

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000073-001 DT

05/11/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
T. Melius
Deputy

EQUABLE ASCENT FINANCIAL LLC

ANDREW J WESTLE

v.

JOSE GALLARDO (001)

CLAUDIO E IANNITELLI

MCDOWELL MOUNTAIN JUSTICE
COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2010167909

Defendants Appellants Jose Gallardo and spouse (Defendants) appeal the McDowell Mountain Justice Court's granting Plaintiff summary judgment. Defendant contends the trial court erred. For the reasons stated below, the court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

On March 26, 2010, Plaintiff Appellee (Plaintiff) Equable Ascent Financial, LLC filed a complaint against Defendant alleging Defendant breached his contract by failing to pay for credit extended to him. Plaintiff claimed Defendant owed GE Capital Corporation¹ (GE) certain accounts totaling \$1,954.62 plus interest, court costs, and attorney fees. Plaintiff alleged it is the current owner of these accounts.

Defendant timely answered and alleged that he did not open an account or authorize anyone else to open an account with GE and, although he received invoices from GE, he denied owing any money to them. The parties participated in mediation but were not able to settle their dispute.

On August 17, 2010, Plaintiff submitted a Motion for Summary Judgment claiming Defendant applied for revolving credit from GE and used the credit card to purchase goods including a Select Comfort bed. Plaintiff purchased the account after it became delinquent. Plaintiff's attorney filed an Attorney Affidavit in Support of Plaintiff's Motion for Summary Judgment stating: (1) the Affidavit was based on his personal knowledge; (2) Defendant owed Plaintiff money in the principal amount of \$1,954.62; and (3) Defendant failed to repay this obligation. Plaintiff reiterated the debt in its Statement of Facts in Support of Its Motion for Summary Judgment.

¹ Plaintiff purchased the paper account from GE.

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On September 3, 2010, Defendant filed a Motion To Strike Plaintiff's Motion for Summary Judgment claiming the motion violated Ariz. R. Civ. P., Rule 56(a) as it was filed less than 90 days before trial. Defendant also filed a 'Motion to Strike Plaintiff's Statement of Facts, Plaintiff's Affidavit and Attorney Affidavit in Support of Plaintiff's Motion for Summary Judgment or in the Alternative for Disqualification of Andrew J. Westle, Esq. and Gurstel Chargo PA' on September 16, 2010. Defendant claimed the trial court erred in granting the summary judgment as the factual statement supporting the motion violated Ariz. R. Civ.P., Rule 56(e).

The parties submitted the case on the written record. No transcript or CD was included. This Court has jurisdiction pursuant to ARIZONA CONST. Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUES:

A. Did the Trial Court Err in Granting Summary Judgment When the Alleged Facts Were Supported by the Attorney's Affidavit.

Plaintiff's attorney, Andrew J. Westle, filed an "Affidavit in Support of Plaintiff's Motion for Summary Judgment." In his affidavit, Mr. Westle states that he is both competent to testify about the matters set forth in his affidavit and that his affidavit is "made on personal knowledge" of this matter. He then states (1) Defendant owes Plaintiff the principal sum of \$1,954.62 and (2) Defendant failed to repay his obligation. Mr. Westle, however, does not state the source of his knowledge. Assuming Ms. Westle is representing Plaintiff, as he evidences from the name, address, telephone number and State Bar of Arizona attorney identification number at the top of the pleading,² he is the attorney and should not provide an affidavit of the facts in the case. Rule 42 Rules of Professional Conduct, Ethical Rule 3.7 states:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - 1) the testimony relates to an uncontested issue;
 - 2) the testimony relates to the nature and value of legal services rendered in the case; or
 - 3) disqualification of the lawyer would work substantial hardship on the client.

Mr. Westle did not refer to any of these exceptions in his Affidavit. The Comments to Rule 3.7 illustrate the problems inherent in combining the roles of advocate and witness. Witnesses must testify based on their personal knowledge. Advocates comment and explain the evidence. When an attorney combines these roles, it is unclear to the trier of fact if the statement is to be taken as proof or as analysis. In the case here, it is unclear if the attorney's affidavit is to be proof or advocacy.

