In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00034-CV

TERRY THANPHIROM, APPELLANT

V.

WELLS FARGO BANK, N.A., APPELLEE

On Appeal from the 352nd District Court
Tarrant County, Texas
Trial Court No. 352-307547-19, Honorable Josh Burgess, Presiding

July 10, 2020

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and DOSS, JJ.

This is an appeal from a judgment awarding recovery upon a $6,730.86 credit card debt. Terry Thanphirom owed the debt to Wells Fargo. The latter sued to recover the amount and moved for summary judgment.[1] Thanphirom answered, moved for summary judgment as well, and objected to the evidence proffered by Wells. The trial court granted Wells's motion after overruling the evidentiary objections uttered by Thanphirom. The issues or complaints he now urges concern the propriety of both decisions, and they are

[1] The causes of action sounded in breached contract and account stated.

presented in a rather overlapping, interlocking (and sometimes conclusory) manner. Thus, we will address them as they appear in his brief and upon doing so, affirm the summary judgment.[2]

First, Thanphirom asserts that the trial court erred in denying his motion for summary judgment because Wells could not "produce a witness with personal knowledge of the facts" to prove the requisite agreement or its breach. He supports his argument through the use of a deposition. The deponent was allegedly an employee of Wells named Smith. Furthermore, the deposition was taken as part of separate suits initiated by Wells against other debtors. Apparently, Wells had Smith execute an affidavit in those distinct proceedings. Through the instrument, she offered evidence purporting to establish the debt and the debtors' liability therefor in those suits. Her personal knowledge of the matters about which she attested, though, came into question via her deposition.

Here, Wells did not have Smith execute an affidavit to authenticate business records and otherwise support its claim against Thanphirom. It had another employee, Little, do that. Despite this difference in identity between debtors, suits, and affiants, Thanphirom attempts to use Smith's deposition as evidence purportedly illustrating that Little also lacked sufficient personal knowledge to authenticate records pertaining to and establish the claim against him.[3]

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[2] Because this appeal was transferred from the Second Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this court. *See* TEX. R. APP. P. 41.3.

[3] Interestingly, Thanphirom referred to portions of Smith's deposition to attack Wells's motion for summary judgment but objected when Wells offered and the trial court accepted the entire document as summary judgment evidence. To the extent he complains here of the trial court's decision, he failed to illustrate how it harmed him. So, even if admitting the entire deposition were error, he failed to satisfy his appellate burden to establish that the error was reversible. *In re Marriage of Scott*, 117 S.W.3d 580, 584

Unlike Smith, Little was not deposed. Nor did Thanphirom cite us to or proffer discovery from her or others about her duties at Wells and the extent of her knowledge of the matters to which she attested. So, unlike the cases wherein Smith appeared, we have no evidence discrediting her attestation about being "fully competent in all respects to make this Affidavit [and] having personal knowledge of all facts stated herein." Nor do we have evidence discrediting her representation that the facts recited in her affidavit were "true and correct." Given these circumstances, it appears that Thanphirom would simply have us infer that because one Wells employee may not have personal knowledge of matters underlying a lawsuit, then all Wells employees *ipso facto* lack such knowledge in every other suit. Such an inference is as sensible as suggesting that because one Wells employee is not female, then all Wells employees must not be female. We opt not to engage in such nonsense. It is illogical to infer that because Smith purportedly lacked personal knowledge of what she spoke then Little must also lack such knowledge.

Thanphirom next argues that Wells had no evidence of an agreement between he and the bank, its breach, and the sum due from him. Yet, such an agreement was appended to Little's affidavit.[4] Furthermore, his signature appeared on the agreement.[5] Through it, he 1) agreed to "accept the terms of this Agreement by using or activating

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(Tex. App.—Amarillo 2003, no pet.) (holding that the appellant has the burden to prove error was harmful). Indeed, the failure to address harm here is especially problematic given that the trial court deemed the deposition to be of "minimal evidentiary value."

[4] To the extent that Thanphirom suggests the agreement cannot be the one he executed because the date appearing at its end differs from the date he signed it, he cites us nothing of record suggesting that the mark "08/17" is a date. It was preceded by the word "Core" and appeared along with other characters, such as "M-119975" and "LS 9075." In other words, its status as a date is nothing more than speculation, and speculation is not evidence. *Fieldtech Avionics & Instruments, Inc. v. Component Control.Com, Inc.*, 262 S.W.3d 813, 833 (Tex. App.—Fort Worth 2008, no pet.) (stating that speculation is not evidence).

[5] Thanphirom never denied via verified pleading or through discovery responses that the signature was his. *See* TEX. R. CIV. P. 93(7), (8) (requiring the denial of the execution or endorsement of a written instrument upon which a pleading or suit is founded to be verified).

[the] Account" and 2) "promise[d] to pay the total amount of the Purchases, Cash Advances, and balance transfers, plus all Interest, fees and other amounts that" he owed. Other portions of the document itemized the fees which would be assessed and the manner in which interest would be calculated, which were matters he agreed to by using or activating the account. That he used the account, and thereby accepted the terms of the agreement, was illustrated through copies of monthly billing statements, which statements also accompanied Little's affidavit. They illustrated numerous charges made against the account. So too did they indicate he made several payments on the outstanding balances throughout the account's life.

Of course, Thanphirom attacks Little's affidavit and questions whether the allegations therein and documents attached thereto constitute probative evidence. He begins by alleging that the affiant failed to show she was "competent" and had sufficient "personal knowledge" to authenticate the business records upon which Wells relied. She was a "loan adjustor," not the custodian of records, which allegedly rendered her incompetent in some respect. Much of his argument, though, is founded upon comments uttered by Smith in her deposition. And as we said earlier, Smith purportedly lacked personal knowledge about how the records were developed or gathered is not imputable to Little.

Moreover, to render business records admissible under Texas Rule of Evidence 803(6), it must be shown "by the testimony of the custodian or another qualified witness or by an affidavit or unsworn declaration that complies with Rule 902(10)" that 1) the "record was made at or near the time by—or from information transmitted by—someone with knowledge," 2) the record was "kept in the course of a regularly conducted business

activity" and 3) making of the record was "a regular practice of that activity." TEX. R. EVID. 803(6)(A)–(D). What Thanphirom questions is Little's personal knowledge regarding the conditions which a custodian or qualified witness must establish. That is, nothing "shows how . . . Little knows anything about how any of the documents are originated or are accurate."

Rule 803(6) does not mandate that the witness be the person who created the record or have personal knowledge of the record's contents; rather, it requires the witness to have personal knowledge about the manner in which the records were prepared. *See Abrego v. Harvest Credit Mgt. VII, LLC,* No. 13-19-00026-CV, 2010 Tex. App. LEXIS 3117, at *7 (Tex. App.—Corpus Christi Apr. 29, 2010, no pet.) (mem. op.) (so holding); *Martinez v. Midland Credit Mgt*, 250 S.W.3d 481, 485 (Tex. App.—El Paso 2008, no pet.) (so holding). Little met that requirement. She attested to "having personal knowledge of all facts stated" in her affidavit. Those facts included her statement that the records in question were "made at or near the time by, or from information provided or transmitted by, persons with knowledge of the activity and transactions reflected in such records, and are kept in the course of business activity conducted regularly by Wells Fargo." That utterance addresses both the manner in which the records were prepared and her knowledge of same.

And, that those records were made "by, or from information provided . . . by[] persons with knowledge of the activity and transactions reflected" in them dispels his complaint touching upon her knowledge about the accuracy of the records. Again, the affiant need not have personal knowledge of the record's contents. Nor need he or she personally know that the content of those records is true. Instead, Rule 803(6) simply

dictates that the records be made by, or from information transmitted by, someone with knowledge. TEX. R. EVID. 803(6)(A). It says nothing about that someone with knowledge being the affiant. Here, Little satisfied the requirement by attesting that the records underlying authentication were made "by, or from information provided . . . by[] persons with knowledge of the activity and transactions reflected" in them.

A litany of other complaints also was directed at Little's affidavit. For instance, he believed "paragraph 5" of the document was objectionable "as lacking personal knowledge, constituting hearsay, being conclusory, and lacking foundation when [she] stated that 'Thanphirom for value received, made, executed and delivered to Plaintiff a Wells Fargo Consumer Credit Card Customer Agreement and Disclosure Statement . . . Evidencing a Line of Credit.'" Yet, substantive analysis did not accompany this argument; such was required by rule of appellate procedure. Thus, the assertion was waived. *See Standerfer v. State,* No. 07-19-00257-CV, 2020 Tex. App. LEXIS 4355, at *3 (Tex. App.—Amarillo June 11, 2020) (mem. op., not designated for publication) (so describing the result of having failed to support an argument with substantive analysis). Nonetheless, we also note that the documents authenticated by Little and rendered admissible under Rule 803(6) (i.e., the application, account agreement, and monthly billing records) supplied the particular data Thanphirom deemed missing. They supplement and add factual substance to her statement that he executed the agreement establishing his liability for payment.

The same is true of his complaints about Little's attestations "lacking personal knowledge, constituting hearsay, being conclusory and lacking foundation" when stating that: 1) he "was the owner and holder of a Wells Fargo account that enabled Defendant

to charge items to the Wells Fargo account which forms the basis of this suit"; 2) "the Agreement included language wherein by either signing, using or accepting the plastic card(s) issued to the Defendant by Wells Fargo, Defendant accepted the terms and conditions of the Agreement"; 3) "Terry Thanphirom opened the account with Wells Fargo, and with the first use thereafter, agreed and accepted the terms and conditions within the Agreement"; 4) the "Agreement provided for Defendant to make payments to Plaintiff of all principal and interest"; 5) "Defendant defaulted under the terms of the Agreement, by failing and refusing to make payments as required under the terms of the Agreement"; 6) the account was accelerated; 7) Wells sued to obtain judgment for the entire, unpaid principal balance of the Account and any other amounts due and owing per the terms of the Account; 8) Wells "delivered said Account to its attorneys for collection" and "agreed to pay reasonable attorney's fees"; and 9) the amount due and owing from Thanphirom was $6,730.86. They too lacked substantive analysis and, therefore, were waived or were otherwise established through documentation appended to Little's affidavit and her own statements. As illustrated in her affidavit, she reviewed the documents to garner personal knowledge about Thanphirom's liability for the credit card debt and the amount he owed.

We further observe that a representation within an affidavit about the amount due is not conclusory if accompanied by other matter. Such other matter includes evidence of the indebtedness (such as the promissory note) coupled with a statement by one with personal knowledge that the borrower defaulted, failed to pay the debt after demand, and owed a specified amount. *See Granbury Hosp., Inc. v. State Bank of Tex.*, No. 05-16-01509-CV, 2018 Tex. App. LEXIS 6558, at *12–13 (Tex. App.—Dallas Aug. 20, 2018, pet. denied) (mem. op.) (so observing and holding that the statement regarding the

amount due from the debtor was not conclusory because it was made by the bank's vice president and was accompanied by the note showing the total indebtedness, the monthly payments, and interest rate). Here, Little, a "loan adjustor," described how, as part of her job, she had access to records maintained by Wells for the purpose of servicing its credit card portfolio. She not only authenticated the exhibits attached to her affidavit but also incorporated them into the document. As previously mentioned, those exhibits included the credit card agreement and monthly billing statements. The latter illustrated the monthly charges made to the credit card issued Thanphirom, the monthly outstanding balances, and the monthly payments he made.[6] The amount due from him was also a "fact" she mentioned in her affidavit. Such information likens to that provided the trial and appellate courts in *Granbury*. Given that, her utterance about $6,730.86 being due from Thanphirom was and is not a conclusory statement.

Next we address the allegation that the trial court erred in granting summary judgment in favor of Wells because fact issues "remain as to the amount due, as there was no credible summary judgment proof that establishes a sum certain." The foregoing evidence from Little belies that contention. She attested to him owing Wells the sum certain of $6,730.86. Furthermore, the sum was due from him given his execution of the "Credit Card Application and Agreement" appended to and authenticated by her affidavit. That agreement held what Thanphirom admitted was "his electronic signature as recorded on a device at the bank."[7] And, through the accord, "agree[d] to be bound by the terms and conditions of the Customer Agreement and Disclosure Statement," which

[6] Thanphirom admitted that all his payments were credited to the account.

[7] Because Thanphirom did not substantively brief whether a creditor must give the debtor a copy of the agreement before the obligations therein become enforceable, we need not address that matter.

agreement was subject to being "changed at any time."[8] That Little so appended the authenticated "Credit Card Application and Agreement" as well as the customer agreement and disclosure statement to her affidavit also rebuts his appellate contention that Wells failed to prove the existence of an agreement with Wells to pay the outstanding balance.

We further note Thanphirom's admission to owning a credit card having the last four numbers 7622. Those numbers happened to be the same ones assigned the credit card account depicted in the numerous monthly statements also appended to Little's affidavit. Those statements depicted both charges and payments made. So too did Thanphirom admit that all his payments were credited to the account assigned 7622, which in turn further proves his assumption of the obligations imposed under the customer agreement and disclosure statement. Conduct says much, as does his conduct in making repeated payments to reduce the balance in account number 7622. Unless someone is a volunteer or operating under mistake, it is reasonable to infer that the person would not pay a debt he does not owe. Thanphirom did and does not suggest he made his payments as a volunteer or under some mistake.

Moreover, the final statement issued in account 7622 and involving the billing period of "03/08/2019 to 04/06/2019" revealed an outstanding balance of $6,730.86. The latter happened to be the very amount due Wells, according to Little. So, this and all the foregoing evidence mentioned illustrates Thanphirom's execution of a contract obligating him to pay the outstanding credit card balance of $6,730.86.

[8] A "Consumer Credit Card Customer Agreement & Disclosure Statement" accompanied the "Credit Card Application and Agreement" upon which appeared Thanphirom's signature.

Finally, we address the contention that "Wells . . . offered no evidence in support of attorney's fees." According to Thanphirom, the affidavit tendered by Wells's trial counsel "did not contain any facts to support the request for appellate attorney's fees" and the "reasonableness of attorney's fees must be supported by expert testimony." So, "[b]ecause the award of appellate attorney's fees is unsupported by evidence, it must be reversed," he concludes. We disagree.

The trial court awarded Wells $800 in fees through summary judgment, a $5,000.00 fee conditioned upon a successful appeal to the Court of Appeals, and another $5,000.00 fee "conditioned upon success on a review at the Supreme Court." Those were the amounts sought by counsel for Wells. To justify them he attested, via affidavit, to 1) having "practiced in the area of commercial litigation and other litigation in the Dallas and surrounding area since 2009," 2) being "familiar with the reasonable, usual and customary attorney's fees charged in Tarrant County in litigation similar to this suit," 3) charging Wells an hourly rate of $150 for his services, 4) developing the opinion that the services rendered on behalf of Wells were reasonable and necessary based upon his consideration of the "factors set forth in Rule 1.04(b) of Article 10, Section 9 of the State Bar Rules," and 5) developing an opinion that "$800.00 is reasonable and necessary in this case through obtaining Summary Judgment, and that an additional $5,000.00 is reasonable and necessary in the event of an appeal to the Court of Appeals, and that the sum of an additional $5,000.00 is reasonable and necessary" if a petition for review is sought in the Texas Supreme Court.[9]

[9] We make no comment on whether a fee of $800 through summary judgment was reasonable given the burdens depicted by size of the appellate record, the issues urged by Thanphirom, and the obligation to attend a live hearing on the motions for summary judgment and miscellaneous objections to evidence.

An award of attorney's fees may include appellate attorney's fees. *State & Cty. Mut. Fire Ins. Co. ex rel S. United Gen. Agency of Tex. v. Walker,* 228 S.W.3d 404, 409 (Tex. App.—Fort Worth 2007, no pet). Yet, there must be evidence of the reasonableness of those fees. *Id.* The court in *State & County* found such evidence in counsel's "having already testified as to his familiarity with the reasonable charges for attorney's fees in Tarrant County and to his own hourly rate" as well as his opinion "of what a reasonable attorney's fee would be for the services that would 'necessarily need to be rendered' in the event of an appeal." *Id.* Like evidence appears in what we mentioned above.

Counsel for Wells attested to his familiarity with the reasonable, usual and customary rates charged in Tarrant County, his hourly rate, and the reasonableness and necessity of a $5,000 fee should he have to defend against an appeal to an intermediate appellate court and another $5,000 fee if a petition for review to the Supreme Court were sought. To that we add statutory authority permitting a trial court to judicially notice, in a suit upon a contract, usual and customary attorney's fees. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.001(8), 38.004 (West 2015). Given the latter, the contents of the case file, the numerous issues raised by Thanphirom as exemplified therein, and counsel's own attestations, we cannot say that the trial court erred in granting the conditional appellate attorney's fees under attack.

We overrule Thanphirom's issues and affirm the summary judgment.

Per Curiam