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, LLC.....Respondent,

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE

On April 12, 2011, CACH, LLC (Respondent) filed a Complaint against Toby Hoffman, Jr. (Appellant). The Complaint alleged that Respondent was the assignee of two debts previously owed to Bank of America, and Respondent was seeking a judgment against Appellant for the debts.

Appellant filed an Answer denying most of the allegations, but admitting that he had credit accounts with Bank of America Corporation. Appellant also admitted in response to Requests for Admission to having credit accounts with Bank of America and confirming the account numbers; he admitted to using the cards and making payment on the cards; and he admitted to receiving monthly statements from Bank of America and never raising any disputes. Appellant also admitted to having an outstanding balance on both accounts, although he denied the amount claimed by Respondent.

The case was scheduled for a bench trial in front of the Honorable G. Thomas Cooper, Jr. in the Court of Common Pleas for Richland County on October 9, 2012. Judge Cooper rendered judgment against Appellant in the amount of $134,600.15 by way of an Order filed October 17, 2012. Appellant now appeals this Order.

STATEMENT OF THE FACTS

Bank of America Corporation is a financial holding company that operates its banking activities primarily under two (2) separate charters, FIA Card Services, N.A. ("FIA") and Bank of America, N.A. [Tr. 17, 190, 196]. Both charters use the brand name of "Bank of America" when doing business. Respondent is a subsidiary of Square Two Financial out of Denver, Colorado, and it is in the business of buying debt (delinquent accounts) from financial institutions (Tr. 19).

Appellant opened a credit card account with FIA [1] on February 1, 2008. Appellant defaulted on that account, leaving an outstanding balance of $12,266.15. FIA then sold the account to Respondent on June 17, 2010 (Tr. 23-26, 60, 68). Appellant opened another account with FIA on August 1, 2008. That account also became delinquent and was charged-off with an outstanding balance of $99,972.21. FIA also sold that account to Respondent on June 17, 2010 (30-32, 97, 105). Magic West, who testified for Respondent, testified that Respondent owned both of these accounts (Tr. 30, 36).

When Respondent purchases delinquent accounts from financial institutions, it receives these accounts in portfolios which contain large batches of accounts (Tr. 23, 24, 47, 48). These portfolios contain all of the relevant information about the accounts that are being sold (Tr.24) In the normal course of business, Respondent obtains Affidavits of Sale from the selling bank to certify the information and the amount of the debt (Tr. 24). The company will also obtain other supporting documentation from the financial institution in the course of its business, to include account statements (Tr. 25, 33-35). These documents provide a double check to make certain that the information obtained on the loan schedule is accurate (Tr. 25, 26, 27-29).

[1] FIA Card Services, N.A. is the entity that issues Bank of America credit cards.

STANDARD OF REVIEW

The issues raised by Appellant in this case primarily relate to the admissibility of evidence. It is well established that the admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

Appellant also takes issue with the ability of Magic West, who was the only witness to testify, to authenticate the evidence submitted to the Court, particularly under the business records exception to the rule against hearsay. As is shown by the Record and arguments below, it is respectfully submitted that the trial Court did not abuse its discretion in allowing Mr. West to serve as the records custodian or other qualified witness. It is also respectfully submitted that the Court properly found the records to fall under the business record exception, and this evidence was properly considered by the Court.

ARGUMENTS

I. CACH, LLC PROVED THAT IT HAD VALID ASSIGNMENTS FROM THE CREDITOR AND THAT IT THEREFORE HAD STANDING TO PURSUE CLAIMS AGAINST MR. HOFFMAN

Bank of America Corporation is a bank holding company that operates its banking activities through two separately chartered banks: (i) Bank of America National Association (Bank of America, N.A.); and (ii) FIA Card Services, N.A. ("FIA") [reference is made to Forms 8-K and 10-Q submitted to the Court at trial]. Bank of America Corporation and its subsidiaries all conduct business under the branded name of "Bank of America."

In his brief, Appellant makes a number of erroneous assumptions. It is apparent that Appellant assumes that a reference to "Bank of America" is automatically a reference to "Bank of America, N.A.," which is incorrect. Appellant describes "Bank of America" as having 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." This statement is incorrect, and there is no evidence in the Record to support this assertion. Further, and contrary to Appellant's assertions, it is clear from the face of the bank statements that the accounts were "issued and administered by FIA Card Services, N.A." (Tr. 69, 106). Appellant admitted in response to Requests for Admission that he received those statements (Requests to Admit), so he clearly had actual notice of this fact.

