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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000183-001 DT 07/11/2013

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

ASSET ACCEPTANCE L L C

CYNTHIA L FULTON

v.

JOHN A SHANNON JR. (001)

JOHN A SHANNON JR.
61 WEST WILSHIRE DR
PHOENIX AZ 85003

ENCANTO JUSTICE COURT
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Lower Court Case No. CC2011088873 RC.

Defendant-Appellant John A. Shannon (Defendant) appeals the Encanto Justice Court's determination that he was liable for a credit card debt. Defendant contends the trial court erred. For the reasons stated below, the court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

Defendant opened a credit card account in August, 2002. In June, 2009, Defendant ceased making payments on this account, and, on Nov. 30, 2009, Wells Fargo Card Services charged off the account. On Oct. 28, 2010, Plaintiff (Asset Acceptance LLC) purchased the account from Wells Fargo. Plaintiff filed a Complaint on May 5, 2011, and alleged (1) breach of contract and (2) unjust enrichment. Plaintiff attached an Affidavit of Account dated April 26, 2011, from one of its employees attesting (1) Plaintiff purchased the asset from Wells Fargo Bank, NA; and (2) the claim is for $6,621.05; but (3) failing to identify the account by any number or name. Plaintiff also attached—as Exhibit 1 to the Complaint—a Bill of Sale indicating Wells Fargo Bank, N.A. sold Plaintiff account # 4465420108261884 re Defendant. Defendant responded and (1) alleged a statute of limitations defense; and (2) claimed the action was governed by A.R.S. § 12–543 re debt on an open account.

The trial court denied Defendant's motion for compulsory arbitration as untimely,[1] and immediately thereafter began the trial. Trace McClenahan was the Plaintiff's first witness. He stated he worked for Plaintiff and ran the Phoenix office of Plaintiff's debt collection call center.[2] He

[1] Audio transcript, May 10, 2012 at 3:13:05–3:18:24.
[2] *Id*. at 3:22:35–44.

said he reviewed Defendant's file on line and identified the bill of sale from Wells Fargo which included the principal amount of Defendant's debt.[3] Defendant objected based on foundation and authentication, voir dired the witness, and asked if the witness personally reviewed the document when it was created.[4] Defendant also asked who reviewed the document when it was created. The witness replied he assumed it was reviewed by the VP of the purchasing department but he had not spoken with her.[5] Defendant continued to ask questions about the document and its contents, but the witness was unable to answer these questions.[6] Defendant moved to strike the exhibit based on foundation and hearsay. The trial court overruled the objections.[7]

Mr. McClenahan identified Exhibit 2 as monthly billing statements from Wells Fargo[8] and said (1) the purchase of the portfolio of accounts gave Plaintiff access to the accounts—which were electronically kept—;and (2) Exhibit 2 was a print-out of files which came directly from Wells Fargo.[9] Plaintiff's counsel directed the witness' attention to the July 10, 2009, statement, and he agreed two payments were made: (1) for $243.00; and (2) $20.00 for a total of $263.00 in June.[10] He stated that—to the best of his knowledge—the June payment was the last payment made on the account.[11] Defendant objected based on foundation and authentication but the trial court overruled the objection.[12] The witness identified the last page of the Exhibit as the charge-off statement (last statement created by Wells Fargo).[13] Defendant's objection was again overruled. The witness reviewed the total amount on the charge-off statement and stated (1) the account was opened in August, 2002; and (2) he knew the date because he reviewed the Plaintiff's file.[14]

On cross-examination, Defendant inquired how Wells Fargo determined the amount owed and the witness (1) said he did not know; but (2) agreed it was possible the amount listed could be a summary of purchases.[15] Defendant asked how the witness determined the account was created in 2002, but the witness failed to identify a specific source for his knowledge other than to state Plaintiff received electronic data from Wells Fargo and put it into their system.[16] When asked if the data could be memorialized and reviewed in court, the witness responded he did not know.[17] Mr. McClenahan agreed the documents provided as Exhibit 2 could be considered a

