IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

BANK OF AMERICA, N.A.,
Plaintiff/Appellee,

v.

MARK S. CORNELIUSSEN,
Defendant/Appellant.

No. 2 CA-CV 2021-0029
Filed October 26, 2021

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NOT FOR PUBLICATION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. C20200374
The Honorable D. Douglas Metcalf, Judge

AFFIRMED

COUNSEL

The Moore Law Group APC, Phoenix
By Darren Tallman, Nicolena Milicevic, and Devin Philip Izenberg
Counsel for Plaintiff/Appellee

McCarthy Law PLC, Scottsdale
By Joseph Panvini
Counsel for Defendant/Appellant

MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Espinosa and Judge Eckerstrom concurred.

S T A R I N G, Vice Chief Judge:

¶1 Mark Corneliussen appeals from the trial court's grant of summary judgment in favor of Bank of America in this action involving recovery of an unpaid credit card balance. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In 2011, Bank of America issued a credit card to Corneliussen, who made purchases and payments on the account until late 2018. In January 2020, Bank of America sued him to recover an unpaid balance of $33,088.17. In response, Corneliussen asserted various affirmative defenses, including that the bank had failed to provide him with account-opening disclosures as required under § 1637(a) of the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667f, and therefore he was entitled to "recoupment or set-off in damages and attorney's fees."

¶3 Bank of America subsequently moved for summary judgment and, in response, Corneliussen argued there was a genuine dispute of material fact as to whether the bank had provided him with the required disclosures under § 1637(a). Supporting his argument, he submitted an affidavit attesting that he did "not recall ever receiving a credit card agreement from Bank of America containing any terms and conditions" and that the bank had not "provide[d him] with any terms or conditions for use of a credit card." The trial court granted the bank's motion, stating that although TILA "allows . . . credit card user[s] to assert a set-off or recoupment defense for any finance charges," Corneliussen had "not come forward with any facts whatsoever to establish" a TILA violation.

¶4 Corneliussen moved for reconsideration, arguing that because he had submitted an affidavit alleging Bank of America failed to provide him with opening disclosures, the trial court had erred in granting the bank's motion for summary judgment. The court acknowledged that Corneliussen's "statement about not receiving an opening disclosure is

enough to establish a contested issue of material fact as to whether [Bank of America] violated 15 U.S.C. § 1637(a), especially because [the bank] did not come forward with the actual disclosure or evidence that [Corneliussen] received it." But the court denied his motion, concluding that because Corneliussen had not "come forward with any facts" establishing he was "entitled to actual damages under 15 U.S.C. § 1640(a)(1), or statutory damages under § 1640(a)(2)(A)," he could not "prove a set-off to [the bank]'s computation of the amount due for failing to pay the outstanding credit card debt." The court proceeded to enter final judgment in favor of Bank of America for the full amount of Corneliussen's outstanding debt, plus costs.

¶5 Corneliussen filed another motion for reconsideration, which the trial court construed as a motion for new trial under Rule 59, Ariz. R. Civ. P. In his motion, he asserted that "[d]amages under TILA are set by statute, at 'twice the amount of any finance charge in connection with the transaction, with a minimum of $500 and a maximum of $5,000.'" § 1640(a)(2)(A)(iii). And, Corneliussen continued, because Bank of America had submitted account statements showing it charged him "at least $7,950.87 in finance charges," the "maximum cap on damages would apply and, if the trier of fact determines that [the bank] violated the TILA, [he] would be entitled to $5,000.00 in offset."

¶6 In response, Bank of America asserted it had "provide[d] an Agreement and mandatory account disclosures" to Corneliussen and produced "the initial Credit Card Agreement from 2011 and various amendments from 2012 through 2019," claiming the documents had been disclosed to defense counsel in June 2020 pursuant to Rule 26.1, Ariz. R. Civ. P. The trial court denied Corneliussen's motion, stating the "undisputed material facts show that [Bank of America] did not violate [TILA] because it provided proper disclosure of the terms of the credit card agreement" to Corneliussen, and therefore "there is no potential set-off to the amount [he] owes" the bank. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶7 On appeal, Corneliussen argues that because he "presented evidence creating a genuine dispute of material fact" as to whether Bank of America had provided him with the requisite account-opening disclosures under TILA and the trial court failed "to view the facts on the record in the light most favorable" to him as the nonmoving party, it therefore erred in granting summary judgment in favor of the bank. We review the court's

grant of summary judgment de novo. *See BMO Harris Bank, N.A. v. Wildwood Creek Ranch, LLC*, 236 Ariz. 363, ¶ 7 (2015). And, we construe the facts and all reasonable inferences in the light most favorable to Corneliussen. *See Engler v. Gulf Interstate Eng'g, Inc.*, 230 Ariz. 55, ¶ 8 (2012).

¶8 Summary judgment is proper where "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). When confronted with a factually supported motion for summary judgment, the responding party "has the burden of presenting evidence that justifies a trial." *United Servs. Auto. Ass'n v. DeValencia*, 190 Ariz. 436, 441 (App. 1997). Such evidence may not merely recite the allegations in the pleadings but, instead, must show "specific facts" demonstrating "a genuine issue for trial." *McCleary v. Tripodi*, 243 Ariz. 197, ¶ 21 (App. 2017) (quoting *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, ¶ 15 (App. 2000)).

¶9 Corneliussen argues the trial court erred "in granting Bank of America summary judgment instead of setting for trial the issue of whether [he] was entitled to recoupment or setoff based on [the bank]'s failure to comply with" TILA. Specifically, he contends "Bank of America provided no testimony that the document it produced was sent to [him], [or] when, how, or by whom," and even if the bank had produced evidence that it sent the disclosure, his "countervailing testimony that the disclosure was not sent still creates a genuine dispute as to that fact." (Citation omitted.) And, Corneliussen asserts, because the only evidence presented as to whether the disclosure had been sent was his testimony that the bank never sent it, "a jury could reasonably conclude that Bank of America did not send him the disclosures."

¶10 Bank of America counters that Corneliussen is liable for the balance owed under Arizona's credit card statutes and "general account stated principles." Further, it argues he "has not contested in any meaningful way the material facts listed in [its] Motion for Summary Judgment" and instead "continuously relies on an unfounded assertion that [the bank] is in violation of TILA, despite various Court rulings and compelling evidence" indicating otherwise. Specifically, it asserts that because Corneliussen's "affidavit lacks an evidentiary basis, and does not create a genuine issue, there are no uncontested material facts that require a Court's assessment at trial." Moreover, the bank contends, Corneliussen "does not dispute use of the Account, the contents of the Account Application, . . . [or] any specific account activity reflected in th[e] Statements" and "does not present any plausible explanation as to why he

wouldn't have been in receipt of the documents mailed to his address." Finally, it argues that "even if a TILA violation occurred[,] any recovery would be barred by the applicable statute of limitations" because Corneliussen opened his Bank of America account in 2011 and, under § 1640(e), his cause of action would have expired in 2012.

¶11 TILA was enacted in part to strengthen the "informed use of credit" and "protect the consumer against inaccurate and unfair credit billing and credit card practices." § 1601(a). It provides that "[b]efore opening any account under an open end consumer credit plan," creditors are required to make certain disclosures to credit card applicants, including the "conditions under which a finance charge may be imposed," the method of determining the balance and finance charge, and the identification of any other charges that may be imposed. § 1637(a); *see also* 12 C.F.R. § 1026.5(b)(1)(i) ("creditor shall furnish account-opening disclosures . . . before the first transaction is made under the plan"). Further, § 1640 authorizes civil liability in the form of actual damages, statutory damages, costs, and attorney fees for lenders who violate the disclosure requirements of TILA. *See generally Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412-13 (1998) (discussing remedies provided by TILA). Such a violation, however, does not create a bar to collection of a credit card debt incurred by the credit card user. *See Seidner v. Citibank (S.D.) N.A.*, 201 S.W.3d 332, 336-38 (Tex. Ct. App. 2006). Rather, § 1640 allows the credit card user to assert a set-off or recoupment defense for actual damages or finance charges. *Id.*; § 1640(a)(1), (2)(A)(iii).

¶12 Section 1640(a)(1) provides, in pertinent part, that when a credit card issuer fails to abide by TILA, a consumer may recover "any actual damage sustained . . . as a result of the [disclosure] failure." Additionally, § 1640(a)(2)(A)(iii) creates liability for twice the amount of finance charges levied on the cardholder, with a minimum recovery of $500 and maximum of $5,000. Such claims are generally subject to a one-year statute of limitations. *See* § 1640(e). However, TILA contains its own savings clause, which states as follows:

> This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

Id. Thus, TILA allows a person in a collection case to bring an otherwise time-barred claim if the person does so as a matter of defense by recoupment or set-off, unless the state's own law provides otherwise.[1] *Id.* And, "[u]nder both federal and Arizona law, a statute of limitations is not a bar to a recoupment defense." *Aetna Fin. Co. v. Pasquali*, 128 Ariz. 471, 473 (App. 1981). Indeed, "[a] recoupment defense survives as long as [a] plaintiff's claim can be asserted, even though [a] defendant's claim would be barred by the statute of limitations if brought as an affirmative action." *Id.*

¶13 Here, although Corneliussen may have been entitled to assert that Bank of America violated TILA's disclosure requirements as an affirmative defense in the debt-collection action, in order to defeat the bank's motion for summary judgment, "it was necessary for [Corneliussen] to produce appropriate proof of [his] affirmative defense." *Ickes v. Bache Halsey Stuart Shields, Inc.*, 133 Ariz. 300, 302 (App. 1982). And, although his affidavit may have been sufficient to raise a genuine issue of fact as to whether the bank violated § 1637(a), *see Pinder v. Lomas & Nettleton Co.*, 83 B.R. 905, 913 (Bankr. E.D. Pa. 1988) ("unrebutted testimony of a debtor may be sufficient to support a finding that the required TILA disclosures were not given, even where a disclosure statement is produced"), he fails to address the issue of damages, which is reflected by the trial court's conclusion that summary judgment was nevertheless appropriate based on his failure to show he was "entitled to actual damages under 15 U.S.C. § 1640(a)(1), or statutory damages under § 1640(a)(2)(A)." It is not incumbent upon this court to develop a party's arguments. *Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143 (App. 1987).

¶14 Notably, Corneliussen first argued he "would be entitled to $5,000.00 in offset" in his second motion for reconsideration, which the trial court treated as a motion for new trial. *See Conant v. Whitney*, 190 Ariz. 290, 293-94 (App. 1997) (arguments raised for the first time in motion for new trial are waived). And, he does not argue in his opening brief that the court erred in denying his motion for new trial. *See* Ariz. R. Civ. App. P.

[1] "Recoupment is a defense growing out of the transaction constituting the plaintiff's claim for relief" and "is available to reduce or satisfy the plaintiff's claim, but permits no affirmative relief." *Granmo v. Superior Court*, 122 Ariz. 510, 512 (App. 1979). In contrast, a counterclaim or set-off "is a cause of action in favor of the defendant on which he might have brought a separate action against the plaintiff and recovered a judgment." *Id.*

13(a)(7)(A) (opening brief must contain argument with "[a]ppellant's contentions concerning each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record" relied upon). Thus, on the record before us, Corneliussen fails to establish the court erred in granting summary judgment in favor of Bank of America.

Disposition

¶15 For the foregoing reasons, we affirm. As the prevailing party on appeal, Bank of America is entitled to recover its taxable costs upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* A.R.S. § 12-341.