

72301-4

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No. 72301-4-1

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

American Express Bank, F.S.B

Plaintiff and Respondent,

v.

Jerry Hoang,

Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON

COUNTY OF KING

No. 13-2-14864-1 KNT

RESPONDENT'S REPLY TO APPELLANT'S OPENING BRIEF

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ARGUMENT

I. STATEMENT OF THE CASE

On or about March 27, 2013, Respondent American Express Bank, FSB (“Amex”) filed a collection action against Appellant Jerry Hoang (“Hoang”) in the Washington Superior Court in King County. Clerk’s Papers p. 1-4 (hereinafter CP). On or about April 29, 2013 Hoang filed his answer. CP p. 7-11. Discovery was exchanged and Amex filed a motion for summary judgment and supporting affidavit on or about May 13, 2014. Supplemental CP p. ___ (Sub #61). The Court granted the same on July 8, 2014. CP p. 182-83. In response, Hoang filed a notice of appeal on August 4, 2014. CP p. 195-99.

II. STATEMENT OF THE FACTS

This matter is a simple credit card collection case. Hoang defaulted on his American Express credit card account. Amex filed suit to collect the unpaid balances. CP p. 1-4. Hoang filed an answer. CP p. 7-11. Hoang propounded a second set of interrogatories, admissions, and request for production on April 8, 2014, and the same was responded to timely by Amex on April 30, 2014. CP p. 117-35. Counsel for Amex received a letter from Hoang on May 7, 2014 demanding revised responses to his second set of discovery, although Hoang’s letter did not clarify why he

believed the response and objections were insufficient. CP p. 138-39. Without attempting to meet and confer regarding the sufficiency of the responses as required by CR 26(i), Hoang filed a motion for sanctions and motion to compel discovery. CP p. 111-39. The Court denied Hoang's motion on June 6, 2014. CP p. 173-75.

On or about May 13, 2014 Amex proceeded with a motion for summary judgment. In support of its motion, Amex offered into evidence the declaration of Linda Salas, Assistant Custodian of Records for American Express Bank, FSB with supporting exhibits, the declaration of Plaintiff's attorney, and account payments. Supplemental CP p. ____ (Sub #61, date 05-13-2014).

Hoang opposed the motion. CP p. 140-72. To support his opposition, Hoang submitted the affidavit of William McCaffrey, Consultant for Housing Mortgage Consultants Inc. CP p. 82-85.

On July 8, 2014, the Court granted Amex's motion for summary judgment and entered judgment for Amex. CP p. 182-83. On August 4, 2014 Hoang filed this appeal.

III. STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and the moving party is entitled to judgment

as a matter of law. Wash.Super.Ct.Civ.R 56, Wash.Super.Ct.Civ.R 56(c); Del Guzzi Constr. Co. v. Global Northwest Ltd., 105 Wn.2d 878, 882, 719 P.2d 120 (1986), Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). Amex's motion and supporting declaration were sufficient to meet its burden of proof and Hoang failed to offer evidence to rebut Amex's assertions. Thus, no triable issues of material fact were in dispute and summary judgment was appropriate.

IV. DISCUSSION

On appeal, Hoang assigns two errors to the trial court 1) the order granting Amex's motion for summary judgment and 2) the order denying Hoang's motion to compel discovery and motion for sanctions. Hoang's Opening Brief p. 9. As discussed below, these arguments lack merit and the Court properly denied Hoang's motion to compel and motion for sanctions, and granted Amex's motion for summary judgment.

A. American Express Bank, FSB met its burden of proof establishing no triable issues of material facts in dispute, and that it was entitled to summary judgment.

Amex provided sufficiently detailed and itemized proof of Defendant's use of his American Express Bank, FSB credit card. The supporting affidavit attached to Amex's summary judgment motion was made based on the personal knowledge and professional experience of Linda Salas, Assistant Custodian of Records for American Express Bank, FSB.

Supplemental CP p. ____ (Sub #61, date 05-13-2014). In her capacity as Assistant Custodian of Records, Salas has gained personal knowledge of the business and record keeping practices of Amex. Supplemental CP p. ____ (Sub #61, date 05-13-2014). In addition, Salas has access to the books and records maintained in the ordinary course of business relating to Hoang's account. Supplemental CP p. ____ (Sub #61, date 05-13-2014). Salas' knowledge and experience qualifies her to authenticate the business records she personally reviewed in connection with her signed affidavit, and provides competent testimony relating to Hoang's indebtedness: including the opening of the account, use of the account, and failure to pay. Further, the business records attached provide a detailed accounting of how the amounts due and owing have been calculated. The Court granted AMEX's motion on July 8, 2014. CP p. 182-83.

B. Jerry Hoang failed to raise a triable issue of material fact.

Based on the evidence submitted in Amex's motion, pursuant to CR 56(E), the burden of proof shifted to Hoang to raise a genuine issue of material fact. See Seven Gables Corp v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13; 721 P. 2d 1, 7(1986). In support of his opposition, Hoang offered to the Court the affidavit of William McCaffrey, Consultant for Housing Mortgage Consultants Inc. CP p. 82-85. On its face, the McCaffrey affidavit purports to be that of an expert witness. The

qualifications of an expert witness to testify on a particular subject are determined by the trial court within its sound discretion. Wilson v. Wright, 52 Wn.2d 805, 812, 329 P.2d 461 (1958). If the reasons for admitting or excluding the opinion evidence are “fairly debatable” the trial court’s exercise of discretion will not be reversed on appeal. Hill v. C.& E. Constr. Co., 59 Wn.2d 743, 746, 370 P.2d 255 (1962).

McCaffrey’s affidavit fails to set forth any specific credentials that would qualify him as an expert in the area of securities, or provide any sort of methodology or publically accepted process by which he determined Hoang’s account is securitized. McCaffrey simply states that he uses unspecified “software” that allows him access to documents filed with the Securities and Exchange Commission. CP p. 84. McCaffrey also fails to specify what duties he has performed in the banking industry, or what experience he has had (past or present) that would qualify him an expert on securities, nor has he set forth facts which would evidence his personal knowledge about Defendant account. The only thing McCaffrey has to say about his professional credentials is that “[His] experience in the Banking industry encompasses over 30 years of employment for federally insured institutions,” with no details regarding his professional history. As such, it is fairly debatable (if not certain) that Mr. McCaffrey is

not qualified to offer an expert opinion, and the trial court properly disregarded his testimony in its discretion.

Further, the affidavit fails to set forth specific facts which rebut that Hoang opened an account with Amex, used the credit card account, failed to make payments on the account, and that Amex was damaged after the default for the unpaid balance. Under *Layne v. Hyde* “a non moving party in a summary judgment may not rely on speculation, augmentative assertions that unresolved factual issues remain, or on affidavits considered at face value. After the moving party submits adequate affidavits, the moving party must set forth specific facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue of material fact.” Layne v. Hyde, 54 Wn. App. 125, 130; 773 P.2d 83, 86 (1989) citing Meyer v. UW, 105 Wn.2d 847, 852, 719 P.2d 98 (1986); Allard v. Board of Regents, 25 Wn. App. 243, 247; 606 P.2d 280 (1980). McCaffery’s affidavit provides none of this. CP p. 82-85.

C. The Court properly denied Hoang’s motion to compel discovery and motion for sanctions.

CR26(i) requires that parties meet and confer in an effort to resolve discovery disputes before submitting them to the Court. The plain language of the rule requires that parties meet in person or via telephone. While Hoang did send an ambiguous letter demanding regarding Amex’s

discovery responses, it was merely a demand for Amex to “completely and fully answer to [sic] every questions [sic] asked...” CP p. 139. Hoang’s demand letter did not fulfill the requirements of CR 26(i), and thus it was proper for the Court to deny his motion to compel and motion for sanctions on procedural grounds.

Furthermore, Hoang’s letter did not clarify any of his discovery requests or address any of Amex’s objections. For example: Hoang addresses Amex’s responses to Hoang’s first and second interrogatories with “the alleged debt has been charged off, your answered (sic) is invaliding (sic) not acceptable and you attempt to commit fraud upon the Court.” CP p. 138. Hoang’s letter goes on to address the remainder of Amex’s responses in a similar and nonsensical manner and fails to establish how the materials and information he is seeking is material to his case. Amex provided Hoang with copies of relevant account records including the account statements, payments, and a copy of the governing terms and conditions. Amex’s discovery responses were not evasive and were answered insofar as they were understood by Amex.

In addition to denying his motion to compel, the Court also properly denied Hoang’s motion for sanctions pursuant to CR 37. Hoang was not entitled to sanctions under CR 37 as Amex’s responses were not evasive. Instead, they were simply the product of Hoang asking nonsensical

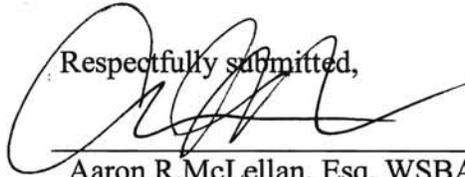
questions and seeking information and documents that were irrelevant and/or subject to privilege.

V. CONCLUSION

For the reasons discussed above, Respondent requests that this honorable court affirm the judgment of the trial court and award Respondent its costs on appeal.

Dated: ~~DEC 12 2014~~

Respectfully submitted,



Aaron R. McLellan, Esq, WSBA 45072
Attorney for Respondent

DECLARATION OF MAILING

I hereby certify, under penalty of perjury of the laws of the State of Washington, that a copy of the forgoing was provided to the Appellant, Jerry Hoang, by placing in the mail in Milwaukie, Oregon, a true and correct copy, addressed to the below address, postage prepaid, on this date: DEC 1 2 2014.

Jerry Hoang
PO Box 98032
Des Moines WA 98198

Dated: DEC 1 2 2014



Aaron R. McLellan, Esq, WSBA 45072
Attorney for Respondent