IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DELAWARE ACCEPTANCE CORP.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. CPU4-10-006533
	)	
ROBERT S. SWAIN,	)	
	)	
Defendant.	)	

Patrick Scanlon
Law Offices of Patrick Scanlon, P.A.
203 NE Front Street, Suite 101
Milford, Delaware 19963

Attorney for Plaintiff Delaware Acceptance Corp.

Elwood T. Eveland, Jr.
The Eveland Law Firm
715 North Market Street, Suite 200
Wilmington, Delaware 19801

Attorney for Defendant Robert S. Swain

MEMORANDUM OPINION AND ORDER
ON COMPLAINT OF PLAINTIFF DELAWARE ACCEPTANCE CORP.

Submitted: December 28, 2011
Decided: January 31, 2012

DAVIS, J.

This is an action for breach of contract of a credit card agreement between plaintiff Delaware Acceptance Corp. ("DAC"), as assignee of Chase Bank USA ("Chase"), and defendant Robert S. Swain. On December 9, 2011, the Court of Common Pleas held a civil trial (the "Trial") on the complaint (the "Complaint") filed by DAC. This is the Court's Memorandum Opinion and Order in connection with the relief sought in the Complaint. For the reasons set forth below, the Court enters judgment in favor of Mr. Swain.

I. General Procedural Background

On October 27, 2010, DAC filed an action for breach of contract against Mr. Swain. Mr. Swain answered the Complaint on February 4, 2011. On December 9, 2011, the Court held the

Trial on DAC's Complaint. For purposes of the Trial, Mr. Swain admitted that he had an agreement with Chase, that he breached this agreement by failing to make payments as required by the agreement, and as a result, Chase suffered damages. However, Mr. Swain argued that DAC cannot establish that it is the proper owner of this credit card account and thus does not have standing to recover under the Complaint. Accordingly, DAC and Mr. Swain stipulated that the sole and dispositive issue in this trial is whether DAC is the proper party in interest to prosecute this action.

At trial, the Court heard testimony from one witness – Daniel Scanlon. Mr. Scanlon is an officer and vice president of DAC. Mr. Scanlon testified on behalf of DAC. Mr. Scanlon testified to, and was subject to cross-examination on: (i) the facts of this case and (ii) eight exhibits proffered by DAC in support of its case-in-chief. DAC contended that these exhibits, along with Mr. Scanlon's testimony, establish DAC as the proper party in interest to prosecute this action. When DAC sought to have the exhibits entered into evidence, Mr. Swain objected to the admission of these documents. Mr. Swain's basis for the objection was that the exhibits constitute inadmissible hearsay. The Court reserved decision on the admissibility of these exhibits.[1] At the conclusion of the Trial, the Court reserved decision.

[1] As discussed *infra*, at the conclusion of Mr. Scanlon's testimony, DAC moved for the admission into evidence of Plaintiff's exhibits for identification # 1-8. Mr. Swain specifically challenged the admissibility of Plaintiff's Exhibits # 1, 2 and 4 through 8. Mr. Swain conceded that Exhibit # 3, the bill of sale from GACC to DAC, was admissible under the business records exception to the hearsay rule codified in DRE 803(6). Mr. Swain did not challenge the admission of this document and DAC did not argue, nor could it reasonably have argued, that this document establishes the entire chain of assignment, because this document does not speak to the alleged Chase to GACC assignment. Therefore, notwithstanding the admissibility of Plaintiff's Exhibit # 3, the parties agreed that the sole and dispositive issue in this case is the admissibility of Plaintiff's Exhibits # 1, 2, and 4-8 into evidence supporting DAC's claim that it is the real party in interest to prosecute Chase's case.

On December 20, 2011, DAC filed several briefs submitted in a similar action currently pending before the Missouri Supreme Court. The Court provided Mr. Swain with an opportunity to respond to this filing. Mr. Swain did not file any response.

II. Facts

Mr. Scanlon testified that DAC is a debt collection company that buys charged off credit card debt and then attempts to collect on this debt through various means, including litigation. Mr. Scanlon is an officer of DAC and its vice president. Mr. Scanlon also testified that he is not paid by DAC. Mr. Scanlon testified that as an officer and the vice president of DAC he is the person responsible for purchasing charged off credit card debt. Mr. Scanlon stated that while others assist in the maintenance of DAC's business records, Mr. Scanlon is primarily responsible for maintaining DAC's business records.

Mr. Scanlon then addressed the specific account at issue in this case. Mr. Scanlon testified that on September 3, 2010, DAC purchased the account from Global Acceptance Credit Company ("GACC"). Mr. Scanlon testified that this sale is documented by an assignment and bill of sale.[2] Mr. Scanlon admitted that this document does not list the alleged account with Mr. Swain by account number or name. Rather, the document provides that DAC purchased a pool of accounts from GACC.

Mr. Scanlon testified, however, that as part of the September 3, 2010 sale, GACC sent DAC a package of documents listing the identifying information of the accounts included in this sale.[3] One of these accounts is an account ending in #0099 (the "Account"). According to these documents, the Account is Mr. Swain's account and that his address is 115 Northern Ave,

[2] Plaintiff's Exhibit # 3.
[3] Plaintiff's Exhibits # 4, 5, 6, 7.

Wilmington, Delaware 19805.[4] In addition, the spreadsheet identifies Chase as the originating bank.[5] The current balance listed on the spreadsheet for the Account is $26,418.36.[6]

Mr. Scanlon then testified that he knew that GACC owned this account when it sold the account to DAC because, as part of the September 3, 2010 sale of accounts by GACC to DAC, GACC sent DAC a document titled "Affidavit of Correctness."[7] This document is dated March 24, 2011.[8] Mr. Scanlon testified that this document is the affidavit of Michael Varrichio, the president of GACC. This affidavit provides that Mr. Varrichio is the president of GACC. Moreover, the affidavit provides that Mr. Varrichio has knowledge that Chase transferred ownership of a pool of accounts – including the Account – to GACC, and that GACC then transferred ownership of the Account to DAC. On cross-examination, Mr. Scanlon stated that he believes that this affidavit conclusively establishes that GACC acquired the Account from Chase. Mr. Varrichio was not available to testify, or subject to cross-examination at the Trial.

Mr. Scanlon testified further that as part of the September 3, 2010 sale of accounts, GACC transferred monthly account statements relating to the Account to DAC. Mr. Scanlon stated that DAC's possession of these statements is relevant because Chase would only give these statements to GACC if GACC were the owner of the Account. Mr. Scanlon then proffered that federal banking regulations forbid the owner of a credit card account from disseminating credit card statements to anyone other than a party to the Account. Despite repeatedly referring to these statements, DAC did not offer any bank statements into evidence at trial.

On re-direct, Mr. Scanlon testified that, as part of the September 3, 2010 sale of accounts, GACC sent DAC two other documents that demonstrate that GACC owned the Account. The

[4] Plaintiff's Exhibits # 4, 5.
[5] Plaintiff's Exhibit # 5.
[6] Plaintiff's Exhibit # 6.
[7] Plaintiff's Exhibit # 8.
[8] *Id*.

first document is titled "Bill of Sale" and states that on June 25, 2010, Chase transferred a pool of accounts to GACC.[9] The second document is titled "Redacted Report," and lists the name "Robert S. Swain," an account ending in #0099 (*i.e.*, the Account), and a balance on that account of $26,418.3594.[10] Mr. Scanlon testified that this is part of a spreadsheet that was transferred from Chase to GACC as part of the June 25, 2010 sale. On additional cross-examination, Mr. Scanlon admitted that there is no information on the spreadsheet indicating that the document was generated by Chase.

At the conclusion of the Trial, Mr. Swain objected to the admission of the Exhibits 1, 2 and 4 through 8 -- documents relating to the purported sale of the Account from Chase to GACC -- on the basis that these documents contain inadmissible hearsay. DAC argued first that the documents are not hearsay. Next, DAC argued in the alternative that even assuming the documents contain hearsay, the documents are admissible because they fall under the business records exception to the hearsay rule set out in Rule 803(6) of the Delaware Rules of Evidence ("DRE"). The parties then agreed that the admissibility of Exhibits 1, 2 and 4 through 8 is dispositive in this case. In other words, if the Court holds that these documents are admissible, the Court must enter judgment in DAC's favor. Alternatively, if the Court holds that these documents are inadmissible, the Court must enter judgment in Mr. Swain's favor.

III. Discussion

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[11] Hearsay is generally not admissible into evidence.[12] Hearsay may be admissible, "usually under a specific exception,

[9] Plaintiff's Exhibit # 1.
[10] Plaintiff's Exhibit # 2.
[11] DRE 801(c).
[12] DRE 802.

only where the declaration has some theoretical basis making it inherently trustworthy."[13] Therefore, "absent some special indicia of reliability and trustworthiness, hearsay statements are inadmissible."[14]

Qualifying business records are a recognized exception to the hearsay rule under DRE 803(6), and are defined as:

> A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness...unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.[15]

The Delaware Supreme Court has explained that this rule contains the following requirements: (1) the record was made at or near the time of the act or event recorded; (2) the record was made by or from information transmitted by a person with knowledge; (3) the record was prepared and maintained in the ordinary course of regularly conducted business activity; and (4) it was the regular practice of the organization to make records of this type of act or event.[16] However, "[e]ven if the statement satisfies these requirements...the trial court may nevertheless exclude the statement where the method of preparation of the record or the source of the information 'indicate[s] [a] lack of trustworthiness.'"[17]

The business records from one business may qualify as business records under DRE 803(6) of a second business provided that the second business has adequate verification or other strong assurances that the records are accurate. In *Kpakiwa v. Brazos Student Fin. Corp.*, the

[13] *Smith v. State*, 647 A.2d 1083, 1088 (Del. 1994).
[14] *Id.*
[15] DRE 803(6).
[16] *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 238 (Del. 2001).
[17] *Id.* at 238-39.

plaintiff filed a complaint for breach of contract based on the defendant's alleged breach of a student loan agreement.[18] At summary judgment, the plaintiff attempted to rely upon the affidavit of its records custodian to establish when defendant was a full time student in order to establish that the plaintiff had filed the complaint within the applicable statute of limitations.[19] This affidavit, however, was based on information that defendant's college sent to the National Student Clearing House ("NSCH").[20] NSCH then prepared a document indicating when defendant was a full time student, and plaintiff's records custodian relied on this document in preparing the affidavit.[21]

The Court held that the plaintiff could not rely upon this affidavit at summary judgment in that particular case, reasoning that:

> [i]nformation provided by outsiders that is recorded in business records may satisfy the business records exception. Importantly, "[i]f the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception...However, if the business entity has adequate verification or other assurance of accuracy of the information provided by the outside person, the business record exception applies. Since the trustworthiness of the evidence is the justification of the business record exception, the verification must provide a strong assurance of accuracy.
>
> Here, [the records custodian's] incorporation and reliance upon the NSCH document in its business may be a basis of reliability of NSCH generated information. However, [defendant's college] provided the statement that [the defendant] was a full-time student through 12/15/2001. No evidence was provided about the verification measures routinely taken by NSCH in the compiling of school enrollment data. Without assurances of this nature, a substantial concern exists about the reliability of this potentially critical information.[22]

In other words, documents of a third party are not *per se* inadmissible merely because the documents would have to be qualified twice under DRE 803(6). Such records may qualify as

[18] *Kpakiwa v. Brazos Student Fin. Corp.*, 2010 WL 2653413, *1 (Del. Super. July 1, 2010).
[19] *Id.* at *2.
[20] *Id.*
[21] *Id.*
[22] *Id.* at *3-4.

business records of a second business if the requirements of DRE 803(6) – or another exception to the hearsay rule – are satisfied, or where there is a demonstration of adequate verification or other strong assurances that the records are accurate such that the records' admission does not offend the policy underlying the business records exception – *i.e.*, to ensure the records are trustworthy.

While there is a substantial body of case law in Delaware on the admissibility of hearsay documents under DRE 803(6), the Court was unable to find a published or unreported decision within the precise factual context presented here. Accordingly, the Court has examined decisions from other jurisdictions on the admission of business records in the precise factual context presented in this case, and has found these decisions helpful in this analysis.

For example, in *Commonwealth Financial Systems v. Smith*, the plaintiff filed a complaint in a consumer debt collection action alleging that the original creditor had assigned the debt to a debt collection agency, who later assigned the debt to the plaintiff.[23] At trial, the plaintiff called only one witness, its vice president, to testify regarding the chain of assignment.[24] This witness admitted that he was never an employee of either the original creditor or the intermediary debt collection agency.[25] The witness testified that both the sale from the original creditor to the intermediary and the later sale from the intermediary to the plaintiff were sales of pools of accounts.[26] The witness testified that as part of these sales, the seller in each instance transferred to the buyer its records regarding the particular accounts contained in the pool of

[23] *Commonwealth Fin. Sys. v. Smith*, 2010 WL 3491225 (Pa. Com. Pl. Jan. 26, 2010)
[24] *Id.* at *4.
[25] *Id.*
[26] *Id.*

accounts, including identifying information such as each individual debtors' name, account number, balance, address, and social security number.[27]

Based on this testimony, the plaintiff moved for the admission of documents titled "bill of sale," purportedly documenting the two sales of the pools of account containing the account at issue, and the affidavit of one of the intermediary's employees, purportedly documenting the entire chain of assignment from the original creditor to plaintiff.[28] On cross-examination, the witness admitted that he had no knowledge as to how the original creditor or intermediary maintained or handled their respective records.[29] The witness further admitted that he had no personal knowledge regarding whether the information contained in the documents was accurate or whether it had been damaged or corrupted before it was received by the plaintiff.[30] Rather, the witness testified that he believed that the documents were accurate because he knew that they were kept on computers and that the intermediary's computer system had recently passed a rigorous information technology examination designed to ensure the integrity of its data.[31]

Based on that record, the court did not admit the documents purportedly documenting the chain of title under the business records exception to the hearsay rule. The court there held that the witness was not an "other qualified witness" who could testify that the records were made by or from information transmitted by a person with knowledge. The court opined that:

> [i]t is not essential…to produce either the person who made the entries or custodian of the record at the time the entries were made, nor…that a witness qualifying business records have personal knowledge of the facts reported in the business records…As long as the authenticating witness can provide sufficient information relative to the preparation and maintenance of records to justify a presumption of trustworthiness for the business records of a company, or in this case, companies, a sufficient basis is provided to offset the hearsay character of

[27] *Id.*
[28] *Id.* at *4.
[29] *Id.* at *5.
[30] *Id.*
[31] *Id.*

> the evidence…Mr. Venditti's admission to knowing nothing regarding [the original creditor's and intermediary's] business records utterly disallowed him from attesting to their trustworthiness, and hence, precluded their admission as evidence into the record…The plaintiff presented no evidence or testimony describing the computer processes of [the original creditor and intermediary], nor credible testimony from Mr. Venditti as to whether or not they produced accurate results or were properly operated so as to produce the exhibits presented.[32]

The court therefore held that the witness' testimony did not establish a sufficient foundation for admission of the documents under the business records exception as the testimony failed to satisfy the court that the documents were trustworthy.

As a preliminary matter, the exhibits proffered by DAC through Mr. Scanlon are hearsay documents. These exhibits contain statements made by a person who did not testify at trial and DAC is offering each exhibit for the truth of the matter asserted. Specifically, Exhibit # 1 states that, on June 25, 2010, a pool of accounts was sold from Chase to GACC. Exhibit # 8 is the affidavit of Mr. Varrichio stating that the Account was sold to GACC as part of the alleged June 25, 2010 sale. Exhibits # 2, and 4-7 are spreadsheets listing Mr. Swain as the account holder for the Account, and listing his address and the balance allegedly owed on the Account.

First, Mr. Scanlon admitted that neither he, nor any employee or affiliate of DAC prepared these documents. Second, these documents were offered for the truth of the matter asserted therein because all of the documents state varying parts of the circumstantial evidence supporting DAC's claim that Mr. Swain and Chase had a credit card agreement for an account ending in #0099, that Mr. Swain breached this agreement by failing to make payments, incurred a balance in the amount of $26,418.36, that this account was sold by Chase to GACC, and then sold by GACC to DAC.

Therefore, these documents are hearsay. According to DRE 802, hearsay is not admissible in evidence. As previously stated, hearsay may be admissible in evidence if the

[32] *Id.* at *12.

proponent of the evidence, here DAC, has met the requirements to a specific exception to the general rule and/or where the statement offered has some basis for making it inherently trustworthy.[33] However, these hearsay documents are not admissible in this case because Mr. Scanlon is not a qualified witness to testify that the records proffered here were made by or from information transmitted by a person with knowledge.[34]

As with the foundational witness in *Commonwealth Financial Systems,* Mr. Scanlon testified that Chase, the original creditor of the Account, sold the Account to GACC as part of the sale of a larger pool of accounts, who then sold the Account to DAC as part of the sale of a pool of accounts. Mr. Scanlon testified that as part of both sales, the seller in each instance transferred to the buyer a package of documents listing identifying information for the accounts contained in each pool of accounts. Mr. Scanlon stated that the Account was a part of both sales. Mr. Scanlon testified that he knows this because when he received the package of documents as part of the GACC to DAC sale of the pool of accounts, GACC provided DAC with the following documents: (1) the purported affidavit of Mr. Varrichio, the president of GACC, indicating that the Account was part of the Chase to GACC sale[35]; (2) a spreadsheet listing Mr. Swain by name and address referencing an account originally existing between Chase and Mr. Swain for the Account, with a balance of $26,418.36[36]; (3) a document titled "Bill of Sale" that states that, on June 25, 2010, Chase transferred a pool of accounts to GACC.[37] On cross-examination, Mr. Scanlon admitted that the spreadsheet did not contain any information describing whether it was generated by Chase, GACC, or an unnamed third party. Moreover, DAC presented no evidence or testimony describing the computer processes of Chase and GACC, nor credible testimony

[33] *Smith*, 647 A.2d at 1088.
[34] *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 238 (Del. 2001).
[35] Plaintiff's Exhibit # 8.
[36] Plaintiff's Exhibits # 2, 4-7.
[37] Plaintiff's Exhibit # 1.

from Mr. Varrichio as to whether or not they produced accurate results or were properly operated so as to produce the exhibits presented at the Trial.

As *Kpakiwa* guides the Court here, Exhibits 1, 2 and 4 through 8 are not rendered *per se* inadmissible because the source of the information was provided by non-members of DAC's business -- GACC and Chase. Rather, these exhibits are inadmissible hearsay because DAC has not met the requirements of the business records exception set out in DRE 803(6). As in *Kpakiwa* and *Commonwealth Financial Systems*, DAC, the proponent of Exhibits 1, 2 and 4 through 8, has failed to proffer sufficient foundational testimony from a witness with knowledge of how the information contained in these documents was compiled or verified, or even how the documents themselves were created or maintained. Mr. Scanlon testified that he has no knowledge as to how either Chase or GACC maintain their business records. DAC, instead, argues that the exhibits are admissible under DRE 803(6) because Mr. Scanlon testified that he received these documents as part of the sale of a pool of accounts from GACC to DAC. DAC contends that the exhibits are accurate and trustworthy because financial entities such as GACC and Chase tend to keep accurate and meticulous records, and are prohibited by law from transferring information regarding accounts that they do not own.

While as a practical matter such generalizations about the banking and financial industries may tend to be true, this alone does not satisfy the Court's concerns regarding the trustworthiness of the proffered documents. In both *Kpakiwa* and *Commonwealth Financial Systems*, the courts declined to find the proffered foundational testimony sufficient because the proffered witness did not provide any testimony regarding how the data contained in the hearsay documents was compiled or verified. Here, Mr. Scanlon was similarly unable to testify regarding either how Chase or GACC maintain or verify their records. As such, he is not a qualified

witness to testify that the records proffered here were made by or from information transmitted by a person with knowledge.

Therefore, DAC has not met the requirements of DRE 803(6), and the proffered hearsay documents are inadmissible in evidence. Because the parties agreed both before trial and at the conclusion of the Trial that the admissibility of the documents is dispositive on the issue of liability in this case, the Court enters judgment in Mr. Swain's favor.

IV. Conclusion

For the reasons stated above, the Court finds for, and enters judgment on behalf of Mr. Swain on the claim set out in the Complaint.

IT IS SO ORDERED this 31st day of January, 2012.

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Eric M. Davis
Judge