamation claims. Perik also contends that the trial court erred in denying its motion to strike portions of a declaration Early Warning submitted to support its motion to dismiss. For the reasons that follow, we affirm the trial court's rulings regarding the claims Perik brought against Chase and affirm in part and reverse in part and remand for further proceedings the trial court's rulings regarding the claims Perik brought against Early Warning.

¶ 4 *Background*

¶ 5 Early Warning's business consists of assisting financial institutions in the detection and elimination of fraud by facilitating the secure exchange of information and knowledge of consumer activity between financial organizations. Early Warning maintains a shared database to which financial institutions, known as "furnishers," are able to contribute current information regarding the activities of their depositors. Other financial institutions, known as "inquirers," considering a business relationship with a depositor may make a request for information from the shared database that Early Warning maintains. When Early Warning receives a request for information about a potential depositor from an inquirer, it generates a consumer report (report) based only on the information maintained in its database. After Early Warning generates the report, it provides the report to the inquiring financial institution. The inquirers may use the report to assist them in making the decision of whether to enter into a banking relationship with the depositor, and in particular, in determining the risk involved in establishing a business

relationship with the prospective consumer. Furnishers provide the information in the database that Early Warning maintains and Early Warning relies on the information and representations made by the furnishers. Early Warning informs furnishers that the information they contribute to the database may be used to generate a report. As part of its business practices, Early Warning complies with FCRA regulations.

¶ 6 Chase is a financial institution and furnishes to Early Warning information regarding its depositors. Perik had a banking relationship with Chase from approximately 1992 to 2008. Perik reported to Chase that on or about February 5, 2008, two blank checks from her checking account with Chase were stolen and subsequently negotiated to purchase goods. On March 14, 2008, Perik filed a police report with the Des Plaines Police Department concerning the two checks stolen from her residence and subsequent unauthorized negotiation of the checks.

¶ 7 On March 27, 2008, Chase reimbursed Perik for the negotiated amount of the two checks totaling $1,135 and deposited that amount in her checking account. Chase contacted Early Warning and provided it with a fraud alert based on Perik's stolen checks and their subsequent negotiation. Specifically, Chase informed Early Warning that Perik "had participated in: a) transacting or attempting to transact an exchange from her checking account with a check in a fraudulent manner, b) passing or depositing a forged, altered, stolen, or counterfeit check, c) passing or depositing a check from a closed account, d) passing or depositing a non-negotiable item, and/or e) participating in a check kiting scheme, drawing against insufficient or uncollected funds, depositing empty envelope ATM deposits, or creating keying errors."

¶ 8 On April 1, 2008, Washington Mutual requested financial information about Perik from Early Warning. In response to the request, Early Warning generated a report on Perik and

provided that report to Washington Mutual. On August 20, 2008, Perik opened a checking account with TCF National Bank (TCF), and TCF contacted Early Warning to request a report on Perik. Early Warning provided a report to TCF. On August 22, 2008, TCF sent Perik a letter informing her that it could not maintain a banking relationship with her based upon information it received from Early Warning. Perik then requested a copy of the report from Early Warning. In a letter to Perik dated September 19, 2008, Early Warning informed Perik that Chase reported that she inappropriately and illegally used a checking account.

¶ 9 On March 3, 2009, Perik filed a complaint alleging that the statements Chase made and Early Warning subsequently published were false. Thereafter, Perik filed an amended complaint, and on March 3, 2010, Perik filed a second amended complaint. The second amended complaint (complaint) contained the following counts: (1) Libel *per se* - Chase; (2) Libel *per se* - Early Warning; (3) Libel *per se* - Chase, as successor in interest to Washington Mutual; and (4) Libel *per se* - TCF. Perik alleged that on March 27, 2008, Chase published statements to Early Warning that she engaged in the following activities:

> "(a) transacted or attempted to transact an exchange from her checking account with a check in a fraudulent manner;
>
> (b) passed or deposited a forged check;
>
> (c) passed or deposited an altered check;
>
> (d) passed or deposited a check from a closed account;
>
> (e) passed or deposited a stolen check;
>
> (f) passed or deposited a counterfeit check;
>
> (g) passed or deposited a non-negotiable item; and

(h) participated in a check kiting scheme, drew against insufficient or uncollected funds, deposited empty envelope ATM deposits, or created keying errors."

Perik also alleged that Chase, Early Warning, Chase as successor in interest to Washington Mutual, and TCF "made the statements with the knowledge of their falsity, in reckless disregard for their falsity; despite a high degree of awareness of their probable falsity; and/or while entertaining serious doubts as to their truth." Perik further pled that Chase, Early Warning, Chase as successor in interest to Washington Mutual, and TCF made the statements "with a direct intention to injure Perik; with a reckless disregard of Perik's rights and the consequences that might result to her as a result of the statements; while failing to properly investigate the truth of the statements; and/or while failing to limit the scope of the defamatory material."

¶ 10 On April 21, 2009, Chase filed a motion to dismiss pursuant to sections 2-615 and 2-606 of the Code because Perik's complaint failed to attach the underlying report forming the basis of her libel *per se* claim. Perik filed a copy of the report on May 26, 2009, and Chase withdrew its motion to dismiss. On June 5, 2009, Perik served Chase with a request to produce documents and on June 9, 2009, Perik served Chase with interrogatories. Chase's responses to Perik's written discovery were due by July 6 and July 10, 2009, respectively. On June 26, 2009, Chase asked Perik whether she would agree to stay the action and compel arbitration as stated in Chase's account agreement. Perik refused arbitration.

¶ 11 On June 30, 2009, Chase filed a motion to stay the action and compel arbitration (motion to compel arbitration) pursuant to section 5-2(a) of the Illinois Uniform Arbitration Act (Act) (710 ILCS 5/2(a)(West 2008)), or, alternatively, to dismiss the count pursuant to section 2-619(9) of the Code because the FCRA preempted Perik's claim. On the same day, Chase also

filed an emergency motion to stay discovery, which Perik opposed. The trial court denied Chase's motion and ordered it to respond to Perik's written discovery. Chase responded to Perik's written discovery motions on July 17, 2009, and included as a general objection to the interrogatories that it had a pending motion to compel arbitration. When Chase responded to Perik's written discovery, it also served Perik with a request to produce documents and interrogatories.

