Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2022-000227-001 DT 09/14/2022

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
J. Eaton
Deputy

DESERT CROWN I I I HOMEOWNERS ASSOCIATION

EMILY ELIZABETH COOPER

v.

DEBABRATA GUPTA (001)

DEBABRATA GUPTA
11419 E GAMBLE LN
SCOTTSDALE AZ 85262

JUDGE KILEY
MCDOWELL MOUNTAIN JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL REVIEW / REVERSED

McDowell Mountain Justice Court Case No. CC2021124323RC

Defendant/Appellant Debabrata Gupta ("Appellant") appeals from the March 30, 2022 judgment that the McDowell Mountain Justice Court entered against him and in favor of Plaintiff/Appellee Desert Crown III Homeowners Association ("Appellee" or the "Association"). For the following reasons, this Court reverses the Judgment and remands for further proceedings.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

Appellant owns real property (the "Property") located at 11419 East Gamble Lane in Scottsdale, Arizona. The Property is subject to a declaration of covenants, conditions and restrictions that was recorded in 1996. *See* Declaration of Covenants, Conditions, and Restrictions for Desert Crown III ("Declaration"), attached as Exhibit B to Complaint.

On or about August 4, 2021, the Association filed a Complaint against Appellant in McDowell Mountain Justice Court, alleging that, "[p]ursuant to the Declaration" and "by virtue of [his] ownership of property within the Association," Appellant "agreed to pay" "annual maintenance assessments," "special and/or fine assessments," and "other charges." Complaint at p. 2. The Association further alleged that Appellant "breached said agreement" and was "indebted" to the Association "in the amount" of $3,123.05." *Id*. Further, it alleged, "[t]he assessment levied against" Appellant was "continuing to accrue monthly at a rate of" $51.45, "plus…periodic late charges" and "fines." *Id*.

On September 7, 2021, Appellant filed an Answer in which he denied the Association's substantive allegations, insisting that he "has been paying Homeowners dues to the [Association] every month." Answer at p. 1. He further asserted that the Association imposed fines on him that are "baseless." *Id*. at p. 3. He explained, for example, that he has been fined for his "failure/unwillingness" to "paint the exterior of [his] home" even though the Association has never explained "on what basis was this being asked for." *Id*. at p. 2. The Association had no justification for requiring him to re-paint his house, he argued, adding that "the paint" on his neighbor's house "looks exactly like" the paint on his house. *Id*.

Along with his Answer, Appellant asserted certain counterclaims against the Association, asking that the Association be ordered to (1) send him a written "Letter of Apology"; (2) "do remedial service" by "providing free Weed Cleaning" at his house "for the next 6 mo.s."; (3) "complete the repairs to the Holding Pond they had agreed to at the General Meeting in Oct 2018"; and (4) "[i]mmediate[ly] change" the "Modus Operandi" of its "HOA Agent AmCor." Answer at p. 5.[1]

The Association moved to dismiss Appellant's counterclaims, asserting, *inter alia*, that Appellant "fail[ed] to state a valid claim" for relief or to identify "any legal theory" under which he would be entitled to the relief he requested. [Association's] Motion to Dismiss Counterclaim ("Motion to Dismiss") at p. 3. Appellant filed a response (which he erroneously identified as a "reply") on October 18, 2021. Shortly thereafter, the trial court granted the Motion to Dismiss. *See* Order Dismissing Counterclaim With Prejudice dated November 4, 2021.

In December 2021, the Association filed a Motion for Summary Judgment in which it requested "summary judgment in the principal amount of $4,204.50, which represents past due assessments, late charges, pre-litigation attorney fees, fines, and other charges which are

[1] Although it is not entirely clear, the phrase "HOA Agent AmCor" appears to refer to the Association's management company.

unpaid…as of November 29, 2021." Motion for Summary Judgment ("MSJ") at p. 2. The Association asserted that Appellant owns real property that is "subject to" the Declaration, and that, pursuant to the Declaration, Appellant "agreed to pay all assessments, late charges, interest, fines, attorney fees, and other charges levied by the Association." *Id*. at pp. 2, 3. Appellant "breached the Declaration," the Association asserted, "by failing to pay the assessments, fines, and related charges." *Id*. at p. 4. The Association acknowledged that Appellant "made partial payments," but insisted that his "account remains delinquent." *Id*. The Association concluded by asserting that, after "credit[ing] [Appellant's] account for any and all payments made toward the account," Appellant "remains indebted to the Association" in "the principal amount of $4,204.50." *Id*.

In support of its MSJ, the Association submitted a copy of the Declaration and recorded documents reflecting ownership of the real property at issue. *See* Exhibits B, C, and D to MSJ. The Association also submitted, as Exhibit E to its MSJ, a document it described as "an accounting…that supports the principal amount alleged in [the] Complaint." MSJ at p. 5 and Exhibit E thereto. Exhibit E to the MSJ, which will be referred to herein as the "Ledger," consists of a chart of columns of line items under such headings as "date," "description," "amount," and "balance." *See generally* Ledger. The Association provided no evidence, however, about how the Ledger was created, nor does anything in the Ledger explain the basis for the dollar figures set forth therein. *See generally id*. Additionally, the Association submitted, as Exhibit A to the MSJ, the affidavit (the "Thomas Affidavit") of Robin Thomas ("Thomas"), who is identified as an "employee of" the Association's "management agent." Exhibit A to MSJ, Thomas Affidavit, at ¶ 1.[2]

Appellant filed a response to the MSJ on January 7, 2022. *See generally* Response to Motion for Summary Judgment ("Response to MSJ"). Although Appellant's Response to MSJ is difficult to follow, the arguments he raised in the Response to MSJ include his assertion that the Association "failed to prove" the "violations" it alleged, and that the Association's "claim[] that there are NO DISPUTES" was not true. *Id*. at pp. 1, 11.

In its reply in support of its MSJ, the Association asserted that Appellant's Response to MSJ "fails to dispute the outstanding balance." [Association's] Reply in Support of Its Motion for Summary Judgment at p. 2. The Association further asserted that Appellant "failed to provide

[2] The affidavit that the Association originally submitted with its MSJ was unsigned. The Association later supplemented its MSJ with a copy of the Affidavit signed by Thomas. *See* Notice of Lodging Declaration of Association filed December 10, 2021 and Exhibit A thereto.

any evidence disputing the accounting ledgers," and that he "[t]herefore...has failed to allege a material fact in genuine dispute as to the principal balance." *Id.*

On February 24, 2022, the trial court granted the MSJ. *See* Order Granting Motion for Summary Judgment dated February 24, 2021 at p. 1. The trial court subsequently entered a judgment awarding the Association damages in the principal amount of $4,204.50 along with attorney fees of $9,517.50.00 and court costs of $244.04. Judgment dated March 30, 2022 ("Judgment") at pp. 1-2.

Appellant filed a timely Notice of Appeal. This Court has jurisdiction pursuant to Ariz. Const. art. VI, § 16 and A.R.S. §§ 12-124, 22-261.

DISCUSSION

The Court has reviewed and considered Appellant's Appellant Memorandum, which will be referred to herein as the "Opening Memorandum or "O.M." The Court has also reviewed and considered Appellee's Memorandum on Appeal, which will be referred to herein as the "Answering Memorandum" or "A.M." Although Appellant has requested Oral Argument, the Court finds the parties' arguments well-presented in the briefings, and so will rule without Oral Argument as permitted by S.C.R.A.P. – Civ. 11.

In his Opening Memorandum, Appellant argues that the trial court erred in granting the MSJ because "the requirements for Summary Judgment" were "NOT met." O.M. at p. 6. The Association "had argued for Summary Judgment on the grounds that…there is no genuine issue as to ANY material fact," he asserts, "[b]ut this is NOT true." *Id.* at p. 7. On the contrary, Appellant contends, he "submitt[ed] evidence" to prove "that [Appellee's] claims are baseless," but his evidence was "ignored." *Id.* at p. 6. Because the Association "did NOT satisfy requirement [*sic*] for Summary Judgment," Appellant concludes, "[i]t is requested that" this Court "reverse the original judgment of Feb 24, 2022 and the award of April 2, 2022 to [Appellee]." *Id.* at pp. 8, 9-10.[3]

[3] In his Opening Memorandum, Appellant does not challenge the trial court's November 4, 2021 ruling dismissing his counterclaims. *See generally* Opening Memorandum. Appellant could hardly do so; the trial court's ruling dismissing his counterclaims was clearly correct. After all, the relief that a justice court is authorized to grant is limited to that set forth in statute. *See* A.R.S. § 22-201. Such relief does not include issuing the orders Appellant requested in his counterclaims, such as orders requiring the Association to send him a written apology, to change its management company's "Modus Operandi," and to "provid[e]" him with free Weed Cleaning" for "the next 6 mo.s." Answer at p. 5.

In response, Appellee asserts that "the trial court did not commit any error in weighing the evidence presented from both sides" and "award[ing] judgment in favor of the Association." A.M. at p. 2. It argues that "[t]he Association presented a valid *prima facie* case against" Appellant, and that Appellant subsequently failed to establish "that the Association [was] not entitled to judgment as a matter of law" because he failed to show "a disputable genuine issue of material fact." *Id*. at p. 8.

A party that moves for summary judgment bears the burden of making a *prima facie* showing of its entitlement to judgment as a matter of law. *See, e.g., Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 114-15 ¶ 12 (App. 2008). "Only if the moving party satisfies this burden" does the burden shift to the non-moving party "to come forward with evidence establishing the existence of a genuine issue of material fact that must be resolved at trial." *Id*. trial. If the moving party fails to make the requisite *prima facie* showing, summary judgment must be denied even if the non-moving party fails to file any response at all. *See Schwab v. Ames Constr*., 207 Ariz. 56, 60 ¶ 16 (App. 2004) ("[I]f a moving party's summary judgment motion fails to show an entitlement to judgment, the nonmoving party need not respond to controvert the motion.").

In support of its MSJ, the Association attached a copy of a Ledger that includes various line items for "monthly assessment[s]" and "fines" with associated dollar amounts. *See* Exhibit E to MSJ. Nothing in the Ledger, however, purports to explain how the Ledger was created. Likewise, nothing in the Ledger purports to explain the line items set forth therein or the dollar amounts listed. *See generally id*. Although, for example, the Ledger contains a line item dated "11/09/2021" with an "amount" of $2,884.59 and a "description" that reads, "MAXWELL INV/2021/3693 2021," *id*. at p. 2, nothing in the Ledger purports to explain what this charge represents, or why Appellant should be expected to pay it.

Similarly, although the Ledger contains multiple line items with descriptions that include the word "violation," nothing in the Ledger indicates what Appellant did or failed to do that purportedly "violated" any obligation. For example, although the Ledger indicates that a charge of $100.00 was imposed on "7/6/2021" for what is described only as "Violation Yard," Exhibit E to MSJ at p. 3, nothing in the Ledger explains what, exactly, Appellant did to merit the imposition of this $100.00 fine.

Likewise, the Ledger includes eight different line items for "Pre-litigation attorney fees and costs," in amounts ranging from $4.50 to $175, Exhibit E to MSJ at p. 3, the Ledger gives no indication of what these fees and costs represent. *Id*.

Because the Ledger contains no explanation for the charges listed therein, the Ledger, by itself, has little evidentiary value. Certainly, the Ledger, by itself, is insufficient to establish the Association's entitlement to judgment as a matter of law.

In order to give meaning to the figures listed in the Ledger, the Association was required to submit an affidavit explaining how the Ledger was prepared and providing a factual basis for the figures therein. A review of the Thomas Affidavit shows that it makes no attempt to do so. Nothing in the Thomas Affidavit explains how the Ledger was created. *See generally* Affidavit. Nothing in the Thomas Affidavit identifies any specific act or omission by Appellant that purportedly constituted a breach of an obligation he purportedly had. *See generally id*. Indeed, the Thomas Affidavit does not even mention the Ledger at all. *See generally id*.

Instead of attempting to explain and/or justify the figures listed in the Ledger, the Thomas Affidavit simply states, in conclusory terms, that, based on Thomas's "personal experience" and "review of Association documents and records" - - documents and records that Thomas never identifies - - Thomas has concluded that Appellant "breached" his obligations under the Declaration "by failing to pay the assessments, monetary penalties and all other charges and fees owed." Exhibit A to MSJ at ¶¶ 2, 9. Accordingly, Thomas has concluded, Appellant "is indebted to the Association…in the principal amount of $4,204.50." *Id*. at ¶ 10.

The Arizona Court of Appeals has already held that conclusory assertions of the sort found in the Thomas Affidavit are wholly insufficient to establish the moving party's entitlement to summary judgment. *See Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209 (App. 2012). In *Allen*, a bank that had sued the defendants for unpaid credit card charges filed a motion for summary judgment that was supported by the affidavit of a bank employee and a summary chart purporting to reflect that no payments had been received during the time period covered by the chart. 231 Ariz. at 211 ¶ 4, 212 ¶ 7. The employee's affidavit "made a general avowal" that the employee was the bank's "custodian of records" and that he had "personally reviewed records that established the amount of" the indebtedness. *Id*. at 213-14 ¶ 18. The records that the affiant purportedly reviewed were, however, "neither described nor attached." *Id*. Moreover, in his affidavit, the affiant neither identified "any specific documents" that he reviewed nor "claimed…to know the manner in which" the unidentified documents "were prepared and kept." *Id*. at 214 ¶ 19. Further, nothing in the affidavit "provide[d] a reviewing court with the means to evaluate the accuracy of the [affiant's] calculation of the amount claimed to be due." *Id*. ¶ 18. The *Allen* court concluded by holding that "conclusory affidavits" that merely set forth "liquidated amounts" are not "sufficient" to establish the moving party's "entitlement to judgment as a matter of law." *Id*. at 214-15 ¶¶ 20-21.

Since *Allen* was decided, the Court of Appeals has made clear, in two unpublished memorandum decisions, that a court cannot simply defer to the plaintiff's avowal that the defendant owes a debt, and that the plaintiff's affiant must do more than simply "identify" or "describe" the documents he or she reviewed that purportedly establish the defendant's indebtedness. Instead, the affiant must supply copies of those documents for the court's own independent review. Additionally, the affiant must describe the manner in which those documents were created in enough detail to allow the court to determine that the figures on the documents can be trusted. *See Copper State Fin. Mgmt., LLC v. High Valley Builders, LLC*, 2016 WL 275458 at *4 ¶ 13 (Ariz.App., Div. 1, Jan. 21, 2016) (affidavit in support of motion for summary judgment to recover on a debt "must substantively address the accompanying evidence well enough to establish its credibility and allow a court to review its accuracy"); *CACH, LLC v. Martin*, 2015 WL 5620322 at *3 ¶ 16 (Ariz.App. Div. 1, Sept. 24, 2015) (affidavit "which summarily recited an amount owed and little else" was insufficient to sustain summary judgment).

Allen and subsequent appellate decisions stand for the proposition that a plaintiff moving for summary judgment cannot meet its burden of establishing its entitlement to judgment in its favor merely by submitting an affidavit avowing, in conclusory terms, that the affiant has reviewed unidentified documents and decided that the defendant owes money. The court cannot blindly accept the plaintiff's avowal of the amount owed; the plaintiff must provide the court with enough information to allow the court to independently determine that the defendant does, in fact, owe the amount the plaintiff claims. To make this showing, the plaintiff must supply to the court the underlying documents that establish the defendant's indebtedness, and must provide an affidavit that explains the underlying documents in enough detail to allow the court can make a finding that the information contained in the documents is accurate.

Here, the Thomas Affidavit makes no reference to the Ledger or the figures set forth therein. Moreover, although the Thomas Affidavit states that Thomas reviewed unidentified "documents and records," Thomas Affidavit at ¶ 2, the Association never supplied the trial court with copies of any of the documents that Thomas reviewed. Indeed, the Thomas Affidavit does not even identify those documents, or indicate that Thomas has any familiarity with the manner in which they were prepared. And although the Thomas Affidavit asserts in conclusory terms that Appellant is "indebted to the Association…in the amount of $4,204.50," Thomas Affidavit at ¶ 10, neither the Thomas Affidavit nor any other exhibit submitted by Appellee provided the trial court with a means to evaluate the accuracy of Thomas's calculation. Pursuant to *Allen*, the Thomas Affidavit and the other exhibits submitted by the Association in support of its MSJ are

insufficient as a matter of law to establish the Association's entitlement to judgment as a matter of law.

Because the Association's MSJ failed to make the requisite *prima facie* showing of the Association's entitlement to judgment as a matter of law, the trial court erred in granting the Association's MSJ. *See Schwab*, 207 Ariz. at 60 ¶ 16 ("[I]f a moving party's summary judgment motion fails to show an entitlement to judgment, the nonmoving party need not respond to controvert the motion."). Accordingly, the Judgment must be reversed and the matter remanded for further proceedings.

CONCLUSION

In accordance with the foregoing,

IT IS ORDERED reversing the judgment entered by the McDowell Mountain Justice Court in this matter on March 30, 2022.

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

No matters remain pending in connection with this appeal. This is a final order. See Rules 12(c), 12(d), 14(b), Sup. Ct. R. App. P. – Civil and Rule 54(c), Ariz. R. Civ. P.

/s/ Daniel J. Kiley
THE HON. DANIEL J. KILEY
Judge of the Superior Court

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