

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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S.C. Supreme Court

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

v.

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

PETITION FOR CERTIORARI

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QUESTIONS FOR REVIEW ON CERTIORARI

- 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?

STATEMENT OF THE CASE

This appeal presents two very important questions regarding the quantum of proof required by admissible evidence in a debt collection case, brought by a national debt buyer against an alleged debtor.

CACH L.L.C. is a national buyer of debts from various issuers of debt, typically revolving credit accounts or credit card debt. In this instance, CACH brought an action against Mr. Hoffman seeing a total of about \$110,000.00 in debts it said it purchased from the issuer, Bank of America, plus interest. There were two accounts, the first in the principal amount of \$100,000.00 and the second in the amount of \$10,000.00.

The action was heard on its merits in a bench trial before Circuit Judge G. Thomas Cooper, Jr. in the Richland County Court of Common Pleas on October 9th, 2012. CACH claimed it had the right to collect the debts on an assignment from Bank of America, a right which the defendant disputed. The proof of the amounts owed by the defendant debtor consisted of affidavits submitted by Bank of America officials, and one ‘Magic West,’ an employee of a corporation called Square Two, said to be the owner of CACH, Inc. Mr. West testified, over objection, that he was an expert on the billing and accounting practices of virtually all the major banks in the country, including Bank of America, and he could vouch for the integrity of the accounts Bank of America sent CACH in support of the debt it claimed it was owed.

The circuit court entered an order granting judgment in favor of CACH L.L.C. on October 17th, 2012. Mr. Hoffman timely appealed. The court of appeals, after hearing argument, issued an opinion affirming the judgment on December 3rd, 2014, in Opinion No. 2014-UP-438. Mr. Hoffman timely petitioned for rehearing on December 12th, 2014. The court

of appeals denied rehearing on January 8th, 2015. Mr. Hoffman now petitions this court for certiorari.

ARGUMENTS

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

CACH claimed that it was assigned the rights to sue on the debts purportedly owed by Mr. Hoffman because Bank of America had assigned both accounts with the necessary instruments to enable it to bring suit as the third-party owner of the accounts. The assignments are found in the Record on Appeal at pp. 60; 97.

The assignments, however, are from FIA Card Services to CACH, not Bank of America. CACH maintains that FIA Card Services is a wholly owned subsidiary of Bank of America, and therefore had a lawful assignment. CACH points to a filing with the federal Securities and Exchange Commission attesting to the status of FIA Card Services as a wholly owned subsidiary of the Bank of America. [See ROA, p. 190; ROA pp. 15-17.]

The debtor has consistently pointed out, however, that Bank of America does business through two separately chartered banks, Bank of America N.A., and FIA Card Services. See Brief of Appellant at pp. 2-3. This is established by additional filings with the Securities and Exchange Commission. [ROA p.194; p.196.] Moreover, each and every account statement introduced in evidence against the debtor reflected that the creditor was Bank of America, not FIA Card Services. There is no evidence in the record that FIA Card Services ever billed Mr. Hoffman, sought payment from him, or otherwise notified him of any interest it had in either account.

In order to collect against Mr. Hoffman, CACH must show that it had a valid assignment of the debt. *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 him. *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.

Mr. Hoffman has argued throughout these proceedings that there are two entities involved in this action, not just one – Bank of America N.A. and FIA Card Services. In order for FIA Card Services to have authority to assign the debt to CACH, there must be a separate assignment from Bank of America N.A. to FIA Card Services.. *See, e.g. CACH, L.L.C v. Askew*, 358 S.W.3d 58 (Mo. 2012) holding that where there are multiple entities claiming assignment a right of action, there must be proof of the validity of the assignment whenever the rights to collect the debt is transferred. “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* at 62 (citation omitted). *See also, Wirth v. CACH, L.L.C.*, 300 Ga.App. 488, 685 S.E.2d 433 (2009).

There are no cases in South Carolina addressing this issue, and hence this appeal presents a novel question, and a valid one. At least one court, albeit a trial court, has addressed this question contrary to the respondent, and provides guidance on this issue. *See, CACH L.L.C. v. Fatima*, 2011 N.Y. Slip Op. 51510 (New York District Court for Nassau County), where 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. (See Opinion Attached.)

The court of appeals summarily disposed of this important issue in a footnote. See, Opinion No. 2014-UP-438 . fn 1.

This issue, however, is important, not only for Mr. Hoffman’s defense, but purported debtors like him in South Carolina, and this court is now presented with the opportunity to clarify the law in this area.

II. THE EVIDENCE RELIED UPON BY CACH TO PROVE ITS CASE WAS INADMISSIBLE HEARSAY, AND THEREFORE INSUFFICIENT TO ESTABLISH ITS CLAIM.

CACH relied on Magic West to introduce the records of Bank of America sent to CACH under the business records exception to the rule against hearsay, relying on Rule 803(6) of the South Carolina Rules of Evidence.

His testimony consists of records provided to him by Bank of America, and hearsay statements from affidavits of third party witnesses. The latter are clearly inadmissible. *See, 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).

Mr. West vouched for the integrity of the bank records, even though they were furnished him from “a computer.” The court of appeals found this testimony sufficient to qualify under Rule 803(6) because they were conveyed by a person “with knowledge” of the records to Mr. West, an “other qualified witness” under the rule, citing *Twelfth RMA Partners, L.P. v. National Safe Corporation*, 335 S.C. 635, 518 S.E.2d 44 (1999), and *Midfirst Bank, SSB v. C.W. Haynes & Co.*, 893 F.Supp. 1304 (D.S.C. 1994)(noting many bank records are generated by computer in this modern age.

The witnesses in those cases had much more direct involvement in the collection and management of the information there than Mr. West did here, merely accumulating records from another entity. His involvement in maintaining the records was much more attenuated than those witnesses and hence unqualified. Moreover, that entity, Bank of America, does not even vouch for the integrity of the records furnished from “the computer.” As the appellant argued in the petition for rehearing, when Bank of America assigned its loans to CACH, it declaimed it was transmitting the records “without representations or warranties of any type, kind, character or nature, express or implied...” ROA, p. 60, 97. This is a problem of national dimension. About a month before oral argument of this case before the court of appeals, the New York Times Magazine highlighted the general malaise of predatory debt-buying collection practice, and the indifference of banks towards the integrity of their own banking records when transferred to third party debt buyers:

This is true for many banks; when they sell their unpaid accounts, their contracts testify to this indifference. According to American Banker, in a series of transactions in 2009 and 2010, Bank of America sold millions of dollars of charged-off debt to a company in Denver called CACH. In the sales agreement, Bank of America said it would not make “any representations, warranties, promises, covenants,

agreements or guarantees of any kind or character whatsoever” about the accuracy of the account information it was selling...In other words, there might be problems with the debts, but they were being sold *as is*.

Inside the Dark, Lucrative World of Debt Buyer Collection, New York Times Magazine, August 10, 2014, adapted from “*Bad Paper: Chasing Debt From Wall Street to the Underworld*” by Jake Halpern (Farrar Straus and Giroux October 2014) and available at www.nytimes.com.

Mr. West could not testify about the mode of preparing the records. *State v. McFarlane*, 279 S.C. 327, 306 S.E.2d 611 (1983). Merely having 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 rejected the position of CACH maintaining that its witness is qualified to attest to the integrity of such records, let alone rely on the affidavits of others. *See, e.g. Ortega v. CACH L.L.C.*, 396 S.W.3d 622 (Tex. Ct.App.).

Hence, this appeal presents the important and novel question about the admissibility of third-party evidence in an action bought by a buyer of debts against a purported debtor.

CONCLUSION

CACH did not have a valid assignment of this substantial debt, and did not prove its claims with competent evidence. This case presents novel questions of importance to both creditors and debtors in the state of South Carolina, and the petitioner respectfully requests this court grant certiorari to review them.

Respectfully submitted,

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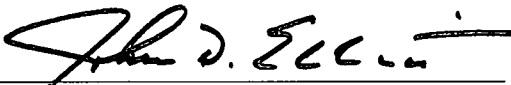
March 4th, 2015

CERTIFICATE OF SERVICE

Counsel certifies he has served the Petition for Rehearing on all parties by depositing a copy of the same in the United States Mail, postage prepaid, on this 4th day of March, 2015:

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