2013 IL App (2d) 120330-U
No. 2-12-0330
Order filed May 16, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TEXAS 1845, LLC, Plaintiff-Appellee, v. DANIEL G. DVORKIN, DVORKIN HOLDINGS, LLC, a Delaware Limited Liability Company, and DAN AIR, LLC, an Oregon Limited Liability Company, Defendants-Appellants.	))))))))))))	Appeal from the Circuit Court of Du Page County. No. 10-L-1249 Honorable Hollis L. Webster, Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion by admitting plaintiff's exhibits to support its damages and properly denied defendants' motion for a directed finding; affirmed.

¶ 2 This is an appeal from a breach of contract case in which plaintiff, Texas 1845, LLC, sought payment from defendants, Daniel Dvorkin, Dvorkin Holdings, LLC, and Dan Air, LLC (defendants), for their breach of two aircraft loan guaranties. The circuit court of Du Page County granted plaintiff's motion for partial summary judgment as to liability. Following a bench trial on the issue

of damages, the trial court entered judgment in favor of plaintiff in the amount of over $8.256 million. Defendants do not appeal the trial court's ruling on the motion for partial summary judgment or the method used to calculate plaintiff's damages. Defendants also withdrew their request to remand the cause for further proceedings. Defendants maintain that the judgment should be reversed outright, without remand and a new trial, because the trial court erred by admitting into evidence plaintiff's exhibits regarding damages. Without this evidence, defendants claim that plaintiff failed to establish any actual loss or measurable damages, and therefore, the trial court erred in denying their motion for a directed finding. We affirm.

¶ 3 FACTS

¶ 4 Key Equipment Finance, Inc. loaned $3.046 million to Dan Air II, LLC, and $6 million to Dan Air V, LLC. These loans were subsequently assigned by Key Equipment Finance to plaintiff. Defendants Dvorkin and Dvorkin Holdings guaranteed all of the payment obligations of Dan Air II. All of the defendants guaranteed the payment obligations of Dan Air V.

¶ 5 Both the Dan Air II and Dan Air V loans were secured by collateral. The Dan Air II loan was secured by a 1986 British Aerospace Model BAE 125 Series 800A aircraft ("800 Aircraft"). The Dan Air V loan was secured by a 1995 Raytheon Corporate Jets, Inc. Hawker 800XP aircraft ("800XP Aircraft"). Dan Air II and Dan Air V defaulted on their respective loans, and plaintiff demanded payment by defendants. Defendants failed to repay the loans, and plaintiff proceeded with the present court action.

¶ 6 Defendants did not dispute that they breached their obligations under the guaranties and the related documents, and the trial court granted plaintiff's motion for partial summary judgment as to

liability. Defendants do not appeal the summary judgment ruling or contend that they are not liable to plaintiff for breach of the loan guaranties.

¶ 7 Following the summary judgment ruling on liability, the trial court held a hearing to determine damages. Plaintiff argued that defendants owed an unpaid principal balance, plus interest and late fees. The amount of indebtedness on the guaranties relating to the loan to Dan Air V was $7.569 million. This amount included an unpaid balance of $6.102 million, plus $1.425 million in interest and a $41,671 late fee. The amount of indebtedness on the guaranties related to the loan to Dan Air II was $3.755 million. This amount included an unpaid balance of $3.023 million, plus $713,542 in interest and an $18,319 late fee.

¶ 8 More than four months prior to the hearing, plaintiff submitted a "Damage Calculation and Hearing Memorandum," which set forth the damages. With the memorandum, plaintiff submitted the affidavit of plaintiff's manager, Billy Meyer, and various other supporting documents were submitted, including contracts, payment histories, and invoices.

¶ 9 Meyer was the sole witness to testify at the hearing. Meyer is the manager of plaintiff and also owns Texas Aero, the company which purchased from Key Bank the loans at issue in the present case.

¶ 10 Damages were determined by calculating the amount of indebtedness and then offsetting that amount by the net proceeds plaintiff received in connection with the sale of the collateral aircraft. Meyer testified about the amount plaintiff received when it sold the airplanes. Meyer testified regarding the costs incurred by plaintiff in connection with retaking, holding, fixing, and selling the airplanes. This testimony was supported by documentary evidence, including contracts related to the sale of the airplanes and invoices reflecting the costs incurred by plaintiff.

¶ 11 Over 100 documents were introduced into evidence at the hearing. To assist the court in keeping track of the costs in connection with the sale of the airplanes, invoices were organized by category of expense (*e.g.*, maintenance fees, hangar fees, insurance expenses) and a summary document preceded each category of invoice. For example, exhibit 21 is a group exhibit that includes invoices related to maintenance expenses paid by plaintiff to repair the 800 Aircraft, and the first page is a spreadsheet that summarizes the costs reflected in the accompanying invoices. Exhibits 22 through 38 are other group exhibits that include invoices related to the costs incurred by plaintiff. All of these invoices and summary documents had been provided by plaintiff to defendants when plaintiff filed its damages memorandum. Meyer testified that he personally reviewed the original records related to these loans and that plaintiff currently has the original copies of all the loan documents in its file.

¶ 12 The damages of the outstanding principal on each loan was supported by plaintiff's exhibits 41 and 42, which show each loan's payment history. Meyer testified about the outstanding principal, as well as the interest and late fees owed on each loan, and he explained to the court how these amounts were calculated.

¶ 13 Defendants stipulated to the authenticity of the loan documents, identified as plaintiff's exhibits 3 through 20. Defendants did not argue that the method or equation used by plaintiff to calculate damages was improper, and do not do so on appeal. Defendants' primary defense was through their objections, on various grounds, to exhibits 21 through 38, and 41 and 42, all of which were overruled by the trial court.

¶ 14 At the conclusion of the hearing, the trial court entered judgment in favor of plaintiff and against defendants Dvorkin and Dvorkin Holdings in the amount of over $2.753 million for their

breach of the guaranties related to the Dan Air II loan. The trial court further entered judgment in favor of plaintiff and against all defendants in the amount of over $5.506 million for their respondent breach of the guaranties related to the Dan Air V loan.

¶ 15 Defendants filed a timely notice of appeal, requesting that we reverse or vacate the judgment or alternatively remand the cause for further proceedings. In their appellate brief, defendants withdraw their request for remand and specifically state that they do not want the cause remanded for a new hearing.

¶ 16 ANALYSIS

¶ 17 Defendants argue on appeal that the trial court erred in admitting plaintiff's exhibits 21 through 38 and 41 and 42 into evidence over its objections. Without this evidence, defendants claim that plaintiff failed to prove damages, and therefore, the trial court erred in denying its motion for a directed finding when the court relied on the inadmissible exhibits referenced above. In other words, defendants argue that, had the trial court sustained defendants' objections, there would not have been evidence sufficient to withstand the motion for a directed finding. We address the evidentiary objections first, as this resolves the secondary issue.

¶ 18 Standard of Review

¶ 19 The admission of exhibits is largely within the discretion of the trial court. *Little v. Tuscola Stone Company*, 234 Ill. App. 3d 726, 731 (1992); *Landmark Structures, Inc. v. F.E. Holmes & Sons Construction Company*, 195 Ill. App. 3d 1036, 1051 (1990). An abuse of discretion occurs when no reasonable person would take the position adopted by the trial court. *Simmons v. Garces*, 198 Ill. 2d 541, 567-68 (2002).

¶ 20 Admission of Exhibits 21 through 38

¶ 21 Exhibits 21 through 38 are invoices reflecting the costs incurred by plaintiff to acquire, maintain, and sell the collateral airplanes. Due to the large number of invoices, plaintiff prepared summaries of the invoices that were introduced into evidence. The invoices were organized into group exhibits by category of expense. Each group exhibit consisted of a summary document that was followed by the underlying invoices. Over four months prior to the hearing, plaintiff provided defendants with copies of all the documents it intended to use at the hearing. This included all of the invoices compiled in exhibits 21 through 38. Moreover, the underlying invoices were also introduced into evidence.

¶ 22 Defendants raise two primary issues concerning these exhibits. First, defendants challenge the admission of exhibits 21 through 38 on the basis that Meyer was unable to lay a proper foundation. Defendants suggest that the person who assembled the exhibits may have been able to lay the foundation for the documents, but that Meyer's knowledge of the exhibits was too distant and indirect.

¶ 23 "Basic rules of evidence require that a party lay a proper foundation for the introduction of a document into evidence." *People ex rel. Madigan v. Kole*, 2012 IL App (2d) 110245, ¶ 47. To properly authenticate a document, a party must present evidence that demonstrates that the document is what the party claims it to be. *Id.*

¶ 24 Meyer testified that Doug Mann, an employee of plaintiff, prepared the invoice summaries, but Meyer also testified that he personally confirmed that the summaries accurately reflected the costs identified in the invoices. Accordingly, he established personal knowledge sufficient to support the entry of the exhibits. This was an adequate foundation, and thus, the trial court did not abuse its discretion by finding that plaintiff laid a proper foundation for admitting the exhibits.

¶ 25 Defendants next challenge the use of the summaries. Rule 1006 of the Illinois Rules of Evidence (eff. Jan. 1, 2011) permits the use of summary documents under the following circumstances:

> "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both by other parties at reasonable time and place. The court may order that they be produced in court."

Defendants claim that the invoices were not voluminous enough to warrant a summary. This argument is absurd, as there were over 100 invoices.

Furthermore, as pointed out by plaintiff, the issue of who prepared the summaries or whether they were properly introduced into evidence is immaterial to the calculation of damages because the underlying invoices were also introduced into evidence, and Meyer demonstrated his personal knowledge of these invoices. He testified that he personally reviews all invoices as they come in to plaintiff's office. He also testified that he personally reviewed all of the original invoices introduced into evidence and that they were true and authentic copies of the invoices that plaintiff maintains in its records. Thus, the admission of the summaries could not have resulted in prejudice because of the admission of the invoices. The invoices also were made available for examination both prior to and during the hearing. In sum, we do not find the trial court abused its discretion in admitting exhibits 21 through 38 on the basis of foundation or on the basis that the invoices were not voluminous enough to warrant a summary.

¶ 26 Exhibits 41 and 42

¶ 27 As previously mentioned, exhibits 41 and 42 are documents that reflect the payment history of the loans at the time plaintiff purchased the loans from Key Equipment. Defendants present two basic arguments regarding these exhibits. Defendants argue that (1) the records of the previous lender were inadmissible when no one from that company authenticated them, and (2) Meyer could not lay the proper foundation for the admission of the records as computer-generated records.

¶ 28 Rule 803(6) of the Illinois Rules of Evidence (eff. Jan. 1, 2011))[1] provides that "records of regularly conducted activity" are not considered inadmissible hearsay where they constitute:

> "A memorandum, report, record, or data compilation, in any form, of acts, 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 Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness * * *[.]"

¶ 29 While an individual receiving a document from a business generally cannot solely by virtue of having received the document lay a sufficient foundation for admitting the documents as a business record of the issuing business, "[a]n exception exists when the business receiving the information, acting in the regular course of business, integrates the information received into the

[1]In 2011, Rule 803(6) essentially merged, in a manner consistent with the Federal Rules of Evidence, this state's already existing rules regarding business records.

business's records and relies on it in its day-to-day operations, and surrounding circumstances indicate trustworthiness." Graham's Handbook of Illinois Evidence § 803.6 (10th ed.2010).

¶ 30 In this case, both arguments raised by defendants are addressed by *Beal Bank, SSB v. Eurich*, 444 Mass. 813 (2005). In *Beal Bank*, the bank brought an action against the defendant to recover a deficiency on a mortgage note after a foreclosure sale. The circuit court entered judgment for the bank and ordered the defendant to pay the deficiency and attorney fees. The appellate court reversed the judgment, holding it was error to allow into evidence two computer printouts showing the amount owed on the debt. *Id.* at 813. The sole issue considered by the Massachusetts supreme court was whether computer printouts generated by a company that services loans for the bank were properly admitted as the bank's records under the business records exception to the hearsay rule. *Id.*

¶ *31* Like the contentions raised by defendants here, the defendant in *Beal* argued that the judge improperly admitted the computer printouts because they were the records of the loan servicer and the bank failed to present testimony concerning the business practices of the servicer in maintaining such records. The defendant specifically pointed out that the bank's manager was not the preparer of the documents and did not testify about how the records were maintained or generated. The defendant also argued that, because the computer printouts were created by the loan servicer and merely received by the bank, they lacked the indicia of reliability and were inadmissible as business records of the bank. *Id.* at 816.

¶ 32 Citing the business records exception to the hearsay rule and the Massachusetts General Laws statute (Mass. Gen. Laws ch. 233, § 78), which is similar to Rule 806(3), the court concluded that the judge was warranted in finding that the two computer printouts were made in good faith and in the regular course of business. *Id.* at 814, 819. The court stated:

> "Given the common practices of banks buying and selling loans, we conclude that it is normal business practice to maintain accurate business records regarding such loans and to provide them to those acquiring the loan. [Citations omitted.] Therefore, the bank need not provide testimony from a witness with personal knowledge regarding the maintenance of the predecessor's business records. The bank's reliance on this type of record keeping by others renders the records the equivalent of the bank's own records. To hold otherwise would severely impair the ability of assignees of debt to collect the debt due because the assignee's business records of the debt are necessarily premised on the payment records of its predecessors." *Id.* at 819.[2]

¶ 33 In determining whether the business record exception is applicable, Illinois courts, like the *Beal* court, examine whether the record was made in the regular course of business. Whether the testifying witness prepared the records, however, goes to the weight of the records, not their admissibility, and our courts will apply the business records exception where the testifying witness did not prepare the records if circumstances suggest the records are trustworthy. See, *e.g.*, *Bachman v. General Motors Corp*., 332 Ill. App. 3d 760, 789-90 (2002); *Birch v. Township of Drummer*, 139 Ill. App. 3d 397, 407 (1985).

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[2] *U.S. Bank National Association. v. American Screw & Rivet Corp*., 2010 WL 3172772 (N.D. Ill. Aug. 10, 2010), and *Krawczyk v. Centurion Capital Corp*., 2009 WL 395458 (N.D. Ill. Feb. 18, 2009), like *Beal*, hold that business records are admissible as they are relied on by lenders and are not prepared in anticipation of litigation. The cases relied on the federal counterpart to Rule 803(6) in reaching its decisions. See Fed. R. Evid. 803(6)). Although these unpublished cases are not precedential, we nevertheless find their analyses to be persuasive.

¶ *34* *Beal* dealt specifically with computer printouts and did not draw a distinction between computer printouts and other business records; rather, it was based on the trustworthiness of the documents. We apply the same analysis here. As in *Beal*, the circumstances surrounding the foundation of the payment histories support their trustworthiness.

¶ 35 Meyer testified that he conducted due diligence on the information contained in the documents and, similar to the reliance by the bank on its servicing agent in *Beal*, plaintiff relied on the accuracy of the records, which became plaintiff's records following the transaction. Additionally, defendants did not dispute the accuracy of the payment histories. Defendant Dvorkin, who managed the borrowers, had personal knowledge of the payments made by the borrower and the amounts owed on the loans, and defendants never argued that the figures reflected in exhibits 41 and 42 were inaccurate.

¶ 36 The trial court observed the following:

> "And I think there's a real good rationale for the business records exception here because it rests on the notion that in carrying on the proper transaction of business, which is exactly what this case is about, such records are useless unless they're accurate. The motive to follow a routine of accuracy, such as the payment—the periodic payment of a loan, therefore, is great while the motive to falsify is nonexistent, and I think that's the rationale behind the business records exception."

¶ 37 In admitting the evidence, the trial court implicitly found the following: (1) the documents were not prepared in anticipation of litigation but were prepared in the regular course of business to memorialize the payment history on the loans; (2) the information contained within the documents was verified through a due diligence investigation; (3) the loan files did not contain any documents

suggesting the borrowers disputed the payment history; (4) plaintiff relied on the information contained in the documents and the purchase of the loans was premised on the accuracy of the payment history; and, (5) the bank's records were useless to plaintiff if they were not accurate. Given these findings, we cannot say that the trial court's admission of these exhibits was an abuse of discretion.

¶ 38 Duplicates

¶ 39 Defendants next contend that the trial court erred in admitting duplicate copies of exhibits 21 through 38 and 41 and 42. Rule 1003 of the Illinois Rules of Evidence (eff. Jan. 1, 2011), regarding the admissibility of duplicates, provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Based on the testimony, the trial court determined that neither one of the factors in Rule 1003 was applicable.

¶ 40 Defendants contend that there is no evidence that the copies were duplicates and the trial court should have questioned the authenticity of the documents. We disagree.

¶ 41 As stated above, plaintiff provided defendants with copies of all the documents it intended to use at the hearing approximately four months prior to the hearing. This included all of the invoices compiled in exhibits 21 through 38 and 41 and 42. If defendants wanted plaintiff to bring original copies of those documents to the hearing, it could have made such a request pursuant to Supreme Court Rule 237(b) (eff. July 1, 2005). Instead, defendants raised the issue for the first time during the hearing.

¶ 42 Moreover, contrary to defendants' assertion, sufficient testimony was provided to show that the documents at issue were duplicates of the originals. Defendants argue that Meyer did not testify

as to the manner in which the copies were made. However, Meyer did repeatedly testify that he viewed the original documents and that the duplicates were true and authentic copies of the originals.

¶ 43 Although Meyer testified that the exhibits were true copies of the original documents, defendants challenge the authenticity of the exhibits. However, none of defendants' challenges really raise any legitimate doubt concerning the authenticity of the documents.

¶ 44 For example, defendants argue that there are questions about the authenticity of the invoices because there is no evidence that plaintiff paid the invoices. We note that Meyer did testify that plaintiff paid the invoices. In any event, the manner in which plaintiff responded to the invoices is immaterial to the issue of whether the documents are authentic.

¶ 45 Defendants also argue that plaintiff should have disclosed any profit made by Texas Aero on the services it provided to plaintiff. This argument extends to the reasonableness of the charges. Whether a supplier of services made a profit is irrelevant to the authenticity of the underlying documents.

¶ 46 Defendants maintain that a party's decision not to use original documents "casts a pall on the genuineness of the copies it did bring." The availability of original documents is not an element of Rule 1003, and it is not a basis for overturning the trial court's ruling. We find the trial court did not abuse its discretion in admitting duplicate copies of exhibits 21 through 38 and 41 and 42.

¶ 47 CONCLUSION

¶ 48 Because exhibits 21 through 38 and 41 and 42 were properly admitted and considered in determining plaintiff's damages, defendant's motion for a directed finding was appropriately denied. Defendants do not challenge the method or equation used by plaintiff to calculate damages and thus, we find that the trial court's judgment for damages was not against the manifest weight of the

evidence. We have considered the remaining arguments and find them either undeveloped or lacking in merit. For the preceding reasons, we affirm the decision of the circuit court of Du Page County.

¶ 49 Affirmed.