IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

DISCOVER BANK, Issuer of the Discover Card, Respondent, v. LESA M. BUTLER and DOE I, and their marital community composed thereof, Appellants.	)	No. 65069-6-I (Consolidated w/ No. 66060-8-I) UNPUBLISHED OPINION FILED: May 31, 2011

Spearman, J. — Lesa Butler appeals a superior court order granting Discover Bank's motion for summary judgment based on alleged credit card debt. In a consolidated appeal arising out of the same litigation, Butler also challenges the trial court's ruling holding her responsible for paying for the cost of the transcript of those proceedings and attorney fees after she filed and attempted to rely on an inaccurate narrative report of proceedings. Discover Bank provided adequate proof of Butler's assent to the terms of her credit card agreement, and the trial court did not err in considering the materials Discover Bank provided in support of its motion or in rejecting Butler's other arguments. Butler likewise does not establish the trial court erred in rejecting her proposed narrative

report of proceedings and in awarding Discover Bank its resulting costs and fees. We affirm.

FACTS

According to Discover Bank, Lesa Butler opened a Discover Platinum Card credit card account on or about January 21, 2002. After Butler defaulted on the account, Discover Bank served a complaint on Butler seeking a judgment for the unpaid principal sum of $11,041.73 together with attorney fees pursuant to the credit card agreement. Butler responded with a pro se answer in which she admitted she had entered into an agreement with Discover Bank, but stated that she found the complaint's reference to a credit card agreement "vague, ambiguous and unintelligible" and argued that the complaint provided no proof that her account was the same account as the debt alleged in the complaint. Discover Bank thereafter filed the collection action.

Discover Bank filed a motion for summary judgment on October 14, 2009, supported by an affidavit of Robert Adkins. Attached to the Adkins affidavit was a copy of a credit card acceptance form, signed by Butler, together with a card member agreement and account statements dating from May 2006 through May 2009.

Butler filed responses to Discover Bank's motion in November 2009 and again in January 2010. Discover Bank filed a reply on January 6, 2010. The trial court heard and granted Discover Bank's motion for summary judgment on January 11, 2010. Butler filed a motion to reconsider. The court heard oral argument on the motion and denied it on February 22, 2010. Butler filed a notice of appeal on March 18, 2010.

On June 18, 2010, after Butler filed her notice of appeal, she filed with the trial

court her proposed narrative report of proceedings. On June 28, 2010, Discover Bank filed an objection to the narrative, challenging its basic accuracy because it misidentified counsel who appeared at the hearing and included what appeared to be excerpts from pleadings Butler had filed rather than statements and arguments that Butler had actually made to the court at the time of the summary judgment and reconsideration hearings. Discover Bank requested that the court direct that verbatim reports of the proceedings be used in place of the proposed narrative, and that Butler be required to pay the cost of the verbatim reports together with additional attorney fees.

Butler agreed to the use of the verbatim reports, but argued that she should not be required to pay for their production since Discover Bank had not timely served its objection on Butler under RAP 9.5(c). Discover Bank replied arguing that service had been timely. The trial court initially heard argument and testimony regarding the objection on July 12, 2010, then continued the matter to July 19. At that time the court sustained Discover Bank's objection. The court ordered that Butler pay the cost of the production of the verbatim reports in the amount of $176 and pay Discover Bank reasonable attorney fees in the amount of $750. Butler filed a motion for reconsideration of that order, which the court denied on August 23, 2010. Butler thereafter filed a separate appeal of the order and denial of reconsideration. A commissioner of this court ordered consolidation of the two appeals.

ANALYSIS

A motion for summary judgment may be granted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. CR

56(c). "A material fact is one that affects the outcome of the litigation." Owen v. Burlington N. Santa Fe R.R. Co., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005) (quoting Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980)). When considering a summary judgment motion, the court construes all facts and reasonable inferences in the light most favorable to the non-moving party. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). "[T]he moving party bears the burden of showing the absence of a material issue of fact." Swinehart v. City of Spokane, 145 Wn. App. 836, 844, 187 P.3d 345 (2008) (citing Redding v. Virginia Mason Med. Ctr., 75 Wn. App. 424, 426, 878 P.2d 483 (1994)). After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclose that a genuine issue of material fact exists. Seven Gables Corp. v. MGM/UA Ent. Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. Khung Thi Lam v. Global Med. Sys. Inc., P.S., 127 Wn. App. 657, 661 n.4, 111 P.3d 1258 (2005).

Butler first contends that the trial court erred by considering the Adkins affidavit and the attached account records because they constituted inadmissible hearsay. The trial court admitted the records over Butler's objection at the hearing as business records. We review de novo a trial court's evidentiary rulings made in conjunction with a summary judgment motion. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

CR 56(e) provides, in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in

> evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.
>
> In addition, RCW 5.45.020 provides:
>
> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Adkins stated in his declaration that he is an employee of DFS Services LLC, which is the servicing agent of Discover Bank. His position includes responsibility for managing and overseeing contested Discover Bank accounts. He recited that he made his affidavit on the basis of his personal knowledge and review of the records maintained by Discover Bank with respect to the account in issue. He further testified that all such records were maintained in the regular course of business at or near the time of the recorded events and that he was a designated agent and custodian of those records. Given this testimony, the trial court properly considered Adkins' affidavit and did not err by considering the attachments as business records. See Discover Bank v. Bridges, 154 Wn. App 722, 726, 226 P.3d 191 (2010).

Repeating an argument she raised for the first time in her motion to reconsider, Butler nonetheless argues that the trial court should have followed In re Vinhee, 336 B.R. 437 (9th Cir. BAP 2005) in holding the Adkins materials inadmissible. In Vinhee, the Bankruptcy Appellate Panel for the Ninth Circuit upheld a federal district court trial ruling

excluding electronic records under Federal Rule of Evidence 803(6) on authentication grounds. Butler, however, has cited no Washington authority adopting the Vinhee approach under the applicable Washington statutes and rules of evidence. See State v. Copeland, 130 Wn. 2d 244, 258, 922 P.2d 1304 (1996) (Washington interprets its rules independently of the federal courts' interpretation of federal rules, even when the rule is identical to the state rule). The trial court's ruling comported with existing Washington law regarding the admissibility of business records and we find no basis for creating new requirements in addition to those rules here.

Next, Butler cites Discover Bank v. Bridges, 154 Wn. App. at 727-28, in support of her claim that Discover Bank failed to provide sufficient proof of an enforceable credit card agreement in this case. This contention clearly fails because, unlike in Bridges, Discover Bank here provided a copy of the credit card acceptance form personally signed by Butler. The deficiency in Bridges, which was the absence of any personalized acknowledgment of an agreement, is not present in this case. See Bridges, 154 Wn. App. at 727-28, see also Citibank South Dakota, N.A. v. Ryan, 160 Wn. App. 286, 247 P.3d 778, 780-81 (2011) (likewise requiring proof of personal acknowledgment by the defendant).[1]

Butler alternatively contends that even if there was no question that she owed Discover Bank for an unpaid balance on her credit card, there was still a disputed question of material fact as to the amount. For this argument she references the last two of the account statements contained in Discover Bank's summary judgment materials.

[1] Butler also repeats arguments she raised in the trial court related to her claims that her opposing counsels were actually assignees of the Discover Bank debt and were operating unlawfully as unlicensed debt collectors. These arguments are all based on speculation and clearly fail as the record shows that counsel was simply representing Discover Bank as counsel.

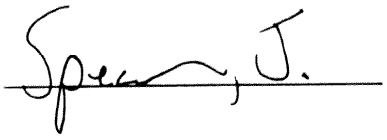
Because both of those bills were issued in the same month of May 2009, she argues that there was a fact question as to the accuracy of the amount owing on the card. We disagree.

Examination of the actual statements shows that Butler had not made a payment on the card since 2008. Both of the May 2009 bills referenced the same total amount due and owing, $11, 041.73. The only difference was the first of the bills had given Butler until June 18, 2009, to make a minimum payment of $1,999 to avoid default, while the later one extended the date to June 25, but adjusted the minimum payment Discover Bank would accept to $2,200. Butler never claimed to have made any attempt to pay either amount, and, as noted above, did not dispute that she owed Discover Bank for a deficiency. The relevant question is whether Discover Bank provided sufficient evidence to sustain its initial burden of showing a lack of disputed facts that Butler owed the total $11,041.73 amount. Our de novo review of the record shows that it did.

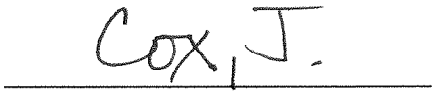
Finally, we also reject the challenge in Butler's consolidated appeal to the trial court's ruling regarding the cost of the transcript and attorney fees. It is well established that an appellant bears the burden of providing a sufficient record to review the issues raised on appeal. State v. Garcia, 45 Wn. App. 132, 140, 724 P.2d 412 (1986). Butler argues that she relies only on the clerk's papers relating to the trial court hearings regarding her proposed narrative report of the summary judgment proceedings. But the clerk's papers reflect that there was a factual dispute between the parties about whether Discover Bank timely served its objection on Butler and do not disclose the basis for the trial court's resolution of that dispute.[2]

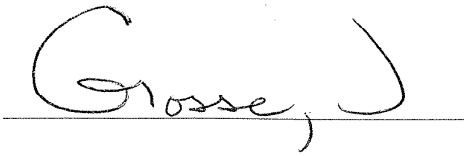
Moreover, even if, as Butler contends, it appeared that the service of Discover Bank's objection to her proposed narrative report of proceedings was untimely under RAP 9.5(c), that would not necessarily be dispositive of the question. The trial court would have had the discretionary authority to extend the time allowed for such service under the court rules. See CR 6 (allowing for enlargement of time under the superior court rules); RAP 18.8(a) (likewise allowing for enlargement of time under the appellate rules). Furthermore, regardless of the rules, the trial judge has inherent authority to settle the record for appeal. State v. Arnold, 81 Wn. App. 379, 383-84, 914 P.2d 762 (1996). Accordingly, Butler has not established that the trial court erred in rejecting Butler's inadequate narrative report of proceedings or in awarding Discover Bank its resulting costs and attorney fees.

We affirm the trial court in all respects.



WE CONCUR:





[2] According to the notes of a delivery agent, the address Butler had given the court as her actual residence had a mailbox that had been sealed shut and there was no house at that location. Butler apparently disputed the lack of a residence at that location. It appears that after that hearing, however, Butler began using a post office box as her official address for purposes of the litigation.