STATE OF MICHIGAN

COURT OF APPEALS

COMMUNITY SHORES BANK, Plaintiff-Appellant,	UNPUBLISHED August 2, 2012
v	No. 305235 Muskegon Circuit Court
BABBITT'S SPORT CENTER, LLC, Defendant-Appellee.	LC No. 09-046857 CZ

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

In this security interest case, plaintiff, Community Shores Bank, appeals the trial court's finding for defendant, Babbitt's Sport Center, LLC of no cause of action based on plaintiff's failure to prove that it had perfected its security interest, plaintiff's failure to prove its damages, plaintiff's failure to prove the requisite elements of equitable estoppel, and plaintiff's waiver of its claim for conversion by refusing an offer by defendant to return some assets. We affirm.

In 2004, a businessman named Rick Sly owned a business called Grow's Marine, Inc. Plaintiff is a lender that provides commercial loans and had provided previous loans to Sly. Plaintiff had an "all asset" security interest in Grow's Marine and its real estate. In 2007, Sly formed an entity called BMC Acquisition Company, LLC to purchase a business called Boston Motors, which was a Honda, Ski Doo and Yamaha dealership. Sly, on behalf of BMC, asked plaintiff for a loan of $350,000, which would partially finance his purchase of Boston Motors which was being sold for $750,000. Plaintiff approved the loan, on the condition that it be secured by the assets purchased (the dealership and all inventory), all assets of Grow's Marine, and by Sly's fiancée's house. Plaintiff required the additional security of Grow's Marine and the house because Sly was not able to document exactly what he was purchasing from Boston Motors.

On February 15, 2007 BMC executed a promissory note for $350,000 to plaintiff. Among the items securing this note were, "equipment, inventory, general intangibles, good will and any proceeds" from Boston Motors. The note was also cross-collateralized with the assets of Grow's Marine. Plaintiff contends that it properly perfected the security interest in all of these assets by filing financing statements with the Michigan Secretary of State.

In February, 2008, this loan, as well as the other loans plaintiff had made to Sly, went into default, with Sly still owing plaintiff $371,210.07 for the BMC loan, and roughly $245,000 for the previous loans taken out personally by Sly for Grow's Marine. BMC then sold all of its assets to defendant, Babbitt's Sports Center, which was an existing, competing dealership.[1] Sly's attorney, Edward Newmeyer, who was involved in this sale, testified that he was aware of BMC's outstanding debt to plaintiff, but that he never attempted to ascertain whether plaintiff had any security interests in Boston Motors. The sale was to occur in two parts. First, on January 30, 2008 BMC sold the Yamaha dealership ("the dealership") to defendant for $1 million.[2] According to Newmeyer, this money was used to pay off other creditors. The second part of the sale was to be of the Honda franchise. Sly anticipated that he would receive another $1.8 million once this portion of the sale was complete. The Honda deal never closed, and although defendant eventually acquired the Honda franchise after litigation, plaintiff did not receive any money.

Defendant's owner and manager, Edward Babbitt, testified that he purchased Boston Motors in order to eliminate competition in the area. Both Sly and Newmeyer represented to him that all of the assets he had purchased along with Boston Motors were free and clear of any liens. Babbitt estimated that the parts he received were worth approximately $25,000 and that the value of the dealership itself was about $100,000. Babbitt testified that he had expected to receive hundreds of thousands of dollars worth of parts, accessories, customer lists, equipment, and apparel from the sale, but ended up with only a small portion of what he had expected. Upon learning of plaintiff's possible interest in the assets of the dealership, defendant offered to return the parts inventory to plaintiff, but plaintiff declined. Babbitt testified that he was shocked to learn that plaintiff was asserting a lien because he knew and trusted Sly and Newmeyer and fully believed them that the assets were being sold "free and clear of any and all liens."

Plaintiff filed this action against defendant alleging three counts: 1) conversion; 2) a claim under Article 9 of the UCC; and 3) equitable estoppel. Following a two-day bench trial, the trial court ruled in favor of defendant. On June 27, 2011 plaintiff filed a motion for a new trial. The trial court denied the motion and plaintiff now appeals.

Plaintiff argues that the evidence demonstrated that plaintiff perfected its security interest in all assets of BMC Acquisition and Grow's Marine, and that furthermore, plaintiff offered testimony of a knowledgeable witness to establish the authenticity of the documents purporting to support this. We disagree.

