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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2021-000358-001 DT 05/13/2022

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
P. McKinley
Deputy

THE ARROWHEAD RANCH PROPERTY OWNERS ASSOCIATION PHASE IV — CHAD M GALLACHER

v.

HE LIU (001) — JONATHAN A DESSAULES

ARROWHEAD JUSTICE COURT
JUDGE KILEY
REMAND DESK-LCA-CCC

RECORD APPEAL REVIEW / REVERSED & REMANDED

Arrowhead Justice Court Case No. CC2020093450RC

Defendant/Appellant He Liu ("Appellant") appeals from the March 31, 2021 judgment that the Arrowhead Justice Court entered against her and in favor of Plaintiff/Appellee Arrowhead Ranch Property Owners' Association Phase IV ("Appellee" or the "Association"). For the following reasons, this Court reverses the judgment of the Arrowhead Justice Court and remands for further proceedings.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

Appellant owns real property (the "Property") located at 5937 W. Sack Drive in Glendale. The Property is subject to a declaration of covenants, conditions and restrictions that was recorded on August 25, 1995. *See* Master Declaration of Covenants, Conditions, Restrictions, Assessments, Charges, Servitudes, Liens, Reservations and Easements for the Arrowhead Ranch Phase IV ("Declaration"), attached as Exhibit C to Plaintiff's Motion for Summary Judgment.

On or about June 5, 2020, the Association filed a Complaint against Appellant in Arrowhead Justice Court, alleging that, "[p]ursuant to the Declaration," it had "levied" "annual maintenance assessments," "fine[s]," and "other charges" against Appellant, which she "agreed to pay" "by virtue of [her] ownership of" the Property. Complaint at p. 2. The Association alleged that these assessments, fines and charges totaled $2,588.50, and that Appellant has failed to pay this sum "although demand for payment has been made[.]" *Id*. Additionally, the Association alleged that "[t]he assessments levied against" Appellant "continu[e] to accrue semi-annually at the rate of" $370.00, along with "semi-annual late charges" of $15.00 "plus fines, plus admin fees [*sic*]." *Id*. The Association requested judgment in its favor in the amount of $2,588.50 "for assessments and pre-litigation attorney fees and collection costs," along with "semi-annually accruing assessments" of $370.00 "plus semi-annual late charges, plus fines, plus admin fees [*sic*]," as well as court costs and attorney fees. *Id*. at p. 4.

Appellant filed an Answer *in propria persona* using a form provided by the trial court. Under the pre-printed line that reads, "I admit the following portion(s) of the Plaintiff's complaint," Appellant wrote,

> $805 of 'admin fees' HOA charged on the account.

Answer filed August 6, 2020 at p. 1. Under the pre-printed line that reads, "I deny the following portion(s) of the Plaintiff's complaint," Appellant wrote,

> A) The the [*sic*] fines and late fees that HOA had removed prior to this Summons
>
> B) I have paid each of the semi-annual assessments up to the entire year 2020.

Id. Appellant asserted no affirmative defenses. *See generally id*.

In December 2020, the Association filed a Motion for Summary Judgment in which it requested "summary judgment in the principal amount of $2,588.50, which represents past due homeowners assessments, late charges and other charges which were unpaid…as of the date of the Complaint." Motion for Summary Judgment ("MSJ") at pp. 1-2. The Association asserted that the Property is "subject to" the Declaration, and that "[t]he Declaration requires that each homeowner pay assessments and related charges." *Id*. at pp. 2, 4. Despite this obligation, the Association contended, Appellant "breached the Declaration by failing to pay charges levied against" her. *Id*. at p. 3. The Association further asserted 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 $2,558.50." *Id.*

