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STATE OF MICHIGAN

COURT OF APPEALS

NAVIENT CREDIT FINANCE CORPORATION,

Plaintiff-Appellee,

v

APRIL NEWTON,

Defendant-Appellant.

UNPUBLISHED
December 22, 2020

No. 351329
Kent Circuit Court
LC No. 19-000816-CK

Before: RONAYNE KRAUSE, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendant, April Newton, appeals as of right the trial court's order granting summary disposition in favor of plaintiff, Navient Credit Finance Corporation, pursuant to MCR 2.116(C)(10). We affirm.

I. FACTUAL BACKGROUND

In 2005, defendant executed a promissory note with Stillwater National Bank & Trust Corporation ("Stillwater"). The fact that defendant signed the note is one of two facts to which she admits; the other is that she financed her education at the California School of Culinary Arts.[1] Stillwater disbursed a total amount of $28,000 to defendant and charged defendant a fee of $1,680. According to plaintiff, Stillwater sold defendant's promissory note to SLM Education Credit Finance Corporation ("SLM"). At that time, defendant owed a principal amount of $29,680 and interest in the amount of $1,592.60. Afterward, SLM sold defendant's promissory note to Mustang Funding I, LLC ("Mustang"). Mustang later sold the note back to SLM. Sometime afterward, SLM changed its name to Navient Credit Finance Corporation (i.e., plaintiff). Plaintiff's proffered records seem to indicate that defendant never made consistent payments toward her debt, and her last payment, of $420.00, was made on July 4, 2014. On January 28, 2019, plaintiff commenced

[1] Although not specifically admitted in so many words, defendant appears to tacitly concede that she financed her education using the loan from Stillwater.

the instant suit, alleging that defendant had defaulted and owed plaintiff "the principal amount of $38,773.01, plus accrued interest in the amount of $24,422.27 through December 20, 2018."

Defendant denied most of plaintiff's allegations. She also argued that plaintiff's suit was barred under the statute of limitations, and plaintiff lacked standing because it was not assigned defendant's promissory note. Plaintiff filed a motion for summary disposition in which it argued that there was no genuine issue of material fact in regard to defendant's liability, damages, the statute of limitations, and plaintiff's standing. Defendant argued in response that the trial court could not consider any of the evidence that plaintiff attached to its motion for summary disposition. Defendant contended that plaintiff failed to lay the proper foundation for the evidence and that it was prepared in anticipation of litigation. Furthermore, defendant contended that plaintiff did not have standing, the suit was barred under the statute of limitations, and that the documents that plaintiff provided proving damages were unreliable. The trial court agreed with plaintiff and granted its motion for summary disposition. Defendant now appeals.

II. STANDARD OF REVIEW

This Court reviews de novo a grant of summary disposition pursuant to MCR 2.116(C)(10). *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). Motions under MCR 2.116(C)(10) test the factual sufficiency of a claim, and all evidence submitted by the parties must be construed in the light most favorable to the non-moving party. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The initial burden rests on the moving party, and "[t]he burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547NW2d 314 (1996). "If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 370; 775 NW2d 618 (2009). Conversely, "[i]f the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Quinto*, 451 Mich at 363. This Court limits its "review to the evidence presented to the trial court at the time defendant's motion was decided." *Pena v Ingham Co Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

MCR 2.116(G)(6) provides that "[a]ffidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on [MCR 2.116](C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." "However, although the evidence must be substantively admissible, it does not have to be in admissible form." *Barnard Mfg Co*, 285 Mich App at 373. It is the content of the evidence that must be admissible. *Id.* Additionally, the affidavits submitted with a motion for summary disposition "must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence to establish or deny the ground stated in the motion." *SSC Assoc Ltd Partnership v General Retirement Sys of City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). The purpose of the affidavits is not to resolve issues of fact but instead "to help the court determine whether an issue of fact exists." *Id.* "Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule[.]" *Id.*

III. HEARSAY CHALLENGES

Defendant first argues on appeal that the evidence that plaintiff attached to its motion for summary disposition constitutes inadmissible hearsay, so the trial court erred by considering the evidence when determining the motion. Specifically, defendant contends that plaintiff failed to lay proper foundation showing that the documents that plaintiff attached regarding assignment fell within the business-records exception to the general rule that hearsay is inadmissible. However, plaintiff "did not have to lay the foundation for the admission of the [assignment documents] in order for the court to consider them on a motion for summary disposition as long as there was a plausible basis for the admission of the [assignment documents]." *Barnard Mfg Co, Inc*, 285 Mich App at 373. See also MCR 2.116(G)(6). With a proper foundation, the assignment documents would be admissible as records of regularly conducted activity. See MRE 803(6). We find the trial court properly considered the documents attached to plaintiff's motion.

A. GENERAL PRINCIPLES

MRE 801(c) defines "hearsay" as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Generally, hearsay is inadmissible. MRE 802. However, there are numerous exceptions to that general rule. See MRE 803. One is known as the business-records exception. See MRE 803(6). See also *Solomon v Shuell*, 435 Mich 104, 108; 457 NW2d 669 (1990). The business-records exception provides as follows:

> Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, 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 by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. [MRE 803(6).]

B. PLAINTIFF'S ATTACHED DOCUMENTS

Plaintiff attached a number of documents to its brief in support of its motion for summary disposition. It attached the promissory note that defendant executed with Stillwater, which contained the loan disbursement amounts. It attached a registry of payments that defendant made toward her debt. The registry, which dated back to the initial disbursement of funds, showed that defendant made her last payment on July 4, 2014, in the amount of $420.00, and that defendant had an outstanding principal amount of $38,773.01. The registry also showed that additional interest had accumulated after defendant stopped making payments. Plaintiff attached a State of Delaware "certificate of amendment of certificate of incorporation," which showed that plaintiff was formerly known as SLM. Plaintiff attached a bill of sale between Stillwater and SLM, which showed Stillwater selling defendant's promissory note to SLM. Finally, plaintiff attached the

purchase agreement between SLM and Mustang and the bill of sale between Mustang and SLM. The latter two documents lacked specific identifying information regarding the debtor.

Furthermore, plaintiff attached two affidavits from Mary Kay Mauer, litigation supervisor for Navient Solutions, LLC, a subsidiary of Navient Corporation. The May 2017 affidavit explained that the bill of sale and the purchase agreement between Mustang and SLM were not originally generated during the initial transactions. Mauer explained that SLM and Mustang shared a parent company, and therefore loan transfers between those two entities were "documented within a common system of record," but bills of sale were not contemporaneously generated. It was possible that a screenshot could be taken from that system to show the transfer of defendant's loan. However, "[t]o simplify the process of proving chain of title, Bills of Sale [were] prepared for certain transactions wherein a Bill of Sale was not created contemporaneously with those transactions."

In the December 2018 affidavit, Mauer explained that she was an employee of "Navient Solutions, LLC as a Litigation Supervisor." She stated that her "job duties include, but are not limited to, reviewing and processing documents and records relating to loans in default, researching and responding to inquiries via telephone and/or in writing pertaining to litigation accounts, and reviewing, processing, and signing affidavits relating to account balances on loans in default." She stated that she was "familiar with Navient Solutions, LLC and plaintiff's record keeping practice and activities" and that she had "access to the records of [defendant's] loan account," and she "personally inspected the account's records regarding the balance due on [defendant's] loan." She explained that "[a]ccount information and business records regarding plaintiff's accounts are kept and maintained by Navient Solutions, LLC, as Servicer for plaintiff, NAVIENT CREDIT FINANCE CORPORATION." Additionally, she swore that those "records are kept in the normal course of business and entries thereon and are made in the ordinary course of business at or about the time of events they purport to record" and that "[t]he records kept and maintained by Navient Solutions, LLC are reliable."

