COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2734 **Cir. Ct. No. 2013SC762**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

FIRST NATIONAL BANK OF OMAHA,

PLAINTIFF-RESPONDENT,

V.

KORRY L. ARDELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Korry L. Ardell appeals from a judgment entered against him for unpaid credit card debt. We affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Facts

¶2 First National Bank of Omaha (the Bank) sued Ardell for unpaid credit card debt, alleging breach of contract, account stated, and unjust enrichment. The Bank alleged that Ardell had entered into a charge account agreement with the Bank, that Ardell had purchased "goods, merchandise and/or services, and/or took cash advances and/or balance transfers" using the charge account, that Ardell defaulted under the terms of the agreement by failing to make payments, and that Ardell owed the Bank $9173.54. Ardell answered, indicating in response to most of the complaint's numbered paragraphs that he lacked knowledge or information sufficient to form a belief as to the allegations.[2] As a final catchall in response to the Bank's request for relief, Ardell indicated that he "denies any factual allegations not expressly admitted herein."

¶3 The Bank moved for summary judgment and in support submitted copies of (1) a Notice of Right to Cure sent to Ardell, (2) the Cardmember Agreement from First National Bank of Omaha, (3) account inquiry summaries showing Ardell's balance, and (4) Ardell's First National Bank of Omaha account statements going back to a zero balance. These documents were submitted under affidavit of Daniel Dunn, who swore, in part, as follows:

> 1. I am an adult resident of the State of Nebraska, and I am authorized to make this Affidavit on behalf of the plaintiff, as recovery representative of said plaintiff.
>
> 2. The matters referenced herein are based upon knowledge derived from records regularly kept in the ordinary course of the plaintiff's business, said records having been reviewed by me. I have personal knowledge

[2] Ardell admitted the paragraph listing Ardell's name and address and denied the paragraph concluding that Ardell was unjustly enriched.

> as to how the records were created, and that they were made at or near the time by, or from information transmitted by, a person with knowledge.

¶4 Ardell filed a brief in opposition to summary judgment, but did not support that brief with any affidavit. In his brief, Ardell objected to the illegibility of the Cardmember Agreement submitted by the Bank and to the Dunn affidavit, arguing that it should not be considered by the court because Dunn was unavailable for cross-examination and he was outside the court's jurisdiction.

¶5 The court granted summary judgment to the Bank.[3]

Discussion

¶6 We review a motion for summary judgment de novo, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). "A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law." ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503; WIS. STAT. §802.08(2). We examine the moving party's submissions to determine if they make a prima facie case for summary judgment. ***Palisades***, 324 Wis. 2d 180, ¶9. "If they do, then we examine the opposing party's submissions to determine whether there are material facts in dispute that entitle the opposing party to a trial." ***Id.*** In sum, summary judgment is appropriate when material facts are undisputed and when these facts

[3] We do not have the benefit of the circuit court's reasoning in ruling on summary judgment because Ardell did not include the transcript of the hearing on the summary judgment motion as part of the record. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986) (appellant's duty to see that record is sufficient for the court to review issues raised on appeal).

and the reasonable inferences drawn from them lead to only one conclusion. ***Radlein v. Industrial Fire & Cas. Ins. Co.***, 117 Wis. 2d 605, 609, 345 N.W.2d 874 (1984).

¶7 Affidavits supporting a motion for summary judgment or in opposition to such a motion "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3). A party submitting evidence in support of a motion for summary judgment need not conclusively demonstrate that the supporting evidence would be admissible. ***Palisades***, 324 Wis. 2d 180, ¶10. Rather, the party need only make a prima facie case that the evidence would be admissible at trial. ***Id.***

¶8 Here, the issue is whether Dunn's affidavit makes a prima facie case that the attached documents are admissible under the hearsay exception for records of regularly conducted activity. *See* WIS. STAT. § 908.03(6). For the exception to apply, the record must be:

> 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, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with [WIS. STAT. §] 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

Id.

¶9 Ardell argues that the Bank did not make a prima facie case, relying in part on ***Palisades***, 324 Wis. 2d 180, for the proposition that an affidavit that does not show the affiant's personal knowledge of how the records of regularly conducted activity were made does not meet the hearsay exception for records

kept in the ordinary course of business. *See* WIS. STAT. § 908.03(6). Therefore, argues Ardell, the circuit court should not have granted summary judgment and we should reverse.

¶10 In ***Palisades***, the plaintiff was the subsequent owner of credit card debt and submitted copies of credit card statements in support of its motion for summary judgment. ***Palisades***, 324 Wis. 2d 180, ¶¶3-4. The ***Palisades*** court held that the affidavit introducing the account statements did not present any facts to show that the affiant had "personal knowledge of how the account statements were prepared and whether they were prepared in the ordinary course of [the original account owner's] business." ***Id.***, ¶23. Under ***Palisades***, a records custodian who is testifying to establish admissibility of business records must be qualified "to testify that the records (1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity." ***Id.***, ¶20; WIS. STAT. § 908.03(6). The ***Palisades*** court made it clear, however, that the affiant "does not need to be the author of the records or have personal knowledge of the events recorded in order to be qualified to testify to the requirements of WIS. STAT. § 908.03(6)." ***Palisades***, 324 Wis. 2d 180, ¶22; *see also* ***Bank of Am. v. Neis***, 2013 WI App 89, ¶34, 349 Wis. 2d 461, 835 N.W.2d 527 (indicating that ***Palisades*** requires a showing that a witness have personal knowledge of how documents were created, not that the witness describe procedures used to create documents).

¶11 Ardell's reliance on ***Palisades*** is misplaced. "***Palisades*** stands for the extremely narrow proposition that the hearsay exception for business records is not established when the only affiant concerning the records in question lacks personal knowledge of how the records were made." ***Central Prairie Fin. LLC v. Yang***, 2013 WI App 82, ¶9, 348 Wis. 2d 583, 833 N.W.2d 866. Here, Dunn

averred that he was a recovery representative of the Bank and that the "matters referenced herein are based upon knowledge derived from records regularly kept in the ordinary course of the plaintiff's business." Dunn averred that he had reviewed the records and that he had "personal knowledge as to how the records were created, and that they were made at or near the time by, or from information transmitted by, a person with knowledge." These averments are sufficient to make a prima facie showing under WIS. STAT. § 908.03(6).

¶12 Ardell also argues that the Cardmember Agreement submitted in support of summary judgment is illegible. Ardell points out that the circuit court wrote to the Bank and asked for a better copy. Ardell argues that the agreement does not support the Bank's case because it is illegible. Our review of the record confirms that the Cardmember Agreement is difficult and in places impossible to read. We note that an attached chart showing interest rates and fees is legible. Ardell does not contend that he himself requested a copy of the Cardmember Agreement. Nor does Ardell argue the relevance as to how a copy of the Cardmember Agreement would undercut the debt owed or the Bank's claims for account stated or unjust enrichment.

¶13 Dunn avers that Ardell "purchased various goods, merchandise and services utilizing charge account … issued to the defendant(s) by the plaintiff, and the defendant(s) agreed to pay the plaintiff for said purchases," and that "[a]t the time this matter was filed, there was due and owing to the plaintiff from the defendant(s) the sum of $9,173.54, which the defendant(s) refuse(s) to pay despite due demand having been made." The affidavit itself supports the Bank's claim that Ardell owes the Bank money. These sworn facts, along with the attached Notice of Right to Cure, account summaries, and account statements, are enough to make a prima facie case regarding Ardell's default on the alleged credit card

debt. Ardell cannot rest on his general denial in the pleadings to refute the Bank's case for summary judgment; Ardell needed to submit evidence in opposition showing that a material fact was in dispute. This he did not do. *See* ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.***, 2001 WI App 148, ¶48, 246 Wis. 2d 933, 632 N.W.2d 59 ("One who opposes summary judgment … may not rely on a conjecture that evidence in support of the motion 'may' not be accurate or reliable. The opponent's obligation is to counter with evidentiary materials demonstrating there is a dispute ….").

¶14 Ardell does not argue that he did not use the card to make purchases, that he has paid the Bank, or that he does not, for whatever reason, owe the money, i.e., any facts to show that the accounting is untrustworthy or unreliable. He only attacks the foundation of the Bank's supporting documentation. But the hearsay exception for business records applies to these documents because the affidavit makes an undisputed prima facie showing that the records of the events recorded were made at or near the time by a person with knowledge in the course of regularly conducted business activity. As the ***Central Prairie*** court pointed out:

> The routine of modern affairs, mercantile, financial and industrial, is conducted with so extreme a division of labor that the transactions cannot be proved at first hand without the concurrence of persons, each of whom can contribute no more than a slight part, and that part not dependent on his [or her] memory of the event. Records, and records alone, are their adequate repository, and are in practice accepted as accurate upon the faith of the routine itself, and of the self-consistency of their contents. Unless they can be used in court without the task of calling those who at all stages had a part in the transactions recorded, nobody need ever pay a debt, if only his [or her] creditor does a large enough business.

Central Prairie, 348 Wis. 2d 583, ¶13 (quoting ***Palmer v. Hoffman***, 318 U.S. 109, 112 n.2 (1943) (citation omitted)).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.