IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MIDLAND FUNDING LLC, A FOREIGN ENTITY,
Plaintiff/Counterdefendant/Appellee,

v.

HARRY FUNG AND CELIA FUNG, HUSBAND AND WIFE,
Defendants/Counterclaimants/Appellants.

No. 2 CA-CV 2016-0094
Filed December 2, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20153605
The Honorable Leslie Miller, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Harry and Celia Fung appeal from the trial court's summary judgment in favor of Midland Funding LLC. The Fungs argue Midland's claim for the collection of a credit-card debt is barred by the statute of limitations under A.R.S. § 12-548. Alternatively, they contend the court erred by not conducting a hearing to determine the amount of the debt owed. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to the Fungs, the party against whom summary judgment was entered. *See Mitchell v. Gamble*, 207 Ariz. 364, ¶ 3, 86 P.3d 944, 946 (App. 2004). However, the relevant facts are undisputed. In 2006, the Fungs opened a credit-card account with Bank of America. The account was later assigned to Midland.

¶3 In August 2015, Midland initiated this breach-of-contract action against the Fungs for failing to pay on the account.[1] Shortly thereafter, Midland moved for summary judgment. In response, the Fungs largely agreed with the facts as stated by Midland, disputing only the amount of the debt and reasoning that

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[1]The Fungs also counterclaimed on various grounds; however, the trial court dismissed those claims. Because the Fungs raise no argument regarding the counterclaims on appeal, any such argument is waived. *See Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived.").

they "owe [Midland] nothing" because the statute of limitations had expired. Accordingly, they filed a cross-motion for summary judgment, asserting that Midland was "seeking judgment on alleged credit card purchases, none of which are shown to have been incurred within the statute of limitations." At a hearing, the trial court granted Midland's motion for summary judgment and denied the Fungs's cross-motion. After the court entered a final judgment, the Fungs initiated this appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1).

Discussion

¶4 The Fungs argue the trial court erred by entering summary judgment in favor of Midland because the action is barred by the statute of limitations. Summary judgment is appropriate "if the moving party shows that 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). "The moving party bears the burden of providing undisputed admissible evidence that would entitle it to judgment as a matter of law." *Watkins v. Arpaio*, 239 Ariz. 168, ¶ 7, 367 P.3d 72, 74 (App. 2016). We review de novo "whether there are genuine issues of material fact and whether the trial court erred in applying the law." *Preston v. Amadei*, 238 Ariz. 124, ¶ 9, 357 P.3d 159, 164 (App. 2015); *see also Watkins*, 239 Ariz. 168, ¶ 7, 367 P.3d at 74 (we review de novo questions of law regarding statute of limitations).

¶5 The parties agree that the applicable statute of limitations is six years under § 12-548. Section 12-548(A)(2) provides that "[a]n action for debt shall be commenced and prosecuted within six years after the cause of action accrues, and not afterward, if the indebtedness is evidenced by . . . [a] credit card as defined in [A.R.S.] § 13-2101, paragraph 3, subdivision (a)."[2] The parties, however, dispute when a cause of action for credit-card debt accrues.

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[2]Under § 13-2101(3)(a), "credit card" is defined as:

> Any instrument or device, whether known as a credit card, charge card, credit

¶6 The Fungs maintain that under § 12-548, a credit-card account must reflect purchases by the debtor for goods or services within six years prior to the creditor's filing of the lawsuit or it is barred. In support of this argument, the Fungs rely on A.R.S. § 12-543(2), which provides a three-year statute of limitations for "stated or open accounts . . . so long as any item thereof has been incurred within three years immediately prior to the bringing of an action thereon." The Fungs seem to reason that, because courts treated credit cards as open accounts under § 12-543(2) before our legislature enacted § 12-548, the same requirement for incurring an item on the account within the statutory period must now apply to credit cards under § 12-548. We disagree.