The original creditor relative to the accounts at issue is FIA. The record clearly establishes that FIA sold the accounts to Respondent. This is supported by the testimony of Magic West. (Tr. 20, 21, 23-26, 30-32, 36). This is also supported by numerous documents submitted to the Court, two of which were admitted without objection (Tr. 24, 32, 60, 68, 97,

105). Appellant's argument that "Bank of America" was the original creditor, rather than FIA has no basis in the record. The evidence shows these accounts were owned by FIA and that FIA properly sold the accounts to Respondent. Appellant had no objection to the bills of sale or assignments. (Tr. 24, 32)

Respondent clearly met its burden of showing that there was a valid assignment. FIA is a subsidiary of Bank of America Corporation, and it was doing business as "Bank of America" when the two accounts were created and later sold to Respondent. FIA executed a bill of sale to Respondent (Tr. 60, 97), and the exhibits to that bill of sale show that Appellant's accounts were among the accounts sold to Respondent. That bill of sale is the best evidence of the sale and transfer of the accounts.

II. THE EVIDENCE INTRODUCED BY RESPONDENT CACH, LLC WAS PROPERLY ADMITTED INTO EVIDENCE AND WAS PROPERLY CONSIDERED BY THE COURT

Appellant makes numerous objections to the evidence presented by Respondent. He contends the Court was in error in allowing documents into evidence under the business records exception to the rule against hearsay. He also contends that Mr. West does not qualify as a records custodian or other qualified witness. It is respectfully submitted that these arguments are without merit and that the Court properly considered the evidence submitted.

A. Appellant's Failure to Appear Creates Inference that his Testimony would be Unfavorable

This case is an action to collect on a debt owned by Appellant. The sole trial witness was Magic West, who is an employee of Square Two Financial, which is the parent company of Respondent. Mr. West is an authorized agent of CACH, LLC, and he testified in that capacity. Appellant did not present any witnesses. In fact, Mr. Hoffman failed to appear for the trial

(Tr.17, 18).

In response to Requests for Admission, Appellant admitted having credit accounts with Bank of America Corporation; he admitted to using the cards and making payment on the cards; and he admitted to receiving monthly statements from Bank of America and never raising any disputes. Appellant admitted to having an outstanding balance on both accounts, although he denied the amounts claimed by Respondent. Appellant admitted the authenticity of the monthly account statements given to the Court, although he did not admit to the contents (Requests to Admit). These admissions support most of the elements of Respondent's case, as they establish: (1) the existence of the accounts; (2) Appellant's obligation on the accounts; (3) the authenticity of the account statements; (4) Appellant's default; and (5) the lack of contest as to the charges.

Such evidence is sufficient to support an award in favor of Respondent. See, e.g. Am. Express Travel Related Servs. v. Silverman, 2006-Ohio-6374, P10 (Ohio Ct. App., Franklin County Dec. 5, 2006).

Given the nature of the lawsuit Appellant was probably in the best position to explain the debt created on his accounts and to challenge any amounts that he felt were not owed, assuming a valid challenge existed. His decision not to testify (or even be present for the trial) without any explanation, raises an inference that his testimony would have been unfavorable to his position. Crocker v. Weathers, 240 S.C. 412, 423,126 S.E.2d 335, 340 (1962)

B. Magic West as the Records Custodian or other Qualified Witness

Mr. West testified at length about the process of purchasing delinquent accounts from financial institutions (Tr. 23-29, 33-35, 47-48). He explained Respondent's operations; he

testified that he was authorized to speak on the company's behalf, which he had done hundreds of times before; and he testified that he had personal knowledge of the accounts at issue and was familiar with all of the business records (Tr. 20-24). Mr. West also testified that he had been trained by Bank of America, Chase Manhattan, H.S.B.C. and G.E. Money Bank regarding their policies and procedures for record keeping (Tr. 21-22). Thus, the record shows that he established his credentials and knowledge as a person qualified to attest to business records.

A witness does not even have to be the custodian of documents offered into evidence to establish Rule 803(6)'s foundational requirements. United States v. Ray, 930 F.2d 1368, 1370 (9th Cir. 1991); see also Bergen v. F/V St. Patrick, 816 F.2d 1345, 1353 (9th Cir. 1987), mod. on other grounds, 866 F.2d 318 (9th Cir.), cert. denied, 493 U.S. 871 (1989). "The phrase 'other qualified witness' is broadly interpreted to require only that the witness understand the record-keeping system." Ray, 930 F.2d at 1370.

Appellant challenges the ability of Mr. West to serve as a custodian of the business records, citing Connelly v. Wometco Enterprises, Inc., 314 S.C. 188, 442 S.E.2d 204 (Ct. App. 1994) and State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611 (1983). These cases are clearly distinguishable from the case at bar. Mr. West testified that he was an authorized representative to speak on behalf of Respondent (Tr. 20); he was familiar with and had received training from the original creditor as to the records being submitted as evidence (Tr. 20, 21); he has testified about business records on behalf of Respondent hundreds of times (Tr. 21); he has been trained by Bank of America and other banks regarding their policies and procedures in keeping records (Tr. 21-22); and he was familiar with the purchase of the records from FIA and how these records were generated (Tr. 23).

South Carolina's rules of civil procedure and evidence are patterned after the federal rules. Rule 803(6), SCRE [Business Record Exception] requires certain information to be presented by the "custodian or other qualified witness." In deciding whether a person meets the standard of a "qualified witness," the Fourth Circuit has held that the term should be interpreted broadly, and the individual only needs to be one who understands the system used to record and maintain the information or someone with knowledge of the procedure governing the creation and maintenance of the type of record being admitted into evidence. U.S. v. Sofidiya, 165 F.3d 22 (4th Cir. 1998). The "qualified witness" is not required to have personally participated in or observed the creation of the document, nor is the person required to have known who actually recorded the information. Id.

Federal courts have recognized that a qualified witness is one who can explain the system of record keeping and vouch that the requirements of Rule 803(6) are met; the witness need not have personal knowledge of the record keeping practice or the circumstances under which the objected to records were kept. United States v. Box, 50 F.3d 345, 356 (5th Cir. 1995), (citing United States v. Iredia, 866 F.2d 114, 119-20 (5th Cir.), cert. denied, 492 U.S. 921, 109 S. Ct. 3250, 106 L. Ed. 2d 596 (1989). See, also, Baker v. Wagers, 472 N.E.2d 218 (Ind. App. 1984), stating:

> While the most commonly encountered witness today may be a person in authority of the record-keeping department of the business, he or she is not the only witness who can provide the necessary foundation for admission of a business record. This foundation can be established by anyone who possesses, with respect to the particular document in question . . . This could be the entrant, the entrant's supervisor, co-workers, a records custodian or any other such person. What we demand is not a witness with a formalistic title but one with a functional understanding of the record-keeping process of the business with respect to the specific entry, transaction or declaration contained in the document.

Mr. West was familiar with procedures of FIA; he was familiar with Bank of America's procedures; he received the training that gave rise to such familiarity directly from the bank; he was a custodian of the records from Respondent; and based on the manner in which the records were generated [discussed below], he should properly be considered a record custodian, or at least a qualified witness, for purposes of admitting business records into evidence. Furthermore, the monthly account statements were authenticated by Appellant through his responses to Requests for Admission, and Appellant is estopped from denying or challenging the effect of those admissions. Appellant also raised no objection to the admission of the Bills of Sale. Under the facts of the case at bar, the Court properly held that Mr. West's testimony was sufficient to admit the documents into evidence.

C. Creation and Possession of Business Records

Appellant takes issue with the documentary evidence introduced at trial, which were admitted under the business record exception to the rule against hearsay, Rule 803(6), SCRE. The documents introduced into evidence consisted of the following: (1) Bills of Sale / Assignment of Loans; (2) Affidavits of Sale / Certification of Debt; (3) Account Statements; and (4) Summaries of the two accounts at issue.

Respondent introduced two Bills of Sale showing the assignment of the accounts from FIA to Respondent, and there was no objection to allowing those exhibits into evidence (Tr. 23, 24, 32, 60, 97). These documents show two accounts in the name of Toby Hoffman, Jr. with Mr. Hoffman's identifying information. They show that the accounts were charged off, leaving balances of $12,266.15 and $99,972.21. Appellant offered no testimony and did not introduce any evidence to refute the testimony of Mr. West or the contents

of the Bills of Sale.

In the absence of an objection to the Bills of Sale and the exhibits thereto the objection to Mr. West's testimony is irrelevant. Those exhibits attest to the obligation owed by Appellant, and whether or not they are business records Appellant did not object to their admission.

The circumstances surrounding the creation of the two accounts, and all of the documents related to those accounts, do not make the application of business record exception improper. The credit card accounts were created by a computer. All activity on the accounts (when transactions are made) is done by computers that record the transactions at or near the time that they occur. All of this information is stored by the financial institution in the course of its regularly conducted business. The data being stored in the computer can be used to print monthly statements. The data can also be compiled, packaged, and sold to debt buyers such as Respondent (Tr. 19-21, 23-32).[2] Once these accounts have been sold by financial institutions, purchasers such as Respondent gather and keep records in the regular course of their business. At this juncture, the proper records custodian or qualified witness would be a person from Respondent.

Mr. West identified the records, stated his knowledge of the records and how they were created, and explained that these are records that are obtained and kept by Respondent in the

[2] Debt-buying serves a valuable, pro-consumer function (at least for the majority of consumers (who pay their bills):

> Adopting the plaintiffs' interpretation of the Illinois Interest Act would push the debt buyers out of the debt collection market and force the original creditors to do their own debt collection. Borrowers would not benefit on average, because creditors, being deprived of the assignment option as a practical matter (the statutory rates being far below the market interest rates for delinquent borrowers), would face higher costs of collection and would pass much of the higher expense on to their customers in the form of even higher interest rates. Olvera v. Blitt & Gaines, P.C., 431 F.3d 285, 288 (7th Cir. 2005).

regular course of its business (Tr. 42-44). Under these circumstances, the Court did not commit error in allowing the records into evidence through the business records exception to the bar against hearsay.

D. Self-Serving Statements

Appellant cites Woodward v. South Carolina Farm Bureau Ins. Co., 277 S.C. 29, 282 S.E.2d 599 (1981) for the proposition that the affidavits submitted into evidence were self-serving and should therefore be held inadmissible. Respectfully, at a certain level all business records affidavits are self-serving. The information contained in the two Affidavits for Sale is available in the other records submitted to the Court. The purpose of the Affidavit is not to be self-serving. Instead the Affidavit serves as verification of the data previously provided to Respondent. As Mr. West testified, Respondent purchases large portfolios containing batches of delinquent accounts and receives a loan schedule with account-specific information. The Affidavit of Sale is intended to have a person from the financial institution review the data and confirm that Respondent has the correct information (Tr. 23-26). The Affidavits of Sale are regularly obtained by Respondent in its normal course of business. (Tr. 26, 27).

III. THE TESTIMONY OF RESPONDENT'S WITNESS SHOULD NOT BE EXCLUDED FOR ALLEGED FAILURE TO IDENTIFY THE WITNESS IN DISCOVERY.

Appellant contends that pursuant to Bensch v. Davidson, 354 S.C. 173, 560 S.E.2d 128 (2003), the testimony of Mr. West should have been excluded because Respondent failed to list Mr. West as a witness in response to interrogatories. Respondent acknowledges that Magic West was not identified as a witness in response to Appellant's Interrogatories. However, Respondent contends that Appellant's reliance on Bensch, which dealt with the exclusion of expert testimony, is misplaced. It is respectfully submitted that the trial court did not

abuse its discretion in refusing to exclude the testimony of Mr. West.

The purpose of discovery before trial is to avoid surprise and to promote decisions on the merits after a full and fair hearing. Reed v. Clark, 277 S.C. 310, 286 S.E.2d 384 (1982). If the Court finds that there has been a violation of the Rules, it lies within the discretion of the trial court to decide what sanction, if any, should be imposed. Jackson v. H & S Oil Co., Inc., 263 S.C. 407, 211 S.E.2d 223 (1975). The sanction of excluding a witness should never be lightly invoked. Kirkland v. Peoples Gas Co., 269 S.C. 431, 237 S.E.2d 772 (1977). Before excluding the testimony of a witness, the trial court should ascertain the type of witness involved, the content of the evidence, the explanation for the failure to name the witness in response to the interrogatory, the importance of the witness' testimony, and the degree of surprise to the other party. Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974).

