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| **American Express Bank, FSB v Zweigenhaft** |
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| 2013 NY Slip Op 50127(U) |
| Decided on January 29, 2013 |
| Civil Court Of The City Of New York, Kings County |
| Dear, J. |
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Decided on January 29, 2013

**Civil Court of the City of New York, Kings County**

**American Express Bank, FSB, Plaintiff,**

**against**

**Efraim Zweigenhaft aka EFRAIM M. ZWEIGENHAFT, Defendant.**

CV-20740-12/KI

American Express Legal by Peter F. Coates, Esq., for Plaintiff

Efraim Zweigenhaft, pro se

Noach Dear, J.

This is an consumer credit action wherein Plaintiff American Express Bank, FSB

(henceforth, "Plaintiff" or "Amex") seeks $16071.80 based on claims of breach of contract, account stated, and unjust enrichment, all, according to Plaintiff, stemming from a credit card agreement between the parties, use of the resulting credit card, and Defendant Efraim Zweigenhaft's (henceforth, "Defendant") default on his obligations to pay Amex for such use.

A trial was held before me on January 17, 2013. Richard Kier, an Assistant Custodian of Records for Plaintiff was the only witness. Amid Amex's counsel's desultory reading of a script of questions and responses to objections and Mr. Kier's rather mechanical responses [FN1], this Court excluded each piece of the offered documentary evidence as being hearsay. Defendant elected not to put on any witnesses or offer any evidence and this Court reserved decision.

The following are the Court's findings of fact and conclusions of law:

**I. Mr. Kier's Testimony**

Not surprisingly, Mr. Kier's testimony was directed solely toward qualifying Plaintiff's proposed exhibits as "business records" subject to an exception to the hearsay rule and he, not unexpectedly since all of the relevant events likely took place outside the presence of Amex personnel, did not claim to have any first-hand knowledge of the events underlying Amex's claims against Mr. Zweigenhaft. His testimony, however, failed to provide sufficient foundation [*2]to admit the Cardmember Agreements and statements offered as evidence by Amex and the documents were excluded.

**A. The Business Records Exception to the Hearsay Rule**

"Out—of—court statements offered for the truth of the matters they assert are hearsay and may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable"(*Nucci ex rel. Nucci v. Proper*, 95 NY2d 597, 602 [2001] [internal citations and quotation marks omitted]). One such exception codified as CPLR §4518(a) is directed to business records since "records systematically made for the conduct of a business as a business are inherently highly trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them truthful and accurate for

purposes of the conduct of the enterprise (*People v Kennedy*, 68 NY2d 569, 579 [1986]).

There are three foundation requirements for a document to be deemed a potentially admissible business record pursuant to CPLR §4518(a):

*first*, that the record be made in the regular course of business— essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business; *second*, that it be the regular course of such business to make the record (a double requirement of regularity)—essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record; and *third*, that the record be made at or about the time of the event being recorded—essentially, that recollection be fairly accurate and the habit or routine of making the entries assured. (*Id.*, at 579-580)

Further, the business records exception only applies where "each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct [and t]hus, not only must the entrant be under a business duty to record the event, but the informant must be under a contemporaneous business duty to report the occurrence to the entrant as well"(*In re: Leon RR*, 48 NY2d 117, 122-123 [1979]; *see also Hochhauser v Electric Ins. Co.*, 46 AD3d 174, 179 [2d Dept 2007]). "[A]s a rule, the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records (*People v Cratsley*, 86 NY2d 81, 90 [1995][internal citations and quotation marks omitted]).

**B. Mr. Kier's Testimony Provided Insufficient Foundation to Qualify the Proposed Exhibits as Business Records**

**1. The Substance of the Testimony**

Mr. Kier testified that he has been an Assistant Custodian of Records at Amex for one year (Transcript, at 3:10-14), that he is familiar with Amex's policies, practices, procedures, and document types (Id., at 3:15-46), and that he has testified on Plaintiff's behalf in other cases (Id., at 4:7-15). [*3]

As to the first two documents offered into evidence[FN2], each of which states that it is a Cardmember Agreement, Mr. Kier explained that he is familiar with this type of document (Id., at 5:14-16) and that such documents are intended to set forth the obligations of the cardholder and Amex (Id., at 5:22-24). He then affirmatively answered questions attempting to paraphrase the necessary elements to fall within the business records exception — agreeing that it is "the regular policy of American Express to have card member agreements made in the regular course of business for each new card member account" and that it is "the regular course of American Express business to make this card member agreement at the time a new card member account is opened" (Id., at 6:3-10). As to the documents actually offered as evidence, Mr. Kier opined that, based on "match[ing] the card product and the name with the account number that's on American Express system," these agreements pertain to Defendant's account (Id., at 7:2-7).

Mr. Kier had little to say as to Amex's third proposed exhibit. After the witness identified the pile of documents as statements showing the balance on an account taking into account charges, prior balance, payments, and credits (Id., at 11:14-23), counsel unsuccessfully offered them into evidence and rested his case. No meaningful effort was made to provide a foundation for admission pursuant to §4518.

**2. The Bases of Insufficiency**

The sum total of Plaintiff's foundation testimony is that Amex has cardmember agreements made in the regular course of business and that it is in the regular course of Amex's business to make this cardmember agreement at the time a new card member account is opened. While paraphrasing sections of law, whether statute or judicial decision, is fine under some circumstances, in the context of exceptions to the hearsay rule, the testimony must provide indicia of reliability such to show that "the declaration was spoken under circumstances which render it highly probable that it is truthful" (*Nucci*, 95 NY2d at 602).597, 602 [2001] [internal citations and quotation marks omitted]) . In seeking to apply the business records exception, the proffering party must show that "they are routine reflections of day-to-day operations and [] the entrant's obligation is to have them truthful and accurate for purposes of the conduct of the enterprise" (*Kennedy*, 68 NY2d at 579).

As to the Cardmember Agreements, Amex provided no information as to whether (and, if so, why and how) these documents are needed and relied on in the performance of

functions of the business. Nor was any testimony elicited as to how these documents are created, when, and by whom. Further, to the extent that these appear to be contracts, no information was provided as to how they are entered into and subsequently stored. Accordingly, the indicia of reliability and trustworthiness are lacking here.

Even had Mr. Kier provided detailed testimony regarding the credit card statements, there are additional hurdles that would need to be overcome with regard to documents like these that include information generated by third-parties. As mentioned, supra, everybody in the chain of [*4]information needs to be under a business duty to record and/or report the event. A credit card is generally used at a vendor who transmits information reflecting the transaction. This Court does not know who (or more likely, whose computer system) is the recipient nor whether there are intermediaries prior to the credit card company itself being alerted. Credit card statements can, thus, not be deemed to fall within the business records exception absent sufficient proof that everyone in the chain of information — from the vendor all the way through the generator of the statements — must be acting within the course of regular business conduct. Only once that hurdle is overcome can a court turn to other important aspects of its analysis such as how the document is generated, by whom, when, and for what purpose.

In the absence of a sufficient foundation, Plaintiff's proposed exhibits did not qualify as business records and were inadmissible hearsay. Accordingly, they were excluded from evidence in their entirety.

**II. Amex's Response When Asked for Further Foundation**

As to each of the proposed exhibits, Amex's counsel was asked whether there was any additional foundation that he wanted to lay before the objection to admissibility was ruled on. The first time, the instance where he responded with the most detail, he stated that "[t]he witness has testified that he has personal knowledge as to the electronic records and how they are kept with American Express" (Transcript, at 8:12-14). He then continued with the same argument made on the latter occasions, that these documents are electronic records admissible pursuant to New York State Technology Law §306 (Id., at 8:14-22, 10:19-25, 12:6-16)[FN3]. These responses were both insufficient and inaccurate.

**A. Law**

Pursuant to New York State Technology Law §306, "[i]n any legal proceeding where the provisions of the civil practice law and rules are applicable, an electronic record ... may be admitted into evidence pursuant to the provisions of article forty-five of the civil practice law and rules including, but not limited to section four thousand five hundred thirty-nine of such law and rules." As noted therein, this is limited by the provisions of the CPLR — including the rule against hearsay and other requirements relating to reliability. That is, an electronic document *may* be admitted but is not automatically accepted as evidence.

One important group of limitations to the admissibility of electronic evidence is codified as CPLR §4539(b):

A reproduction created by any process which stores an image of any writing, entry, print or representation and which does not permit additions, deletions, or changes without leaving a record of such additions, deletions, or changes, when authenticated by competent testimony or affidavit which shall include the manner or method by which tampering or degradation of the reproduction is prevented, shall be as admissible in evidence as the original.

Pursuant to this section, the party offering the proposed exhibit must provide competent [*5] testimony as a foundation for admissibility. Such testimony should include sufficient detail as to the manner in which the party's records, including those proffered as evidence, are created, compiled, stored, and maintained, as well as details of the system employed by the party to prevent tampering and to track changes. (*See Bank of America, N.A. v. Friedman Furs & Fashion, LLC*, 38 Misc 3d 1201[A], 2012 NY Slip Op. [Sup Ct, Kings County 2012]; *American Exp. Bank, FSB v. Dalbis*, 30 Misc 3d 1235[A], 2011 NY Slip Op. 50366 [U] [Civ Ct, Richmond County 2011]["a statement must be made under oath by someone who is aware of the manner in which plaintiff's records are compiled and maintained as well as the system employed by plaintiff to prevent tampering. Plaintiff then has to establish that the records of this particular defendant are maintained in that manner"]; *American Exp. Centurion Bank v. Badalamenti*, 30 Misc 3d 1201[A], 2010 NY Slip Op. 52238[U] [Nassau Dist Ct 2010][Rejecting electronically stored documents noting affiant's failure to establish "when, how or by whom plaintiff's exhibits were created" and "whether plaintiff's electronic record keeping system permits additions, deletions or changes without leaving a record of such additions, deletions or changes"]).Meeting the requirements of Technology Law §306

and CPLR §4539(b) does not in any way affect whether a document is hearsay and, to the extent that it is, it must fall within one of the accepted exceptions in order to be admissible. Pursuant to CPLR §4518(a), "[a]n electronic [businees] record...shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record." It is up to the Court to consider the accompanying testimony and determine whether the paper copy is indeed "a true and accurate representation of such electronic record" (CPLR §4518[a]). Again, this is a requirement additional to those of physically maintained business records, not instead of such conditions.

**B. Mr. Kier's Testimony**

Mr. Kier's testimony included exceptionally minimal details both regarding Plaintiff's system of document retention in general and regarding the storage of the proposed exhibits specifically. As best this Court can tell, he only stated that he is familiar with how Cardmember Agreements are stored and reproduced in paper format (Id., at 3:25-4:3), that he is authorized to access such agreements (Id., 4:25-5:2), and that he looked at the system to determine whether the first proposed exhibit relates to Defendant's account (Id., at 7:2-7).

This testimony was insufficient to meet the requirements inherent in Technology Law §306 and CPLR §4539(b). Mr. Kier did not provide any detail as to Amex's system of generating and maintaining electronic records. No information was provided as to how the documents were created or compiled to begin with. Nor was there any testimony as to how Amex maintains its electronic files — while this Court has no interest in the type of hardware used, it would be helpful to know how the files are organized, who has access, and how the integrity of the files is maintained such to prevent tampering and track what changes were made, by whom, and when. In failing to set forth any of this information about Amex's electronically stored documents generally, Mr. Kier also did not provide such testimony about the specific documents proffered. Additionally, he failed to explain how the paper documents physically in the courtroom were created and provided no basis for the Court to find them to be "a true and accurate representation" of an electronic record as required by CPLR §4518(a). In sum, Amex abjectly failed to meet the additional requirements for admission of electronic documents.

**III. Conclusions [*6]**

Plaintiff presented only one witness and his testimony was directed solely to the admissibility of the proposed exhibits. To the extent that all of Amex's documents were deemed inadmissible hearsay, Plaintiff presented no evidence and this Court has no reason to assess its individual claims, each of which was contested by Defendant and needed to be proven.

Based on the above, it is hereby

**ORDERED** that judgment be entered in favor of Defendant and against Plaintiff; and it is further

**ORDERED** that Plaintiff's complaint is hereby **DISMISSED** with prejudice on the merits.

The foregoing constitutes the Decision and Order of the Court.

Dated: Brooklyn, New York

January 29, 2013

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**Footnotes**

**Footnote 1:**Mr. Kier informed the Court that he is not a "robo-testifier" and that he has never been accused of such in prior cases in which he appeared (Transcript, at 4:16-5:2). This Court does not disagree and intends solely to describe his demeanor at this particular trial and generally very short responses to leading questions from counsel.

**Footnote 2:**As to the second document, the witness was actually just asked whether he "renews his testimony that he has made prior in this case as to how he knows this document has been produced" (Transcript, at 9:9-15). Though his affirmative response to this unclear question lends itself to diverse explanations, this Court will assume arguendo that counsel's intention was to apply his foundation testimony regarding the first document to this agreement, as well.

**Footnote 3:**In the absence of a sufficient foundation to qualify Plaintiff's documents as "business records," it is actually irrelevant whether they comport with the additional requirements incident to being electronically maintained. Nonetheless, this Court will deal with the issues raised by Plaintiff at trial.

Return to Decision List