"A . . . court's decision to admit evidence is within its sound discretion and will not be disturbed absent an abuse of discretion." *Chmielewski v Xermac, Inc,* 457 Mich 593, 613-614; 580 NW2d 817 (1998). Preliminary questions of law concerning admissibility, such as whether

[1] At the time of the sale, BMC and Babbitt's were the only two dealers in Muskegon that sold snowmobiles, personal watercraft, and all terrain vehicles.

[2] As a part of this deal, defendant also took on $750,000 in debt to Yamaha for the Yamaha products that were being sold on the showroom floor.

a rule or statute precludes the admission of the evidence, are reviewed de novo. *People v Lukity,* 460 Mich 484, 488, 596 NW2d 607 (1999).

At trial, plaintiff attempted to introduce financing statements prepared by the bank into evidence. Plaintiff tried to use the testimony of bank manager Ronald Maciejewski to authenticate photocopies of the documents as financing statements that had been perfected by filing with the Secretary of State before defendant purchased the dealership. Maciejewski testified that he personally did not prepare the statements, but supervised an assistant who actually prepared them. He stated that it was the usual practice of the bank to file the financing statements, and that from his past experience, the codes printed on the upper right hand corner of the documents indicated to him that the Secretary of State had received and properly filed the statements.

Defendant objected to the introduction of this evidence, arguing that it was not properly authenticated because, 1) no keeper of records from the Secretary of State had testified that they were properly perfected at the time defendant purchased the dealership, and 2) the documents were not originals, and Maciejewski had not prepared them himself, nor did he testify that he confirmed with the Secretary of State that the documents were recorded or perfected.

In response to defendant's objection the trial court stated,

> Well, I'm going to have to do some research on this because it's a rather important point to both sides. At this point, I'm going to allow it in, but reserving the right after I can do some research, which may be at the conclusion of the trial, to determine whether that's admissible or not as proof that it's been properly perfected because I would like to see some cases that explicate that.

The trial court also allowed the parties to brief the issue. In its opinion, the trial court held that the uncertified copies offered by plaintiff to prove that its interest had been perfected at the time of the sale were inadmissible under MRE 902 and MRE 1005. It stated:

> The court finds that the uncertified copies of the financing statements do not comply with any of the requirements of MRE 902. As to rule 1005, the court finds that the copies are not certified as being correct in accordance with MRE 902. No witness who compared the copy with the <u>original after filing with the Secretary of State</u> testified that the copy was correct. Plaintiff failed to establish that a copy which complies with the rule could not be obtained by due diligence. Thus, the court sustains defendant's objections to the admission of the copies of the financing statements. [emphasis in original].

Based on this finding, the court concluded that plaintiff was not entitled to any UCC remedies. Plaintiff contends this was error and that the trial court should have admitted the documents under MRE 901.

To preserve an evidentiary issue for appellate review, a party must raise the issue in the trial court and the trial court must address it. MRE 103(a)(2); *Haberkorn v Chrysler Corp,* 210 Mich App 354, 368; 533 NW2d 373 (1995). Before evidence is admitted, the item must be authenticated; specifically, the trial court must find that the matter in question is what the

proponent claims. *Haberkorn,* 210 Mich App at 366. When a party fails to produce pertinent evidence within its control, there is a presumption that the evidence, if produced, would be contrary to the withholding party's position. *Devlin v Kaplanis,* 43 Mich App 519, 524–525; 204 NW2d 543 (1972).

MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay evidence is inadmissible unless it comes within an established exception. MRE 802; *People v Eady,* 409 Mich 356, 361; 294 NW2d 202 (1980). MRE 1002 requires, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Before evidence of a particular matter can be admitted, it must be identified or authenticated. MRE 901(a). It can be identified by the testimony of a witness with knowledge that the documents are what they are claimed to be, MRE 901(b)(1), or self-authenticated by an affidavit from the records custodian. MRE 902(11).

Plaintiff concedes that the documents were not properly admissible under MRE 902 or MRE 1005; however, it contends that MRE 901 allows for their admission. MRE 901 provides in relevant part:

> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
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> (1) *Testimony of Witness With Knowledge.* Testimony that a matter is what it is claimed to be.
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> ***
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> (4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
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> ***
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> (7) *Public Records or Reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

7 Wigmore, Evidence §§ 2158–2160 (Chadbourn rev 1978). Fed R Evid 901(b)(7) provides that "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept" is sufficient to satisfy the authentication requirement of Rule 901(a).

The trial court was not satisfied that the documents were what they were purported to be. Whether a document has been properly authenticated is a matter within the trial court's discretion. *Champion v Champion,* 368 Mich 84, 87-88; 117 NW2d 107 (1962). Plaintiff's witness, the manager of the bank, did not provide the trial court with an adequate foundation for the admission of the documents. Plaintiff did not submit a certified copy from the Secretary of State. Plaintiff's witness did not testify that the documents had been transmitted to his office from the Secretary of State, or that he had filed them. He did not testify that he had personal knowledge that they had, in fact, been filed. The documents themselves were photocopies and did not have a seal. There was no testimony from anyone who worked at the Secretary of State that the documents were authentic. Furthermore, the bank manager never testified that he had not filed a termination statement. Based on this lack of foundation, the trial court was unable to determine if the financing statements were actually in effect on the date of the sale to defendant.

The trial court has the discretion to admit or exclude evidence, and we will not disturb the trial court's ruling on such an issue absent a determination that an abuse of discretion occurred. *Elezovic v Ford Motor Co,* 472 Mich 408, 419, 697 NW2d 851 (2005). A trial court does not abuse its discretion when its decision falls within the range of principled outcomes. *Maldonado v Ford Motor Co,* 476 Mich 372, 388, 719 NW2d 809 (2006). "Though we may have ruled differently, the level of deference we must give to the trial court under well-established Michigan law prohibits reversal if we merely disagree with the trial court." *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234, 238 (2008). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Blackston*, 481 Mich 451, 467; 751 NW2d 408 (2008); *Morales v State Farm Mut Automobile Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008).

Next, plaintiff argues that the trial court erred in concluding that because defendant's owner had known Sly for many years, Sly's representation to defendant that the assets were free and clear of liens constituted due diligence. We agree, but find that whether defendant exercised due diligence is irrelevant to this case.

In a bench trial, the trial court's findings of fact are reviewed for clear error but its conclusions of law are reviewed de novo. *Omnicom of Michigan v Giannetti Investment Co,* 221 Mich App 341, 348; 561 NW2d 138 (1997).

In its opinion the trial court stated, "the court finds Babbitt's reliance on these representations [by Sly and counsel that there were no security interests] to constitute due diligence." The trial court made this statement in the fact section of its opinion. It gave no supporting cases or legal analysis. We have found no support in Michigan or Federal case law for the proposition that reliance on the word of an old friend would constitute due diligence with respect to investigating liens on assets. This Court has defined "due diligence" as "devoted and

painstaking application to accomplish an undertaking." *Woodbeck v Curley (On Remand)*, 107 Mich App 784, 788; 310 NW2d 242 (1981).

In spite of this error, the trial court also found that "plaintiff did not provide sufficient evidence to establish that it perfected its security interest in the transferred assets." MCL 440.9317(2) provides:

> Except as otherwise provided in subsection (5), a buyer, other than a secured party, of tangible chattel paper, documents, goods, instruments, or a security certificate takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

Thus, without admissible evidence of a perfected security interest, the trial court was left to determine whether defendant had knowledge of the security interest. Testimony at trial established that defendant did not have knowledge, either actual or constructive. Babbitt testified that he was assured that there were no liens involved in the transaction. Also, in response to being asked whether defendant or any of its agents involved in the transaction had any knowledge about any potential liens by plaintiff, attorney Newmeyer replied, "[t]o the best of my knowledge, no." Additionally, Sly testified that defendant had no knowledge of any liens.

Therefore, given our conclusion that the trial court did not err in refusing to admit the documents that plaintiff contends proved it had perfected a security interest, the matter of due diligence was irrelevant. Under MCL 440. 9317(2), what mattered was that 1) plaintiff did not show that there was a perfected security interest at the time Sly sold the dealership to defendant, and 2) defendant demonstrated that it did not have any knowledge of the security interest.

Finally, plaintiff argues that the trial court erred in concluding that plaintiff failed to prove damages. We decline to address this issue because our previous conclusions render this issue moot.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens