

DIVISION II

CA07-1165

May 14, 2008

OZARK CAPITAL CORPORATION  
APPELLANT

APPEAL FROM BENTON COUNTY  
CIRCUIT COURT, CIVIL DIVISION  
[NO. CV-06-634-2]

V.

HON. DAVID CLINGER,  
JUDGE

KIMBERLY K. ROBERSON  
APPELLEE

AFFIRMED

Appellant, Ozark Capital Corporation, filed a complaint alleging that appellee, Kimberly K. Roberson, received a credit card made charges, and had a past-due unpaid balance. Appellant further alleged that it had been assigned the account by the credit card issuer and prayed that it be granted judgment for the balance due, costs, pre-judgment interest, attorney's fees, and post-judgment interest. At trial, the court granted appellee's motion to dismiss on the grounds that appellant presented no evidence that it was the assignee of the credit card account. Appellant argues on appeal that the trial court erred in granting appellee's motion to dismiss. Appellant also argues that the trial court erred in refusing to admit appellant's business records affidavit establishing that appellee had a contractual agreement with the credit card issuer and the amount of the debt, and in refusing to allow appellant to call appellee as a witness. We affirm.

Appellant first argues that the trial court erred in granting appellee's motion to dismiss because appellee failed to state specific grounds therefor as required by Ark. R. Civ. P. 50(a). We do not agree. Although it is true that Rule 50 requires that a motion for a directed verdict or dismissal state the specific grounds on which it is based, the purpose of the rule is to ensure that the trial court is sufficiently apprised of the particular proof that is missing so as to permit the court to decide the motion or to allow the opposing party an opportunity to provide the missing proof if justice so requires. See *Ouachita Wilderness Institute v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997); *Phillips v. State*, 361 Ark. 1, 203 S.W.3d 630 (2005). Here, however, appellant admitted to the trial judge that, besides evidence that had just been ruled inadmissible, it had no proof whatsoever to offer. Immediately thereafter, appellee moved for dismissal, and that motion was granted. Under these circumstances, where appellant stated that it had no evidence to offer, it was apparent to all that the proof was completely deficient in all respects, and appellee's motion was adequate.

Furthermore, we note that this is a case where the motion was granted rather than denied. Therefore, the rule that failure to state specific grounds for a motion to dismiss waives any argument on appeal concerning the sufficiency of the evidence has no application because appellee, who prevailed below, has made no such argument on appeal. Instead, the adequacy of appellee's motion for dismissal is being raised by *appellant* for the first time on appeal, and, as such, provides no ground for reversal. See *Hackelton v. Malloy*, 364 Ark. 469, 221 S.W.3d 353 (2006).

We need not address either of appellant's remaining arguments because, even assuming *arguendo* that the trial court did err in excluding the affidavit and refusing to allow appellant to call appellee as a witness, appellant has failed to demonstrate prejudice. In order to establish a cause of action for breach of contract, appellant was required to present, *inter alia*, evidence of a valid and enforceable contract between the *plaintiff* and defendant. *Rabalaia v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985). The proffered business records affidavit contained no evidence of the alleged assignment of the issuer's account to appellant, nor is there any reason to believe that appellee would have any knowledge of the alleged assignment.

Unless the defendant admits the assignment under which the plaintiff claims, the plaintiff has the burden of proving that there was a valid assignment in order to show that it has a cause of action. *Beal Bank v. Thornton*, 70 Ark. App. 336, 19 S.W.3d 48 (2000). This is not a question of standing or of a defense to an action, but is instead a necessary element of appellant's cause of action. We hold that, in the absence of any evidence of the alleged assignment,<sup>1</sup> the trial court did not err in directing a verdict in favor of appellee.

Affirmed.

ROBBINS and MARSHALL, JJ., agree.

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<sup>1</sup>Appellant made no proffer of the testimony that it hoped to obtain from appellee and, given that she denied appellant's allegation of assignment in her answer, it would be speculative in the extreme for us to assume that she would have admitted the assignment had she been required to testify.