IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ACARTA, LLC,	)	1 CA-CV 12-0344
	)	
Plaintiff/Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	
CHRISTINE BAKER,	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
Defendant/Appellant.	)	Civil Appellate Procedure)
	)	

Appeal from the Superior Court in Mohave County

Cause No. S8015CV201101349

The Honorable Lee F. Jantzen, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

Law Office of James R. Vaughan, P.C. Scottsdale
By Brian K. Partridge
Attorneys for Plaintiff/Appellee

Christine Baker Kingman
Defendant/Appellant *In Propria Persona*

J O H N S E N, Judge

¶1 Christine Baker appeals the superior court's grant of summary judgment to Acarta, LLC, on its claim for breach of contract and on Baker's counterclaim. For the reasons explained below, we reverse the summary judgment on the contract claim.

We affirm the summary judgment on Baker's counterclaim in part, and remand the matter for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 In its complaint, Acarta alleged that on January 30, 2009, Baker defaulted on a credit card agreement she had with Chase Bank USA, N.A., and that Acarta had purchased the "contract for payment." In her answer, Baker admitted defaulting on her credit card, but denied Acarta's allegation that the principal balance due was $12,348.06 and claimed the 18 percent post-default interest Acarta sought was not substantiated by any documentation. Baker also denied that January 30, 2009, was the date she defaulted, and she alleged as an affirmative defense that the statute of limitations barred Acarta's claim.[1] For her counterclaim, Baker alleged Acarta violated the Fair Debt Collection Practices Act, 15 United States Code ("U.S.C.") sections 1692a-g (West 2013).[2]

¶3 Acarta moved for summary judgment on its claim, attaching an affidavit by its manager, Victor Gilgan (the

[1] According to an account statement that Acarta filed with its summary judgment motion, Chase "charged off" Baker's account on January 30, 2009, when the outstanding purchase balance was $9,783.03 and accrued interest and fees were $2,565.03, for a total outstanding balance of $12,348.06. The statement also indicates Baker's last payment on the account was June 4, 2008, and her first day of delinquency was July 10, 2008.

[2] Absent material revision after the relevant date, we cite a statute's current version.

"Affidavit"), to which in turn were attached copies of a cardmember agreement (the "Agreement" or "Exhibit 1"); monthly account statements from September 11, 2007, to January 10, 2009, addressed to Baker ("Exhibit 2"); portions of bills of sale relating to Chase accounts ("Exhibit 3"); a document described as a "DETAILED STATEMENT of ACCOUNT" ("Exhibit 4"); and a copy of a letter dated October 20, 2010, from Acarta's counsel to Baker ("Exhibit 5"). Although the Affidavit stated that Acarta had purchased the account from Turtle Creek Assets, Ltd., it did not say how Turtle Creek had acquired the account.

¶4 Acarta also sought summary judgment on Baker's counterclaims, attaching copies of a letter from Baker to Acarta's counsel dated November 16, 2010; a letter from Acarta's counsel to Baker dated November 23, 2010; a facsimile from Baker to Acarta's counsel dated August 30, 2011; and a letter from Acarta's counsel to Baker dated August 30, 2011. Baker opposed the summary judgment motions and moved to strike the Affidavit and Exhibits 1 through 4.

¶5 At oral argument, Baker argued Acarta lacked standing because it could not establish that it had purchased her debt from Chase. The superior court denied Baker's motion to strike and entered judgment for Acarta in the amount of $12,348.06 with 18 percent interest (the rate specified in the Agreement)

accruing from January 30, 2009, plus attorney's fees of $3,000.00 and costs of $358.00.

¶6 We have jurisdiction of Baker's timely appeal pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2013) and -2101(A)(1) (West 2013).

DISCUSSION

A. Legal Principles.

¶7 We review *de novo* the grant of a motion for summary judgment. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15, 165 P.3d 173, 177 (App. 2007). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1).

¶8 A party moving for summary judgment must "demonstrat[e] both the absence of any factual conflict and his or her right to judgment." *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990). A motion for summary judgment must be supported by admissible evidence. *Mason v. Bulleri*, 25 Ariz. App. 357, 359, 543 P.2d 478, 480 (1975).

