IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

DISCOVER BANK, ISSUER OF THE DISCOVER CARD, Respondent, v. RICHARD S. RODRIQUEZ and DOE 1, and their marital community composed thereof, Appellant.	)	No. 30581-3-III Consolidated with No. 30582-1-III
_____	)	UNPUBLISHED OPINION
DISCOVER BANK, ISSUER OF THE DISCOVER CARD, Respondent, v. SHONNA L. RODRIQUEZ and DOE 1, and their marital community composed thereof, Appellant.	)	

Sweeney, J. — Affidavits supporting a motion for summary judgment must set forth admissible evidence. CR 56(e). After the Rodriguezes stopped making their monthly Discover Card payments, Discover sued for breach of contract and moved for summary judgment. It supported its motions with the affidavits of a DB Servicing Corporation employee. The court granted summary judgment in Discover's favor. On appeal, the Rodriguezes argue that evidence in the affidavits was inadmissible because the affidavits failed to authenticate the evidence and satisfy the business records exception to the hearsay rule. We conclude that the affidavit satisfied these requirements and that the evidence was properly admitted. We also conclude that no genuine issues of material fact prevented summary judgment. We therefore affirm summary judgment in favor of Discover Card.

FACTS

Richard and Shonna Rodriguez each had their own Discover Bank credit card. They each promised to pay "for all purchases, cash advances and balance transfers including applicable Finance Charges and other charges or fees incurred" in their "cardmember agreements." Clerk's Papers (CP) at RR 49, SR 13.[1] Both Rodriguezes

[1] Because there are records from two different cases here, citations to the trial record in Mr. Rodriguez's case are noted by "RR" and citations to Ms. Rodriguez's case are noted by "SR."

eventually stopped making their monthly payments.

Discover sued them separately and filed motions for summary judgment. In both cases, Discover supported its motions with Patrick Sayers' affidavits. He swore in both affidavits,

> I am an account manager in the Attorney Placement Department for DB Servicing Corporation, the servicing affiliate of DISCOVER BANK, ISSUER OF THE DISCOVER CARD . . . . I am responsible for managing and overseeing the Discover accounts that have resulted in contested litigation. Included within the scope of my responsibilities includes the performance of collection and recovery services. I make this affidavit on the basis of my personal knowledge and a review of the records maintained by Discover with respect to the account at issue. All such records are maintained in the regular course of business at or near the time of the events recorded. I am a Designated Agent and a Custodian of the records.

CP RR at 41, SR at 7.

In Mr. Rodriguez's case, Mr. Sayers swore that Mr. Rodriguez had not made any payments since July 7, 2009, defaulted under the terms of his agreement, and that his principal balance was $12,966.84. He swore that, "[a]ttached hereto is [a] true and correct copies of the Cardmember Agreement and Application which govern the credit card account at issue, along with periodic statements and evidence of payments on the account." CP RR at 42. He attached a printout of a computer screen showing Mr. Rodriguez's application, as well as copies of a cardmember agreement and monthly statements.

In Ms. Rodriguez's case, Mr. Sayers swore that Ms. Rodriguez had not made any payments since November 2008, defaulted under the terms of her agreement, and that her principal balance was $1,428.89. He swore that, "[a]ttached hereto is [a] true and correct copy of the Cardmember Agreement which governs the credit card account at issue, along with periodic statements and evidence of payments on the account." CP SR at 8. He attached copies of a $35.95 check written by Ms. Rodriguez to Discover, a cardmember agreement, and monthly statements.

The trial court granted Discover's motions for summary judgment. The Rodriguezes each appealed and their appeals were consolidated into this case. They argue that the trial court erred by admitting Mr. Sayers' affidavits and the documents attached.

ANALYSIS

We review all trial court rulings connected with a summary judgment motion, including evidentiary rulings, de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); *see Ensley v. Mollmann*, 155 Wn. App. 744, 752, 230 P.3d 599, *review denied*, 170 Wn.2d 1002 (2010).

I. Mr. Sayers' Affidavit

Affidavits made in support of a summary judgment motion must meet several

requirements. *See* CR 56(e). CR 56(e) requires that they: (1) be made on personal knowledge, (2) set forth such facts as would be admissible in evidence, and (3) show affirmatively that the affiant is competent to testify to what is in the affidavit. CR 56(e); *Discover Bank v. Bridges*, 154 Wn. App. 722, 725-26, 226 P.3d 191 (2010).

A. Hearsay

The Rodriguezes argue that the affidavits and attached records should be excluded as hearsay. They contend that the affidavits contain hearsay because Mr. Sayers does not work for Discover and therefore cannot base his affidavits on personal information.

Hearsay is a statement offered to prove the truth of the matter asserted that is not made by the declarant while testifying at trial. ER 801(c). Hearsay is generally inadmissible. ER 802.

The affidavits here do not contain hearsay for a couple of reasons. First, contrary to the Rodriguezes' contention, Mr. Sayers' statements are not necessarily hearsay because he does not work for Discover. He stated that he works for DB Servicing and that DB Servicing is an affiliate of Discover. Second, he made the affidavits on personal knowledge. He explained that he has reviewed the Rodriguezes' records, and that he made the affidavits on personal knowledge. The court properly admitted the affidavits.

Next, the Rodriguezes contend that the documents attached to Mr. Sayers'

affidavits do not satisfy the business records exception to the hearsay rule. They contend that the affidavits do not establish that Mr. Sayers created the records, was the custodian when the records were created, or had knowledge of the creation.

Business records of regularly conducted activity are an exception to the hearsay rule. *State v. Iverson*, 126 Wn. App. 329, 337, 108 P.3d 799 (2005); RCW 5.45.020. RCW 5.45.020 states,

> 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.

In other words, the custodian of the records or other qualified witness must testify to the (1) record's identity; (2) its mode of preparation; (3) if it was made in the regular course of business; and (4) if it was made at or near the time of the act, condition, or event. RCW 5.45.020. An affidavit that touches upon each of these elements is generally admissible. *See Discover Bank*, 154 Wn. App. at 726 (holding that affidavits that collectively touched upon these elements supported admission business records).

The affidavits here satisfy RCW 5.45.020's requirements. Mr. Sayers states that he is a custodian of records. He identifies the documents: a copy of a check written by Ms. Rodriguez, Mr. Rodriguez's credit card application, cardmember agreements, and

statements showing Rodriguezes' account activity and failure to make payments. He then says that those records are maintained in the regular course of business and were made around the time of the events recorded. The trial court properly admitted these documents under the business records exception to the hearsay rule.

B. Authentication

The Rodriguezes also argue that the affidavits at issue failed to authenticate the attached documents under ER 901.

Documents offered through an affidavit must be authenticated under ER 901 to be admissible. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 746, 87 P.3d 774 (2004). ER 901 requires a prima facie showing that the evidence "is what it purports to be." *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 86, 272 P.3d 865, *review denied*, 174 Wn.2d 1016 (2012). It states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a).

ER 901 illustrates numerous methods with which it may be satisfied. *See* ER 901(b). These methods include "[t]estimony that a matter is what it is claimed to be." ER 901(b). That testimony must be based upon personal knowledge. *Int'l Ultimate, Inc.*,

122 Wn. App. at 747, 750. Reviewing and making copies of original documents does not establish personal knowledge. *Id.* at 750; *see Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 966 P.2d 921 (1998).

The Rodriguezes argue that Mr. Sayers' affidavits do not satisfy ER 901 because they fail to demonstrate Mr. Sayers' personal knowledge of the documents' authenticity. They rely on *Amtruck Factors, a Division of Truck Sales, Inc. v. International Forest Products*, 59 Wn. App. 8, 22-23, 795 P.2d 742 (1990). There, the appellate court held that a witness could not lay "the necessary foundation" for a chart that he created. *Amtruck*, 59 Wn. App. at 23. This was because, although that witness created the chart, he was not involved in determining the figures used in the chart. *Id.* at 22-23. The Rodriguezes suggest that, like the witness in *Amtruck*, Mr. Sayers' prepared documents for litigation, but he has no first-hand knowledge about those documents' authenticity.

Although Mr. Sayers' affidavits do not suggest that he prepared the documents attached, his affidavits show that he had personal knowledge. Unlike the witnesses in *International Ultimate, Inc.*, *Burmeister*, and *Amtruck*, Mr. Sayers swore that his affidavit was made "on the basis of my personal knowledge." CP RR at 41. He then went on to say that the documents attached to his affidavits are "true and correct" copies. CP RR at 42. This information is sufficient to authenticate the documents under ER 901.

II. Summary Judgment

Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). If the moving party submits sufficient evidence, the burden shifts to the nonmoving party, who must rebut the moving party's contentions or show that a genuine issue exists. *Discover Bank*, 154 Wn. App. at 727. The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.* Mere allegations and conclusory statements are insufficient to establish a genuine issue. *Id.* And the nonmoving party cannot rely on speculation or argumentative assertions that genuine issues remain. *Id.*

The Rodriguezes contend that Discover was not entitled to summary judgment because it could not show an absence of genuine issues of material fact without submitting admissible evidence. As discussed above, Discover submitted admissible evidence. The cardmember agreements showed that the Rodriguezes promised to make their monthly payments. The Rodriguezes' monthly statements showed that they broke their promises to pay. Because this evidence showed a breach of contract, the burden

shifted to the Rodriguezes to raise an issue of material fact. They submitted no evidence. The judge, therefore, correctly granted summary judgment.

Finally, the Rodriguezes argue that there is a statute of limitations problem. They reason that, without admissible evidence of a written contract, Discover had to file its complaint within the three-year statute of limitations for unwritten contracts.

The Rodriguezes cannot assert the three year statute of limitations for several reasons. First, they failed to plead it as an affirmative defense. *See* CR 8(c). Second, there is a written contract, so the three year statute of limitations does not apply. And third, Discover's causes of action accrued no more than two years before it filed suit. A statute of limitations does not preclude summary judgment here.

III. Attorney Fees

The Rodriguezes ask for attorney fees and costs under RCW 4.84.330. They are not entitled to attorney fees and costs because they are not the prevailing parties.

We affirm the trial court's decision granting summary judgment in favor of Discover Card.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Sweeney, J.

WE CONCUR:

Siddoway, A.C.J.

Kulik, J.