

COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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| CACH, LCC, |) Case No. CV 13 805328 |
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| |) |
| Plaintiff, |) JUDGE MICHAEL E. JACKSON |
| |) |
| v. |) |
| |) |
| KATHLEEN VEGA |) <u>JOURNAL ENTRY AND OPINION RULING</u> |
| |) <u>ON PLAINTIFF'S MOTION FOR DEFAULT</u> |
| Defendant. |) <u>JUDGMENT</u> |
| |) |

Cach, LLC ("Plaintiff") filed a Motion for Default Judgment ("Motion") when Kathleen Vega ("Defendant") failed to file an answer in response to Plaintiff's Complaint. A default hearing was held on October 24, 2013. Plaintiff appeared through counsel. Defendant did not appear and did not answer or otherwise plead by the default date or thereafter. On the date of the hearing, the Court instructed Plaintiff to file a supplemental brief providing case law that allows an assignee creditor, such as Plaintiff, to obtain default with an affidavit of their own employee attesting to the accuracy of business records they obtained from the predecessor, assignor creditor. Plaintiff submitted its Supplemental Brief ("Brief") on October 25, 2013. The Court has reviewed Plaintiff's Motion and its Brief. The Court denies Plaintiff's Motion for the reasons stated below.

This Complaint alleged that the Defendant was liable for an outstanding balance on a credit card debt the Plaintiff has purchased from the original creditor, Wells Fargo Financial ("Wells Fargo"). Plaintiff attached to its Complaint several documents regarding the terms and conditions of the credit card debt, a bill of sale entitling the Plaintiff to collect on this account, and an Affidavit ("Affidavit") from Plaintiff's custodian of records, which included the amount due.

This Affidavit stated, in essence, that these Wells Fargo records also constituted business records of the Plaintiff, which were entitled to be admitted into evidence under Evidence Rule 803(6) because Plaintiff had kept these records in the ordinary course of its business after acquisition. Plaintiff's custodian of records also stated in his Affidavit that "I know from my

experience reviewing such records and from common knowledge how credit cards work that those records were made and maintained by individuals who have a business duty to make entries in the records accurately at or near the time of the event that they record." See Affidavit, paragraph 1.

After filing its Motion, the Court requested that Plaintiff file a supplemental brief in support of its Motion to address the issue of whether its Affidavit was sufficient under Evidence Rule 803(6) to support its Motion when these business records were originally prepared by Wells Fargo.

The Court has applied the following rule, which has been adopted by numerous Ohio courts, including the 8th District Court of Appeals, concerning this issue: "Business records created by an entity other than the party offering them are admissible, provided that there are sufficient indications of trustworthiness and that all the other Evidence Rule 803(6) requirements are met." *Great Seneca Financial v. Felt*, 2006-Ohio-6618 (Ohio App. 1st Dist.), syllabus, 2nd paragraph; *State Farm Mutual Automobile Ins. Co. v. Anders*, 2012-Ohio-824 (Ohio App. 1st Dist.); *Freedom Mortgage Corp. V. Petty*, 2011-Ohio-3067 (Ohio App. 8th Dist.); *RBS Citizens v. Zignon*, 2010-Ohio-3511 (Ohio App. 8th Dist.)

After consideration of the above-mentioned, the Court has determined that Plaintiff submitted insufficient evidence in its Affidavit to support a default judgment. Plaintiff could have solved this problem if it obtained more trustworthy documentation such as a sworn certification of the records from the appropriate custodian of records or representative of the prior creditor, Wells Fargo as discussed in *Great Seneca* and its progeny.

A sworn certificate from the original creditor is the classic way to validate such records, and this method would have provided sufficient trustworthiness regarding these records. In cases where intermediate assignees are involved, a similar affidavit would likewise validate the records while those records were being held by such an intermediate creditor. In the ordinary course of business of obtaining credit files for the purposes of collection, as is the case here, obtaining a certification is not unusual and not known to be difficult to obtain.

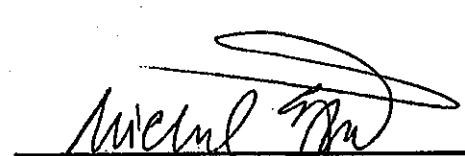
Plaintiff, as the assignee of the original creditor, also could submit an affidavit from its own employee with sufficient information regarding the original creditor's maintenance of its business records to support a default judgment. However, Plaintiff submitted an Affidavit that provides insufficient information for multiple reasons. First, the affiant did not indicate that he

had personal knowledge of the accuracy of the prior creditor's business records. Second, even if he had, the affiant would have needed to state supporting facts to indicate why or how he was familiar with the records of Wells Fargo. Instead, the affiant made a general statement indicating, in effect, that "based on his experience" all records of all credit card companies should be deemed accurate. Without more this statement lacks the type of trustworthiness required to satisfy Evid.R. 803(6). Third, none of the statements in the Affidavit indicated an ongoing relationship between the assignor and assignee creditors, to provide another form of trustworthiness that justifies application of the business records exception to the hearsay rule, Evid.R. 803(6), as discussed in *Great Seneca* and its progeny.

For all of these reasons, this Affidavit does not resemble in any trustworthy fashion the affidavits or certificates that were found acceptable in *Great Seneca* and its progeny. Plaintiff's Motion for Default Judgment is denied.

IT IS SO ORDERED.

DATED: 11/21/13



JUDGE MICHAEL E. JACKSON

THE CLERK OF COURT SHALL SERVE A COPY OF THE FOREGOING JOURNAL ENTRY AND OPINION ON ALL COUNSEL OF RECORD AT THE ADDRESS LISTED ON THE COURT DOCKET.

RECEIVED FOR FILING

DEC 02 2013

CUYAHOGA COUNTY
CLERK OF COURTS
By John Miller Deputy