DIVISION ONE
FILED: 10/27/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CITIBANK SOUTH DAKOTA N.A.,	)	1 CA-CV 10-0675
Plaintiff/Appellee,	)	DEPARTMENT B
v.	)	
	)	**MEMORANDUM DECISION**
LESLIE SELIGMANN and PAUL SELIGMANN, wife and husband,	)	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
Defendants/Appellants.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-023404

The Honorable Jeanne M. Garcia, Judge

AFFIRMED

Seidberg Law Offices, P.C. — Phoenix
By Kenneth W. Seidberg
and Joseph L. Whipple
Attorneys for Appellee

Leslie Seligmann, *in Propria Persona* — Scottsdale
Paul Seligmann, *in Propria Persona*
Appellants

K E S S L E R, Judge

¶1 Leslie Seligmann and Paul Seligmann[1] (collectively "Seligmann") appeal from the trial court's order granting summary judgment in favor of Citibank (South Dakota) N.A. ("Citibank"). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In September 1989, Citibank issued a credit card to Seligmann, who both used and made payments on the account for eighteen years. Seligmann discontinued payments in October 2007 and eventually defaulted. Due to the delinquency, Citibank demanded an accelerated payment of the amount owed in full. As the balance remained unpaid, Citibank filed this lawsuit to collect the $31,757.71 still owed on the account.

¶3 In September 2009, Citibank moved for summary judgment and filed along with its separate statement of facts: (1) a copy of an unsigned credit card agreement copyrighted in 2006; (2) monthly account statements spanning over eight years;[2] and (3) an

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[1] Citibank alleged the amount owed is both a community and separate liability. Neither in the Seligmann's answer to the complaint nor on appeal do they dispute that allegation. Accordingly, any claim that only one spouse's separate property is liable for the debt is waived. *James v. State*, 215 Ariz. 182, 191, ¶ 34, 158 P.3d 905, 914 (App. 2007) (finding issues not raised in the opening brief to be waived).

[2] The statements, which span from January 4, 2001, to April 3, 2009, show continual activity on the account for over six years. The last charge was made on October 3, 2007, and the last payment was posted October 15, 2007. The account number changed in August 2007, thus accounting for the custodian of

affidavit by an authorized custodian of records. In response, Seligmann alleged that Citibank violated the Truth in Lending Act ("TILA"), 15 U.S.C. § 1642 (2006),[3] that the affidavit submitted by Citibank was inadmissible hearsay, and that Citibank was barred from collecting the sum after failing to respond to a letter disputing the amount in 2006. Relying on the credit card agreement submitted by Citibank,[4] Seligmann also filed a motion to compel arbitration and requested a dismissal of the proceedings.

¶4 The trial court granted the Seligmann's motion in part, giving them until April 30, 2010, to initiate arbitration. When Seligmann failed to initiate arbitration by the deadline, the court granted Citibank's motion for summary judgment.

¶5 Seligmann filed a timely appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶6 Seligmann asserts that the trial court erred in granting summary judgment because: (1) Citibank violated TILA,

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records' use of an account number differing from statements prior to August 2007.

[3] We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

[4] The credit card agreement includes the following provision: "At any time you or we may ask an appropriate court to compel arbitration of Claims, or to stay the litigation of Claims pending arbitration, even if such Claims are part of a lawsuit, unless a trial has begun or a final judgment has been entered."

15 U.S.C. § 1642, by failing to produce a signed copy of the alleged application; (2) the affidavit submitted by Citibank was inadmissible due to the affiant's lack of personal knowledge; (3) the 2006 credit card agreement is inapplicable as the account was opened in 1989;[5] and (4) Citibank failed to respond to a letter disputing the amount due and is therefore barred from collecting that sum.

¶7 "Our role, in reviewing [a] grant of summary judgment, is to determine whether there is any genuine issue of material fact underlying the adjudication, and, if not, whether the substantive law was correctly applied." *Long v. Buckley*, 129 Ariz. 141, 142, 629 P.2d 557, 558 (App. 1981). We view the facts and all reasonable inferences in the light most favorable to the non-moving party. *Hill-Shafer P'ship v. Chilson Family Trust*, 165 Ariz. 469, 472, 799 P.2d 810, 813 (1990).

A. TILA VIOLATION

¶8 Seligmann claims that Citibank violated TILA by issuing a credit card for which she neither applied nor requested. TILA was enacted to strengthen "the informed use of credit" and "protect the consumer against inaccurate and unfair

[5] We decline to address this issue as Seligmann failed to raise it below. *Stewart v. Mut. of Omaha Ins. Co.*, 169 Ariz. 99, 108, 817 P.2d 44, 53 (App. 1991) ("This argument was not raised below and we will not consider it for the first time on appeal."); *Campbell v. Warren*, 151 Ariz. 207, 208, 726 P.2d 623, 624 (App. 1986) ("We will not consider new theories raised in order to secure a reversal of a summary judgment.").

credit billing and credit card practices." 15 U.S.C. § 1601(a) (2006); *see also Basham v. Fin. Am. Corp.*, 583 F.2d 918, 928 (7th Cir. 1978) ("The design of TILA was to provide protection to consumers by affording them meaningful disclosure and thereby an opportunity to shop for credit. It was not designed, nor should it be used to thwart, the valid claims of creditors."). TILA specifically provides that:

> No credit card shall be issued except in response to a request or application therefor. This prohibition does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted credit card.

