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.	)	

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MEMORANDUM OPINION AND ORDER
ON PLAINTIFF'S MOTION FOR REARGUMENT

Submitted: February 14, 2012
Decided: March 9, 2012

DAVIS, J.

On December 9, 2011, the Court of Common Pleas held a trial on a complaint (the "Complaint") filed by Plaintiff Delaware Acceptance Corp. ("DAC"). In the Complaint, DAC sought damages from Defendant Robert S. Swain for a purported breach of contract arising out of an alleged credit card agreement. At the conclusion of trial, the Court reserved decision. On January 31, 2012, the Court ruled in favor of Mr. Swain, holding that DAC failed to prove a breach of contract based on the evidence presented at trial.

On February 6, 2012, DAC filed a motion for reargument (the "Motion"). On February 14, 2012, Mr. Swain filed a response (the "Response") to the Motion. After reviewing the

Motion, the Response, the file in this Civil Action, the transcript of the trial, and for the reasons set forth herein, the Motion is denied.

I. Applicable Law

Rule 59 of the Court of Common Rules of Civil Procedure applies to a party's request for the Court of Common Pleas to reconsider a prior decision. Rule 59(e) provides as follows:

> [a] motion for reargument shall be served and filed within 5 days after the filing of the Court's opinion or decision. The motion shall briefly and distinctly state the grounds therefor. Within 5 days after service of such motion, the opposing party may serve and file a brief answer to each ground asserted in the motion. The Court will determine from the motion and answer whether reargument will be granted. A copy of the motion and answer shall be furnished forthwith by the respective parties serving them to the Judge involved.

A motion for reargument is the proper device for seeking the trial court's reconsideration of its findings of fact, conclusions of law, or judgment.[1] The "manifest purpose" of a motion under Rule 59, including a motion for reargument, is to give the trial court an opportunity to correct errors prior to appeal.[2] It is not a device for raising new arguments or stringing out the length of time for making an argument, nor is it intended to allow parties to rehash arguments already decided by the trial court.[3] A party must serve and file the motion for reargument within 5 days after the entry of the trial court's opinion or decision.[4]

A motion for reargument will be denied unless the trial court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision.[5] A party seeking to have the trial court

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[1] *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969).
[2] *Id*.
[3] *Bd. of Managers of the Del. Crim. Justice Info. Sys. v. Gannett Co.*, 2003 WL 1579170, at *1 (Del. Super. Jan. 17, 2003).
[4] Ct. Com. Pl. Civ. R. 59(e). *See also, Hessler, Inc.*, 260 A.2d at 701-02.
[5] *Simonton v. Orlov*, 2008 WL 2962015, at *2 (Del. Com. Pl. July 31, 2008) (quoting *Kennedy v. Invacare Corp.*, 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006)).

reconsider the earlier ruling must demonstrate newly discovered evidence, a change in the law or manifest injustice.[6] The trial court will generally deny a motion for reargument unless the underlying decision involved an abuse of discretion.[7]

II. Discussion

At trial, the parties stipulated that an account existed between Chase Bank USA ("Chase") and Mr. Swain, that Mr. Swain breached the terms of this account agreement, and as a result, Chase incurred damages in the amount pled in DAC's Complaint. The parties further stipulated that the sole and dispositive issue at trial was the admissibility of DAC's Exhibits # 1, 2, and 4 through 8 (the "Exhibits") – a series of documents that purportedly establish DAC's ownership of the admitted account between Chase and Mr. Swain. During the trial, Mr. Swain made a timely objection to the admission of these documents as inadmissible hearsay. DAC responded, arguing that these documents are not hearsay or, if these exhibits constituted hearsay, the documents are admissible pursuant to Rule 803(6) of the Delaware Rules of Evidence ("DRE") – the business records exception to the hearsay rule.

On January 31, 2012, the Court issued a Memorandum Opinion and Order (the "Decision"), finding that Plaintiff's exhibits were hearsay documents not admissible under DRE 803(6). Accordingly, the Court entered judgment in favor of Mr. Swain.

In the Motion, DAC believes reargument is appropriate for three reasons. First, DAC argues that the Court erred in finding that the Exhibits were inadmissible hearsay because they are "operative document[s]" that were not offered for the truth of the matter asserted therein. Second, DAC contends that even if the Exhibits are hearsay documents, the Court misapprehended the law because these documents are admissible hearsay pursuant to DRE

[6] *Gannett Co.*, 2003 WL 1579170, at *1.
[7] *Id.*

803(15) -- statements in documents affecting an interest in property. Third, DAC asserts that the Court erred in excluding the Exhibits because the policy of the DRE is to ascertain the truth and avoid unjustifiable expense and delay. DAC argues that there is no evidence in the record establishing that there is another owner of the debt and, therefore, the Court has obstructed justice by making it financially and practically difficult for DAC to prove the debt by way of the Exhibits.

In the Response, Mr. Swain argues first that the Exhibits are hearsay documents because they are documents purportedly establishing DAC's ownership of the account, and they are offered for their truth – to establish that DAC owns the account. Next, Mr. Swain argues that the Exhibits are not admissible under DRE 803(15) because DAC did not raise this argument at Summary Judgment or at trial and therefore the argument should be deemed waived; and, even if not waived, the documents are not admissible pursuant to DRE 803(15). Finally, Mr. Swain contends that, notwithstanding the underlying purpose of the DRE, the Exhibits are not admissible because the Exhibits are hearsay that do not satisfy any exception to the hearsay rule.

The Court finds that the Motion should be denied as the arguments forwarded on reargument have either been waived, already addressed in length or are otherwise not meritorious. Even assuming DAC has not waived the arguments, however, the Motion would be denied because the Exhibits do not qualify as not hearsay operative documents, fail to meet the requirements of DRE 803(15), and their exclusion is not contrary to the policy of the DRE.

a. DAC has waived arguments asserted for the first time in the Motion.

Delaware law does not permit parties to use motions for reargument to raise new arguments.[8] Raising new arguments at motion for reargument "does not promote the efficient

[8] *Plummer v. Sherman*, 2004 WL 63414, at *2 (Del. Super. Jan. 14, 2004).

use of judicial resources, is unfair to the [opposing party] and does not promote an orderly process of reaching closure on the issues raised" in the initial proceeding.[9] Federal courts follow a similar rule, holding that arguments that could have been raised prior to the court's initial opinion or decision may not be raised on motion for reargument.[10]

The Court finds that DAC has waived its right to argue that the Exhibits are not hearsay operative documents, admissible under DRE 803(15), or admissible based on the underlying policy of the DRE because DAC did not raise these arguments at trial or any earlier stage of the proceedings in this case. Mr. Swain first challenged the chain of assignment (and ownership of the account) in his June 1, 2011 response to DAC's Motion for Summary Judgment. Further, the parties entered into a pre-trial stipulation that the sole and dispositive issue at trial was the admissibility of the Exhibits – all of which purport to establish the chain of assignment. DAC appeared at trial with the Exhibits, and was prepared to argue that the documents were not hearsay and, alternatively if they were hearsay, they were admissible under DRE 803(6) – the business records exception. On December 16, 2011, DAC submitted various briefs filed in a similar action in Missouri. Each brief addressed whether credit card chain of title documents are hearsay, and the business records exception to the hearsay rule.

Despite this extensive argument throughout the proceedings surrounding the chain of assignment, hearsay character of the Exhibits, and whether these documents were admissible business records, DAC never argued that the exhibits were not hearsay operative documents, were admissible pursuant to DRE 803(15), or were admissible based on the general policy of the DRE. Permitting DAC to raise these arguments in this Motion, under these circumstances, would

[9] *Plummer*, 2004 WL 63414, at *2.
[10] *Id.* (citing *FDIC v. World University, Inc.*, 978 F.2d 10 (1st Cir. 1992)).

constitute an inefficient use of judicial resources, be unfair to Mr. Swain, and diminish the efficacy of the Court's prior trial in this case.

b. The Exhibits do not qualify as not hearsay "operative documents."

