

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2013-000510-001 DT

12/20/2013

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

J. Eaton

Deputy

SECURITY CREDIT SERVICES L L C

MARGO SARA ALLEN

v.

TUO WANG (001)

TUO WANG

1316 E LIBRA DR

TEMPE AZ 85283-3131

REMAND DESK-LCA-CCC

UNIVERSITY LAKES JUSTICE COURT

RECORD APPEAL RULING / REMAND

**Lower Court Case No. CC2012–208950RC.**

Plaintiff-Appellant Security Credit Services LLC (Plaintiff) appeals the University Lakes Justice Court's determination denying its claim and awarding judgment to Defendant. Plaintiff contends the trial court erred. For the reasons stated below, this Court affirms the trial court's judgment.

**I. Factual Background.**

On October 23, 2012, Plaintiff filed a complaint alleging Defendant owed money for a credit card debt Defendant allegedly engendered on a credit card issued by Wells Fargo Bank, N.A. Plaintiff alleged Wells Fargo Bank sold and assigned all of its rights on the credit account to Plaintiff. Plaintiff further alleged Defendant owed \$1,824.33 plus interest as well as costs and attorneys' fees. Plaintiff sued on two theories: breach of contract and account stated. Plaintiff claimed Wells Fargo Bank (1) made accurate invoices and statements of account of the transactions on the credit card; (2) Defendant received and accepted these invoices; (3) Defendant did not object to these invoices; (4) Defendant failed to pay the sums due on the account; and (5) Plaintiff was entitled to judgment.

Defendant filed an Answer and made a general denial of Plaintiff's claims. He asserted:

PLEASE TAKE NOTICE, that the Defendant denied all the allegations of the complaints [sic.] Someone has stolen my card and it is a fraudulent charges [sic.].

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Defendant needs time to find the exact facts and need time to wait for inquiries from the Wells Fargo Bank about the situations [sic.].

Defendant will seek the reimbursement for all the fee [sic.] from the Plaintiff relating to this response and further proceedings.

Thereafter Plaintiff filed its disclosure statement on Dec. 21, 2012, and a supplemental JCRCP Rule 121 disclosure statement on April 8, 2013. In its initial disclosure statement Plaintiff listed the “Custodian of Records” as a witness and asserted the name of the witness would be disclosed prior to trial. Plaintiff claimed the custodian of records would testify about the accuracy of the business records pertaining to Defendant’s account, including but not limited to the account’s outstanding balance, the payment history of the account, and the business practices regarding billing. At trial, Plaintiff informed the trial court that Plaintiff disclosed its witness’ identity to Defendant on April 5, 2013.

The trial court set trial for April 17, 2013. Defendant failed to appear at trial. The witness—pursuant to a prior court order—was telephonically present in the courtroom. Because Defendant had not appeared in court, the trial court made a courtesy phone call to him and informed him the trial court would be proceeding with the trial in his absence.<sup>1</sup> The trial court made a specific finding there was notice of the trial date.<sup>2</sup>

The trial court ruled on “housekeeping” motions and denied Plaintiff’s summary judgment motion as untimely.<sup>3</sup> The trial court then discussed the telephonic witness and whether Plaintiff complied with JCRCP, Rule 121, by listing the witness by name, address, and telephone number within 40 days after the Answer was filed.<sup>4</sup> Plaintiff asserted they supplemented their disclosure to list the witness’ identity and the trial court asked Plaintiff’s counsel to provide legal authority allowing them to supplement their disclosure late in the proceedings.<sup>5</sup> Plaintiff’s counsel responded Plaintiff was asking for leave to supplement.<sup>6</sup> The trial court determined Plaintiff failed to comply with JCRCP, Rule 121, and stated that had Plaintiff originally provided the name, address, and telephone number of a witness who later became unavailable it might have allowed a substitution but because (1) no specific witness was timely disclosed; and (2) Defendant was not present and the trial court did not know what Defendant may or may not have wanted to do; the trial court would not allow the witness to testify. The trial court explained the late disclosure was not a fair way to conduct a trial under either Rule 121 JCRCP or Rule 26.1 A.R.C.P as it is well known the custodian of records provides the “heart of the case” in credit card cases.<sup>7</sup> The trial court found that because of its ruling precluding the custodian of records from testifying, the

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<sup>1</sup> Audio Transcript, April 17, 2013, at 3:22:53–3:24:38.

<sup>2</sup> *Id.* at 3:26:02–12.

<sup>3</sup> *Id.* at 3:26:26–3:27:06.

<sup>4</sup> *Id.* at 3:27:21–53.

<sup>5</sup> *Id.* at 3:27:53–3:28:14.

<sup>6</sup> *Id.* at 3:28:14–31.

<sup>7</sup> *Id.* at 3:28:31–3:33:37.

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Plaintiff was unable to present any evidence.<sup>8</sup> The trial court entered Judgment for Defendant on April 17, 2013.<sup>9</sup>

Thereafter, Plaintiff's counsel asked the trial court to strike Defendant's Answer and grant a default because Defendant did not appear at trial.<sup>10</sup> The trial court responded Defendant (1) was not required to appear at trial; (2) had presented a general denial; and (3) denied using the credit card.<sup>11</sup> The trial court continued Plaintiff had not shown Defendant used the account and Defendant claimed identity theft/fraud.<sup>12</sup> Although counsel argued Defendant admitted to the debt, the trial court ruled (1) Defendant had not admitted to the debt; (2) counsel did not present any situation that would allow the trial court to remove Defendant's response; and (3) Plaintiff still needed to prove its case but was unable to do so.<sup>13</sup>

Plaintiff filed a timely appeal. Respondent Tuo Wang failed to file 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 Denying Plaintiff's Witness The Right To Testify.*

Plaintiff claimed the trial court erred when it denied it the right to present its witness' testimony because the identity of the witness was not timely disclosed. This is a discretionary determination on the part of the trial court. As the Arizona Court of Appeals recently stated:

A trial court has broad discretion in ruling on disclosure and discovery matters, and this court will not disturb that ruling absent an abuse of discretion.

*Marquez v. Ortega*, 231 Ariz. 437, 441, 296 P.3d 100, 104 (Ct. App. 2013). The Arizona Supreme Court commented about the role of the trial court in determining compliance with the disclosure rules and stated:

We have encouraged trial courts to take firm, active roles in the application and enforcement of these procedural rules that were specifically designed to curb discovery abuse, excessive cost, and delay. We have pledged to support them if they do. We will not tie their hands by relegating to them the performance of purely ministerial and frequently counterproductive acts.

*Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 287, 896 P.2d 254, 257 (1995). Plaintiff's counsel presented no reason why the custodian of records was not identified at an earlier time. In

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<sup>8</sup> *Id.* at 3:33:37-57.

<sup>9</sup> *Id.* at 3:34:02.

<sup>10</sup> *Id.* at 3:34:03-12.

<sup>11</sup> *Id.* at 3:34:16-3:35:31.

<sup>12</sup> *Id.* at 3:35:31-3:36:07.

<sup>13</sup> *Id.* at 3:36:33-54.

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discussing the failure to timely disclose witnesses, the Arizona Supreme Court also ruled about the mandatory disclosure required by A.R.C. P. Rule 26.1 and commented about inadequate disclosure. The Supreme Court said:

Disclosures such as these do not comply with the rules. Thus, the trial court legitimately looked to Rule 26.1(c), Ariz.R.Civ.P., for guidance. That rule provides:

In addition to any other sanction the court may impose, the court shall exclude at trial any evidence offered by a party that was not timely disclosed as required by this rule, except by leave of court for good cause shown, and no party shall be permitted to examine that party's witness to prove facts other than those identified in the written disclosure to the party's opponents except by leave of court for good cause shown.

It is the trial judge's application of the rule with which we disagree. The purpose of the mandatory exclusionary sanction is to put "teeth" into the disclosure requirements of Rule 26.1(a). The intent is to deter litigants and their counsel from withholding relevant information by precluding its later use at trial. *See* State Bar Committee Comments to Rule 26.1(a), Ariz.R.Civ.P. This sanction was never designed or intended, however, to be just another weapon in the arsenal of those who delight in gamesmanship and like to call it "advocacy."

Under the rule, relief is available upon a showing of good cause.

*Bryan v. Riddel*, 178 Ariz. 472, 475-76, 875 P.2d 131, 134-35 (1994). Here, Plaintiff made no showing of good cause to allow for relief from the strictures of the disclosure rule. JCRCP Rule 121(b) states:

**b. Disclosure of new information.** If a party discovers new or different witnesses, documents, or other information that will be used at trial, the party has a duty to promptly provide to the other parties: (1) a statement containing the additional information or witness information, or (2) copies of the new documents. The duty to make the disclosures required by this rule is a duty that continues until the lawsuit is over. [ARCP 26.1(b)]

Courts in Arizona often refuse to allow litigants to utilize the testimony of witnesses who were not timely disclosed. The Arizona Supreme Court discussed the reason for this harsh rule and explained the rationale emanated from the need to deter litigation by ambush and to put "teeth" into the disclosure requirements. However, the Supreme Court also ruled trial courts have the discretion to (1) weigh and balance the needs for timely disclosure against (2) the court's duty to do justice and not allow harm based on a delay that does not prejudice the opposing party. The Supreme Court held:

We believe the interpretation and application of Rule 26.1(c) should be

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accorded a “common sense” approach similar to that recently espoused in *Bryan v. Riddell*, 178 Ariz. 472, 477, 875 P.2d 131, 136 (1994). Although it is true that “[t]he purpose of the mandatory exclusionary sanction is to put ‘teeth’ into the disclosure requirements of Rule 26.1(a),” *id.* at 476, 875 P.2d at 135, and to deter parties from practicing “litigation by ambush,” it was not meant to be a weapon of destruction in the hands of “win at all costs” litigators. *See* Ariz.R.Civ.P. 26.1 ct. cmt. While we agree with the court of appeals that there is a clear and deliberate distinction between Rules 26.1(c) and (g), *see Allstate*, 178 Ariz. at 615–16, 875 P.2d at 848–49, we cannot subscribe to the view that the former subsection was meant to deprive judges of all discretion to do what may be right and just in particular circumstances. We have encouraged trial courts to take firm, active roles in the application and enforcement of these procedural rules that were specifically designed to curb discovery abuse, excessive cost, and delay. We have pledged to support them if they do. We will not tie their hands by relegating to them the performance of purely ministerial and frequently counterproductive acts.

While the Supreme Court also ruled the trial court may grant permission to use undisclosed evidence at trial, the trial court has the discretion to consider various factors in order to determine if the sanction of witness preclusion is appropriate. The Supreme Court indicated trial courts may consider the provided excuse for failing to disclose as well as the willfulness or inadvertence of the party’s conduct, the prejudice that might result for excluding or allowing the testimony, and the diligence with which the case was prosecuted. In the current case, however, Plaintiff provided no reason for its failure to disclose the identity of its custodian of records and the trial court ruled it could not evaluate the prejudice the late disclosure may have caused Defendant. *Allstate Ins. Co. v. O’Toole*, 182 Ariz. at 287–8, 896 P.2d at 257–8. The Supreme Court continued and held an attempt to disclose witnesses just before trial could establish a more serious concern. The Supreme Court said:

Delay, standing alone, does not necessarily establish prejudice. Every late disclosure will involve some delay, but the relevant question must be whether it is harmful to the opposing party or to the justice system. A slight delay in a case such as this, where the trial date has not yet been set, clearly may be less prejudicial than that resulting from an attempt to disclose new witnesses just before trial. *See, e.g., Jones v. Buchanan*, 177 Ariz. 410, 413, 868 P.2d 993, 996 (Ct.App.1993). Each situation must necessarily be evaluated on its own facts.

*Allstate Ins. Co. v. O’Toole*, 182 Ariz. at 288, 896 P.2d at 258. In the current case, Plaintiff waited until days before trial to disclose the identity of its proposed witness.

Trial courts have the discretion to determine appropriate sanctions for noncompliance with disclosure requirements. In determining if the trial court abused its discretion, this court must consider the standards for an abuse of discretion claim. The Supreme Court of Arizona stated:

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In exercising its discretion, the trial court is not authorized to act arbitrarily or inequitably, nor to make decisions unsupported by facts or sound legal policy. . . . Neither does discretion leave a court free to misapply law or legal principle.

*City of Phoenix v. Geyley*, 144 Ariz. 323, 328–329, 697 P.2d 1073, 1078–1079. (1985) (citations omitted). Thus, a trial court abuses its discretion if it:

1) applied the incorrect substantive law or preliminary injunction standard; 2) based its decision on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction; or 3) applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion.

*McCarthy Western Constructors v. Phoenix Resort Corp.*, 169 Ariz. 520, 523, 821 P.2d 181, 184 (Ct. App. 1991) (citation omitted). Plaintiff failed to demonstrate the trial court applied an incorrect substantive law or based its decision on a clearly erroneous finding of fact. Although Plaintiff argued the trial court became an advocate for Defendant when it decided not to allow Plaintiff's witness to testify, Plaintiff failed to establish how a ruling on a disclosure issue transformed the trial court from an unbiased observer to an advocate. JCRCP Rule 121(e) specifically allows the trial court to penalize a party for failing to timely disclose witnesses. The rule states—in relevant part—:

The court may penalize any party who fails to disclose or who fails to timely disclose witnesses, exhibits, or information, or who discloses inaccurate information. Penalties that the judge may impose are provided in Rule 127(d).

JCRCP, Rule 127(d) allows a court to order that a particular witness or exhibit not be used at trial and the appellate court will not disturb the trial court's decision absent a clear abuse of discretion.

