CUSTOMERS BANK *v.* TOMONTO INDUSTRIES, LLC, ET AL.
(AC 36240)

Lavine, Alvord and West, Js.

Argued January 15—officially released April 14, 2015

(Appeal from Superior Court, judicial district of Stamford-Norwalk, Hon. Edward R. Karazin, Jr., judge trial referee.)

Gary S. Klein, with whom, on the brief, was *Ryan W. Scully*, for the appellants (defendants).

Opinion

LAVINE, J. In this breach of contract action, the defendants, Tomonto Industries, LLC, and Joseph A. Tomonto, appeal from the judgment of the trial court rendered in favor of the plaintiff, Customers Bank. Specifically, the defendants claim that the trial court: (1) improperly admitted into evidence (a) a summary of the defendants' debt in violation of § 10-5 of the Connecticut Code of Evidence and (b) bank documents as business records without proper authentication; (2) erred in awarding the plaintiff damages; and (3) erred in awarding the plaintiff postjudgment interest. We affirm the judgment of the trial court.[1]

In July, 2012, the plaintiff initiated the present action, which concerns a breach of contract claim. On December 7, 2012, the plaintiff filed the second revised complaint alleging breach of contract against Tomonto Industries, LLC, and breach of guaranty against Tomonto. The following facts were alleged in the complaint. On September 22, 2006, the defendants signed a promissory note and personal guaranty with USA Bank in the principal amount of $3,374,800. The plaintiff subsequently acquired USA Bank by virtue of a purchase and assumption agreement between the Federal Deposit Insurance Corporation and the plaintiff. Accordingly, the plaintiff became the owner and holder of the promissory note and guaranty. The plaintiff made demand on the note on April 3, 2012, and the defendants failed to make payment in full.

On February 5, 2013, the plaintiff filed a motion for summary judgment as to liability only on both counts of the second revised complaint. The trial court, *Hon. Taggart D. Adams*, judge trial referee, having heard the parties' arguments, granted the plaintiff's motion as to liability only. Thereafter, on October 17, 2013, the trial court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, conducted a hearing in damages. The plaintiff called one witness, Richard Napierkowski, the plaintiff's senior vice president and manager of the special assets group. Following the hearing, Judge Karazin rendered judgment against the defendants and awarded the plaintiff $551,683.44 in damages plus postjudgment interest. This appeal followed. Additional relevant facts will be set forth as necessary.

I

The defendants first claim that the court abused its discretion by admitting into evidence (1) a summary of the defendants' debt in violation of § 10-5 of the Connecticut Code of Evidence and (2) bank documents as business records without the proper authentication. We begin with the standard of review that guides our analysis of both evidentiary claims. "[O]ur standard of review regarding challenges to a trial court's evidentiary rulings is that these rulings will be overturned on appeal

only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Solomon*, 150 Conn. App. 458, 462–63, 91 A.3d 523, cert. denied, 314 Conn. 908, 100 A.3d 401 (2014).

A

The defendants first claim that the court improperly admitted a summary of the defendants' debt (exhibit 10)[2] into evidence in violation of § 10-5 of the Connecticut Code of Evidence. Specifically, the defendants argue that, under our Code of Evidence, the plaintiff was required to provide them with the underlying documents used to create exhibit 10 for their review, and failed to do so. They claim, therefore, that the court improperly admitted exhibit 10 into evidence. We conclude that the court did not abuse its discretion in admitting exhibit 10 into evidence.

"To the extent [that] a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Willoughby*, 153 Conn. App. 611, 617, 102 A.3d 1118 (2014).

Section 10-5 of the Connecticut Code of Evidence provides: "The contents of voluminous writings, recordings or photographs, otherwise admissible, that cannot be conveniently examined in court, may be admitted in the form of a chart, summary or calculation, provided that the originals or copies are *available* for examination or copying, or both, by other parties at a reasonable time and place."[3] (Emphasis added.)

"Most modern evidence rules explicitly allow the introduction of summaries of records which are lengthy, complicated, or both, in the original form. Even before the explicit recognition of this, however, many courts were deemed to have the discretion to permit a witness to testify as to lengthy, complicated, and voluminous records as an exception to the best evidence rule." (Internal quotation marks omitted.) *National Publishing Co.* v. *Hartford Fire Ins. Co.*, 94 Conn. App. 234, 265–66, 892 A.2d 261 (2006), rev'd on other grounds, 287 Conn. 664, 949 A.2d 1203 (2008). "[Section] 10-5 of the Connecticut Code of Evidence and a line of cases, of which *Brookfield* v. *Candlewood Shores Estates, Inc.*,

201 Conn. 1, 513 A.2d 1218 (1986), is a part, state that summaries may be admitted provided that the documents on which they are based are available to the court and opposing counsel. Unavailability of some supporting documents, not due to the fault of the proponent, will not bar the admissibility of the summary." *National Publishing Co.* v. *Hartford Fire Ins. Co.*, supra, 264–65.

The following facts are relevant to our resolution of the defendants' claim. The hearing in damages was originally scheduled for July 1, 2013, but the defendants stated that they were not prepared to go forward due to the lack of documents received. Even though the defendants did not file any discovery requests, the court gave them the relief they were seeking and continued the matter for approximately fifteen weeks, until October 17, 2013. The plaintiff provided the defendants with a copy of its entire file on September 26, 2013.

At the October 17, 2013 hearing in damages, the plaintiff offered into evidence exhibit 10, a summary of the debt owed by the defendants to the plaintiff. The defendants objected to its admission claiming they were not given the opportunity to review the documents that were used to compile exhibit 10. The defendants, however, concede that they received exhibit 10 on October 16, 2013, the day before the hearing, and made no effort whatsoever to request the underlying documents used to compute the figures in exhibit 10 in advance of the hearing, nor did they request a continuance. See, e.g., *Brookfield* v. *Candlewood Shores Estates, Inc.*, supra, 201 Conn. 13 (defendant failed to request underlying documents and never requested continuance). The plaintiff argued that all of the documents used to compute the figures in exhibit 10 already had been entered into evidence.

After the defendants objected to the admission of exhibit 10, the court repeatedly asked the defendants what documents they needed to review in light of the summary. The defendants failed to articulate what they needed to review. The court initially overruled the objection but took a brief recess to reconsider its ruling. When the court reconvened, it concluded that § 10-5 requires the opposing party to make a preliminary demand for the underlying documents and that the plaintiff had complied with the Code of Evidence. The court stated that such a preliminary demand could consist of the party filing a request to view the documents in advance, which the defendants had failed to do. The court highlighted the proper timing of a demand when it stated "[t]he very fact that section [10-5] says, *at a reasonable time and place*, contemplates that it's not at trial." (Emphasis added.) The court further noted that it had already granted the defendants a continuance to review documents and, if that was inadequate, they could have sought relief prior to the October 17,

2013 hearing.

The defendants failed to make any discovery requests and received the plaintiff's file approximately three weeks prior to the October 17, 2013 hearing in damages. Given the language of § 10-5 of the Connecticut Code of Evidence, the court properly noted that once the defendants received exhibit 10, one day before the hearing, they could have made a preliminary demand to review the underlying documents, but failed to do so. Accordingly, we conclude that the admission of exhibit 10 did not constitute an abuse of discretion, given the facts and circumstances of this case.

B

The defendants next claim that the court improperly admitted various bank documents into evidence as exhibits without being properly authenticated. Specifically, the defendants claim that the plaintiff's sole witness, Napierkowski, did not have the personal knowledge required under General Statutes § 52-180[4] to authenticate the exhibits as business records. We disagree that the exhibits were improperly admitted.

"To admit evidence under the business record exception to the hearsay rule, a trial court judge must find that the record satisfies each of the three conditions set forth in . . . § 52-180. The court must determine, before concluding that it is admissible, that the record was made in the regular course of business, that it was in the regular course of such business to make such a record, and that it was made at the time of the act described in the report, or within a reasonable time thereafter. . . . To qualify a document as a business record, the party offering the evidence must present a witness who testifies that these three requirements have been met. . . .

"Section 52-180 is to be liberally construed [in favor of admissibility], and our review is limited to determining whether the trial court abused its discretion in admitting the challenged evidence." (Citations omitted; internal quotation marks omitted.) *Emigrant Mortgage Co.* v. *D' Agostino*, 94 Conn. App. 793, 807–808, 896 A.2d 814, cert. denied, 278 Conn. 919, 901 A.2d 43 (2006).

At the hearing in damages, the plaintiff offered the exhibits in question to quantify the debt owed by the defendants. The exhibits included computer records of the promissory note history and two commercial loan statements dated June 17, 2010, and July 18, 2010.[5] The exhibits were entered into evidence through the testimony of Napierkowski. The defendants argue that Napierkowski lacked the personal knowledge required under the business record exception to the hearsay rule to authenticate these exhibits. Specifically, the defendants argue that Napierkowski lacked the requisite personal knowledge because the documents were created by USA Bank, and Napierkowski never worked for

that bank.

"The requirements for authenticating a business record are identical to those for laying a foundation for its admissibility under the hearsay exception. It is generally held that business records may be authenticated by the testimony of one familiar with the books of the concern, such as a custodian or supervisor, who has not made the record or seen it made, that the offered writing is actually part of the records of business." (Internal quotation marks omitted.) Id., 811.

At the hearing in damages, Napierkowski testified that he had worked for the plaintiff for approximately three years and was familiar with the plaintiff's books and records, specifically as they related to the defendants. Napierkowski further testified that the plaintiff created the type of documents at issue in the regular course of its business, and he knew that these particular documents were generated in the regular course of the plaintiff's business. Moreover, Napierkowski had personal knowledge of the facts and circumstances surrounding the defendants' loan and had personal experience with the plaintiff's general record keeping procedures.

After hearing his testimony, the court overruled the defendants' objection that the documents were not properly authenticated and stated that the objection went to the credibility of the evidence. "The witness' personal knowledge [of the information contained in the business record] goes to the weight of the evidence, not its admissibility." *Federal Deposit Ins. Corp.* v. *Carabetta*, 55 Conn. App. 384, 390, 739 A.2d 311, cert. denied, 251 Conn. 928, 742 A.2d 362 (1999). Furthermore, "[t]he witness introducing the document need not have made the entry himself or herself, *nor have been employed by the organization during the relevant time period*." (Emphasis added.) Id., 393. Accordingly, we conclude that the court did not abuse its discretion in admitting the exhibits into evidence as business records.

II

The defendants' next claim is that the court erred in awarding the plaintiff $551,683.44 in damages. The defendants argue that the court relied on inadmissible evidence, specifically, the aforementioned exhibits, in determining the plaintiff's award. We disagree with the defendants.

"The general rule in breach of contract cases is that the award of damages is designed to place the injured party, so far as can be done by money, in the same position as that which he would have been in had the contract been performed. . . . In making its assessment of damages for breach of [any] contract the trier must determine the existence and extent of any deficiency and then calculate its loss to the injured party.

The determination of both of these issues involves a question of fact which will not be overturned unless the determination is clearly erroneous." (Internal quotation marks omitted.) *Benedetto* v. *Wanat*, 79 Conn. App. 139, 153–54, 829 A.2d 901 (2003).

In the present case, the damages awarded by the court track figures provided in exhibit 10 and Napierkowski's testimony. Exhibit 10 states the total debt due to the plaintiff as $552,083.44. The court awarded the plaintiff $551,683.44 in damages. We already have concluded that the court did not abuse its discretion in admitting the exhibits into evidence and, therefore, the court had the broad discretion to use these documents in determining whether damages were appropriate. The court reduced the amount of damages claimed by the plaintiff after hearing all of the evidence. The court reduced the claim by $300 for a "search fee" and $100 for a "satisfaction fee" because the court found "that there was no evidence of [those] being part of the responsibility of the defendants." Further, the defendants failed to impeach the evidence presented by the plaintiff. Because the award of damages is fully supported by the record before us, the court's judgment is not clearly erroneous.

III

The defendants' final claim is that the court erred in awarding the plaintiff 6 percent postjudgment interest. The defendants argue that the court improperly awarded postjudgment interest because the plaintiff failed to request it in its prayer for relief or by motion. We disagree.

"A decision to deny or grant postjudgment interest is primarily an equitable determination and a matter lying within the discretion of the trial court." (Internal quotation marks omitted.) *Bower* v. *D'Onfro*, 45 Conn. App. 543, 550, 696 A.2d 1285 (1997). "Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court properly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, 121 Conn. App. 31, 61, 994 A.2d 262, cert. denied, 297 Conn. 918, 996 A.2d 277 (2010).

In this case, the plaintiff orally requested postjudgment interest at the hearing in damages. The plaintiff asserted that the "wherefore clause in the complaint [that requests] such other relief as the court may deem equitable and necessary" allowed the court to award postjudgment interest. The defendants opposed this request by stating that the plaintiff did not properly

raise this request in their complaint or by motion. The plaintiff, however, was not required to claim postjudgment interest in its second revised complaint. Practice Book § 10-28 provides: "Interest and costs need not be specifically claimed in the demand for relief, in order to recover them." The court awarded the plaintiff postjudgment interest in the requested amount of 6 percent per annum. See General Statutes § 37-3a. The court noted that the "claim of money damages in the complaint, and such other further relief that the court may deem equitable and necessary, are sufficient to award postjudgment interest." We agree. Accordingly, the court did not abuse its discretion in awarding the plaintiff postjudgment interest.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] The plaintiff failed to file a timely appellate brief by July 23, 2014. Pursuant to Practice Book § 85-1, this court ordered that the plaintiff file its brief on or before September 4, 2014. The plaintiff failed to file a brief and, therefore, we have considered this appeal on the basis of the defendants' brief and the record only. See, e.g., *Housing Authority* v. *Morales*, 67 Conn. App. 139, 139 n.1, 786 A.2d 1134 (2001).

[2] We note that the plaintiff's witness, Napierkowski, also referred to exhibit 10 as a "payoff statement for the loan." Exhibit 10 is a three page document including: a table calculating the total debt owed by the defendants; three entries indicating the interest accrued on the note; six entries for the additional interest accrued for defaulting on the note; and twenty-three entries for the plaintiff's alleged attorney's fees. The trial court unequivocally treated exhibit 10 as a summary.

Section 10-5 of the Connecticut Code of Evidence "permits the contents of admissible, *voluminous* documents to be admitted in the form of a summary . . . ." (Emphasis added.) *Natarajan* v. *Natarajan*, 107 Conn. App. 381, 391, 945 A.2d 540, cert. denied, 287 Conn. 924, 951 A.2d 572 (2008). For the purpose of this appeal, we assume without deciding that the underlying documents used to compute exhibit 10 were "voluminous." See Conn. Code Evid. § 10-5.

[3] "Available" in this context suggests "present or ready for immediate use." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003). Section 10-5 of the Connecticut Code of Evidence requires that the party offering the summary have the originals accessible but does not mandate that such documents must be produced to the other side without a request. See *Pierce* v. *Norton*, 82 Conn. 441, 447, 74 A. 686 (1909); see also C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 10.9.3, p. 715 ("[i]f summaries are permitted, the original documents must be produced and made available for examination *if requested by the opposing party*" [emphasis added]).

[4] General Statutes § 52-180 provides: "(a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.

"(b) The writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, *including lack of personal knowledge by the entrant or maker*, *may be shown to affect the weight of the evidence*, *but not to affect its admissibility*." (Emphasis added.) See also Conn. Code Evid. § 8-4.

[5] "When computer records are offered as evidence [under the business records exception], the proponent must satisfy a two part test. In addition to meeting the three requirements of the business records exception to the hearsay rule . . . the proponent also must establish that the basic elements

of the computer system are reliable." (Internal quotation marks omitted.) *Emigrant Mortgage Co.* v. *D' Agostino*, supra, 94 Conn. App. 809. The defendants' arguments on appeal focus on Napierkowski's familiarity with the computer system and not whether the plaintiff demonstrated that the system was sufficiently reliable.