STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
In the Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2011-CP-40-2389
Court of Appeals No. 2012-213531

CACH, L.L.C.....Respondent,

v.

Toby Hoffman, Jr., a/k/a
Carl W. Hoffman, Jr.....Appellant,

INIITAL BRIEF OF APPELLANT

JOHN D. ELLIOTT
Attorney for Appellant
P.O. Box 607
1122 Lady Street, 5th Floor
Columbia, SC 29202
Phone: 803.252.9236
Fax: 803.799.2079
E-Mail: jayel@mindspring.com

TABLE OF CONTENTS

TABLE OF CASES

Cases

Rules

Other Authority

STATEMENT OF THE ISSUES ON APPEAL

I. DID CACH L.L.C. PROVE THAT IT HAD A VALID ASSIGNMENT FROM THE CREDITOR IN ORDER TO PURSUE CLAIMS AGAINST MR. HOFFMAN?

II. WAS THE EVIDENCE INTRODUCED BY CACH L.L.C. TO PROVE ITS CASE INADMISSABLE HEARSAY?

III. BECAUSE CACH FAILED TO DISCLOSE ITS PRINCIPAL WITNESS THROUGH DISCOVERY SHOULD HIS TESTIMONY HAVE BEEN EXCLUDED?

STATEMENT OF THE CASE

On April 12, 2011, CACH, L.L.C., filed an action against Toby Hoffman, Jr. alleging it was the assignee of two debts owed to Bank of America, and seeking judgment against him for the debt. Mr. Hoffman timely served an answer denying the allegations of the complaint. The action was tried before the Hon. G. Thomas Cooper, Jr. in the Court of Common Pleas for Richland County on October 9, 2012 and judgment was rendered against Mr. Hoffman in the total amount of $134,600.15, in an order filed October 17, 2012. Mr. Hoffman served notice of appeal on November 17, 2012.

ARGUMENTS

I. CACH L.L.C. DID NOT PROVE THAT IT HAD A VALID ASSIGNMENT FROM THE CREDITOR IN ORDER TO PURSUE CLAIMS AGAINST MR. HOFFMAN.

CACH, L.L.C. is a grand-scale national buyer of debt.[1] In this case, it asserts that it has two accounts for which it purchased the rights to sue through assignments made by the original creditor.

The original creditor, however, was the Bank of America. [Exhibits 3 & 6.] The assignor of the two accounts was FIA Card Services. [Exhibits 1 & 4.] At trial, CACH introduce evidence of a filing with the U.S. Securities and Exchange Commission – Form 8-K- to show that FIA Card Services was a wholly-owned subsidiary of Bank of America Corporation. [Form 8-K; Tr. pp. 4-6.]

Mr. Hoffman introduced two other filings with the Securities and Exchange Commission, Form 10-Q's, which were filed with the commission, one of them for the period ending June 30, 2010, about the time the assignment was made. The 10-Q's filed

[1] For a discussion of this industry and especially its effect on consumers in small claims courts, see generally, Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J.Bus. & Tech. L. 259 (2011)

by Bank of America Corporation plainly state that the corporation operates its banking activities through two separately charted banks, Bank of America National Association (or Bank of American N.A.) and FIA Card Services, N.A. [10-Q's;, Tr. p. 43.] *See also,* Scott and Arias, "Banking Profitability Determinants," 4 Business Intelligence Journal 209 at 217 (2011).

In order for CACH to sue Mr. Hoffman on the debts, it must first show proof of a valid assignment, essential to its claims against him. *Professional Bankers Corporation v. Floyd*, 285 S.C. 607, 331 S.E.2d 362 (Ct.App.1985). Without such proof, CACH has no claims against Mr. Hoffman. *See, e.g. S.C.D.S.S. v. Deglman*, 288 S.C. 149, 341 S.E.2d 638 (Ct.App. 1986), where the department failed to produce proof of an assignment of a putative obligee's right to obtain child support. *Rev'd.,* in *S.C.D.S.S. v. Deglman*, 290 S.C. 542, 351 S.E.2d 864 (1986) on procedural grounds.

Where there are multiple entities which have purported to assign a right of action, there must be proof of the validity of the assignment whenever the rights to collect the debt is transferred. *CACH, L.L.C v. Askew*, 358 S.W.3d 58 (Mo. 2012) at 62. "In other words, every link in the chain between the party to which the debt was originally owed and the party trying to collect the debt must be proven by competent evidence in order to demonstrate standing." *Id* (citation omitted). *See also, Wirth v. CACH, L.L.C.*, 300 Ga.App. 488, 685 S.E.2d 433 (2009).

Bank of America has two separately chartered banks, one which apparently issues the credit comprising the debt allegedly owed by Mr. Hoffman, and the other which apparently services the loan. As such, they are different and distinct entities, requiring proof of an assignment from Bank of America to FIA Card Services. That assignment has not been proven.

Other trial courts have engaged in a similar analysis. For example, in *CACH L.L.C. v. Fatima*, 2011 N.Y. Slip Op. 51510 (New York District Court for Nassau County), the trial court likewise noted that there was no explanation by the plaintiff as to how FIA Card Services as a "wholly owned subsidiary" of Bank of America acquired the right to convey a cause of action to CACH. While not binding precedent, that case is squarely analogous to the facts here and provides a useful example of how any such assignments of debt should be scrutinized.

CACH has not established a proper chain of assignment of a right to collect these debts against Mr. Hoffman and has not proven this essential element of its claims against him.

II. THE EVIDENCE INTRODUCED BY CACH L.L.C. TO PROVE ITS CASE WAS INADMISSABLE HEARSAY.

The sole witness testifying for CACH L.L.C. was one "Magic West," who was not an employee of CACH, but rather an employee of its parent company, Square Two.[2]

In his testimony, he referenced affidavits of the sale of the accounts from Bank of America and their balances, introduced in evidence over objection. [Exhibits 2 & 4.] Mr. West also introduced credit card statements said to be the records of the two accounts CACH acquired from the bank.

These records were introduced under the business record exception to the rule against hearsay, at rule 803(6) of the S.C. Rules of Evidence. That rule admits in evidence business records or data compilations "made at or near the time" of their making "if kept in the course of a regularly conducted business activity" by "a person

[2] According to Mr. West, CACH has no employees. [Tr. p. 9, l. 14-15.]

with knowledge" of their making. *Id.* Moreover, any such records may only be introduced by the custodian of the records, "or other qualified witness."

First, the affidavits relied upon by Mr. West and introduced as evidence were clearly inadmissible hearsay. *Lee v. Gulf Insurance Company*, 248 S.C. 296, 149 S.E.2d 639 (1966). Furthermore, the affidavits were clearly prepared in anticipation of this litigation; hence they are self-serving and inadmissible for that reason. *Woodward v. South Carolina Farm Bureau Insurance Co.*, 277 S.C. 29, 282 S.E.2d 599 (1981) holding that the admission of a letter from a treating physician was reversible error due to the self- serving statements contained in it. *See also, LVNV Funding L.L.C. v. Mastaw*, 2012 WL 1534785 (Tenn. App. Apr. 30, 2012, "Documents prepared specifically for the subject litigation are 'properly excluded because of motivational concerns arising from the fact that they were generated for litigation purposes,' as opposed to records generated for business purposes." Id, at ___, citing 2 Broun, *McCormick on Evidence* Section 288 (6th Ed.1999).

Moreover, while Mr. West testified that he was generally familiar with all banking records from institutions around the country, he conceded that he was not an employee of the Bank of America nor responsible for overseeing the generation of the records from the Bank of America. [Tr. pp. 30-32.] He testified that his company – CACH or Square Two – only became the custodians once those records were sent to it, ostensibly by the same affidavits he was relying upon. [Tr. p. 31, l. 19-25.] Indeed, he testified that the original records custodian was "a computer," somewhere in Bank of America. [Tr. p. 32, l. 5-6.]

Mr. West is neither the custodian nor a "qualified witness" under the rule and its rationale. He could not testify about the mode of preparing the records. *State v.*

McFarlane, 279 S.C. 327, 306 S.E.2d 611 (1983). Merely because he has possession of the records does not qualify him as a custodian nor a person who can attest to their preparation. *Connelly v. Wometco Enterprises, Inc.*, 314 S.C. 188, 442 S.E.2d 204 (Ct.App.1994).

Other courts have ruled this type of evidence in an action to collect a debt on assignment is inadmissible. See, *LVNV Funding L.L.C. v. Mastaw, supra,* at ____. *See also, Ortega v. CACH L.L.C.*, 396 S.W.3d 622 (Tex. Ct.App.).

The testimony of Mr. West, and the record evidence he introduced, were inadmissible hearsay under Rule 803(6) of the South Carolina Rules of Evidence.

III. CACH FAILED TO DISCLOSE ITS PRINCIPAL WITNESS THROUGH DISCOVERY AND HIS TESTIMONY SHOULD HAVE BEEN EXCLUDED.

Mr. Hoffman, through his counsel, sent interrogatories to CACH, L.L.C. asking, among other inquiries, for its witnesses. In response, CACH named two, Mr. Peter Huber and Mr. Tom Vigil.[3] The response also averred that the individuals "and any other authorized agent of the plaintiff" would testify in accordance with affidavits furnished the defendant. [Plaintiff's Response to Interrogatories and Vigil Affidavit.]

At trial appears Mr. Magic West, as an employee of Square Two.

No supplement to the interrogatories identified him or his company. Accordingly, the defense objected on grounds of surprise and unfair prejudice. [Tr. p. 8; p. 11.]

The decision to exclude a witness as a sanction for failure to name the witness is discovery is within the trial court's discretion. *Bensch v. Davidson*, 354 S.C. 173, 560 S.E.2d 128 (2003). In making such a decision, the trial court should consider the type of

[3] This witness was incorrectly named as Mr. "McNeil" in the transcript of the proceedings. [Tr. p. 8, l. 14-20.]

witness presented, the content of the evidence, the explanation for failure to name the witness, the importance of the testimony and the degree of surprise to the other party. *Id.*

CACH gave no explanation for why this witness was never identified. Clearly this was the principal and only witness for CACH, and indeed, he did not work for CACH. Moreover, to the extent Mr. West's testimony was that of an expert, as he contended he was in all matters of banking records and credit collection, CACH had a special obligation to name him, and its failure to do so should have been especially scrutinized. *Cf., Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457 (Ct.App. 2010), where a so-called fact witness was identified in answers to interrogatories and was later proferred as an expert at trial.

Mr. Hoffman's counsel explained that he had prepared a cross-examination using the identified witness's affidavit, Mr. Vigil. The calling of Mr. West as the principal witness for CACH, with no prior disclosure of a summary of his testimony "sufficient to inform" Mr. Hoffman's counsel of the important facts known to him, especially as an expert, nor his business relationship with CACH constituted surprise and prejudice to Mr. Hoffman's counsel, requiring his exclusion. *See* Rule 33(b)(7), South Carolina Rules of Civil Procedure.[4]

[4] The trial court pointed out that counsel had submitted *CACH, L.L.C v. Askew, supra,* which described the relationship between Square Two and CACH, L.L.C. [Tr. p. 41.] Counsel should not have to guess, however, at the witnesses who will be called to testify for whom counsel will have to prepare in defense.

CONCLUSION

CACH, L.L.C. did not meet its burden of proof in presenting its claims for debt against Mr. Hoffman. It failed to prove a valid assignment, and the evidence relied upon to prove its claims was not competent, nor provided through its principal witness adequately identified in discovery, to the detriment of Mr. Hoffman. The judgment should be reversed.

JOHN D. ELLIOTT
P.O. Box 607
Columbia SC 29202
Phone: (803) 252-9236
E-Mail: jayel@mindspring.com

By: 
JOHN D. ELLIOTT

August 19th, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
In the Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2011-CP-40-2389
Court of Appeals No. 2012-213531

CACH, L.L.C.....Respondent,

v.

Toby Hoffman, Jr., a/k/a
Carl W. Hoffman, Jr.....Appellant,

DESIGNATION OF THE RECORD ON APPEAL

The appellant designates the following to be included in the record on appeal in this case:

1. The order on appeal
2. Complaint
3. Answer
4. Trial testimony
5. Plaintiff's exhibits Nos. 1-8
6. U.S. Securities and Exchange Commission forms 10-Q (2) & 8-K
7. Plaintiff's answers to interrogatories
8. Affidavit of Tom Vigil

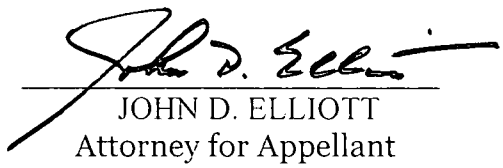
JOHN D. ELLIOTT
Attorney for Appellant

August 19th, 2013

CERTIFICATE OF SERVICE

Counsel certifies that the Initial Brief and Designation of the Record in this case was served on all parties by depositing a copy of the same in the United States Mail, postage prepaid, and addressed as follows, on the 19th of August, 2013:

Edward H. Overcash, Jr., Esquire
Law Offices of Ed Overcash, L.L.C.
33 Villa Road, Suite 401
Greenville SC 29615



JOHN D. ELLIOTT
Attorney for Appellant