B. Acarta's Contract Claim.

¶9 As the party with the burden of proof on its claim for breach of contract, on summary judgment Acarta was required to demonstrate that admissible evidence entitled it to judgment as

a matter of law. *See Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, ___, ¶ 16, 292 P.3d 195, 199 (App. 2012). We review the denial of a motion to strike for abuse of discretion. *Birth Hope Adoption Agency, Inc. v. Doe,* 190 Ariz. 285, 287, 947 P.2d 859, 861 (App. 1997).

¶10 The Gilgan Affidavit that Acarta filed in support of its motion for summary judgment stated, in relevant part:

> I am the Manager for Acarta, LLC, and I am one of the custodians of its records. I am familiar with its practices and procedures and base this Affidavit upon records which are kept and maintained by Acarta, LLC in the ordinary course of business.
>
> * * *
>
> The bank's digital business records concerning the debt described in this Affidavit were electronically transmitted to Acarta, LLC and exact digital duplicates of the bank's business records were incorporated into the digital business records kept and maintained by Acarta, LLC. After inspection of these business records I have personal knowledge that the debt described in this Affidavit was purchased from Turtle Creek Assets, Ltd. by Acarta, LLC . . . . Therefore, Acarta, LLC is the sole owner of all right, title and interest in and to the debt described in this Affidavit.
>
> Furthermore, according to the digital business records concerning the debt described in this Affidavit, Chase Bank USA, N.A. was the original issuer of a credit card account used by Christine Baker as account number ['030]. **The credit card agreement provides for attorney fees and**

> **interest at a rate greater than 18.00%.** A true and correct copy of the Cardmember Agreement is attached as **Exhibit 1**. . . . True and correct copies of the Monthly Statements are attached as **Exhibit 2.** True and correct copies of the Bills of Sale Agreements are attached as **Exhibit 3**. A true and correct copy of the detailed statement of Defendants' [sic] account is attached as **Exhibit 4**. True and correct copies of the letters [sic] properly addressed to Defendants [sic] are attached as **Exhibit 5**.

¶11 Baker's motion to strike the Affidavit argued it contained hearsay and was "based on inadmissible and unauthenticated Exhibits." She pointed out that although Gilgan averred that the Agreement was a "true and correct copy" of her cardmember agreement, the Agreement bears a date of 2007, a year after she established her account. At oral argument on the motion for summary judgment and on her motion to strike, Baker also argued Acarta had failed to establish that it had acquired her account.

¶12 To the extent Baker's motion to strike was directed at the Affidavit and Exhibits 1 and 3 regarding the Agreement and Acarta's purported acquisition of Baker's account, the superior court erred in denying the motion. The Affidavit does not claim any personal knowledge of any cardmember agreement between Chase and Baker. Moreover, whatever Gilgan knew on the matter came from the Agreement attached to the Affidavit, which, as Baker

points out, does not contain her name and is dated a year after she opened her account.

¶13 Moreover, Acarta presented no admissible evidence that it had purchased Baker's account. Even if we assume that Gilgan had personal knowledge of the accounts Acarta purchased from Turtle Creek, the Affidavit makes no showing that he had personal knowledge of what non-party Turtle Creek purchased from non-party Chase. And Gilgan's summary avowal of "personal knowledge" based on documents is insufficient to establish the particulars of a legal transaction under circumstances such as this. *See Allen*, 231 at ___, ¶¶ 21-22, 292 P.3d at 200-01.

¶14 Exhibit 3 to the Affidavit does not properly cure these deficits. Exhibit 3 appears to be made up of portions of Bills of Sale involving Acarta and Turtle Creek, and Turtle Creek and Chase, without attachments (redacted or otherwise) showing any transfer of Baker's account. Exhibit 3 does not mention Baker's account as one of the accounts supposedly assigned by Chase to Turtle Creek and then from Turtle Creek to Acarta.

¶15 For these reasons, the superior court could not properly consider the Affidavit and Exhibits 1 and 3 in addressing Acarta's motion for summary judgment and, accordingly, should have stricken them. *See* Ariz. R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on

personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.").

¶16 Because Acarta failed to offer admissible evidence in support of its contention that it owned Baker's account and that the account was subject to an Agreement allowing default interest at the rate of 18 percent, the superior court erred in granting its motion for summary judgment.[3]

C. Baker's Counterclaim.

¶17 Baker's counterclaim alleged Acarta committed several violations of the Fair Debt Collection Practices Act (the "Act"). On appeal, Baker does not challenge the court's entry of summary judgment on many of her allegations; we address only the allegations she raised in her opening brief. *See Phoenix Newspapers, Inc. v. Molera*, 200 Ariz. 457, 462, ¶ 26, 27 P.3d 814, 819 (App. 2001).

