2015 IL App (5th) 140295-U

NO. 5-14-0295

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CAPITAL ONE BANK (USA), N.A., Successor in Interest to Capital One Bank,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiff-Appellee,	)	
v.	)	No. 13-AR-131
THOMAS E. DeMOND,	)	Honorable Heinz M. Rudolf,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's judgment is affirmed, as there was sufficient evidence to support the jury's verdict, and the circuit court did not abuse its discretion in admitting several business records.

¶ 2 Capital One Bank (USA), N.A., as successor in interest to Capital One Bank, brought an action in St. Clair County against Thomas DeMond (Thomas), claiming he owed $11,566.96 on a credit card account. The case ultimately went to jury trial. At the close of evidence, Thomas filed a motion for directed verdict, which was denied. A jury then found in favor of Capital One for the full amount sought. Thomas then filed a motion for judgment notwithstanding the verdict and, alternatively, for a new trial, which

was also denied. Thomas now appeals each of these motions. For the reasons that follow, we affirm the decision of the circuit court.

¶ 3 BACKGROUND

¶ 4 Sometime on or after March 20, 2003, Capital One issued a credit card account (the Account) in the name of Thomas and his then-wife Lori DeMond (Lori). As of November 9, 2009, the Account was fully paid. From February through April 2011, several large charges were made to the Account, but no payment was ever made. Capital One ultimately filed a complaint in St. Clair County against Thomas and Lori on February 5, 2013, claiming they owed $11,566.96 on the Account. After learning that Thomas and Lori had divorced and that Lori was now in Florida, Capital One voluntarily dismissed its complaint against her without prejudice.

¶ 5 Capital One filed its amended complaint against Thomas on March 11, 2014. In its amended complaint, Capital One alleges that Thomas and Lori opened the Account, that they were in default of its terms for failure to make payment, that $11,566.96 was owed on the Account, and that demand for the balance due had been made to the DeMonds, but no payment had been made. Thomas filed his answer on March 13, 2014, denying all of Capital One's allegations except that Capital One demanded payment.

¶ 6 The case was tried to a jury on April 23, 2014. Demechiel Satterwhite, a legal specialist with Capital One Services, was the only witness. Satterwhite testified regarding Capital One's records for the Account. Capital One introduced numerous records via her testimony, including Exhibit 2 (a Capital One credit card application with the alleged signatures of Thomas and Lori DeMond), Exhibit 8 (credit card statements for

the Account covering the period after it had been fully paid), and Exhibit 10 (terms and conditions for the Account issued during 2010). Thomas objected to each of these. He claimed Exhibit 2 was not a business record, Exhibit 8 lacked foundation to be a business record and was not an original writing, and that there was no foundation for Exhibit 10. All were admitted over objection.

¶ 7 At the close of Satterwhite's testimony, both sides rested. Thomas moved for a directed verdict, alleging that there was insufficient evidence to show that he had used the Account after it had been fully paid. The trial court denied this motion. The jury returned its verdict in favor of Capital One on April 23, 2014. Thomas then timely filed a posttrial motion for judgment notwithstanding the verdict and, alternatively, for a new trial, which was denied on June 19, 2014. Thomas then filed his notice of appeal on June 25, 2014.

¶ 8 ANALYSIS

¶ 9 On appeal, Thomas argues that the trial court erred in denying his motion for a directed verdict at the close of evidence and in denying his motion for judgment notwithstanding the verdict because Satterwhite provided no evidence that Thomas used the Account after it had been fully paid. In the alternative, Thomas argues that the trial court should have granted his motion for a new trial because the trial court abused its discretion by admitting Exhibits 2, 8, and 10. We consider each argument in turn.

¶ 10 " 'Judgment notwithstanding the verdict should not be entered unless the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand.' " *McClure v.*

Owens Corning Fiberglas Corp., 188 Ill. 2d 102, 132 (1999) (quoting *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 109 (1997)). "Judgment notwithstanding the verdict is not appropriate if 'reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented.' " *Id.* (quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995)). Because it is the jury's duty to weigh the evidence in reaching a verdict, "[a] trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions." *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). Similarly "the appellate court should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way." *Id.* at 452-53. Decisions on motions for judgments notwithstanding the verdict are reviewed *de novo*. *McClure*, 188 Ill. 2d at 132.

¶ 11 Thomas argues that credit card issuance is not a contract. Instead, every time a cardholder uses a credit card, a separate contract is created between the cardholder and the credit card company. See *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 4. Satterwhite could verify that charges were made on the Account after it had been fully paid, but she could not definitively verify that Thomas made the charges. Therefore, Thomas argues, there is no evidence that he formed a contract with Capital One to pay any charges after the Account had been fully paid.

¶ 12 Thomas's argument hinges on whether or not the jury could infer from the evidence admitted that Thomas had made the charges, or had at least agreed to be liable for the charges. Capital One, through Satterwhite, introduced a Capital One credit card

application allegedly signed by Thomas and Lori DeMond that led to the creation of the Account (Exhibit 2). Capital One then introduced several years' worth of statements for the Account covering the time period from April 20, 2003, to August 25, 2009 (Exhibit 3). These statements had been mailed to an address associated with the DeMonds and listed charges made to the Account. Some of these charges were created by purchase checks issued by Capital One to customers to use to make purchases or pay bills (Exhibits 4-7). These purchase checks were allegedly signed by Thomas. Capital One also introduced statements indicating that all charges on the Account, including those from the purchase checks, were paid off by November 9, 2009 (Exhibit 8). A sample payment check that appears to have been issued by the DeMonds from their personal account was also admitted (Exhibit 9). That payment check was used to pay off the Account as of November 9, 2009. The Exhibit 8 statements also showed charges incurred from February 26, 2011, to April 24, 2013. According to the Exhibit 8 statements, no payment had been made on the Account in that time frame. Further, the Exhibit 8 statements indicated that they had been sent to the same address as the Exhibit 3 statements. The Exhibit 8 statements do not indicate that Thomas raised any dispute as to the charges listed in the Exhibit 8 statements, and Thomas did not allege that he had disputed these charges. Lastly, Capital One introduced the customer agreement for the Account that was in effect at the time it brought suit (Exhibit 10). This agreement stated that the accountholders "promise individually and jointly to pay [Capital One] all amounts due on your Account" and that "[i]f you let someone else use your Card, you are responsible for all transactions that person makes."

¶ 13 Based upon this evidence, a reasonable mind could find, as the jury did, that Thomas or another person authorized by Thomas to use the Account incurred the disputed charges and that Thomas is now liable for them. Both at trial and in his brief, Thomas argues that Capital One cannot hold him accountable for these charges because it cannot produce individual receipts or otherwise show that Thomas did any specific credit card transaction charged. While certainly evidence from individual retailers regarding each charge would be strong evidence that Thomas made these charges, such evidence is not the only means to prove that Thomas authorized these charges. Capital One produced sufficient evidence that a reasonable mind could support the jury's verdict. The trial court's denial of Thomas's motion for directed verdict and motion for a new trial are affirmed.

¶ 14 In the alternative, Thomas argues that he is entitled to a new trial because the circuit court abused its discretion in admitting Exhibits 2, 8, and 10. He argues that none of these exhibits were admitted with a proper foundation. Specifically, he argues that Exhibit 2 is not a business record and that its original was not produced, that Exhibit 8 was admitted without the original in the form of signed sales slips from merchants, and that Exhibit 10 was admitted despite a lack of evidence showing that Thomas used the Account after Exhibit 10's terms were in effect. Because these exhibits were highly prejudicial, Thomas now seeks a new trial.

¶ 15 "A trial court's decision regarding the presentation of evidence to a jury is reviewed under an abuse of discretion standard." *Troyan v. Reyes*, 367 Ill. App. 3d 729, 732 (2006). "Any writing or record, *** made as a memorandum or record of any act,

transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter." Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992). This rule "requires only that the party tendering the record satisfy the foundation requirement by demonstrating that the record was made in the regular course of a business at or near the time of the transaction." *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 789 (2002). Further, "[a]ll other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility." Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992). The creator of a business record need not testify to establish its foundation, as the testimony of a records custodian or any other person who is familiar with the business and its mode of operation may instead establish the record's foundation. *Troyan*, 367 Ill. App. 3d at 733. Once a business record's foundation is established, it should be introduced and "should only be barred from admission if [it is] irrelevant, prejudicial or for some other legally appropriate reason." *Id*.

¶ 16 "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required," except as provided elsewhere by statute or by the Illinois Rules of Evidence. Ill. R. Evid. 1002 (eff. Jan. 1, 2011). Under the Illinois Rules of Evidence, " 'a duplicate of a document should be admissible in Illinois to the same extent as an original unless a genuine issue is raised as to the authenticity of the original or unless it would be unfair to admit the duplicate as an original under the circumstances

present in the case where the document was offered into evidence.' " *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 30 (quoting *People v. Bowman*, 95 Ill. App. 3d 1137, 1143 (1981)); see also Ill. R. Evid. 1003 (eff. Jan. 1, 2011) (codifying the *Bowman* standard). With regard to all three exhibits, Thomas does not raise any question as to the authenticity of the original documents or argue that admitting the duplicates in lieu of the originals was in any way unfair beyond the blanket denial of his answer to the amended complaint. Since Thomas failed to properly challenge the duplicates as required under the Illinois Rules of Evidence, we cannot say that the circuit court abused its discretion by admitting duplicates in lieu of the originals.

¶ 17 At trial, and in his brief, Thomas argues that Exhibit 2, the credit card application that led to the creation of the account, is not a business record of Capital One. Instead, he claims, it is a record of the party that signed it. According to Thomas, Capital One merely filed the document after it was sent to it, and such filing does not suffice to make it their own business record. While Thomas cites several cases in his argument, none support his contention. In *Benford v. Chicago Transit Authority*, 9 Ill. App. 3d 875 (1973), an employer was unable to admit an employee's medical records prepared by a separate physician as a business record merely because it was in the employer's files. In *Apa v. National Bank of Commerce*, 374 Ill. App. 3d 1082 (2007), the First District held that a plaintiff could not introduce his own bank statements under the business records exception to show damages because he failed to show that they were records made in the regular course of business at or near the time of the occurrence. The court in *Gulino v.*

Economy Fire & Casualty Co., 2012 IL App (1st) 102429, rejected a consumer from admitting documents from Home Depot for the same reason. These cases, chiefly *Apa* and *Gulino*, stress that a record can be admitted as a business record if it is made in the regular course of business at or near the time of the occurrence.

¶ 18 Exhibit 2 is a form credit card application that Capital One alleges was signed and returned by the DeMonds. Satterwhite testified that the exhibit was kept in the normal course of business at Capital One and that it had been received in substantially the same shape. She also testified that the Account was created shortly thereafter. Based upon evidence adduced at trial, Exhibit 2 was made in the regular course of Capital One's business at or near the time the Account was created. Therefore, the circuit court did not abuse its discretion in admitting Exhibit 2 as a business record.

¶ 19 Thomas also argues that Exhibit 8, a collection of credit card statements detailing the unpaid charges on the Account, should not have been admitted. Thomas argues that Capital One has not produced the sales slips or other documentation signed by the credit card holder at the time of each transaction. Thomas repeatedly refers to these slips as "the original documents" and "original records," which mischaracterizes the evidence adduced at trial as to how credit card charges are processed. Satterwhite explained at trial that the credit card slips are kept by the individual businesses where each charge is generated. Capital One only seeks these records if a credit card holder disputes the validity of a charge. Capital One does not use these slips for its own record keeping. It instead uses electronic information generated at the time each credit card transaction occurs. This electronic record is kept in the ordinary course of Capital One's business

and is used to generate monthly statements such as those in Exhibit 8. The credit card slips are not an "original" record for Capital One's business purposes and have no bearing on the admissibility of Exhibit 8. Based on the evidence adduced at trial, the circuit court did not abuse its discretion in admitting Exhibit 8 as a business record.

¶ 20 Lastly, Thomas argues that Exhibit 10, the customer agreement/terms and conditions for the Account as of February 2010, should not have been admitted because there is no evidence that Thomas used the Account after it had been fully paid. This argument repeats the points used in his motion for a directed verdict and in his motion for judgment notwithstanding the verdict, and the same rebuttals detailed above apply here. Further, Satterwhite testified that Exhibit 10 was generated within the normal course of business and mailed to Thomas in his February 2010 statement. Based on the evidence adduced at trial, the circuit court did not abuse its discretion in admitting Exhibit 10. Because the circuit court properly exercised its discretion in admitting Exhibits 2, 8, and 10, Thomas's motion for a new trial was properly denied.

¶ 21 CONCLUSION

¶ 22 For the reasons stated, we affirm the judgment of the circuit court of St. Clair County.

¶ 23 Affirmed.