

STATE OF MICHIGAN
COURT OF APPEALS

LEESA KAMEN,

Plaintiff-Appellant/Cross-Appellee,

v

SPECTRUM HR, LLC,

Defendant,

and

LEXINGTON INSURANCE COMPANY,

Garnishee Defendant-
Appellee/Cross-Appellant

UNPUBLISHED
December 1, 2011

No. 299585
Oakland Circuit Court
LC No. 2005-066091-CD

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

Plaintiff Leesa Kamen brought a wrongful discharge claim against defendant Spectrum HR, LLC, and obtained a \$500,000 default judgment. At the time Spectrum fired Kamen, an insurance policy issued by the Lexington Insurance Company covered Spectrum for employment-related claims. Kamen attempted to execute the default judgment by serving Lexington with a writ of garnishment. Lexington moved for summary disposition, asserting that Spectrum had not sought coverage for Kamen's claim. Despite that Kamen produced no evidence that Spectrum ever tendered Kamen's claim to Lexington, the trial court denied Lexington's summary disposition motion.

The parties proceeded to a bench trial on stipulated facts. They agreed that after the trial court entered a default judgment in Kamen's favor, her counsel mailed a copy of the complaint to the AON Corporation, an independent insurance broker. Gene Huddleston, an AON employee, notified Lexington of Kamen's claim by leaving a voicemail and by forwarding the complaint to Lexington. The parties stipulated that four days after Huddleston forwarded the complaint, "AON advised Lexington that AON had mistakenly submitted the Kamen claim to Lexington, as Spectrum did not intend to submit it, and advised Lexington to discontinue the claims process."

In addition to the stipulated facts, the parties presented the trial court with Huddleston's deposition testimony. During the deposition, Huddleston produced a copy of the email he sent to Lexington advising that Spectrum had not intended to submit the claim. The email stated in relevant part:

As per my voice message to you, today, 5/24/05, I have been informed, our client, SpectrumHR, did not intend for this matter to be submitted as a claim. With respect to our client's request, please discontinue the claims process.

Huddleston identified his informant as "Carolyn Carter," but could not recall anything about Carter or where she worked. Kamen objected to the introduction of this email, asserting that it contained inadmissible hearsay. The trial court admitted it as a "record of regularly conducted activity" under MRE 803(6), the business record exception to the hearsay rule. In a written opinion, the trial court ruled that the email supported that Spectrum had "disclaimed" coverage, eliminating Kamen's right to garnish the Lexington policy.¹

Kamen's argument on appeal focuses exclusively on the Huddleston email. According to Kamen, the email's "inner" statement, asserting "SpectrumHR, did not intend for this matter to be submitted as a claim," constituted inadmissible hearsay. Kamen contends that absent this e-mail, Lexington presented no evidence supporting summary disposition. In a cross-appeal, Lexington argues that the trial court erred by denying its motion for summary disposition based on Spectrum's failure to tender the claim to Lexington.

The majority holds that Huddleston's e-mail falls within MRE 803(6), despite that it "recit[ed] statements by others." *Ante* at 11. According to the majority, "Information flowing from one employee to another regarding an insured's account is exactly the type of information kept in the regular practice of Aon's business." *Id.* The majority further concludes that "the e-mail was not being used to prove the truth of the matter asserted (that Spectrum HR specifically informed Carolyn Carter that it disclaimed coverage); rather, the email was relevant to show [that] Aon, acting on behalf of Spectrum HR, disclaimed coverage on the insured's behalf." *Ante* at 12.

I believe that the email contained inadmissible hearsay, and should have been excluded on this ground. I respectfully disagree with the majority's conclusion that "the e-mail was not being used to prove the truth of the matter asserted." *Id.* However, because Kamen stipulated to the content of the e-mail, and because the trial court erred by denying Lexington's motion for summary disposition based on Spectrum's failure to tender the claim, I agree with the majority's decision to affirm dismissal of the garnishment proceeding.

Kamen expressly stipulated that "AON advised Lexington that AON had mistakenly submitted the Kamen claim to Lexington, as Spectrum did not intend to submit it, and advised Lexington to discontinue the claims process." With this stipulation, Kamen agreed to the factual

¹ More accurately, Spectrum never tendered a request for coverage. Consequently, Lexington never investigated the claim or took any action, including disclaiming it.

substance of the disputed Huddleston e-mail. By voluntarily placing before the trial court that Spectrum never intended to seek coverage, Kamen provided the trial court facts compelling summary disposition in Lexington's favor. I would resolve Kamen's appellate claim on this obvious basis alone. Consequently, I believe the majority's hearsay analysis is unnecessary as well as incorrect.

In my view, the statement within the e-mail referencing Spectrum's intent qualifies as inadmissible hearsay. MRE 801(c) defines "hearsay" as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 803(6) sets forth an exception to the hearsay rule for records of "regularly conducted activity," also called business records, defined as:

A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, 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 business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Kamen does not contest Lexington's assertion that AON compiled and kept Huddleston's e-mail message in the regular course of its business.²

Assuming that the e-mail message itself qualified as a properly authenticated business record, I respectfully disagree with the majority's declaration that because "[i]nformation flowing from one employee to another regarding an insured's account is exactly the type of information kept in the regular practice of Aon's business," *ante* at 11, it cannot constitute hearsay. If offered to prove the truth of the matter asserted, a statement "flowing from one employee to another" falls squarely within the definition of hearsay. Huddleston may have acted in the regular course of his business by writing the email message to Lexington, but he

² Despite Kamen's apparent concession, I am not convinced that Huddleston's testimony established an adequate foundation for the admission of the e-mail itself as a business record. Neither Huddleston nor any other witness testified that the email was "kept in the course of a regularly conducted business activity," or that "it was the regular practice of that business activity to make the . . . record." The e-mail was not authenticated by certification. See MRE 902(11). The mere fact that someone found the e-mail within an AON computer's memory does not, standing alone, establish that the e-mail qualifies as a record of a "regularly conducted activity." See *White Industries, Inc v Cessna Aircraft Corp*, 611 F Supp 1049, 1059 (WD Mo, 1985).

incorporated in the email an out-of-court statement made by Crawford. “Double hearsay exists when a business record is prepared by one employee from information supplied by another employee.” *United States v Baker*, 224 US App DC 68; 693 F2d 183, 188 (1982). “[H]earsay within hearsay is excluded where no foundation has been established to bring each independent hearsay statement within a hearsay exception.” *Solomon v Shuell*, 435 Mich 104, 129; 457 NW2d 669 (1990) (lead opinion of Archer, J.). “[S]tatements made by third parties in an otherwise admissible business record cannot properly be admitted for their truth unless they can be shown independently to fall within a recognized hearsay exception.” *Woods v City of Chicago*, 234 F3d 979, 986 (CA 7, 2000). “The fact that third-party hearsay is contained in an otherwise-admissible business record does not cleanse it of the ‘untrustworthy’ hearsay taint.” *State v Reynolds*, 746 NW2d 837, 842-843 (Iowa, 2008). The business records exception simply does not shield Crawford’s out-of-court assertion from the rule against hearsay.

Huddleston’s contested statement recited: “I have been informed, our client, SpectrumHR, did not intend for this matter to be submitted as a claim.” Crawford’s assertion, “SpectrumHR, did not intend for this matter to be submitted as a claim,” is classic hearsay. Spectrum has offered no argument that an exception to the hearsay rule applies to this out-of-court statement, and neither has the majority. Nor do I agree with the majority’s puzzling determination that:

although the statement ‘I have been informed’ indicates that Huddleston learned the information from a third party and not from Spectrum HR itself, the e-mail was not being used to prove the truth of the matter asserted (that Spectrum HR specifically informed Carolyn Carter that it disclaimed coverage); rather, the email was relevant to show [that] Aon, acting on behalf of Spectrum HR, disclaimed coverage on the insured’s behalf. [*Ante* at 12.]

The “inner” statement made by Crawford to Huddleston constituted the only relevant portion of the e-mail. Lexington introduced it to prove that Spectrum had not requested coverage for Kamen’s claim.³ Spectrum never “disclaimed” coverage; rather, it never sought coverage in the first place. “[I]nsurance contracts require a claim to be made for benefits before entitlement can be established.” *Morley v Automobile Club of Michigan*, 458 Mich 459, 466; 581 NW2d 237 (1998). *Spectrum* never informed either Huddleston or Lexington of Kamen’s lawsuit; AON’s information came from Kamen’s attorney. Huddleston submitted the claim to Lexington at *Kamen’s* request, not Spectrum’s; and in doing so, he acted as Kamen’s agent, not Spectrum’s. Lexington sought to introduce Huddleston’s e-mail because it confirmed that Spectrum “did not intend for this matter to be submitted as a claim.” In other words, Lexington relied on the third-party hearsay within Huddleston’s e-mail to prove that Spectrum never tendered Kamen’s claim. The hearsay contained in Huddleston’s email proved that Spectrum never submitted the claim, and Lexington introduced it for precisely that purpose.

³ “Absent a request, an insurer has no duty to defend an insured.” *DAIIE v Higginbotham*, 95 Mich App 213, 218; 290 NW2d 414 (1980).

Although the trial court improperly admitted the email, unrebutted evidence proved that Lexington bore no liability as a garnishee to Kamen. Accordingly, I concur with the result reached by the majority.

/s/ Elizabeth L. Gleicher