Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000138-001 DT 06/03/2014

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

CAVALRY S P V, I , L L C

v.

CHRISTINA BROUWER (001)

SITAR J BHATT

CHRISTINA BROUWER
3139 W HONOR CT
ANTHEM AZ 85086

NORTH VALLEY JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No.CC2012–202958.

Defendant-Appellant Christina Brouwer (Defendant) appeals the North Valley Justice Court's determination that Plaintiff's civil action was timely filed. Defendant contends the trial court erred and the statute of limitations had passed. For the reasons stated below, this Court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

On October 16, 2012, Plaintiff-Appellee Cavalry SPC I, LLC (Plaintiff) filed a civil action against Defendant claiming (1) it owned certain credit card accounts it had obtained from Bank of America/FIA Card Services, N.A.—including Defendant's account; and (2) Defendant failed to pay the charges she incurred from the use of her account with Bank of America. Plaintiff alleged Defendant applied for a revolving credit card with Bank of America/FIA Card Services—Plaintiff's predecessor in interest—used the card, and incurred a debt of $9,850.60. Plaintiff alleged a breach of contract claim as well as a claim for an account stated. Plaintiff requested its attorneys' fees as well as costs and interest on the debt.

Defendant responded to this claim and filed her Answer on December 19, 2012. In her Answer, she claimed she did not know what the case was about and did not know if the court had jurisdiction in the matter.

Plaintiff filed a Motion For Summary Judgment and claimed Defendant was liable on the theory of account stated because Defendant never disputed the monthly billing statements Bank of America sent about the account. Plaintiff also claimed Defendant entered into a contract by her use of the credit card and failed to dispute any charge on this account within the 60 day time period allowed by Regulation Z, Subsection 226.13(b)(1) of the Truth in Lending Act, 15 U.S.C. 1666. Plaintiff provided supporting documentation indicating the charge-off date for the account was October 27, 2009 as well as a credit card statement showing a balance due and owing of $9,349.80. This credit card statement was for October 2009, with a payment due date of November 5, 2009. Defendant filed a responsive motion alleging the last pay date for the debt was July 1, 2009, and Plaintiff's suit was untimely as it was not filed within the 3 year statute of limitations for a suit on an open account/account stated. Plaintiff replied (1) the suit was based on an "account stated and breach of contract" claim;[1] and (2) an open account is not the same as the "open account" or "stated account" contemplated by A.R.S. §12–543(2).[2]

The trial court entered Plaintiff's requested Judgment on November 18, 2013. Defendant filed a timely appeal. Plaintiff filed a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ERR BY ENTERING SUMMARY JUDGMENT FOR PLAINTIFF.

Standard of Review

Appellate courts review the granting of a summary judgment motion by (1) giving the appellant the benefit of all reasonable inferences which may be drawn from the record; and (2) viewing the evidence in the light most favorable to the party against whom the summary judgment was entered. Therefore, this Court must view the evidence in the light that most favors Defendant. *State ex rel. Corbin v. Sabel*, 138 Ariz. 253, 255, 674 P.2d 316, 318 (Ct. App. 1983). In addition, this court will only sustain a summary judgment if the record shows there was no genuine dispute as to any material fact and the moving party—Plaintiff—was entitled to judgment as a matter of law. *Chanay v. Chittenden*, 115 Ariz. 32, 38, 563 P.2d 287, 293 (1977). The review is *de novo*. *Strojnik v. Gen. Ins. Co. of Am.*, 201 Ariz. 430, 36 P.3d 1200 ¶ 10 (Ct. App. 2001).

The Statute of Limitations Defense

Defendant predicates her appeal on her contention that Plaintiff's claim was untimely. Defendant did not raise this claim until she filed her responsive motion to Plaintiff's request for summary judgment. Thus, the first question this Court must address is if Defendant timely raised this defense. Rule 116, Justice Court Rules of Civil Procedure (JCRCP) governs responses to a complaint and allows a party to file (1) an answer; or (2) a motion to dismiss the complaint. A motion to dismiss because the complaint does not state a valid claim is subsumed within this

[1] Plaintiff's Reply To Defendant's Response To Plaintiff's Motion For Summary Judgment at p. 2, l. 1.
[2] *Id*. at p. 2, l. 8.

rubric. See JCRCP, Rule 116(a)(2)(iv) allowing for a motion to dismiss the complaint because the complaint does not state a valid claim even if the facts in the complaint are assumed to be true.

The defense of limitations may be waived and courts have found a party waives this defense when it is not properly asserted either in the party's pleading or motion.

> The pleadings and record fail to show that defendant raised the statute of limitations in defending against the plaintiff's action to recover insurance premiums. Unless properly raised the defense of the statute of limitations is waived. Nor can the defendant raise this issue for the first time on appeal.

England v. Valley Nat. Bank of Phoenix, 94 Ariz. 267, 269-70, 383 P.2d 183, 184-85 (1963) (citations omitted). Accord, *Weller v. Weller*, 14 Ariz. App. 42, 48, 480 P.2d 379, 385 (1971) (citations omitted) where the Court of Appeals stated:

> The statute of limitations is an affirmative defense, to be pleaded and proved by the one asserting it. The defendant's answer merely contains a general allegation that the statute of limitations bars the plaintiff's claims for reimbursement. Such allegation is insufficient to raise the question of limitations.

The statute of limitations defense is not preferred. As our Supreme Court stated:

> It is the contention of the petitioner that the statute applies only to payment made after a final determination of the amount. We have repeatedly held that while the defense of the statute of limitations is a legitimate one, it is not favored by the courts, and, where two constructions are possible, the one which gives the longer period of limitations is the one which is to be preferred.

O'Malley v. Sims, 51 Ariz. 155, 165, 75 P.2d 50, 54-55 (1938). The Court of Appeals confirmed this belief in *Floyd v. Donahue*, 186 Ariz. 409, 411, 923 P.2d 875, 877 (Ct. App. 1996) where it held:

> In general, the statute of limitations defense is disfavored; courts prefer to resolve cases on their merits.

JCRCP, Rule 116 (c) addresses the waiver of defenses and states:

> Except for a lack of jurisdiction over the subject matter or discharge in bankruptcy, a defense that might have been presented by a motion under paragraphs (a)(2), (3), or (4) of this rule is waived if it is not made before an answer is filed.

Here, Defendant failed to raise her statute of limitations defense in either a Motion To Dismiss or in her Answer. Defendant waived this claim.

Cause of Action Accrues

Even had the statute of limitations defense not been waived, Plaintiff brought its action within the three year period provided by A.R.S. 12–543 for an open account and definitely within the six year period allowed by A.R.S. 12–548. Plaintiff filed its action on October 16, 2012. Plaintiff asserted the cause of action accrued on October 27, 2009, when the Defendant's account was charged off. In contrast, Defendant asserted Plaintiff's cause of action accrued on July 1, 2009 based on a report by a credit reporting agency, Experion. Defendant failed to provide any support for her position that Experion is used to establish the correct date for establishing when a cause of action accrues. Additionally, the Experion report indicates the account was charged off and was closed but does not specifically state the date the account was charged off. Instead, the document—printed on February 21, 2013,—indicates the payment status and the date the account was last updated. It does not specifically state when the account was charged off. Defendant did not provide any authority indicating if the Experion statement was (1) accurate or reliable; or (2) how, when, or from where Experion obtained its information.

In contrast, as an exhibit to its summary judgment motion, Plaintiff submitted a credit card statement from Bank of America showing a payment due date of November 5, 2009, with a new balance of $9,349.80. This indicates that—at least—until November 5, 2009, Defendant maintained an active credit card account. Because the account was active and Defendant had not defaulted on the account, no cause of action accrued. Our Supreme Court addressed when a cause of action accrues and held:

> As a general matter, a cause of action accrues, and the statute of limitations commences, when one party is able to sue another The traditional construction of that rule has been that the period of limitations begins to run when the act upon which legal action is based took place, even though the plaintiff may be unaware of the facts underlying his or her claim. In an effort, however, to mitigate the harshness that the traditional rule was capable of inflicting on a plaintiff who did not know of the breach, courts have developed an exception. Under the "discovery rule," a plaintiff's cause of action does not accrue until the plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause.

Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am., 182 Ariz. 586, 587–88, 898 P.2d 964, 965–66 (1995) (citations omitted).

Statute of Limitations

In 2011, our Legislature amended A.R.S. 12–548 to include debts based on a credit card. This law was approved by the Governor on April 12, 2011, and became effective 90 days after the Legislature adjourned. As amended, A.R.S. § 12–548 allowed a six year statute of limitations for bringing a credit card action.

> 12–548. Contract in writing for debt; six year limitation; choice of law.
>
> A. An action for debt shall be commenced and prosecuted within six years after the cause of action accrues, and not afterward, if the indebtedness is evidenced by or founded on either of the following:
>
> 1. A contract in writing that is executed in this state.
>
> 2. A credit card as defined in section 13-2101, paragraph 3, subdivision (a).
>
> B. If there is a conflict between another jurisdiction and this state relating to the statute of limitations for a debt action as described in subsection A of this section, this section applies.

The Arizona Supreme Court addressed when statutes of limitations take effect and ruled (1) statutes of limitations are viewed as procedural acts for purposes of retroactivity; and (2) apply to actions instituted after the procedural statute becomes effective. The Supreme Court held:

> Arizona courts have traditionally viewed statutes of limitations as procedural for retroactivity purposes. *See, e.g., Harrelson v. Indus. Comm'n*, 144 Ariz. 369, 372, 697 P.2d 1119, 1123 (App.1984).
>
> Our inquiry today, however, is not guided solely by the judge-made exceptions to the general statutory rule about retroactivity. The legislature has expressly addressed the retroactivity of newly enacted statutes of limitations in A.R.S. § 12–505. That statute, entitled "Effect of statute changing limitation," provides as follows:
>
> A. An action barred by pre-existing law is not revived by amendment of such law enlarging the time in which such action may be commenced.
>
> B. If an action is not barred by pre-existing law, the time fixed in an amendment of such law shall govern the limitation of the action.
>
> C. If an amendment of pre-existing law shortens the time of limitation fixed in the pre-existing law so that an action under pre-existing law would be barred when the amendment takes effect, such action may be brought within one year from the time the new law takes effect, and not afterward.

City of Tucson v. Clear Channel Outdoor, Inc., 209 Ariz. 544, 105 P.3d 1163, ¶ 12 (2005). The Supreme Court continued and held:

> The most reasonable reading of each of the provisions of § 12–505 is that each was meant to apply to suits filed after the effective date of a new statute of limitations and to specify what statute of limitations would now apply. As to claims filed before the effective date of the new statute, absent an express legislative statement to the contrary, the law in effect at the time of filing applies.

Clear Channel Outdoor, Inc., at ¶ 20. This ruling continued the policy expressed by the Supreme Court of the Territory of Arizona in *Crowell v. Davenport*, 11 Ariz. 323, 94 P. 1114 (1908).

> The rule for the construction of new, re-enacted, or amended statutes of limitation applied in some jurisdictions is that, unless a contrary intent be expressed, they are to be given a prospective effect so as to extend the period of time within which suits might be brought on existing causes of action to the full time prescribed by such statutes counting from the time they take effect. This rule in its application to new statutes of limitation has been recognized by us.

Crowell v. Davenport, 11 Ariz. at 326, 94 P. at 1115 (citations omitted). Plaintiff did not file its Complaint until after the 2011 amendment to A.R.S. §12–548 became effective.

Because (1) there was a 6 year statute of limitations in effect at the time Plaintiff filed suit; (2) statutes of limitations are procedural statutes and have prospective effect; (3) the cause of action did not accrue until after November 5, 2009; and (4) Defendant waived her statute of limitations argument by failing to assert this claim in either her Answer or a Motion To Dismiss; this Court finds the trial court did not err when it determined Plaintiff filed a timely action and granted Plaintiff its requested summary judgment.

III. CONCLUSION.

Based on the foregoing, this Court concludes the North Valley Justice Court did not err.

IT IS THEREFORE ORDERED affirming the judgment of the North Valley Justice Court.

IT IS FURTHER ORDERED remanding this matter to the North Valley 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 060320141007

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