15 U.S.C. § 1642. A violation of that section of TILA, however, does not create a bar to collection of a credit card debt incurred by the credit card user. Rather, TILA merely allows the credit card user to assert a set-off or recoupment defense for any finance charges. *Seidner v. Citibank (S.D.) N.A.*, 201 S.W.3d 332, 336-38 (Tex. App. 2006). Neither in the trial court nor on appeal does Seligmann request such a set-off or recoupment. Thus, assuming without deciding there was a TILA violation, the trial court did not err in granting Citibank's motion for summary judgment based on an alleged TILA violation.

B. ADMISSIBILITY OF CITIBANK'S AFFIDAVIT

¶9 In support of its motion for summary judgment, Citibank included an affidavit by the custodian of records, Mary E. Crum ("Crum"). Seligmann contends that the trial court erred

in considering the affidavit as it was hearsay and not based on personal knowledge.

¶10 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). Such a statement is inadmissible unless one of the exceptions to the hearsay rule applies. *State v. McCurdy*, 216 Ariz. 567, 571, ¶ 7, 169 P.3d 931, 935 (App. 2007). We review evidentiary rulings for an abuse of discretion, *State v. Tucker*, 205 Ariz. 157, 165, ¶ 41, 68 P.3d 110, 118 (2003), and conclude the affidavit was admissible under the business records exception.

¶11 To fall within the business records exception,

> [r]ule 803(6) requires 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.

McCurdy, 216 Ariz. at 571-72, ¶ 9, 169 P.3d at 935-36 (internal quotation marks omitted); Ariz. R. Evid 803(6). In her affidavit, Crum averred she was a custodian of records with personal knowledge of the information set out therein, that she had access to Seligmann's account records, and that these records were "electronically maintained on computer systems in

the ordinary course of [Citibank's] business at or near the time of each event recorded, by someone with personal knowledge of the events, or from information transmitted by someone with personal knowledge of the events." Under these circumstances, we find the affidavit falls within the business records exception, and the court did not err in considering it.[6]

C. DISPUTED AMOUNT

¶12 Seligmann claims that Citibank also violated a provision of the credit card agreement which mirrors a specific section of TILA identified as the Fair Credit Billing Act ("FCBA"). 15 U.S.C. §§ 1666-1666j (2006). Seligmann states that because Citibank failed to properly respond to a letter in December 2006 disputing the entire balance due, it is barred from collecting that sum.

¶13 The FCBA prescribes a systematic procedure for identifying and resolving billing disputes:

> If the [cardholder] believes that the statement contains a billing error [as defined in 15 U.S.C. § 1666(b)], he then may send the creditor a written notice setting forth that belief, indicating the amount of the error and the reasons supporting his belief that it is an

[6] Seligmann cites to *Midland Funding, L.L.C. v. Brent*, 644 F. Supp. 2d 961 (N.D. Ohio 2009), to argue that Crum's affidavit is patently false. Such reliance is misplaced because in *Midland Funding*, as opposed to here, the debtor took the deposition of the alleged custodian of records who admitted he did not have personal knowledge of the account. *Id.* at 967. Seligmann also cites various unreported decisions in violation of Arizona Supreme Court Rule 111(c). We will not consider those cases.

> error. If the creditor receives this notice within 60 days of transmitting the statement of account, [§ 1666(a)] imposes two separate obligations upon the creditor. Within 30 days, it must send a written acknowledgement that it has received the notice. And, within 90 days or two complete billing cycles, whichever is shorter, the creditor must investigate the matter and either make appropriate corrections in the [cardholder's] account or send a written explanation of its belief that the original statement sent to the [cardholder] was correct. The creditor must send its explanation before making any attempt to collect the disputed amount.

Gray v. Am. Express Co., 743 F.2d 10, 13-14 (D.C. Cir. 1984) (alterations in original) (quoting *Am. Express Co. v. Koerner*, 452 U.S. 233, 235-37 (1981)). This procedure is only triggered if the cardholder provides the necessary written notice of the billing error. Simply disputing the entire account without more does not trigger the statute. *Daniel v. Chase Bank USA, N.A.*, 650 F. Supp. 2d 1275, 1285, 1286 (N.D. Ga. 2009) ("[P]laintiff's claim that the entire Account balance is in dispute, without pointing out a specific 'computation error or accounting error,' does not provide the requisite notice of billing error required by the statute.").

¶14 Seligmann's letter dated December 8, 2006, challenged the entire account balance without disputing a specific transaction, extension of credit, computational error, or

erroneous reflection of payment.[7] *See id.* at 1286. As a result, Seligmann did not provide sufficient notice of a billing error to trigger Citibank's duty to respond, and Citibank was thus entitled to summary judgment.[8]

[7] The letter states:

> When we received our statement from Citi, we could not understand how the balance could be so high. As we stated to you, there were so many charges in this last statement, and the previous statements that it made no sense. Because there are so many charges, there is no way of knowing if all/any are ours. So, . . . we are putting this in writing that we contest the amount on the statement, which is around $14,000.

[8] On appeal, Seligmann has included an additional document (a letter dated December 18, 2006) that was not provided to the court below. "[A]bsent an abuse of discretion, we need only consider the record as it existed when the court made its minute order granting summary judgment." *Overson v. Cowley*, 136 Ariz. 60, 63 n.2, 664 P.2d 210, 213 n.2 (App. 1982). Accordingly, we will not address this dispute letter dealing with a charge of $174.25.

CONCLUSION

¶15 For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of Citibank.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
PETER B. SWANN, Judge