¶7 Section 12-548 plainly provides a six-year statute of limitations for credit-card debts without any provision comparable to that in § 12-543(2). *See Stambaugh v. Butler*, 240 Ariz. 354, ¶ 6, 379 P.3d 250, 252 (App. 2016) (we apply statutory language as written if clear and unambiguous). We "will not read into a statute something that is not within the manifest intent of the legislature as indicated by the statute itself, nor will [we] inflate, expand, stretch, or extend a statute to matters not falling within its express provisions." *Cicoria v. Cole*, 222 Ariz. 428, ¶ 15, 215 P.3d 402, 405 (App. 2009). This is particularly true here, where our legislature was aware of the language necessary to achieve the result advocated by Fung, as

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> plate, courtesy card or identification card or by any other name, that is issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value, either on credit or in possession or in consideration of an undertaking or guaranty by the issuer of the payment of a check drawn by the cardholder, on a promise to pay in part or in full therefor at a future time, whether or not all or any part of the indebtedness that is represented by the promise to make deferred payment is secured or unsecured.

evidenced by § 12-543(2), but nonetheless did not include that language in § 12-548. *See Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.*, 218 Ariz. 293, ¶ 12, 183 P.3d 544, 548 (App. 2008); *see also* 2011 Ariz. Sess. Laws, ch. 57, § 1.

¶8 The Fungs also rely on *Navy Federal Credit Union v. Jones*, 187 Ariz. 493, 930 P.2d 1007 (App. 1996), to argue this action is barred because the record contains no evidence of credit-card charges in the six years before Midland's filing. In *Navy Federal*, Jones executed a promissory note in June 1981, payable to Navy Federal Credit Union (NFCU) in monthly installments over fifteen years. *Id.* at 494, 930 P.2d at 1008. Because the note was in arrears, NFCU demanded full payment under the acceleration clause of the note and, when Jones failed to pay, initiated a lawsuit in June 1994. *Id.* The issue presented on appeal was "when [does] a cause of action accrue[] on a defaulted installment of an unmatured note." *Id.* at 495, 930 P.2d at 1009. Relying on cases from other jurisdictions, this court concluded that "the action accrues and the statute of limitations runs against each installment from the time it becomes due." *Id.* We further explained that, as to future installments, the statute of limitations begins to run when the creditor exercises the acceleration clause. *Id.*

¶9 The Fungs appear to analogize the past-due note installments in *Navy Federal*, which triggered the running of the statute of limitations in that case, to their credit-card charges. But an installment-based promissory note, which has a defined amount of indebtedness and repayment schedule, is distinguishable from a credit-card account, in which the amount of the debt and monthly payments fluctuate. *See Smither v. Asset Acceptance, LLC*, 919 N.E.2d 1153, 1159 (Ind. Ct. App. 2010). *Navy Federal* is nonetheless instructive, albeit in a way that undermines the Fungs's argument.

¶10 As *Navy Federal* illustrates, a breach-of-contract action accrues upon the happening of the breach or the date of default. *See Navy Fed.*, 187 Ariz. at 495, 930 P.2d at 1009; *see also Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, ¶ 13, 985 P.2d 556, 561 (App. 1998). Other jurisdictions that have considered the issue have likewise determined that the date of accrual for a credit-card debt is "the date of default—the first date on which the debtor fails to make

a minimum payment." *Midland Funding LLC v. Thiel*, 144 A.3d 72, 79 (N.J. Super. Ct. App. Div. 2016); *see also Taylor v. First Resolution Invest. Corp.*, No. 2013-0118, ¶ 50, 2016 WL 3345269 (Ohio June 16, 2016).

¶11 Thus, we conclude that "[a] cause of action for breach of a credit-card agreement based on nonpayment accrues when the obligation to pay under the agreement becomes due and owing and the cardholder does not make an agreed-to monthly payment." *Taylor*, 2016 WL 3345269, ¶ 50. This rule encourages creditors to promptly begin their collection efforts and protects debtors from stale claims. *See Navy Fed.*, 187 Ariz. at 495, 930 P.2d at 1009.

