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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 3/26/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ASSET ACCEPTANCE, LLC,) No. 1 CA-CV 12-0272
)
Plaintiff/Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
SUSAN E. GORAJ,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Defendant/Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-016806

The Honorable Sally Schneider Duncan, Judge

REVERSED AND REMANDED

Fulton Friedman & Gullace, L.L.P. Phoenix
by Cynthia L. Fulton
Attorneys for Plaintiff/Appellee

Susan E. Goraj Phoenix
Defendant/Appellant *in propria persona*

S W A N N, Judge

¶1 Susan E. Goraj appeals from a summary judgment that held her liable to Asset Acceptance, LLC, for unpaid credit card charges. We reverse and remand. As we recently explained in *Wells Fargo, N.A. v. Allen*, 231 Ariz. 209, 292 P.3d 195 (App.

2012), a plaintiff seeking summary judgment must always affirmatively satisfy its burden of proof and cannot rely on deficiencies in the defendant's response to carry that burden. Asset Acceptance failed to submit evidence sufficient to compel all reasonable jurors to find in its favor, and therefore was not entitled to judgment as a matter of law.

FACTS AND PROCEDURAL HISTORY

¶2 Asset Acceptance filed a complaint alleging that Goraj had defaulted on her payment obligations under a credit-card contract she had entered with Asset Acceptance's predecessor in interest, Citibank, N.A. As an attachment to the complaint, Asset Acceptance provided the affidavit of an Asset Acceptance employee. In the affidavit, the employee stated that she was "familiar with the manner and method" of Asset Acceptance's record-keeping, and "[t]o the best of [her] knowledge and belief and upon review of records in [her] possession," Goraj had established an account with Citibank, incurred charges on the account, and failed to pay the charges. The employee further stated the principal amount claimed to be owed, the statutory interest rate, and that Asset Acceptance had purchased the account. The affidavit did not identify or describe the records the employee reviewed to support her avowals, and no records were attached.

¶13 Goraj filed an answer denying all of the complaint's allegations.¹ Asset Acceptance then moved for summary judgment. As an attachment to its motion, Asset Acceptance provided a "Bill of Sale and Assignment" transferring "the Accounts described in Exhibit 1 and the final electronic file" from Citibank to Asset Acceptance. Asset Acceptance also attached a list, titled "Unknown Schedule A" and "Client - Citibank (South Dakota), NA," that included a line showing an account number, Goraj's name, and the principal amount sought.

¶14 Goraj filed a response to the motion for summary judgment, arguing that she "d[id] not recall using any unsecured accounts in recent years," had previously been notified by her health-insurance provider that a computer disk drive containing her personal information had gone missing, and believed that she was "entitled to be able to examine alleged charges and documents, signed by [her], of the alleged account, before any further proceedings."

¶15 Asset Acceptance replied, arguing that Goraj's response was factually and legally insufficient to defeat summary judgment. Goraj then filed a sur-reply asking that she

¹ Asset Acceptance contends on appeal that Goraj failed to deny any of the complaint's allegations. This contention is contradicted by the record. Goraj's answer plainly denied all of the complaint's allegations. To the extent that the answer stated insufficient information to admit or deny, those statements operated as denials. Ariz. R. Civ. P. 8(b).

be provided a copy of the alleged contract and given an opportunity to examine all alleged charges on the account. At oral argument on the summary judgment motion, Goraj reiterated her request for a copy of the contract and an opportunity to examine the charges, and Asset Acceptance acknowledged that its disclosure had been limited to the documentation attached to its motion.

¶6 The court granted summary judgment for Asset Acceptance. Goraj timely appeals. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶7 Goraj contends that the evidence was insufficient to support summary judgment for Asset Acceptance. We review the grant of summary judgment de novo, viewing the facts in the light most favorable to Goraj. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003).

¶8 We agree with Goraj that Asset Acceptance failed to carry its evidentiary burden. As we explained in *Allen*, a plaintiff is not automatically entitled to summary judgment merely because there is no genuine dispute of material fact.²

² *Allen* was decided after the close of briefing on appeal in this case. Accordingly, we invited the parties to address *Allen* in supplemental briefing. In its supplemental brief, Asset Acceptance asserts: "Ms. Goraj, in this matter answered, neither admitted nor denied the allegations in the Complaint, and asserted only that Appellee had failed to state a claim. Thus,

231 Ariz. at 213, ¶¶ 16-17, 292 P.3d at 199. To prevail on summary judgment, the plaintiff must submit "undisputed admissible evidence that would compel any reasonable juror to find in its favor on every element of its claim." *Id.* at ¶ 18 (citation omitted). A custodian's affidavit generally avowing that unattached or unspecified records establish indebtedness is insufficient to carry this burden.³ *Id.*

¶19 Here, the only evidence that Asset Acceptance provided was the bill of sale, the "Unknown Schedule A" list, and the employee's affidavit. Asset Acceptance contends that the bill of sale and the list were "[t]he records reviewed and identified in the affidavit." But the list was never identified in the affidavit, attached to it, or otherwise authenticated or explained, and was therefore not admissible. *Allen*, at 214 n.3, ¶ 20, 292 P.3d at 200 n.3. The employee's conclusory affidavit,

unlike in the *Wells Fargo* matter, not one of the allegations to the complaint was denied." This assertion is indisputably false. In her answer, Goraj expressly denied each of the allegations of the complaint. Counsel is admonished that slipshod treatment of the truth in briefs submitted to this court is not taken lightly, and may lead to significant sanctions.

³ Our observation in *Allen* that the affidavit in that case "neither described nor attached" the relevant records should not be read to imply that an affidavit may be sufficient if it merely describes the records reviewed. *Allen*, 231 Ariz. at 214, ¶ 18, 292 P.3d at 200. Unless the relevant records are already before the court -- which, in fact, was not the case in *Allen* (see *id.* at 214 n.3, ¶ 20, 292 P.3d at 200 n.3) -- their mere description does not provide the court with any means to evaluate the affidavit's accuracy and determine whether summary judgment is warranted.

unaccompanied by the documents upon which she relied, could not support summary judgment. *Id.* at 213-14, ¶ 18, 292 P.3d at 199-200. Further, her affidavit failed to establish her familiarity with the manner in which Citibank's records are kept, as required by Ariz. R. Civ. P. 56(e)(1).

¶10 Though Goraj may ultimately be found liable on the debt, we cannot say on this record that the evidence would compel all reasonable jurors to find both the existence of a contract and an indebtedness. We therefore need not evaluate whether Goraj established a genuine dispute regarding her ownership of the account and the indebtedness thereon. Asset Acceptance was not entitled to judgment as a matter of law regardless of the deficiencies it alleges concerning Goraj's disclosures and responses to the summary judgment motion.

CONCLUSION

¶11 We reverse and remand. We deny Asset Acceptance's request for attorney's fees on appeal because it is not the prevailing party. Goraj is entitled to an award of costs upon compliance with ARCAP 21.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

ROBERT CARTER OLSON, Judge*

*The Honorable Robert Carter Olson, Presiding Judge of the Pinal County Superior Court, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147 (2003).