[Cite as *Shawnee Assoc., L.P. v. Shawnee Hills*, 2010-Ohio-1183.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
SHAWNEE ASSOCIATES, LP	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 09-CAE-05 0051
VILLAGE OF SHAWNEE HILLS, ET AL	:	
	:	
	:	O P I N I O N
Defendant-Appellee		

CHARACTER OF PROCEEDING:	Civil appeal from the Delaware County Court of Common Pleas, Case No. 06CVH020156
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 22, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
E. JOEL WESP GREGORY P. BARWELL 6400 Riverside Drive, Ste. D Dublin, OH 43017	PAUL N. GARINGER 65 East State Street, 4th Floor Columbus, OH 43215

Gwin, P.J.

{¶1} Plaintiff-appellant Shawnee Associates, LP, appeals a judgment of the Court of Common Pleas of Delaware County, Ohio, entered in favor of defendants-appellants, the Village of Shawnee Hills. Appellant assigns two errors to the trial court:

{¶2} "I. THE COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN ENTERING JUDGMENT FOR DEFENDANT-APPELLEE VILLAGE ON THE COUNTER-CLAIM AGAINST PLAINTIFF-APPELLANT FOR SEWER CHARGES OF $40,848.28 BECAUSE THE JUDGMENT WAS BASED ON THE INCOMPETENT TESTIMONY OF THE VILLAGE CLERK WHO LACKED ANY FIRSTHAND KNOWLEDGE OF THE SEWER CHARGES AND ON DEFENDANT-APPELLEE'S EXHIBIT J. (SHAWNEE ASSOCIATES' SEWER BILLINGS) WHICH WAS ERRONEOUSLY ADMITTED IN EVIDENCE OVER PLAINTIFF-APPELLANT'S OBJECTIONS FOR LACK OF FOUNDATION AND AS HEARSAY (I.E., PLAINTIFF-APPELLANT FAILED TO INTRODUCE EVIDENCE AS REQUIRED BY OHIO EVIDENCE R. 602 THAT SHIRLEY ROSKOSKI HAD PERSONAL KNOWLEDGE AS TO HOW EXHIBIT J WAS PREPARED, FAILED TO AUTHENTICATE AND LAY A FOUNDATION FOR EXHIBIT J AS A BUSINESS RECORD UNDER OHO EVID. R. 901 (B)(10) AND 803 (6).

{¶3} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN ADMITTING EXHIBIT J INTO EVIDENCE AS PROOF OF THE AMOUNT OF DEBT SERVICE CHARGES OWED BY PLAINTIFF-APPELLANT FOR THE PERIOD BEFORE IT TAPPED INTO THE VILLAGE OF SHAWNEE HILLS' SEWER SYSTEM BECAUSE DEFENDANT-APPELLEE'S SOLE WITNESS ON THE

AMOUNT OF SEWER CHARGES ADMITTED THAT SHE ONLY "GUESSED" AT THE AMOUNT OF PLAINTIFF-APPELLANT'S MONTHLY WATER USAGE IN CALCULATING THE DEBT SERVICE CHARGES AND ADMITTED THAT HER "GUESSES" WERE WRONG."

{¶4} After a bench trial the trial court made extensive findings of fact, comprising some fourteen pages, as well as conclusions of law on appellant's complaint and appellee's counterclaim.

{¶5} The court found appellant holds a ground lease for certain property located in the Village of Shawnee Hills. The property includes a Wendy's building, owned by Wendy's, and the Shawnee Square Shopping Center Building, which is owned by appellants. Wendy's International leases the property on which the building is located.

{¶6} In 2000-2001, appellee Village began construction of a sanitary sewer system within the Village. On November 9, 2001, the Village sent a letter by regular mail to the property owners, notifying them the sanitary sewer system was operational, and they had 90 days to connect to the system. The letter stated if a property owner failed to connect, the Village would connect and charge accordingly. The letter was sent to William H. Trembly, Jr., who is the President and sole officer and shareholder of Vector Enterprises, Inc., the general partner for appellant. There are no other partners. Trembly did not respond to the letter, and the Village did not connect appellants' property to the sewer system.

