

No. 1-16-2083

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PORTFOLIO RECOVERY ASSOCIATES, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 14 M3 002934
)	
JOZSEF MERCZEL,)	Honorable
)	Thomas D. Roti,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* We reversed the circuit court's order granting summary judgment in favor of the plaintiff, finding that the affidavit submitted in support of the plaintiff's motion did not satisfy the business records exception to the rule against hearsay.

¶ 2 The defendant, Jozsef Merczel, appeals from an order of the circuit granting summary judgment in favor of the plaintiff, Portfolio Recovery Associates, LLC, in the amount of \$14,456.78 plus costs. For the reasons which follow, we reverse the summary judgment entered in favor of the plaintiff and remand this matter to the circuit court for further proceedings.

¶ 3 On September 5, 2014, the plaintiff filed the instant action against the defendant for monies due on a delinquent charge account. In its complaint, the plaintiff alleged that it acquired

No. 1-16-2083

all right, title and interest to the account theretofore owed by the defendant to U.S. Bank National Association ND (U.S. Bank). On September 23, 2014, the defendant filed his *pro se* appearance, jury demand and answer to the complaint, denying the material allegations contained therein and setting forth what he styled as ten affirmative defenses. Also contained within the pleading was a six-count counterclaim against the plaintiff asserting claims for "Fraud and Misrepresentation," "Frivolous Conduct," and "Violations of the Federal Fair Credit Collection Act."

¶ 4 On October 29, 2014, the plaintiff filed its combined motion pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)), seeking a dismissal of all of the counts of the defendant's counterclaim. On November 12, 2014, the circuit court entered an order, *inter alia*, granting the plaintiff's motion to dismiss counts 1, 2, 3 and 6 of the defendant's counterclaim and granting the defendant until December 10, 2014, to amend his affirmative defenses and counts 4 and 5 of his counterclaim.

¶ 5 On December 5, 2014, the defendant filed his amended answer to the plaintiff's complaint, again denying the material allegations thereof, along with six affirmative defenses and a two-count counterclaim against the plaintiff asserting claims for "Violations of the Federal Fair Debt Collection Act" and "Common Law Fraud and Misrepresentation." On January 7, 2015, the plaintiff filed a motion to strike the defendant's amended affirmative defenses pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)). On February 19, 2015, the circuit court entered an order striking the defendant's affirmative defenses and counterclaim and granting the defendant 21 days to file amended affirmative defenses and counterclaims. On April 9, 2015, the circuit court granted the defendant an extension until May 7, 2015, to file his amended pleadings.

¶ 6 On May 5, 2015, the defendant filed his second amended two-count counterclaim against the plaintiff, again asserting claims for "Violations of the Federal Fair Debt Collection Act" and "Common Law Fraud and Misrepresentation." On that same day, the defendant filed a motion to dismiss the plaintiff's complaint pursuant to section 2-615 of the Code. The record fails to reflect that the defendant ever filed amended affirmative defenses.

¶ 7 On June 10, 2015, the plaintiff filed its combined motion pursuant to section 2-619.1 of the Code, seeking a dismissal of both counts of the defendant's second amended counterclaim. On August 27, 2015, the matter came before the circuit court for hearing on both the defendant's motion to dismiss the plaintiff's complaint and the plaintiff's motion to dismiss the defendant's second amended counterclaim. The circuit court entered an order denying the defendant's motion to dismiss the plaintiff's complaint and granting the plaintiff's motion to dismiss the defendant's second amended counterclaim, finding that count I thereof was time barred and count II failed to state a claim. On that same day, the circuit court also entered an order assigning the matter to mandatory arbitration.

¶ 8 An arbitration hearing was held on November 4, 2015, after which the arbitrators entered a unanimous award in favor of the plaintiff in the sum of \$12,424.54. On December 2, 2015, the defendant filed a notice of rejection of the arbitration award and requested that the matter be set for trial. Thereafter, the circuit court set the matter for trial on February 29, 2016.

¶ 9 On February 11, 2016, the defendant filed a motion *in limine* seeking to prevent the plaintiff from making any reference to: the summaries contained in the statement of the account upon which the plaintiff's claim is based, the "Cardmember Agreement;" "any items contained on the Account statements;" and any evidence that had not been disclosed in the plaintiff's Rule

No. 1-16-2083

222(d) disclosure. Ill. S. Ct. R. 222(d) (eff. Jan. 1, 2011). In addition the defendant sought an order barring the plaintiff from pursuing recovery on an account stated theory.

¶ 10 On February 16, 2016, the plaintiff filed a motion for summary judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2014)) supported by the affidavit of Cristina Patterson, the plaintiff's "Custodian of Records." Attached to the affidavit are three exhibits, namely: a copy of the a Visa Card Agreement purporting to be between the defendant and Arlene Merczel, and U.S. Bank; copies of U.S. Bank's monthly statements of account addressed to the defendant and Arlene Merczel for the monthly periods from September 3, 2010, through October 31, 2011; and a copy of an assignment by U.S. Bank to the plaintiff of all of its right, title and interest to the "assets identified on the Tapes," which contained a document purporting to be copy of an electronic record relating to an account in the name of the defendant and Arlene Merczel, provided by U.S. Bank pursuant to its asset assignment to the plaintiff. On February 25, 2016, the circuit court entered an order striking the trial date, quashing all subpoenas, granting the defendant's motion *in limine* in part and denying it in part, and granting the defendant until March 31, 2016, to respond to the plaintiff's motion for summary judgment.

¶ 11 On March 31, 2016, the defendant filed his response to the plaintiff's motion for summary judgment attacking the affidavit of Cristina Patterson, asserting that her affidavit consisted of legal conclusions and unsupported facts. The response was not supported by any affidavits or other counter-evidentiary material.

¶ 12 On May 12, 2016, the circuit court entered a Memorandum Opinion and Order, granting the plaintiff's motion for summary judgment and entering judgment against the defendant for \$14,456.78 plus costs. On June 6, 2016, the defendant filed a motion to reconsider supported by his affidavit claiming no recollection of: having a credit card account with U.S. Bank; receiving

No. 1-16-2083

an offer of a credit card from U.S. Bank; receiving a credit card from U.S. Bank; using a credit card from U.S. Bank; and refusing to pay any "legally due and proven amount due" on a credit card from U.S. Bank. In addition, the defendant's affidavit states the he sent a letter to U.S. Bank's legal department stating that "it was a dispute of debt with a cease and desist letter." On June 23, 2016, the circuit court denied the defendant's motion for reconsideration, and this appeal followed.

¶ 13 In his *pro se* brief, the defendant argues that the trial court erred in granting the plaintiff's motion for summary judgment and denying portions of his motion *in limine*. The plaintiff contends that the defendant's brief fails to conform to Illinois Supreme Court Rule 341 (eff. Jan. 1, 2016). On this issue, we agree with the plaintiff.

¶ 14 Rule 341(h) provides that an appellant's brief shall contain a statement of facts, argument, and an appendix, the required contents of which are set forth in the rule. Ill. S. Ct. R. 341(h) (eff. Jan. 1, 2016). The defendant's brief fails to comply with the rule in each of these three required components.

¶ 15 Rule 341(h)(6) provides that an appellant's brief shall contain a statement of the facts necessary to an understanding of the case, stated without argument and with appropriate reference to the pages of the record on appeal. Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016). The statement of facts in the defendant's brief consists of 19 one-sentence bullet points, some of which are argumentative, and none of which reference the page in the record which supports the statement.

¶ 16 Rule 341(h)(7) requires that the argument in an appellant's brief contain his contentions, the reasons therefore with citation of the authorities relied upon, and the pages in the record supporting the arguments. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). The argument contained in

No. 1-16-2083

the defendant's brief fails to set forth any citations to the authorities relied upon and fails to reference the page numbers in the record where support for each argument might be found.

¶ 17 Rule 341(h)(9) provides that an appellant's brief shall contain "[a]n appendix as required by Rule 342." Ill. S. Ct. R. 341(h)(9) (eff. Jan. 1, 2016). Rule 342(a) requires that the appendix to an appellant's brief contain, among other items, a table of contents to the appendix, a copy of the judgment appealed from, any pleadings or other materials from the record which are the basis of the appeal or pertinent to it, the notice of appeal, and a complete table of contents, with page references, to the record on appeal. Ill. S. Ct. R. 342(a) (eff. Jan. 1, 2005). The defendant's brief in this case has no appendix.

¶ 18 Illinois Supreme Court Rules are not advisory suggestions; they are rules to be followed by attorneys and *pro se* litigants alike. The fact that a party appears *pro se* does not relieve him or her from complying with the Illinois Supreme Court Rules applicable to practice before this court. *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8; *In re Marriage of Barile*, 385 Ill. App. 3d 752, 757 (2008). As a reviewing court, we expect an appellant to furnish us with a clear and concise statement of the facts necessary to an understanding of the case with appropriate references to the supporting pages in the record, and we are entitled to have the issues clearly defined, pertinent authority cited, and a cohesive legal argument presented. *Walters v. Rodriguez*, 2011 IL App (1st) 103488, ¶ 5.

¶ 19 The defendant's brief in this case fails to comply with the Illinois Supreme Court Rules governing the required content of an appellant's brief. The deficiencies in the defendant's brief have required this court to sift through 393 pages of record in an effort to find the pleadings and orders necessary for a resolution of this appeal and have placed the burden of research upon us. The defendant's violations of the Illinois Supreme Court Rules would justify this court in finding

each of the issues raised forfeited and dismissing his appeal. However, we may overlook forfeiture in cases where it is necessary in order to obtain a just result or to maintain a sound body of precedent. *Wilson v. Humana Hospital*, 399 Ill. App. 3d 751, 757 (2010). We believe that this is such a case.

¶ 20 This matter comes to this court on appeal from an order granting a motion for summary judgment. Our review is, therefore, *de novo*. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). We must independently examine the evidence which was before the circuit court to determine whether the plaintiff is entitled to judgment as a matter of law. *Arra v. First State Bank & Trust Company of Franklin Park*, 250 Ill. App. 3d 403, 406 (1993). In so doing, we may not consider evidence which would be inadmissible at trial. See *Babich v. River Oaks Toyota*, 377 Ill. App. 3d 425, 429 (2007).

¶ 21 Summary judgment is appropriate in cases where the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Kuwik v. Starmark Star Marketing and Administration, Inc.*, 156 Ill. 2d 16, 31 (1993). Although summary judgment is to be encouraged as an expeditious means for disposing of lawsuits, it is a drastic measure which should be allowed only when the right of the movant is clear and free from doubt. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986).

¶ 22 The burden of proof and the initial burden of production in a motion for summary judgment lie with the movant. *Pecora v. County of Cook*, 323 Ill. App. 3d 917, 933 (2001). The respondent to such a motion may rely solely upon his pleadings to create a material question of fact until the movant supplies evidentiary material that would clearly entitle it to judgment as a matter of law. *Id.* at 934.

¶ 23 In this case, the only evidentiary material before the circuit court in support of the plaintiff's motion for summary judgment was the affidavit of Cristina Patterson, the plaintiff's "Custodian of Records" and the documents attached thereto. The defendant did not file any counter-evidentiary material with his response to the motion. Rather, he attacked the Patterson affidavit, albeit inartfully, as hearsay and consisting of legal conclusions made without supporting evidence. On appeal, the defendant did not address the Patterson affidavit directly. He did, however, address the hearsay nature of the documents attached to her affidavit in the context of his arguments addressed to the circuit court's denial of portions of his motion *in limine*.

¶ 24 In its brief, the plaintiff argues that "the trial court correctly found that the documents [attached to the Patterson affidavit] are admissible under the business records exception to the rule against hearsay." We disagree.

¶ 25 Attached to the Patterson affidavit is a copy of a document which purports to be a Visa Card Agreement between U.S. Bank and the defendant and Arlene Merczel. Also attached are copies of U.S. Bank's monthly credit card statements addressed to the defendant and Arlene Merczel reflecting credit card activity from September 3, 2010, through October 31, 2011 (collectively referred to as the documents). The purpose of the documents was to prove the truth of the matters contained therein and establish the amount due and owing to the plaintiff as the assignee of U.S. Bank. The documents are, by their very nature, hearsay. See Ill. R. Evid. 801(c) (eff. Oct. 15, 2015).

¶ 26 Hearsay is not admissible in evidence except as provided in the Illinois Rules of Evidence, other rules prescribed by the supreme court, or by statute. Ill. R. Evid. 802 (eff. Jan. 1, 2011). Illinois Rule of Evidence 803(6) (eff. April 26, 2012) and Illinois Supreme Court Rule

No. 1-16-2083

236 (eff. Aug. 1, 1992) are a codification of the business records exception to the rule against hearsay. Business records are admissible in evidence as an exception to the rule against hearsay provided that the party tendering the record satisfies the foundational requirements that (1) the record was made in the regular course of business and (2) at or near the time of the event or occurrence reflected therein. *Kimble v. Earle M. Jorgenson Company*, 358 Ill. App. 3d 400, 414 (2005); *In re Estate of Weiland*, 338 Ill. App. 3d 585, 600 (2003).

¶ 27 In this case, the Patterson affidavit to which the documents are attached makes clear that the documents were received by the plaintiff from U.S. Bank when it assigned all of its rights and title to the defendant's account to the plaintiff on March 28, 2012. A simple examination of the documents reveals that they were created by U.S. Bank, not by the plaintiff or for the plaintiff.

¶ 28 As was noted in *Apa v. National Bank of Commerce*, 374 Ill. App. 3d 1082, 1087-88 (2007), earlier cases decided by this court held that documents which were not created by their proponent are inadmissible as the business records of the proponent. See *Argueta v. Baltimore & Ohio Chicago Terminal R.R. Co.*, 224 Ill. App. 3d 11, 20 (1991); *International Harvester Credit Corp. v. Helland*, 151 Ill. App. 3d 848, 853 (1986); *Pell v. Victor J. Andrew High School*, 123 Ill. App. 3d 423, 433 (1984); *Benford v. Chicago Transit Authority*, 9 Ill. App. 3d 875, 877-78 (1973). However, neither the language of Illinois Rule of Evidence 803(6) nor the language of Illinois Supreme Court Rule 236 indicates that the application of either rule is limited to cases in which the record in question was created by its proponent. See *Apa*, 374 Ill. App. 3d at 1087. All that is required for a document to be admitted in evidence under the business records exception to the rule against hearsay is that the proponent satisfy the foundational requirements. *Id.* Therefore, we next address the question of whether the Patterson affidavit satisfies the

foundational requirements for the admission of the attached Visa Card Agreement and monthly credit card statements into evidence under the business records exception to the rule against hearsay.

¶ 29 Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) governs the form and content of all affidavits submitted in support of, or in opposition to, motions for summary judgment. *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992). In relevant part, Rule 191(a) provides that affidavits in support of a motion for summary judgment

"shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim *** is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

Affidavits are a substitute for testimony taken in open court and must meet the same requisites as competent testimony. *Harris Bank Hinsdale*, 235 Ill. App. 3d at 1025. Courts may not consider evidence in support of a motion for summary judgment that would not be admissible at trial. *Id.*; *Babich*, 377 Ill. App. 3d at 429.

¶ 30 Patterson's affidavit states that the plaintiff acquired the defendant's account by assignment from U.S. Bank and that a copy of the bill of sale is attached to her affidavit. The affidavit goes on to state that, when an account is acquired by the plaintiff, the account records are integrated into an electronic file which is maintained under Patterson's supervision and regularly relied upon by the plaintiff in the ordinary course of business. Patterson's affidavit also

states that the documents attached to her affidavit are "true and faithful reproductions of the defendant's electronic file."

¶ 31 Although the Visa Card Agreement and monthly credit card statements attached to the Patterson affidavit could be admitted in evidence under the business records exception to the rule against hearsay despite the fact that they are copies of documents which were prepared by U.S. Bank, the Patterson affidavit does not establish the circumstances of their creation by U.S. Bank. From the content of her affidavit, it is clear that, although Patterson is competent to testify that the copies of the Visa Card Agreement and monthly credit card statements attached to her affidavit are reproductions of documents contained within the plaintiff's records, her only knowledge of the accuracy of the matters contained in those documents is based upon her review of the documents themselves. Her affidavit does not assert that the documents were made in the regular course of U.S. Bank's business or that entries in the monthly credit card statements were made at or near the time of the transactions reflected therein.

¶ 32 Application of the business records exception to the hearsay rule is not justified in this case merely because Patterson is competent to testify that the documents are retained by the plaintiff in the ordinary course of its business. See *Apa*, 374 Ill. App. 3d at 1088. Patterson's affidavit does not satisfy the foundational requirements necessary for the Visa Card Agreement or the monthly credit card statements attached to her affidavit to be admitted in evidence under the business records exception to the rule against hearsay. See *Kimble*, 358 Ill. App. 3d at 414.

¶ 33 The plaintiff's entitlement to summary judgment in this case rests upon the truth of the information contained in Visa Card Agreement and monthly credit card statements attached to Patterson's affidavit. In the absence of a proper foundation for the admission of the documents into evidence, they cannot be considered in support of the plaintiff's motion for summary

No. 1-16-2083

judgment. We conclude, therefore, that the plaintiff failed to satisfy its burden of demonstrating its entitlement to judgment as a matter of law.

¶ 34 For the reasons stated, we reverse the summary judgment entered in favor of the plaintiff and remand this cause to the circuit court for further proceedings.

¶ 35 Reversed and remanded.