In support of its MSJ, the Association submitted, as Exhibit D to its MSJ, a document it described as "an accounting…that supports the principal amount alleged in [the] Complaint." MSJ at p. 4 and Exhibit D thereto. Exhibit D to the MSJ, which will be referred to herein as the "Ledger," consists of a chart that purportedly reflects the date on which payments were received and the amount of such payments, as well as the dates on which "fines," "admin. fees" and "assessments" were imposed along with the amount of such fines, fees, and assessments. *See generally* Ledger. The Association provided no evidence, however, about how the Ledger was created. Nothing in the Ledger, for example, contains any indication as to how or why the fines, fees or assessments were charged to Appellant's account, or how the amount of those fines, fees and assessments was determined. *See generally id*. Although the Association also submitted, as Exhibit A to the MSJ, the affidavit (the "Riesland Affidavit") of Lisa Riesland ("Riesland"), the Riesland Affidavit does not explain how the Ledger was created, nor does it provide any explanation for the "fines," "admin. fees," and other charges listed in the Ledger. *See generally* Riesland Affidavit, attached as Exhibit A to MSJ.

In the Response to Motion – Plaintiff's Motion for Summary Judgment ("Response") that she filed on or about January 7, 2021, Appellant asked the trial court to "[r]e-evaluate the charges claimed in" the MSJ while noting that she "hop[ed] to reach a reasonable settlement." Response at p. 1.

In her Response, Appellant did not challenge the admissibility of the Ledger on grounds of hearsay, lack of foundation, or otherwise, nor did she argue that the trial court could not properly consider the Ledger in making its ruling. *See generally* Response. She did, however, dispute the accuracy of many of the figures listed in the Ledger, asserting that "the integrity" of the Ledger was "in question" because "items that had been already paid or waived were incorrectly included." Response at p. 3 of 3. She asserted, for example, a "fine[]" imposed on February 11, 2019 for "street parking" had been "[w]aived by" the Association. *Id*. at p. 2 of 3. She further asserted that a $60 "[f]ine" for "weeds" was imposed on March 4, 2020 even though she "[does] not agree there was a weed issue." *Id*. She nonetheless "agree[d] to pay" the $60 fine imposed for weeds "to resolve this matter." *Id*. As to other fines, fees, and assessments, Appellant asserted that those charges were "[u]ndefined," and that "more details" were required before she could respond to them. *Id*. She concluded that she would "agree to pay the fines" in the total amount of $120, but "not the $2,588.50 claimed in" the MSJ. *Id*. at p. 3 of 3.

On February 5, 2021, the trial court granted the MSJ. *See* Ruling on Motion dated February 5, 2021 at p. 1.

The trial court subsequently entered a judgment awarding the Association damages of $2,343.50 along with attorney fees of $4,345.00 and court costs of $212.80. Judgment dated March 31, 2021 ("Judgment") at pp. 1-2.

Appellant filed a Motion for New Trial, which the trial court denied on May 12, 2021. *See* Ruling on Motion dated May 12, 2021 at p. 1.

Appellant filed a timely Notice of Appeal on May 20, 2021. This Court has jurisdiction pursuant to Ariz. Const. art. VI, § 16 and A.R.S. §§ 12-124, 22-261.

ISSUES PRESENTED

Appellant raises the following three issues in this appeal:

1. Did the trial court err in awarding Appellee a judgment for time-barred charges under A.R.S. § 12-548(A)(1)?
2. Did the trial court err in relying on unauthenticated, inadmissible ledgers of unknown authorship in granting Appellee's MSJ?
3. Did the trial court err in granting Appellee's MSJ?

Appellant's Memorandum – Opening Brief at p. 4.