[3] *Id*. at 3:22:50–3:24:01.
[4] *Id*. at 3:24:04–3:25:09.
[5] *Id*. at 3:25:24–54.
[6] *Id*. at 3:25:56–3:26:46.
[7] *Id*. at 3:26:46–3:28:00.
[8] *Id*. at 3:28:53–3:29:03.
[9] *Id*. at 3:29:03–41.
[10] *Id*. at 3:30:05–3:31:04.
[11] *Id*. at 3:31:05–15.
[12] *Id*. at 3:31:24–28.
[13] *Id*. at 3:31:42–3:32:28.
[14] *Id*. at 3:32:28–3:33:32.
[15] *Id*. at 3:34:34–3:35:33.
[16] *Id*. at 3:35:34–3:37:10.
[17] *Id*. at 3:37:10–24.

summary of Defendant's transactions with Wells Fargo.[18] He agreed he did not know if Defendant ever disputed the total bill with Wells Fargo or how any dispute was resolved.[19] The witness also could not say how or why Defendant was included in the portfolio that was purchased other than by relying on Plaintiff's "due diligence to buy valid accounts."[20]

Plaintiff called Defendant as a witness. Defendant said he recalled having a credit card agreement but could not state Exhibit 3 was the document he reviewed.[21] Defendant admitted he probably used his credit card over the years but said others may have used the card as well.[22] Defendant reviewed paragraph 5 of the credit card agreement and agreed he was to be responsible for debts charged to the account, but said he disputed some of the charges to the account by making "repeated" phone calls to Wells Fargo complaining about (1) specific charges; (2) the interest; and (3) the overcharge fees.[23] He admitted he (1) never wrote a letter to Wells Fargo; and (2) received monthly statements from Wells Fargo; but (3) said he did not read the back of the statement which included language informing him he had 60 days in which to dispute the charges.[24] Counsel directed his attention to paragraph 22 of the credit card agreement referencing writing to Wells Fargo within 60 days to dispute charges and Defendant said he did not write to Wells Fargo and, instead, called them on the phone about problems he had with the credit card account.[25] Defendant said he had no record of whom he spoke with.[26] Defendant stated he did not know if he made payments on his account after June, 2009, as the only documentation he could think of was what Plaintiff produced, and he did not review his checking account.[27] Plaintiff moved Exhibits 2 and 3 into evidence. Defendant objected based on relevance, foundation, hearsay, and authentication.

Plaintiff re-called Mr. McClenahan who stated that although the date on the proffered credit card agreement was Nov. 2008, he had seen 2002 agreements and he assumed the proffered agreement was the periodic addendum that Wells Fargo sent out.[28] He stated he did not know if the provisions in paragraph 2 changed over time.[29] The trial court overruled Defendant's objection and admitted Exhibit 3.

Defendant said (1) he had no way of confirming any of the charges that were included as parts of Exhibit 1 and 2 without specific verification and (2) could not remember which charges he disputed with Wells Fargo at the time the account was charged off.[30] Defendant moved for a

[18] *Id*. at 3:38:18–3:39:25.
[19] *Id*. at 3:39:26–3:40:00.
[20] *Id*. at 3:42:06–41.
[21] *Id*. at 3:44:10–3:45:22.
[22] *Id*. at 3:46:27–3:47:49.
[23] *Id*. at 3:48:00–3:50:08.
[24] *Id*. at 3:50:08–3:51:56.
[25] *Id*. at 3:52:44–3:53:32.
[26] *Id*. at 3:54:25.
[27] *Id*. at 3:53:48–3:56:48.
[28] *Id*. at 3:58:45–4:00:07.
[29] *Id*. at 4:01:27–44.
[30] *Id*. at 4:02:55–4:03:34.

directed verdict claiming the account was an open account and the Plaintiff needed to prove the specific charges which Plaintiff did not do. Plaintiff argued the case was a contract case and not an open account case. The trial court denied the directed verdict.

Defendant argued Exhibits 1 and 2 were nothing other than summaries; and only included the months between June and November, 2009. Defendant also claimed Plaintiff failed to produce anything that would allow Defendant to verify if the other charges were appropriate.[31] He added his recollection of the account was that it was an open account; but admitted he had not paid the account in full because he had a dispute with the bank.[32] He said he did not recall the pending balance and, when Wells Fargo did not resolve his dispute and told him they were going to charge off the account, he "tossed everything away."[33] On cross-examination, Defendant admitted he did not pay the undisputed charges.[34]

The trial court found Plaintiff met its burden of proof and granted judgment for Plaintiff and awarded it $6,048.68 principal, interest of $996.58, costs of $ 118.00 and attorneys' fees of $1,500.00 with interest from April 21, 2011, until paid in full.

Defendant filed a timely appeal claiming (1) the credit card debt was an open account because it resulted from a series of transactions; and (2) Plaintiff failed to provide any information about specific transactions, some of which he had challenged in the past. Plaintiff-Appellee Asset Acceptance LLC 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 Failing To Find Plaintiff's Claim Was An Open Account.

Throughout the proceedings, Defendant (1) maintained Plaintiff's claim was based on an open account because it resulted from a series of transactions; and (2) argued that because Plaintiff failed to provide information about the specific transactions, Plaintiff could not recover. Defendant asserted he had challenged some—but not all—of these transactions. He stated his disputes were made by phone and not in writing. To support his open account claim, Defendant cited *Trimble Cattle Co. v. Horne*,[35] 122 Ariz. 44, 592 P.2d 1311 (Ct. App. 1979), *Kunselman v. Southern Pac. R. Co*.,[36] 33 Ariz. 250, 259–260, 263 P. 939, 942 (1928), superseded by statute on other grounds as stated in *Marshall v. Superior Court, Maricopa County*, 131 Ariz. 379, 641 P.2d 867 (1982)[37] and *Holt v. Western Farm Service, Inc*.,[38] 110 Ariz. 276, 517 P.2d 1272 (1974).

[31] *Id*. at 4:13:42–4:17:12.
[32] *Id*. at 4:17:28–39.
[33] *Id*. at 4:17:40:44–4:20:30.
[34] *Id*. at 4:21:02.
[35] *Trimble* dealt with accounting services.
[36] *Kunselman* differentiated between an open account and an account stated.
[37] The portion superseded referred to the ability to amend a complaint.
[38] *Holt* dealt with the purchase of seed and fertilizer from the seed company.

These cases all deal with open accounts. However, this presupposes a credit card account is an open account. Arizona has no specific law dealing with this issue. Our sister states do. Our Supreme Court commented on using the law of our sister states and held:

> We therefore hold that the constitution, statutes and reported court decisions of our sister states are a proper subject for judicial notice.

Prudential Ins. Co. of Am. v. O'Grady, 97 Ariz. 9, 13-14, 396 P.2d 246, 249 (1964). Accord, *Shulansky v. Michaels*, 14 Ariz. App. 402, 405, 484 P.2d 14, 17 (1971) where the Arizona Court of Appeals stated:

> To determine the common law rule on a particular issue, we need not delve into the archives in search of some ancient rule from the English common law, since the common law is not a rigid, dead code, but rather a growing, living body of law. We may therefore look to decisions from sister states in search of common law rules.

Several of our sister states have specifically ruled that credit card debts are open accounts. The Texas Court of Appeals held:

> An action to collect a credit card debt may be brought as an action on an "open account." The elements of an open account are: (1) transactions between the parties, (2) creating a creditor-debtor relationship through the general course of dealing, (3) with the account still being open, and (4) with the expectation of further dealing. A credit card debt may be considered an open account because, under a credit card agreement, the terms of repayment remain subject to modification, and the parties exchange credits and debits until either party settles the balance and closes the account.

Capital One Bank (USA), N.A. v. Conti, 345 S.W.3d 490, 491-92 (Tex. App. 2011) (citations omitted). The Louisiana Court of Appeals concurred and ruled:

> Plaintiff correctly notes that the courts of this state have treated suits to collect credit card debt as suits on open account

CACV of Colorado, LLC v. Spiehler, 11 So. 3d 673, 675, 2009-151 (La. App. 3 Cir. 6/3/09). In Indiana, the Court of Appeals commented:

> With *Feltman's* observations and our own, we note that credit card accounts would appear to closely resemble the common law definition of an "open account."
>
> An "open account" is an account with a balance which has not been ascertained and is kept open in anticipation of future transactions. An open account results where the parties intend that the individual transactions in the account be considered as a connected series, rather than as independent of each other, subject to a shifting balance as additional debits and credits are made, until one of the parties wishes to settle and close the account, and where there is but one single

> and indivisible liability arising from such series of related and reciprocal debits and credits. This single liability is fixed at the time of settlement, or following the last entry in the account, and such liability must be mutually agreed upon between the parties, or impliedly imposed upon them by law. *Thus, an open account is similar to a line of credit.*
>
> **Observation:** Openness of an account, for purposes of an action on an open account, is indicated when further dealings between the parties are contemplated and when some term or terms of the contract are left open and undetermined.
>
> . . . .
>
> This definition encompasses credit card agreements: the precise amount of indebtedness that a customer may incur is unknown and fluctuating and the account is kept open in anticipation of future transactions, unless one of the parties decides to close it.

Smither v. Asset Acceptance, LLC, 919 N.E.2d 1153, 1159-60 (Ind. Ct. App. 2010). The Court of Appeals of Ohio agreed in *Jarvis v. First Resolution Mgt. Corp.*, 2012-Ohio-5653, 983 N.E.2d 380, 389 (Ohio Ct. App. 2012) appeal allowed, 2013-Ohio-1622, 135 Ohio St. 3d 1412, 986 N.E.2d 29 (2013) as did the Georgia Court of Appeals which, as early as 1967, held:

> The issuance of a credit card is but an offer to extend a line of open account credit.

City Stores Co. v. Henderson, 116 Ga. App. 114, 120, 156 S.E.2d 818, 823 (1967). Accord, *Garber v. Harris Trust & Sav. Bank*, 104 Ill. App. 3d 675, 679, 432 N.E.2d 1309, 1312 (1982) where the Appellate Court of Illinois quoted with approval from *City Stores Co. v. Henderson*, and *Hickman v. Citibank (S. Dakota), N.A.*, 89 So. 3d 691, 694, fn.4 (Miss. Ct. App. 2012) where the Mississippi Court of Appeals referenced a Mississippi Supreme Court case, defining an open account as an account based on continuing transactions between the parties which have not been closed or settled but are kept open in anticipation of further transactions.

In contrast, a number of states have ruled that credit card actions are accounts stated. The Connecticut Court of Appeals upheld the account stated cause of action and held that where the credit card company provided regular monthly statement which the recipient failed to object to, an account stated was created.

> On the basis of that, we conclude that the plaintiff demonstrated that the statements of the defendant's account were rendered to the defendant and that the defendant retained the statements for an unreasonable time, which, in an action that was based on account stated, is prima facie evidence of the correctness of the account.

Credit One, LLC v. Head, 117 Conn. App. 92, 99, 977 A.2d 767, 771 (2009). The Florida courts concurred and held that when a bank sued to collect on a credit card account, (1) the cause of action was an account stated; and (2) the bank did not need to provide proof of the itemized

charges. The Florida court determined an account stated cause of action was correct and provided the debtor had the burden of showing any fraud, mistake or error in the account.

> Thus, when an account statement has "been rendered to and received by one who made no objection thereto within a reasonable time," a prima facie case for the correctness of the account and the liability of the debtor has been made. An objection "impliedly admit[s] the correctness of the amounts on the account stated" when it does not challenge them. A debtor may overcome a prima facie case of an account stated by "meeting the burden of proving fraud, mistake[,] or error" in the account.

Farley v. Chase Bank, U.S.A., N.A., 37 So. 3d 936, 937 (Fla. Dist. Ct. App. 2010) (citations omitted). The New York Supreme Court, Appellate Division, affirmed the determination of a credit card debt as an account stated cause of action and ruled:

> Through these entries, she had "full knowledge" of the account stated which arose out of plaintiff having extended credit to defendant via the credit card which defendant used to purchase goods and services. Although defendant was sent monthly statements indicating the "full and true accounts of [her] indebtedness", an outstanding balance remained unpaid, which as of August 27, 1998 had reached nearly $2,000. The manager further averred that plaintiff's records indicated that "[d]efendant neither disputed the validity of the balance owed nor notified [p]laintiff of any claims, defenses, offsets or counterclaims whatsoever to the balance due and owing." These submissions adequately demonstrated "that 'there was an account between the parties and that a specified balance was found to be due' " (and sufficiently made out a prima facie case of an account stated).

Citibank (S. Dakota) N.A. v. Jones, 272 A.D.2d 815, 816, 708 N.Y.S.2d 517, 519 (2000) (citations omitted). The Iowa Court of Appeals agreed and held:

> We conclude, therefore, that account stated is a potentially valid claim for creditors seeking to collect a credit card debt in Iowa.

Capital One Bank (USA), N.A. v. Denboer, 791 N.W.2d 264, 275 (Iowa Ct. App. 2010). The Iowa court concluded a creditor seeking to recover a credit card debt from a consumer had two options: (1) prove an account stated; or (2) provide itemized statements showing a transaction history. The Iowa Court held:

> To be clear, a creditor seeking to recover a credit card debt from a consumer must either:
>
> (1) *Meet the requirements of account stated*, by providing an account agreement with the consumer, a final or "charge-off" statement with the consumer's address, and a sworn statement from a person with knowledge that regular monthly account statements were sent to the consumer at the address provided by the consumer, the charge-off statement is the sum total of those

> statements, the consumer used the credit card, and the consumer never objected to the monthly statements. If the creditor cannot prove the consumer never objected to any item, as an alternative the creditor may provide a sworn statement detailing the objections and demonstrating they were resolved without further objection by the customer, or a statement establishing that during the last 90 days before the charge-off statement (or during any longer period of time leading up to the charge-off statement), the customer used the credit card and made no objections during that time.
>
> (2) *Provide an itemization of the debt it is seeking to recover,* by filing an account agreement with the customer and a transaction history ending at a recent charge-off statement, together with a sworn statement from a person with knowledge authenticating these two items. In this event, the creditor is limited to recovering any increase in debt shown on the transaction history, plus ongoing interest

Denboer, 791 N.W.2d at 282. There is no consistency among our sister states in determining if credit card debt is an open account or an account stated. However, even where the courts have considered the credit card debt to be an account stated, defendants were able to challenge the action by demonstrating the debtor disputed the amount claimed.

On appeal, Plaintiff countered Defendant's open account argument by stating the debt was transformed into a contract debt—account stated[39]—by the time Plaintiff brought suit as the amount had not changed since the account was charged off. Plaintiff provided this Court with no binding authority supporting its position that a credit card account transforms once the account is charged off, although, as stated above, *Denboe*r provides some persuasive authority on this point. Plaintiff's position is similar to that of the accounting firm in *Trimble* where the service provider argued the open account became an account stated when the accounting firm sent its final bill and the recipient failed to object. *Trimble,* 122 Ariz. at 47, 592 P.2d at 1313. In ruling on whether the account became an account stated, the Arizona Court of Appeals determined the account may have transformed if the adverse party

> . . . . upon examining it make no objection, an inference might legitimately be drawn that he was satisfied with it as rendered.

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[39] In a separate credit card case, Wells Fargo characterized credit card debt as debt on an open account.

> The complaint alleged that Wells Fargo had agreed to extend credit to the Allens "on open account." "In Arizona it is the settled rule that the burden is on the person seeking to recover on an open account to prove the correctness of the account and each item thereof." *Holt v. W. Farm Servs., Inc.,* 110 Ariz. 276, 278, 517 P.2d 1272, 1274 (1974). A "merely general description" of the transactions between the parties is insufficient for a plaintiff to recover an amount owing on an open account; there must be "some descent into detail." *Trimble Cattle Co. v. Henry & Horne,* 122 Ariz. 44, 49, 592 P.2d 1311, 1315 (App.1979).

Wells Fargo Bank, N.A. v. Allen, 231 Ariz. 209, fn. 1, 292 P.3d 195, 200, fn. 1 (Ct. App. 2012).

Trimble, 122 Ariz. at 48, 592 P.2d at 1314. The *Trimble* court, however, found the plaintiff failed to provide sufficient description of the work performed to enable it to recover on an open account theory. Here, Defendant not only challenged the account stated theory, he also testified he did object—albeit by phone, and not in writing—to the total amount Plaintiff claimed. Plaintiff did not object to his testimony about his prior actions. Although the credit card agreement—paragraph 22—and the credit card statements provided for written objections, those objections went to the bank's requirement to investigate the dispute. The requirement for written objections did not hamper Defendant from presenting the issue as a defense to a legal action.

Defendant claimed Plaintiff failed to meet its burden of proof as the burden is on the person seeking to recover on an open account to prove the correctness of the account and provide proof of the specific items claimed.[40] *Holt*, 110 Ariz. at 278, 517 P.2d at 1274. There is little law on the need of the credit card company or its assignee to produce the defendant's entire transaction history.[41] However, the Iowa Court of Appeals addressed this situation and held that if the transaction was not an account stated, the creditor could provide an account history—electronic or hard copies—of past monthly statements. The Iowa Court of Appeals held if monthly statements were provided, the creditor would be restricted in the amount it could recover to those items for which an itemization had been provided as otherwise there would be no indication as to how the requested amount had been determined. *Denboer*, 791 N.W.2d at 267–268.

After weighing the law, this Court concludes Defendant was correct in asserting the credit card debt was an open account.

B. Did The Trial Court Err By Finding Plaintiff Produced Sufficient Admissible Evidence To Support Its Claim.

Defendant consistently challenged the admissibility of Plaintiff's three exhibits as (1) violations of the hearsay rule; and (2) lacking foundation. The trial court found all three exhibits were admissible. Appellate courts review evidentiary rulings for an abuse of discretion. *State v. Tucker*, 205 Ariz. 157, 68 P.3d 110, ¶ 41(2003). This Court finds the trial court abused its discretion in admitting the exhibits as exceptions to the hearsay rule.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). Unless one of the exceptions to the hearsay rule applies, such statement is inadmissible. Ariz. R. Evid., R. 803(6) provides for an exception to the hearsay rule where business records are concerned provided certain criteria are met. Mr. McClenahan stated he worked for the Plaintiff, had access to Defendant's account records, and said the records were electronically maintained on computer systems in the ordinary course of Wells Fargo's business. However, he did not state (1) he was a custodian of records for Wells Fargo; (2) he had any knowledge as to how Exhibit 1

[40] As discussed in *Holt*, a plaintiff cannot begin with a debit balance.

[41] This Court is aware that a requirement to provide a transaction history may be burdensome. However, most credit card records are kept electronically and what might have been an insurmountable burden with regard to retention of records when paper records were kept is no longer as onerous.

was created or (3) how he knew about how or when Wells Fargo created its electronic records. He could only testify Defendant's account was included in the numerous accounts Plaintiff purchased from Wells Fargo. He was unable to testify about how or why Defendant's name was included in these accounts. The witness was also unable to state how the amount claimed on the individual statements was calculated or the basis for any charges. He did not state he was familiar with anyone at Wells Fargo charged with the duty of maintaining these records. The witness lacked the personal knowledge required for the business record exception to the hearsay rule which requires the person testifying about the record to meet five criteria: (1) the record must be made contemporaneously or nearly so with the underlying event; (2) it must be by or from information transmitted by a person with first-hand knowledge that is acquired in the course of a regularly conducted business activity; (3) it must he completely created in the course of that activity; (4) it must be made as a regular practice for that activity and (5) the source of the information and the method of preparation cannot indicate a lack of trustworthiness. Here, the witness lacked this knowledge. Mr. McClenahan made a general statement that he reviewed the records from Wells Fargo. However, he was not able to describe the Wells Fargo records he reviewed or provide any way in which the trial court—or a reviewing court—could evaluate the amount Plaintiff claimed Defendant owed. He failed to specify the particular records Wells Fargo used to establish the amount claimed, how the records were created, how the records were kept—other than "electronically"—and, instead, merely asserted his belief that the records must be accurate because Plaintiff acquired them as part of a portfolio of transactions. Under these circumstances, Mr. McClanahan's testimony about Exhibits 1 and 2 was not sufficient to establish these exhibits as business records exceptions to the hearsay rule, and these documents should have been excluded.