{¶7} On or about March 5, 2002, the Village began invoicing appellant for sewer fees even though the property was not tapped into the sewer system. Under the

Village Code, bills are sent to the owner of the property unless the owner requests a bill be sent to a different mailing address. If a building is owned separately from the land, the bill is to be sent to the mailing address of the owner of the building. The Village did not invoice Wendy's International as a separate user.

{¶8} On March 15, 2002, the Village sent a second notice by certified mail to Trembly notifying him appellant was required to complete the connection to the sanitary sewer system. The notice stated appellant was in violation of Section 925 of the Village Shawnee Hills Codified Ordinances. The notice provided as a result of his failure to connect to the sanitary sewer system appellant would be charged with the current sanitary sewer charge in effect beginning April 1, 2002, unless Trembly responded by April 30, 2002. Trembly did not respond, but the Village did not connect. Trembly testified he received the notice and was aware appellant would be billed the current sanitary sewer charge.

{¶9} The sanitary sewer charge to appellant at this time only included a debt service charge, which is a proportionate monthly rate for repayment of the cost associated with construction of the sewage disposal system.

{¶10} On June 14, 2002, the Village sent a third notice to Trembly by certified mail, advising that appellant must connect the Village sanitary sewer system. The third notice required connection within 15 days of the receipt of the notice. Appellant did not respond to the notice.

{¶11} On January 29, 2003, the Village sent notice to Mary Buchsieb, the lessor of appellant's property, requiring connection to the sanitary sewer system. The Village

sent this notice to her because it had received no response to the prior notices from appellant.

{¶12} On March 17, 2003, the Village sent a second notice to Buchsieb, notifying her that Trembly had not connected the property to the sanitary sewer system nor had he paid any of the sewer fees. The Village requested confirmation that appellant was responsible for any sewer fee invoices and for the connection to the sewer system. In response, Buchsieb notified the Village appellant was responsible for all utility fees, including sewer fees. She provided a copy of her lease with appellant, which confirmed that appellant was responsible for sewer fees and connection costs. The court concluded the Village had notified and billed the proper party, appellant, regarding the sewer fees, dating back to November 2001.

{¶13} On May 2, 2003, the Village engaged a contractor to connect appellant's property to the sewer system. The materials were purchased and on site, and work was to begin on June 2, 2003. The Village did not connect the property to the sewer system in the 90 days following the notice it sent to Trembly.

{¶14} On May 14, 2003, Trembly contacted the Village and requested a review of the sewer user charges and tap-in fees, and also filed a grievance requesting the user charges be reviewed and recomputed. As of May 14, 2003, Trembly had not submitted the sewer permit application which was given to him in November 2001, and again in March 2002.

{¶15} In its May 14, 2003 letter, appellant advised the Village any payments it made were made under protest in order to mitigate appellant's potential damages in the matter. However, should appellant prevail in challenging the assessment of taps fees,

the Village would have no legal right to retain any fees previously paid, and appellant demanded prompt refund of all such fees. Along with the permit application and building plans for connecting the property to the sanitary sewer system, the Village required the capacity fees be paid before the permit could be issued. The capacity fees totaled $24,000. Appellant did not pay the sewer fees.

{¶16} Prior to connecting to the Village sanitary sewer system, appellant's property was connected to a waste water treatment plant, which the Ohio EPA had previously required the county to abandon by March 1, 2003. The Ohio EPA extended the deadline twice, until a final date of June 17, 2003.

{¶17} Appellant did not submit the required sewer permit application prior to the March 2003, or May 2003 EPA deadlines. On May 27, 2003, three weeks prior to the final deadline to abandon the waste water treatment plant, appellant submitted the required permit application for connection and inspection for sewer service. Trembly also provided building plans for the properties' connection to the sanitary system. Trembly testified the permit application building plans provided for connection of both the Wendy's building and the Shawnee Square Shopping Center to the system, to be made with one sewer pipe to the sewer system from appellant's property. The permit was issued on June 17, 2003.