² See Maricopa County Local Rules of Superior Court, Rule 2.15.
Docket Code 512

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The Arizona Supreme Court commented on the role of attorney as witness and said the attorney may be disqualified “. . . not because his testimony is incompetent but because of the dangers and prejudice inherent in the practice.” *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99, 102, 624 P.2d 296, 299 (1981). Our Supreme Court continued:

When an attorney persists in acting both as witness and advocate, ordinary procedural safeguards designed to give the parties a full and fair hearing become problematic. For example, the familiar mechanics of question-and-answer interrogation become impossible. The rule excluding witnesses from the courtroom may be invoked, yet the advocate-witness obviously must be allowed to remain. The advocate who testifies places himself in the position of being able to argue his own credibility. This special witness can take the stand, objectively state the facts from personal knowledge, then press home those facts by argument to the jury. Our belief is that an adversary system works best when the roles of the judge, of the attorneys, and of the witnesses are clearly defined. Any mixing of those roles inevitably diminishes the effectiveness of the entire system.

Id. at 128 Ariz. 103, 624 P.2d 296.

This court notes the current situation is of the Plaintiff’s choosing. The Plaintiff chose to support its allegations by using an attorney affidavit and thus placed itself in the position of having a unity of witness and attorney. This court cannot now determine if the trial court granted the attorney’s affidavit greater weight as the attorney is an officer of the court. There is, however, an appearance of impropriety. Here, the affidavit referred to material facts and provided support the trial court used in granting summary judgment. The trial court erred.

B. Was Summary Judgment appropriate when Defendant contested the underlying obligation.

Defendant contested the trial court’s grant of a summary judgment motion and claimed significant procedural errors about the timing of the motion as well as the factual basis supporting the summary judgment. When reviewing appeals from a grant of summary judgment, the appellate court views the facts and reasonable inferences in the light favoring the party against whom judgment was entered. *Airfreight Express Ltd. v. Evergreen Air Ctr. Inc.*, 215 Ariz. 103, 158 P.3d 2332 ¶ 2 (Ct. App. 2007). The court reviews de novo the trial court’s determination about any genuine issues of material fact and the trial court’s application of law. *Airfreight Express Ltd.*, *id.*, at ¶ 19, *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, 965 P.2d 47 ¶ 8 (Ct. App. 1998).

Summary judgment is inappropriate if the salient facts are in controversy. *Orme v. Reeves*, 166 Ariz. 301, 802 P.2d 1000 (1990). Here the essential facts are contested. In its summary judgment motion, Plaintiff maintained—through counsel and through Plaintiff’s counsel’s Affidavit—Defendant owed the debt. Plaintiff based this assertion on Plaintiff’s monthly

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bills. Plaintiff also asserted that Defendant failed to provide any documentation that he disputed the debt. Defendant, in his Answer and, again, in his Response, disputed Plaintiff's assertion that he ever opened an account or requested an extension of credit from Plaintiff. Defendant thus contested his obligation to pay any bill to Plaintiff. These are material facts which go to the heart of the matter. Consequently, this court finds the material facts are in controversy.

This court further determines Plaintiff failed to properly support its summary judgment motion. Ariz. R. Civ. P. Rule 56(e) provides:

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. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Furthermore, Ariz. R. Civ. P. Rule 56(c) requires that the factual statement refer specifically to the portions of the record where the fact may be found.

In this case, Plaintiff's support is limited to (1) its attorney's affidavit which merely restates the allegations in the Complaint and (2) the affidavit of its authorized agent. The attorney states that the debt is "as stated in Plaintiff's complaint" and that the "affidavit is made on personal knowledge of this matter." As stated above, this Court is troubled by Plaintiff's attorney acting as both witness and attorney and this Court cannot determine if the trial court knew the source of the attorney's knowledge or if the attorney had any independent knowledge separate and apart from information he received from his client. In discussing the effect of attorney affidavits on summary judgment motions, our Court of Appeals in *Tilley v. Delci*, 220 Ariz. 233, 204 P.3d 1082 ¶ 9 (Ct. App. 2009) stated:

Ziman's affidavit did not reflect that he had personal knowledge of relevant facts. The "affidavit of an attorney is insufficient under Rule 56(e) except where the facts set out are based upon his personal knowledge."

