

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

AMERICAN EXPRESS BANK FSB, *Plaintiff/Appellee*,

v.

DARIN DAMME, PRIMAVERA DAMME, *Defendants/Appellants*.

No. 1 CA-CV 16-0024
FILED 2-16-2017

Appeal from the Superior Court in Maricopa County
No. CV2014-096244
The Honorable Robert H. Oberbillig, Judge

AFFIRMED

COUNSEL

Burse & Associates, Tucson
By Jennifer E. Wiedle, Barry Bursey
Counsel for Plaintiff/Appellee

Kelly McCoy, PLC, Phoenix
By Mathew J. Kelly, Kevin C. McCoy
Counsel for Defendants/Appellants

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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Paul J. McMurdie joined.

T H O M P S O N, Judge:

¶1 Darin and Primavera Damme (the Dammes) appeal from the trial court's entry of summary judgment in favor of American Express Bank FSB (American Express). For the following reasons, we affirm the decision of the trial court.

FACTUAL AND PROCEDURAL HISTORY

¶2 In November 2014, American Express filed a complaint in superior court alleging that the Dammes opened a credit card with it (account ending in 52008), used the card, and failed to pay credit card charges of \$28,217.11. The Dammes filed an answer containing general denials to the allegations of the complaint. In September 2015, American Express filed a motion for summary judgment. The Dammes opposed the motion for summary judgment but did not submit a controverting affidavit with their answer.

¶3 The trial court granted the motion for summary judgment and the Dammes timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2016) and -2101(A)(1) (2016).

DISCUSSION

¶4 Summary judgment is appropriate 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(a) (Rule 56(a)).¹ We review the grant of summary judgment de novo to determine whether any genuine issue of material fact exists, and we view the evidence and all reasonable inferences in favor of the non-moving party. *Chalpin v. Snyder*, 220 Ariz. 413, 418, ¶ 17, 207 P.3d 666, 671 (App. 2008) (citation omitted). "A plaintiff's motion must stand on its own and demonstrate by admissible evidence that the

¹ We cite the current version of the applicable rule unless revisions material to this decision have occurred since the events in question.

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plaintiff has met its burden of proof and that it is entitled to judgment as a matter of law.” *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 211, ¶ 1, 292 P.3d 195, 197 (App. 2012). “An affidavit used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.” Ariz. R. Civ. P. 56(c)(5). “When a summary judgment motion is made and supported as provided in [Rule 56], an opposing party may not rely merely on allegations or denials of its own pleading. The opposing party must, by affidavits or as otherwise provided in this rule, set forth specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment, if appropriate, shall be entered against that party.” Ariz. R. Civ. P. 56(e). See also *Nat’l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 119, ¶ 26, 180 P.3d 977, 984 (App. 2008) (“The non-moving party may not rest on its pleadings; it must go beyond simply cataloging its defenses.”).

¶5 In an action based on breach of contract, the plaintiff has the burden of proving the existence of a contract, breach of the contract, and damages. *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, ¶ 30, 83 P.3d 1103, 1111 (App. 2004) (citations omitted). In granting American Express’s motion for summary judgment, the trial court found that the motion was properly supported by an affidavit and records, that American Express had met its burden of proof, and that the Dammes had not presented any evidence.

¶6 The Dammes argue that the trial court erred by finding that American Express had met its burden of proof because the evidence did not prove the Dammes entered into a contract with American Express. They cite *Wells Fargo Bank*, 231 Ariz. 209, 292 P.3d 195, in support of their argument that summary judgment was improper. In *Wells Fargo Bank*, this court found that the plaintiff, Wells Fargo Bank, had failed to present sufficient undisputed admissible evidence to establish its entitlement to summary judgment because Wells Fargo’s affiant, a paralegal/custodian of records, “never claimed to have reviewed any specific documents or to know the manner in which they were prepared and kept.” 231 Ariz. at 214, ¶ 19, 292 P.3d at 200.

¶7 Here, American Express’s motion for summary judgment was supported by the affidavit of Anthony D. Mendez (Mendez), assistant custodian of records for American Express. The Mendez affidavit stated that in his position with American Express, Mendez was familiar with American Express’s card member account records. The affidavit further stated that Mendez personally reviewed American Express’s card member

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records concerning the Dammes, and that the records “reflect that [the Dammes] opened an American Express credit card account, the current account number ending in 52008, previously 51000 . . . in November 2011.” The Mendez affidavit stated that the Dammes defaulted on the account, American Express closed it, and as of August 12, 2015 the Dammes owed \$28,217.11 on the account, exclusive of attorneys’ fees and costs. The affidavit referenced two exhibits attached to the affidavit in support of Mendez’s assertions: exhibit A, a card member agreement dated November 30, 2011, and exhibit B, a credit card statement dated July 27, 2014 showing a past due amount of \$28, 217.11.

¶8 The Mendez affidavit and attachments, which were admissible under the business records exception contained in Arizona Rule of Evidence 803(6), adequately supported the motion for summary judgment and the Dammes presented no controverting evidence. The Dammes provide no legal authority for the premise that a credit card contract can only be evidenced by a written agreement with a signature. Further, we do not agree that the Mendez affidavit was somehow untrustworthy and therefore inadmissible pursuant to Arizona Rule of Evidence 803(6)(E) because it stated the Dammes’s account had two different account numbers during the time it was open. *See* Ariz. R. Evid. 803(6)(E) (business records exception does not apply if the opponent shows “that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.” Accordingly, we find no error in the trial court’s decision granting summary judgment to American Express.

Attorneys’ Fees and Costs

¶9 The Dammes request an award of costs and attorneys’ fees pursuant to A.R.S. §§ 12-331, 341.01, and ARCAP 21(a). Because they are not the prevailing party, we deny the request for attorneys’ fees and costs.

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CONCLUSION

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court.

For the foregoing reasons, we affirm the decision of the trial



AMY M. WOOD • Clerk of the Court
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