

REVERSE and REMAND and Opinion Filed March 30, 2022



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-21-00295-CV

**COLLINS ASSET GROUP, LLC AS SUCCESSOR-IN-INTEREST TO
LEHMAN BROTHERS BANK, Appellant**

V.

MICHAEL AYRES, Appellee

**On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-06094**

MEMORANDUM OPINION

Before Justices Carlyle, Smith, and Garcia
Opinion by Justice Garcia

This is a suit on a promissory note. The trial court excluded the note from evidence and granted a directed verdict and take-nothing judgment in favor of Ayres. Collins Asset Group, LLC (“CAG”) argues the trial court abused its discretion by excluding the note because it was properly authenticated as a business record and as commercial paper.

As discussed below, we conclude the note was properly authenticated and the trial court abused its discretion by excluding it from evidence. We reverse the

trial court's judgment and remand for further proceedings consistent with this opinion.

I. BACKGROUND

In 2005, Ayres executed a promissory note payable to Lehman Brothers for the principal amount of \$48,963.00 (the "Note"). The Note was secured by a deed of trust as a second lien on Ayres' property.

The Note was ultimately transferred to CAG. CAG initiated a breach of contract suit against Ayres seeking repayment of principal only. Ayres answered and asserted various affirmative defenses. He also filed an amended verified answer denying: (i) that conditions precedent have been performed or occurred; (ii) specific notice and proof of loss and/or acceleration; (iii) capacity to sue and be sued; (iv) that CAG is the assignee of the Note; and (v) that the collateral "if any, was sold in a commercially reasonable manner."¹

Two years prior to trial, CAG filed a business records affidavit to which various records were attached, including the Note, notice concerning CAG's purchase of the Note, notice of acceleration, amortization schedule, and other documents concerning the transaction.

The trial court conducted a bench trial. CAG appeared with its corporate representative and offered the Note into evidence. Ayres objected to the Note's

¹ As to the latter, Ayres' brief makes repeated reference to a foreclosure sale. There is no evidence of such a sale in the record, nor does the petition indicate that this a suit to recover a deficiency balance following foreclosure.

admission on three grounds: (1) “hearsay based on the fact that there’s no evidence that [the corporate representative] is an expert on signatures,” (2) the lack of assignments, and (3) that the note is not a negotiable instrument.²

The trial court ruled that the Note would not be admitted into evidence. CAG made an offer of proof.

When CAG’s evidence concluded, Ayres moved for a directed verdict. The trial court granted the motion and subsequently entered a final judgment that CAG take nothing on its claim. This appeal followed.

II. ANALYSIS

A. Standard of Review and Applicable Law

We review a ruling on the admissibility of evidence for abuse of discretion. *Fleming v. Wilson*, 610 S.W.3d 18, 21 (Tex. 2020) (per curiam). A trial judge abuses her discretion if she acts without reference to any guiding rules and principles such that her ruling is arbitrary or unreasonable. *Pressley v. Casar*, 567 S.W.3d 327, 333 (Tex. 2019) (per curiam). The trial judge has no discretion in determining what the law is or in applying the law to the facts. *Id.*

The rules of evidence require that a document be authenticated with evidence that establishing that the document is what it purports to be. *See* TEX. R. EVID. 901(a). Generally, the proponent of evidence must authenticate it by a

² There was also extensive discussion about which pages of the attachments to the business records affidavit Ayres objected to. But Ayres never objected to the business records affidavit itself, nor did the court rule on the affidavit alone. Instead, the court’s ruling was on the admissibility of the Note.

sponsoring witness or by showing that the evidence meets Rule 902's requirements for self-authentication. *See Swan v. GR Fabrication, LLC*, No. 05-17-00827-CV, 2018 WL 1959486, at *2 (Tex. App.—Dallas Apr. 26, 2018, no pet.) (mem. op.) (discussing the authentication requirement).

B. Negotiable Instrument

The parties argue extensively about whether the Note is a negotiable instrument.³ Negotiability, however, is not a prerequisite for admitting a promissory note into evidence.

A promissory note does not have to meet the UCC's definition of a negotiable instrument to be enforceable. *Tapia v. Collins Asset Group, LLC*, No. 02-20-00129-CV, 2022 WL 325392, at *3 (Tex. App.—Fort Worth Feb. 3, 2022) (mem. op.). A suit on a note has four elements: (1) a note exists, (2) the plaintiff is the note's legal owner and holder, (3) the defendant is the maker of the note, and (4) a certain balance is due and owing on the note. *See Manley v. Wachovia Small Bus. Capital*, 349 S.W.3d 233, 237 (Tex. App.—Dallas 2011, pet. denied); *see also Perkins v. Crittenden*, 462 S.W.2d 565, 568 (Tex. 1970) (plaintiff must establish he is present legal owner or holder of note sued upon).

³ Ayres also argues on appeal that the Note was not admissible because it was stale under the two-year statute of limitations, there was conflicting evidence of damages, and the Note is not commercial paper because "there was no evidence that persons in the commercial world relied on this Note." None of these arguments were raised in the court below, nor are they pertinent to the issue of admissibility. Our inquiry is confined to the issues raised and ruled upon in the trial court. *See TEX. R. APP. P. 38.1.*

The effect of non-negotiability is simply that such notes are governed by contract law rather than by the UCC. *See FFP Mktg. Co. v. Long Lane Master Tr. IV*, 169 S.W.3d 402, 409 (Tex. App.—Fort Worth 2005, no pet.) (holding that because promissory notes were not negotiable instruments, contract law rather than UCC controlled enforcement). Whether a note is negotiable or nonnegotiable also controls the applicable limitations period. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 3.118(a).

A promissory note is a contract between maker and payee, *see Strickland v. Coleman*, 824 S.W.2d 188, 191–92 (Tex. App.—Houston [1st Dist.] 1991, no writ), and a negotiable promissory note is but a UCC-governed subset of that broader category. Both can be sued upon. *Tapia*, 2022 WL 325392, at *3.

Significantly, however, negotiability and enforceability go to the merits of the suit. Here, the court was only tasked with assessing the adequacy of the evidentiary predicate to admit the Note; specifically, its authentication. Thus, to the extent the trial court determined that the Note should be excluded because it was nonnegotiable or unenforceable, the ruling was in error.

C. Authentication

CAG argues the Note should have been admitted into evidence as a properly authenticated business record. We agree.

Rule 902(10) reflects an intent to allow the admission of an organization's business records without requiring testimony from all of the company's employees

who have personal knowledge of the records' contents. *Kaldis v. U.S. Bank Nat'l Ass'n*, 14-11-00607-CV, 2012 WL 3229135, at *3 & n. 1 (Tex. App.—Houston [14th Dist.] Aug. 9, 2012 pet. dismissed w.o.j.) (mem. op.). Accordingly, the witness need not have personal knowledge of the records' contents but need only have knowledge of how the records were prepared. *In re K.C.P.*, 142 S.W.3d 574, 578 (Tex. App.—Texarkana 2004, no pet.).

The unobjected to business records affidavit of CAG's custodian of records meets Rule 902(10)'s requirements and established that the Note was a business record. *See* TEX. R. EVID. 902 (10) (B). Accordingly, the records attached to the affidavit (including the Note) were self-authenticated. *See Foster v. Nat'l Coll. Student Loan Tr.* 2007-4, No. 01-17-00253-CV, 2018 WL 1095760, at *6 (Tex. App.—Houston [1st Dist.] Mar. 1, 2018, no pet.) (mem. op.).

But even if we did not consider the business records affidavit, CAG's corporate representative authenticated the records at trial. Specifically, Dan Laux, CAG's Legal Outsourcing Manager, testified that he is familiar with CAG's records and the method by which CAG acquires, stores, and takes possession of notes. He further described how this Note was received, scanned, and stored with CAG's business records.

Laux testified that he received the original Note within thirty days of CAG's purchase of the Note, and that he had tendered the original to counsel. He

identified the Note attached to the business records affidavit as a true and correct copy of the original.

Laux also offered testimony about how CAG relied upon and used the Note to calculate the amount due and sent letters based on that calculation. Laux testified that CAG is the owner of the Note.

Laux's testimony was sufficient to authenticate the Note. *See* TEX. R. EVID. 901. Because the Note was properly authenticated, the trial court abused its discretion by denying its admission into evidence.⁴

To establish reversible error based on the erroneous exclusion of evidence, the complaining party must establish: (1) the evidence was erroneously excluded; (2) the excluded evidence was on a material issue and not cumulative of other evidence; and (3) the error probably caused the rendition of an improper judgment. *Coterill-Jenkins v. Tex. Med. Ass'n Health Care Liab. Claim Trust*, 383 S.W.3d 581, 593 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); TEX. R. APP. P. 44.1; *see also Tex Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000).

⁴ Ayres also objected to the Note based on the absence of assignments, and on cross-examination, appeared to challenge the signatures on the Note. Ayres did not contest the authenticity of signatures in his verified denial, so the Note was admissible in that regard as fully proved. *See* TEX. R. CIV. P. 93(7); *Boyd v. Diversified Fin. Sys.*, 1 S.W.3d 888, 891 (Tex. App.—Dallas 1991, no pet.). Whether CAG can recover as an assignee (or is required to prove an assignment) goes to the merits, not admissibility.

We have concluded that the evidence was erroneously excluded. And it is undisputed that the Note was material; this is a suit on a note. It is also undisputed that the exclusion of the evidence forming the basis for CAG's breach of contract case probably contributed to the rendition of an improper judgment.

CAG's second issue is sustained, and we need not consider the remaining issue. *See* TEX. R. APP. P. 47.1.

III. CONCLUSION

We reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

/Dennise Garcia/
DENNISE GARCIA
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

COLLINS ASSET GROUP, LLC AS
SUCCESSOR-IN-INTEREST TO
LEHMAN BROTHERS BANK,
Appellant

No. 05-21-00295-CV V.

MICHAEL AYRES, Appellee

On Appeal from the 101st Judicial
District Court, Dallas County, Texas
Trial Court Cause No. DC-18-06094.
Opinion delivered by Justice Garcia.
Justices Carlyle and Smith
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant COLLINS ASSET GROUP, LLC AS SUCCESSOR-IN-INTEREST TO LEHMAN BROTHERS BANK recover its costs of this appeal from appellee MICHAEL AYRES.

Judgment entered this 30th day of March 2022.