Furthermore, Mauer swore that Stillwater transferred defendant's note to SLM, which then transferred the note to Mustang, which in turn transferred the note to SLM. Mauer stated that in support of plaintiff's action she attached the "true, accurate and complete copy of the original" promissory note between defendant and Stillwater and an "accurate and complete copy of the amortization" of defendant's loan, which shows that defendant defaulted on her obligation. Mauer also swore that defendant's last payment was on July 4, 2014, and that "[t]he outstanding balance due on the Note is $63,195.28 which includes the principle sum of $38,773.01 together with interest in the amount of $24,422.27 through December 20, 2018 and court costs." In support of its response to plaintiff's motion, defendant simply attached a printout of an unpublished opinion that she contended supported her argument that plaintiff's documents were insufficient to prove chain of title.

The documents that show assignment of defendant's promissory note consist of the bill of sale between Stillwater and SLM, the purchase agreement between SLM and Mustang, and the bill of sale between Mustang and SLM. A plausible basis for the admission of those documents exists because the documents were clearly made and "kept in the course of regularly conducted business activity," and it was clearly regular practice of plaintiff to keeps such documents. MRE 803(6). If plaintiff laid a proper foundation for the documents at trial, then the assignment documents,

which constitute a record of a transaction regularly conducted between financial institutions, would be admissible as records of regularly conducted business activity. Additionally, Mauer is someone with knowledge of the records that plaintiff attached to the motion. See MRE 803(6). Mauer would be able to testify that the documents were created contemporaneously with the sale of defendant's promissory note and that those types of documents were regularly made and kept in the course of purchasing and selling promissory notes. See also MRE 803(6).

Therefore, the trial court properly considered the assignment documents. Plaintiff was not required to establish foundation for the admission of the chain of title documents, and there is a plausible basis for the admission of the records at trial. See *Barnard Mfg Co, Inc*, 285 Mich App at 373. Plaintiff also raises specific further challenges to particular documents.

C. ASSIGNMENT DOCUMENTS – PREPARED FOR LITIGATION

Defendant argues that the trial court should not have considered the assignment documents because the circumstances of the creation of the documents indicate a lack of trustworthiness. See MRE 803(6). Specifically, defendant contends that the documents lack dates and were created in anticipation of litigation. Defendant correctly notes that generally, "documents prepared for use in litigation are not admissible as records of regularly conducted activities." *Attorney General v John A Biewer Co, Inc*, 140 Mich App 1, 17; 363 NW2d 712 (1985). "The justification for the business records exception is that a record kept in the regular course of business is trustworthy," but when "the record is prepared for the purpose of litigation, the record does not have the inherent trustworthiness that a record kept in the regular course of business does." *Id.*

However, in support of her argument, defendant misconstrues the statements that Mauer made regarding the purchase agreement between SLM and Mustang and the bill of sale between Mustang and SLM. Mauer swore in her May 2017 affidavit that bills of sale are not contemporaneously generated for transactions between companies that directly or indirectly share the same parent company. However, Mauer swore that the transfer is "documented within a common system of record." In this case, "Mustang Funding is an indirect subsidiary of Navient Corporation[,]" so plaintiff could enter its "system of record and produce a 'screen shot' from that system to show the transfer of that loan." However, "[t]o simplify the process for proving chain of title," plaintiff prepared bills of sale from its common system of record in support of its motion.

Although the paper form of the purchase agreement between SLM and Mustang and the bill of sale agreement between Mustang and SLM were created in anticipation of litigation, the substance of those documents existed in an electronic form in one of plaintiff's electronic databases. See *Barnard Mfg Co*, 285 Mich App at 373. Printed screen shots of the transactions would be admissible at trial pursuant to MRE 803(6). See *United States v Nixon*, 694 F3d 623, 633-635 (CA 6, 2012).[2] Additionally, at trial, Mauer could testify that it is plaintiff's regular

[2] The decisions of lower federal courts are not binding on this Court, but they may serve as persuasive authority. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Additionally, federal caselaw interpreting the Federal Rules of Evidence may be used as persuasive authority. See *Central Fabricators, Inc v Big Dutchman*, 398 Mich 352, 357-360; 247 NW2d 804 (1976). We find the Sixth Circuit's analysis in this matter persuasive and instructive.

practice to make, keep, and maintain sales documents between companies that share the same parent company on a computer database. See *id*. She would also be able to produce the electronic form or paper form of the data. See *id*. Therefore, although the evidence of the transactions between SLM and Mustang were not in admissible form, there is a plausible basis upon which the content or substance of the evidence would be admissible. See *Barnard Mfg Co*, 285 Mich App at 373. As stated earlier, the trial court properly considered the chain of title documents that plaintiff attached to its motion for summary disposition.

D. ALL DOCUMENTS – LACK OF FOUNDATION

Defendant argues that the trial court should not have reviewed *any* of the documents that plaintiff attached to its motion for summary disposition because "[a]ll of them lacked a proper foundation." However, as stated earlier, plaintiff "did not have to lay the foundation for the admission of the [documents] in order for the court to consider them on a motion for summary disposition as long as there was a plausible basis for the admission of the [documents]." *Barnard Mfg Co*, 285 Mich App at 373; see also MCR 2.116(G)(6). With a proper foundation, the other documents, such as the amended certificate of incorporation and the original loan agreement between defendant and Stillwater, that plaintiff attached to its motion for summary disposition would also be admissible pursuant to the business-records exception. See MRE 803(6).

The records were clearly made and "kept in the course of regularly conducted business activity," and it is apparently "regular practice" of plaintiff to make and keep such documents. MRE 803(6). If plaintiff laid a proper foundation for the documents at trial, then the records, which constitute records of transactions regularly conducted by financial institutions, would be admissible as records of regularly conducted business activity. Additionally, Mauer is someone with knowledge of the records that plaintiff attached to the motion. See MRE 803(6). Mauer would be able to provide the necessary foundation for the documents at trial. See MRE 803(6).

Furthermore, in addition to the assignment documents, the original promissory note, and the amended certificate of incorporation; plaintiff attached two affidavits from Mauer in support of its motion for summary disposition. In the affidavits, Mauer made statements that were "made on the basis of personal knowledge" and that "set forth with particularity such facts as would be admissible as evidence to establish or deny the ground stated in the motion." *SSC Assoc Ltd Partnership*, 192 Mich App at 364. Additionally, the content of the affidavits would be admissible pursuant to MRE 701 (opinion testimony from lay witness) because the statements Mauer made were opinions and inference rationally based on her perception, and they would be helpful to "the determination of a fact[s] in issue."

E. REGISTRY OF PAYMENTS

Defendant also argues that the registry of payments is inadmissible pursuant to the business-records exception; and, in any event, it was not trustworthy or reliable, so the trial court should not have considered it when determining whether a question of fact remained in regard to the statute of limitations. For the reasons already discussed, the registry of payments was properly considered. With a proper foundation, the registry of payments would be admissible as records of regularly conducted activity, because it was a record made and kept in the regular course of plaintiff's business. See MRE 803(6). Additionally, Mauer is someone with knowledge of the

record. See MRE 803(6). Mauer would be able to testify that the registry was "kept in the normal course of business and entries thereon and are made in the ordinary course of business at or about the time of events they purport to record." See MRE 803(6).

