

FILED

APR 16 2012

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DIVISION III
STATE OF WASHINGTON
By _____

NO. 30596-1-III

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STATE OF WASHINGTON

DISCOVER BANK, ISSUER OF THE
DISCOVER CARD

Respondent/Appellee,

v.

ALAINE GARDNER, ET AL.,

Appellants.

APPELLANTS' BRIEF

DAVID B. TRUJILLO
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I. ASSIGNMENTS OF ERROR

A. First, the trial court erred by considering the alleged exhibit records (CP-37-203) attached to the Plaintiff Discover Bank's third-party affidavit of Natasha Szczygiel from another company called DB Servicing Corporation, which Discover Bank filed in support of Plaintiff's motion for summary judgment (CP-31-34) which affidavit was fatally deficient on its face and out of compliance with the governing statute and basic rules of admissibility for ever considering any such records.

B. Second, with regard to the sufficiency of the Plaintiff's affidavit for any proper admission of the disputed exhibit records (CP-37-203) into evidence, the trial court erred by not construing all the facial deficiencies of the Plaintiff's affidavit in the light most favorable to the Defendants Gardner, pursuant to CR 56.

C. Third, the trial court erred by granting summary judgment in favor of the Plaintiff despite the Plaintiff's failure to properly establish the absence of the genuine issues of material fact, given the genuine issues of material fact raised on the face of Plaintiff's own affidavit in support of the Plaintiff's motion, pursuant to CR 56.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the Affidavit of Natasha Szczygiel properly identify and authenticate without any hearsay all of the exhibit documentation attached thereto and used against the Defendants Gardner at the summary judgment hearing of January 4th, 2012, and was this in full compliance with CR 56(e) and RCW 5.45.020 / ER 803(6), ER 804, ER 805, ER 901(a) and ER 901(b)(1), or at the very least is there any genuine issue of material fact thereon?

III. STATEMENT OF THE CASE

A. OVERVIEW OF BACKGROUND FACTS

Plaintiff Discover Bank filed suit against the

Defendants in Yakima County Superior Court, under Cause Number 11-2-02332-9, on July 1st, 2011. (CP-1-5). Defendants Gardner filed their answer disputing the allegations in the Plaintiff's complaint on August 18^{th,k} 2011. (CP-15-30).

On October 14th, 2011, Plaintiff Discover Bank filed a motion for summary judgment (CP-31-34). In alleged support for Plaintiff's motion for summary judgment, the Plaintiff simultaneously filed the Affidavit of Natasha Szczygiel with numerous alleged exhibit records attached thereto. (CP-35-203). This affidavit at issue merely states in relevant part, without ever actually referencing a single specific document attached thereto:

I make this affidavit on the basis of my personal knowledge and a review of the computer records maintained by Discover with respect to the account at issue. All such records are maintained in the regular course of business, at or near the time of the events recorded. I am a Designated Agent and a Custodian of the records and can testify as to their authenticity.

. . . The Undersigned is informed and believes, and therefore alleges, that . . . Defendant opened a Discover Credit Card. Attached hereto are true and correct copies of the Application and Cardmember agreement which govern the credit card account at issue. Also attached are periodic statements which were provided to the defendant monthly along with copies of payments . . .

(CP-35-36).

The Affidavit of Natasha Szczygiel only makes the generic argumentative and conclusory statement that the affidavit is made on her personal knowledge. However, the key portions of her declaration listed above and in dispute for this appeal are all clearly made only on mere information and belief at best, as she clearly states at CP 35, line 25. Ms. Szczygiel, an employee of the DB Servicing Corporation readily admits that her affidavit is merely based on "a review of the records maintained by Discover with respect to the account at issue." However, Ms. Szczygiel never once claims that she personally

himself maintained those records or that she herself ever personally had any participation or involvement therein whatsoever. Furthermore, Ms. Szczygiel never stated what she meant by the word "maintained" and most certainly never used the words "drafted" or "created" or "authored" or "filled out" or "handled" or "directed" or "ordered" or the like, as a true witness would have and could have stated but did not.

At the very best, Ms. Szczygiel could only be asserting that some unidentified person at her company (DB Servicing Corporation) handed her records from some unidentified person at another company (Discover) and told her hearsay on hearsay about all the alleged "facts" for her to assert and sign for in her declaration and for referencing the alleged exhibits. Ms. Szczygiel never even stated when she joined the DB Servicing Corporation or whether this was before or after the alleged creation of the alleged account and the documents

at issue. As such, Ms. Szczygiel at best simply parroting hearsay from what someone else told her to say to the Court from whoever the real witness was, if any.

Furthermore, since Ms. Szczygiel clearly failed or refused to state under oath that she, personally, herself ever worked at Discover and was the one who actually authored, drafted, created, filled out, ordered, directed, and or initially handled and was in direct charge of any of the documents that the Plaintiff simply attached to the back of her declaration and had her sign off on, Ms. Szczygiel has absolutely no basis for alleging any understanding and beliefs thereon. Ms. Szczygiel has no factual basis for asserting any valid belief that the attached records were ever really created in the regular course of business, let alone at or near the alleged time of the alleged events recorded by someone therein.

Finally, Ms. Szczygiel's statement that she is "a Designated Agent and a Custodian of the records" establishes nothing without giving any definition of that job title. As far as anyone knows from Ms. Szczygiel's very limited affidavit, a perfectly reasonable inference that must be given to the Defendants Gardner based on what little was stated and especially because of what was NOT stated in the affidavit, is that her entire affidavit is hearsay on hearsay or worse.

At best, it is fair to say that it appears that some unidentified person at the Plaintiff Discover company simply handed boxes of files to some unidentified person at DB Serving Corporation, who then handed them all to Ms. Szczygiel and said there you go, you are now the custodian of these files, now please sign hundreds robo-statements all day long claiming that all the documents in the boxes handed to you are what we told you they are based on what they told us they are.

Plaintiff Discover then used the Affidavit of Ms. Szczygiel as the foundation for Plaintiff's motion for summary judgment at the January 4th, 2012 hearing.

Well before the hearing, on November 2nd, 2011, Defendants Gardner filed a 23-page opposition to the Plaintiff's motion at CP-206-240. This included Exhibit A thereto, consisting of the Sworn Declaration of Mr. Tom Gardner denying ever having any contract, any debt, and any obligation to Plaintiff at CP-232. This also included Exhibit B Plaintiff Discover's Sworn Discovery answers identifying at CP-239 a different records custodian for the records at issue, a Mr. James Ball, not Ms. Szczygiel, who actually notarized Mr. Ball's CR 26(g) certification thereof at CP-240.

At CP-210, lines 20-21, Defendants Gardner challenged the admissibility of Plaintiff Discover's evidence submitted for its summary

judgment motion. Defendants Gardner further objected to admissibility, based on lack of foundation and authenticity (CP-216, lines 9-13). Defendants Gardner pointed out how Plaintiff Discover's submission of evidence was nothing more than ". . . here is the testimony of my employee after they looked at what I printed." CP-219, lines 9-10.

Defendants Gardner also pointed out that "Discover [itself] fails to authenticate the alleged billing statements it offers into evidence. They are therefore void of evidentiary value for summary judgment purposes pursuant to ER 901 & CR 56(E)." CP-222, lines 9-10.

The Defendants Gardner pointed out numerous objections as follows: "The billing statements Discover provides are hearsay pursuant to ER 801(c) . . . They lack the proper foundation pursuant to CR 56(E) and do not qualify as 'business records'

under the business records exemption to the hearsay rule. . . . " CP-223, lines 7-10. Defendants Gardner also pointed out: "There is no testimony regarding the origin of these documents or the mode of their preparation." CP-223, lines 15-16; "There is no foundational testimony regarding these billing statements from a custodian or other qualified witness. James Ball is the custodian of records (See Exhibit B) and he provides no testimony regarding the billing statement Discover relies on for summary judgment." CP-223, line 21 to CP-224, line 2.

Defendants Gardner also made further objections and stated as follows: "The final amount claimed due on the billing statements is bald hearsay." CP-224, line 10-11; "Based on the above, the billing statements Discover offers for summary judgment should be stricken from evidence. (See Motion to Strike)." CP-224, lines 14-15; "Natasha L. Szczygiel is not employed by Discover and has no

personal knowledge regarding defendant's alleged account. Her Affidavit is not signed under the penalty of perjury. Her boilerplate Affidavit does not comply with CR 56(E) and ER 602." CP-226, lines 12-14;

Defendants Gardner did not just object, but also stated: "Defendant moves the Court to strike the Affidavit of Natasha L. Szczygiel for the same reasons stated above (See Motion to Strike). In the absence of this Affidavit, Discover has not met its burden of proof for summary judgment according to CR 56(e)." CP-227, lines 1-3; "WHEREFORE, based on the above, defendants move the Court to deny Plaintiff's motion for summary judgment and pray that this case be dismissed with prejudice. Defendant also move for summary judgment in their favor and further relief as the Court may deem just and proper." CP-227, lines 19-22.

In fact, Defendants Gardner not only moved to

strike the Affidavit and all the exhibits attached thereto, but also moved to dismiss the Plaintiff's entire case (CP-10-14). Specifically, Plaintiff moved to strike the alleged credit card application (CP-244-245), the alleged card member agreement allegedly formed thereon (CP-204-205), all the alleged billing statements (CP-241-243), and the entire Affidavit of Natasha Szczygiel (CP-246-247).

On November 14th, 2011, Plaintiff Discovery timely filed a reply to Defendant's opposition to summary Judgment attempting to respond to the Defendants Gardner's opposition, objections, and motions to strike. CP-255-282. The November 16th, 2011 summary judgment hearing was re-noted to January 4th, 2012. CP-308, lines 3-9.

On January 4th, 2012, notwithstanding the Defendants' objections to the admissibility and sufficiency of the Plaintiff's affidavit and alleged evidence attached thereto, and Defendants'

own cross-motion for summary judgment dismissal of the Plaintiff's case, the Court granted Plaintiff's motion for summary judgment without any oral argument and solely based on the pleadings on file at the time of the hearing. CP-308, lines 13-16; CP-305-306. Defendants Gardner then filed a timely notice of appeal on February 2nd, 2012. (CP-309-313).

IV. ARGUMENT

A. THE STANDARD OF REVIEW

1. CR 56(e) requires that a court consider ONLY ADMISSIBLE evidence when ruling on a motion for summary judgment. Cotton v. Kronenberg, 111 Wash. App. 258, 44 P.2d 878 (2002). Here, the Defendants Gardner assert that the trial Court's conclusions on the admissibility and sufficiency of evidence submitted with the Plaintiff's hearsay Affidavit based merely on information and belief, and any and all the proper inferences thereon was an error of law since any and all Affidavits verified on belief only and not on actual personal

knowledge do not comply with CR 56(e). Klossner v. San Juan County, 93 Wn.2d 42, 45, 605 P.2d 330 (1980) (citing to Stringfellow v. Stringfellow, 53 Wn.2d 639, 335 P.2d 825 (1959)).

Any ruling based on an error of law is an abuse of discretion. King v. Olympic Pipe Line Co., 104 Wn. App. 338, 355, 16 P.3d 45 (2000) (further citations omitted). See Marriage of Schwietzer, 81 Wash. App. 589, 595, 915 P.2d 575 (1996) (Trial Court committed Reversible Error using parol evidence impermissibly since no authority permits the use of extrinsic evidence to delete or contradict the existing written terms in a contract that are inconsistent with the extrinsic evidence proffered to get around them).

Here, the Plaintiff's attempted submission of alleged facts allegedly creating the absence of a genuine issue of fact, also necessarily based on assuming and inferring everything in favor of the

moving party plaintiff, were sufficiently objected to by Defendants Gardner as being inadmissible in the first place. In any event, the proper standard of review is De Novo review for summary judgments and/or judgments on the pleadings. Davis v. Baugh Industrial Contractors, 159 Wn.2d 413 (2007) (citing to Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). Accordingly, given that all aspects of this appeal involve issues of law, all the assignments of error should be reviewed de novo.

B. THE ANALYTICAL FRAMEWORK

1. For all of the assignments of error, the issue overall is simply whether the Plaintiff Discover's use of an Affidavit from an employee from another company reviewing Discover's alleged records all submitted by the Plaintiff for Plaintiff's motion for summary judgment, ever met the requirements of CR 56(e), RCW 5.45.020 / ER 803(6), ER 804, ER 805, ER 901(a) and ER 901(b)(1),

or at the very least whether there is any genuine issue of material fact thereon.

No averment in an affidavit may be based on hearsay. Charbonneau v. Wilbur Ellis Co., 9 Wash. App. 474, 477, 512 P.2d 1126 (1973). The substance of the affidavit must ACTUALLY **DEMONSTRATE** that the affiant has actual personal knowledge, and a mere averment by the affiant that he or she is competent and has personal knowledge is insufficient. Antonio v. Barnes, 464 F.2d 584, 585 (4th Cir. 1972). Allegations in an affidavit must be based on more than "information and belief". Stringfellow v. Stringfellow, 53 Wn.2d 639, 641, 335 P.2d 825 (1959).

First of all, ER 901 requires authentication or identification of evidence before it is admissible. In order for any evidence in this case to be admitted, ER 901(b)(1) requires that the Plaintiff must produce a person with actual

personal knowledge of the key facts the Plaintiff wants to get into evidence. ER 901 governs the foundation needed for the admissibility of any evidence on the Plaintiff's claims in this case, whether by testimony at trial or by sworn declaration in any pre-trial hearing.

ER 901(a) requires, as a condition precedent to admissibility, IDENTIFICATION and AUTHENTICATION. ER 901(b)(1) further clarifies that for admissibility, all documents must be authenticated and then identified by a person with "knowledge". According to the legal treatise on this rule from The Law of Evidence in Washington, 2d Ed. (1993), Section 901-9 and 901-10:

Testimony of a witness with **personal [not hearsay] knowledge** is the most often used method of authentication and includes "a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis."

Id. (Citing FRE Advisory Committee's Note) (emphasis added). Interestingly, enough, all we know from Discover's affidavit of Natasha Szczygiel is that she is at best the present custodian of the alleged records, but no evidence was ever offered to establish an actual chain of custody from who first actually produced and generated the documents to when and from whom Ms. Szczygiel finally acquired and heard about all the documents second hand.

In Amtruck Factors v. International Forest Prods., 59 Wash. App. 8, 795 P.2d 742 (1990), a chart recalculating price mark-ups on product invoices was properly excluded from evidence. The exhibit at issue therein was prepared and presented in court by an employee of the Plaintiff who did not actually participate in the mark-up determinations or agreements. Thus the witness was properly held to be NOT competent because the witness could only provide hearsay at best. Therefore, the document itself was thereby held to

lack foundation under ER 901.

In the case at bar, Plaintiff is most likely asserting that the documents attached to Ms. Szczygiel's Affidavit are automatically admissible "business records" under ER 803(6) in order to avoid ER 804 (hearsay) and ER 805 (hearsay on hearsay) as well. However, such an attempt fails as explained herein.

ER 803(6), is reserved in Washington State, but is the same thing as has been adopted by our legislature at RCW 5.45.020 which governs the admissibility of the business records as evidence in the exact same manner. RCW 5.45.020 states:

A record of an act, condition or event, shall in so far as relevant, be competent evidence **IF** the custodian or other **QUALIFIED WITNESS TESTIFIES TO ITS IDENTITY AND MODE OF ITS PREPARATION, AND IF IT WAS MADE IN THE REGULAR COURSE OF BUSINESS, AT OR NEAR THE TIME OF THE ACT, CONDITION OR EVENT,** and if, in the opinion of the court, the sources of information, method and time of

preparation were such as to justify its admission.

RCW 5.45.020 (emphasis added).

However, in this case, the Plaintiff's witness merely claims to be a current custodian, but failed to establish when his position began and whether it was before or after the records were created, never mind that Ms. Szczygiel has no personal knowledge of the actual creation or timing of the creation of any of the records that were attached to her declaration. Furthermore, she has never stated that she was ALWAYS the custodian and or was and still is the original custodian.

No records custodian is competent to identify and authenticate something just handed to them second hand from the real witness at a different company. Just giving the hearsay declarant the title of "custodian" changes nothing. A truly competent custodian is one whose affidavit actually DEMONSTRATES them to be competent to personally

give first hand information on the documents in their possession from the inception of the documents to the inquiry date. Otherwise, Plaintiff needs more than one witness to complete the chain of custody. Plaintiff has no one from Discover to talk about a single Discover document.

Moreover, aside from HEARSAY, a second hand custodian has no actual personal knowledge about a document's actual facts which must be established under RCW 5.45.020, including: (1) the actual identity and authenticity of each document, AND (2) its mode of preparation and creation, and (3) to verify that each of those records were actually made in the regular course of business, AND (4) that each was actually made at or near the time of the alleged act, condition or event.

Plaintiff Discover never properly submitted any affidavits sufficient to meet the Plaintiff's initial burden, and as such Defendants had no

burden shifted to them to submit anything at all because the Plaintiff's motion never got off the ground to start with. Kahn v. Salerno, 90 Wash. App. 110, 951 P.2d 321 (1998) (The party moving for summary judgment has the initial burden of establishing its case and showing there is no dispute as to any issue of material fact thereon, THEN the burden shift to the non-moving party). In the case at bar, the Defendant properly objected because the Plaintiff didn't even establish anything on its case because of the lack of any proper witnesses, and nothing further was required of the defense.

Without a competent witness who can personally authenticate the records rather than just claim an after the fact title of "custodian" designation while remaining silent on true witness status, the Plaintiff's case has a fatal, statute of limitations problem. In the absence of a signed written contract, which the Plaintiff was never

able to properly introduce in its motion for summary judgment, the time for commencing a lawsuit thereon is three years pursuant to RCW 4.16.080(3) which states:

The following actions shall be commenced within three years:

. . . an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument . . .

RCW 4.16.080(3).

In this case, there is no written contract with the Defendants, which even mentions their name at all, and Ms. Szczygiel could not state that she had personally negotiated any contract with the Defendants either. Defendants' signature is nowhere to be found. If the Plaintiff really has a credit card account, there is no admissible evidence about who actually opened it, who agreed to it, who used it, or who paid on it. On a just as likely basis, there is a completely reasonable inference or indication that this could be a

fraudulent account.

Plaintiff is again at best just arguing that there are hearsay indications reflecting or commemorating an oral agreement or acquiescence and alleged usage such that some type of enforceable obligation may have arose with someone. However, any claim for breach thereon as against Defendants had to be brought in less than 3 years and it was not. As such, the Plaintiff's claim should have been dismissed.

V. ATTORNEY'S FEES AND COSTS

RCW 4.84.330 actually REQUIRES that reasonable attorney fees be awarded to the prevailing party even for a defendant who proves the plaintiff's contract is unenforceable. Herzog Aluminum, Inc. v. Gen. Am. Window Corp., 39 Wash. App. 188, 191, 692 P.2d 867 (1984). The Court may not deny the fee request outright.

The court has no discretion to decide WHETHER fees should be allowed at all or not; Rather, it has discretion only in setting the proper AMOUNT to be allowed and shifted to the other side for that award. Kofmehl v. Steelman, 80 Wn. App. 279, 286, 908 P.2d 391 (1996); Farm Credit Bank v. Tucker, 62 Wn. App. 196, 207, 813 P.2d 619, review denied, 118 Wn.2d 1001 (1991) (indicating no discretion is allowed as to whether fees are permissible, but only as to the amount to be allowed). Costs are also recoverable for the ultimately prevailing party pursuant to RCW 4.84.010.

Accordingly, Defendants Gardner respectfully request that reasonable attorney's fees and costs which are incurred by the Defendants both below and on appeal, be awarded to the Defendants if they are the prevailing party, at conclusion of this case, pursuant to both RCW 4.84.010 and RCW 4.84.330.

VI. CONCLUSION

For the reasons stated above, Defendants Gardner respectfully request that this court find that Plaintiff's affidavit of Natasha Szczygiel had deficiencies on its face which raised genuine issues of material fact over both the admissibility and the legal effect of the exhibit documents attached thereto, such that no burden ever shifted to the Defendants to do anything, and summary judgment was improper. Accordingly, this Court should reverse and remand for trial.

Respectfully submitted this 14th day of April, 2012.

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