¶ 12 On August 7, 2009, Chase filed a supplemental memorandum supporting its motion to compel arbitration and attached an affidavit of Laura Deck and Andrea Beggs as support. Deck was Chase's Vice President, Product Manager II, and stated in her affidavit that she had personal knowledge of Chase's procedures when it opened bank accounts with potential customers. Beggs was Chase's Associate General Counsel, and stated in her affidavit that she also had personal knowledge of Chase's procedures when it opened new accounts and notified customers of changes in the account agreement's terms and conditions. Attached as exhibits to the affidavits were Chase's 1991 and 2006 account rules and regulations.

¶ 13 The 1991 account rules and regulations (1991 Agreement), which was still effective in 1992, stated the following regarding the agreement in general, arbitration and amendments to the agreement:

> "AGREEMENT
>
> This Agreement shall govern all . . . checking accounts with us. By signing a signature card, making deposits or withdrawals, or leaving amounts on deposit, you agree to the terms of this Agreement. This Agreement shall supersede all previous agreements for such accounts."

"ARBITRATION

Any controversy or claim arising out of or relating to this Agreement, or the bank accounts covered by this Agreement, including but not limited to, a claim based on or arising from an alleged tort, shall at your or our request, be determined by arbitration under the auspices and rules of the American Arbitration Association and in accordance with the Federal Arbitration Act and the Illinois Uniform Arbitration Act."

"AMENDMENT

We many change any of the terms of this Agreement at any time without prior notice to you if the change is favorable to you. We may make changes that are adverse to you only if we provide you with at least 15 days advance notice. (See Notices.) You may close the account if you do not agree to the changes, [sic] if you continue to use the account or keep the account open after the effective date of such change, you will be deemed to have agreed to the changes."

The 2006 account rules and regulations (2006 Agreement) stated the following regarding arbitration, amendments and general information:

"Arbitration

PLEASE READ THIS PROVISION CAREFULLY. IT PROVIDES, WITH THE SPECIFIC EXCEPTION STATED BELOW, THAT ANY DISPUTE MUST BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT. . . . IN THE ABSENCE OF THIS ARBITRATION AGREEMENT, YOU AND THE BANK MIGHT

> OTHERWISE HAVE HAD A RIGHT OR OPPORTUNITY TO BRING CLAIMS IN A COURT, BEFORE A JUDGE OR JURY, AND/OR TO PARTICIPATE OR BE REPRESENTED IN A CASE FILED IN COURT BY OTHERS (INCLUDING CLASS ACTIONS). EXCEPT AS OTHERWISE PROVIDED BELOW, THOSE RIGHTS ARE WAIVED. OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT, SUCH AS THE RIGHT TO APPEAL AND TO CERTAIN TYPES OF DISCOVERY, MAY BE MORE LIMITED OR MAY ALSO BE WAIVED.
>
> Either you or the Bank may, without the other's consent, elect mandatory, binding arbitration of any claim, dispute or controversy raised by either you or the Bank against the other, ... arising from or relating in any way to this Agreement, any prior account agreement between you and the Bank . . . (the "Claim" or "Claims"). All Claims originating from or relating to this Agreement are subject to arbitration, no matter what theory they are based on or what remedy they seek, whether legal or equitable. This includes Claims based on contract, tort (including intentional tort), fraud, agency, negligence, statutory or regulatory provisions, or any other sources of law, or any request for equitable relief."

¶ 14 On August 31, 2009, Perik filed a motion to strike Beggs' and Deck's affidavits because they violated Illinois Supreme Court Rule 191(a) (Rule 191(a)) (eff. Aug. 1, 1992) since the information in the affidavits were not based on Beggs' and Deck's personal knowledge. The trial court denied Perik's motion to strike the affidavits reasoning that the affidavits were not filed to

support a section 2-615 motion to dismiss, but to support Chase's motion to compel arbitration, which was not within the scope of Rule 191(a).

¶ 15 On September 10, 2009 the trial court held a status hearing on the motion to compel arbitration. During the hearing, the trial court stated that "I [am] holding in abeyance the motion to dismiss and that we [are] proceeding on a motion to compel arbitration." Perik's counsel responded "And I agree with you. Those are held in abeyance."

¶ 16 Following a hearing on Chase's motion to compel arbitration on October 20, 2009, the trial court granted Chase's motion and stayed the case "as to all matters as to Chase, including discovery, pending completion of arbitration of Plaintiff's claims against Chase." The trial court found that a valid agreement to arbitrate the dispute existed, which dated back to 1992. The trial court also found that the 2006 Agreement applied to and was accepted by Perik because she continued to maintain her account with Chase until 2008. The trial court further found that Chase did not waive its right to arbitrate. Perik timely filed an interlocutory appeal of the trial court's ruling.

¶ 17 On March 3, 2010, Chase received a copy of Perik's complaint that included a libel *per se* count against it and another libel *per se* count against it as successor in interest to Washington Mutual. On April 12, 2010, Chase filed a motion to enforce the stay of the action as to Chase as successor in interest to Washington Mutual and compel arbitration pursuant to the trial court's previous order (motion to enforce the stay). The trial court granted Chase's motion to enforce the stay based on its previous order finding that an arbitration agreement existed between Perik and Chase and that all counts brought against Chase should be stayed.

¶ 18 On May 27, 2009, Early Warning filed a section 2-619 motion to dismiss. Early Warning

asserted that Perik's libel *per se* count against it was barred either by a qualified privilege or the claim was preempted by the FCRA, which precludes state-law defamation claims against consumer reporting companies. Early Warning attached a declaration of Donald C. Overlock, who was Early Warning's Compliance Support Director, to its motion to dismiss. Overlock was responsible for ensuring that Early Warning complied with the FCRA's requirements. In his declaration, Overlock explained Early Warning's business. Overlock stated that "upon receiving a request from an Inquirer for information about a prospective depositor, Early Warning generates a report based solely on the information contained in the shared database, which Early Warning then publishes to the Inquirer." Overlock also stated that "furnishers are informed that the information they contribute to the shared database about their former depositors may ultimately be published in consumer reports generated by Early Warning at the request of Inquirers." Perik filed a motion to strike Overlock's declaration alleging that the declaration failed to comply with Rule 191(a)'s requirements because Early Warning did not attach documents that Overlock relied upon in the declaration. Perik also alleged that Overlock's statement that Early Warning complied with the FCRA was a legal conclusion and that statement should be struck. Perik further alleged that Overlock's statement that furnishers are informed that the information they provide may be included in a credit report was hearsay. The trial court struck Overlock's statement that Early Warning complied with the FCRA's requirements because that the statement was a legal conclusion, but it did not strike any other information.

¶ 19 Overlock also participated in a discovery deposition. Overlock stated that both Washington Mutual and TCF had a contract with Early Warning allowing them access to Early Warning's database to retrieve information about potential depositors. On April 1, 2008,

Washington Mutual requested information regarding Perik from Early Warning's database. Early Warning did not confirm the accuracy of the information contained in its database. Rather, Early Warning follows the procedures outlined in the FCRA to ensure the accuracy and integrity of the information contributed to its database by furnishers. Overlock reiterated that the FCRA did not require Early Warning, as a credit reporting agency, to confirm the data prior to releasing it to inquirers. Early Warning, however, was required to correct inaccurate or incomplete data when notified of the incorrect information.

¶ 20 Overlock further testified that Early Warning's database compiles information involving fraud about depositors. After receiving the fraud alert from Chase in March 2008, Early Warning did not contact Perik to confirm the accuracy of the information received because it would not have known whether the information was accurate or inaccurate. According to Early Warning's operating rules, inquirers of its database must have a permissible purpose prior to accessing the database, but it does not validate or monitor the inquirer's permissible purpose. If an inquirer accesses the database and issues an adverse action regarding the consumer, the inquirer must notify the consumer about the adverse action and provide Early Warning's contact information. If the consumer contacts Early Warning, then the consumer may dispute the information in the database, but must do so by submitting written documentation. Chase subsequently deleted the information that Perik contested from Early Warning's database. Chase deleted the information without notifying Early Warning and Early Warning did not inquire why Chase deleted the information. Early Warning did not receive written documentation from Perik disputing the information in its database even though it explained the dispute process to Perik on August 26, 2008 and September 19, 2008.

¶ 21 At the conclusion of the limited discovery, the trial court granted Early Warning's section 2-619 motion to dismiss with prejudice. The trial court ruled that a qualified privilege applied to Early Warning's communication of the alleged defamatory statements. The trial court also stated that even though Perik technically pled malice to bar the privilege, she did not plead facts to support the malice claim. The trial court further stated that it did not believe that there was an abuse of the qualified privilege and that Early Warning made a good faith communication. Perik timely appealed. Perik's two appeals relating to her claims against Chase and Early Warning are addressed in this consolidated appeal.

¶ 22 *Analysis*

¶ 23 *Claims against Chase*

¶ 24 As a preliminary matter, the parties disagree on the applicable standard of review relating to Perik's claims against Chase. Perik contends that a *de novo* standard should be adopted because a motion to compel arbitration is akin to a section 2-619 motion to dismiss, which is reviewed *de novo*. Chase contends that an abuse of discretion standard should be adopted because Perik brought her claims before this court as an interlocutory appeal pursuant to Illinois Supreme Court Rule 307, which employs an abuse of discretion standard. Perik's appeal is, in fact, an interlocutory appeal and the trial court, after conducting a hearing on Chase's motion to compel arbitration, entered three findings of fact. As Chase points out, interlocutory appeals, and in particular motions to compel arbitration, are reviewed adopting an abuse of discretion standard. *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1093 (2001). For these reasons, we adopt an abuse of discretion standard of review. Nonetheless, the disposition of this case would be the same regardless of the standard of review

adopted.

¶ 25 Perik contends that the trial court erred in denying her motion to strike Deck's and Beggs' affidavits that Chase filed to support its motion to compel arbitration. Perik claims that the affidavits fail to comply with Rule 191(a)'s requirements because Deck's and Beggs' affidavits were not based on their personal knowledge. Perik also claims that Begg's affidavit included impermissible legal conclusions.

¶ 26 Rule 191(a)'s requirements do not apply to the affidavits Chase attached to its motion to compel arbitration. Rule 191(a) requires an affidavit to: "(1) state matters within the affiant's personal knowledge; (2) state with particularity the facts upon which the claim, counterclaim, or defense is based; (3) attach sworn or certified copes of all papers the affiant relies upon; (4) omit conclusions of law, but include admissible facts; and (5) show that the affiant, if sworn as a witness, can testify competently to the attested to facts." Rule 191(a) (eff. Aug. 1, 1992). Rule 191(a) expressly states the dispositive motions that its requirements apply to, which include motions for summary judgment under section 2-1005 of the Code, motions to dismiss under section 2-619 of the Code and motions to contest jurisdiction over the person under section 2-301 of the Code. Absent from the list of motions in Rule 191(a) is a motion to stay proceedings and compel arbitration. A ruling on a motion to stay proceedings and compel arbitration does not address the merits of the underlying claim and does not dispose of the litigation. The merits of the claim sought to be stayed and adjudicated are yet to be determined when a trial court rules on a motion to stay proceedings and compel arbitration. *See, e.g., Estate of Tassaras v. Michas*, 404 Ill. App. 3d 825, 827 (2010) (finding that the trial court did not err in relying on an affidavit supporting a petition to admit a will into probate because the petition was not equivalent to a

motion for summary judgment.) Because a motion to compel arbitration is not one of the three motions expressly stated in Rule 191(a), the motion is not required to adhere to Rule 191(a)'s affidavit requirements. Moreover, the trial court's ruling on a motion to compel arbitration is not a final adjudication of the issues, and thus, is not subject to Rule 191(a)'s requirements. Accordingly, the trial court did not err in denying Perik's motion to strike the affidavits on the basis that they failed to comply with Rule 191(a).

¶ 27 Perik next claims that the trial court erred in finding that an arbitration agreement existed between her and Chase. Perik contends that Chase failed to identify the procedural basis supporting its motion to compel arbitration. Perik also contends that she never received the agreement requiring her to arbitrate any claim that she had against Chase and she did not consent to an arbitration agreement.

¶ 28 We disagree with Perik's contention that Chase failed to specify the procedural basis underlying its motion to compel arbitration. Chase clearly delineated in its motion that it was seeking to stay the action and compel arbitration pursuant to section 2(a) of the Act. A motion to compel arbitration is not a dispositive motion that requires specification of the Code section that the litigant is following as a basis to file its motion. Chase did not file its motion to compel arbitration in conjunction with its section 2-619 motion to dismiss, but rather, as an alternative to its motion to dismiss. The trial court did not rule upon Chase's section 2-619 motion to dismiss and that motion is not before this court for review. By stating that it was seeking to stay the action and compel arbitration pursuant to section 2(a) of the Act, Chase did, in fact, specify the basis for its motion to compel. Chase, however, was not required to identify a Code section as its procedural basis for bringing the motion to compel arbitration because the motion was not

dispositive in nature.