Defendant also contends that the trial court should not have considered the registry because it was not trustworthy and was "haphazardly manufactured for the purposes of litigation by Navient." However, defendant's argument amounts to mere conjecture because she fails to support her assertion with any proof, and speculation and conjecture do not create an issue of material fact. See *Quinto*, 451 Mich at 362; see also *Ghaffari v Turner Const Co*, 268 Mich App 460, 464; 708 NW2d 448 (2005). At most, defendant points out that the registry reflects a final balance of $38,773.01, which is significantly less than the $63,195.28 that plaintiff seeks in this matter; apparently overlooking the fact that the complaint specifically requested a principal balance of $38,773.01 plus $24,422.27 in accrued interest. Defendant has not presented any challenge to plaintiff's arithmetic regarding the accrued interests, so we will not craft any such argument on her behalf. *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). As discussed, plaintiff was not required to establish foundation for the registry of payments, and there is a plausible basis for the admission of the record at trial. See *Barnard Mfg Co, Inc*, 285 Mich App at 373.

The trial court properly considered the registry of payments because the content of the document was admissible pursuant to the business-records exception, and there is no proof that it is untrustworthy or unreliable.

Consequently, the registry establishes that plaintiff sued within the relevant statutory period of limitations. "The burden of establishing the bar imposed by a statute of limitations is normally on the party asserting the defense." *Kuebler v Equitable Life Assurance Society of the United States*, 219 Mich App 1, 5; 555 NW2d 496 (1996). Under MCL 600.5807(9), a breach of contract claim must be brought within six years. "[A] claim of breach of contract accrues when the promisor fails to perform under the contract." *Cordova Chem Co v Dep't of Natural Resources*, 212 Mich App 144, 153; 536 NW2d 860 (1995). "[A] partial payment restarts the running of the limitation period unless it is accompanied by a declaration or circumstance that rebuts the implication that the debtor by partial payment admits the full obligation." *Yeiter v Knights of St Casimir Aid Society*, 461 Mich 493, 497; 607 NW2d 68 (2000). Although defendant claims she breached the agreement in 2005, the registry actually appears to show no pattern of consistent payments, and the last payment was made on July 4, 2014. The complaint in this matter was filed within six years of July 4, 2014.

IV. STANDING

Defendant also argues that even if the documents that plaintiff attached to its motion are admissible, they fail to establish that plaintiff has standing. Specifically, she argues, the documents that plaintiff produced in support of its motion for summary disposition failed to establish the chain of title for defendant's debt. We disagree.

Generally, "standing requires a party to have a sufficient interest in the outcome of litigation to ensure vigorous advocacy and in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of

the controversy." *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd v City of Pontiac*, 309 Mich App 611, 621; 873 NW2d 783 (2015) (quotation marks and citations omitted). The loan agreement shows that the original loan agreement was between defendant and Stillwater. The bill of sale between Stillwater and SLM Credit Finance Corporation proves that SLM purchased defendant's debt from Stillwater, because the bill of sale specifies that defendant's loan was part of the debt pool that SLM purchased. However, the purchase agreement between SLM and Mustang does not specify that defendant's debt was part of the debt pool that Mustang purchased from SLM. Instead, the purchase agreement only specifies that Mustang purchased debt from Account 304,884. Nothing in the purchase agreement provides any information linking the purchase agreement to defendant. The same problem exists with the bill of sale between Mustang and SLM: nothing in the bill of sale identifies defendant. The bill of sale only proves that SLM purchased debt from Mustang, but it does not indicate that the debt belonged to defendant.

However, in support of its motion, plaintiff also attached an affidavit from Mauer, which clarified that defendant's debt was transferred from SLM to Mustang and that Mustang transferred the debt back to SLM. Additionally, plaintiff produced a registry of payments from defendant that dates back to the initial disbursement of the loan money. Therefore, the documents that plaintiff provided are sufficient to establish a chain of title from the loan originator.

Finally, defendant raised additional issues on appeal in regard to the statute of limitations, damages, and inferences the trial court made. However, defendant failed to properly brief those issues. Therefore, we decline to address those issues in the absence of a meaningful argument advanced by defendant as the appealing party. See *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008); see also *Mitcham*, 355 Mich at 203. We note that it is not immediately obvious that any such argument would be meritorious, in any event.

Affirmed. Plaintiff, being the prevailing party, may tax costs. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Jane E. Markey
/s/ Stephen L. Borrello