In the Missouri Court of Appeals
Eastern District

DIVISION ONE

CACH, LLC,	)	No. ED94814
	)	
Respondent,	)	
	)	Appeal from the Circuit Court of
v.	)	St. Louis County
	)	Cause No. 09SL-AC13903
JON J. ASKEW,	)	Honorable Dale W. Hood
	)	
Appellant.	)	Filed: March 29, 2011

Background and Procedural History

At its core this is a relatively simple collections action brought by Respondent CACH, LLC (CACH) against Appellant Jon J. Askew (Askew) for amounts owed on a credit card issued to Askew. Sometime in 1998[1], Appellant applied for a credit card through Providian Bank (which was later acquired by Washington Mutual (WaMu)). Initially, Askew used the card per the agreement, making purchases and monthly payments, but at some point he stopped making payments on the account. Eventually WaMu closed the defaulted account and sold it to Worldwide Asset Purchasing (Worldwide) for collection, which then sold it to CACH.

CACH is a wholly-owned subsidiary of Two Square Financial and is in the business of purchasing defaulted credit accounts. CACH has no employees but hires

[1] The exact date of the application is disputed and will be discussed *infra*.

attorneys to collect the debts it purchases. After two failed attempts to collect on Askew's debt, CACH instituted this suit in three counts: (1) Breach of Contract, (2) Account Stated, and (3) Suit on Account. Askew responded by filing a counter-claim alleging violations of the Fair Debt Collection Practices Act (FDCPA). After a bench trial, the court entered judgment in favor of CACH on all three counts, and against Appellant on his counter-claim. On appeal, Askew does not dispute that he owes the underlying debt but only maintains that there was insufficient admissible evidence for CACH to collect that debt.

Discussion

Admissibility of Evidence

We will examine the admissibility of the challenged evidence first as the other matters on appeal depend, at least to some extent, on the resolution of this issue. Askew argues that the trial court erred in admitting exhibits 1, 2, (5, 6,)[2] 7, 8, 9, and 11 because these documents were hearsay and did not qualify for admission under any exception.

The objected-to exhibits consist of:

1. Providian Bank credit card application signed by Askew
2. Credit card statements created by Washington Mutual (original owner of the account)

5. & 6. Checks from Appellant to Collect America (now Square Two Financial)

7. Bill of sale from Washington Mutual to Worldwide
8. Bill of sale from Worldwide to CACH
9. Redacted account list identifying Appellant's account

11. Credit card agreement for Askew's account

The trial court has broad discretion in determining whether evidence meets the minimal requirements of a hearsay exception and is admissible. *C & W Asset Acquisition, LLC v. Somogyi*, 136 S.W.3d 134, 138 (Mo.App. S.D. 2004). Its decision

[2] Appellant did not include an objection to exhibits 5 & 6 in his Points Relied On but does include them in his Argument. Per our discretion, we will address them in this opinion.

will not be overturned absent a showing of abuse of that discretion. *Id*. at 137.

This Court finds that exhibits 2, 7, 8, 9, and 11 were admissible under the business records exception to hearsay. Section 490.680[3] (the business records exception) provides that evidence may be admissible as a business record if a sponsoring witness testifies to its identity, mode of preparation, and that it was made in the regular course of business at or near the time of the event. "'[T]he bottom line' regarding the admissibility of the business records is the discretionary determination by the trial court of their trustworthiness." *C&W Asset*, 136 S.W.3d at 138. The trustworthiness of evidence is bolstered by the sponsoring witness's presence in court – i.e. availability for cross-examination – and the witness' familiarity with the exhibits. *Id*. at 139.

Diana Eakins, an employee of Square Two Financial (the parent-company of CACH LLC), sponsored these exhibits. At trial she testified as to her knowledge of them and was available for cross-examination. Askew's primary objection to the admission of these exhibits is that they were not created by CACH, but merely received by them. However, it is not a strict requirement of the business records exception that a document be created by the entity sponsoring it. A witness may properly qualify a document under the business record exception if she is familiar with the mode of preparation and the document was transmitted to and maintained in the ordinary course of business by the entity for which she is the custodian. *State v. Carruth*, 166 S.W.3d 589, 591 (Mo. App. W.D. 2005). Eakins testified that she had received training at the institutions which created these documents and was familiar with the way each was prepared. It was also the ordinary course of business for CACH to receive and maintain records such as these as it was in the business of purchasing defaulted credit accounts.

[3] All statutory references are to RSMo (2010) unless otherwise indicated.

Askew argues that the outcome of this case is dictated by this Court's recent decision in *Asset Acceptance v. Lodge*, 325 S.W.3d 525 (Mo. App. E.D. 2010). *Lodge* involved a fact pattern similar to this one in which the assignee of a consumer creditor attempted to collect the balance on a debtor's account. *Id*. at 527. This Court determined that the trial court had erred in admitting the Sale Agreement between assignor and assignee and the credit agreement between original creditor and debtor. *Id*. at 529. The documents were sponsored by an employee of the assignee. *Id*. at 528. This Court concluded that because the documents were not prepared by the assignee but simply received by them that assignee's employee could not qualify them under the business records exception. *Id*. at 529.

While similar, this case is factually distinguishable from *Lodge*. The sponsoring witness in *Lodge* testified that he was familiar with how these types of documents, the Sales Agreement and the credit agreement, were prepared in the "industry." *Id*. at 527. Eakins, on the other hand, testified that she had been to training at the specific institutions which created these documents and was familiar with the mode of preparation used by each. While the witness in *Lodge* may not have had the level of familiarity regarding the mode of preparation needed to sponsor the documents, Eakins met that threshold.

Exhibits 1, 5, and 6 were admissible as admissions by a party opponent. "A statement by a party-opponent is admissible if it meets the following requirements: (1) a conscious or voluntary acknowledgment by a party-opponent of the existence of certain facts; (2) relevant to the cause of the party offering the admission; and (3) unfavorable to, or inconsistent with, the position now taken by the party-opponent." *In re Mirabile*, 975

S.W.2d 936, 938-39 (Mo. banc 1998). As to Exhibit 1, by signing the application[4], and subsequently using the card, Askew consciously and voluntarily acknowledged that he was agreeing to the terms of the credit agreement. This is relevant as CACH was attempting to collect for charges made per that agreement. It is inconsistent with the position taken by Askew at trial – both that he did not sign the agreement and that he does not owe CACH for the incurred charges. Likewise for Exhibits 5 & 6, by authorizing those checks, Askew tacitly acknowledged his debt, the debt is at issue in this case, and Askew now claims he does not owe that debt.

There was sufficient evidence of trustworthiness of these exhibits. The trial court did not err in allowing their admission.

Standing as the Real Party in Interest

Askew argues that CACH lacked standing to bring this suit because it did not present sufficient evidence that it was the true owner of his account, and therefore not the real party in interest. Askew claims that this evidentiary void leaves him vulnerable to future claims by others who purport to own his debt. In support of standing, CACH offered the testimony of Diana Eakins, employee of Square Two Financial (the parent company of CACH), that CACH had purchased the account from Worldwide who had previously purchased the account from WaMu. CACH also introduced a bill of sale from WaMu to Worldwide, and a bill of sale from Worldwide to CACH.

Standing is a question of law this Court reviews *de novo*. *Missouri State Med. Ass'n v. State*, 256 S.W.3d 85, 87 (Mo. banc 2008).

In a recent case in the Southern District with the same Plaintiff/Respondent and

[4] Askew admitted to signing the application in a Request for Admissions which was admitted at trial without objection.

nearly identical facts, that Court found that credible testimony of a CACH employee as to the purchase and assignment of the account was enough to support standing. *CACH, LLC v. Lawrence*, No. SD30304, slip op. at 8 (Mo. App. S.D. 2010). Additionally a "Bill of Sale" expressly transfers interest in an account and so supports standing by the purchaser. *American First Federal, Inc. v. Battlefield Center, L.P.*, 282 S.W.3d 1, 5 (Mo. App. E.D. 2009). Eakins' testimony and the two bills of sale taken together are sufficient evidence of standing for CACH as the real party in interest.

Judgment on Theory of Account Stated

Even accepting that CACH had standing to bring this suit, Askew claims that there was not substantial and sufficient evidence to support the court's verdict in favor of CACH on a theory of account stated and was deficient for two reasons. First, there was no evidence of prior financial dealings between the parties. Second, the parties never agreed upon the balance.

As this was a court-tried case, this Court reviews the trial court's judgment under *Murphy v. Carron*: the judgment should be affirmed unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

To prevail on a claim of account stated, a debtor must show (1) there was an agreement between parties who had previous financial transactions; (2) the balance claimed is correct and due between the parties; (3) and the debtor made a promise, either express or implied, to pay the agreed-upon balance. *Chisler v. Staats*, 502 S.W.2d 424, 426 (Mo. App. 1973). In his Point Relied On, Appellant claims that CACH failed to prove both the first and the third elements. However, his corresponding Argument

section does not address the first element. "When matters referenced as alleged error in a point relied on are not developed in the argument portion of a brief, they are deemed abandoned." *Saunders-Thalden and Associates, Inc. v. Thomas Berkeley Consulting Engineer, Inc.*, 825 S.W.2d 385, 387 (Mo. App. W.D.1992). Accordingly, this Court will only consider whether CACH presented sufficient evidence of the third element – promise to pay.

When there is no dispute that a debtor-creditor relationship exists, partial payment by debtor without dispute constitutes an implied promise to pay the balance. *Chisler*, 502 S.W.2d at 426. Here, there is no dispute that a relationship existed between Askew and WaMu (as evidenced by the signed credit application) and that CACH was the successor-in-interest to WaMu (as evidenced by the two bills of sale). By tendering a partial payment to Collect America[5], Askew made an implied promised to pay.[6] Additionally, Eakins testified that Askew's wife explicitly agreed to pay the full amount claimed by CACH. There was sufficient evidence for the court to find in favor of CACH on the theory of account-stated.

Askew argues that CACH did not establish the third element of its theory of recovery due to the operation of 15 U.S.C. § 1692g(c). 15 U.S.C. § 1692g(c) of the FDCPA states that: "[t]he failure of a consumer to dispute the validity of a debt *under*

[5] Collect America is the previous name of Square Two Financial, the parent company of CACH.
[6] The payment was actually made by Askew's wife. Askew argues that the actions of his wife did not bind him because there was no evidence that his wife was acting as his agent. While generally there is no agency relationship between spouses simply because they are married, such a relationship may be implied when one spouse cloaks the other with apparent authority to act on his behalf. *Rosehill Gardens, Inc. v. Luttrell*, 67 S.W.3d 641, 647 (Mo. App. W.D. 2002). This is a fact question to be resolved by the trial court. *Missouri Farmers Ass'n, Inc. v. Busse*, 767 S.W.2d 108, 110 (Mo. App. E.D. 1989). It is a reasonable inference that an agency relationship existed between Askew and wife given the fact that he authorized his wife to draw checks on their bank account, that his wife drew such a check to pay the debt, that Askew did not stop payment on the first check, and that Askew testified he does not pay debts he doesn't owe.

this section may not be construed by any court as an admission of liability by the consumer." (Emphasis added). Although the FDCPA applies to this case (contrary to CACH's claim), this section does not assist Askew. This is not a case where the consumer did not take any action and so the Court should not presume that he admitted his liability. Instead, there was an agreement between Askew, through his wife, and Collect America to pay the debt. Additionally, Askew took the action of making a partial payment on the debt. Theses actions take him outside the protection of § 1692g(c).

Judgment on Theory of Breach of Contract

Askew claims that there was not substantial and sufficient evidence to support the court's verdict in favor of CACH on a theory of breach of contract because there was no valid contract between the parties. Specifically, Askew contends there was no "mirror-image" acceptance on the part of WaMu because the "terms" applied to the account were different than those in the credit application signed by Appellant.

The same standard of review articulated in the previous section applies here.

To prevail on a breach of contract claim, claimant must prove: (1) existence and terms of contract, (2) that claimant performed pursuant to the contract, (2) breach of contract by defendant; and (4) damages suffered by claimant. *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 104 (Mo. banc 2010). In his Argument section, Askew only disputes the first element and so that is the only element preserved for review. *Saunders-Thalden*, 825 S.W.2d at 387.

Askew is correct that in order to have a valid contract there must be an offer and a "mirror-image" acceptance. *Pride v. Lewis*, 179 S.W.3d 375, 379 (Mo. App. W.D. 2005). However, it appears from the rest of his argument that he does not understand the

contracting process in regards to credit cards. Askew appears to believe that by signing the credit application, he was making an "offer" to the credit card company that it must accept with mirror-image terms as were included in the application, and any change in those terms results in the parties failing to form a contract. Askew argues that since the credit card agreement was dated four months after he allegedly signed the application, there was no way it could have been a mirror-image acceptance.

In reality, the credit card application was simply a request by Askew for an offer to extend credit to him.[7] WaMu, CACH's predecessor-in-interest, made an offer through its credit card agreement, mailed to Askew, which he accepted by using the card.[8] *Citibank (South Dakota), N.A. v. Wilson*, 160 S.W.3d 810, 813 (Mo. App. W.D. 2005). Askew's use of the card, and thereby acceptance of the terms communicated to him, can be inferred by the high balance on the card and his tacit admission that he owed the debt. *Cach, LLC v. Lawrence*, 2010 WL 4451883, *5 (Mo. App. S.D. 2010).

Askew also asserts that there was no valid contract because there was a change in the terms during the life of his account. WaMu explicitly reserved the right to make changes to the terms of the agreement.[9] This notice is evidenced by the terms provided in the "Balance Category" section of credit card statements admitted at trial. Askew's failure to cancel the account after notice of the change of terms constituted acceptance of those new terms. *Citibank (South Dakota), N.A.*, 160 S.W.3d at 813.

Given all these facts, there was sufficient evidence for the trial court to determine

[7] Askew conceded this point at trial: "This is an application, and the case law is clear that an application is not a contract."
[8] The credit card agreement stated: "Any use of this Account shall constitute acceptance of the terms of this Agreement."
[9] The credit card agreement stated: "After we provide you any notice required by law, we may change any part of this Agreement and add or remove requirements."

the existence of a contract between Askew and CACH (or its predecessors-in-interest). As this was the only element of breach of contract that Appellant preserved for review, we affirm the trial court's judgment on this theory.

Judgment on Theory of Suit on Account

Askew asserts there was insufficient evidence to support judgment for CACH on a theory of Suit on Account/Action on Account. Specifically he argues there was no evidence in the record about the reasonableness of the underlying charges.

> To recover on a suit on account, a plaintiff must show an offer, an acceptance, and consideration between the parties as well as the correctness of the account and the reasonableness of the charges. Such evidence consists of proof that: 1) Defendant requested plaintiff to furnish merchandise or services; 2) plaintiff accepted the offer of the defendant by furnishing such merchandise or services; and 3) the charges were reasonable.

Citibank South Dakota N.A. v. Whiteley, 149 S.W.3d 599, 601 (Mo. App. S.D. 2004) (internal citations omitted). The party bringing a cause of action on account cannot prevail if one or more elements of the cause are not supported by substantial evidence. *Id.*

The record here is void of any evidence as to the reasonableness of the individual charges to Askew's account. As it would be nearly impossible for the purchaser of a defaulted credit card account to prove the reasonableness of the underlying charges, an action on account is unlikely to be a viable theory for recovery in such cases. However, as the court's judgment was well-supported under two separate theories of recovery, its judgment regarding action on account is harmless error and does not require reversal.

FDCPA Violations

Finally, Askew claims the trial court erred in dismissing his claim of FDCPA violations by CACH. The trial court ruled that CACH was not a "debt collector," and

thus not covered by FDCPA. Even if the trial court erred in determining that CACH was not a debt collector, such error was harmless. As discussed *supra*, Askew failed to establish that CACH violated any provisions of the FDCPA in its attempts to collect from him. As CACH did not violate the FDCPA, Askew was not entitled to any recovery. 15 U.S.C. § 1692k.[10]

Conclusion

The trial court did not err in admitting the evidence challenged by Askew. While hearsay, the exhibits were severally admissible either as business records or admissions. Based on the record as a whole, there was sufficient evidence to support the trial court's judgment on either a theory or Account Stated or Breach of Contract. As Askew was unable to establish any violations of the FDCPA by CACH, he was not entitled to any recovery under the Act. The judgment of the trial court is affirmed.

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Kenneth M. Romines, J.

Roy L. Richter, C.J. and David Ash, Sp.J., concur.

[10] Appellant's request for attorney's fees is denied.