An appellate court must sustain the trial court's determination if there is any reasonable basis for so doing. The Court of Appeals made this clear in *Trimble*.

> We must of course view the record in the light most favorable to sustaining the judgment. We must also assume that the trial court made all findings necessary to support the judgment, and we must affirm if there is any theory of the case upon which the judgment can be sustained and any reasonable evidence supporting such theory.

Trimble, 122 Ariz. at 46, 592 P.2d at 1313. However, before the appellate court is able to sustain the trial court's action, there must be both a theory of the case and evidence supporting that theory. Plaintiff had the burden of persuasion for its claim. As stated by our Arizona Supreme Court,

> To bring an action for the breach of the contract, the plaintiff has the burden of proving the existence of the contract, its breach and the resulting damages.

Graham v. Asbury, 112 Ariz. 184, 185, 540 P.2d 656, 657 (1975). Accord, *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 292 P.3d 195, 199 ¶ 16 (Ct. App. 2012) where the Arizona Court of Appeals held:

In a contract case, the burden of proof rests solely on the plaintiff.

Plaintiff failed to meet this burden. Plaintiff failed to provide the specific credit card statements detailing the purchases Defendant made even though Plaintiff's witness asserted he had access to Wells Fargo's electronic records. Plaintiff apparently had the ability to provide the required evidence but failed to do so. Mr. McClenahan's testimony did not provide the needed support to sustain Plaintiff's claim and Plaintiff called no other witnesses who could provide this support. In a credit card case involving Wells Fargo, our Court of Appeals commented on the use of testimony from an employee who was not personally involved in the creation or maintenance of the credit card statements. The Arizona Court of Appeals reviewed the evidence and stated:

> In his affidavit, the paralegal made a general avowal that he is the custodian of records and that he personally reviewed records that established the amount of the Allens' indebtedness to Wells Fargo. Those records were neither described nor attached, nor was there anything in the affidavit to provide a reviewing court with the means to evaluate the accuracy of the paralegal's calculation of the amount claimed to be due. The affidavit also failed to establish the admissibility of the November 2010 computer-generated account statement, which was hearsay because it was offered to prove the truth of its statement of the amount that the Allens owed. To be admissible, the exhibit would have to qualify under an exception to the hearsay rule, such as the business-records exception contained in Ariz. R. Evid. 803(6). Without ever referring to any of the specific documents submitted to the trial court, the paralegal summarily asserted that he was familiar with the Allen account "records" that Wells Fargo kept in the ordinary course of business.
>
> The purpose of a custodian's affidavit is to authenticate evidence—such an affidavit is of little value when it does not attach the evidence at issue. And to the extent that the paralegal's role was intended to be akin to that of a fact witness or expert witness, the only personal knowledge he could have offered (as required by Ariz. R. Civ. P. 56(e)) would necessarily have been based on his review and analysis of documents. But the paralegal never claimed to have reviewed any specific documents or to know the manner in which they were prepared and kept. His affidavit, therefore, was sufficient neither to invoke the business-records exception nor to support the motion for summary judgment.
>
> It may be true that the paralegal's assertion of the amount owed is correct. It may also be true that the 2010 agreement submitted with the complaint and with the paralegal's affidavit is binding on the Allens. . . . .
>
> We conclude that Wells Fargo failed to establish its entitlement to judgment as a matter of law.

Wells Fargo Bank, N.A. v. Allen, ¶¶ 18–21. Similarly, here, Plaintiff failed to establish its entitlement to judgment as a matter of law.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Encanto Justice Court erred.

IT IS THEREFORE ORDERED reversing the judgment of the Encanto Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Encanto 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 071220130945