The Lohmeiers first argue that photographs of the vehicles were improperly admitted because they were taken on an unknown date and did not accurately depict the damage to the vehicles immediately following the collision. On appeal, we will not disturb a trial court's rulings on the admission or exclusion of evidence unless we find a clear abuse of discretion and resulting prejudice, or find that the trial court misapplied the law.

*Lohmeier v. Hammer*, 214 Ariz. 57, 148 P.3d 101, ¶ 7 (Ct. App. 2006). Accord, *Lund v. Donahoe*, 227 Ariz. 572, 578, 261 P.3d 456, 462 (Ariz. Ct. App. 2011). As the Arizona Court of Appeals held:

Whether a disclosure obligation exists in the first instance is a question of law that we review *de novo*. Assuming such an obligation exists, a trial court has broad discretion in determining whether evidence has been properly disclosed and whether it should be admitted at trial. See *Link v. Pima County*, 193 Ariz. 336, 338, ¶ 3, 972 P.2d 669, 671 (App.1998). Trial judges are better able than appellate courts to decide if a disclosure violation has occurred in the context of a given

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case and the practical effect of any non-disclosure. Such decisions will not be disturbed on appeal absent an abuse of discretion. *Id. See also Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 287, 896 P.2d 254, 257 (1995) (“We have encouraged trial courts to take firm, active roles in the application and enforcement of [the disclosure] rules that were specifically designed to curb discovery abuse, excessive cost, and delay. We have pledged to support them if they do.”).

*Solimeno v. Yonan*, 224 Ariz. 74, 77, 227 P.3d 481, 484 ¶ 9 (Ct. App. 2010). The trial court did not abuse its discretion in ruling on the disclosure violation.

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*B. Did The Trial Court Err In Granting Judgment To Defendant Despite Defendant's Failure To Appear At Time Of Trial.*

On appeal, Plaintiff alleged Defendant claimed fraud as his defense to Plaintiff's Complaint. This is inaccurate. Plaintiff misconstrued Defendant's Answer when Plaintiff claimed Defendant's defense was one of fraud. In his Answer, Defendant stated—in relevant part:

PLEASE TAKE NOTICE, that the Defendant denied all the allegations of the complaints [sic.] Someone has stolen my card and it is a fraudulent charges [sic.].

Although Defendant used the adjective “fraudulent” in describing the charges, the import of the Answer is that Defendant is not responsible for the credit card charges because his credit card was stolen and he did not incur these charges. This is not the same as asserting a defense of fraud. Defendant did not claim Plaintiff was responsible for the fraud. The essence of his Answer is he is not responsible for any debt because he did not cause the debt to be incurred. Since he did not raise fraud as an affirmative defense to Plaintiff's claim, he did not shoulder the burden of needing to (1) prove fraud; or (2) disprove Plaintiff's claim. The trial court did not err in refusing to shift the burden of proof from Plaintiff to Defendant as Defendant did not raise an affirmative defense. Consequently, the burden of proof remained with Plaintiff which needed to prove its claim.

Plaintiff mischaracterized Defendant's Answer when it claimed Defendant did not deny (1) the balance owing; or (2) Plaintiff is the owner of the obligation at issue. Defendant made a general denial of all of Plaintiff's claims when he denied all the allegations of the complaint. The A.R.C.P. governed Justice Court actions at the time Defendant filed his Response on November 30, 2012. Pursuant to A.R.C.P. Rule 8(b), a defendant may make a general denial. Defendant made a general denial and thereby put Plaintiff to the test of proving its case.

In a civil case, the plaintiff typically bears the burden of persuasion with respect to each factual element of each of the claims brought, and the defendant bears the burden of persuasion with respect to each factual element of any affirmative defenses and/or counterclaims. The usual standard of proof in civil cases is the “preponderance of the evidence” standard, which basically requires the party with

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the burden of persuasion to convince the trier of fact that the existence of the fact in question is more probable than its nonexistence; but with regard to some factual issues in some civil cases, the party with the burden of persuasion may have to satisfy the more exacting “clear and convincing evidence” standard.

1 Ariz. Prac., Law Of Evidence § 301:2 (4th ed.) As stated in the Arizona Rules of Evidence, Rule 301:

In a civil case, unless a statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Because Plaintiff did not prove its case, the trial court did not err by granting judgment for Defendant.

III. Conclusion.

Based on the foregoing, this Court concludes the University Lakes Justice Court did not err.

**IT IS THEREFORE ORDERED** affirming the judgment of the University Lakes Justice Court.

**IT IS FURTHER ORDERED** remanding this matter to the University Lakes 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

122020131545

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