¶12 The record in this case includes sporadic monthly credit-card statements from Bank of America to the Fungs in 2010 and 2011. According to those statements, the last three payments posted to the account occurred on May 5, 2010, July 7, 2010, and September 27, 2010. The Fungs did not present any evidence showing a missed monthly payment earlier than May 2010—outside the prescribed six-year limitation period. *See Kiley v. Jennings, Strouss & Salmon*, 187 Ariz. 136, 139, 927 P.2d 796, 799 (App. 1996) ("When a defendant asserts the statute of limitations as a defense, that defendant has the burden of proving the complaint falls within the statute."). Regardless of whether we treat the first missed monthly payment as occurring in June 2010—something that is not part of our record—or after the final payment in September 2010, Midland's action is not barred by § 12-548. Midland filed its complaint on August 11, 2015, within six years of either date.[3]

¶13 The Fungs also maintain that "[a]t a minimum this case should be remanded for a hearing on the amount of damages"

[3] Because we have reached this conclusion, we need not address the Fungs's additional argument that "[p]artial [p]ayment did not renew the debt pursuant to A.R.S. § 12-508." However, this court has held that "part payment alone cannot evidence an acknowledgment of a debt barred by the statute of limitations." *Cheatham v. Sahuaro Collection Serv., Inc.*, 118 Ariz. 452, 455, 577 P.2d 738, 741 (App. 1978).

because Midland must "prove the amount due through evidence other than its billing statements or its electronic records of account." They rely on A.R.S. § 44-7804, which provides as follows:

> In an uncontested court action in this state a creditor may establish the amount of the debt that is owed on a credit card account through a copy of the issuer's final billing statement or by the electronic record pursuant to § 44-7007 that is maintained by the issuer and that represents the amount owed. In contested actions the court shall weigh the evidence of the parties as required by law.

We disagree with the Fungs for two reasons.

¶14 First, nothing within the plain language of § 44-7804 requires a trial court to conduct a hearing before determining the amount of a credit-card debt. *See Stambaugh*, 240 Ariz. 354, ¶ 6, 379 P.3d at 252. And we will not read such a requirement into the statute. *See Cicoria*, 222 Ariz. 428, ¶ 15, 215 P.3d at 405.

¶15 Second, even if we treat this as a contested action, as both parties suggest it is, the only evidence of the amount of the debt presented to the trial court was the credit-card statements. But in response to the motion for summary judgment, the Fungs disputed they owed the debt only on the basis that "the statute of limitations has run," asserting they "owe [Midland] nothing." The Fungs did not challenge, much less offer evidence of, the amount due. Consequently, the only evidence of the amount of the debt consisted of the statements previously offered by Midland. Indeed, the Fungs claimed that, after a "due and diligent search of all their records," they were unable to locate any information on this credit-card account, "all of said records having been lost over 2 years ago." And, on appeal, they do not suggest that they had available any different evidence to present. Without any controverting evidence, the court did not err in relying on the statements to establish the amount of the debt.

¶16 In sum, Midland offered undisputed evidence that the Fungs had a credit-card account with Bank of America, Midland's predecessor in interest, made charges against the account, and failed to make any monthly payments after September 2010. *See Watkins*, 239 Ariz. 168, ¶ 7, 367 P.3d at 74. The Fungs disputed the amount of the debt but only on the basis that the statute of limitations barred the action and precluded recovery. However, Midland's complaint was timely filed within the six-year statute of limitations in § 12-548, and the Fungs's argument fails. Because there were no genuine issues of material fact or errors in the application of the law, the trial court did not err in granting summary judgment. *See Preston*, 238 Ariz. 124, ¶ 9, 357 P.3d at 164.

Disposition

¶17 For the foregoing reasons, we affirm.