IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MIDLAND FUNDING, LLC, *Plaintiff/Appellee*,

v.

LISA HOWELL, *Defendant/Appellant.*

No. 1 CA-CV13-0015
FILED 11-12-2013

Appeal from the Superior Court in Maricopa County
CV2012-001355
The Honorable Michael J. Herrod, Judge

REVERSED AND REMANDED

COUNSEL

Lisa Howell, Phoenix

Defendant/Appellant in Propria Persona

Jerold Kaplan Law Office, PC, Phoenix
By Patricio Esquivel

Counsel for Plaintiff/Appellee

MEMORANDUM DECISION

Presiding Judge Andrew W. Gould delivered the decision of the Court, in which Judge Donn Kessler and Judge Michael J. Brown joined.

G O U L D, Judge:

¶1 Appellant Lisa Howell ("Howell") appeals the trial court's grant of summary judgment in favor of Midland Funding, LLC ("Midland"). For the following reasons, we reverse and remand for further proceedings.

BACKGROUND

¶2 Midland filed a complaint against Howell, alleging she had defaulted on a Citibank/Home Depot[1] credit card account that had been assigned to Midland. Howell filed an answer denying she owed the debt.

¶3 After Howell filed her answer, Midland moved for summary judgment. In support of its motion, Midland attached a billing statement which Midland's counsel asserted was "a true and correct copy of Monthly Statement [sic] from October 24, 2010, regarding Defendant's credit card account." Midland also incorporated by reference an affidavit attached to its complaint. The affidavit was executed by April Crandall, a "Legal Specialist" for Midland Credit Management, Inc. ("MCM").

---

[1] The record is unclear as to which entity owned the credit card account before it was purchased by Midland. Midland asserts in its answering brief that Citibank was the original owner of the account. The agreement attached to Midland's complaint refers to the account as a "Home Depot" account, while April Crandall's affidavit refers to the account as a "Citibank" account. In its response to Howell's motion to strike, Midland refers to the account as both a "Chase Bank Visa" account and a "Citibank" account. For the purposes of our decision, we refer to the account as the "Citibank" account.

Attached to Crandall's affidavit was a copy of an unsigned credit card agreement.[2]

¶4 Howell filed a response to Midland's motion, arguing that Midland failed to present any admissible evidence showing she owed the debt. Howell attached an affidavit to her response generally avowing that she did not owe the debt. Howell also filed a separate motion to strike Crandall's affidavit as inadmissible hearsay. The court granted Midland's motion for summary judgment and denied Howell's motion to strike. This timely appeal followed.

DISCUSSION

¶5 We review de novo a grant of summary judgment, viewing the evidence in the light most favorable to the party opposing the motion. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003) (internal citation omitted). 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).

¶6 A party seeking summary judgment must support its motion with specific facts that are admissible as evidence. *See* Ariz. R. Civ. P. 56(e); *GM Development Corp. v. Community American Mortg. Corp.*, 165 Ariz. 1, 8, 795 P.2d 827, 834 (App. 1990). A party opposing summary judgment must contest the accuracy of the moving party's evidence with specific, admissible facts. *See* Ariz. R. Civ. P. 56(e); *Florez v. Sargeant*, 185 Ariz. 521, 526, 917 P.2d 250, 255 (1996).

¶7 Howell asserts the trial court erred in granting Midland's motion for summary judgment because it was based on Crandall's affidavit, which was inadmissible hearsay. Howell further argues the trial court erred by denying her motion to strike Crandall's affidavit.

¶8 We will not disturb a trial court's ruling regarding the admissibility of evidence in summary judgment proceedings absent an abuse of discretion. *Mohave Elec. Co-op., Inc. v. Byers*, 189 Ariz. 292, 301, 942 P.2d 451, 460 (App. 1997). 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). A hearsay statement is inadmissible unless one of the

[2] The credit card agreement does not contain Howell's name, and it is not signed by Howell.

exceptions to the hearsay rule applies. *Villas at Hidden Lakes Condominiums Ass'n v. Geupel Const. Co., Inc.,* 174 Ariz. 72, 82, 847 P.2d 117, 127 (App. 1992).

¶9 Crandall's affidavit, as well as the credit card agreement and the 2010 October statement, are hearsay. Midland contends, however, that the affidavit and subject documents are admissible because they qualify as business records pursuant to Rule 803(6), Arizona Rules of Evidence.

I. Business Records Exception

¶10 The business records exception requires that "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." *State v. McCurdy,* 216 Ariz. 567, 572-73, ¶ 9, 169 P.3d 931, 935-36; Ariz. R. Evid. 803(6).

¶11 On its face, Crandall's affidavit alleges the basic elements of the business record exception. Crandall identifies herself as a "Legal Specialist" for MCM, a "servicer" of Howell's account on behalf of "plaintiff [Midland]." Crandall avows that Midland "is the current owner of, and/or successor to" Howell's account, and "was assigned all rights, title and interest to defendant's [Howell's] Citibank" account. Crandall further avows to have "personal knowledge of those account records maintained on plaintiff's [Midland's] behalf" and to be familiar with "the manner and method by which MCM creates and maintains its business records pertaining to this account." Crandall also states that the records were compiled in the "regular course of business" and made "at or near the time of the act or event."

¶12 However, the core issue before us is not whether Crandall's affidavit alleges the basic elements of the business records exception; the issue is whether Crandall's affidavit properly sets forth her qualifications to serve as a custodian/foundational witness for the subject credit card account. Ariz. R. Evid. 803(6); *McCurdy,* 216 Ariz. 567, 572-73, ¶ 9, 169 P.3d at 935-36. *See* Ariz. R. Civ. P. 56(e) (stating affidavits in support of a motion for summary judgment "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.").

¶13 While Crandall is not a custodian for Citibank, she could still testify for Midland if Midland purchased and incorporated Citibank's records into its own business records. Business records originally created by another business entity may be admissible as business records for a party that neither prepared nor created them if the party "regularly relies on the information that third parties submit as part of their ordinary course of business." *State v. Parker*, 231 Ariz. 391, 401-02, ¶¶ 31, 33, 296 P.3d 54, 64-65 (2013). In some jurisdictions this is referred to as the "adoptive business records doctrine," which provides for the admission of documents as business records "where an organization incorporated the records of another entity into its own, relied upon those records in its day-to-day operations, and where there are other strong indicia of reliability." *Air Land Forwarders, Inc. v. U.S.*, 172 F.3d 1338, 1344 (Fed. Cir. 1999). *See Saks Intern, Inc. v. M/V Export Champion*, 817 F.2d 1011, 1013 (2d Cir. 1987) (following the adoptive business records doctrine); *U.S. v. Ullrich*, 580 F.2d 765, 771-72 (5th Cir. 1978) (same).

¶14 Crandall's affidavit sufficiently establishes that Howell's purported Citibank account was adopted as a business record by Midland. While Crandall's affidavit does not state Midland regularly relies upon Citibank's account records in collecting on delinquent accounts, it is reasonable to infer that Midland relies on Citibank's records in the daily operation of its business since Crandall avowed Citibank assigned the subject account to Midland, and that Midland is the current owner and/or successor to the Citibank account.

¶15 However, we are unable to conclude that Crandall's affidavit establishes her qualifications to testify as a business records custodian for Midland. Crandall avows that she works for, and maintains records on behalf of MCM, not Midland. Apart from a reference that MCM is a "servicer" of Howell's account "on behalf of" Midland, the affidavit provides no further information as to the relationship between MCM and Midland, and/or the relationship between MCM and Citibank. As a result, the affidavit fails to state any basis showing MCM regularly relies upon records from either Midland or Citibank in its daily operations.[3]

[3] Crandall also fails to avow in her affidavit how her position as a "Legal Specialist" with MCM qualifies her as a proper custodian of records for the account, *e.g.*, the affidavit does not describe Crandall's

II. Reference/Reliance on Account Records

¶16 Rule 56(e) provides that sworn or certified copies of all papers referred to in an affidavit must be attached to the affidavit. As one commentator has noted, "[T]his means that if written documents are relied upon [in the affidavit] they actually must be exhibited; affidavits that purport to describe a document's substance or an interpretation of its contents are insufficient." 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2722, at 3 (3d ed. 2013).[4]

¶17 In her affidavit, Crandall averred she had reviewed the records pertaining to Howell's alleged account in reaching her conclusion Howell owed a balance of $13,143.48. However, none of these records, much less a summary of these records, is attached to Crandall's affidavit. As a result, Crandall's affidavit is insufficient under Rule 56(e). *See Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 214, ¶¶ 18-19, 292 P.3d 195, 200 (App. 2012) (holding that affidavit was not sufficient to satisfy business records exception or to support motion for summary judgment where "[The paralegal's] records were neither described nor attached, nor was there anything in the affidavit to provide a reviewing court with the means to evaluate the accuracy of the paralegal's calculation of the amount claimed to be due.").

III. Account Statement and Credit Card Agreement

¶18 Finally, the October 2010 statement and the credit card agreement attached to Crandall's affidavit are not self-authenticating documents, and, as such, require an affidavit or statement attesting they are (1) true and accurate copies and (2) constitute business records. *See State v. Johnson*, 184 Ariz. 521, 524, 911 P.2d 527, 530 (App. 1994) (holding that when documents are attached and/or referenced in an affidavit, the affiant must establish that he reviewed the documents and was familiar with the manner in which they were prepared); *Villas*, 174 Ariz. at 82, 847 P.2d at 127 (same). *See also* Rule 901(a), Ariz. R. Evid. (authentication);

---

duties and responsibilities as a "Legal Specialist" for MCM in terms of keeping and maintaining Midland's/MCM's records.

[4] The current version of Rule 56(e), effective January 1, 2013, is even more explicit than the prior version of the rule: "[I]f a paper or part of a paper is referred to in an affidavit, a properly authenticated copy shall be attached to or served with the affidavit." Ariz. R. Civ. P. 56(e).

Rule 803(6), Ariz. R. Evid. (business records). Here, there is nothing in Crandall's affidavit verifying either the authenticity of the subject documents or identifying them as business records. As a result, the trial court erred in admitting both the October 2010 statement and the credit card agreement as evidence in support of Midland's motion for summary judgment.[5] *See Wells Fargo Bank*, 231 Ariz. at 214, ¶ 19, 292 P.3d at 200 ("The purpose of a custodian's affidavit is to authenticate evidence-such an affidavit is of little value when it does not attach the evidence at issue.").

CONCLUSION

¶19 For the foregoing reasons, we conclude the trial court erred in denying Howell's motion to strike Crandall's affidavit, and in granting Midland's motion for summary judgment. We therefore reverse the trial court's grant of summary judgment and remand for further proceedings consistent with this decision. Further, because we have reversed the trial court's decision on appeal, we deny Midland's request for fees on appeal, and award costs in favor of Howell.

Ruth A. Willingham · Clerk of the Court
FILED: mjt

[5] Likewise, Crandall's avowal that Howell owed a balance of $13,143.48, on the grounds "I am advised that such balance will continue to accrue interest at the rate set forth in the cardholder agreement/original contract and/or as required by law" is inadmissible as hearsay. Rule 801(c), Ariz. R. Evid.