When Respondent responded to discovery, Respondent listed as witnesses Peter Huber and Tom Vigil, both out of Denver, Colorado. Respondent also added that "any other authorized agent of the Plaintiff would testify in accordance with the affidavits attached to the Complaint and Motion for Summary Judgment." (Respondent's Interrogatory Responses). At the time that this response was made, the names given were the only ones known by counsel (Tr. 19).

The discovery response made by Respondent put Appellant on notice that other authorized persons may be called to testify on behalf of Respondent, and that their testimony would be consistent with the Affidavits previously submitted. Respondent files collection actions all over the country, and it has numerous records custodians. Because of scheduling, it is often not known until the last minute who will be coming to testify on behalf of the company.

Appellant has not presented any argument that the testimony of Mr. West was inconsistent with the Affidavits provided. Appellant took no depositions in this case, and Appellant has failed to show that he was unfairly prejudiced by the appearance of this witness rather than another authorized agent of Respondent.

During the trial, counsel for Appellant argued surprise in two ways: (1) counsel did not know who Mr. West was; and (2) counsel was surprised to learn of the existence of Square Two Financial and its status as the parent company of Respondent. (Tr. 22). However, the trial court even called into question whether there was any surprise, as counsel for Appellant had handed up a Supreme Court opinion from Missouri that specifically discussed the relationship between Square Two Financial and Respondent (Tr. 51-52).

In his brief, Appellant makes the assertion that Mr. West was an "expert" and therefore there was a greater reason to exclude his testimony. However, the transcript reflects that at no time did Respondent ask the Court to find Mr. West to be an expert, and at no time was Mr. West called on to render opinions as an expert. His testimony was based solely on his personal knowledge of the business operations and the records submitted to the Court.

Mr. West merely served as an authorized agent to testify on behalf of Respondent. More specifically, he served as a records custodian. As explained by Mr. West, Respondent does not have any employees. (Tr. 20). It is a wholly owned subsidiary of Square Two Financial. (Tr. 20). In Mr. West's capacity as a records custodian, he had to be familiar with the records being submitted into evidence, and he had to have knowledge about how these records were created.

Considering the nature of the case (debt collection), Mr. West did not present any evidence that served as an unfair surprise to Appellant. Appellant knew of the existence of the records being submitted to the Court, so there was no prejudice. Furthermore, there is no reason to believe that any of the other listed witnesses would have testified to anything different from Mr. West.

Under the circumstances, it is respectfully submitted that the Court did not abuse its discretion in refusing to exclude the testimony of Mr. West.

CONCLUSION

The Record shows that Respondent was properly assigned the accounts from FIA. As the owner of the accounts, Respondent filed suit against Appellant to collect on the debt. All of the necessary evidence was presented to the Court through a competent witness in compliance with the Rules of Evidence, and Respondent met its burden of proof. Appellant did not appear at trial. Additionally, his counsel presented no witnesses and offered no evidence to refute Respondent's claim. It is respectfully submitted that the trial court did not abuse its discretion in its rulings, and the judgment should be affirmed.

Respectfully submitted,

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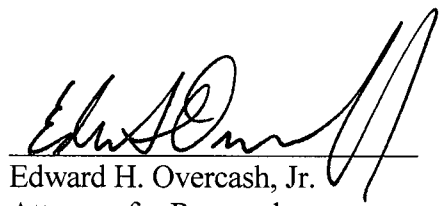
Attorney for Respondent

CERTIFICATE OF COUNSEL

This is to certify that the Respondent's Final Brief complies with the South Carolina Appellate Court Rule 211(b).



Edward H. Overcash, Jr.
Attorney for Respondent

February 25, 2014

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PROOF OF SERVICE

This is to certify that on the 5th day of March, 2014, the undersigned served three (3) copies of the **RESPONDENT'S FINAL BRIEF** by depositing a copy of the same into the United States Mail, postage pre-paid and in the correct amount to the following:

John D. Elliott, Esquire
P.O. Box 607
Columbia, SC 29202

Edward H. Overcash, Jr.
Attorney for Respondent

SWORN to before me this 5th
day of March, 2014.

(SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 9/20/2016