

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

NATIONAL CHECK BUREAU, INC.

C.A. No. 24241

Appellee

v.

PAMELA RUTH

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
CUYAHOGA FALLS MUNICIPAL
COURT
COUNTY OF SUMMIT, OHIO
CASE No. 2006 CVF 03142

DECISION AND JOURNAL ENTRY

Dated: August 19, 2009

BAIRD, Judge.

{¶1} Defendant-Appellant, Pamela Ruth, appeals from the judgment of the Cuyahoga Falls Municipal Court, which adopted a magistrate’s decision awarding Plaintiff-Appellee, National Check Bureau, Inc. (“NCBI”), \$2,809.70 plus interest. This Court reverses.

I

{¶2} On August 3, 2006, NCBI filed suit against Ruth for \$2,809.70 in charges she accrued and failed to pay on an AOL Visa credit card account. According to NCBI, Ruth obtained her credit card through Chase Manhattan Bank U.S.A., N.A. (“Chase Manhattan”), and the account was later assigned to NCBI. According to Ruth, she obtained the credit card through First USA Bank, N.A. On June 26, 2007, the matter was submitted to a magistrate. NCBI presented the following five exhibits: (1) a computer print out of an unsigned, typewritten “First USA Telemarketing Application[]” dated June 11, 1999 and bearing Ruth’s typed name; (2) a copy of an America Online Visa Cardmember Agreement; (3) multiple printouts of account

statements addressed to Ruth, some of which were addressed from “First USA Bank, N.A.,” and others of which were addressed from “Cardmember Service”; (4) a “Bill of Sale” signed by representatives of “Chase Bank U.S.A., N.A. [] as successor through merger with Bank One, Delaware, N.A.,” and Unifund Portfolio A, LLC (“Unifund”), which indicated that Unifund was purchasing accounts from “JP MORGAN CHASE/BANK ONE”; and (5) an affidavit from a director of acquisitions at “Unifund CCR Partners” indicating that it had purchased Ruth’s account and later assigned the account to NCBI. Ruth admitted that she opened and used the AOL Visa credit card account, but objected to NCBI’s exhibits on the bases that they were unauthenticated and hearsay. NCBI never produced Ruth’s original credit card application.

{¶3} The magistrate issued his decision in favor of NCBI on September 20, 2007. On October 2, 2007, Ruth filed objections to the magistrate’s decision. The trial court entered its order approving the magistrate’s decision on May 5, 2008. Ruth appeals from the trial court’s order and raises seven assignments of error for our review. For ease of analysis, we rearrange and combine several of the assignments of error.

II

Assignment of Error Number One

“THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DISREGARDING THE DEFECTS IN THE CHAIN OF TITLE OF THE CLAIM ASSERTED BY NCBI.”

Assignment of Error Number Three

“THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FINDING THAT NCBI’S TRIAL EXHIBIT E WAS ADMISSIBLE EVIDENCE UNDER THE OHIO RULES OF EVIDENCE.”

Assignment of Error Number Four

“THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FINDING THAT EXHIBIT E SUPPORTED NCBI’S RIGHT TO MAKE A CLAIM AGAINST RUTH.”

Assignment of Error Number Five

“THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FINDING THAT EXHIBIT E SUPPORTED NCBI’S CLAIM AS TO THE AMOUNT ALLEGEDLY OWED BY RUTH.”

Assignment of Error Number Six

“THE TRIAL COURT AND THE MAGISTRATE COMMITTED PREJUDICIAL ERROR IN FINDING THAT THE DEFENDANT’S TESTIMONY CONSTITUTED AN ADMISSION OF LIABILITY AS TO NCBI’S CLAIMS.”

{¶4} In all of the foregoing assignments of error, Ruth essentially argues that the trial court erred in agreeing with the magistrate’s determination that NCBI’s Exhibit E was admissible and established NCBI’s right to seek judgment against Ruth on her AOL Visa credit card account in the amount of \$2,809.70. Ruth admits that she failed to make payments on the account in question, but argues that NCBI failed to establish its interest in the account so as to prove that she was liable to NCBI rather than to another entity. We agree.

