

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000505-001 DT

12/18/2012

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT  
J. Eaton  
Deputy

MIDLAND FUNDING

PATRICIO ESQUIVEL

v.

CUONG NGUYEN (001)

CUONG NGUYEN  
7102 W MARYLAND AVE  
GLENDALE AZ 85303

ESTRELLA MOUNTAIN JUSTICE  
COURT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case No. CC2011-144989.**

Defendant-Appellant Nguyen (Defendant) appeals the Estrella Mountain Justice Court's determination granting Plaintiff-Appellee Midland Funding LLC. summary judgment after Defendant failed to respond to Plaintiff's request for summary judgment. Defendant contends the trial court erred and Plaintiff failed to provide sufficient proof to meet its burden of proof. For the reasons stated below, the court reverses the trial court's judgment.

**I. FACTUAL BACKGROUND.**

On July 20, 2011, Plaintiff filed a complaint alleging Defendant entered a contract with Plaintiff's assignor and defaulted on the contract. Plaintiff attached an affidavit from a Minnesota resident—Jeannie Loehrer—asserting she (1) was employed by Plaintiff as a legal specialist; and (2) made her affidavit based on her personal knowledge. She stated Plaintiff was the current owner of and successor to the credit card account Defendant established with Capitol One Bank and Defendant had a balance of \$1,868.93. Ms. Loehrer did not indicate how she acquired her knowledge of Defendant's account. Plaintiff requested the past due balance plus attorneys' fees.

On August 2, 2011, Defendant filed an Answer denying the claim and asserting as defenses (1) his bankruptcy discharge on 11/30/07; (2) failure to state a claim on which relief can be granted; (3) lack of standing; (4) Statute of Frauds; (5) unjust enrichment; and (6) the Plaintiff's failure to provide a copy of the contract, account statements, or purchase receipts. Defendant denied all of the Plaintiff's allegations.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000505-001 DT

12/18/2012

On September 2, 2011, Plaintiff filed a Motion For Summary Judgment and attached a copy of a Capitol One credit card statement for February 13–March 12, 2010, which indicated Defendant was seven payments late on his account. Defendant failed to file any responsive pleading and, on November 30, 2011, the trial court granted the unopposed motion. Thereafter, on December 5, 2011, Defendant filed a motion with the trial court alleging he was (1) ill-advised of the legal process; and (2) challenging Plaintiff for not having met its burden of proof that Defendant owed Plaintiff any debt. On December 22, 2011, Defendant filed a Motion to Dismiss—despite Plaintiff’s successful summary judgment—and alleged (1) Plaintiff failed to state a cause of action against Defendant; (2) Plaintiff lacked standing; (3) unjust enrichment; and (4) Plaintiff failed to prove its claim. The trial court denied Defendant’s Motion to Dismiss on Jan. 9, 2012. That same day the trial court signed a formal judgment for Plaintiff and awarded Plaintiff the principal sum of \$1,868.93, costs of \$212.00, and attorneys’ fees of \$390.00 for a total judgment of \$2,470.93. The trial court also awarded interest on the principal at the rate of 4.25% per year.

Defendant filed a Motion To Vacate Judgment pursuant to the Fair Debt Collection Practices Act alleging (1) the creditor failed to provide him with a written notice of the debt; (2) Ms. Loehrer’s Affidavit violated hearsay rules; (3) Plaintiff did not show how it acquired the debt and therefore was a “fraud on the court”; and (4) Plaintiff violated Rule 17 A.R.C.P. because it brought the action in its own name and not in the name of the prior owner of the credit card debt. Defendant then cited to the Federal Rules for Civil Procedure and asserted the trial court was required to dismiss the claim based on Rule 12(b)(6). The trial court denied this motion

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. ISSUES:

- A. *Did The Trial Court Err By Granting An Unopposed Summary Judgment Motion.*

**Standard of Review.**

Appellate courts review trial court determinations about summary judgment on a *de novo* basis and in the light most favorable to the non-moving party. In *Aranki v. RKP Investments, Inc.*, 194 Ariz. 206, 208, 979 P.2d 534, 536 (Ct. App. 1999) our Court of Appeals stated:

Our standard of review for a grant of summary judgment is *de novo* for both factual and legal determinations. *See Kiley v. Jennings, Strouss & Salmon*, 187 Ariz. 136, 139, 927 P.2d 796, 799 (App.1996). Summary judgment should be granted “if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.” *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000505-001 DT

12/18/2012

(1990). We view the evidence and reasonable inferences in the light most favorable to the non-moving party. See *Thompson v. Better-Bilt Aluminum Products Co., Inc.*, 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992).

Accord, *Hourani v. Benson Hosp.* 211 Ariz. 427, 432, ¶ 13, 122 P.3d 6, 11 ¶ 13, (Ct. App. 2005).

In the current case, Plaintiff presented its summary judgment motion but failed to show there were no facts in controversy. Indeed, Defendant disputed a major fact: whether he was indebted to Plaintiff. Defendant raised this issue in his initial pleading. Therefore, this Court shall review the trial court's granting of summary judgment on the basis of the record and review—*de novo*—whether summary judgment was proper. In so doing, this court notes Plaintiff failed to show either that there were no material facts in controversy or that it was entitled to judgment as a matter of law.

**Motion For Summary Judgment**

The central issue in this case is whether the trial court should have granted Plaintiff's summary judgment motion. Defendant asserted the trial court erred by granting the summary judgment because Plaintiff did not produce sufficient evidence to show (1) there were no material facts in controversy and (2) Plaintiff was entitled to judgment as a matter of law. Defendant contested both points—albeit not in a responsive motion to the summary judgment request—and asserted there were material facts in controversy and Plaintiff was not entitled to judgment as a matter of law.

Defendant contested Plaintiff's factual assertion and argued he had no contract with Plaintiff. To support its claim, Plaintiff alleged a copy of a monthly statement sent by Capitol One. In its summary judgment motion, however, Plaintiff failed to demonstrate it was Capitol One's successor in interest; that it purchased Defendant's debt; or the circumstances for any alleged purchase. To support its underlying complaint Plaintiff offered the affidavit of Jeannie Loehrer who only asserted she was the servicer of the account and that Plaintiff was the current owner. She included no proof for any of her assertions and no statement as to how she acquired personal knowledge of Defendant's account, how the account was purchased, when it was purchased, and any verification of any payment Defendant may have made to Capitol One. The affidavit attached to the Complaint only states it was in "the regular course of business for a person with knowledge of the act or event recorded to make the record or data compilation, or for a person with knowledge to transmit information thereof to be included in such record." This Court notes the statement refers to "a person" but the person is not identified. Nor is there any indication of any steps or checks to make sure the transferred information is or was accurate.

Although Plaintiff correctly states a party should raise claimed deficiencies, the failure to file a responsive motion is not fatal. In *Schwab v. Ames Const.*, 207 Ariz. 56, 59–60, ¶ 15, 83 P.3d 56, 59–60, ¶ 15 (Ct. App. 2004) [citations omitted] the Court of Appeals said:

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000505-001 DT

12/18/2012

A failure to respond to a motion for summary judgment with a written memorandum or opposing affidavits cannot, by itself, entitle the moving party to summary judgment. The trial court must consider the entire record before deciding a summary judgment motion. Rule 56(e) provides that “an adverse party may not rest upon the mere allegations or denials of [its] pleading,” and that if the party does not respond, summary judgment shall be entered against the party “if appropriate.” This is another way of saying that the moving party is entitled to summary judgment if “there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” The burden of showing that no genuine issue of material fact exists rests with the party seeking summary judgment.

The Court of Appeals continued and held that if a moving party’s summary judgment motion fails to show it is entitled to judgment the non-moving party does not need to controvert the motion. *Schwab v. Ames Const., id.*, 207 Ariz. at 60, ¶ 16, 83 P.3d at 60, ¶ 16. Although a party acts “at his peril” when he fails to respond to a motion for summary judgment, *Tilley v. Delci*, 220 Ariz. 233, 236–37 ¶ 11, 204 P.3d 1082, 1085–86, ¶ 11 (Ct. App. 2009) quoting from *Choisser v. State ex rel. Herman*, 12 Ariz. App. 259, 261, 469 P.2d 493, 495 (1970), the Court of Appeals, in *Choisser, id.*, specifically held that the trial court must find summary judgment “is appropriate” and that two prerequisites must be met: (1) there is no genuine dispute as to any material fact and only one inference can be drawn from these facts; and (2) the moving party is entitled to judgment as a matter of law. *Choisser v. State ex rel. Herman, id.*, 12 Ariz. App. at 261, 469 P.2d at 495. In the current case,—and after viewing the facts in the light most favorable to Defendant—Plaintiff failed to show it properly owned the debt or was Capitol One’s successor or assignee. Plaintiff also failed to show the debt was due and owing either at the time Plaintiff allegedly purchased the debt or when Plaintiff sought compensation. Additionally, although Defendant pled a discharge in bankruptcy in his Answer, Plaintiff never addressed this allegation. The Court of Appeals held:

However, where the motion is one for summary judgment there are certain limitations on the exercise of the court's discretion. A failure to respond to the motion with a written memorandum or opposing affidavits cannot, by itself, entitle the movant to a summary judgment. The trial court is required to consider those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file which are brought to the court's attention by the parties. It is true that Rule 56(e), Rules of Civil Procedure, *supra*, states that ‘an adverse party may not rest upon the mere allegations or denials of his pleading’ and that if he does not respond summary judgment shall be entered against him, but only ‘if appropriate.’ Moreover, the required response may be ‘by affidavits or as otherwise provided in this rule.’ There are two prerequisites that must be met

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000505-001 DT

12/18/2012

before entry of summary judgment is appropriate: (1) the record brought to the trial court's attention must show that there is no genuine dispute as to any material fact and that only one inference can be drawn from those undisputed material facts; and (2) that based on the undisputed material facts the moving party is entitled to a judgment as a matter of law.

*Choisser v. State ex rel. Herman, id.*, 12 Ariz. App. at 261, 469 P.2d at 495 [citations omitted].

In *Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, ¶ 23, 180 P.3d 977, 983 ¶ 23 (Ct. App. 2008) the Court of Appeals explained the movant's burden when filing a motion for summary judgment and quoted the following from *Celotex Corp. v. Cattrett*, 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 district court of the basis for its motion, and identifying those portions of the pleadings, depositions, 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.

The Arizona Court of Appeals continued in *In Nat'l Bank of Arizona v. Thruston*, 218 Ariz. at 119, ¶¶ 28–29, 180 P.3d at 984 ¶¶ 28–29 [citations omitted] and held:

To carry its initial burden of production, the Bank was, nevertheless, required to “point out” to the superior court, by reference to relevant evidentiary materials, *see* Ariz. R. Civ. P. 56(c), that the Thrustons had no evidence to support their affirmative defenses. The Bank, however, did not do this. Instead, the Bank argued it was entitled to summary judgment solely because it had presented evidence supporting the necessary elements of its breach and foreclosure claims.<sup>11</sup> But, to meet its burden of production, the Bank had to establish more than the essential elements of its own claims. Because the Bank failed to satisfy its initial burden of production, the Thrustons were not required to come forward with any evidence showing the existence of a genuine issue of material fact.

In summary, the Thrustons bore the ultimate burden of proof at trial on their affirmative defenses; accordingly the Bank was not required to present evidence disproving these defenses when it moved for summary judgment. But, the Bank was, at a minimum, still required to “point out,” by referring to evidence in the record, that insufficient evidence existed to support the Thrustons' affirmative defenses. What the Bank could not do was to ignore the Thrustons' affirmative defenses. Because it did precisely that, the Bank failed to meet its initial burden of production and was not, therefore, entitled to summary judgment.

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SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000505-001 DT

12/18/2012

Similarly, in this case, Plaintiff did little more than state its position when it moved for summary judgment. It ignored Defendant's raised affirmative defenses and produced only a minimal statement of facts indicating (1) a monthly credit card statement from Capitol One; (2) their assertion there were no payments on the account; (3) the amount they claimed was owing on the credit card; and (4) their statement the credit card account included an agreement for Defendant to pay the principal amount plus interest, court costs, and attorneys' fees. These minimal facts do not support a summary judgment motion favoring Plaintiff.

Public policy favors resolution of claims on the merits. As stated in *Walker v. Kendig*, 107 Ariz. 510, 513, 489 P.2d 849, 852 (1971) "the interests of justice are best served by a trial on the merits." Here, the trial court erred by granting Plaintiff summary judgment where there are contested facts in controversy.

*B. Was Defendant's Appeal Untimely.*

Defendant filed several motions in his attempt to vitiate Plaintiff's successful summary judgment. Defendant's last motion—a Motion to Vacate Judgment—was not denied until March 13, 2012. Defendant filed his notice of appeal on March 27, 2012,—14 days later. Rule 4 (a) Superior Court Rules of Appellate Procedure—Civil (SCRAP—Civ.) allows fourteen calendar days within which to file an appeal after the entry of judgment. Because the trial court did not rule on Defendant's final motion until March 13, 2012, Defendant's Notice of Appeal was timely.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Estrella Mountain Justice Court erred in granting Plaintiff's Motion for Summary Judgment.

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

**IT IS FURTHER ORDERED** remanding this matter to the Estrella 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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