{¶18} The court found appellant's property was connected to the sewer system in June 2003, and appellant became a "user" for the purpose of being charged a user charge. On June 17, 2003, appellant filed its complaint asking for monetary damages and for a declaratory judgment and injunctive relief, against the Village, the county, the Director of the Ohio EPA, and various individuals. Appellant requested a temporary

restraining order and preliminary injunction. The same day, appellant and the Village entered into a "stand-still agreement", which preserved the status quo for 21 days. Appellant withdrew its motion for a temporary restraining order. Under the agreement, during the 21 days, the parties intended to complete construction of the sewer system up to the point of tap-in, and the Village could then issue an inspection permit for a $680.00 fee.

{¶19} The Village agreed to complete an administrative review process over appellant's grievance and issue its decision within the same 21 day period. After the decision was rendered, appellant would have the choice of paying the bill or appealing. If appellant appealed the decision, it agreed to escrow the full amount of the current billed monthly sewage debt-service as well as the tap-in fee, secured by either cash, surety bond, or irrevocable letter of credit issued by a bank or savings institution.

{¶20} Following this agreement, the Village issued the sewer permit and construction of the connection of appellant's property to the sanitary system was completed. Within the 21-day stand-still agreement time period, the Village administrator issued an opinion, finding appellant had been properly charged according to the Village Ordinances. The written decision notified appellant that if it decided to appeal, appellant was required to place a cash amount in escrow as agreed in the stand-still agreement.

{¶21} The court found appellant did not appeal the decision under the appropriate administrative appeal statutes, but did deposit $33,749.28 into an escrow account. This amount represents the total bill for capacity fees and sewer use charges as of the July 25, 2003 deposit date. Following the original escrow deposit, appellant did

not deposit any additional amounts to the account for subsequent monthly sewer use charges through April 2004. As of January 23, 2009 the Village claimed appellant owed $44,078.76, including a credit of $19,145.25 Wendy's paid in April 2004.

{¶22} Each user pays for sewer fees based on water use plus a monthly service charge based on the cost of operation, maintenance and repair plus debt-service, plus sewer surcharge rates. The Village did not charge appellant any sewer surcharge fees, but did charge an operation maintenance and repair fee based upon appellant's water usage amount and the prorated fee for the annual operation, maintenance, and replacement costs.

{¶23} The trial court found the sewer usage charge to appellant by the Village does not match the amount of water billed by Del-Co Water, Inc., the company the Village hired to administer its water and sewer bills. The sewer usage charged to appellant by the Village was consistently higher than the water usage charged by Del-Co Water, because Del-co did not take into account Wendy's usage. Del-Co billed Wendy's separately for water usage even though the shopping center and restaurant utilized the same connection.

{¶24} The Village Fiscal Officer maintains a reserve account in which she deposits all sewer fees collected. From this account she distributes various fees and maintenance costs to the Village General Fund, and the remainder of the fees should comprise the reserve funds the Village is required to maintain. The court found the Village has been able to make its annual debt-service payments but has been unable to fulfill its reserve account obligations. A state audit found the financial records of the

Village were in error, and the auditor criticized the Village for contracting with Del-Co Water for the bill collection and meter reading without sufficient controls in place.

{¶25} Appellant re-filed this action in February 2006. Appellant's complaint requested a declaratory judgment that the Village failed to follow its ordinances for review and grievances, and requested a remand to the Village to conduct an adjudicatory hearing. In the alternative, appellant sought an order permitting it to bring an administrative appeal to the court of common pleas. The Village's counterclaim sought recovery of the outstanding sewer fees from March 11, 2002 to January 23, 2009. The Village Fiscal Officer, who is the custodian of records, presented evidence of all the outstanding sewer fees owed by appellant for the time period. The court awarded the Village sewer fees of $40,848.28, which includes a credit for the payment made by Wendy's. The court ruled against appellant on its complaint.