APPLICABLE LEGAL PRINCIPLES & STANDARD OF REVIEW

In deciding a motion for summary judgment, the trial court must view the facts and all reasonable inferences therefrom in the light most favorable to the non-moving party. *See, e.g., Hourani v. Benson Hosp*., 211 Ariz. 427, 432 ¶ 13 (App. 2005). Even if no response is filed, a motion for summary judgment may properly be granted only if the moving party demonstrates that "there is no genuine issue as to a material fact, and that the moving party is entitled to judgment as a matter of law." J.C.R.C.P. 129(d). *See also Schwab v. Ames Constr*., 207 Ariz. 56, 59 ¶ 15 (App. 2004) ("A failure to respond to a motion for summary judgment…cannot, by itself, entitle the moving party to summary judgment."). Summary judgment is not appropriate merely because the trial judge believes that the moving party "will probably win the jury's verdict," or even if the trial judge believes that "the moving party *should* win the jury's verdict."

Plattner v. State Farm Mut. Auto. Ins. Co., 168 Ariz. 311, 316 (App. 1991) (emphasis in original, citation and internal quotations omitted).

A reviewing court will "review the trial court's grant of summary judgment on the basis of the record made in the trial court," but will "determine *de novo* whether the entry of judgment was proper." *Schwab*, 207 Ariz. at 60 ¶ 17. "In determining whether the trial court properly granted summary judgment," a reviewing court "appl[ies] the same standard in determining whether genuine issues of material fact exist and the proper application of the law as that which the trial court should use in ruling on the summary judgment motion." *Id*. *See also Modular Mining Sys., Inc. v. Jigsaw Technologies, Inc*., 221 Ariz. 515, 518 ¶ 9 (App. 2009) ("In determining whether the court properly granted summary judgment, we apply the same standard a trial court uses in ruling on a summary judgment motion.").

A "statute of limitations" defense is waived "if it is not asserted prior to judgment." *Transamerica Ins. Co. v. Trout*, 145 Ariz. 355, 358 (App. 1985).

Article II, § 1 of the Declaration provides in part that

> [E]ach Owner of a Lot…by acceptance of a deed therefor…is deemed to covenant and agrees to pay Assessments and Charges to the Association in accordance with this Declaration. All Assessments and Charges shall be established and collected as provided for in this Declaration. The Assessments and Charges, together with interest, late charges and all costs, including, but not limited to, reasonable attorney's fees, incurred by the Association in collecting or attempting to collect delinquent Assessments and Charges, whether suit is filed or not, shall be a charge on the Lot or Lots owned by the Member of the Association…Each Assessment and Charge, together with interest, late charges and all costs, including, but not limited to, reasonable attorney's fees, incurred by the Association in collecting or attempting to collect delinquent Assessments and Charges, whether or not suit is filed, shall also be the personal obligation of the person…who was the Owner of such Lot or Lots at the time when the Assessment and Charge became due.

Declaration, attached as Exhibit C to MSJ, at p. 3, Art. II § 1. The Declaration goes on to provide in part,

> …In order to provide for the operation and management of the Association and provide funds for the Association to pay all Common Expenses and perform its

> duties and obligations…the Board, for each Assessment Period, shall assess against each Lot…an "Annual Assessment" of which the due dates shall be established by the Board.
>
> * * *
>
> The Board shall have the right to adopt, rescind and amend Rules setting forth procedures for the purpose of making, billing and collecting Assessments and Charges…The Rules may…set forth a schedule of "late" or similar charges…

Id. at p. 4, Art. II § 2(A); p. 7, Art. II § 8.

DISCUSSION

The Court has reviewed and considered Appellant's Memorandum - Opening Brief ("Opening Memorandum" or "O.M.") and Appellee's Responsive Memorandum ("Answering Memorandum" or "A.M."). Although Appellee has requested Oral Argument, the Court finds the parties' positions to be well-presented in the briefing, and so will rule without Oral Argument pursuant to S.C.R.A.P. – Civ. 11(a).

A. Appellant Waived Her Argument that Appellee's Claims are Time-Barred by Failing to Timely Raise It.

In her Opening Memorandum, Appellant argues that, for multiple reasons, the trial court erred in granting summary judgment in favor of Appellee. Among other things, she contends that most of the "allegedly unpaid charges" that the Association claimed were more "than six-years-old," and that the trial court "err[ed]" in entering "a judgment for time barred charges under A.R.S. § 12-548(A)(1)." O.M. at pp. 2, 4.[1]

As Appellee correctly argues in its Answering Memorandum, Appellant did not assert a limitations defense in her Answer, nor did she raise such a defense in her Response to Appellee's MSJ. A.M. at p. 6. Accordingly, she waived this defense, and cannot raise it at this stage of the proceedings. *See Trout*, 145 Ariz. at 358. *See also Lewis R. Pyle Mem. Hosp. v. Gila County*, 161 Ariz. 82, 84 (App. 1989) (affirming summary judgment and holding that defendant "waived" the

[1] A.R.S. § 12-548(A)(1) provides that "[a]n 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…[a] contract in writing that is executed in this state."

"statute of limitations as a defense" by failing to "assert" it "in opposition to the motion for summary judgment").

B. Appellant Waived Her Argument that the Ledger is Inadmissible by Failing to Object in Her Response to the MSJ.

Appellant further argues that the trial court erred in considering the Ledger in ruling on the MSJ because the Association "made no attempt to provide foundation or establish the authenticity of the ledger." O.M. at p. 7. Accordingly, Appellant concludes, the Ledger is "inadmissible and cannot be used to obtain summary judgment." *Id.*

In her Response to the MSJ, Appellant disputed the accuracy and validity of many of the fines and fees set forth in the Ledger. She did not, however, object to the admissibility of the Ledger itself. She never argued, for example, that the Ledger constituted inadmissible hearsay, nor did she assert any objection to the Ledger on grounds of lack of foundation. *See generally* Response. Because Appellant never argued in her Response that the Ledger was inadmissible, she has waived any such argument on appeal. *See Airfreight Expr. Ltd. v. Evergreen Air Ctr.*, 215 Ariz. 103, 112 (App. 2007) (holding that defendant "waived on appeal any argument" that declarations offered in opposition to defendant's motion for summary judgment "contain inadmissible hearsay" because defendant never asserted any evidentiary objections to the declarations in the trial court). *See also In re 1996 Nissan Sentra*, 201 Ariz. 114, 117 ¶ 7 (App. 2001) (holding that appellee "waived her right to object to any deficiencies in the documents [appellant] attached to its motion for summary judgment…by failing to file a motion to strike").

C. Appellee Failed to Establish Its Entitlement to Recover the Fines, Fees, and Other Charges It Claims.

Finally, Appellant asserts that the trial court erred in granting summary judgment because the evidence the Association submitted with its MSJ was insufficient to establish that the Association "is entitled to judgment as a matter of law on its claims." O.M. at p. 6. She contends that, although the Ledger reflects "different types of allegedly unpaid charges," the Association "offered no evidence demonstrating its right to impose these charges[.]" *Id.* at pp. 6-7. Likewise, Appellant asserts, Riesland's "barebones affidavit" neither "mention[s] the [L]edger" nor "substantiate[s] any of the charges reflected therein." *Id.* at p. 2. In effect, Appellant argues, the Association took the position in its MSJ that Appellant "is liable for" these unexplained charges merely because "she was billed for them." *Id.* at p. 8. The Association bore the burden of establishing its entitlement to judgment in its favor, she concludes, and "'[b]ecause we billed it' is not *prima facie* evidence of a debt." *Id.* at pp. 9, 12.

In its Answering Memorandum, Appellee contends that, along with its MSJ, "the Association submitted an accounting for all amounts charged and sought by the Association…as well as an affidavit attesting to the accuracy of the same." A.M. at p. 9. Moreover, it contends, the Declaration "expressly authorizes the Association to charge all costs (including admin fees and misc. fees)," and to "charge to and collect from homeowners all these amounts whether or not lawsuit is filed [*sic*]." *Id*. at p. 12. The Declaration "provides that all Owners within the Association, including [Appellant], covenanted and agreed to pay not only all assessments, but also all charges[.]" *Id*. at p. 8. The Declaration thus establish "the Association's ability to impose assessments, late fees, fines, collection costs (including admin fees) and other charges against" Appellant for her "failure to comply with the terms of the Declaration." *Id*. at p. 9.

Appellee acknowledges that the Declaration establishes only "the Association's *authority* to impose…charges" on homeowners, and does not purport to establish the basis for, or amount of, any specific charge that the Association imposed on Appellant. A.M. at p. 11 (emphasis added). Appellee argues, however, that the Ledger and the Riesland Affidavit, taken together, are sufficient to establish Appellant's indebtedness to the Association. According to Appellee, the Ledger "provided a detailed accounting break-down of the amounts the Association charged" to Appellant "under the authority of the Declaration," while the Riesland Affidavit "avowed as to the accuracy of the [L]edger and the total amount owed." *Id*.

Contrary to Appellee's assertion, a review of the Ledger shows that it is not a "detailed break-down" of amounts charged to Appellant. *See generally* Ledger. The Ledger consists of several pages of columns with line items listing dates and dollar amounts. Although the Ledger includes a column entitled "Description," the so-called "[d]escription[s]" are, in many instances, so vague as to be unintelligible. Some of the charges, for example, as described by the term "misc. charges," which provides the reader with no idea what the associated dollar figure is supposed to represent. Likewise, the handwritten figure of $72.00 appears on the last page of the Ledger; this sum is unaccompanied by any description of any kind. *See* Ledger at p. 6.

Moreover, as Appellant points out, the Ledger contains numerous entries described as "Fines" that are in amounts "ranging from $50.00 to $160.00," with no explanation of "[t]he basis for, or calculation of," any of those fines. O.M. at p. 7. Nothing in the Ledger establishes that the Association was entitled to impose these fines, or how the amount of each fine was determined. *Id*. at p. 8. Presumably, any "fine" that was imposed constitutes a purported sanction for a breach by Appellant of her obligations under the Declaration. As Appellant correctly argues, however, the Association never "even attempt[ed] to" show that Appellant committed any breach, and therefore failed to show that the Association had "a right to" impose or "collect" any “fines” at all. *Id. See also id.* at p. 9 (observing that the Association “fined” Appellant for “landscaping violations” that the Association “has not proved…she committed”).

The Court thus finds that the Ledger, by itself, is of little evidentiary value, and is certainly insufficient to establish the Association’s entitlement to judgment as a matter of law. As Appellant correctly asserts, “the amount of debt” owed by a defendant “is not established…by the existence of a ledger with nondescript line items.” O.M. at p. 5.

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 Riesland Affidavit shows that it does not come close to establishing the accuracy of the Ledger or the amount that Appellant purportedly owes.

Nothing in the Riesland Affidavit, for example, identifies any specific act or omission by Appellant that purportedly constituted a breach of her obligations under the Declaration. *See generally* Riesland Affidavit. The Riesland Affidavit provides no information to explain the basis for any fine that was purportedly imposed, or to establish the amount of such fine(s). *See id.* While the Ledger reflects charges for “fines” in amounts that vary from $50 to $160, nothing in the Riesland Affidavit establishes that these amounts are anything other than what Appellant says they are: “ad hoc fines, plucked from the air.” O.M. at p. 8.

Likewise, nothing in the Riesland Affidavit establishes the Association’s entitlement to recover the sums in the Ledger that purport to represent charges for legal fees. Appellee’s assertion that the Declaration “expressly authorized the Association to charge for and collect…pre-litigation legal fees and costs,” A.M. at p. 12, overlooks the fact that the Declaration only entitles the Association to collect “*reasonable* attorney’s fees,” and only if those fees were “incurred by the Association in collecting or attempting to collect delinquent Assessments and Charges.” Declaration at p. 3, Art. II § 1 (emphasis added). Moreover, it is for the court, not the Association, to determine the Association’s entitlement to fees and the reasonableness of the amount claimed. As Appellant correctly asserts, the Association cannot properly “usurp[]” the court’s role by unilaterally deciding its own entitlement to fees and the reasonableness of the amount it claims. O.M. at p. 11. Because the Association never attempted to identify the legal services that were performed, the Association failed to establish that the fees were incurred in an attempt to collect delinquent assessments and charges. Absent a showing that the fees were incurred in an attempt to collect delinquent assessments and charges, the Association has not established that the Declaration entitles it to recover those fees. Further, as Appellant points out, the Association never “attempted to establish” the “reasonableness” of the amount of legal fees listed in the Ledger, and never “even disclosed the evidence necessary for such a determination.”

Id. at p. 11. Accordingly, the Association failed to establish the reasonableness of the amount of the legal fees that are included in the Ledger.

Similarly, the Riesland Affidavit does not attempt to explain the basis for numerous other unexplained charges in the Ledger, such as, for example, the $480.00 charge imposed on November 16, 2015 that is described only as "misc. charges," or the charge in the amount of $72.00 that is handwritten on the last page of the Ledger. Ledger at pp. 3, 6.

Because the Riesland Affidavit does not describe how the Ledger was prepared (indeed, it does not even mention the Ledger), the Riesland Affidavit gave the trial court no means of making an independent determination about whether Appellant did, in fact, breach her obligations under the Declaration, or to make an independent determination of the amount owed as a result of any breach. Instead, the Riesland Affidavit includes nothing more than conclusory assertions that (1) Riesland "review[ed]" unspecified "Association documents and records, including the files and accounting related to" the Property, (2) Appellant "breached the Declaration by failing to pay the assessments, monetary penalties, and all other fees and charges owed that have been charged against" the Property, and (3) Appellant is "indebted to the Association…for unpaid assessments and related amounts, in the amount of $2,588.50, at the time of the Complaint[.]" Riesland Affidavit at ¶¶ 2, 8, 10. Such conclusory assertions are wholly insufficient to support summary judgment. *See Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 214 ¶¶ 18-20 (App. 2012) (affidavit that "summarily" stated, in a "conclusory" manner, the amount of the debt allegedly owed by the non-moving party was insufficient "to support the motion for summary judgment" because affiant failed to "provide a reviewing court with the means to evaluate the accuracy of the [affiant's] calculation").

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*. at 214 ¶ 18. 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*. 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*. The *Allen* court concluded by holding that "conclusory affidavits stating 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, because a court cannot simply defer to the plaintiff's avowal that the defendant owes a debt, 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"); *See CACH, LLC v. Martin*, 2015 WL 5620322 at *3 (Ariz.App. Div. 1, Sept. 24, 2015) (affidavit "which summarily recited an amount owed and little else" was insufficient to sustain summary judgment).[2]

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 come to the conclusion 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 Riesland Affidavit does not explain how, when, or by whom the Ledger was created, or, indeed, make any reference at all to the Ledger. Moreover, although the Riesland Affidavit states that Riesland reviewed unidentified "documents and records," Riesland Affidavit at ¶ 2, the Association never supplied the trial court with copies of any of the documents that Riesland reviewed. Indeed, the Riesland Affidavit does not even identify those documents, or indicate that Riesland is familiar with the manner in which they were prepared.

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[2] *High Valley Builders* and *Martin* are being considered herein for their persuasive value pursuant to R.Supr.Ct. 111(c)(1)(C).

Although the Riesland Affidavit sets forth Riesland's conclusion that Appellant "breached the Declaration," Riesland Affidavit at ¶ 8, whether a breach occurred was a determination for the trial court to make, not Riesland. And although the Riesland Affidavit states that Appellant is "indebted to the Association…in the amount of $2,588.50," *id*. at ¶ 10, neither the Riesland Affidavit nor any other exhibit submitted by Appellee provided the trial court with a means to evaluate the accuracy of Riesland's calculation. Pursuant to *Allen*, the Riesland 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.

In support of its position, Appellee offers a number of factual assertions in an effort to justify at least some of the fines and charges that are reflected in the Ledger. Appellee asserts, for example, that, "[b]eginning in July 2014," Appellant "allowed conditions to exist on her Property that violated the Declaration," that "those violations were not abated," and that those purported violations form the basis for the "fines" that were "imposed." A.M. at pp. 2, 3. These factual assertions are being raised by Appellee for the first time on appeal, and are not supported by any evidence in the record. Because there is no evidence in the record to support these assertions, the Court will not consider them. *See Sholes v. Fernando*, 228 Ariz. 455, 457 n.2 (App. 2011) (disregarding assertions of fact with no citation to evidence in the record); *Flood Control Dist. of Maricopa County v. Conlin*, 148 Ariz. 66, 68 (App. 1985) ("[F]actual assertions" in opening brief "for which we find no record support" will be "disregarded").

Appellee also asserts that Appellant "did not present any competent evidence to contradict" the evidence the Association presented in support of its MSJ. A.M. at p. 10. While this assertion is true, it is also irrelevant. In opposing Appellee's MSJ, Appellant had no obligation to come forward with evidence to rebut evidence presented by Appellee unless and until Appellee presented admissible evidence to establish a *prima facie* case of its entitlement to summary judgment. *Allen*, 231 Ariz. at 211 ¶ 1 ("A plaintiff's motion [for summary judgment] must stand on its own and demonstrate by admissible evidence that the plaintiff has met its burden of proof and is entitled to judgment as a matter of law."). Because, for the reasons stated above, the evidence the Association submitted in support of its MSJ was insufficient to establish its entitlement to judgment as a matter of law, Appellant had no obligation to come forward with controverting evidence of her own. *See id*. at 214-15 ¶ 21 (because moving party "failed to establish its entitlement to judgment as a matter of law," non-moving parties "were not required to create a genuine dispute of material issue of fact to avoid summary judgment"). *See also 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.").

Appellee asserts that Appellant "expressly admitted that she owed the admin [*sic*] charges in her Answer," and that admission alone establishes that "the trial court properly granted the Association's [MSJ]." A.M. at p. 13.

Appellee's assertion on this point overlooks the factual dispute between the parties over the total amount that Appellant paid to the Association during the time period covered by the Ledger. In the Answer she filed on August 7, 2020, Appellant asserted, under oath, that she "paid each of the semi-annual assessments up to the entire year 2020." Answer at p. 1. Appellee insists, however, that, "[a]t the time [Appellant] filed her Answer, her claim to have paid assessments up to and including the entire year 2020 was false." A.M. at p. 3. A court obviously cannot resolve factual disputes when ruling on a motion for summary judgment. On the contrary, the court must view the facts in the light most favorable to the non-moving party. *Hourani*, 211 Ariz. at 432 ¶ 13. The factual dispute between the parties over how much Appellant paid to the Association during the relevant time period precludes a finding about whether Appellant would be indebted to the Association after being given credit for all payments she made.

In support of its position, Appellee relies on *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284 (App. 2000). According to Appellee, *Kelly* stands for the proposition that, "in order to make a *prima facie* showing as to amounts claimed due and owing, an accounting of [a plaintiff's] claim satisfies the evidentiary standard necessary for a court to grant summary judgment." A.M. at p. 9.

Contrary to Appellee's suggestion, *Kelly* does not stand for the proposition that any so-called "accounting," no matter how vague or conclusory, is sufficient to establish a *prima facie* showing of the existence and amount of a debt. In *Kelly*, former homeowners sued after their house was sold at a trustee's sale, alleging, *inter alia*, that the trustee's sale failed to comply with statutory requirements. 199 Ariz. at 286. The homeowners "also requested an accounting of payments received" by the lender "so that they could determine whether the amounts they had paid had been properly credited." *Id*. The lender moved for summary judgment, submitting evidence to show that it had taken "all steps required by statute to process a non-judicial foreclosure." *Id*. The lender also provided "a list of mortgage payments made" during the three-year period preceding the foreclosure sale. *Id*. After the trial court granted the lender's motion for summary judgment, the Court of Appeals affirmed. In so ruling, the Court rejected the homeowners' assertion that issues of fact remained about the accuracy of the lender's figures, noting that the homeowners "failed to provide any evidence to refute the accounting supplied by" the lender. *Id*. at 287.

In *Kelly*, the homeowners did not dispute that they owed monthly mortgage payments to the lender. Moreover, there was no dispute in *Kelly* about what the figures in the lender's accounting represented, *i.e*., "an accounting of the most recent thirty-six months of [mortgage] payments" made by the homeowners. 199 Ariz. at 287.

Here, by contrast, the Association has provided no explanation for most of the figures listed in the Ledger, and, with the exception of the "admin fees," Appellant has not admitted that she owes any of those sums. Moreover, although the Riesland Affidavit includes the conclusory assertion that "[t]he Association has credited [Appellant's] account for any and all payments made towards the account," Riesland Affidavit at ¶ 12, the Association has presented no evidence of how the Ledger was created, and therefore no evidence on which the trial court could find that the Ledger accurately reflects all payments made by Appellant. Further, the parties have presented conflicting evidence on that point. In her Answer, Appellant asserted under oath that she "paid each of the semi-annual assessments up to the entire year 2020," Answer at p. 1, while Appellee alleges that this statement is "false." A.M. at p. 3. The disputes about the basis for, and accuracy of, the figures in the Ledger were not present in *Kelly*, which renders *Kelly* inapposite.

The Association supported its MSJ with documents that failed to establish its entitlement to judgment as a matter of law. The Declaration merely established the Association's authority to impose assessments, late fees, fines, and other charges on homeowners; it did not establish the basis for, or amount of, any specific charges that were imposed on Appellant. The Ledger consists of nothing more than a list of figures with little or no explanation. The Riesland Affidavit makes no reference to the Ledger, and simply states in a conclusory manner that Appellant breached the Declaration and owes $2,588.50. *See* Riesland Declaration at ¶¶ 8, 10. Pursuant to *Allen*, the evidence submitted by the Association was insufficient to establish its entitlement to judgment in its favor. *See Allen*, 231 Ariz. at 214 ¶¶ 18-20. The trial court therefore erred in granting the MSJ.

Both parties have requested an award of fees and costs incurred on appeal. *See* O.M. at p. 12; A.M. at p. 14. As the prevailing party, Appellant may be entitled to recover her reasonable attorney fees and taxable costs on appeal. Upon Appellant's compliance with Rule 13, Sup.Ct.R.App.P. – Civ., this Court will consider Appellant's request for costs and fees.

If Appellant contends that a provision of a contract between the parties requires this Court to award reasonable attorneys' fees and/or costs, Appellant's filing must either supply the contractual provision requiring the award of fees or specifically identify where in the existing record that provision can be found. *See Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 206 ¶

8 (App. 2014). Appellant's filing also "must disclose the terms of any fee agreement for the services for which the claim is made." Rule 54(g)(4), Ariz. R. Civ. P. *See also Jerman v. O'Leary*, 145 Ariz. 397, 403 (App. 1985) ("[I]t is vital to know what the agreement was between [the successful parties] and their lawyer."). Upon resolution of Appellant's request for fees and costs, the Court will enter a signed judgment pursuant to S.C.R.A.P. - Civ. 12 and remand this matter to the Arrowhead Justice Court.

In accordance with the foregoing,

IT IS ORDERED reversing and vacating the Judgment entered by the Arrowhead Justice Court on March 31, 2021.

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.