(Citations omitted). Here, the attorney's affidavit does not refer to a specific portion of the record where the fact can be found. Furthermore, there is a difference between an "allegation" and a "fact." As defined in Black's Law Dictionary,³ an allegation is "Something declared or asserted as a matter of fact, esp. in a legal pleading: a party's formal

³ 9th ed. 2009.

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statement of a factual matter as being true or provable without its having yet been proved.” A fact, however, is “Something that actually exists.”⁴

Plaintiff also supported its summary judgment with an affidavit of one of its authorized agents who stated that “GE Capitol Corporation represented to Plaintiff that it was the valid owner of the account at issue.” This affidavit fails to indicate where this fact may be found.⁵ Furthermore, the summary judgment in this case is not about what GE Capitol may or may not have represented to Plaintiff. Instead, the summary judgment determines the underlying question whether Defendant established an account with GE Capitol. Defendant asserts that he did not establish or create an account and thus places this assertion at issue.

Plaintiff has a heavy burden. *National Bank of Arizona v. Thruston*, 218 Ariz. 112, 180 P.3d 977 ¶ 17 (Ct. App. 2008). To sustain a summary judgment, the moving party must do more than provide conclusory statements. *Id.*, at ¶ 21, 23. “We underscore what our supreme court said in *Orme School*, “[c]onclusory statements will not suffice” *Id.* at ¶ 23. As was stated in *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986):

Of course, a party seeking summary judgment always bears the initial responsibility of informing the trial court of the basis for its motion, and identifying those portions of “the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

Similarly, our Supreme Court stated:

Therefore, most courts have declined to grant summary judgment if either the facts are in dispute (or there is the slightest doubt that they are) or the evidence presented could lead “reasonable minds” to draw different inferences therefrom.

Orme, 166 Ariz. 306, 802 P.2d 1000 (citations omitted).

Defendant does not need to show that he would prevail at trial to defeat a summary judgment motion.

We also point out that summary judgment should not be used as a substitute for jury trials simply because the trial judge may believe the moving party *will* probably win the jury’s verdict, nor even when the trial judge believes the moving party should win the jury’s verdict.

Orme, 166 Ariz. at 310.

⁴ Black’s Law Dictionary, 9th ed. (2009).

⁵ This Affidavit only references sections of Plaintiff’s Complaint. The Complaint contains allegations and may or may not be accurate. Plaintiff has the burden of proving this allegation. It is specious to believe that Plaintiff meets its burden of demonstrating facts by merely referencing its allegation.

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Summary judgment is improper if the material facts are uncertain. In this case, they are. Consequently the trial court erred when it granted Plaintiff summary judgment.

C. Was Summary Judgment Appropriate When the Summary Judgment Was Filed Within 90 Days of the Trial Date.

Defendant contends Plaintiff's summary judgment motion was untimely. Ariz. R. Civ. P. Rule 56(a) mandates that summary judgment motions be filed no later than 90 days prior to the date set for trial. The State Bar Committee Notes accompanying this rule specify:

The amendments to Rule 56(a) and (b), requiring a motion for summary judgment to be filed 90 days prior to the trial date, change the practice of permitting the superior court to adopt local rules setting deadlines for the filing of summary judgment motions.

This note does not refer to the practice in justice courts where the time lines for setting trials may be shorter than those in the superior courts. Plaintiff countered Defendant's claim by arguing trial was scheduled only 47 days after the mediation process ended and it would be impossible for the trial court to hear a motion for summary judgment within the 90 days allowed by Rule 56(a).

A.R.S. § 22-211 states the law governing both the procedure and practice in superior court governs procedure and practice in justice of the peace courts. In this case, neither party specifically briefed whether Rule 56(a) timelines were intended to apply strictly in lower court proceedings. Because neither party adequately addressed this issue and because the court has already determined summary judgment was inappropriate, the court will not grant relief on this claim.

III. CONCLUSION.

Based on the foregoing, this Court concludes the McDowell Mountain Justice Court erred in granting Plaintiff summary judgment.

IT IS THEREFORE ORDERED reversing the judgment of the McDowell Mountain Justice Court.

IT IS FURTHER ORDERED remanding this matter to the McDowell Mountain Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS
JUDICIAL OFFICER OF THE SUPERIOR COURT

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