

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

DISCOVER BANK, ISSUER OF THE DISCOVER CARD,)	No. 30596-1-III
)	
Respondent,)	
)	
v.)	
)	UNPUBLISHED OPINION
ALAINE GARDNER and DOE I, and their marital community composed thereof,)	
)	
Appellants.)	
)	

Kulik, J. — Discover Bank brought an action against Alaine Gardner for breach of contract after Ms. Gardner stopped making payments on her Discover credit card. Discover moved for summary judgment. In support of the motion, Discover submitted an affidavit from a servicing affiliate claiming to have personal knowledge of the account, with the account documents attached to the affidavit. The trial court granted the summary judgment motion. Ms. Gardner appeals. She contends that the affidavit from the servicing affiliate, Natasha Szczygiel, contained inadmissible hearsay and failed to

authenticate the evidence under the business records exception to the hearsay rule.

We agree that the affidavit satisfied the statutory requirements for business records and that the evidence was properly admitted. And there were no genuine issues of fact disputing that Ms. Gardner breached her contract when she failed to pay her credit card. Therefore, we affirm summary judgment in favor of Discover Card.

FACTS

Ms. Gardner opened a credit card account with Discover Bank around June 2000. Ms. Gardner stopped making payments after May 2010 and defaulted under the terms of the agreement. Discover began legal proceedings to collect on the debt based on Ms. Gardner's breach of contract.

Discover moved for summary judgment against Ms. Gardner and "Doe I." In support of its motion, Discover filed the affidavit of Natasha Szczygiel. In the signed, sworn affidavit, Ms. Szczygiel stated,

I am an account manager in the Attorney Placement Department for DB Servicing Corporation, the servicing affiliate of DISCOVER BANK, ISSUER OF THE DISCOVER CARD, and FDIC insured Delaware State Bank collectively ("Discover"). I am responsible for managing and overseeing the Discover accounts that have resulted in contested litigation. Included within the scope of my responsibilities includes the performance of collection and recovery services. I make this affidavit on the basis of my personal knowledge and a review of the records maintained by Discover with respect to the account at issue. All such records are maintained by Discover with respect to the account at issue. All such records are maintained in the regular course of business at or near the time of the events

recorded. I am a Designated Agent and a Custodian of the records.

....

On or about June 09, 2000 Defendant opened a Discover Credit Card. Attached hereto are true and correct copies of the Application and Cardmember Agreement which govern the credit card account at issue. Also attached are periodic statements which were provided to the defendant monthly along with copies of payments for the following months: . . . No payments have been made since May 03, 2010, and Defendant has defaulted under the terms of the Cardmember Agreement by failing to make the payments due as required by the agreement.

At the time that the suit was commenced, the principal balance on the account was \$10,953.69.

Clerk's Papers (CP) at 35-36. Attached to Ms. Szczygiel's affidavit was a "Pre-Approved Discover Platinum America Acceptance Form,"¹ copies of over 30 cancelled checks showing payments made by Ms. Gardner on her account, account statements with closing dates from May 13, 2005, to November 13, 2010, and the cardmember agreement.

Tom Gardner, husband of Ms. Gardner, opposed summary judgment and moved to strike Discover's documentary evidence and to strike Ms. Szczygiel's affidavit. Discover replied and attached the declaration of Marisa Bender, the affidavit of Robert Adkins who explained the relationship between DB Servicing and Discover, and a copy of the cardmember agreement that governed the account.

The trial court granted Discover's motion for summary judgment based on the pleadings on file. Ms. Gardner appeals. She argues that the trial court erred by admitting

¹ CP at 37.

Ms. Szczygiel's affidavit and the attached account documentation.

ANALYSIS

Standard of Review. This court reviews de novo all trial court rulings connected with a summary judgment motion, including evidentiary rulings. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); see *Ensley v. Mollmann*, 155 Wn. App. 744, 752, 230 P.3d 599, review denied, 170 Wn.2d 1002 (2010).

Ms. Szczygiel's Affidavit. Affidavits made in support of a summary judgment motion must meet several requirements. See CR 56(e). CR 56(e) requires that the affidavits: (1) be made on personal knowledge, (2) set forth such facts as would be admissible in evidence, and (3) show affirmatively that the affiant is competent to testify to what is in the affidavit.

Hearsay. Ms. Gardner argues that both the affidavit and attached records should be excluded as hearsay.

Hearsay statements are statements offered into evidence to prove the truth of the matter asserted and were not made by the declarant at trial or hearing. ER 801(c).

Hearsay is generally inadmissible. ER 802.

Ms. Gardner contends that the affidavit should be excluded as hearsay because Ms. Szczygiel does not work for Discover and, therefore, she cannot base her affidavit on

personal knowledge. She argues that the affidavit makes generic and conclusory hearsay statements that do not support admission of the attached documents, and that Ms. Szczygiel is simply a third party signer who was told by a company servicing Discover's accounts to attest to a stack of documents.

Ms. Szczygiel's affidavit is not hearsay. The affidavit does not contain information that Ms. Szczygiel would not be able to offer at trial. As stated, Ms. Szczygiel bases her affidavit on her personal knowledge and on a review of the records maintained by Discover with respect to the account at issue. Her affidavit does not state that she is a third party to the information. Instead, she states that DB Servicing is an affiliate of Discover. The affidavit of Robert Adkins explains the duties that DB Servicing performs as an affiliate of Discover. The mere fact alone that Ms. Szczygiel works for an affiliate of Discover does not make her affidavit hearsay.

As for the account documents attached to the affidavit, Ms. Gardner contends that the documents are hearsay and the business records exception, RCW 5.45.020, does not apply. She contends that the affidavit does not establish that Ms. Szczygiel created the records, was the custodian when the records were created, or that she had knowledge of the creation.

Business records of regularly conducted activity are an exception to the hearsay

rule. *State v. Iverson*, 126 Wn. App. 329, 337, 108 P.3d 799 (2005). Such documents are admissible under RCW 5.45.020, which states,

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Stated differently, the custodian of the records or other qualified witness must testify to the (1) record's identity; (2) its mode of preparation; (3) if it was made in the regular course of business; and (4) if it was made at or near the time of the act, condition, or event. RCW 5.45.020. The court must be satisfied that the source of the information, method, and time of preparation justify admitting the evidence. *State v. Ziegler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990).

Ms. Szczygiel's affidavit satisfies the requirements of RCW 5.45.020. In her sworn statement, she testifies that she is the custodian of the record. Ms. Szczygiel identifies the documents attached to the affidavit as the application, cardmember agreement, Ms. Gardner's monthly statements, and copies of payments. She testifies that the records are maintained by Discover in respect to Ms. Gardner's account. She also testifies that the records were maintained within the course of business at or near the time of events recorded. Contrary to Ms. Gardner's contention, Ms. Szczygiel did not need to

testify that she actually produced the records. The trial court properly admitted the documents as business records.

Authentication. Ms. Gardner contends that the documents are not admissible because Ms. Szczygiel's affidavit does not authenticate the documents as required by ER 901.

Documents offered through an affidavit must be authenticated under ER 901 to be admissible. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 745, 87 P.3d 774 (2004). ER 901 requires a prima facie showing that the evidence "is what it purports to be." *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 86, 272 P.3d 865, review denied, 174 Wn.2d 1016 (2012). ER 901(a) states that "[t]he 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."

ER 901 illustrates numerous methods with which it may be satisfied. *See* ER 901(b). For instance, evidence can be authenticated by a witness with knowledge who testifies that the evidence is what it is claimed to be. ER 901(b)(1). Reviewing and making copies of original documents does not establish personal knowledge in situations where the affiant does not claim that he or she possesses such knowledge. *Int'l Ultimate,*

122 Wn. App. at 750.

Ms. Szczygiel authenticates the documents under ER 901 by stating that she is the custodian of the records and that the attached documents are true and correct copies of the documents. As stated, she bases her affidavit on personal knowledge and on her review of the records. Ms. Szczygiel's affidavit sufficiently sets forth that the documents are what they are claimed to be.

Chain of Custody. Ms. Gardner contends that the documents are not admissible because Discover failed to show a proper "chain of custody" in handling the business records.

Chain of custody generally applies to admission of physical evidence in criminal cases and stands for the idea that before such physical evidence can be admitted, the evidence must be identified and shown to be in substantially the same condition as when the crime was committed. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Factors include "'the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.'" *Id.* (quoting *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960)). Here, the evidence being presented is business records, not physical evidence in a criminal case. Furthermore, there is no requirement in RCW 5.45.020 that the chain of custody of a business record

needs to be established for admissibility. It is reasonable to believe that the court was satisfied that the evidence was reliable. Ms. Gardner's chain of custody contention fails.

Summary Judgment. This court reviews de novo all trial court rulings connected with a summary judgment motion, including evidentiary rulings. *Folsom*, 135 Wn.2d at 663.

Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). If the moving party submits sufficient evidence, the burden shifts to the nonmoving party, who must rebut the moving party's contentions or show that a genuine issue exists. *Discover Bank v. Bridges*, 154 Wn. App. 722, 727, 226 P.3d 191 (2010). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.* Mere allegations and conclusory statements are insufficient to establish a genuine issue. *Id.* And the nonmoving party cannot rely on speculation or argumentative assertions that genuine issues remain. *Id.* (quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

Ms. Gardner contends that Discover was not entitled to summary judgment because it could not show an absence of genuine issues of material fact without

submitting admissible evidence. As discussed above, Discover produced admissible evidence which supported summary judgment. To show the existence of an agreement, Discover produced a Pre-Approved Discover Platinum America Acceptance Form signed by Ms. Gardner. Discover also produced the cardmember agreement, which stated that by using the card Ms. Gardner accepted the agreement, and cancelled checks issued from Ms. Gardner to Discover as proof that Ms. Gardner used the card.

Discover also produced evidence that Ms. Gardner breached the agreement. The cardmember agreement stated that Ms. Gardner was to pay the minimum amount due each month. Discover presented Ms. Gardner's cardmember statements showing that her last payment was made on May 3, 2010. Thus, Discover produced sufficient evidence to prove that Ms. Gardner entered into a contract with Discover and that the account was past due.

The burden shifted to Ms. Gardner to rebut Discover's contentions or show that a genuine issue existed. Ms. Gardner did not produce any admissible evidence or raise an issue of material fact. As a result, no genuine issue of material fact existed as to whether Ms. Gardner breached her contract with Discover. The trial court appropriately granted

summary judgment in favor of Discover.

Finally, Ms. Gardner contends that Discover's action is barred by Washington's three-year statute of limitations. Without passing judgment on whether this is the appropriate statute of limitations that applies to this matter, we conclude that this contention fails. The statute of limitations for an action commences on the date when the party had the right to petition for relief. *Hudson v. Condon*, 101 Wn. App. 866, 874, 6 P.3d 615 (2000). Discover filed this action on July 1, 2011. Thus, the action commenced well within three years of when Ms. Gardner breached her contract, which occurred sometime after Ms. Gardner made her last payment on May 3, 2010. Accordingly, Ms. Gardner's contention fails.

Attorney Fees. Ms. Gardner did not prevail on appeal. Therefore, we decline her request for attorney fees.

We affirm the trial court's decision granting summary judgment in favor of Discover Card.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

No. 30596-1-III
Discover Bank v. Gardner

Kulik, J.

WE CONCUR:

Sweeney, J.

Siddoway, A.C.J.