

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DELAWARE ACCEPTANCE)
CORPORATION,)
)
Plaintiff Below/Appellant,)
) C.A. No. N12A-03-012 MMJ
v.)
)
ROBERT S. SWAIN,)
)
Defendant Below/Appellee.)

Submitted: September 4, 2012
Decided: November 30, 2012

On Appeal from the Court of Common Pleas

AFFIRMED

MEMORANDUM OPINION

Patrick Scanlon, Esquire, Law Offices of Patrick Scanlon, P.A., Milford,
Delaware, Attorney for Plaintiff Below/Appellant

Elwood T. Eveland, Jr., Esquire, The Eveland Law Firm, Wilmington,
Delaware, Attorney for Defendant Below/Appellee

JOHNSTON, J.

Plaintiff-Appellant Delaware Acceptance Corporation (“DAC”) has appealed the decision of the Court of Common Pleas. The Court of Common Pleas entered judgment in favor of Defendant-Appellee Robert S. Swain (“Swain”), and subsequently denied DAC’s Motion for Reargument. DAC has appealed to this Court.

FACTUAL AND PROCEDURAL CONTEXT

The facts of this case are relatively straightforward and undisputed. Swain opened a credit card account with Chase Bank USA (“Chase”). Swain later defaulted on the account, leaving a balance of \$26,418.36. DAC alleges that Swain’s account was subsequently acquired by Global Acceptance Credit Company (“GACC”) before being purchased by DAC, a debt collection company.

On October 27, 2010, DAC filed suit against Swain, seeking the outstanding balance on the account, as well as pre-judgment and post-judgment interest. On December 9, 2011, the matter proceeded to trial.

The Trial

For purposes of trial, Swain admitted that he had an agreement with Chase, that he breached this agreement by failing to make payments as required by the agreement, and that Chase suffered damages as a result of the breach. Swain, however, argued that DAC could not establish that it was

the current owner of the credit card account, and thus, entitled to recover damages. Accordingly, DAC and Swain stipulated that the sole and dispositive issue at trial was whether DAC was the real party in interest to prosecute the action.

Daniel Scanlon (“Scanlon”), vice president of DAC, was the only witness at trial. Scanlon testified that DAC is a debt collection company that buys charged-off credit card debt and then attempts to collect the debt, initiating litigation if necessary. Scanlon stated that he is primarily responsible for maintaining DAC’s business records.

Scanlon testified that Swain’s account originated with Chase before being acquired by GACC. In support of his testimony, Scanlon presented the Bill of Sale which stated that certain accounts were transferred from Chase to GACC on June 25, 2010 (“Exhibit 1”). Scanlon testified that attached to the Bill of Sale was a spreadsheet labeled “Redacted Report,” which reflected that an account owned by Robert S. Swain, a resident at 115 Northern Avenue in Wilmington, Delaware, had been transferred as part of the transaction (“Exhibit 2”). Scanlon acknowledged, however, that there was nothing on the face of the “Redacted Report” indicating that it had been generated by Chase.

Scanlon further testified that GACC subsequently sold a pool of accounts – including Swain’s account – to DAC on September 3, 2010. As evidence of DAC’s acquisition of Swain’s account, Scanlon presented the Assignment and Bill of Sale from GACC to DAC (“Exhibit 3”). Scanlon acknowledged, however, that the Assignment and Bill of Sale did not specifically identify which accounts were transferred in that sale.

Scanlon testified that, following DAC’s acquisition of the accounts, GACC transmitted a multi-page spreadsheet listing the accounts transferred, along with identifying information, such as the account holder’s name, address, and social security number (“Exhibits 4-7”). The spreadsheet reflected that an account owned by Robert S. Swain, a resident at 115 Northern Avenue in Wilmington, Delaware, had been transferred to DAC. The outstanding balance on the account was \$26,418.36.

Scanlon also presented a document entitled “Affidavit of Correctness,” dated March 24, 2011 (“Exhibit 8”). Mr. Scanlon testified that this document was the affidavit of Michael Varrichio, President and CEO of GACC. The affidavit stated that Varrichio was responsible for the books and records of GACC, and had knowledge that Swain’s account was transferred from Chase to GACC, before being acquired by DAC. The

affidavit further provided that Swain's account had an outstanding balance of \$26,418.36.

Scanlon also testified that DAC received statements from Chase regarding Swain's account.¹ According to Scanlon, federal regulations prohibit credit card companies from disseminating account information to anyone but the owner of the account.

At the conclusion of trial, Swain objected to the admission of certain exhibits that related to GACC's purported purchase of Swain's account from Chase on the basis that such exhibits constituted inadmissible hearsay. These exhibits include: the Bill of Sale reflecting Chase's transfer of a pool of accounts to GACC (Exhibit 1); the "Redacted Report" listing Robert S. Swain as an account holder (Exhibit 2); the multi-page spreadsheet which identifies Robert S. Swain as the holder of an account that originated with Chase and has an outstanding balance of \$26,418.36 (Exhibits 4-7); and the document entitled "Affidavit of Correctness" (Exhibit 8).² The Court of Common Pleas reserved decision on the admissibility of these exhibits.

¹ DAC did not offer these bank statements into evidence.

² Swain did not challenge the admissibility of the Bill of Sale and Assignment, dated September 3, 2010, which provided that a pool of accounts was transferred from GACC to DAC (Exhibit 3). As the trial court properly observed, this exhibit was admissible under the business records exception to the hearsay rule, as set forth in Delaware Rule of Evidence 803(6). Therefore, the Court's analysis will focus solely on the remaining, objectionable exhibits – Exhibits 1, 2, 4-7.

The Court of Common Pleas' Decision

By Opinion dated January 31, 2012, the Court of Common Pleas entered judgment in favor of Swain, finding that DAC failed to establish that it was the real party in interest entitled to prosecute this action. The trial court found that the exhibits offered by DAC constituted hearsay because they contained statements made by a person who did not testify at trial, and were offered to prove the truth of the matter asserted. In concluding that the exhibits constituted inadmissible hearsay, the trial court found that DAC had not met the requirements of the business records exception set out in Delaware Rule of Evidence (“D.R.E.”) 803(6). Specifically, the court held that DAC did not offer a “qualified witness to testify that the records proffered ... were made by or from information transmitted by a person with knowledge,” as required by D.R.E. 803(6). Accordingly, the court entered judgment in favor of Swain.

Memorandum Opinion on Plaintiff's Motion for Reargument

By Opinion dated March 9, 2012, the Court of Common Pleas denied DAC's Motion for Reargument. The court found that DAC failed to demonstrate that the court had overlooked a controlling precedent or legal principles, or that the court had misapprehended the law or the facts such that the outcome would have been affected. Rather, according to the court,

DAC merely advanced new arguments in its motion for reargument. In particular, DAC argued that the exhibits were admissible as either nonhearsay “operative documents,” or alternatively, admissible under D.R.E. 803(15) as statements in documents affecting an interest in property. By raising these arguments for the first time in its Motion for Reargument, the court found that DAC had waived such arguments.

ANALYSIS

Exhibits Constitute Inadmissible Hearsay

This Court reviews the Court of Common Pleas’ decision to admit or exclude evidence under an abuse of discretion standard.³ “An abuse of discretion occurs when ‘a court has ... exceeded the bounds of reason in view of the circumstances,’ [or] ... so ignored recognized rules of law or practice ... to produce injustice.”⁴ Reversal of a lower court’s evidentiary decision is warranted only if there was a clear abuse of discretion.⁵

The issue before the Court is whether the Court of Common Pleas abused its discretion in excluding the exhibits offered by DAC. The trial court found that DAC failed to lay the proper foundation to allow the

³ *Palomino v. State*, 2011 WL 2552603, at *2 (Del. Super.) (citing *Harper v. State*, 970 A.2d 199, 201 (Del. 2009)).

⁴ *Culp v. State*, 766 A.2d 486, 489 (Del. 2001) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 571 (Del. 1988)).

⁵ *Culp*, 766 A.2d at 489.

exhibits to be admitted under the business records exception to the hearsay rule. According to the trial court, DAC did not offer a qualified authenticating witness to testify that the records were made by, or from information transmitted by, a person with knowledge. As such, the court excluded the exhibits as inadmissible hearsay. This Court agrees.

The business records exception to the hearsay rule, set forth in D.R.E. 803(6), provides for the admission of an out-of-court record if: (1) the record was prepared in the regular course of business; (2) the record was made “at or near the time of the event”; (3) the information and circumstances of recordation are trustworthy; and (4) a custodian or other qualified witness is available to testify. “The rationale for the [business records] exception is founded on the theory that records which are properly shown to have been kept as required[,] normally possess a circumstantial probability of trustworthiness, and therefore ought to be received in evidence.”⁶

The sole issue in the case *sub judice* is whether Scanlon could properly authenticate the exhibits as an “other qualified witness” under D.R.E. 803(6). This Court previously has held that the term “other qualified

⁶ *State v. McCoy*, 2012 WL 1415698, at *3 (internal quotation marks omitted) (citing *Liptak v. Rite Aid, Inc.*, 673 A.2d 309 (N.J. Super. Ct. App. Div. 1996)).

witness” must be construed broadly.⁷ The “other qualified witness” need not be an employee of the record-keeping entity nor have observed the document’s creation.⁸ Rather, the “other qualified witness” must only be someone who understands the record-keeping system.⁹ As set forth by the Delaware Supreme Court in *Trawick v. State*,¹⁰ an “other qualified witness” must attest to the following foundational requirements in order for a record to be admissible under D.R.E. 803(6):

(1) [that] the declarant in the records had knowledge to make accurate statements; (2) that the declarant recorded statements contemporaneously with the actions which were the subject of the reports; (3) that the declarant made the record in the regular course of business activity; and (4) that such records were regularly kept by the business.¹¹

The Court finds no abuse of discretion in the Court of Common Pleas’ determination that Scanlon did not meet the foundational requirements of an “other qualified witness,” as required by D.R.E. 803(6). As the Court of Common Pleas noted, Scanlon testified generally as to the acquisition of a pool of accounts from Chase to GACC, and then from GACC to DAC. As

⁷ *McCoy*, 2012 WL 1415698, at *3 (citing *U.S. v. Console*, 13 F.3d 641, 657 (3d Cir. 1993)).

⁸ *Trawick v. State*, 845 A.2d 505, 509 (Del. 2004); *McCoy*, 2012 WL 1415698, at *4.

⁹ *Trawick*, 845 A.2d at 508 (citing *Console*, 13 F.3d at 657).

¹⁰ 845 A.2d 505.

¹¹ *Id.* at 509.

evidence of DAC's ownership of Swain's account, Scanlon offered the following exhibits: a Bill of Sale reflecting Chase's transfer of a pool of accounts to GACC (Exhibit 1); a "Redacted Report" listing Robert S. Swain as an account holder (Exhibit 2); a multi-page spreadsheet identifying Robert S. Swain as the holder of an account that originated with Chase and has an outstanding balance of \$26,418.36 (Exhibits 4-7); and a document entitled "Affidavit of Correctness" indicating that GACC acquired Swain's account from Chase (Exhibit 8).

Scanlon, however, was unable to expound upon the creation, recordation, compilation, or maintenance of these documents. As the Court of Common Pleas noted, Scanlon testified that he had no knowledge as to how either Chase or GACC maintained their business records. Furthermore, Scanlon was unable to offer any testimony concerning which entity generated the "Redacted Report" and multi-page spreadsheet. Scanlon's admission to knowing nothing regarding Chase or GACC's record-keeping system wholly precludes him from testifying as an "other qualified witness." Therefore, the Court of Common Pleas properly excluded the exhibits.

DAC Waived Arguments

Following trial, DAC moved for reargument on the ground that the court erred in excluding admission of the exhibits. DAC contended that the

exhibits were admissible as either nonhearsay “operative documents,” or alternatively, admissible under D.R.E. 803(15) as statements in documents affecting an interest in property. The Court of Common Pleas denied DAC’s motion, finding that DAC had waived such arguments by failing to raise them prior to or at trial. The trial court further found that even had DAC not waived such arguments, the exhibits were neither admissible as “operative documents” nor under D.R.E. 803(15).

DAC contends that the Court of Common Pleas erred in denying its Motion for Reargument. The decision to grant or deny a motion for reargument rests with the sound discretion of the trial judge.¹²

This Court finds no abuse of discretion in the Court of Common Pleas’ decision to deny DAC’s Motion for Reargument. As the Court of Common Pleas properly noted, DAC could and should have raised these arguments before the Court of Common Pleas issued its opinion – yet it failed to do so.¹³ Instead, DAC elected to advance these arguments for the

¹² *Horton v. Lempesis*, 1992 WL 19986, at *3 (Del. Super.) (citation omitted).

¹³ Prior to filing its Motion for Reargument, DAC never raised the argument that the exhibits were admissible under D.R.E. 803(15). As to the claim that the exhibits constitute “operative documents,” DAC made a vague and fleeting reference to such an argument during trial. Contrary to DAC’s assertion, however, this reference did not preserve the issue for appeal. *See U.S. v. Dupree*, 617 F.3d 724, 728 (3d Cir. 2010) (“[A] fleeting reference or vague allusion to an issue will not suffice to preserve it for appeal[.] Rather, a party ‘must unequivocally put its position before the trial court at a

first time in its motion for reargument. Such a procedural maneuver constituted waiver of these arguments.¹⁴

CONCLUSION

The Court finds no abuse of discretion in the Court of Common Pleas' decision to exclude the exhibits offered by DAC as inadmissible hearsay. DAC failed to offer a qualified authenticating witness to testify that the records were made by, or from information transmitted by, a person with knowledge, as required by Delaware Rule of Evidence 803(6).

Further, the Court of Common Pleas properly acted within its discretion in denying DAC's Motion for Reargument. DAC failed to demonstrate that the court had overlooked a controlling precedent or legal principle, or that the court had misapprehended the law or the facts such that the outcome would have been affected.

point and in a manner that permits the court to consider its merits.”) (internal citations omitted).

¹⁴ *Carlozzi v. Fidelity & Cas. Co.*, 2001 WL 755941, at *1 (Del. Super.) (“Motions for reargument will be denied where they rely on grounds not raised in the original proceeding or where they merely advance the same matters that were already considered in the original proceeding.”) (citation omitted).

THEREFORE, the Court hereby **AFFIRMS** the Court of Common Pleas' January 31, 2012 Memorandum Opinion and March 9, 2012 Memorandum Opinion.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston