



Missouri Court of Appeals

Southern District

Division Two

CACH, LLC,)	
)	
Respondent,)	
)	
vs.)	No. SD30304
)	
EDDIE M. LAWRENCE,)	
)	
Appellant.)	

APPEAL FROM THE CIRCUIT COURT OF LACLEDE COUNTY

Honorable Larry Winfrey, Jr., Associate Circuit Judge

AFFIRMED.

Eddie M. Lawrence ("Appellant") appeals a judgment in favor of CACH, LLC ("CACH") in the amount of \$19,457.99, arising from Appellant's delinquent credit card account ("Account"). We affirm the judgment of the trial court.

Factual and Procedural History

On May 22, 2007, CACH, a debt buyer, purchased from Bank of America ("BOA") a portfolio of debt accounts incurred by credit card usage. Appellant's account was included in that portfolio. At the time of purchase, Appellant's account had an outstanding balance of \$19,457.99.

On May 22, 2009, CACH filed a three-count petition against Appellant. The petition included a breach of contract claim or, in the alternative, an account stated claim or suit on account claim. The petition alleged BOA was CACH's assignor and that BOA entered into an agreement with Appellant, who utilized the credit card and incurred charges resulting in an outstanding balance of \$19,457.99. On June 15, 2009, Appellant answered the petition and filed affirmative defenses, pursuant to section 517.132,¹ alleging in part that CACH did not have standing to sue and was not the real party in interest.

On November 13, 2009, the trial court conducted a bench trial. CACH called one witness, Peter Huber, CACH's custodian of records and authorized agent. The evidence adduced at trial included Mr. Huber's testimony and documentary evidence that was introduced during his testimony.

Mr. Huber testified to the following facts without objection: (1) on May 22, 2007, CACH purchased Appellant's account from the original creditor—BOA; (2) CACH purchased the right to collect the amount owed on the Account; (3) CACH had complete authority to settle the Account; (4) the last payment made on the Account was \$100.00, which was credited to the Account on January 20, 2005; (5) no other payments were made on the Account after its purchase by CACH; and (6) the cardholder agreement, admitted into evidence without objection, included a provision allowing for assignment of the Account. Mr. Huber testified, over objection, that the balance due on Appellant's account purchased by CACH was \$19,457.99, and that the cardholder agreement governed the Account.

During Mr. Huber's testimony, CACH offered into evidence "Plaintiff's Exhibit 1" ("Exhibit 1"). Exhibit 1 was not deposited with this Court and we are only able to glean from the

¹ All references to statutes are to RSMo 2000, unless otherwise indicated.

testimony that the exhibit was a BOA Business Records Affidavit that included eight additional pages of business records. Appellant's counsel objected to the first two pages of Exhibit 1, described in the record as "Affidavit of Claim and Certification of Debt" and "Exhibit A Bill of Sale," but did not object to the remainder of the exhibit. Mr. Huber did not describe the purported Affidavit of Claim and Certification of Debt. However, he did testify the bill of sale was a document prepared by FIA Card Services ("FIA") verifying the sale of accounts from FIA to CACH on May 22, 2007. Three of the remaining pages of Exhibit 1 were described in Mr. Huber's testimony as three monthly credit card account statements for Appellant from BOA. He described the statements as demonstrating Appellant's address was the same address where he was served and that a \$100.00 payment was made January 18, 2005. The final three pages of Exhibit 1 is a cardholder agreement with the BOA logo, which Mr. Huber testified was associated with Appellant's account. The Account statements were admitted into evidence without objection. The trial court took Appellant's objection to the first two pages of Exhibit 1 under advisement, but later overruled the objection.

As described in the transcript, CACH also introduced into evidence "Plaintiff's Exhibit 2" ("Exhibit 2"), which apparently was the same "Exhibit A Bill of Sale" in Exhibit 1, along with a heavily redacted listing of accounts purchased by CACH on May 22, 2007. Mr. Huber testified the unredacted portion of the listing included details of Appellant's account such as the account number, the address, the amount owed, the interest rate, the date the account was charged off, the date the account was placed with CACH, and the name of the original creditor—BOA. Appellant's counsel objected to the admission of Exhibit 2 because there was insufficient foundation for its admission into evidence. The trial court initially took Appellant's objection under advisement but later overruled the objection and admitted Exhibit 2 into evidence.

Next, CACH introduced into evidence "Plaintiff's Exhibit 4" ("Exhibit 4"), Appellant's supplemental responses to interrogatories and request for production of documents, which included Appellant's Central Bank account records. According to the transcript, the Central Bank account records included a transaction on January 18, 2005, in the amount of \$100.00, for a credit card payment. Appellant's counsel objected to the bank records as hearsay, but the trial court overruled Appellant's objection to Exhibit 4 and admitted it into evidence.

Appellant did not present any evidence at trial.

On December 7, 2009, the trial court entered judgment in favor of CACH and against Appellant in the amount of \$19,457.99, plus court costs, but rejected CACH's request for an additional \$13,452.57, in prejudgment interest at a rate of 30.24% per annum. This appeal followed.

In Appellant's first two points relied on, he contends the trial court erred in admitting into evidence the Affidavit of Claim and Certification of Debt and Appellant's Central Bank records because the records were hearsay and an insufficient foundation was laid. Next, Appellant contends the trial court erred in entering judgment for CACH in that CACH lacked standing to sue because CACH failed to establish any rights or legal interest in the cardholder agreement or the Account. Finally, Appellant argues the trial court erred in entering judgment in CACH's favor on each of the three counts alleged in the petition because CACH failed to present competent evidence regarding the Account. CACH contends admission of the records was proper, that CACH provided ample evidence of its legal interest and standing, and the evidence was sufficient to prove breach of contract, account stated, or an account due. The issues for our determination are:

1. Were the Affidavit of Claim and Certification of Debt and Appellant's Central Bank records erroneously admitted into evidence?

2. Did CACH prove it was a real party in interest with standing to sue?
3. Was there sufficient evidence to prove CACH's theories of breach of contract, account stated, or account due?

Alleged Erroneous Admission of Evidence

First, Appellant alleges error in admitting into evidence portions of Exhibits 1 and 2, including the Affidavit of Claim and Certification of Debt and Appellant's Central Bank records, due to CACH's failure to prove sufficient foundation for the business records, and CACH's failure to qualify the records to meet any hearsay exceptions. Unfortunately, Appellant failed to deposit these exhibits² with this Court as required by Rules 81.12(e)³ and 81.16. Although the transcript and the parties' appellate briefs describe aspects of these documents, in the absence of these exhibits, we are unable to determine from the record before us whether these exhibits were erroneously admitted.

"Appellant is responsible for depositing all exhibits that are necessary for the determination of any point relied on." Rule 81.12(e). "Rule 81.12 requires that the record on appeal contain all of the record, proceedings and evidence necessary to the determination of all questions to be presented to the appellate court for decision." *Bridgeman v. Bridgeman*, 63 S.W.3d 686, 692 (Mo.App. E.D. 2002). Additionally, Rule 81.16(a) mandates that "[i]f original exhibits are necessary to the determination of any point relied on, they *shall* be deposited in the appellate court."⁴ (emphasis added).

² During oral argument, inquiry was made as to the location of these exhibits in the record. No subsequent motion was filed requesting the exhibits be included in the record.

³ All references to rules are to the Missouri Rules of Civil Procedure (2009).

⁴ Rule 4 of the Southern District Special Rules provides that "[i]n the event a party other than appellant has custody of an exhibit, the appellant shall request the exhibit in writing from the party having custody" and file a copy of the request with this Court. Appellant did not file a copy of a written request with this Court and there is no other evidence that Appellant made a request.

We are cognizant of our duty to provide a review upon the merits of a case whenever possible. *Murphy v. Aaron's Auto. Products*, 232 S.W.3d 616, 619 (Mo.App. S.D. 2007). "This principle, however, presupposes a record upon which this court can act with some degree of confidence in the reasonableness of its review, without resort to speculation and conjecture as to the controlling facts of the case." *City of St. Clair v. Cash*, 579 S.W.2d 763, 764 (Mo.App. E.D. 1979). For us to attempt to determine on this record, the precise content of the exhibits in question would necessitate prohibited forays into areas of judicial guesswork. Since Appellant failed to comply with Rules 81.12(e) and 81.16 and deposit the exhibits with this Court, we cannot determine if the Affidavit of Claim and Certification of Debt and Appellant's Central Bank records were erroneously admitted into evidence. See *Dennis by & through Dennis v. St. Louis Bd. of Educ.*, 809 S.W.2d 20, 22 (Mo.App. E.D. 1991). Points I and II are denied.

CACH's Standing to Sue

Next, we determine whether CACH was the real party in interest so that it had standing to sue.

Standard of Review

"Because standing is a question of law, review of the issue on appeal is *de novo*." *Missouri State Med. Ass'n v. State*, 256 S.W.3d 85, 87 (Mo. banc 2008).

"Standing to sue . . . exists when a party has an interest in the subject matter of the suit that gives it a right to recovery, if validated' and the 'issue of standing cannot be waived.'" *Landstar Investments II, Inc. v. Spears*, 257 S.W.3d 630, 632 (Mo. App. S.D. 2008) (quoting *Midwestern Health Mgmt., Inc. v. Walker*, 208 S.W.3d 295, 298 (Mo.App. W.D. 2006)). Additionally, proof of an assignment of the account is essential to recovery where a plaintiff sues on an account accruing to another in his own right. *Midwestern Health Mgmt.*, 208 S.W.3d at

298. Whether a party has standing is determined by the particular facts of each case. *F.W. Disposal South, LLC v. St. Louis County*, 168 S.W.3d 607, 611 (Mo.App. E.D. 2005).

Analysis

When an exhibit is not deposited with this Court, "the intendment and content of the exhibits [will be] taken as favorable to the trial court's ruling and [as] unfavorable to the appellant." *Brown v. Brown*, 14 S.W.3d 704, 708 n.5 (Mo.App. S.D. 2000). Accordingly, we consider first of all the information we are able to glean from the transcript and legal file. In addition to the record, we consider the exhibits not deposited with this Court as favorable to the judgment and unfavorable to Appellant's position.

Although the nature of CACH's evidence was not without question, sufficient evidence was adduced at trial to show CACH was the real party in interest to support its standing to sue. Mr. Huber testified as to CACH's interest and to the assignment of the Account from BOA. Without objection, Mr. Huber testified that on May 22, 2007, CACH purchased Appellant's account from the original creditor—BOA, for the amount owed on Appellant's account. He further testified, without objection, that as purchaser of the Account, CACH purchased the right to collect on the Account and CACH had complete authority to settle the Account. *See* § 425.300 (allowing collection agencies to take an assignment of claims in their own names for the purposes of billing, collection and bringing suit).

Moreover, we conclude the trial court's finding as to CACH's interest in the Account was supported by CACH's Exhibits 1 and 2 since Appellant failed to deposit these exhibits with this Court in accordance with Rules 81.12(e) and 81.16. *See Brown*, 14 S.W.3d at 708 n.5. Exhibit 2 is described in the record as a bill of sale and a redacted attachment to the bill of sale listing Appellant's account as one of those purchased by CACH on May 22, 2007.

Although this Court is unable to examine any exhibits admitted as evidence, the trial court had the opportunity to evaluate these exhibits. Rule 73.01(c) directs us to conclude that "[a]ll fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached."⁵ Since we are unable to evaluate the exhibits, Appellant is essentially asking this Court to condemn the trial court's judgment based largely upon judicial guesswork. We decline to do so. Accordingly, we conclude the evidence adduced at trial, including Mr. Huber's unopposed testimony and Exhibits 1 and 2, established CACH's interest in the subject matter of the suit as assignee of Appellant's account and demonstrated CACH was the real party in interest with standing to sue for Appellant's account. Point III is denied.

Evidence to Support Judgment

Appellant's final three points contend the trial court erred in entering judgment in CACH's favor on each of the three counts alleged in the petition because CACH failed to present competent evidence regarding the Account. A finding of sufficient evidence on any one of these counts would support the judgment. Since we find there was sufficient evidence to prove each element of the breach-of-contract claim, we need only discuss this point.

Standard of Review

Rule 84.13(d) governs appellate review for this court-tried case. The judgment must be affirmed unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). "A judgment is presumed correct, and the appellant has the burden of proving it erroneous." *Ewanchuk v. Mitchell*, 154 S.W.3d 476, 478 (Mo.App. S.D. 2005). Substantial

⁵ No party requested formal findings of fact or conclusions of law as permitted by Rule 73.01. Therefore, all fact issues are considered as having been found in accordance with the judgment.

evidence means "competent evidence from which the trial court could reasonably decide the case." *Bauer v. Bauer*, 38 S.W.3d 449, 455 (Mo.App. W.D. 2001). We must view "the evidence and all reasonable inferences in the light most favorable to the judgment and disregard all contrary evidence and inferences." *Ewanchuk*, 154 S.W.3d at 478. Credibility of the witnesses and the weight to be given to their testimony is for the trial court, which is free to believe none, part, or all of the testimony of any witness. *Id.* This Court defers to the trial judge's superior opportunity to assess the witnesses' credibility. *Harris v. Lynch*, 940 S.W.2d 42, 45 (Mo.App. E.D. 1997).

Analysis

The elements of a cause of action for breach of contract are: (1) mutual agreement between parties capable of contracting; (2) mutual obligations arising out of the agreement; (3) valid consideration; (4) part performance by one party; and (5) damages resulting from the breach of contract. *Leo Journagan Const. Co., Inc. v. City Utilities of Springfield, Mo.*, 116 S.W.3d 711, 717 (Mo.App. S.D. 2003).

Again, Appellant's failure to deposit Exhibits 1, 2, and 4 with this Court result in the content of these exhibits as being viewed favorable to the trial court's ruling and as unfavorable to Appellant. *See Brown*, 14 S.W.3d at 708 n.5.

We conclude the trial court was persuaded CACH adduced sufficient evidence of an offer and acceptance of the terms and conditions of the BOA credit card agreement between Appellant and CACH's predecessor in interest—BOA. The trial court had the cardholder agreement, admitted without objection as part of Exhibit 1, as a part of the evidence before it.

Acceptance of an offer need not be spoken or written; rather, an offer may be accepted by the offeree's conduct or failure to act. *Citibank (South Dakota), N.A. v. Wilson*, 160 S.W.3d

810 (Mo.App. W.D. 2005). Mr. Huber testified that Appellant accepted the offer of the card member agreement by virtue of using the credit card. Further, he described Appellant's BOA account statements from October 2004, December 2004, and January 2005, admitted into evidence as Exhibit 1, showed an outstanding balance on Appellant's account. It is reasonable to infer from the substantial balance on the Account that this resulted from Appellant's use of the card according to the terms of the cardholder agreement. This supports acceptance of an offer by Appellant's conduct.

Evidence of consideration by both parties was also presented. We glean from the record that the cardholder agreement contained in Exhibit 1 reflects the exchange of promises that were made whereby Appellant made a promise to pay BOA in exchange for credit to purchase goods and services. Mr. Huber explained the BOA account statements admitted in Exhibit 1 list the variable interest rates on the Account and Appellant's outstanding balance reflects the credit provided to Appellant.

Finally, CACH presented evidence demonstrating breach and damages. According to Mr. Huber's testimony, the three monthly account statements demonstrated an outstanding balance on the Account. Additionally, he testified that at the time CACH bought the Account from BOA, there was an outstanding balance of \$19,457.99. Again, we view the omitted exhibits as favorable to the trial court's finding. Thus, we find it reasonable to infer that these facts demonstrate Appellant's failure to pay as agreed, as well as the amount of damages.

As mentioned before, the record before us is incomplete in that none of the exhibits admitted into evidence were deposited with this Court. Because of this, we are unable to examine any exhibit in relation to the judgment of the trial court. The trial court, however, did have the benefit of examining the exhibits and hearing Mr. Huber's testimony. Appellant is

essentially asking this Court to condemn the trial court's judgment based solely on speculation and conjecture. In this situation, we necessarily give due deference to the trial court not only because of its superior position to judge the credibility of the testimony, but because the trial court was also able to evaluate and assess the exhibits. We decline to second-guess the trial court's judgment based upon a deficient record.

In viewing this evidence, and the inferences drawn from it in the light most favorable to the judgment, we conclude there was sufficient evidence to prove each element of the breach-of-contract claim. Appellant failed to prove the judgment was erroneous and there is no showing that judgment is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. Point IV is denied.

Since this finding is dispositive as to Appellant's claim, it is unnecessary to rule on Appellant's remaining points. The trial court's judgment is affirmed.

William W. Francis, Jr., Judge

SCOTT, C.J. - Concur.

BATES, J. – Concur.

Opinion Filed: October 29, 2010

Appellant Attorney: David C. Replogle, of Marshfield, Missouri

Respondent's Attorney: Christopher K. Durso, of Saint Louis, Missouri

Division II