Court of Appeals, State of Michigan

ORDER

Manchester Colony LLC v Gary Novara

Docket No. 316369

LC No. 12-125889 CK

Joel P. Hoekstra
Presiding Judge

Kurtis T. Wilder

Karen M. Fort Hood
Judges

The Court orders that the September 19, 2014 opinion is hereby AMENDED. The opinion contained the following clerical error: Page 1, section I, paragraph 2, line 3, the word "a" between the words "that" and "questions" shall be stricken.

In all other respects, the September 19, 2014 opinion remains unchanged.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

NOV 07 2014
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

MANCHESTER COLONY, LLC, Plaintiff-Appellant,	UNPUBLISHED September 9, 2014
v	No. 316369 Oakland Circuit Court
GARY NOVARA, Defendant-Appellee.	LC No. 12-125889-CK

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

In plaintiff's suit to enforce defendant's personal guaranty on a commercial loan, plaintiff appeals as of right from the court's order granting summary disposition to defendant pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). We reverse and remand.

I

In 2002, Warren Bank made a commercial loan to Warren Condominiums, LLC. To secure that loan, defendant executed an unlimited personal guarantee, guaranteeing Warren Condominiums' debt. In 2009, the Federal Deposit Insurance Corporation (FDIC) became the receiver for Warren Bank, assuming all of its ongoing operations. The promissory note was transferred by two allonges from the FDIC to North CRE Venture, 2010-2, LLC, and from North CRE Venture, 2010-2, LLC to plaintiff. Plaintiff was also assigned the mortgage. When the loan went into default, plaintiff sued to enforce defendant's personal guaranty.

Plaintiff initially filed a motion for summary disposition pursuant to MCR 2.116(C)(10), and the trial court found no genuine issue of material fact as to defendant's liability as guarantor, but concluded that a questions of fact remained regarding whether a debt remained on the loan and damages.

Defendant subsequently filed a motion for summary disposition in his favor, contending that plaintiff's evidence was insufficient to authenticate the loan documents, specifically two loan schedules that detailed the activity on the loan. One schedule was from 2008 and was prepared by Warren Bank; the other schedule was from 2010 and was prepared by the FDIC. To authenticate this evidence, plaintiff presented an affidavit from a former employee of Warren Bank, Tom Nahas, who attested that the loan schedules were the books and records regularly kept by Warren Bank during the course of its operations, at or near the time of the transactions.

Building on his authentication argument, defendant contended that the opinion of plaintiff's expert witness, George Ianev, was inadmissible because his opinion was predicated on the challenged loan schedules.

In granting defendant's motion, the court held that Nahas's affidavit was insufficient to authenticate the loan schedules, rendering them inadmissible. It also agreed that Ianev's opinion was inadmissible because it was predicated on inadmissible and flawed facts. Thus, the court concluded that plaintiff failed to present sufficient evidence to raise a genuine issue of material fact for trial on the existence and amount of defendant's liability under the note. Plaintiff now challenges this ruling.

II

We review de novo a trial court's decision on a motion for summary disposition, *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008), as we do preliminary questions of law on the admissibility of evidence under our rules of evidence, *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999) (quotation marks and citations omitted).]

Moreover, "[o]pinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact, or the lack of it, must be established by admissible evidence." *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 321; 575 NW2d 324 (1998).

Regarding the trial court's ruling that both the loan schedules and Ianev's expert opinion predicated on the loan schedules were inadmissible, plaintiff chiefly contends that the Nahas affidavit was sufficient to authenticate the loan schedules because his personal knowledge was

unnecessary to authenticate the documents. Defendant contends that this evidence is inadmissible because Nahas lacked any personal knowledge about defendant's alleged debt, and thus could not establish that the loan schedules accurately reflected the existence or amount of his purported debt. Defendant also claims that Nahas could not authenticate the documents because he was a former employee, and thus could not competently attest to the methods of creating books and records of Warren Bank or the FDIC when the documents were created.

Evidence supporting a motion under MCR 2.116(C)(10) "shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." Affidavits "must be made on the basis of personal knowledge [of the affiant] and must set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion." *Marlo*, 227 Mich App at 329. Additionally, an affidavit must "show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit." MCR 2.119(B)(1)(c).

MRE 901(a) provides that evidence is authenticated, and thus admissible, by offering "evidence sufficient to support a finding that the matter in question is what its proponent claims." Moreover, business records are admissible regardless of the personal knowledge of the affiant:

> A writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum of an act, transaction, occurrence, or event is admissible in evidence . . . in proof of the act, transaction, occurrence, or event if it was made in the regular course of business and it was the regular course of business to make such a memorandum at the time of, or within a reasonable time after, the act, transaction, occurrence, or event. *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 not its admissibility*. . . . A reproduction of such a writing or record is admissible in evidence in a trial, hearing, or proceeding by order of the court, made within its discretion, upon motion with notice of not less than 4 days. *All circumstances of the making of the reproduction may be shown upon the trial, hearing, or proceeding to affect the weight but not the admissibility of the evidence*. [MCL 600.2146 (emphasis added).]

See also *Giddens v Appeal Bd of Michigan Employment Sec Comm'n*, 4 Mich App 526, 533; 145 NW2d 294 (1966) (circumstances surrounding a record, including the entrant's lack of personal knowledge of the contents of the record, only affect the weight, not the admissibility, of the evidence); *Dalton v FDIC*, 987 F2d 1216, 1223 (CA 5, 1993) ("[A]n affidavit of an FDIC account officer is not defective solely because the officer did not have personal knowledge of the loan transaction when it occurred, and only learned about the loan after the bank went into receivership.").[1]

[1] Although a judicial decision from a foreign jurisdiction is not binding, it may constitute persuasive authority. *Hiner v Mojica*, 271 Mich App 604, 611-612; 722 NW2d 914 (2006).

Thus, to authenticate the loan schedules, plaintiff only needed to present evidence to establish that the loan schedules were "what its proponent claims," MRE 901(a), i.e., the business records of Warren Bank. Nahas attested that he was a former loan officer of Warren Bank, he was familiar with the books and records of Warren Bank, it was the regular practice of Warren Bank to maintain loan schedules for loans like the instant loan, and that a person with knowledge of the loan would have made applicable entries on the loan schedules at or near the time of each transaction. He also attested that his statements in the affidavit were based on his personal knowledge. Taking this evidence in the light most favorable to plaintiff, we conclude that the court erred in holding that plaintiff failed to authenticate the loan schedules. Nahas's lack of personal knowledge of the transactions involving the loan, and the fact that he was not the custodian of the schedules would only affect the weight given the loan schedules by the trier of fact, not their admissibility. *Giddens*, 4 Mich App at 533; *People v White*, 208 Mich App 126, 133; 527 NW2d 34 (1994); *Dalton*, 987 F2d at 1223.

Although not specifically addressed by the trial court, defendant also contends that the loan schedules were inadmissible hearsay. We disagree, and address this unpreserved, preliminary question of law because all the facts necessary to resolve defendant's argument are before us. *Macatawa Bank v Wipperfurth*, 294 Mich App 617, 619; 822 NW2d 237 (2011). Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally inadmissible. MRE 802. But MRE 803 creates a number of exceptions to the hearsay rule; notably, business records are admissible. MRE 803(6) defines admissible records as follows:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

And MCL 600.2146 makes these records admissible notwithstanding the entrant's lack of personal knowledge of the contents of the record.

As we noted above, the 2008 schedule was prepared by Warren Bank and the 2010 schedule was prepared by the FDIC. Nahas's testimony is sufficient to render the 2008 schedule admissible under the business records exception. He attested that the schedule was made in the course of Warren Bank's regular operations, and that these types of records were made near the time in which the transaction occurred. The 2008 schedule was not hearsay, and should have been considered admissible evidence when the trial court reviewed defendant's motion for summary disposition. Moreover, MRE 703 requires that the factual basis for an expert's opinion

be grounded in admissible evidence. Because the 2008 schedule was admissible, the court erred by ruling that Ianev's expert testimony was inadmissible.

In contrast to the 2008 schedule, the 2010 schedule is inadmissible hearsay. The parties concede that the FDIC assumed all of Warren Bank's operations in 2009. Because Warren Bank was no longer carrying on regular business operations when the FDIC created the 2010 schedule, the record could not have been made in the regular course of Warren Bank's operations. Indeed, the heading of the 2010 schedule indicates that it was created by the FDIC, not Warren Bank. Nahas did not attest in his affidavit to the FDIC's regularly conducted business activities. Because plaintiff could not demonstrate that the 2010 schedule was a valid business record of the FDIC, it was inadmissible hearsay.

Even though the 2010 schedule was inadmissible hearsay, summary dismissal of plaintiff's claim was improper because the 2008 schedule clearly corroborated the existence of the debt and presented the outstanding amount of the loan on the date of the schedule's creation. The trial court dismissed the 2008 schedule as being too untimely to be reliable, but in so doing, the trial court improperly weighed the evidence and judged credibility, determinations it is not permitted to undertake when deciding a dispositive motion made under MCR 2.116(C)(10). The schedule's staleness, as well as defendant's purported failure to establish either that the loan was paid off or that any discrepancies in the loan activity demonstrated by the schedule, are factors that should be weighed by the jury.

Defendant raises additional alternative arguments, none of which have merit. Defendant contends that plaintiff lacks standing to sue because the evidence was insufficient to prove that plaintiff owned the loan due to a break in the chain of title. But defendant waived this argument by failing to assert it as an affirmative defense in his first responsive pleading. MCR 2.111(F)(2); MCR 2.116(D)(2); *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 319; 503 NW2d 758 (1993).

Defendant also contends that the trial court could have dismissed the Nahas affidavit as a sanction for filing the document after the close of discovery. But the trial court did not exercise its discretion to sanction plaintiff in this manner and defendant's contention is unpreserved. Because this Court is an error correcting court, and the trial court never ruled on the issue, there is nothing to review and we decline to address it. See *King v Mich State Police Dept*, 303 Mich App 162, 184-185; 841 NW2d 914 (2013) (where there was no exercise of discretion to review with respect to newly asserted grounds for awarding attorney fees, this Court declined to address the plaintiff's unpreserved arguments on appeal).

Reversed and remanded for additional proceedings that are consistent with this opinion. As the prevailing party, plaintiff may tax costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood