Affirmed and Memorandum Opinion filed February 14, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00955-CV

JAMES J. FOX, Appellant

V.

BANK OF AMERICA, N.A., Appellee

On Appeal from the County Civil Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 1057607

M E M O R A N D U M O P I N I O N

In this suit on a credit card debt, appellant James J. Fox challenges the judgment in favor of appellee Bank of America, N.A. ("BOA") on the grounds that the trial court reversibly erred in admitting evidence of Fox's debt. We affirm.

Background

Fox opened a credit card account with BOA's predecessor in interest. Fox defaulted on the account. BOA sued Fox in January 2015 for the balance due on

the account, which it alleged was $10,530.66. BOA attached a copy of Fox's April 2012 statement—reflecting a total balance due of $10,530.66—to its petition and served Fox with the petition and attachments on March 28, 2015. Fox responded with a general denial, various affirmative defenses, and a request for disclosure under Texas Rule of Civil Procedure 194.2.

On September 28, 2015, BOA filed a business records affidavit signed by its custodian of records, Troy Pearson. BOA attached Fox's April 2012 statement to the business records affidavit. On October 12, 2015, Fox and BOA appeared for a bench trial. BOA offered into evidence its business records. Fox objected to the admission of the records, urging that BOA had failed to identify Pearson as a witness until fourteen days before trial. BOA responded that it had supplemented its discovery responses by filing the business records affidavit, which identified Pearson. Fox replied that the affidavit had not been filed thirty days prior to trial as required by "the rules."

The trial court overruled Fox's objection to this evidence and admitted the business records. Both parties rested without presenting any other evidence, and the trial court signed a judgment in favor of BOA on the same day as the bench trial. This appeal timely followed.

Standard of Review

At issue is the admission of BOA's evidence in support of the alleged debt. Fox asserts that, under Texas Rule of Civil Procedure 193.6(a), the trial court was required to exclude BOA's business records affidavit and attachment. We review a trial court's ruling under this rule for an abuse of discretion. *Sprague v. Sprague*, 363 S.W.3d 788, 798 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (citing *Fort Brown Villas III Condo. Ass'n v. Gillenwater*, 285 S.W.3d 879, 881 (Tex. 2009) (per curiam)); *see also Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914

(Tex. 1992) (applying Rule 193.6's predecessor and stating that trial court has discretion to determine whether the offering party met its burden to show good cause to admit evidence not timely disclosed).

Analysis

Fox asserts that the trial court reversibly erred in admitting BOA's business records because BOA did not timely disclose Pearson's identity at least thirty days before trial.[1] As noted above, Fox contends that Rule 193.6 mandated the automatic exclusion of BOA's evidence because it was not timely disclosed. We disagree.

The trial court did not state its reason for overruling Fox's objection to the business records. We may uphold the trial court's ruling if it is correct under any legal theory. *Harris Cnty. v. Int'l Paper Co.*, No. 01-15-00354-CV, 2016 WL 5851895, at *13 (Tex. App.—Houston [1st Dist.] Oct. 6, 2016, no pet.) (mem. op.) ("We will uphold the trial court's evidentiary ruling if it is correct under any legal theory."); *Cano v. Nino's Paint & Body Shop*, No. 14-08-00033-CV, 2009 WL 1057622, at *2 (Tex. App.—Houston [14th Dist.] Apr. 16, 2009, no pet.) (mem. op.) (citing *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998)); *Columbia Med. Ctr. Subsidiary, L.P. v. Meier*, 198 S.W.3d 408, 411 (Tex. App.—Dallas 2006, pet. denied).

Fox complains that BOA failed to timely identify Pearson as a "testifying witness" thirty days prior to trial. Fox relies on Texas Rule of Civil Procedure 193.5, which provides that a party must supplement or amend incomplete or incorrect written discovery responses, including the identification of persons with

[1] Fox presents two issues for our review: (1) whether the trial court reversibly erred by admitting BOA's exhibit into evidence at his bench trial; and (2) whether the trial court's alleged error in admitting this evidence resulted in an improper judgment. We address both issues together.

knowledge of relevant facts, trial witnesses, or expert witnesses. Tex. R. Civ. P. 193.5. Amended or supplemental discovery responses must be made "reasonably promptly"; "it is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly." Tex. R. Civ. P. 193.5.

BOA did not designate Pearson as a testifying witness nor did Pearson testify live at trial. Rather, Pearson signed a business records affidavit to support admission of the account record BOA had served with its petition several months before trial. *See* Tex. R. Evid. 902(10) (providing that business records accompanied by valid custodian of records' affidavit are self-authenticating).[2] Presuming that BOA was required to disclose Pearson's identity as a records custodian to Fox thirty days before trial, Texas Rule of Civil Procedure 193.6 mandates exclusion unless the trial court finds: (1) good cause or (2) lack of unfair surprise or unfair prejudice. Tex. R. Civ. P. 193.6. It is the proponent's burden to demonstrate good cause or the lack of unfair surprise or unfair prejudice, and findings relating thereto must be supported in the record. Tex. R. Civ. P. 193.6(b). The record does not indicate that any party requested findings of fact regarding the evidentiary ruling. Accordingly, we imply all necessary findings in support of the judgment,[3] including, as relevant here, a finding that Fox was not unfairly surprised or unfairly prejudiced by BOA's failure to disclose Pearson's identity as a witness thirty days before trial.

We conclude the lack of unfair surprise or unfair prejudice on the record supports the trial court's ruling. The record reflects that BOA provided Fox with

[2] Fox has not challenged the authenticity of the business records or complained that the accompanying affidavit fails to comply with the requirements of Texas Rule of Evidence 902(10)(B).

[3] *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989) (per curiam).

the same account statement attached to BOA's business records affidavit when BOA served Fox with the lawsuit on March 28, 2015—over six months before the bench trial on October 12, 2015. Thus, the record conclusively shows that Fox had been provided with the record at issue, and Fox was not unfairly surprised or unfairly prejudiced by the admission of this evidence. *See Roper v. CitiMortgage, Inc.*, No. 03-11-00887-CV, 2013 WL 6465637, at *10 (Tex. App.—Austin Nov. 27, 2013, pet. denied) (mem. op.) (concluding that trial court did not abuse its discretion by refusing to exclude CitiMortgage's business records despite untimely disclosure because records had been provided to Roper and were on file with trial court for several years before summary-judgment motion relying on them was filed); *cf. In re RH White Oak, LLC*, 442 S.W.3d 492, 499–500 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (overruling objections to admission of letter attached to business records affidavit because affidavit was filed and served more than fourteen days prior to hearing). Accordingly, the trial court did not abuse its discretion by admitting BOA's business records under Rule 193.6.

Conclusion

Because the challenged ruling was within the trial court's discretion and is supported by the record, we overrule Fox's appellate issues and affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Chief Justice Frost and Justices Brown and Jewell.