DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DISCOVER BANK, Plaintiff/Appellee, v. MARJORIE E. JANKOWSKI, Defendant/Appellant.	)	1 CA-CV 11-0679 DEPARTMENT D **MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-031987

The Honorable George H. Foster, Jr., Judge

REVERSED AND REMANDED

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B R O W N, JUDGE

¶1 Marjorie E. Jankowski appeals the trial court's grant of summary judgment in favor of Discover Bank ("Discover"). For the following reasons, we reverse and remand for further proceedings.

BACKGROUND

¶2 Discover filed a complaint against Jankowski, alleging she applied for and received a credit card from Discover, agreed to abide by its terms and conditions, incurred credit on the card, and was indebted to Discover in the amount of the credit extended to her. Jankowski denied the allegation that she owed the debt.

¶3 Discover moved for summary judgment on a $22,805.53 principal balance, plus costs and attorneys' fees. Jankowski opposed the motion, asserting Discover had failed to meet its burden of establishing it was entitled to judgment. She objected to the documents attached to Discover's motion on the grounds they were inadmissible hearsay, not properly authenticated, and irrelevant. She also argued Discover's claims failed as a matter of law and cross-moved for summary judgment. The court granted Discover's motion and denied Jankowski's cross-motion. This timely appeal followed.

DISCUSSION

¶4 A court may grant summary judgment when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). "Initially, a party moving for summary judgment has the burden of showing there are no genuine issues of material fact and it is entitled to summary judgment as a matter of law. Only if the moving party satisfies this burden will the party opposing the motion be required to come forward with evidence establishing the existence of a genuine issue of material fact that must be resolved at trial." *National Bank of Ariz. v. Thruston*, 218 Ariz. 112, 114-15, ¶ 12, 180 P.3d 977, 979-80 (App. 2008).

A. Discover's Motion for Summary Judgment

¶5 Discover attached two exhibits to support its motion for summary judgment: Exhibit A, an unsigned cardmember agreement;[1] and Exhibit B, itemized account statements dated from December 2008 to July 2009 and addressed to Jankowski. Discover filed separately an affidavit signed by Maggie Foight, who averred she was the "Legal Placement Account Manager for DFS

[1] Exhibit A consists of a document dated March 27, 2008 that contains a cardmember agreement, privacy policy, billing rights, and terms and conditions related to insurance coverage and travel assistance benefits. We refer to this document as a "cardmember agreement."

Services LLC, the servicing agent of Discover Bank." Foight purported to verify the records of Jankowski's Discover account.

¶6 Jankowski argues the trial court erred by considering Exhibits A and B because they were not authenticated and were therefore inadmissible. She also argues the Foight affidavit contains inadmissible hearsay and, as a result, does not satisfy Arizona Rule of Civil Procedure 56(e). We will not disturb a trial court's ruling regarding the admissibility of evidence in summary judgment proceedings absent a clear abuse of discretion and resulting prejudice. *Mohave Elec. Coop. v. Byers,* 189 Ariz. 292, 301, 942 P.2d 451, 460 (App. 1997).

¶7 "[A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively the affiant is competent to testify to the matters stated therein." Ariz. R. Civ. P. 56(e). To show the affidavit was made on personal knowledge, the affiant must review the documents and show familiarity with the manner in which they were prepared. *See Villas at Hidden Lakes Condo. Ass'n v. Geupel Constr. Co.*, 174 Ariz. 72, 82, 847 P.2d 117, 127 (App. 1992) (finding that an association failed to establish a prima facie case entitling it to summary judgment because its supporting affidavit did not provide foundation for the affiant's personal knowledge and conclusion, nor did it demonstrate his familiarity with the person who prepared the

affidavit exhibits or the manner in which they were prepared). Further, "competency to testify must be established by evidence of the offeror's familiarity with the preparer or the manner in which the documents were prepared." *State v. Johnson*, 184 Ariz. 521, 524, 911 P.2d 527, 530 (App. 1994).

¶8 We conclude that Foight's affidavit is insufficient to qualify the Discover billing statements as business records or as self-authenticating documents to make them admissible for summary judgment purposes. In her affidavit, Foight averred Jankowski was the holder of a Discover credit account, had used the account to purchase goods and services, had never disputed the charges that appeared on statements Discover regularly sent to her address, and was indebted to Discover in the amount of $22,805.53. She asserted she had access to and was familiar with Discover's business records, had full access to the computer-generated business records of Discover, and those billing records were maintained with a high degree of accuracy through a computerized database. She also averred that true and correct copies of Jankowski's statements were attached as "Exhibit A" to the affidavit. Although no such billing statements were attached to the affidavit, a copy of a cardmember agreement and regular billing statements from Discover to Jankowski were attached to the motion for summary judgment. Rule 56(e) provides that sworn or certified copies of

all papers referred to in an affidavit must be attached to the affidavit. Nonetheless, the trial court could have properly concluded that Exhibit A described in the Foight affidavit, actually referred to the billing statements attached to the motion as Exhibit B. *See Choisser v. State ex rel. Herman*, 12 Ariz. App. 259, 261, 469 P.2d 493, 495 (1970) (in reviewing motion for summary judgment, court should review entire record before it, at least to the extent that the parties point to those portions of the record). Accordingly, we conclude that the affidavit was sufficient to show Foight had personal knowledge of Discover's billing records and that the statements referred to in the affidavit and attached to the motion for summary judgment were Discover's billing statements.

¶9 However, Jankowski also contends the trial court erred in considering the affidavit and the attachments because they are hearsay and do not fall within the business records exception. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). Such a statement is inadmissible unless one of the exceptions to the hearsay rule applies. *State v. McCurdy,* 216 Ariz. 567, 571, ¶ 7, 169 P.3d 931, 935 (App. 2007). We review evidentiary rulings for an abuse of discretion, *State v. Tucker,* 205 Ariz. 157, 165, ¶ 41, 68 P.3d 110, 118 (2003),

and conclude that while the affidavit was admissible insofar as it was based on Foight's personal knowlege, the affidavit did not meet the requirements for the court to apply the business records exception to the billing statements, which formed the basis for Foight's conclusion that Jankowski was in debt to Discover for $22,805.53.

¶10 To fall within the business records exception,

> [r]ule 803(6) requires either the custodian of records or other qualified witness testify that the record was made 1) contemporaneously, or nearly so, with the underlying event; 2) by, or from information transmitted by, a person with first-hand knowledge acquired in the course of a regularly conducted business activity; 3) completely in the course of that activity; and 4) as a regular practice for that activity.

McCurdy, 216 Ariz. at 572-73, ¶ 9, 169 P.3d at 935-36; Ariz. R. Evid. 803(6). In an attempt to meet these requirements, Foight avers she was familiar with Discover's business records. This is sufficient to meet the first requirement that there be a qualified witness to testify. Additionally, the billing statements reflect charges and payments on a regular, monthly basis and thus, are made "contemporaneously" with the underlying event.[2] *See* Ariz. R. Evid. 803(6). Foight's affidavit, however,

[2] The contemporaneous requirement of 803(6) only requires that the record be made contemporaneously with the underlying event, not the affidavit.

does not meet the other three requirements of Rule 803(6). Under these circumstances, we find the billing statements do not fall within the business records exception to the hearsay rule and the court erred in considering them. Because Foight's conclusion that Jankowski owed Discover $22,805.53 is based on those statements, that conclusion is also inadmissible hearsay.[3]

¶11 We also reject Discover's contention that Exhibits A and B are self-authenticating under Arizona Rule of Evidence Rule 902(11). Rule 902(11) provides that a record of regularly conducted activity that qualifies as a hearsay exception under Rule 803(6) can be self-authenticating if accompanied by a written declaration of its custodian or other qualified person.[4]

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[3] On remand, if Discover produces an affidavit which retains the information in the current affidavit plus the missing elements, it will have met its burden for summary judgment subject to Jankowski raising a material issue of fact as to Discover's claims.

[4] Rule 902(11) provides that the custodian must certify that the record:

> (a) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
>
> (b) was kept in the course of the regularly conducted activity; and
>
> (c) was made by the regularly conducted activity as a regular practice.

Ariz. R. Evid. 902(11).

Ariz. R. Evid. 902(11). Because we conclude the affidavit did not qualify the billing statements under Rule 803(6), there is no written declaration accompanying Exhibits A and B that satisfies the self-authentication requirement. We therefore conclude Exhibits A and B are not self-authenticating.[5]

¶12 By failing to submit competent evidence to support its motion for summary judgment, Discover failed to satisfy its burden to show a prima facie case and was therefore not entitled to summary judgment. *Thruston*, 218 Ariz. at 114-15, ¶ 12, 180 P.3d at 979-80.

B. Jankowski's Cross-Motion for Summary Judgment

¶13 Jankowski argues the trial court erred by denying her cross-motion for summary judgment, which was based on her argument that Discover had no admissible evidence with which it could prove the parties had a contract, Jankowski used the credit account, or the amount allegedly owed on the account. We disagree.

¶14 At this point in the litigation, Jankowski has only challenged the admissibility and authenticity of the documents Discover submitted in support of its motion for summary

[5] Because we determine the court erred in allowing Exhibits A and B for purposes of considering Discover's motion for summary judgment, we do not address Jankowski's alternative argument that Exhibit A was not relevant because Discover did not establish that it contained Discover's cardmember agreement with Jankowski.

judgment. Although we agree those documents were inadmissible, that alone does not entitle Jankowski to judgment as a matter of law. Mere denials of a claim are insufficient; instead, Jankowski must produce affirmative evidence demonstrating she is entitled to judgment as a matter of law, which has not occurred. *See Thruston*, 218 Ariz. 112, 114-15, ¶ 12, 180 P.3d 977, 979-80 (moving party must satisfy initial burden of demonstrating there are no issues of material fact and entitlement to judgment as a matter of law).

CONCLUSION

¶15 For the foregoing reasons, we reverse the trial court's grant of summary judgment and remand for further proceedings consistent with this decision.

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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/S/

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ANDREW W. GOULD, Judge

/S/

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DONN KESSLER, Judge