¶18 Baker claimed Acarta violated the Act by failing to advise her of her right to dispute the debt and the name and address of the original creditor. The Act provides that, if not contained in the initial communication to the consumer about an

[3] Given the parties' arguments and admissions, on this specific record, the superior court did not abuse its discretion in denying Baker's motion to strike Exhibit 2, the monthly account statements, and Exhibit 4, the related summary. *See, e.g.*, Ariz. R. Evid. 803(6); 901(b)(4).

outstanding debt, a debt collector shall within five days send the consumer a written notice that includes:

> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of the judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

15 U.S.C. § 1692g(a)(3)-(5).

¶19 In its summary judgment motion, Acarta attached a copy of a letter from its counsel to Baker dated October 20, 2010, that notified her of the right to dispute the debt and that Chase was the original creditor. On November 16, 2010, Baker responded to that letter and exercised her right to dispute the debt's validity. Baker did not offer any controverting evidence disputing this correspondence; accordingly, Acarta was entitled to summary judgment on Baker's allegation that Acarta violated

15 U.S.C. § 1692g(a). *See Orme Sch. v. Reeves,* 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990).[4]

¶20 Baker also broadly alleged in her counterclaim that Acarta violated the Act by making "several false statements and misrepresentations" in its complaint, including stating an incorrect balance owed, naming non-existent John Doe or multiple "defendants" and stating an incorrect date of default. But it was Baker who made the typographical error in her counterclaim concerning the correctly identified balance in the complaint. Moreover, despite Baker's argument that she was "very confused" and "actually thought this might not be [her] account" because of the reference to "defendants" in the complaint and to "John Doe Baker" in correspondence from Acarta's counsel, these contentions do not constitute "false, deceptive, or misleading representation[s]" in violation of the Act. 15 U.S.C. § 1692e.

¶21 Baker also asserted that Acarta made false and misleading statements in violation of 15 U.S.C. § 1692e by alleging the charge-off date of January 30, 2009, as the default date, when her first default occurred on July 10, 2008. But

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[4] Baker's apparent argument that Acarta violated the statute by providing the required information through its attorney is wholly without merit. *See Barlage v. Valentine*, 210 Ariz. 270, 275, ¶ 16, 110 P.3d 371, 376 (App. 2005) (describing a basic principle of agency law as "when an agent acts . . . it is as if the principal herself has acted"); *Cahn v. Fisher*, 167 Ariz. 219, 221, 805 P.2d 1040, 1042 (App. 1990) ("a lawyer is the agent of his or her client").

even if Baker first defaulted on July 10, 2008, that does not mean she did not continue to default each time thereafter when payment was due, until the account was finally charged off on January 30, 2009.

¶22 A material issue of fact remains, however, concerning Baker's contention that Acarta violated the Act by suing to collect $12,348.06 when her credit limit was $10,000. *See* 15 U.S.C. § 1692f(1) (debt collector may not use unfair means to collect "any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law"). Acarta argued in its summary judgment motion that the Agreement obligated Baker to pay fees and interest on an unpaid balance. As discussed, however, it did not offer admissible evidence of any cardmember agreement that Baker entered into with Chase. Accordingly, Acarta was not entitled to summary judgment on this lone allegation in Baker's counterclaim.

CONCLUSION

¶23 We reverse the summary judgment on Acarta's claim for breach of contract and affirm the summary judgment in favor of Acarta on Baker's counterclaim, except for her allegation that Acarta violated the Act by misrepresenting the amount due in its complaint. We vacate the award of attorney's fees and costs in

Acarta's favor and remand the matter for further proceedings. We decline Baker's request for attorney's fees because she is not represented by counsel on appeal. *Connor v. Cal-Az Props., Inc.*, 137 Ariz. 53, 56, 668 P.2d 896, 899 (App. 1983). Upon compliance with Arizona Rule of Civil Appellate Procedure 21, however, Baker is entitled to her costs on appeal.

_____/s/_____
DIANE M. JOHNSEN, Judge

CONCURRING:

_____/s/_____
SAMUEL A. THUMMA, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge