

No. 48603-2-II

**IN THE COURT OF APPEALS FOR THE  
STATE OF WASHINGTON DIVISION II**

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AMERICAN EXPRESS CENTURION BANK

Respondent

V.

HEINZ HENGSTLER

Appellant

APPEAL FROM PERICE COUNTY SUPERIOR COURT CASE NO.  
12-2-13342-1

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**BRIEF OF RESPONDENT**

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American Express Centurion Bank  
c/o Suttell, Hammer & White, P.S.  
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## **I. INTRODUCTION**

This is a simple collection case in which the Appellant Heinz Hengstler (hereafter “Hengstler”), seeks to avoid paying two credit card debts that he incurred. Two separate cases were filed, one for each credit card account and Summary Judgment was entered in favor of American Express Centurion Bank (hereafter “American Express”) on each account. Hengstler did not submit a contradicting affidavit to the trial court in either case. Hengstler then appealed and the case was consolidated and the case was remanded for further proceedings due to a lack of incorporation of business records in the affidavit of Plaintiff’s custodian of Records. Plaintiff then cured this defect and refiled its motion for summary judgment. After hearing arguments, Plaintiff was again granted Summary Judgment.

Hengstler now claims that the trial court erred in determining whether genuine issues of material fact existed. As recognized by the trial court, American Express’s evidence clearly showed that Hengstler entered into a credit card agreement for each account with American Express and that Hengstler was liable for the debts that he incurred. As a result, a judgment was entered against Hengstler. Further, American Express has cured all previous defects pointed out on appeal. American Express therefore respectfully requests that this Court affirm the summary judgments that were entered on January 15, 2016.

## **II. STATEMENT OF THE CASE**

American Express issued two separate credit card accounts to Hengstler, which were the subject of two separate Pierce County Superior Court cases later consolidated as case No. 12-2-13342-1. Hengstler first opened the account ending in 01003 in September 1993, and the account ending in 71006 in 1996. CP 23-26, 557-560 Hengstler used the accounts to make purchases for goods and services such as on July 23, 2005 for \$1239.00 a flight in the name of Mr. Hengstler, as well as payments regularly made on the account. CP 613-617. Hengstler subsequently ceased making payments on the accounts in 2012. CP 522-540 1248-1260. At the time of default, there was due and owing \$31,598.05 on both accounts. CP 23-26, 557-560. (Affidavit of Mario Morales-Arias).

On January 24, 2013, Hengstler was served with a summons and complaint for that amount due and owing to American Express. CP 1-2. On October 2, 2012, the complaint was filed with the Pierce County Superior Court. CP 1-2. On February 12, 2013, an answer to the complaint was filed denying the allegations generally. CP 3-4. On October 26, 2015 a motion for summary judgment was filed with a hearing date of December 18, 2015. CP 17-1297. American Express' motion for summary judgment was supported by the affidavit of Mario

Morales-Arias for both accounts underlying the summary judgment motion. CP 23-26, 557-5607. Statements on the accounts from 2005 through 2012 were attached and incorporated by Mr. Morales-Arias. CP 17-1297. As mentioned above, the billing statements show detailed and itemized usage on the account. CP 17-1297.

Hengstler filed a response to the summary judgment in his “affidavit denying existence of a debt” and “defendant’s issues in dispute.” CP 5-8, 9-10. In these documents, Defendant alleges that he denies the debt, but if “the alleged debt it is my debt, Affiant denies it is still a valid debt of Affiant’s.” CP 5-8. Defendant goes on to argue that the Mr. Morales-Arias is somehow not affiliated with American Express. CP 9-10. Judge Leanderson summarized Defendant’s arguments by stating “So, in essence, you haven’t provided anything more that there are any material issues of fact remaining for trial, and you have not set forth any evidence to show that you are not indebted to American Express and that you did not make the payments and purchases associated with the account or that you are not in default on the obligations to pay.” Verbatim Report of Proceedings 6.

Judge Leanderson granted summary judgment after considering all filings. CP 11-12. Hengstler subsequently filed this appeal on February 12, 2016. CP 13-15.

**A. SUMMARY JUDGMENT**

On January 15, 2016, the Honorable Gretchen Leanderson heard argument on American Express’s motion for summary judgment. CP 11-12, In the Judgment order, Judge Leanderson specifically reviewed Hengstler’s response, and found it raised no issues of fact. *Id.* Judge Leanderson also clarified during the hearing that Hengstler had not “set forth any evidence to show that you are not indebted to American Express” *Verbatim Report of Proceedings*, 8. Finding no issues of fact, Judgment was entered by the Court. CP 11-12. Hengstler subsequently filed this appeal on January 15, 2013. *Id.*

**III. ARGUMENT**

**A. ISSUES ON APPEAL**

**Whether the trial court properly granted summary judgment.**

**B. STANDARD OF REVIEW**

**1. Granting of Summary Judgment**

An appellate court engages in a *de novo* review of a ruling granting summary judgment, engaging in the same inquiry as the trial court. Lybbert v. Grant County, 141 Wn.2d 29, 34 (2000). Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material

fact and that the moving party is entitled to summary judgment as a matter of law. CR 56(c), Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217 (1991). An appellate court may affirm an order granting summary judgment on any basis supported by the record. Truck Ins. Exchange v. Vanport Homes, Inc. 147 Wn.2d 751 (2002).

### C. ANALYSIS

#### 1. Summary Judgment Was Appropriate as a Matter of Law Because There Were No Genuine Issues of Material Fact.

Summary Judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Pursuant to CR 56(e), an adverse party “may not rest upon the mere allegations or denials of his pleading, but his response, by *affidavits* or as otherwise provided in this Rule, must set forth *specific facts* showing that there is a genuine issue for trial.” CR 56(e) (emphasis added). Hengstler failed to provide any affidavits to set forth specific facts showing that there was a genuine issue for trial in either case. *See CP 5-8, 9-10, 11-12*. Instead, Hengstler merely made meritless legal arguments. *Id.* Hengstler did not submit an affidavit denying that he made purchases on either credit card account. *Id.* Hengstler did not submit an affidavit denying that he made payments on either credit card account. *Id.* Hengstler did not submit an affidavit explaining that the amounts owed were incorrect. *Id.* Hengstler did

not submit an affidavit denying that he was the holder of either credit card account. *Id.* Hengstler's only arguments were a "denial" of the account, or in the alternative that the account was "invalid." CP 5

In contrast, American Express's motion for summary judgment were supported by two affidavits, one for each account. CP 23-26, 557-560. These were affidavits of Mr. Morales-Arias, an assistant custodian of records of American Express, who stated that Hengstler opened each American Express credit card account, that Hengstler used each account to purchase goods and services, that Hengstler subsequently failed to make payments on the accounts, and that as a result Hengstler was in default on each account. CP 23-26, 557-560. Further, all billing statements and other documentation before the court were specifically incorporated into the Affidavit. CP 23-26, 557-560.

American Express's motions for summary judgment were supported in each case by business records specifically incorporated by the affiant. See CP 23-1283. The business records for each account include copies of the cardmember agreements and periodic billing statements showing detailed and itemized usage of each account including numerous purchases and payments. CP 23-1293. For example, a flight to Germany was listed on July 23, 2005. CP 615. The affidavits and business records submitted by American Express show that there was no genuine issue of material fact for

trial in either case. Upon review of the documents and pleadings, reasonable minds cannot differ that Mr. Hengstler was issued two separate credit card accounts, used the accounts, and that there are balances that remain due and owing to American Express by Hengstler for each account. Hengstler did not provide the trial court with any evidence to contradict the evidence provided by American Express, as required by CR 56, therefore there were no issues of material fact and summary judgment in each case was appropriate.

**2. Affidavits and Business Records of American Express are Proper under CR 56 and RCW 5.45.020.**

Pursuant to CR 56, a motion for summary judgment is made through the use of supporting affidavits. The purpose of a summary judgment is to avoid a useless trial. As such, the hearing is set so that the arguments are made upon a motion with supporting affidavits and documentation.

American Express included the affidavits of Mr. Morales-Arias in its motions for summary judgment. CP 23-26, 557-560. Pursuant to CR 56(e), affidavits submitted as part of a summary judgment proceeding shall be made on personal knowledge that shall set forth such facts as would be admissible evidence showing affirmatively that the affiant is competent to testify what is in the affidavit. Mr. Morales-Arias' affidavits satisfy these requirements. Id. Mr. Morales-Arias states that he makes each affidavit

based on personal knowledge or review of the business records of American Express. Id. Mr. Morales-Arias affidavits set out that the records of American Express show Hengstler owes a balance due and owing to American Express for each account. Id. The affidavits affirmatively state that Mr. Morales-Arias is a custodian of records who is competent to make each affidavit. Id. Mr. Morales-Arias' affidavits are admissible under CR 56(e).

American Express's documents meet the Business Records Exception under RCW 5.45.020. The definition of a business record and the requirements for submission are set out in RCW 5.45.020:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

The custodian of records or other qualified witness must then testify to (1) the record's identity; (2) its mode of preparation; (3) if it was made in the regular course of business; and (4) if it was made at or near the time of the act, condition or event. RCW 5.45.020. Mr. Morales-Arias, as an employee, has knowledge of, and access to, relevant account information and records concerning the American Express accounts ending in 01003 and 71006. *Id.* Mr. Morales-Arias swears that he is familiar with how the records are

created and maintained by American Express, which include the business records provided with American Express's motions for summary judgment. *Id.* Mr. Morales-Arias affidavits satisfy the requirements of RCW 5.45.020. Further, as mentioned above, these affidavits specifically incorporate the underlying documents, and cured any defect this Court previously had with their admissibility.

**3. Under Discover Bank v. Bridges and American Express Centurion Bank v. Stratman, American Express has Provided Proof of Hengstler's Personal Acknowledgment of the Accounts.**

Hengstler alleges that American Express has not met the summary judgment standard. In Bridges, the Court of Appeals Division III ruled that the bank had to show that the defendant mutually assented to the credit card agreement and personally acknowledged the account. Discover Bank v. Bridges, 154 Wn. App. 722, 727 (2010). The court ruled that personal acknowledgement of the account could be proven through a signed agreement between the parties, through copies of checks or electronic payments, through detailed itemized proof of the card's usage, or through other evidence of the defendant's personal acknowledgement of the account. *Id.* at 727-728.

The Court of Appeals Division I decided American Express Centurion Bank v. Stratman, 172 Wn. App. 667 (2012), which upheld the

entry of summary judgment and found that the case was distinguishable from Bridges because the account billing statements provided in Stratman listed specific information about the individual purchases and payments that were made on the account (e.g. the date of the purchase, the amount of the purchase, the name of the entity who provided the goods or services purchased). At 674. Thus, this Court held that the billing statements in *Stratman* were enough to show personal acknowledgment of the account. Id.

Here, American Express has provided billing statements for each account from March 2005 through March 2012. CP 23-1297. The billing statements show purchases and payments made on each account from March 2005 until each account went into default. Id. The billing statements show detailed and itemized usage of each account by Hengstler, like as mentioned above, the Germany flight booked July of 2005. CP 615.

American Express has clearly shown that Hengstler personally acknowledged these credit card accounts, and thus that Hengstler assented to the terms of the credit card agreements for each account. American Express has provided detailed and itemized usage of the accounts by showing that Hengstler made purchases and payments. Here, the Bridges standard has been met because American Express provided the listing of purchases and payments made on each account since March 2005. *Id.*, 488-593. Again, in

contrast, Hengstler makes vague denials, but lacks any specific facts to set forth material issues remaining for trial.

Hengstler did not provide adequate evidence to contradict the evidence provided by American Express, as required by CR 56, there were no issues of material fact and summary judgment was appropriate in both cases. Hengstler's "affidavit denying existence of a debt" is in and of itself contradictory and flawed. American Express's motion for summary judgment was proper and should be affirmed.

**4. Cross Examination is not Required in a Summary Judgment Proceeding and No Assignment has Occurred.**

Hengstler argues he was denied an opportunity to cross examine Mr. Morales-Arias, and that Mr. Morales-Arias did not have personal Knowledge of the underlying documentation and Plaintiff's business records. (*Revised Appellant's Brief* 9.) These arguments are without merit. In *Stratman*, the exact issue of cross-examination and assignment was argued. *Stratman*, 172 Was App 667 at 676.

"Stratman argues that defense counsel did not have the "authority" to represent American Express pursuant to RCW 4.08.080. But RCW 4.08.080 involves the authorization of an assignee of a debt to file suit in its own name as long as such an assignment is in writing. American Express did not assign Stratman's debt; it is attempting to collect on its own behalf."

The same issue occurs here, as no assignment has occurred, Plaintiff need not show the account was assigned, as Plaintiff is suing on its own behalf. Further, cross examination is not required at summary judgment proceedings, as the court does not weigh witness credibility. *Id.*

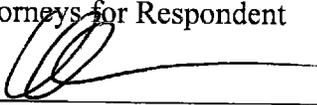
Again, Hengstler argues assignment and hearsay, but has provided no evidence of his own. *CP 5-8.* Therefore the Trial Court did not err in granting summary judgment.

#### **IV. CONCLUSION**

The trial court's order of summary judgment in favor of American Express should be affirmed. Therefore, American Express respectfully requests that this Court affirm the judgments that were entered on January 15, 2016.

Dated this 1 day of November, 2016.

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WASHINGTON STATE COURT OF APPEALS, DIVISION II

AMERICAN EXPRESS CENTURION BANK	Respondent,	APPELLATE COURT
vs.		No. 48603-2-II
HEINZ HENGSTLER,	Appellant.	CERTIFICATE OF MAILING

The undersigned declares and states as follows:

I am a citizen of the United States of America, and of the State of Washington, over the age of twenty-one years, not a party to this proceeding and competent to be a witness herein.

On November 1, 2016, I sent a copy of the RESPONDENT'S BRIEF; CERTIFICATE OF MAILING in the above entitled action to:

HEINZ HENGSTLER  
819 N 5<sup>TH</sup> ST, #104  
Tacoma WA 98417

placing said documents in a sealed envelope with first class postage fully paid thereon.

Declarant states the foregoing is true and correct to the best of his knowledge and belief, subject to the penalty of perjury under the laws of the State of Washington.

DATED this 1<sup>st</sup> day of November, 2016, at Bellevue, Washington.

  
\_\_\_\_\_  
Alicia Clark

## SUTTELL & HAMMER PS

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