J.P. Carrara & Sons, Inc. v. Shum, No. 31-1-07 Rdsc (Teachout, J., Apr. 2, 2008)

STATE OF VERMONT
RUTLAND COUNTY

J.P. CARRARA & SONS, INC.	)	
	)	**Rutland Superior Court**
	)	**Docket No. 31-1-07 Rdsc**
v.	)	
	)	
	)	
SANDRA SHUM	)	

DECISION
Defendant's Motion in Limine, filed March 5, 2008

Plaintiff J.P. Carrara & Sons, Inc., the owner and operator of a mobile home park, alleges that defendant Sandra Shum has not paid lot rent. Ms. Shum admits nonpayment of rent, but argues that her withholding was proper under 10 V.S.A. § 6263. The matter is set for a jury trial on Thursday, April 3, 2008. The present matter before the Court is Defendant's Motion in Limine, filed March 5, 2008 by Karen Richards, Esq. Plaintiff's response was filed on March 14, 2008 by Thomas Dowling, Esq.

The issue is the admissibility of two memoranda prepared by Assistant Attorney General Wendy Morgan. The Attorney General's Office became involved in the rent dispute on January 4th, 2006, when the Clarendon Select Board and the Clarendon Health Officer requested the involvement of the AG regarding rent and habitability issues at the mobile home park. Ms. Shum sent a letter to the AG's office on January 30th, 2006. The letter appears to have been sent in Ms. Shum's capacity as a representative of the Whispering Pines Residents Association.

The AG held two meetings in January and February which various persons attended either in person or by telephone. The attendees included representatives of the Carraras, Clarendon officials, and state employees. In addition, water testing was conducted on February 2nd, which involved a mix of state employees, representatives of the litigants, and private citizens.

Based on the two meetings and the water testing, Ms. Morgan authored a memorandum dated February 23, 2006, addressed to the mobile home park residents, Clarendon officials, and the Carraras. The memorandum describes itself as "a preliminary report" that "does not reflect any conversations with residents of the park that would need to be heard before any final decisions are made regarding the State's ongoing involvement in the park." The body of the memorandum discusses various habitability concerns, and concludes by recommending that the "first step" towards resolving the problems be a meeting between landlord and tenants.

Ms. Morgan authored a second memorandum on April 11, 2006, after the landlord/tenant meeting had taken place. This memorandum provides more information about the substantive issues, and includes recommendations such as that further analysis be undertaken with respect to water issues, that the Carraras provide more information about certain matters, and that the residents and the Carraras work together in the future to resolve differences without the involvement of the State.

Motion in Limine

Ms. Shum filed a motion in limine to exclude the reports from evidence. She argues that the memoranda are replete with hearsay and that the conclusions are based on hearsay; in addition, she argues that the memoranda are unduly prejudicial under Rule 403 because they represent the conclusions of a state agency.

Plaintiff agrees that the memoranda itself is hearsay, and that the memoranda relies on hearsay, but argues that the documents are nevertheless admissible under Rule 803(8), which provides a hearsay exception for public records. Plaintiff argues in the alternative that the reports are admissible under Rule 803(6) as business records upon which Plaintiff relied. The Court considers the arguments in turn.

Rule 803(8)(A): Public Records

Rule 803(8)(A) provides for the admissibility of "records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law." This "public records" exception is "designed to allow admission of official records and reports prepared by an agency or government office for purposes of independent of specific litigation." *United States v. Stone*, 604 F.2d 922, 925 (11th Cir. 1979).

The reliability of public records "is guaranteed by the regularity and lack of future concern with which the records are made, the actual reliance placed upon them in human affairs, and the duty of the recorder to make an accurate record. V.R.E. 803, Reporter's Notes; see also *Palmer v. Hoffman*, 318 U.S. 109, 113–14 (1943) (describing the basis of the closely-related business records exception as "the probability of trustworthiness of records because they were routine reflections of the day to day operations of a business"). Examples of public records in Vermont case law include grand lists, tax collection records, and town-meeting minutes. *Viens v. Lanctot*, 120 Vt. 443, 445 (1958) (grand list); *State v. Intoxicating Liquors*, 44 Vt. 208, 218–19 (1872) (excise tax collection records); *Wilson v. Wheeler*, 55 Vt. 446, 453 (1882) (town meeting

proceedings). The Reporters' Notes to Rule 803 indicate that the public records exception is very similar to the business records exception codified by Rule 803(6).

In this case, Plaintiff has not demonstrated that the memoranda prepared by Ms. Morgan contain the characteristics of reliability that support admissibility under the public records hearsay exception. Plaintiff argues that the AG routinely investigates and prosecutes violations of consumer fraud laws and mobile home laws, but there has been no showing that these memoranda were prepared in the regular course of business and actually relied upon as public records for any purpose other than the issue between the parties that is the subject of this litigation. The hallmark of reliability under both the public records exception and the business records exception is the fact that the hearsay documents have been relied upon for a different purpose. The memoranda at issue here were prepared as reports specifically addressed to issues raised by the parties to this proceeding, and Plaintiff has made no showing that the memoranda have been relied upon otherwise.

Plaintiff argues that the memoranda are admissible under the holding of *Kinney v. Johnson*, 142 Vt. 299 (1982). In that case, the plaintiffs were mobile home park tenants who brought a suit for damages against the park owners, and introduced nine exhibits in support of their claim. The trial court admitted all nine exhibits as business records of the Vermont Department of Health,[1] and the owners appealed from the admission of some of the records. On appeal, the Vermont Supreme Court determined that three of the records had been admitted only for the limited purpose of proving that complaints had been filed, one of the objections had not been properly preserved for appeal, and the admissibility of two records was not considered because their admission was plainly harmless. Therefore, the Court considered only the admissibility of a two-page memorandum submitted by a government water systems expert who used data credited to engineers in the expert's department. The Court ruled that the memorandum was admissible as expert testimony, and that the hearsay relied upon was admissible for the limited purpose of evaluating the basis for the expert's opinion. *Id*. at 304.

The memoranda in this case are being offered as public records, and not as an expert opinion or as basis evidence. For this reason, *Kinney* is inapposite to the facts of this case, and does not support the admissibility of the memoranda prepared by Ms. Morgan.

Plaintiff argues in the alternative that Ms. Morgan is a qualified expert on the habitability of mobile home parks in Vermont, and that the memoranda are therefore admissible as an expert report. The Court has not yet qualified Ms. Morgan as an expert witness. Moreover, the memoranda discuss scientific matters, such as precipitate and scale, to which Ms. Morgan admits having an "inexpert" understanding. Plaintiff has not demonstrated that the memoranda are admissible as expert reports under Rules 702 and 703.

Rule 803(8)(A): Factual Findings Resulting From an Investigation

Plaintiff argues that the memoranda are admissible as "factual findings resulting from an investigation made pursuant to authority granted by law." Plaintiff argues that these memoranda

[1] The case predated the adoption of the Vermont Rules of Evidence. The Court was interpreting the former 12 V.S.A. § 1700 (Uniform Business Records as Evidence Act) and 12 V.S.A. § 1701 (Uniform Photographic Copies of Business and Public Records as Evidence Act).

represent the factual findings of the AG, that the AG has authority to prosecute violations of the mobile-home statutes and consumer-fraud statutes, see, e.g., *L'Esperance v. Benware*, 2003 VT 43, 175 Vt. 292; *Bisson v. Ward*, 160 Vt. 343, 349 (1993), and that the authority to prosecute necessarily implies the authority to investigate. *In re Houston*, 2006 VT 59, ¶ 9, 180 Vt. 535 (mem.).

However, to be admissible under Rule 803(8)(A) as factual findings, the findings "must be final." 3 Graham, Handbook of Federal Evidence § 803.8, at 413 n.21 (5th ed. 2001). Interim agency reports and preliminary memoranda do not satisfy the finality requirement. *Smith v. Isuzu Motors Ltd.*, 137 F.3d 859, 862–63 (5th Cir. 1998). "Rule 803 makes no exception for tentative or interim reports subject to revision and review." Graham, Handbook of Federal Evidence, *supra*, at 413 n.21. "If the document is not sufficiently final, it may not constitute a 'factual finding' or may be considered untrustworthy." *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1140 (5th Cir. 1983).

The first memorandum describes itself as "a preliminary report" that was not based upon discussions with the residents. The second memorandum was prepared after some discussions with the residents, but the recommendations at the end of the memo call for more information to be submitted to the AG, and the general tenor of the memorandum is that it is unclear whether further action needs to be taken with respect to several issues. The documents do not demonstrate the requisite degree of finality to be considered as "factual findings" within the meaning of Rule 803(8)(A), and are therefore not admissible under that exception.

Rule 803(8)(B)(iv): Lack of Trustworthiness

Even if the memoranda were made in the course of the AG's regularly conducted and regularly recorded activities, or were factual findings resulting from an investigation made pursuant to authority, they appear to fall within the caveat set forth by Rule 803(8)(b)(iv), which specifically provides for the non-admissibility of "any matter as to which the sources of information or other circumstances indicate lack of trustworthiness." Ms. Shum points out that the memoranda appear to be based in part on information provided by the Carraras, Clarendon municipal officials, and independent experts, including a plumber and several engineers. To qualify under the public records exception,

> [a]ll persons supplying furnishing and recording information must be under an official duty to do so. If the supplier of the information is not under such a duty to do so, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the report of a police officer incorporating information obtained from a bystander: the police officer qualifies as acting pursuant to an official duty but the bystander does not.

Graham, Handbook of Federal Evidence, *supra*, at § 803.8. Because the memoranda may contain information provided by sources who were not under an official duty to report, and because the memoranda are preliminary in nature and do not seem to have been relied upon by

others in their ordinary affairs, Defendants have adequately demonstrated that the documents are not sufficiently trustworthy within the meaning of Rule 803(8)(B)(iv).

Additionally, the memoranda contain double hearsay in that they rely upon information provided by other sources, apparently including state officials, litigants, and independent engineers. Based on the submissions of the parties, it is impossible to determine whether this double hearsay fits a recognized hearsay exception. The memoranda accordingly do not qualify under Rule 803(8) for this additional reason. *Needham v. Coordinated Apparel Group, Inc.*, 174 Vt. 263, 274–75 (2002). The party offering multiple levels of hearsay must establish that an exception applies to each level of hearsay. In this case, Plaintiff argues that the State employees were all under a duty to report accurately, but this claim has not been supported by foundational evidence. Furthermore, at least some of the information may have been provided by litigants, or by independent citizens. Plaintiff has not demonstrated that this hearsay fits any recognized exception.

Rule 803(6): Business Records Exception

Plaintiff argues in the alternative that the documents are admissible substantively as business records upon which Plaintiff reasonably relied. However, Plaintiff has not offered foundational proof that the records were made "by, or from information transmitted by, a person with knowledge." Additionally, Plaintiff has not demonstrated that these investigative memoranda contain the hallmarks of reliability that ordinary business records (such as shipping logs, or receipts, or other documents that are relied upon for another business purpose) would contain. Ordinary business records are considered reliable because they are "routine reflections of the day to day operations of a business." *Palmer*, 318 U.S. at 113–14. These memoranda have not been shown to be ordinary, routine records.

Conclusion

For the foregoing reasons, Plaintiff has not demonstrated that the hearsay documents authored by Ms. Morgan qualify under any recognized hearsay exception. The policy considerations underlying the hearsay rules support reliance on hearsay only when the documents demonstrate an adequate level of reliability. These memoranda do not demonstrate that level of reliability, in that they were prepared specifically in response to the ongoing disputes in this case, there has been no showing that they have been relied upon for any other purpose, and the reports are not sufficiently final. Cross-examination as to what evidence was or was not considered in preparing the reports would significantly test their reliability. Thus, the policy considerations underlying the hearsay doctrine favor exclusion rather than admissibility.

ORDER

For the foregoing reasons, Defendant's Motion in Limine, dated March 5, 2008, is *granted*.

Dated at Rutland, Vermont this 2nd day of April, 2008.

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Hon. Mary Miles Teachout
Presiding Judge