IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CITIBANK, N.A., *Plaintiff/Appellee*,

v.

CHARLES U. OKONKWO, *Defendant/Appellant*

No. 1 CA-CV 13-0329
FILED 5-6-2014

Appeal from the Superior Court in Maricopa County
No. CV2012-015403
The Honorable Douglas L. Rayes, Judge

AFFIRMED

COUNSEL

Seidberg Law Offices PC, Phoenix
By Kenneth W. Seidberg and Joseph L. Whipple
Counsel for Plaintiff/Appellee

Charles U. Okonkwo, Mesa
Defendant/Appellant In Propria Persona

MEMORANDUM DECISION

Judge Michael J. Brown delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Margaret H. Downie joined.

B R O W N, Judge:

¶1 Charles U. Okonkwo appeals the superior court's grant of summary judgment in favor of Citibank, N.A. (Citibank). Because Citibank established that Okonkwo was liable as a matter of law on his outstanding credit card balance, we affirm.

BACKGROUND

¶2 Citibank filed a complaint against Okonkwo in superior court, alleging an "account stated" based on (1) Citibank's extension of credit to Okonkwo via a credit card, (2) Citibank's mailing of monthly statements notifying Okonkwo of all charges, fees, interest, and amounts owed, and (3) Okonkwo's ceasing to make the mandatory minimum payments and, upon default, owing a balance of $21,154.87. [**I. 1**] Attached to the complaint was the affidavit of Chad Robertson, who averred on behalf of Citibank he had reviewed the documents related to Okonkwo's account ("account number currently ending in 3252") and confirmed the default and ending balance. In his answer, Okonkwo stated that the debt was "not true" and asserted defenses of lack of personal jurisdiction, lack of standing, and insufficient evidence.

¶3 Citibank moved for summary judgment, supported by the affidavit of Jennifer Shepherd, a document control officer for Citibank. Shepherd avowed that she had reviewed the documents related to Okonkwo's account, which was referred to as the account "currently ending in 3252." She confirmed the outstanding balance owed on the account and referred to attached exhibits showing Okonkwo's account statements for one year and the six payments he made ($400 in January 2011, $375 in February 2011, $370 in March 2011, $380 in April 2011, $376 in May 2011, and $368 in June 2011).

¶4 In response, Okonkwo argued that Citibank lacked standing to bring the complaint and that it failed to present sufficient evidence to

prove its claim, challenging the foundation for and admissibility of Citibank's documents and the absence of a signed contract. In an attached affidavit, Okonkwo supported his response by avowing: (1) he never applied for a credit card with a four-digit ending of 3252; (2) he never signed any application or contract for a credit card with a four-digit ending of 3252; and (3) he did not owe principal, fees, or interest for a credit card with a four digit ending of 3252.

¶5 Finding "no dispute with regard to any material fact," the superior court granted Citibank summary judgment. The court awarded Citibank attorneys' fees in the amount of $603.00 and costs in the amount of $379.80. Okonkwo timely appealed.

DISCUSSION

¶6 Okonkwo argues the superior court erred by granting summary judgment in favor of Citibank. We review the court's ruling de novo and view the facts and inferences in the light most favorable to the party against whom judgment was entered. *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 242, ¶ 7, 256 P.3d 635, 639 (App. 2011). Summary judgment is appropriate "when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a).

¶7 Okonkwo first argues that Citibank's documentary evidence lacked foundation because: (1) Citibank relied on an affidavit of a different custodian of record in connection with its motion for summary judgment without explaining the basis for the change; and (2) the documents Citibank relied on were not admissible as business records under the hearsay rule exception. "We review evidentiary rulings for an abuse of discretion and generally affirm a trial court's admission or exclusion of evidence absent a clear abuse or legal error and resulting prejudice." *Ryan v. S.F. Peaks Trucking Co. Inc.*, 228 Ariz. 42, 46, ¶ 12, 262 P.3d 863, 867 (App. 2011).

¶8 Regarding the change of custodian, Okonkwo has not identified any specific basis for challenging Shepherd's qualifications to act on behalf of Citibank, but instead broadly asserts the superior court erred by failing to inquire regarding Citibank's re-designation of the custodian of records. Absent any specific challenge or claim of prejudice caused by the substitution of custodians, we find no abuse of discretion.

¶9 As to whether Citibank's documentation in support of the summary judgment motion was admissible, we likewise conclude the

court did not abuse its discretion. "The business records exception requires that the record be made at or near the time of the entry by or from information transmitted by someone with knowledge, be kept in the ordinary course of business, be made as a regular practice, and be testified to by a qualified witness." *State v. Parker*, 231 Ariz. 391, 401, ¶ 28, 296 P.3d 54, 64 (2013); *see also* Ariz. R. Evid. 803(6).

¶10 In her affidavit, Shepherd avowed that she was a custodian of records with personal knowledge of the information set forth in the account statements, that she had access to Okonkwo's account records, and that these records were created and maintained in the ordinary course of business at or near the time of each recorded event. Okonkwo contends that a hearsay problem persists because Shepherd did not claim involvement in generating the records or otherwise identify who created the records. As recently explained by our supreme court in *Parker*, however, business records may be admissible under Rule 803(6) even when the custodian did not personally assemble the records because "[t]rustworthiness and reliability stem from the fact that [the business] regularly relies on the information . . . as part of their ordinary course of business." 231 Ariz. at 401-02, ¶ 33, 296 P.3d at 64-65. Moreover, Okonkwo does not identify any specific information from the documents that he believes is inaccurate or otherwise unreliable. Under these circumstances, the documents submitted by Citibank fall within the business records exception.[1]

¶11 Okonkwo also argues that Citibank failed to prove (1) that the parties entered into a contract and (2) that the alleged debt was calculated pursuant to the terms of such a contract. Citibank's claim against Okonkwo, however, is based on an account stated, not a breach of contract.

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[1] Although Okonkwo relies on *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 292 P.3d 195 (App. 2012), for the proposition that Shepherd's affidavit does not qualify for the business records exception, that case is readily distinguishable. The custodian of records in *Wells Fargo* avowed that he personally reviewed the records establishing the amount of the indebtedness, but failed to describe or attach the records or provide any other means for a reviewing court to evaluate the accuracy of the amount claim to be due. 231 Ariz. at 213-14, ¶ 18, 292 P.3d at 199-200. By way of contrast, here, Citibank attached as exhibits a year of monthly statements on the account at issue.

¶12 An action for an "account stated" seeks judgment for a sum certain. *Monte Produce, Inc. v. Delgado*, 126 Ariz. 320, 321, 614 P.2d 862, 863 (App. 1980). As explained in *Trimble Cattle Co. v. Henry & Horne*, 122 Ariz. 44, 47, 592 P.2d 1311, 1313 (App. 1979), an account stated "signifies an agreed balance between the parties to a settlement; that is, that they have agreed after an investigation of their accounts that a certain balance is due from one to the other." Merely providing a statement of account that "is not understood by the debtor as a final adjustment of the parties' demands does not constitute an account stated." *Holt v. W. Farm Servs., Inc.*, 110 Ariz. 276, 278, 517 P.2d 1272, 1274 (1974). But when a debtor retains a statement of account without objection for more than a reasonable time, by implication the debtor consents to its validity. *Trimble Cattle Co.*, 122 Ariz. at 47, 592 P.2d at 1314; s*ee also* Restatement (Second) of Contracts § 282 ("[A] party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent.").

¶13 Citibank provided Okonkwo with monthly billing statements from January 2011 through January 2012 that notified Okonkwo of the amount owed, the interest rate charged, and the fees accrued. Yet Okonkwo did not challenge the indebtedness. Instead, between January 2011 and June 2011, he tendered the requisite minimum payments due. When he failed to tender a minimum payment in July 2011, Citibank notified him that his failure triggered a variable rate penalty, a penalty Okonkwo did not dispute. In November 2011, Citibank notified Okonkwo that his default had accelerated the entire balance as due, and again he failed to dispute the amount owed, interest, fees, or penalties. Based on Okonkwo's acknowledgement of the debt through repeated tender of minimum payments pursuant to the terms set forth in the monthly billing statements, and his failure to timely challenge the calculation of the debt or the manner in which interest, fees, or penalties accrued, we conclude Citibank carried its burden of proof by establishing a prima facie case of an account stated.[2] *See PNL Asset Mgmt. Co., LLC v. Brendgen & Taylor P'ship*, 193 Ariz. 126, 130, ¶ 15, 970 P.2d 958, 962 (App.

[2] Okonkwo contends for the first time on appeal that his liability to Citibank is limited to an account ending in "8058," which closed nearly a decade before the complaint was filed. Regardless of whether Okonkwo obtained credit under a different account number, the evidence presented to the superior court supports the conclusion that Okonkwo's failure to timely challenge the billing statements issued on the account ending in "3252" reflected assent.

1998) (concluding the "[u]nquestioning payment . . . on the actual debt implies that the payor accepts the amount of the debt"); *see also Wakeham v. Omega Constr. Co.*, 96 Ariz. 336, 340, 395 P.2d 613, 615 (1964) (explaining that once a plaintiff has "establish[ed] a prima facie case on an account stated . . . it [i]s then incumbent upon defendants to make a counter showing of facts creating an issue which if proven at the trial would legally authorize a judgment in his favor"). Therefore, the record does not show the existence of any genuine dispute of material fact.

CONCLUSION

¶14 We affirm the superior court's order granting summary judgment.

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