¶ 29 The trial court did not err in finding that an arbitration agreement existed between Chase and Perik. Although the trial court stated that it was a customer of Chase and it knew of the name changes associated with that financial institution, the record is devoid of any indication that the trial court's ruling was based on its personal knowledge of the bank's merger and name change history. Thus, the trial court did not inappropriately use its personal knowledge when ruling in the instant case.

¶ 30 On September 9, 1992, Perik signed her name on a signature card when she opened an account with Chase's predecessor. The 1991 Agreement was in effect when Perik opened her account in 1992. The 1991 Agreement contained the following agreement, arbitration and amendment provisions:

> "AGREEMENT"
>
> "This Agreement shall govern all retail money market, savings, NOW and checking accounts with us. By signing a signature card, making deposits or withdrawals, or leaving amounts on deposit, you agree to the terms of this Agreement. This Agreement shall supersede all previous agreements for such accounts."
>
> "ARBITRATION
>
> Any controversy or claim arising out of or relating to this Agreement, or the bank accounts covered by this Agreement, including but not limited to, a claim based on or arising from an alleged tort, shall at your or our request, be determined by arbitration under the auspices and rules of the American Arbitration Act and the

> Illinois Uniform Arbitration Act. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. All statutes of limitation which would otherwise be applicable shall apply to any arbitration proceeding."
>
> "AMENDMENT
>
> We may change any of the terms of this Agreement at any time without prior notice to you if the change is favorable to you. We may make changes that are adverse to you only if we provide you with at least 15 days advance notice. (See Notices.) You may close the account if you do not agree to the changes, [sic] if you continue to use the account or keep the account open after the effective date of such change, you will be deemed to have agreed to the changes."

¶ 31 The 1991 Agreement expressly states that by signing the signature card, a customer agrees to the agreement's terms. The 1991 Agreement also expressly states that a customer who continues to use an account after the effective date of an amendment, acquiesces to the agreement's new terms.

¶ 32 The 2006 Agreement stated the following on the front page:

> "IMPORTANT CUSTOMER INFORMATION
>
> Here's an updated Deposit Account Agreement that will now apply to your checking and savings accounts beginning June 1, 2006."

Appearing on page one of the 2006 Agreement was the following: "We provided you with information about changes to your existing accounts and exciting new product offerings in your December statement. We've recently updated the Deposit Account Agreement that applies to

your checking and savings accounts. Here's what you need to know . . . ."

¶ 33 The changes identified in the 2006 Agreement took effect on June 1, 2006, and one of the changes affected the arbitration provision. The revised arbitration provision stated in relevant part:

> "Arbitration:
>
> PLEASE READ THIS PROVISION CAREFULLY. IT PROVIDES, WITH THE SPECIFIC EXCEPTION STATED BELOW, THAT ANY DISPUTE MUST BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT. . . . IN THE ABSENCE OF THIS ARBITRATION AGREEMENT, YOU AND THE BANK MIGHT OTHERWISE HAVE HAD A RIGHT OR OPPORTUNITY TO BRING CLAIMS IN A COURT, BEFORE A JUDGE OR JURY, AND/OR TO PARTICIPATE OR BE REPRESENTED IN A CASE FILED IN COURT BY OTHERS (INCLUDING CLASS ACTIONS). EXCEPT AS OTHERWISE PROVIDED BELOW, THOSE RIGHTS ARE WAIVED. OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT, SUCH AS THE RIGHT TO APPEAL AND TO CERATIN TYPES OF DISCOVERY, MAY BE MORE LIMITED OR MAY ALSO BE WAIVED.
>
> Either you or the Bank may, without the other's consent, elect mandatory, binding arbitration of any claim, dispute or controversy raised by either you or the Bank against the other, or against the employees, parents, subsidiaries, affiliates, beneficiaries, heirs, agents or assigns of the other,

> arising from or relating in any way to this Agreement, any prior account agreement between you and the Bank, or the advertising, the application for, or the approval of your Account (the "Claim" or "Claims"). All Claims originating from or relating to this Agreement are subject to arbitration, no matter what theory they are based on or what remedy they seek, whether legal or equitable. This includes Claims based on contract, tort (including intentional tort), fraud, agency, negligence, statutory or regulatory provisions, or any other sources of law, or any request for equitable relief.
>
> ****
>
> This arbitration provision applies to all Claims relating to your Account that arose in the past, which may presently be in existence, or which may arise in the future. This arbitration provision shall survive termination of your Account as well as voluntary payment of any outstanding indebtedness in full by you, or any bankruptcy by you. If we assign your Account to any unaffiliated third party, this arbitration provision will apply to any Claim between you and that third party if you or that third party chooses arbitration, or to any Claim between you and the Bank which occurred prior to such assignment or arises from such assignment." (Emphasis in original).

The 2006 Agreement also contained the following provision:

> "Change in Account Agreement:

> We may change the terms of this Agreement, including any fees or features of your Account, upon notice sent to you via ordinary US mail at least 30 calendar days prior to the effective date of the change; provided however, for automatically renewable CDs, no such change shall be effective prior to the renewal date, and such notice may be provided with 10 days written notice prior to the renewal date. You agree that such notice may be provided to any joint account owner. By maintaining your Account after the effective date of any change, you agree to be bound by the changes. No notice is required for changes in the interest rate and corresponding changes in the annual percentage yield for variable rate accounts or in fees for document printing."

¶ 34 A contractual relationship exists between a bank and its customer. *National Bank of Monticello v. Quinn*, 126 Ill. 2d 129, 134 (1988). The account agreement and signature card create a binding contract between the parties. *Continental Casualty Co., Inc. v. American National Bank & Trust Co. of Chicago*, 329 Ill. App. 3d 686, 692 (2002). Perik signed the signature card in 1991 when she first opened the bank account. The 1991 Agreement states that by signing the signature card, making deposits or withdrawals, leaving a balance on deposit, the customer agrees to abide by the agreement's terms. Thus, a contract between Chase and Perik existed, which required Perik to abide by Chase's account terms. The 1991 Agreement provided that its terms may be subject to amendment, and a customer continuing to use an account at the bank agrees to the amendment's terms.

¶ 35 The 2006 Agreement amended the 1991 Agreement, and it incorporated an expanded

arbitration provision. Perik did not close her account after the 2006 Agreement's effective date and, instead, continued to use the account. Perik contends that she did not receive notice of the 2006 Agreement. Chase established that its normal operating procedure was to mail a copy of a revised agreement to every customer. Apart from Chase's business practice of mailing an amended agreement to its customers, the 2006 Agreement stated that statements generated by the bank for December included information about changes to customers' existing accounts. Perik does not claim that she did not receive a December bank statement. Upon receiving the December bank statement, Perik was alerted about and was on notice that there would be changes to her account. By continuing to use her account at Chase, Perik acquiesced to the 2006 Agreement's terms, which included changes to the arbitration provision. The revised arbitration provision included conspicuous language because the provision began with all capital letters drawing the reader's attention to the provision. The arbitration provision's language clearly stated that a customer waives the right to bring a claim in court. By signing the signature card when Perik opened the account and continuing to use the account after being alerted about and notified of changes to her agreement with the bank, she demonstrated an intent to accept and be bound by the terms of the 1991 Agreement, and the 2006 Agreement by invocation of the amendment provision in the 1991 Agreement. A contract existed between Perik and Chase, which included a provision to arbitrate any dispute arising between Perik and Chase.

¶ 36 Moreover, Perik's libel *per se* claim against Chase is a type of claim subject to arbitration. According to the 2006 Agreement's arbitration provision, torts fell within the scope of matters subject to arbitration. When interpreting the language of a contract, we must determine the plain meaning of the unambiguous words purposefully selected by the agreement's

drafter. See *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). The 2006 Agreement expressly states that torts are subject to arbitration. A defamation claim may be based upon libel *per se*, and defamation is a tort. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 404 (1997); *Heerey v. Berke*, 188 Ill. App. 3d 527, 530 (1989). Thus, Perik's libel *per se* claim is a tort and falls within the arbitration provision's scope.

¶ 37 Perik also claims on appeal that Chase waived its right to compel arbitration by actively participating in the ongoing proceedings held in the trial court. Perik contends that Chase waived its right to arbitrate the matter because Chase filed a section 2-615 motion to dismiss, a section 2-619 motion to dismiss, an emergency motion for an order staying discovery, a response to her motion for sanctions, as well as served Rule 213 interrogatories and a Rule 214 notice to produce and conducted a Rule 201(k) conference. Perik maintains that Chase's motions to dismiss required the trial court to address and rule upon substantive issues. Perik claims that these actions resulted in a waiver of Chase's right to arbitration.

¶ 38 Arbitration is favored in Illinois because it is easier, more expeditious and less expensive than litigation. *All American Roofing, Inc. v. Zurich American Ins. Co.*, 404 Ill. App. 3d 438, 441 (2010). The right to arbitrate is a contractual right, which may be waived. *Feldheim v. Sims*, 326 Ill. App. 3d 302, 309 (2001). A party conducting itself in a manner inconsistent with the arbitration clause may waive its right to arbitration because it demonstrates an abandonment of that right. *Id.* Submitting arbitratible issues to a court for a decision on the substantive merits of the case may result in a waiver of the right to arbitrate. *Id.* Illinois courts, though, disfavor a finding of waiver. *Id.*

¶ 39 As Perik notes, Chase filed multiple pleadings before the trial court ruled on its motion to

compel arbitration, including two motions to dismiss. The first motion to dismiss was filed on April 21, 2009 pursuant to sections 2-615 and 2-606 of the Code because Perik failed to attach the documents that her libel *per se* claim was based upon. Chase, however, withdrew the first motion to dismiss when Perik complied with section 2-606 by filing the required document. Chase filed its motion to compel arbitration on June 30, 2009, which was three months after Perik filed her complaint. The motion to compel arbitration also incorporated a section 2-619(9) motion to dismiss as an alternative to its motion to compel arbitration. On the same day that Chase filed its motion to compel arbitration, Chase also filed an emergency motion to stay discovery. Perik opposed the motion, and the trial court denied the motion on July 2, 2009. Thereafter, Chase served Perik with a request to produce documents and interrogatories. Perik failed to answer Chase's written discovery, so Chase filed a motion to compel discovery. Chase's motion to compel discovery was entered and continued on October 9, 2009. On August 17, 2009, Chase voluntarily continued the motion to compel discovery, and the trial court has not yet ruled on that motion.

¶ 40 Perik relies on this court's decision in *Woods v. Patterson Law Firm, P.C.*, 381 Ill. App. 3d 989 (2008), but her reliance on this case is misplaced. In *Woods*, the plaintiff filed a motion to compel arbitration after the trial court ruled on its motions to dismiss. *Id.* at 994. Unlike in *Woods*, Chase filed its motion to compel arbitration before the trial court ruled on either of Chase's motions to dismiss. Chase has not filed nor has the court ruled on any motion addressing any substantive issues. During the hearing on the motion to compel arbitration, the trial court noted that Chase's position from the beginning of the proceedings was that the matter should be arbitrated. Chase's actions do not amount to waiver because it did not file any motions seeking a

ruling by the trial court on substantive matters, the two motions to dismiss that Chase filed were not ruled on by the trial court and it requested a stay of discovery. Moreover, Chase repeatedly made reference to its motion to compel, even in response to Perik's interrogatories. Chase's actions do not reflect an intent to abandon its right to arbitrate Perik's claims.

¶ 41 Perik further claims on appeal that the trial court erred in applying its October 20, 2009 order to stay the proceedings brought against Chase, as successor in interest to Washington Mutual. Perik contends that even assuming a contractual relationship existed between Chase and Perik in 2006, no such relationship existed between her and Washington Mutual. Perik also contends that the trial court erred in applying the arbitration clause in the account agreement between Chase and Perik to the defamation action she brought against Washington Mutual. Perik further claims that applying the trial court's October 20, 2009 ruling to Chase's motion to enforce the stay renders the October 20, 2009 order an advisory opinion.

¶ 42 The parties again disagree on the applicable standard of review. Perik contends that a *de novo* standard applies and Chase contends that an abuse of discretion standard applies. Perik relies on cases that are either not on point or on cases of differing districts to support her position that a *de novo* standard applies. In *Northeast Illinois Regional Commuter Railroad Corp. v. Chicago Union Station Co.*, 358 Ill. App. 3d 985, 993 (2005), this District of our court engaged in a detailed analysis addressing the applicability of a *de novo* or abuse of discretion standard of review relating to a motion to stay and compel arbitration. Relying in part on the Illinois Supreme Court case of *Salsitz v. Kreiss*, 198 Ill. 2d 1, 11 (2001), which held that an order to compel or stay arbitration is injunctive in nature, this court in *Northeast Illinois Regional Commuter Railroad Corp.*, held that an abuse of discretion standard applies. *Id.* We adopt the

conclusion reached in *Northeast Illinois Regional Commuter Railroad Corp.*, and we will employ an abuse of discretion standard in reviewing the trial court's April 19, 2010 ruling. Even if we were to employ a *de novo* standard as urged by Perik, the outcome of this issue would not change.

¶ 43 In count III of Perik's complaint alleging libel *per se* against Chase as successor in interest to Washington Mutual, Perik incorporated the first 20 allegations brought against Chase in count I of the complaint and modified the same remaining three allegations brought against Chase by replacing Chase's name with Washington Mutual. Perik expanded the count against Chase as successor in interest to Washington Mutual by including nine additional allegations establishing Chase as Washington Mutual's successor in interest. Thus, the libel *per se* allegations raised against Chase in count I are mirror images of the allegations raised against Chase as successor in interest to Washington Mutual in count III of the complaint. The parties agree that Chase is Washington Mutual's successor in interest. Accordingly, the trial court did not err in granting Chase's motion to compel arbitration regarding the count brought against Chase as successor in interest to Washington Mutual based on its prior October 20, 2009 order. Perik's assertion that her claim against Chase, as successor in interest to Washington Mutual, raises a derivative liability claim against Chase and that claim is different from the claim addressed by the trial court's October 2009 order thereby rending the prior order inapplicable to her derivative claim is not persuasive. The basis of the claims against Chase and Chase as successor in interest to Washington Mutual arise from the fraud allegations involving Perik's account at Chase. Perik establishing Chase as Washington Mutual's successor in interest does not change the nature of the underlying allegations raised in count I and count III of Perik's

complaint. Thus, the trial court did not err in ruling that the claims that were originally brought against Washington Mutual but are now pending against Chase were subject to its October 2009 order. Also, the trial court's October 20, 2009 order was not an advisory opinion. The trial court did not enter its October 20, 2009 order to dispose of future litigation, but instead, to dispose of the motion presented before it at the time. The trial court's October 20, 2009 order was not merely advisory, but it resolved a pending issue and provided appropriate relief to the prevailing party. *Berlin v. Sarah Bush Lincoln Health Center*, 179 Ill. 2d 1, 8 (1997). Chase's subsequent motion was to enforce the October 20, 2009 order, which again, did not result in that order becoming an advisory opinion.

¶ 44 Perik's last claim against Chase is that the trial court erred in prohibiting Perik from formally responding to Chase's motion to enforce the stay as it relates to the claims brought against Washington Mutual. Perik claims that Chase's motion to enforce the stay was in reality a section 2-619 motion to dismiss. Perik maintains that she had a right to respond to Chase's motion and the trial court's refusal to permit her to respond was an abuse of its discretion.

¶ 45 We disagree with Perik's contention that Chase's motion to enforce the stay was akin to a section 2-619 motion to dismiss. A ruling on a motion to enforce the stay does not result in a decision on the merits of a claim and granting the motion does not end pending litigation. The granting of the motion merely acknowledges that based on the parties' agreement, arbitration is the proper means to resolve the dispute between the parties. Thus, the granting of a motion to compel arbitration and a motion to enforce the stay permits future disposition of a party's claims on their merits. A section 2-619 motion to dismiss, however, raises an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *Barber v. American Airlines*, 241 Ill. 2d

450, 455 (2011). Therefore, the granting of a section 2-619 motion to dismiss generally terminates a plaintiff's case. Perik, relying on *Cole Taylor Bank v. Corrigan*, 230 Ill. App. 3d 122, 131 (1992), contends that the trial court erred in not permitting her to respond to Chase's motion. Perik's reliance on *Cole Taylor Bank*, however, is misplaced. This court in *Cole Taylor Bank* held that the trial court erred in not allowing the plaintiff to respond to a motion for summary judgment. *Id.* A motion for summary judgment is a drastic means of disposing of litigation. *Id.* at 130. The granting of a motion to enforce the stay is not a drastic means of disposing of litigation as is a motion for summary judgment. Thus, *Cole Taylor Bank's* holding is distinguishable. We also note that before rendering its decision, the trial court held a hearing on the motion and Perik's attorney raised his arguments as to why the motion should be denied. Accordingly, the trial court did not abuse its discretion when it did not allow Perik to file a formal written response to Chase's motion to enforce the stay.

¶ 46 *Claims against Early*

¶ 47 Perik contends that the trial court erred in denying her motion to strike Overlock's declaration that supported Early Warning's section 2-619 motion to dismiss. Perik claims that Overlock's declaration refers to documents consisting of his communication with furnishers, inquirers and customers, but these documents were not attached to the declaration as required by Rule 191(a). Perik also claims that Overlock's declaration should be struck because his reference to statements that Early Warning made to furnishers regarding future communication of the contributed information to other financial institutions was hearsay. Perik contends that the trial court erred in not striking the requested information from Overlock's declaration, and not striking the requested information requires reversal of the trial court's granting of Early Warning's 2-619

motion to dismiss.

¶ 48 Since Early Warning filed the affidavits to support its motion to dismiss, we must review the affidavits in conjunction with its section 2-619 motion to dismiss. A *de novo* standard of review applies to this court's review of the trial court's granting of a section 2-619 motion to dismiss. *Barber*, 241 Ill. 2d at 455. Thus, *de novo* is also the appropriate standard of review that we must employ to review the trial court's ruling on the motion to strike the affidavits. See *Madden v. Paschen*, 395 Ill. App. 3d 362, 386 (2009); *Travel 100 Group, Inc. v. Mediterranean Shipping Co. (USA) Inc.*, 383 Ill. App. 3d 149, 152 (2008); and *Jackson v. Graham*, 323 Ill. App. 3d 766, 774 (2001) (finding that a *de novo* standard of review applies to a motion to strike an affidavit that was filed in conjunction with a motion for summary judgment).

¶ 49 The trial court did not err in denying Perik's motion to strike additional paragraphs of Overlock's declaration. Overlock was Early Warning's compliance officer. In that position, Overlock had personal knowledge of Early Warning's business, as well as the role that furnishers and inquirers played in Early Warning's business and the respective reports that were generated. According to Rule 191(a), "affidavits shall have attached thereto sworn or certified copies of all papers upon which the affiant relies." Rule 191(a) (eff. Aug. 1992). Rule 191(a)'s scope encompasses specific documents that an individual relies upon in his declaration. Here, Overlock referred to the report that Early Warning generates based on the information in its database. Thus, Overlock referenced the report to describe Early Warning's general business and the product that it produced. Overlock in his declaration, however, did not refer to a specific report generated for a depositor or a specific transaction. Also, Overlock described Early Warning's business and the report that it produced based upon his personal knowledge.

Moreover, Overlock participated in a discovery deposition where he further described the information in the declaration and Early Warning's business practices, and Perik was permitted to ask him questions. Similarly, Overlock's reference that furnishers are notified that the information they provide may be published and communicated to other parties refers generally to Early Warning's business practice. Overlock's reference to furnishers in describing Early Warning's business and what it informs furnishers as its business policy does not amount to hearsay. Overlock is recounting a statement that Early Warning makes directly to a furnisher, and is not recounting another individual's or entity's statement. Accordingly, the trial court did not err in denying Perik's motion to strike additional portions of Overlock's declaration.

¶ 50 Perik next contends on appeal that the trial court erred when it granted Early Warning's section 2-619 motion to dismiss. Perik claims that Early Warning's qualified privilege and FCRA preemption defenses were inapplicable because she pled facts establishing that Early Warning acted with malice. Perik contends that Early Warning's malice was evidenced by its failure to: "(1) investigate the accuracy of the information used to generate a report based on the information provided by a furnisher; (2) remove the libelous statements from its database; and (3) verify that TCF and Washington Mutual had a permissible purpose to access its database." Perik also contends that her pleading of malice, and Early Warning's abuse of the qualified privilege, defeats application of the qualified privilege. Perik claims that Early Warning's statements imputing criminal behavior on Perik were libelous *per se* and such statements carry a presumption of falsity and malice.

¶ 51 A section 2-619 motion to dismiss "admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's

claim." *Barber*, 241 Ill. 2d at 455. In a section 2-619 motion to dismiss, the relevant inquiry "is whether there is a material issue of fact to be decided and whether the defendant is entitled to judgment as a matter of law." *Zych v. Tucker*, 363 Ill. App. 3d 831, 833 (2006). When reviewing a section 2-619 motion to dismiss, this court must consider "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *United Auto. Ins. Co. v. Wilson*, 407 Ill. App. 3d 39, 42 (2011). A section 2-619 motion to dismiss is reviewed adopting a *de novo* standard of review. *Barber*, 241 Ill. 2d at 455.

¶ 52 To bring a defamation claim, "a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages." *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). A statement is considered defamatory *per se* "if its harm is obvious and apparent on its face." *Id.* There are five categories of defamatory *per se* statements, which are*:* "(1) words that impute a person has committed a crime; (2) words that impute a person is infected with a loathsome communicable disease; (3) words that impute a person is unable to perform or lacks integrity in performing her or his employment duties; (4) words that impute a person lacks ability or otherwise prejudices that person in her or his profession; and (5) words that impute a person has engaged in adultery or fornication." *Id.* at 492. A plaintiff must plead a defamation *per se* claim with sufficient precision and particularity. *Id.*

¶ 53 A defamatory *per se* statement, however, may not be actionable if a qualified privilege applies. *Zych*, 363 Ill. App. 3d at 834. A qualified privilege exists when the following elements are present: "(1) good faith by the defendant in making the statement; (2) an interest or duty to

uphold; (3) a statement limited in its scope to that purpose; (4) a proper occasion; and (5) publication in a proper manner and to proper parties only." *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 25 (1993). The protection provided by a qualified privilege, however, will be lost if: "(1) false statements are made with malice or a reckless disregard for their truth, (2) the statements are not limited in scope, or (3) publication is not limited to proper parties." *Zych*, 363 Ill. App. 3d at 835. A qualified privilege serves to protect "honest communications of misinformation in certain favored circumstances in order to facilitate the availability of correct information." *Id.* at 837. False statements made with malice are not protected by a qualified privilege. *Id*. The burden is on the defendant to prove the applicability of a qualified privilege. *Anderson v. Beach*, 386 Ill. App. 3d 246, 251 (2008). Once a qualified privilege is found to apply, the burden then shifts to the plaintiff to prove that the defendant abused the qualified privilege. *Id.* citing *Kuwik*, 156 Ill. 2d at 20. A defendant abuses a qualified privilege by engaging in "any reckless act which shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties." *Kuwik*, 156 Ill. 2d at 30. Whether a qualified privilege protects an allegedly defamatory statement is a question of law for the court. *Davis v. John Crane, Inc.*, 261 Ill. App. 3d 419, 430 (1994).

¶ 54 In the case at bar, Perik contends that Early Warning's statements were defamatory *per se* because the statements imputed that she committed a crime. In her complaint, Perik alleged that the published statements indicated that she participated in the theft and subsequent unauthorized negotiation of two checks. Early Warning raised the affirmative defense of qualified privilege to assert that the alleged defamatory statements were not actionable. The alleged defamatory

statements were compiled in a report generated by Early Warning based on information provided by Chase and maintained in Early Warning's database. Early Warning published the information generated in the report by providing the report to both Washington Mutual and TCF pursuant to their request for the information. Early Warning alleged that it had no knowledge that the information provided by Chase and maintained in its database was false, and only learned that the database may contain false information after Early Warning provided the information to Washington Mutual and TCF.

¶ 55 According to Washington Mutual's and TCF's contract with Early Warning, they may request a report from Early Warning provided that they have a permissible purpose for requesting the report. A permissible purpose exists when a financial institution requests the information to assist it in its determination of whether to enter into a banking relationship with a potential depositor. By responding to Washington Mutual's and TCF's request for information, Early Warning provided the report to proper parties, in a proper manner and in a limited scope by transmitting the information in response to a request by the inquiring banks. Pursuant to its contract with Washington Mutual and TCF, Early Warning had a duty to provide the fraud related information to the requesting financial institutions. Based on these facts, Early Warning adequately asserted as a matter of law a qualified privilege in response to Perik's defamation allegations because Early Warning provided the report in good faith, it had a duty or interest to uphold, the publication was limited in scope and the statement was published on a proper occasion in a proper manner and to proper parties. Furthermore, the finding that Early Warning sufficiently proved its affirmative defense of qualified privilege is consistent with the privilege's "policy of protecting honest communications of misinformation in certain favored circumstances

in order to facilitate the availability of correct information." *Kuwik*, 156 Ill. 2d at 24. Providing fraud related information to a financial institution to assist with its determination of whether to enter into a banking relationship with a potential depositor upholds the privilege's policy.

¶ 56 Moreover, as a credit reporting agency, Early Warning's business activities are protected by the FCRA, which also presents a defense to Perik's defamation claim. According to the FCRA:

> "no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer." 15 U.S.C.A. § 1681h(e).

The FCRA defines the term "consumer" as an individual. 15 U.S.C.A. § 1681a(c). Thus, Perik is a consumer under the FCRA. The term "consumer reporting agency" is defined in the FCRA as "any person which, for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C.A. § 1681a(f). Early Warning is a

"consumer reporting agency" under the FCRA because its business consists of assembling consumer credit information and then providing consumer reports to third parties in return for a fee. Pursuant to section 1681h of the FCRA, Early Warning, as a consumer reporting agency, is immune from a state law defamation claim, unless it acted with malice. *Benson v. Trans Union, LLC*, 387 F. Supp. 2d 834, 844 (N.D. Ill. 2005).

¶ 57 Acting with malice negates both of Early Warning's affirmative defenses of qualified privilege and FCRA preemption. After a defendant establishes a qualified privilege, the plaintiff bears the burden of proving that the defendant either "intentionally published the material while knowing the matter was false, or displayed a reckless disregard as to the matter's falseness." *Kuwik*, 156 Ill. 2d at 24. The concept of "reckless disregard as to the matter's falseness" is defined as "publishing the defamatory matter despite a high degree of awareness of probable falsity or entertaining serious doubts as to its truth." *Id.* at 25. After the trial court makes a finding that a qualified privilege exists, the jury then determines whether the defendant abused the protection provided by the qualified privilege by acting in bad faith or with actual malice. *Id.* at 26. Perik contends that she pled facts supporting an allegation of malice in her complaint. Specifically, Perik claims that the following language supports a pleading of malice:

> "21. Defendant Early made the aforesaid statements, as presented in Count II, ¶ 11, (a)-(h), with knowledge of their falsity; in reckless disregard for their falsity; despite a high degree of awareness of their probable falsity; and/or while entertaining serious doubts as to their truth.
>
> 22. Defendant Early made the aforesaid statements, as presented in Count II, ¶ 11, (a)-(h), with a direct intention to injure the Plaintiff; with a reckless disregard of the

> Plaintiff's rights and the consequences that might result to her as a result of the statements; while failing to properly investigate the truth of the statements; and/or while failing to limit the scope of the defamatory material."

Perik claims that because she sufficiently pled malice, the trial court erred in dismissing her defamation count against Early Warning.

¶ 58 Malice must be sufficiently pled in a complaint to withstand a section 2-619 motion to dismiss. To dispose of this issue, we must review and analyze Perik's assertions in the complaint. Language stating that a defendant made a statement "knowing it to be false" and "maliciously, willfully and intentionally" is sufficient to allege actual malice in a complaint. See *Colson v. Stieg*, 89 Ill. 2d 205, 216 (1982) (finding that the pleading requirements for malice under the *New York Times* standard were sufficiently alleged to withstand a motion to dismiss where the complaint alleged that the defendant made the statement "knowing it to be false" and "maliciously, willfully and intentionally") and *Davis v. Keystone Printing Service, Inc.*, 111 Ill. App. 3d 427, 442-43 (1982) (pleading that statements were "made maliciously and intentionally in full knowledge of their falsity or in complete and reckless disregard of their truth or falsity" was sufficient to withstand a motion to dismiss.) In the instant case, Perik incorporated similar language in her complaint when she alleged that Early Warning made the statements "with knowledge of their falsity;" "in reckless disregard for their falsity;" "with a direct intention to injure the Plaintiff;" and "with a reckless disregard of the Plaintiff's rights and the consequences that might result to her as a result of the statements." These allegations of malice are sufficiently pled to withstand a section 2-619 motion to dismiss. The trial court in ruling on the section 2-619 motion to dismiss stated that "I don't believe there was an abuse of the qualified, that I

believe they made a good faith communication, so that is why I'm ruling that there is the qualified privilege." Whether a defendant abused the protections provided by a qualified privilege, however, is a question of fact for the fact finder to decide, which precludes the granting of a section 2-619 motion to dismiss provided that allegations of malice are sufficiently pled in the complaint. See *Zych,* 363 Ill. App. 3d at 837-38. This court expresses no opinion on Perik's likelihood of success on her defamation claim, but based on the allegations in the complaint, it appears that Perik "did plead actual malice sufficiently to state a cause of action" for defamation. *Davis,* 111 Ill. App. 3d at 443. Taking the allegations in the complaint as true and in a light most favorable to Perik, as we must in reviewing a section 2-619 motion to dismiss, we conclude that she sufficiently pled a libel *per se* claim incorporating an allegation of malice against Early Warning.

¶ 59 In sum, we affirm the trial court's rulings regarding the claims Perik raises against Chase, and conclude that an arbitration agreement between Chase and Perik exists and all of her claims against Chase are subject to arbitration. We affirm the trial court's ruling denying Perik's motion to strike Overlock's declaration and reverse the trial court's dismissal of Perik's count against Early Warning because whether Early Warning abused a qualified privilege is a question of fact for the fact finder to decide.

¶ 60 Accordingly, the judgment of the trial court as to Chase is affirmed and as to Early Warning is affirmed in part, reversed in part and cause remanded for further proceedings.

¶ 61 No. 1-09-3088, Affirmed.

¶ 62 No. 1-10-1320, Affirmed in part and reversed in part; cause remanded.