I & II

{¶26} Appellant's assignments of error are interrelated, and will be addressed together for purposes of clarity. Essentially, appellant argues the Village Clerk had no first hand knowledge of the sewer charges and Exhibit "J", the billing journal, was improperly admitted for lack of foundation and is hearsay.

{¶27} Roskoski testified in her capacity as a clerk/treasurer and fiscal officer for the Village. She testified she handled all financial operations of the Village, including utility billings. She is also the custodian of records for the Village and is responsible for maintaining all records of the sewer billings and for responding to all public records requests for past sewer bills or sewer fees. In her position as custodian and fiscal

officer, Roskoski is required to provide documentation of all sewer bills and charges to anyone requesting it, regardless of whether she personally calculated the bills.

{¶28} Roskoski testified Exhibit "J" was a true and accurate copy of the billing journal and it lists every monthly sewer bill. The billing journal is the record upon which Roskoski customarily relies in producing past sewer bills or responding to a public records request.

{¶29} The billing journal sets forth the water consumption for each user in total gallons on a monthly basis. The first two pages of Exhibit "J" was a list of appellant's sewer fees beginning March 11, 2002 through January 23, 2009. Roskoski testified she prepared the document based upon information contained within the billing journal. From March or April, 2004 to July 14, 2008, Roskoski was not personally involved in the billings but as Fiscal Officer and Custodian of the Records, she testified to the amounts billed during that time period based upon business records maintained by the Village in its ordinary course of business. She testified from June or July 2005, through July 2008, the Village contracted with Water Quality Management (Del-Co) to perform the sewer fee billings. Roskoski testified she knew how the sewer bills were calculated and was able to verify the propriety of the bills.

{¶30} Appellant asserts Roskoski prepared Exhibit "J" by simply copying the amount shown on the billing journal but offered no evidence the records were admissible as a business record. Appellant also argues the Village offered no evidence to support the water usage numbers or the meter readings from Del-Co. Appellant objected to the admission of Exhibit "J" into evidence.

{¶31} Appellant submitted the State of Ohio audit of the Village's records as its Exhibits "7" and "8". The State audit report indicated the Village's delegation of billing and meter reading responsibilities created a material weakness in the financial procedures of the Village and raised questions about the accuracy of the billings during the time the outside party handled the function. Exhibit "7" states for a variety of reasons during the audit the Village records frequently could not be located when needed. The audit stated the Village had not established procedures to determine whether the outside agency had sufficient controls in place and was operating effectively to insure meters were being read properly and the billing was processed properly. Appellant objected to Exhibit "J" as to the period of time when, it alleged, Roskoski could not validate the records because Del-Co was preparing them.

{¶32} Ohio Evid. R. 901 provides:

{¶33} "(A) General provision

{¶34} "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

{¶35} "(B) Illustrations

{¶36} "By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

{¶37} "(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

{¶38} ***

{¶39} "(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement or data compilation, in any form, is from the public office where items of this nature are kept

{¶40} ***

{¶41} "(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

{¶42} ***"

{¶43} Ohio Evid. R. 803 provides:

{¶44} " Hearsay exceptions; availability of declarant immaterial

{¶45} **"**The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

{¶46} "(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, 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 as provided by Rule 901(B)(10), 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."

{¶47} Appellant concedes Roskoski was the custodian of records, but asserts she was incompetent to testify about the data during the time Del-Co was compiling and generating the bills, because she had no personal knowledge of how the sewer charges were calculated or when or how they were recorded by the persons Del-Co employed to read the meters and calculate the charges.

{¶48} Appellant asserts under Evid. R. 803 (6), the parties seeking to admit the record must establish: (1) the record is one regularly made in a regularly conducted activity; (2) the contents of the record must have been entered or transmitted by a person with knowledge of the act, event, or condition recorded therein; and (3) the act, event, or condition must have been recorded at or near the time of the transaction. Even if the elements are established, appellant asserts a business record may be excluded if the source of information about the method or circumstances or preparation indicates the record is not trustworthy. *Great Seneca Financial v. Felty,* 170 Ohio App. 3d 737, 2006-Ohio-6618, 869 N.E. 2d 30.

{¶49} In the *Felty* case, the Court of Appeals for the First District reviewed a case in which Great Seneca Financial brought suit to collect money due on a credit card account that originated with another company. One issue before the court was whether the records Great Seneca Financial submitted were properly authenticated business records. The Court of Appeals found certain records had been submitted in support of a motion for summary judgment without an accompanying affidavit setting forth the proper foundation, and therefore should have been excluded. However, the court found Great Financial's custodian of records was competent to testify Great Seneca Financial had acquired the application for the credit card and the statements as an assignee of the

original agency, and the documents were kept in the course of a regularly conducted business activity and were made at or near the time of the transactions. The court found the Rule requires the records be made either by a party having personal knowledge of the information or based on information conveyed by a person having personal knowledge of the information.

{¶50} The Court of Appeals found authentication of the documents establishes the records are in fact what the party offering them into evidence claims they are. A separate issue was whether the documents could be admitted as a business record because Great Seneca Financial was not the maker of the records. The court framed the issue as whether the source of information or method of circumstances or preparation indicates trustworthiness. The court found the Rule permits exhibits to be admitted as business records of an entity even when the entity was not the maker of the records, so long as the other requirements of the Rule are met and circumstances indicate the records are trustworthy. Records need not be actually prepared by the business offering them if they are received, maintained, and relied upon in the ordinary course of business. If the document is originally created by another entity, the creator need not testify if the document is incorporated into the business records of the testifying entity.

{¶51} The Court of Appeals concluded documents may properly be admitted as business records even though they are the records of an entity other than one of the parties and even though the foundation for the receipt is made by a witness who is not an employee of the entity that owned or prepared them, provided that there is sufficient

indicia of the records reliability and trustworthiness. *Great Seneca Financial* at paragraph 14, citations deleted.

{¶52} Finally, the Court of Appeals reviewed the documents in question to determine whether the statement of credits and debits leading to the balance due would permit a proper calculation of the total amount due. If the records did not do so, there could be no reliable determination of the balance due. Id. at paragraph 16.

{¶53} We find the Rules do not require Roskoski either prepared the sewer bills during the relevant time period or had first-hand knowledge of the preparation. As appellant concedes, she was the custodian of these records and the record shows she received the records from the party with first-hand knowledge.

{¶54} As for the reliability of the records, the trial court made an exhaustive review of how the fees were calculated, and although appellant presented the state audit report to generally challenge the reliability of the records, appellant did not rebut the Village's evidence the fees were accurate.

{¶55} At the close of the bench trial, the parties and the trial court reviewed the various exhibits. Appellant preserved its objections to Exhibit "J". However, Exhibit "I" was admitted without objection.

{¶56} Exhibit "I" contains nearly sixty photocopies of the actual monthly bills issued by the Village. The copies go from July 2002 to June 2008. They are in different styles, some showing the actual meter readings, and some itemizing the charges for sewer, debt, and clean river fees, along with the past due balance. Some are directed to appellant and some to Trembly. We find these copies are sufficient to allow the court to review the computation of the amount due.

{¶57} We find even if Exhibit "J" had been inadmissible, Exhibit "I", to which appellant raised no objection, places the same information into evidence.

{¶58} Both assignments of error are overruled.

{¶59} For the foregoing reasons, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY

WSG:clw 0217

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IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
VILLAGE OF SHAWNEE HILLS, ET AL	:	
Defendant-Appellee	:	CASE NO. 09-CAE-05 0051

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY