

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

FILED
NOV 17 2016
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

_____))
Plaintiff,)
)
VS.)
)
_____))
Defendant.)

CAUSE NO. _____
DIVISION 28

JUDGMENT AND ORDER

JURISDICTION AND PROCEDURAL HISTORY

This matter was before the Court on Plaintiff's Petition On A Credit Card, filed pursuant to Section 517 RSMO.

On or about February 9, 2016, Plaintiff filed their Petition alleging that Plaintiff issued a credit card to Defendant for which Defendant agreed to pay Plaintiff for all purchases made, services rendered and cash advanced to or for Defendant to obtain goods, services and advances on credit. Further, Plaintiff alleged that Defendant failed to timely repay Plaintiff, pursuant to the credit card agreement. On or about February 24, 2016, Defendant filed her Affirmatives Defenses, asserting: interest, fees of any type and attorney fees are not recoverable, as they are not provided for by contract or law; Plaintiff's claim is barred by the Statute of Limitations (Section 516.120(1)); and Plaintiff failed to state a claim for which relief can be granted.

On or about August 9, 2016, this matter was first called for trial, but continued to September, 8, 2016. On or about September 8, 2016, this matter was called for trial. Plaintiff appeared by and through the firm of Cohen McNeile & Pappas, P.C. and counsel Edward Gilkerson. Defendant appeared by and through the firm of Boevingloh & Pliakos and counsel George Pliakos.

Prior to trial, Defendant withdrew the Statute of Limitations affirmative defense.

Further, prior to trial, Defendant orally moved in limine to exclude any all matters not raised in Plaintiff's Petition during trial of this matter, and objected to any variance from the pleadings pursuant to Rule 55.33 (2). Specifically, Defendant moved in limine to exclude Plaintiff's Exhibit 1, the business records, objecting to, inter alia, the Affidavit of the Custodian of Records. The Court denied Plaintiff's oral motion in limine.

Pursuant to Rule 73.01(c), defense counsel requested Findings of Fact and Conclusions of Law.

At trial, evidence was adduced. Neither party called a witness. This matter was taken under submission by the Court.

The issues before the Court are 1) whether or not Plaintiff presented documentary evidence in support of its claim via a business records affidavit and 2) whether or not Plaintiff's Exhibit 1 based on the business records exception to the hearsay rule is admissible.

APPLICABLE LAW

Section 490.680 RSMo outlines the business records exception to the hearsay rule:

A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the 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 admission.

Section 490.692.1 RSMo delineates when business records or copies thereof are admissible as evidence on an affidavit of the custodian:

Any records or copies of records reproduced in the ordinary course of business by any photographic, microfilm, microcard, miniature photographic, optical disk imaging, or other process which accurately reproduces or forms a durable medium for so reproducing the original that would be admissible under sections 490.660 to 490.690 shall be admissible as a business record, subject to other substantive or procedural objections, in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of sections 490.660 to 490.690, that the records attached to the affidavit were kept as required by section 490.680.

FINDINGS OF FACTS

The Court having evaluated the evidence presented, considered the objections of counsel, weighed the credibility of the evidence presented, and after review of the record and weighed the credibility of the admitted evidence makes the following factual determinations.

1. In support of its claim at trial, Plaintiff offered a "BUSINESS RECORDS AFFIDAVIT PURSUANT TO R.S.MO. Section 490.692". Said affidavit was executed by a [REDACTED], an employee and custodian of records for [REDACTED] Inc. (hereinafter "DP"), successor by merger to DB Servicing Corporation, the servicing affiliate for [REDACTED]."
2. The business records affidavit states "that attached to the affidavit are 306 pages all of records from the account of [REDACTED] ACCOUNT NUMBER xxxxxxxxxxxx [REDACTED]. These 306 pages of records are kept by DP in the regular course of business, and it was the regular course of business of DP for an employee or representative of DP with knowledge of the act, event, condition opinion or diagnosis recorded to make

the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis. The records attached hereto are the original or duplicates of the original.”

3. Although the body of the business records affidavit mirrors the language of Section 409.692.1 (i.e. These 306 pages of records are kept by DP in the regular course of business. . .”) the Court finds the language “successor by merger to DB Servicing Corporation” of particular note.
4. The Court finds that the “successor by merger to DB Servicing Corporation” language renders the business record affidavit, testimonial in nature, stating a legal conclusion that [REDACTED] is the successor in interest to DB Servicing Corporation.
5. The Court finds that the affidavit does not state facts sufficient to show that [REDACTED] Inc., is in fact a successor party in interest. “Successor by merger” is a legal conclusion that does not meet Plaintiff’s burden of proving the merger. Gemini Capital Group, LLC v. Tripp, 445 S.W.3d 583 (Mo.S.D.App.2013).
6. Further, the Court finds that Plaintiff failed to present evidence at trial of any written documentation, servicing agreements or facts to support that [REDACTED] Inc. was in fact the successor in interest to DB Servicing. Moreover, no evidence was offered by Plaintiff regarding the agreement, or any terms and conditions in place at the time Defendant’s account was opened in 2008.
7. Contained in Plaintiff’s Exhibit 1 were 11 pages of what appeared to be copies of computer generated payment records. (Defendant’s Exhibit B). These documents indicate that they were not prepared or maintained by [REDACTED] Inc., but rather by yet another entity “DFS Services”.
8. Missouri law is clear on this issue: “. . . a document that is prepared by one business cannot qualify for the business records exception merely based on another business’s records custodian testifying that it appears in the files of the business that did not create the record. State v. Anderson, 413 S.W.2d 131, 165 (Mo.1967); Zundel v. Bommarito, 778 S.W.2d 964, 958 (Mo.App. 1989) (The business records exception to the hearsay rule applies only to documents generated by the business itself. . . Where the status of the evidence indicates it was prepared elsewhere and was merely received and held in a file but was not made in the ordinary course of the holder’s business is inadmissible and not within a business record exception to the hearsay rule under Section 490.680 RSMO. 1986). A custodian of records cannot meet the requirement of Section 490.680 by simply serving as ‘conduit to the flow of records’ and not testifying to the mode of preparation of the records in question. CACH v. Askew, 358 S.W.3d 58 (Mo. 2012).
9. In the present case, it appears that the documents [REDACTED] Inc. rely on to make its case, were prepared elsewhere (either by DB Servicing Corporation or DFS Services), received by [REDACTED] Inc., and held in [REDACTED] Inc.’s file, but were not made in the its ordinary course of business. Therefore, the Court finds Plaintiff’s evidence

inadmissible, and not within a business record exception to the hearsay rule under Section 490.680 RSMo. CACH v. Askew.

10. Further, the affidavit of the custodian of record offered at trial merely operates to show some flow of records to [REDACTED] Inc., and does not testify to the original mode of preparation of the records in question.
11. As to damages, it is necessary that Plaintiff show not only that it suffered damages, but must also show the amount of the damages with sufficient certainty. Tnemec Co. v. North Kansas City Development Co., 290 S.W.2d 169 (Mo. 1956).
12. The Court notes that at trial, Plaintiff sought damages in the amount of \$13,195.39. However, Defendant's Exhibit B reflects a balance owing and due of only \$12,940.62. The Court finds that Plaintiff failed to offer any credible evidence to support its monetary damage claim. Upon review of Plaintiff Exhibit 1, said Exhibit 1 is void of any reference to how the damage amount was calculated, the actual interest rate applied or the amount of fees requested. The Plaintiff failed to show the amount of its damages with any certainty. Therefore, for the Court to resort to its own calculation of Plaintiff's damages would amount to pure speculation, which the Court can not do.

CONCLUSION OF LAW

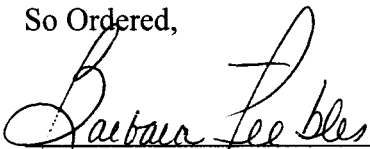
Based on the above, the Court finds that Plaintiff failed to present sufficient documentary evidence in support of its claim via a business records affidavit, and Plaintiff's Exhibit 1 based on the business records exception to the hearsay rule is inadmissible, pursuant to Section 490.680 RSMo and 490.692.1 RSMo.

ORDER

WHEREFORE, IT IS ORDERED ADJUDGED AND DECREED THAT:

The Court finds and enters its Judgment in favor of Defendant [REDACTED]. Cost against Plaintiff [REDACTED]

So Ordered,



Barbara T. Peebles, Judge, 36220

11-17-16
Date

Cc: Ed Gilkerson, Cohen McNeile & Pappas PC, Attorney for Plaintiff
George Pliakos, Boevingloh & Pliakos, Attorney for Defendant