

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

PORTFOLIO RECOVERY ASSOCIATES,)
LLC.)
)
Plaintiff,)
)
v.)
)
CHRISTINE DELGADO,)
)
Defendant.)

Case No. 3AN-13-06902 CI

ORDER REQUESTING SUPPLEMENTATION

Plaintiff Portfolio Recovery Associates, LLC. ("Portfolio") submitted its *Complaint* on May 2, 2013, alleging that Defendant Christine Delgado ("Ms. Delgado") owes a credit card debt that was purchased by Portfolio from an original creditor. In support of the *Complaint*, and pursuant to court rules, Portfolio attached an affidavit from Jennifer Cecka as a means of showing that it purchased the original debt account in question from GE Capital Retail Bank.¹ See Exhibit 3 of Plaintiff's *Complaint*.

Now before the court is Ms. Delgado's *Partial Motion for Summary Judgment* which, in part, calls into question an affidavit of sale submitted as proof that Portfolio currently owns a debt account that can be recovered through legal proceedings against Ms. Delgado.

Alaska Civil Rule 56(e) sets forth the standard for affidavits submitted in support of or in opposition to a motion for summary judgment. The rule states that such affidavits "shall be made on personal knowledge, shall set forth such facts as would be

¹ Civil Rule 10(c).

admissible in evidence. and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” The rule also requires that “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.”

In *Beneficial Maine, Inc. v. Carter*,² the Maine Supreme Court addressed the sufficiency of an affidavit submitted in support of a motion for summary judgment, applying the same standard for affidavits as that set forth in Alaska Civil Rule 56(e). To support its motion, Beneficial submitted an affidavit from an individual who was not Beneficial’s employee. The Court described the affidavit as having a “ cursory reference ... to her knowledge of the critical issues – how Beneficial created, maintained, and produced the records.” The skeletal nature of the affidavit prompted the Court to clarify the foundation of knowledge that a nonemployee must possess to be a “qualified witness” to lay a foundation for a business record in an affidavit to support summary judgment.

The Maine Supreme Court started its inquiry by noting that the affidavit was hearsay, and thus the affidavit needed to satisfy the business records exception to the hearsay rule in order to be admissible for purposes of the motion for summary judgment. The Court explained that the business records exception allows a business’s record of acts or events to be admissible if the necessary foundation is established by the testimony of the custodian or other qualified witness: the exception allows consideration of a business record, without requiring firsthand testimony regarding the recorded facts, by

² 25 A.3d 96 (Maine 2011) (affidavit in support of a business record failed to establish a proper foundation in order for the business record to be accepted into evidence).

supplying a witness whose knowledge of business practices for production and retention of the record is sufficient to ensure the reliability and trustworthiness of the record.

The Court noted that, although an affiant offering statements to establish the admissibility of a business record need not be an employee of the record's creator, the foundational evidence from the receiving entity's employee must demonstrate that "the employee had sufficient knowledge of both businesses' regular practices to demonstrate the reliability and trustworthiness of the information."³ Specifically, the Court held that the affiant must demonstrate knowledge that: (1) the producer of the record employed regular business practices for creating and maintaining the records that were sufficiently accepted by the receiving business to allow reliance on the records by the receiving business; (2) the producer of the record at issue employed regular business practices for transmitting them to the receiving business; (3) by manual or electronic processes, the receiving business integrated the records into its own records and maintained them through regular business practices; (4) the record at issue was, in fact, among the receiving business's own records; and (5) the receiving business relied on these records in its day-to-day operations.

Moving to analysis of the affidavit at issue, the Maine Supreme Court found it deficient, largely because the affiant (an employee of HSBC, which serviced Beneficial Maine, Inc.) did not: (1) describe the basis for her alleged knowledge of Beneficial's practices for creating, maintaining, and transmitting the records at issue; (2) report

³ *Id.* at 102.
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HSBC's practices in obtaining and maintaining Beneficial's records for HSBC's own use; or (3) describe how HSBC integrated Beneficial's records into HSBC's own records.

The Jennifer Cecka affidavit supplied by Portfolio, which appears to be a copy, suffers from deficiencies similar to those in the *Beneficial* case. Ms. Cecka does not describe GE Capital Retail Bank's practices for creating or maintaining credit card debt records. Nor does she describe the records wherein she obtained or reviewed "the information below" regarding Ms. Delgado's account. Moreover, Ms. Cecka's affidavit does not attach any of the documents she presumably must have reviewed in order to identify Ms. Delgado's account number and the balance on the card. Finally, while Ms. Cecka states that the account was sold to Portfolio, she does not describe what records she reviewed in order to offer this assertion. In short, the affidavit falls short of the standard set forth in Alaska Civil Rule 56(e).

It is possible that Portfolio can remedy the deficiencies of Ms. Cecka's affidavit. Accordingly, the court will give Portfolio until January 9, 2017^{at Closing} to file an original (not a photocopied) affidavit that meets the requirements of Alaska Civil Rule 56(e) and is sufficient to show that GE Capital Retail Bank owned the consumer debt at issue and then sold the account to Portfolio. To be clear, the affidavit must establish that the affiant is familiar with GE Capital Retail Bank's regular business practices for creating and maintaining consumer debt records. It should also attach records reviewed in order to provide information about Ms. Delgado's account. Finally, to the extent that Portfolio intends to rely upon the affidavit as proof that Portfolio purchased Ms.

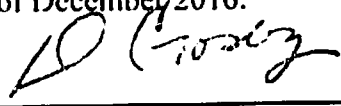
Delgado's account from GE Capital Retail Bank, the affidavit must meet the aforementioned affidavit standards in that regard, as well.

Pending submission of the affidavit, the court will hold the Motion for Partial Summary Judgment in abeyance. Because the outcome of that motion may affect the Motion to Compel, the court will also hold the Motion to Compel in abeyance, but intends to rule upon both motions promptly after the January 9, 2016 deadline, as trial is approaching in this matter.

*2017
of Crosby*

IT IS SO ORDERED.

DATED at Anchorage, Alaska this ^{12th} day of December 2016.



Dani Crosby
Superior Court Judge

I certify that on 12/12/16 a copy of the above was mailed to each of the following at their address of record:
N. Filer / J. Fork / J. Davis
Selami J. Taha
Judicial Assistant