COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-18-00055-CV

BANK OF AMERICA, N.A. APPELLANT

V.

CRISTELLA LERMA A/K/A
CRISTELLA D. LERMA A/K/A
CRISTELA D. LERMA APPELLEE

FROM COUNTY COURT AT LAW NO. 3 OF TARRANT COUNTY
TRIAL COURT NO. 2016-005652-3

MEMORANDUM OPINION[1]

Appellant Bank of America, N.A. sued Appellee Cristella Lerma a/k/a Cristella D. Lerma a/k/a Cristela D. Lerma for $12,891.57 after she defaulted on her credit card bill. In three issues, Bank of America complains that the trial court erred by excluding evidence, misinterpreted Texas Rule of Evidence 803(6), and

[1] *See* Tex. R. App. P. 47.4.

erred in rendering judgment because had the evidence not been excluded, "Appellant would have substantially overcome the preponderance of evidence standard applicable in civil trials."

To its original petition, among other things, Bank of America attached four pages of unsworn credit card information indicating that from October 3–November 3, 2014, Lerma owed $12,991.57 and late fees and that as of September 7, 2016, Lerma had made a $100 payment. In April 2017, Bank of America filed a business records affidavit sponsoring 92 pages of records representing Lerma's payment history from December 4, 2012, to November 3, 2014, and showing $12,991.57 as the amount due. The business records affiant signed the affidavit on February 21, 2017.

During the November 2017 bench trial, Lerma argued that Bank of America's business records affidavit did not comply with rule of evidence 902(10)'s predicate for authenticating computer records. The trial court also pointed out that the unsworn exhibit that Bank of America had attached to its original petition indicated that a $100 payment had been made on September 7, 2016, which was not addressed in the business records or the affidavit, which was signed on February 21, 2017.

The trial court further pointed out that the business records affidavit stated that there were 92 pages of records attached, but the court actually found considerably fewer pages attached—16 pages—rather than 92 pages, as claimed.

In response to the trial court's comment about the inconsistency regarding the number of pages in its exhibit, Bank of America responded with several arguments. First, it pointed out that 92 pages were included in the court's file:

> I believe the Court has in its file the entirety of the records. It may have been that my computer may have shut out. I didn't notice that. But I believe there is all 92 pages in the court's file as well. And if the Court needs me to go to the clerk's office real fast and add whatever the Court takes issue with in terms of the remaining documents, I will do that just out of an abundance of caution. But I believe the first statements were for the 2013 and should go down to -- I think the last statement was 2014, so. I believe the last statement shows 12,991.

But despite its offer to supplement the exhibit, Bank of America did not actually supplement the exhibit. And while Bank of America had earlier asked the trial court to take judicial notice "of the, I guess, records and all the evidence on file," it did not secure a ruling to that effect.[2]

Bank of America urged the document's admissibility under the residual hearsay exception, an exception that does not exist in the Texas Rules of Evidence. *But see* Fed. R. Evid. 807. Another argument urged by Bank of America—a particular favorite among many trial court judges—was that *other courts* "routinely enter judgments based on the accounts stated, based on these exact same documents, [] notwithstanding any business records affidavit in some cases."

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[2]We do not express an opinion as to whether the trial court's taking of judicial notice of the records and evidence on file would have sufficed to transform the exhibits attached to pleadings as exhibits at trial.

During this protracted debate over the admissibility of the business records and affidavit, the trial court read to the parties the portion of this court's opinion in *Gillespie v. National Collegiate Student Loan Trust 2005-3*, No. 02-16-00124-CV, 2017 WL 2806780, at *5 (Tex. App.—Fort Worth June 29, 2017, no pet.) (mem. op.), regarding the importance of paying attention to details. In that case, we stated,

> This appeal is an object lesson in the danger of relying on imprecise or incomplete records to prove a technical issue such as a party's status as a holder in due course on the basis of multiple assignments. The result in this appeal possibly could have been avoided or ameliorated by careful adherence to the rules of evidence and the burden of proof. The mere fact that the subject matter of a suit does not involve a large amount in controversy does not relieve a party of the burden to dot every "i" and cross every "t." Details are important, even where the alleged operative breach seems to be a foregone conclusion.

Id. The trial judge observed, "I feel like we're wallowing in minutia[e] . . . [b]ut I just wanted to point out that I have been told to."

Nevertheless, at the conclusion of the discussion, the trial court overruled Lerma's objection and admitted the business record affidavit and attached records. The exhibits volume of the reporter's record in this case reflects that, including the notice of filing business records affidavit and cover page, Bank of America offered, and the trial court admitted, 16 pages. And the last credit card statement contained in the exhibit is dated March 3–April 2, 2013, showing a balance of $12,598.32.

At the conclusion of the trial, the trial court announced that the discrepancy in the evidence had made the records “inherently unreliable,” but that the reliability concern went “to the credibility as opposed to the admissibility” of the records, and the trial court did not revisit its earlier ruling admitting the records into evidence. The court then ruled that Bank of America take nothing, and consistent with that ruling, signed a take-nothing judgment on the same day.

Bank of America timely filed its request for findings of fact and conclusions of law. In response, Lerma submitted proposed findings of fact and conclusions of law, and the court adopted all of Lerma’s proposed findings and conclusions without change.

Contrary to the express rulings in the record, in finding of fact I, the trial court stated that it had “excluded [Bank of America]’s business records affidavit and attached documentation based on credibility issues” in the affidavit testimony. In the next finding of fact, the trial court stated, “Because Plaintiff had no admissible evidence proving its claim for damages, the Court entered a take-nothing judgment on the record in favor of Defendant.” And, in its sole “conclusion of law,” the trial court recited that, as the trier of fact, it was the sole judge of the credibility of the witnesses and weight to be given their testimony.

In its first two issues, Bank of America asks us to determine whether the trial court erred in its interpretation of rule of evidence 803(6)(E) and by excluding its evidence. Bank of America cites to the reporter’s record—the record of the bench trial proceedings—to argue that “the court *admitted* Appellant’s Business

Records Affidavit after Appellee objected to its trustworthiness," yet it points to the clerk's record—the trial court's findings of fact and conclusions of law—to argue that the trial court "*excluded* Appellant's Business Records Affidavit after Appellee objected to its trustworthiness due to the balance being exactly one hundred dollars greater than the amount sought." [Emphasis added.]

When findings of fact are filed and are unchallenged, they are entitled to the same weight as a jury's verdict and are binding on an appellate court unless either the contrary is established as a matter of law or no evidence supports the finding. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986); *Inimitable Grp., L.P. v. Westwood Grp. Dev. II, Ltd.*, 264 S.W.3d 892, 902 & n.4 (Tex. App.—Fort Worth 2008, no pet.). Written findings of fact and conclusions of law serve the purpose of narrowing the bases of judgment to only a portion of the multiple claims and defenses in the case, thereby reducing the number of contentions that the appellant must raise on appeal. *In re D.H.*, No. 02-05-00179-CV, 2006 WL 133523, at *1 (Tex. App.—Fort Worth Jan. 19, 2006, no pet.) (mem. op.). However, when—as here—the proposed findings do not match the trial record, this purpose is nullified.

Furthermore, the "findings" at issue here were primarily procedural recitations and conclusions of law, which are not binding on us. A "finding of fact" reflects the trial court's decisions regarding the ultimate and controlling *factual* issues of a plaintiff's claim or defendant's defense. *James Holmes Enters., Inc. v. John Bankston Constr. & Equip. Rental, Inc.*, 664 S.W.2d 832,

834 (Tex. App.—Beaumont 1983, writ ref'd n.r.e.) (op. on reh'g). The trial court need only enter findings on ultimate or controlling issues, not on evidentiary issues. *In re Marriage of Grossnickle*, 115 S.W.3d 238, 253 (Tex. App.—Texarkana 2003, no pet.). An ultimate fact is one that would have a direct effect on the judgment. *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 612 (Tex. App.—Fort Worth 2006, pet. denied).

The record here unambiguously reflects that the trial court did not actually exclude Bank of America's evidence or interpret—or "misinterpret," as Bank of America contends—rule of evidence 803(6)(E) in excluding evidence at trial. Rather, the trial court admitted the evidence and then, after weighing it and assessing its credibility, granted Lerma a take-nothing judgment. In light of the trial record, we therefore overrule Bank of America's first two issues as moot.

In its third issue, Bank of America argues that we should reverse the trial court's judgment because there is factually sufficient evidence to support a judgment in its favor. Even if Bank of America is correct in its assertion that there was factually sufficient evidence to support a judgment in its favor, it makes no argument that the trial court's judgment was against the great weight and preponderance of the evidence. *See Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g).

Bank of America's evidence may have been sufficient to support a judgment in its favor. But the trial court, as the factfinder, was the sole judge of the weight and credibility of the evidence. *See Golden Eagle Archery, Inc. v.*

Jackson, 116 S.W.3d 757, 761 (Tex. 2003). As the sole judge of the weight and credibility of the evidence, the trial court did not find Bank of America's evidence trustworthy or credible. *See id.* We may not substitute our judgment for that of the factfinder or reconsider that determination. *See id.* Accordingly, we overrule Bank of America's third issue.

Having overruled all of Bank of America's issues, we affirm the trial court's judgment.

/s/ Bonnie Sudderth

BONNIE SUDDERTH
CHIEF JUSTICE

PANEL: SUDDERTH, C.J.; MEIER and KERR, JJ.

DELIVERED: August 31, 2018