3-5-2019

Frances B. Bunzl et al., ORDER ON PLAINTIFFS' MOTION FOR DETERMINATION OF ADMISSIBILITY OF DOCUMENTS

John J. Goger
Fulton County Superior Court, Judge

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

FRANCES B. BUNZL; SUZANNE BUNZL WILNER, Individually, as Beneficiary of Bunzl Trusts and as General Trustee; ANNA R. WILNER, Individually, as Beneficiary of Bunzl Trusts, and as General Trustee, and PATRICIA H. BUNZL, Individually and as General Trustee,

Plaintiffs,

v.

JUDITH COCHRAN KIGHT, Individually and as Guardian of adult ward BENNETT LEXON KIGHT, named in his Individual capacity and as Member of the Committee for the Trust Established by the Last Will and Testament of Walter H. Bunzl and as former General and Administrative Trustees for the Trust for the Lineal Descendants of Walter Henry Bunzl, former General and Administrative Trustees for the Trust for Richard Charles Bunzl and his Lineal Descendants, and former General and Administrative Trustees for the Trust for Suzanne Irene Bunzl and her Lineal Descendants; WILLIAM C. LANKFORD, JR., in his Individual capacity and as former General Trustee for the Trust for the Lineal Descendants of Walter Henry Bunzl, former General Trustee for the Trust for Richard Charles Bunzl and his Lineal Descendants, and former General Trustee for the Trust for Suzanne Irene Bunzl and her Lineal Descendants; ROBERT F. KIGHT; JOHN DOES 1 THROUGH 100; PLAYMORE/WANTOOT LLC; PLAYMORE TEN LLC; PLAYMORE TRACT A LLC; PLAYMORE TRACT C LLC; PLAYMORE TRACT D LLC; PLAYMORE TRACT E LLC; PLAYMORE TRACT F LLC; and PLAYMORE TRACT G LLC,

Defendants.

CIVIL ACTION NO.
2013CV227097

Bus. Case Div. 4

ORDER ON PLAINTIFFS' MOTION FOR DETERMINATION OF ADMISSIBILITY OF DOCUMENTS

The above styled matter is before the Court on Plaintiffs' Motion for Determination of Admissibility of Documents ("Motion"), wherein Plaintiffs ask the Court to hold that "any and all documents produced in this lawsuit and provided to all parties…area authentic and admissible for the purposes of O.C.G.A. §24-10-1006."[1]

On Feb. 8, 2013, former trustees Bennett L. Kight and William C. Lankford, Jr. ("Former Trustees"), as General Trustees and/or Administrative Trustees of the Trust for Richard Charles Bunzl and His Lineal Descendants, the Trust for Suzanne Irene Bunzl and Her Lineal Descendants, and the Trust for the Lineal Descendants of Walter Henry Bunzl (collectively the "Bunzl Trusts"), initiated this action by filing a Petition for Approval of Interim Accounting. On Jun. 10, 2013, the Court issued its Order on Motion for Immediate Interlocutory Injunction, where the Court granted in part and denied in part the Bunzls' request for equitable relief and appointed Synovus Trust Company, N.A. as Receiver for the Bunzl Trusts. Therein the Court also directed the Receiver to conduct an investigation and accounting of the assets of the Bunzl Trusts:

> The Receiver is directed to investigate and make an accounting of the assets of the Bunzl Trusts, including any entities that own, control, hold or possess interests in assets of the Bunzl Trusts, from 2005 to present, including all compensation, loans and other interests received by the [Former] Trustees from the Trusts from 2005 to the present. The [Former] Trustees and the Bunzls shall cooperate with the investigation by the Receiver and make themselves available for interviews by the Receiver. The Receiver shall prepare a detailed written report summarizing the results of the investigation.[2]

The Final Transaction Narrative Report of the Receiver, Synovus Trust Company, N.A. ("Final Report") was issued on Aug. 13, 2015. Plaintiffs assert that between the appointment of the Receiver on Jun. 10, 2013 and issuance of the Final Report on Aug. 13, 2015, the Former

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1 Plaintiffs' Motion, pp. 1-2.

2 Order on Motion for Immediate Interlocutory Injunction, pp. 6-7.

Trustees produced over 38,000 documents to Plaintiffs and to the Receiver. Plaintiffs further assert that during the course of this and related litigation, various parties have produced approximately 400,000 pages of documents. Plaintiffs cite to 91 specific documents that have been produced which they assert largely consist of, *inter alia*, banking records, Quickbooks documents, real estate transaction records, business entity formation documents, and operating agreements (collectively the "Subject Documents"); documents which Plaintiffs contend should be considered automatically admissible under O.C.G.A. §24-8-803.

Plaintiffs intend to introduce the Subject Documents through the use of summaries and summary witnesses under O.C.G.A. §24-10-1006 which allows the introduction of "[t]he contents of otherwise admissible voluminous writings…in the form of a chart, summary, or calculation." Plaintiffs' witnesses have not yet created the actual summaries to be used at trial and Plaintiffs assert such will be submitted pursuant to a pretrial order at which time Defendants will have the opportunity to argue the admissibility of the actual summary(ies) to be introduced. Nevertheless, Plaintiffs ask the Court to find at this juncture that the underlying Subject Documents are "otherwise admissible" as contemplated under O.C.G.A. §24-10-1006 so that the parties can present their cases through summarizes and summary witnesses.

Defendants each oppose Plaintiffs' Motion, generally asserting: Plaintiffs are conflating the issues of authentication and admissibility, which must be separately established before documents may be admitted into evidence; Plaintiffs have not presented any testimony, certification, affidavit or other evidence that would establish the foundational requirements for the admission of the Subject Documents, whether under the business records exception to hearsay or otherwise; and an individualized review is required to determine whether each document is admissible. The Court is compelled to agree.

Plaintiffs ask the Court to find that the Subject Documents "are authentic and admissible for the purposes of O.C.G.A. §24-10-1006."[3] That code section provides:

> The contents of **otherwise admissible voluminous writings**, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that the contents of such writings, recordings, or photographs be produced in court.

(Emphasis added). *See* Milich, Ga. Rules of Evidence § 8:4 ("When pertinent facts can be ascertained only by the examination of voluminous records, a party may present a written summary of the facts gleaned from those records if (1) the underlying records are voluminous, (2) the underlying records are made available to the court and the parties, (3) the underlying records would be admissible at trial, (4) the summary must be accurate and nonprejudicial, (5) the person who supervised the preparation of the summary testifies at trial and is available for cross-examination") (footnotes omitted). *See also* United States v. Bray, 139 F.3d 1104, 1109 (6th Cir. 1998) (describing the foregoing as "preconditions" to admit a Rule 1006 summary under the substantially similar federal rule). Thus, under the express language of the statute the "voluminous" materials upon which Plaintiffs' anticipated summaries will be predicated must be "otherwise admissible" in order for the information to be presented in summary form under §24-10-2006.

It is axiomatic that

> "[a] proper foundation must be laid for the introduction of documentary evidence." (Citations and punctuation omitted.) Hill Aircraft &c. Corp. v. Cintas Corp., 169 Ga.App. 747, 748(1), 315 S.E.2d 263 (1984) (physical precedent only). "As a general rule, a writing will not be admitted into evidence **unless the offering party tenders proof of the authenticity or genuineness of the writing**. [Cit.] **There is no presumption of authenticity, and the burden of proof rests upon the proffering party**

[3] Plaintiffs' Motion, p. 2.

> **to establish a prima facie case of genuineness**..." Martin v. State, 135 Ga.App. 4, 6-7(3), 217 S.E.2d 312 (1975).

Davis v. First Healthcare Corp., 234 Ga. App. 744, 746, 507 S.E.2d 563, 565 (1998) (emphasis added).

With respect to authentication, O.C.G.A. §24-9-901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

> Under long-standing Georgia law, "[t]he process known as authentication of writings is the means by which a writing is shown to be in fact what it purports to be in order to introduce it in evidence." (Citation and punctuation omitted.) Consolidated Freightways Corp. v. Synchroflo, Inc., 164 Ga.App. 275, 277(1), 294 S.E.2d 643 (1982). "Authentic" does not mean that the document is a legally valid or enforceable instrument; authenticity is merely a matter of "identification, or showing that this writing is the one in question." (Citation and punctuation omitted.) Id.
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> The Evidence Code recognizes a wide variety of means by which a party may authenticate a writing; the use of circumstantial evidence is one of these methods. O.C.G.A. § 24-9-901(b) (listing "[b]y way of illustration only, and not by way of limitation," ten means of authentication or identification conforming with the requirements of the section). **Production of a document by a party during discovery, along with other circumstantial evidence, is evidence of authenticity, particularly when the party who produced the document never claims it is not authentic or genuine.** Gulfstream Aerospace Svcs. Corp. v. U.S. Aviation Underwriters, 280 Ga.App. 747, 760(2)(b), 635 S.E.2d 38 (2006); Salinas v. Skelton, 249 Ga.App. 217, 220–221(1), 547 S.E.2d 289 (2001); Davis v. First Healthcare Corp., 234 Ga.App. 744, 747(1), 507 S.E.2d 563 (1998). The appearance and content of a document may also be circumstantial evidence of authenticity. O.C.G.A. § 24-9-901(b)(4) ("[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances"); Nyankojo v. N. Star Capital Acquisition, 298 Ga.App. 6, 8, 679 S.E.2d 57 (accord); Davis v. First Healthcare Corp., 234 Ga.App. at 747(1), 507 S.E.2d 563 (2009) (accord).

Koules v. SP5 Atl. Retail Ventures, LLC, 330 Ga. App. 282, 286–87, 767 S.E.2d 40, 44 (2014) (footnote omitted; emphasis added). "The party proffering the evidence must present sufficient

evidence to make out a prima facie case that the proffered evidence is what it purports to be. Once that prima facie case is established, the evidence is admitted and the ultimate question of authenticity is decided by the jury." Johnson v. State, 821 S.E.2d 76, 85 (Ga. Ct. App. 2018) (citing Smith v. State, 300 Ga. 538, 541 (2) (b), 796 S.E.2d 666 (2017)).

Here, it appears some of the Subject Documents have been produced during discovery by parties to this action and others have been produced by non-parties. Even as to the documents produced by parties, their mere production—absent "other circumstantial evidence"—is insufficient circumstantial evidence to support their wholesale authentication and admission. No testimony, affidavit, or other evidence has been submitted that would support their authentication. Further, the Subject Documents themselves have not been provided to the Court with the Motion such that other potential circumstances supporting their authentication (*e.g.,* appearance, contents, substance, internal patterns, etc.) cannot be assessed. Moreover, contrary to Plaintiffs' arguments, the fact that some of the Subject Documents were produced by former trustees—who have the general duty to "keep full, accurate, and orderly records" (Bogert on Trusts and Trustees, §962, pp. 10-13 (2d ed. 1962))—is not a compelling circumstance supporting authentication in light of the extensive fraud and misconduct Plaintiffs allege the Former Trustees, here, engaged in and upon which their claims are predicated. Based on the existing record, the cannot simply determine that the Subject Documents have been properly authenticated.

As to the admissibility of the Subject Documents, Plaintiffs urge "[a] great many of the documents in the record in this case" are "documents [that] should be considered automatically admissible under O.C.G.A. §24-8-803[6],"[4] one of the exceptions to hearsay.

"In order for hearsay to be admissible, it must fall within one of the statutory hearsay exceptions, and the moving party has the burden of establishing that one of the exceptions

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[4] Plaintiffs' Motion, p. 15.

applies." Jones v. State, 345 Ga. App. 14, 16, 812 S.E.2d 337, 340 (2018) (citing Phillips v. State, 275 Ga. 595, 598, 571 S.E.2d 361 (2002)). Commonly known as the business records exception, O.C.G.A. §24-8-803(6) provides in relevant part:

> The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness....(6) **Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness** and subject to the provisions of Chapter 7 of this title, **a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if** (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) 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 paragraph (11) or (12) of Code Section 24-9-902 or by any other statute permitting certification**. The term "business" as used in this paragraph includes any business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit...

(Emphasis added). Once the "foundational elements" of O.C.G.A. §24-8-803(6) are satisfied, "a rebuttable presumption of trustworthiness of the evidence is created" and the burden shifts to any party opposing its admission to rebut the presumption. Thompson v. State, 332 Ga. App. 204, 210, 770 S.E.2d 364, 371 (2015) (citation omitted). *See also* D'Agnese v. Wells Fargo Bank, N.A., 335 Ga. App. 659, 662, 782 S.E.2d 714, 717 (2016) ("[B]usiness records generally are admissible as an exception to hearsay found at O.C.G.A. §24-8-803(6) in Georgia's Evidence Code, with the trial court vested with the discretion to determine whether a proper foundation was laid for use of the exception and whether the circumstances of the document's preparation indicate trustworthiness") (citation and footnote omitted).

Here, the "foundational elements" of O.C.G.A. §24-8-803(6) have not been satisfied. Plaintiffs summarily assert that certain business documents produced in this case (generally

described by Plaintiffs as "banking records, Quickbooks documents, business transaction records, business entity formation documents, operating agreements, loan documents, deed records, etc.") as well as documents produced by Miller & Martin and Sutherland Asbill & Brennan were kept in the normal course of business in representing the Bunzl-related entities and meet the requirements of the business records exception. However, Plaintiffs have not submitted any "certification" or "testimony of the custodian or other qualified witness" establishing that the requirements of O.C.G.A. §24-8-803(6) have been met with respect to each record at issue. Absent such, the Court cannot find the Subject Documents are admissible under O.C.G.A. §24-8-803(6).

Although the complexity of the transactions at issue and the number of potentially relevant documents in this and the related litigation will require careful consideration by the parties as to how to efficiently lay the foundation for and present evidence, their admission into evidence is still governed by the requirements of Georgia law. The sheer volume of potential evidence in this litigation, while "overwhelming" as accurately described by Plaintiffs, cannot shadow or blurry applicable and binding law.

Having considered the record and given all of the above, Plaintiffs' Motion is hereby DENIED. However, the parties are directed to confer in good faith regarding the Subject Documents (and any other documents the parties intend to use or introduce) to determine if any genuine dispute exists as to their authenticity and admissibility. Further, the parties are reminded that the assertion of an objection to discovery without a good faith basis therefor may subject that party to sanctions.[5]

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[5] Case Management Order, p. 4; Amended Case Management Order, p. 4.

SO ORDERED this 5 day of March, 2019.

JOHN J. GOGER, JUDGE
Fulton County Superior Court
Business Case Division
Atlanta Judicial Circuit

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