In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00014-CV

DAVID E. NICE, Appellant

V.

DODEKA, L.L.C., Appellee

On Appeal from the County Court at Law No. 2
Montgomery County, Texas
Trial Cause No. 08-12-11802 CV

MEMORANDUM OPINION

Following a summary judgment hearing, Dodeka, L.L.C. obtained a judgment[1] to recover on David E. Nice's credit card debt. Nice initially opened a credit card account with Chase Manhattan Bank USA, N.A. Dodeka's suit is based on its purchase of Nice's debt from an entity that had previously purchased Nice's account.

[1]This judgment contains language that unmistakably indicates the trial court's intent to make the judgment final and appealable. *See Lehmann v. Har-Con. Corp.*, 39 S.W.3d 191, 205 (Tex. 2001). The judgment recites "that all relief requested in this case not expressly granted is denied. This Judgment finally disposes of all parties and claims and is appealable." Nice does not argue that by disposing of his counterclaims in this manner, the trial court erred by granting Dodeka relief that its motion for summary judgment did not request.

Both parties filed motions for summary judgment. Nice asserts the trial court erred by granting Dodeka's motion and by overruling his own motions. After reviewing the summary judgment evidence, we conclude that Dodeka's summary judgment evidence fails to establish that Dodeka suffered damages in the amount the trial court awarded. Therefore, we reverse the trial court's judgment granting Dodeka's motion for summary judgment and remand the cause for further proceedings consistent with this opinion.

Factual and Procedural Background

Nice opened a credit card account with Chase on February 24, 2003. Under his credit card agreement, Nice could use the credit card to pay for personal items and services. The agreement required Nice to repay Chase based on an accounting provided by Chase in monthly credit card statements. In the event that Nice failed to pay in full or failed to make timely payments, he was obligated by the agreement to pay interest and late fees.

After opening the account, Nice acknowledges that he received monthly statements that showed his charges, payments, and monthly balances. Nice's monthly statements also reflect that he incurred finance charges and occasional late fees. Under his agreement with Chase, Nice was required to dispute the charges appearing on the monthly statements within sixty days. The summary judgment evidence does not reflect that Nice ever disputed the charges reflected in Chase's monthly statements. Nice's

statements reflect that on February 13, 2006, Chase received Nice's last payment toward the outstanding balance on his account.

As of September 27, 2006, the outstanding balance on Nice's account was $12,161.02. On May 30, 2008, Chase sold Nice's account to Unifund Portfolio A, LLC. Unifund Portfolio later assigned its interest in Nice's account to Unifund CCR Partners. Unifund CCR then sold Nice's debt to Dodeka on August 13, 2008. On September 11, 2008, Dodeka demanded that Nice pay $13,545.38, claiming that amount as the amount then due on the account. Nice did not respond to Dodeka's written demand for payment.

On December 17, 2008, Dodeka filed suit against Nice. Dodeka sought $13,545.38 in damages and prejudgment interest at the highest rate allowed by law or under the terms of the contract. Nice answered and counterclaimed, alleging that Dodeka had violated the Fair Debt Collection Practices Act ("FDCPA") and the Texas Debt Collection Act ("TDCA"). *See* 15 U.S.C.A. §§ 1692a-1692k (West 2009); Tex. Fin. Code Ann. §§ 392.001-392.404 (West 2006).

Subsequently, claiming that Dodeka had no evidence to support its breach of contract or debt claim, Nice filed a no-evidence motion for summary judgment. In turn, Dodeka filed its own traditional motion for summary judgment on its breach of contract claim, and it filed a response to Nice's no-evidence motion. Nice then filed a separate motion requesting summary judgment on his FDCPA and TDCA counterclaims. Dodeka

responded to Nice's motion seeking summary judgment on his counterclaims, but it did not seek a summary judgment on Nice's counterclaims.

The trial court conducted a combined hearing on all of the parties' motions for summary judgment. At the conclusion of the hearing, the trial court granted Dodeka's motion for summary judgment on its claim for breach of contract. The trial court denied Nice's no-evidence motion on Dodeka's breach of contract claim and denied Nice's motion seeking summary judgment on his counterclaims. The trial court's judgment awards Dodeka $13,545.38 in damages based on Dodeka's breach of contract claim.

Nice timely perfected an appeal, and he raises nine issues for our review. In his first, second, and fourth issues, Nice contends the trial court erred by overruling his objections to Dodeka's summary-judgment evidence. In issue three, Nice challenges the sufficiency of the evidence used to prove that Dodeka owned Nice's account. In issues five, six, and seven, Nice raises sufficiency claims attacking the evidence Dodeka used to prove the existence of an enforceable agreement between the parties and the evidence Dodeka used to prove its damages. In issues eight and nine, Nice complains the trial court erred by denying his summary judgment motions.

Standard of Review

Dodeka filed a traditional motion for summary judgment. We review an order granting a traditional motion for summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). The movant has the burden of

showing, with competent summary judgment evidence, that no genuine issue of material fact exists, and that the movant is entitled to summary judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *see also Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). When a plaintiff moves for a traditional summary judgment, the plaintiff has the burden to conclusively prove all elements of its claims as a matter of law. *See MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986). In resolving whether the movant met its traditional motion for summary judgment burden, we resolve every reasonable inference in favor of the non-movant and take all evidence favorable to the non-movant as true. *See Nixon*, 690 S.W.2d at 548-49.

The Trial Court's Evidentiary Rulings

First we address issues one and two, which assert the trial court improperly considered Holly Chaffin's and Kim Kenney's affidavits. Specifically, prior to the hearing, Nice objected to the affidavits asserting that they contain hearsay, they contain parole evidence, they violate the best evidence rule, and they are conclusory in nature. The trial court overruled Nice's objections.

Affidavits used to support a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Tex. R. Civ. P. 166a(f). We review a trial court's rulings concerning the admission or exclusion of summary judgment evidence for an abuse of discretion. *See*

Fairfield Fin. Group, Inc. v. Synnott, 300 S.W.3d 316, 319 (Tex. App.–Austin 2009, no pet.). An abuse of discretion occurs only when the trial court makes a decision without reference to any guiding rules or principles or its decision is arbitrary or unreasonable. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Dodeka's summary judgment evidence includes three affidavits signed by Chaffin. Chaffin's affidavits, each entitled "Affidavit of Assignment, Damages and Business Records," recite that Chaffin is "personally acquainted with the facts" stated in the affidavits and that they are "true and correct." Her affidavits further state she is the custodian of Dodeka's records, and that she is familiar with how these records are prepared and maintained. Chaffin's affidavits explain how Dodeka acquired Nice's account, and her affidavits indicate that Dodeka's records, which include Nice's credit account, were "made at or near the time or reasonably soon after the act" by an employee "with knowledge of the act [or] event[.]" Numerous pages of records are attached to Chaffin's affidavits, and in referencing these records, Chaffin's affidavits state that Dodeka acquired the records from Unifund CCR Partners; Unifund CCR Partners acquired the records from Unifund Portfolio A, LLC; and Unifund Portfolio A, LLC acquired the records from JPMorgan Chase Bank. Chaffin's affidavits state that she has "personal knowledge of how the records were prepared and maintained by Unifund CCR Partners, by Unifund Portfolio A, LLC, because [she] personally reviewed the record preparation and maintenance procedures with the staff of Unifund CCR Partners and the

staff of Unifund Portfolio A, LLC." Chaffin's affidavits reflect that her knowledge is based on her review of Nice's records, and according to Chaffin, Dodeka owns Nice's account and is trying to collect on the account.

Included within the records attached to Chaffin's affidavits are (1) various credit card agreements; (2) documents indicating that Dodeka purchased Nice's account;[2] (3) eighteen monthly Chase statements, dating from March 2005 through September 2006; (4) Dodeka's demand letter to Nice; and (5) an Affidavit of Indebtedness and Assignment, signed by Kim Kenney, the Media Manager of Unifund CCR Partners. Kenney's affidavit asserts that Unifund CCR assigned Nice's account to Dodeka.

Nice objected to Dodeka's summary judgment evidence claiming that the affidavits contain hearsay, and these objections are argued in issues one and two. The trial court denied Nice's hearsay objections.

The proponent of hearsay bears the burden of showing that the testimony fits within an exception to the general rule prohibiting the admission of hearsay evidence. *Volkswagen of Am., Inc. v. Ramirez,* 159 S.W.3d 897, 908 n.5 (Tex. 2004); *see also* Tex. R. Evid. 802. The Texas Rules of Evidence provide the following hearsay exception for business records:

> A . . . record . . . 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

[2]The bill of sale, redacted to exclude some information in Dodeka's records, reflects that Nice's "remaining balance" was $12,161.02 on the date Chase sold Nice's account.

> business activity to make the . . . record . . . , all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstance of preparation indicate lack of trustworthiness.

Tex. R. Evid. 803(6). The predicate for admission of business records may be established "by affidavit that complies with Rule 902(10)." Tex. R. Evid. 803(6). Rule 902(10) provides that records "shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7)." Tex. R. Evid. 902(10)(a). Rule 902(10) includes a sample form of an affidavit that complies with the rule and states that "an affidavit which substantially complies with the provisions of this rule shall suffice[.]" Tex. R. Evid. 902(10)(b).

Records that contain information concerning regularly conducted activity are not excluded as hearsay. *See* Tex. R. Evid. 803(6). Business records created by one entity that later become another's primary records of the transactions are still admissible as records of regularly conducted activity under Rule 803(6). *See Abrego v. Harvest Credit Mgmt. VII, LLC*, No. 13-09-00026-CV, 2010 Tex. App. LEXIS 3117, at *7 (Tex. App.—Corpus Christi-Edinburg Apr. 29, 2010, no pet.) (mem. op.); *Martinez v. Midland Credit Mgmt., Inc.*, 250 S.W.3d 481, 485 (Tex. App.—El Paso 2008, no pet.). Nevertheless, the witness used to prove that the records are business records must be qualified to testify about the records. *Abrego*, 2010 Tex. App. LEXIS 3117, at *7; *Martinez*, 250 S.W.3d at 485. "A witness may be qualified to testify about another entity's documents if there is testimony that documents obtained by assignment were kept in the ordinary course of

business and formed the basis for ongoing transactions." *Abrego*, 2010 Tex. App. LEXIS 3117, at **7-8 (citing *Cockrell v. Republic Mortgage Ins. Co.*, 817 S.W.2d 106, 112 (Tex. App.—Dallas 1991, no writ)). "[A] document can comprise the records of another business if the second business determines the accuracy of the information generated by the first business." *Martinez*, 250 S.W.3d at 485; *see Duncan Dev., Inc. v. Haney*, 634 S.W.2d 811, 812-13 (Tex. 1982); *see also Cockrell*, 817 S.W.2d at 112-13.

The First Court has applied a three-step test to determine whether business records created by one entity that later became another's primary records are admissible over a hearsay objection. *Simien v. Unifund CCR Partners*, No. 01-08-00593-CV, 2010 Tex. App. LEXIS 5585, at *7 (Tex. App.—Houston [1st Dist.] July 15, 2010, no pet.). The three-step test that the First Court applied requires that (1) the documents be incorporated and kept in the course of the testifying witness's business, (2) the business typically relies upon the accuracy of the contents of the document, and (3) the circumstances otherwise indicate the trustworthiness of the document. *Id.*

Chaffin's affidavits state that she is the record custodian for Dodeka, is personally familiar with how Dodeka prepares and maintains its records, and has personal knowledge of Unifund's business record practices. In her affidavits, Chaffin vouches for the accuracy of the records that were initially created by Chase. Chaffin's affidavits are in a form that substantially complies with Rule 902(10)(b). *See* Tex. R. Evid. 902(10)(b). Additionally, Kenney's affidavit, also found in Dodeka's summary judgment proof,

reflects that Kenney has personal knowledge of Unifund's business record practices and she also vouches for the accuracy of the records initially created by Chase. As the affidavits of Chaffin and Kenney are both in substantially correct form, they are sufficient for the trial court to have determined that the records were admissible as an exception to the hearsay rule. *See* Tex. R. Evid. 803(6). The trial court did not err by overruling Nice's hearsay objection to Chaffin's and Kenney's affidavits.

Nice also lodged best evidence and parole evidence objections to the affidavits used to support Dodeka's motion for summary judgment. But, Dodeka's summary judgment proof includes copies of the documents used to accomplish the sale of Nice's account from Chase to Unifund, and then from Unifund to Dodeka; these documents were thus sufficient to establish Dodeka's ownership of Nice's account. Duplicates of an original document are admissible unless a question is raised as to the authenticity of the original or the circumstances are such that it would be unfair to admit the duplicate instead of the original. Tex. R. Evid. 1003. Nice did not question the authenticity of the documents reflecting the sale of his account in the trial court, nor does he do so on appeal. Because the trial court had copies of relevant account statements on Nice's account, as well as the documents tracing the sale of Nice's account to Dodeka, the trial court was not required to rely upon any parole evidence concerning the terms of the parties' contract when addressing Dodeka's summary judgment motion. In summary, Nice's best evidence objections concern statements in the affidavits: he did not question

the authenticity of the account statements and documents reflecting the account's sale. The trial court did not abuse its discretion in overruling Nice's objections to Chaffin's and Kenney's affidavits that were attached as summary judgment evidence. We overrule Nice's first and second issues.

In his fourth issue, Nice argues the trial court erred by overruling his objections to the 2004 and 2006 credit card agreements included within Dodeka's summary judgment evidence. Nice contends that he established his account on February 24, 2003, and he concludes that the proper predicate for the admission of the agreements was not offered, thereby rendering these later agreements hearsay. Nice also objected that there was no evidence that the agreements were delivered to him by Chase. Nevertheless, the 2004 and 2006 agreements are included in the summary judgment evidence within the records maintained on Nice's account, and these are records maintained in the ordinary course of business. Consequently, the trial court had the discretion to overrule Nice's hearsay objections to the admission of the 2004 and 2006 agreements and to admit them into evidence. *See* Tex. R. Evid. 803(6), 902(10)(a). We overrule issue four.

Dodeka's Damage Evidence

In his sixth issue, Nice contends the trial court erred in granting Dodeka summary judgment because Dodeka "presented no evidence proving how its damages were calculated and how [Dodeka] arrived at the debt balance requested by [Dodeka] and awarded by the trial court." Nice's seventh issue asserts the trial court erred by granting

Dodeka summary judgment motion. Dodeka's claim against Nice, as advanced by its summary judgment motion, was that Nice breached his contract with Chase, and that Dodeka acquired the claim by purchasing it from Unifund, who acquired the account from Chase. The essential elements of a breach of contract claim are: (1) the existence of a valid contract, (2) the performance or tendered performance by the plaintiff, (3) breach of contract by the defendant, and (4) damages sustained as a result of the breach. *Winchek v. Am. Express Travel Related Servs. Co., Inc.*, 232 S.W.3d 197, 202 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

The trial court awarded Dodeka $13,545.38 for breach of contract, attorney's fees, costs of court, and post-judgment interest. In Nice's affidavit, Nice admits that the account upon which Dodeka based its suit consists of his credit card account with Chase. Nice also acknowledges that he received monthly statements that included finance charges and occasional late fees. Several of Nice's monthly statements are contained in Dodeka's summary judgment evidence. Nice's September 2006 statement, which reflects an outstanding balance of $12,161.02, is among the statements included in the summary judgment evidence. Although Nice's summary judgment response includes his affidavit, Nice's affidavit does not dispute the accounting provided by the monthly statements sent to him by Chase.

The account statements on Nice's account are competent summary judgment evidence supporting a claim of $12,161.02, the amount of the outstanding balance on the

last of the monthly statements introduced as evidence. However, the summary judgment evidence does not show the interest rate that applied to the outstanding balance on Nice's account subsequent to September 2006, the date Chase sent the last statement on the account. Instead, the credit card agreement pertaining to Nice's personal account contains a provision that makes the applicable interest subject to interest in a rate table that Dodeka failed to include in its summary judgment evidence. Without the applicable rate schedule, Dodeka's summary judgment evidence does not support the trial court's award of $13,545.38, which is $1,384.36 more than the amount Nice's last credit card statement reflects as being due. Additionally, $1,384.36 is not the amount that might arguably be due under a theory of common law prejudgment interest. *See Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528-32 (Tex. 1998) (providing for common law prejudgment interest in breach of contract cases).

To be entitled to receive a favorable ruling on a motion for summary judgment, the movant must "prove all essential elements of its claim." *MMP, Ltd.*, 710 S.W.2d at 60. Included in Dodeka's claims was a claim for prejudgment interest based on Nice's written agreement with Chase. We conclude that Dodeka failed to provide the trial court with summary judgment evidence supporting the amount the trial court awarded for contractual prejudgment interest. In the absence of evidence showing the interest rate that applied to the account for the period between September 2006 and the trial, the trial court erred by granting a judgment that included prejudgment interest for the period between

September 2006 and the date of the trial. *See* Tex. R. Civ. P. 166a; *MMP, Ltd.*, 710 S.W.2d at 60.

We overrule Nice's sixth issue, as there was evidence proving how the trial court calculated Nice's debt. Nevertheless, we agree with the argument advanced in Nice's seventh issue, in which he asserts the trial court erred in granting Dodeka's motion because the entire amount awarded by the trial court is not fully supported by the summary judgment evidence. Accordingly, because there is some evidence that Dodeka was entitled to prejudgment interest, but not in the amount the trial court awarded, and some evidence that Dodeka could recover another amount for common law prejudgment interest, but not in the amount the trial court awarded, we reverse the trial court's judgment and remand the cause for further proceedings consistent with our opinion.

Conclusion

The trial court erred in awarding prejudgment interest in an amount Dodeka's proof failed to establish was then due. We reverse the trial court's judgment and remand the cause for further proceedings consistent with this opinion.[3]

[3]We decline to specifically address issues three, five, eight, and nine, as their resolution would afford Nice no relief greater than a new trial, which he has been given by virtue of our ruling on issue seven. *See* Tex. R. App. P. 47.1. Additionally, because we have reversed the trial court's judgment, the trial court's decisions to deny Nice's motions for summary judgment are interlocutory. Consequently, the claims Nice has raised in his counterclaim are still before the trial court, unless these claims are resolved prior to trial through dispositive motions. *Id.*

REVERSED AND REMANDED.

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HOLLIS HORTON
Justice

Submitted on August 30, 2010
Opinion Delivered November 10, 2010
Before McKeithen, C.J., Kreger and Horton, JJ.