{¶5} Generally, this Court reviews a trial court’s action with respect to a magistrate’s decision for an abuse of discretion. *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9. “When a court’s judgment is based on an erroneous interpretation of law, [however,] an abuse-of-discretion standard is not appropriate.” *Medical Mutual of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, at ¶13. Instead, a de novo standard of review applies. *Id.* In this case, this Court must determine whether, as a matter of law, NCBI’s evidence established a chain of title so as to indicate NCBI’s interest in Ruth’s account.

{¶6} The Fifth District aptly has summarized that:

“In an action on an account, when an assignee is attempting to collect on an account in filing a complaint, the assignee must ‘allege and prove the assignment.’ *Zwick v. Zwick* (1956), 103 Ohio App. 83, 84. In other words, in order to prevail, the assignee must prove that they are the real party in interest for purposes of bringing the action. An assignee cannot prevail on the claims assigned by another holder without proving the existence of a valid assignment agreement. *Natl. Check Bur., Inc. v. Cody*, Cuyahoga App. No. 84208, 2005-Ohio-283, citing *Zwick & Zwick v. Suburban Constr. Co.* (1956), 103 Ohio App. 83, 84.

“In order to establish a prima facie case for money owed on an account, ‘[a]n account must show the name of the party charged and contain: (1) a beginning balance (zero, or a sum that can qualify as an account stated, or some other provable sum); (2) listed items, or an item, dated and identifiable by number or otherwise, representing charges, or debits, and credits; and (3) summarization by means of a running or developing balance, or an arrangement of beginning balance and items which permits the calculation of the amount claimed to be due.’ *Gabriele v. Reagan* (1988), 57 Ohio App.3d 84, 87, quoting *Brown v. Columbus Stamping & Mfg. Co.* (1967), 9 Ohio App.2d 123, paragraph three of the syllabus. ‘[A]n action upon an account may be proved by the introduction of business records showing the existence of the account.’ *Wolf Automotive v. Rally Auto Parts, Inc.* (1994), 95 Ohio App.3d 130, 137. See, generally, *Raymond Builders Supply, Inc. v. Slapnick*, 11th Dist. No. 2003-A-0040, 2004-Ohio-1437, at ¶8.” *Worldwide Asset Purchasing, L.L.C. v. Sandoval*, 5th Dist. No. 2007-CA-00159, 2008-Ohio-6343, at ¶26-27.

Failure to prove the proper assignment of an account “leaves a hole in the chain of title” and bars an alleged assignee from recovering on the account. *Cody* at ¶20 (Karpinski, J., dissenting).

{¶7} Ruth argues that the trial court erred in overruling her objection to the magistrate’s decision to admit NCBI’s Exhibit E and in relying upon Exhibit E to conclude that NCBI was entitled to judgment. Ruth argues that NCBI should not have been permitted to depend upon Exhibit E because it failed to properly authenticate the exhibit and prove that it qualified as a business record under Evid.R. 803(6). The following items comprised NCBI’s Exhibit E: (1) a “Bill of Sale” signed by representatives of “Chase Bank USA., N.A. [] as successor through merger with Bank One, Delaware, N.A.,” and Unifund, which indicated that

Unifund was purchasing the accounts from Chase Bank USA, N.A. “described in Exhibit 1 attached hereto”;¹ (2) an affidavit signed by Henry N. Thoman, the “Director of Acquisitions for Unifund CCR Partners and its affiliate, Unifund Portfolio A, LLC,” indicating that Ruth’s account was assigned to Unifund CCR Partners and subsequently assigned to NCBI; and (3) an undated printout apparently depicting Ruth’s current account balance.

{¶8} Even assuming that the magistrate properly admitted Exhibit E, we must conclude that the trial court erred in its determination that NCBI was entitled to judgment. The record reflects that NCBI failed to “prove the assignment” and show that it was the real party in interest. *Sandoval* at ¶26. NCBI brought suit against Ruth as the alleged assignee of her AOL Visa credit card account, but failed to account for all of the assignments that occurred so as not to “leave[] a hole in the chain of title.” *Cody* at ¶20 (Karpinski, J., dissenting).

{¶9} The parties disagree as to Ruth’s original creditor, and NCBI never produced Ruth’s original credit card application. The printouts of Ruth’s account statements list “First USA Bank, N.A.” as the addressor of the statements, yet NCBI argues that Chase Manhattan was Ruth’s original creditor. The printout of the “Bill of Sale” to which NCBI points lists “Chase Bank USA, N.A.” as the seller of certain accounts and “Unifund Portfolio A, LLC” as the purchaser. The “Bill of Sale” does not list the accounts that were allegedly sold. Furthermore, it indicates, without any further proof, that “Chase Bank USA, N.A.” was the successor of “Bank One, Delaware, N.A.” The “Bill of Sale” makes no mention of “First USA Bank, N.A.” despite the account statements listing “First USA Bank, N.A.” as the statement addressor. Even a cursory glance at NCBI’s exhibits reveals that it is unclear exactly what type of affiliation any of

¹ There was no “Exhibit 1” attached to the Bill of Sale that NCBI provided.

the foregoing banks had with each other and which one of them was Ruth's original account holder.

{¶10} Finally, the affidavit included in NCBI's Exhibit E does not prove NCBI's assignment. The affidavit of Henry N. Thoman, "Director of Acquisitions for Unifund CCR Partners and its affiliate, Unifund Portfolio A, LLC," indicates the following:

"JP MORGAN CHASE/BANK ONE – AMERICA ONLINE-PLATINUM account number XXXX-XXXX-XXXX-0709 belonging to Pamela Ruth was assigned to Unifund CCR Partners on November 17, 2005. The document attached is a true and accurate copy of data provided by the original creditor via electronic data transfer at the time of purchase of the referenced account. The account subsequently was assigned to [NCBI] on 5/26/2006."

Apart from the fact that it is questionable whether a "Director of Acquisitions" would have any personal knowledge about the assignment of an individual account,² Thoman's affidavit also fails to account for the full assignment history of Ruth's account and what affiliation, if any, all of the banks acquiring an interest in her account had with one another. The fact that Ruth admitted to owing money on her account does not equate to an admission that she owes money to NCBI. It would appear that multiple entities had an ownership interest in Ruth's account at one point or another. Contrary to the trial court's ruling, none of the evidence that NCBI set forth established a clear chain of title between her original creditor, whoever that might be, and NCBI. See *Sandoval* at ¶26. Ruth's first assignment of error, that NCBI failed to demonstrate a chain of title, has merit. Because her third, fourth, fifth, and sixth assignments of error all

² We also would note that according to NCBI's affidavit, summarizing the evidence before the magistrate, a different individual named Nathan Duvelius testified as the custodian for NCBI's records at trial. The fact that NCBI presented a different individual's testimony further leads us to question Thoman's personal knowledge of Ruth's account.

contain evidentiary issues that depend upon our finding that NCBI proved its assignment, those assignments of error are moot and we decline to address them. See App.R. 12(A)(1)(c).

Assignment of Error Number Two

“THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DISREGARDING THE AFFIDAVIT SUBMITTED BY APPELLANT PAMELA RUTH (“RUTH”) IN SUPPORT OF HER OBJECTIONS TO THE MAGISTRATE’S DECISION.”

Assignment of Error Number Seven

“THE MAGISTRATE ERRED IN OVERRULING RUTH’S HEARSAY, AUTHENTICATION AND BEST EVIDENCE RULE OBJECTIONS AS TO NCBI’S EXHIBITS C AND D.”

{¶11} In her second assignment of error, Ruth argues that the trial court erred in refusing to upset the magistrate’s factual determinations based on Ruth’s affidavit, which summarized her recollection of the evidence introduced at trial. In her seventh assignment of error, she argues that the magistrate erred in overruling her objections as to NCBI’s Exhibits C and D (both consisting of multiple printouts of account statements). As we have already determined that the trial court erred in adopting the magistrate’s decision and entering judgment in favor of NCBI, these assignments of error also are moot. See *id.*

III

{¶12} Ruth’s first assignment of error is sustained. Her remaining assignments of error are moot, and we decline to address them. The judgment of the Cuyahoga Falls Municipal Court is reversed and its judgment is hereby vacated.

Judgment reversed
and vacated.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Stow Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

WILLIAM R. BAIRD
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

ANAND N. MISRA, Attorney at Law, for Appellant.

ROBERT S. BELOVICH, Attorney at Law, for Appellant.

STACIE E. BARHORST, Attorney at Law, for Appellee.