DAC does not argue that the Court misapprehended the law or facts in determining that the Exhibits are hearsay in the Decision. Rather, DAC contends that reargument is necessary because the Exhibits are "operative documents" – documents that define the rights or liabilities of the parties in the case, such as contracts between the parties – and thus are not hearsay.[11]

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."[12] As stated in the Decision, the Exhibits are offered for their truth because each document purportedly contains circumstantial evidence supporting DAC's claim that it is the owner of the admitted account.[13] The documents contain statements made by a declarant that was unavailable to testify at trial because Mr. Scanlon testified that he did not prepare any of these documents, and Mr. Scanlon was the only witness made available to testify at trial.

Operative documents are not hearsay. An operative document is a document containing statements that affect the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.[14] This includes contracts, and evidence of lost profits based on a contract, because lost profits concern "the existence of contractual terms rather than an assertion of their

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[11] *Stuart v. UNUM Life Ins. Co. of America*, 217 F.3d 1145, 1154 (9th Cir. 2000); *See also, Padilla v. United States*, 58 Fed. Cl. 585, 593 (Fed. Cl. 2003).
[12] D.R.E. 801(c).
[13] Exhibit # 1 states that a pool of accounts was sold from Chase to GACC. Exhibit # 8 is the affidavit of Michael Varrichio, the president of GACC, stating that the account at issue was sold from Chase to GACC as a part of this sale. Finally, Exhibits # 2 and 4-8 are unlabeled redacted spreadsheets containing Mr. Swain's contact information, and the same account number and balance as are requested in the Complaint. Mr. Scanlon testified that this spreadsheet was transmitted to DAC as a part of a sale of a pool of accounts from GACC to DAC.
[14] *Mueller v. Abdnor*, 972 F.2d 931 (8th Cir. 1992).

'truth.'"[15] "Conversations, letters, and telegrams-relevant to the making of [a] contract are [also] not hearsay."[16] This rule encompasses documents that have "legal significance independent of the truth of any statement contained in it."[17] The reason "operative documents" are not hearsay is because the statements contained therein affect the legal rights of the *parties*.[18]

The Exhibits do not qualify as not hearsay "operative documents." As Mr. Swain argues, in each case cited by DAC concerning the admissibility of "operative documents," the operative document was sought to be admitted by one party to the contract against another party to the contract.[19] None of the Exhibits offered here are offered by one party to their creation against another party to their creation. The Chase-GACC Bill of Sale is a contract between those named parties only. The Court cannot rule that the Bill of Sale is a not hearsay operative document because the Bill of Sale concerns the legal rights of Chase and GACC – both non-parties to this action. Similarly, the spreadsheet is not an operative document because Mr. Scanlon was unable to testify as to who prepared this document. In other words, there is no foundational testimony in the trial record establishing that the spreadsheet was prepared by either party to this action, or linking the spreadsheet to the alleged contract between DAC and Mr. Swain.

The affidavit of Mr. Varrichio, the president of GACC is likewise not an operative document because as stated above, operative documents are documents between the parties concerning their legal rights, *vis-à-vis* each other. While the affidavit concerns the legal relations of the parties, it was made by a non-party to the contract, and therefore does not qualify as a non-hearsay operative document.

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[15] *Id.*
[16] *Mueller*, 972 F.2d 931.
[17] *Padilla*, 58 Fed. Cl. at 593.
[18] *Stuart*, 217 F.3d at 1154 (citing Fed. R. Evid. 801(c) advisory committee's note) (emphasis added).
[19] *Stuart*, 217 F.3d at 1154; *Mueller*, 972 F.2d 931; *Padilla*, 58 Fed. Cl. at 593.

c. The Exhibits are not admissible pursuant to DRE 803(15).

A statement in a document affecting an interest in property is admissible in evidence, and is defined by DRE 803(15) as:

> [a] statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

While there is not a single reported or unpublished decision in Delaware interpreting this rule, DRE 803(15) tracks Federal Rule of Evidence ("FRE") 803(15).[20] Therefore, the Court will look to federal law interpreting FRE 803(15).[21]

This exception to the hearsay rule applies to recitals of fact contained in documents that purport to establish or affect an interest in property.[22] The proponent of the document must establish that "the matter stated was relevant to the purpose of the document."[23] This exception does not apply if the party opposing admission establishes that there have been dealings in the property since the creation of the document inconsistent with the truth of the statements in the document.[24]

The Federal Advisory Committee Notes explain that:

> [d]ispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the

[20] *Smith v. State*, 647 A.2d 1083, 1088 (Del. 1994).
[21] *Id.*
[22] 5 Jack B. Weinstein, WEINSTEIN'S FEDERAL EVIDENCE § 803.17 (2d ed. 2011).
[23] *Id.*
[24] *Id.*

> nonapplicability of the rule if dealings with the property have been inconsistent with the document.[25]

Despite this language, the case law interpreting this rule does not require a dispositive document to meet the requirements of the exception.[26]

In *United States v. Weinstock*, the court admitted an affidavit through F.R.E. 803(15) that was previously submitted to a corporation by the then living declarant so that the declarant could obtain a new stock certificate to replace a lost stock certificate.[27] The court admitted this affidavit against the defendant in a criminal prosecution for securities fraud for the purpose of undermining the defendant's claim that the declarant voluntarily gave the stock certificate to the defendant.[28] The government sought to introduce the stock certificate through the testimony of an officer of the corporation that issued the certificate.[29] This witness had personal knowledge of the loss of the certificate because she personally drafted a letter to the corporations' stock transfer agent directing the agent to place a stop transfer after the loss was reported.[30] Further, the witness actually helped the declarant prepare the affidavit at issue.[31]

The court held that this document met the requirements of F.R.E. 803(15) because: (1) the document was required to be filed for a new stock certificate to issue and thus affected an interest in property; (2) the factual recitals in the document were germane to the purposes of the document – to obtain a replacement stock certificate; (3) there was no evidence of later dealings inconsistent with these factual recitals; and (4) the document was "supported by proper

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[25] Fed. R. Evid. 803(15) advisory committee's note.
[26] *United States v. Weinstock*, 863 F.Supp. 1529, 1532 (D. Utah 1994).
[27] *Id.* at 1531.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*

foundation and verification and the circumstances support a conclusion that the document is trustworthy."[32]

Similarly, in *Compton v. Davis Oil Co.*, the court admitted two warranty deeds executed by two persons as husband and wife, and the husband's death certificate containing statements regarding his marital status under FRE 803(15) for the purpose of establishing that the husband and wife were in fact married.[33] The court explained that the policy supporting FRE 803(15) is rooted in the *reliability* of such documents, because "[s]uch instruments are executed in relation to serious and carefully planned transactions, and the financial stake in the transaction, plus the obvious reliance upon the truth of statements made in such instruments by third parties are adequate to at least imply that the recitals in such instruments are trustworthy."[34]

In the instant case, DAC contends that the Exhibits meet the requirements for admissibility pursuant to DRE 803(15) because: (1) the documents establish or affect an interest in property – the sale of a charge off credit card account between Chase and Mr. Swain to GACC and then to DAC; and (2) the matters stated therein are germane to the purpose of the document as the Bill of Sale states only facts relating to the sale of a pool of accounts, the spreadsheets were transferred as part of that sale, and Mr. Varrichio's affidavit was prepared to evidence the full chain of assignment alleged.

The problem with the spreadsheet and Mr. Varrichio's affidavit with respect to DRE 803(15) is that these documents are not supported by proper foundation and verification such that the circumstances support a conclusion that these documents are trustworthy.[35] In *Weinstock*, the court was comfortable admitting the affidavit into evidence because the foundational witness

[32] *Id.* at 1535.
[33] 607 F.Supp. 1221, 1228 (D. Wyo. 1985).
[34] *Id.* at 1229.
[35] *Weinstock*, 863 F.Supp. at 1535.

testified that she was familiar with the report that the stock certificate was stolen, personally placed a stop transfer on the certificate and helped the declarant prepare the affidavit.[36] Mr. Scanlon did not provide even close to this level of foundational testimony at trial. As stated by the Court in the Decision:

> 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 from Mr. Varrichio as to whether or not they produced accurate results or were property operated so as to produce the exhibits presented at trial...Mr. Scanlon testified that he has no knowledge as to how either Chase or GACC maintain their business records.[37]

Based on the factual record here, the Court is not convinced that DAC has laid a proper foundation that the circumstances support the conclusion that the spreadsheet and affidavit are trustworthy. Mr. Scanlon has no knowledge of Chase and/or GACC record keeping practices or anything even remotely close to the level of understanding held by the foundational witness in *Weinstock*. Simply put, DAC has failed to proffer sufficient foundational evidence to establish that these documents are reliable and trustworthy.

As for the Bill of Sale, this is not the type of document intended to be included within the purview of DRE 803(15). The Court's review of the case law makes clear that use of this hearsay exception is generally limited to documents like stock certificates, deeds, leases, mortgages, questionnaires filed with a court in personal bankruptcies and death certificates – documents generally relied upon by third parties by virtue of the commonly known circumstances under which such documents are made.[38] The Bill of Sale is a contract between two non-parties to the litigation, neither of which was made available to testify at trial.

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[36] *Weinstock*, 863 F.Supp. at 1535.
[37] *Delaware Acceptance Corp. v. Swain*, C.A. No. CPU4-10-006533, at 11-12 (Del. Com. Pl. Jan. 31, 2012).
[38] *Weinstock*, 863 F.Supp. at 1533-34.

Moreover, even assuming the Bill of Sale qualified under DRE 803(15), this document only provides that a pool of accounts was sold from Chase to GACC. The Bill of Sale alone does not come close to establishing the overall chain of assignment because it does not in any way state that it includes the account between Chase and Mr. Swain.

d. Exclusion of the Exhibits is not contrary to the policy underlying the DRE.

DRE 102 governs the purpose and construction of the DRE and provides as follows:

> [t]hese Rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

DAC argues that in the Decision that the Court was "seeking technical ways to obstruct justice by excluding relevant evidence [and making] it financially and practically difficult *to prove an item not in controversy*."[39] DAC further asserts that "[i]t is not alleged that anyone other than Plaintiff owns this debt."[40]

While the DRE are to be construed according to DRE 102, the DRE is a comprehensive scheme of specifically defined rules governing the admissibility and inadmissibility of various different types of evidence. The hearsay rules are particularly well defined. In the Decision, and here, the Court is merely following these well defined rules, and the case law that has developed since their promulgation.

Second, the Court is not making it difficult to prove an item not in controversy. The admissibility of the Exhibits, rather, has been contested from the very outset of this litigation when Mr. Swain filed his Answer on February 4, 2011, contesting whether DAC is the proper party in interest to pursue this claim. Mr. Swain also challenged the alleged assignment at

[39] Plaintiff's Br. at 9. (emphasis added).
[40] *Id.*

Summary Judgment. Finally, the parties – including DAC – stipulated before trial that the sole and dispositive issue at trial was the admissibility of the Exhibits, each of which contained facts tending to establish the alleged chain of assignment. The presentation of evidence and argument at trial was essentially a *de facto* evidentiary hearing on the admissibility of the Exhibits. Given that Mr. Swain has disputed the chain of assignment and admissibility of the Exhibits at nearly every stage of the proceedings, DAC cannot reasonably argue that the chain of assignment is not in controversy.

Finally, it is of no consequence that Mr. Swain has not explicitly argued that there is not another owner of the debt. The sole and dispositive issue at trial, as agreed upon by both parties, was whether DAC is the real party in interest to pursue this action. DAC carries the burden in proving that it is the real party in interest. Mr. Swain bears no burden to allege and/or prove there are other specific potential owners of the debt. Even if he did, Mr. Swain in effect did so when he admitted on the record that a credit card account existed between *Chase* and Mr. Swain, that Mr. Swain breached the terms of this agreement, and as a result *Chase* incurred damages in the amount requested in DAC's Complaint. From this, Mr. Swain made it clear that he believes that Chase, and not DAC, remains the owner of the debt. It was DAC's responsibility to demonstrate otherwise.

III. Conclusion

The Court finds no misapprehension of law or facts such as would have changed the outcome of the underlying decision. The Court's analysis of the Motion leads to the conclusion that DAC has not met the standard necessary to obtain relief under Rule 59(e). Accordingly, the Court **DENIES** the Motion.

IT IS SO ORDERED this 9th day of March, 2012.

Eric M. Davis

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Eric M. Davis
Judge