SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
LAW DIVISION - SPECIAL CIVIL PART
DOCKET NO.: MON-DC-004774-12

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| MSW CAPITAL LLC, | : | |
| Plaintiff, | : | TRANSCRIPT |
| -vs- | : | OF |
| AZEEM ZAIDI, | : | MOTION |
| Defendant. | : | |

Held at: Monmouth County Courthouse
71 Monument Park
Freehold, New Jersey

Heard on: July 13, 2012

B E F O R E:

THE HONORABLE JAMES J. MCGANN, J.S.C.

**TRANSCRIPT ORDERED BY:**

PHILIP D. STERN, ESQ.
(Philip D. Stern & Associates, LLC)

**A P P E A R A N C E S:**

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THE COURT: Please be seated. All right, this is the case of MSW Capital versus Zaidi, docket DC-4774-12, all right. Your appearances.

MR. LANG: Please the Court, Your Honor, plaintiff, I'm sorry, Steven A. Lang, Pressler and Pressler, LLP for plaintiff, MSW Capital LLC, movant on the summary judgment motion and in opposition to defendant's motion.

THE COURT: All right.

MR. STERN: May it please the Court, Your Honor, Philip Stern on behalf of the defendant, Ms. Azeem Zaidi.

THE COURT: All right. We'll hear first from Mr. Lang.

MR. LANG: Yes. Your Honor, the arguments necessarily intertwine, but I am going to focus on plaintiff's, what I view as absolute entitlement to summary judgment. Overarching view, Your Honor, certainly any party or any defendant is entitled to say sit on my hands and hope that you don't have sufficient proofs so I'm willing to keep my mouth shut. I'm going to supply thoroughly evasive answers to interrogatories. I'm not going to admit anything that ought to be admitted.

I'm not even going to bother to serve

discovery. I'm just going to hope that you can't prove your case. And one is certainly entitled to do that but when one does that, one runs the risk of being unable to proffer anything to resist a summary judgment motion here.

THE COURT: And I should note that Mr. Stern just recently came into the case as I understand, is that correct?

MR. LANG: I won't comment on that, Your Honor.

THE COURT: All right. Okay.

MR. LANG: Other than to say Mr. Stern recently made an appearance on the case.

THE COURT: Oh, okay.

MR. LANG: You know what, Your Honor, I would point out that, strike that. I'm thinking of something else. In any event, what we have, Your Honor, notwithstanding defendant's attempt to superimpose upon what is a very simple cause of action, God knows how many layers and layers, there's three elements here. 1) it was the defendant's account. 2) how much is owed on that account? And 3) the person suing owns that account.

How does one prove that, Your Honor? There are a number of ways beginning with ownership. The



case law is quite clear. The very case on which defendant relies for the proposition that one must both avare and prove ownership, Sullivan v. Visconti says when one claims to own something that without more is sufficient to establish a prima facie case. Then the question becomes well, is that sufficient for summary judgment? And then one looks at well, what indicia of reliability do we have to support the claim that you own the account?

So it's important to look at evidence in terms of three things, Your Honor. 1) does it support what the claim is in terms of ownership irrespective of anything else that document is being offered to prove, one. 2) what other evidence is there of the debt that is either judicially noticeable, publicly filed document or otherwise admissible evidence. And 3) and perhaps most important in these cases, after all we're dealing with Your Honor having to wade through a stack of paper this high in an $800 case, I believe it is. Is there any --

THE COURT: No, this is a $12,000 case.

MR. LANG: Sorry, I'm thinking about this morning's case.

THE COURT: Yes.

MR. LANG: Still a stack of documents this

high in a $12,000 case is a lot of paperwork but it's an important issue. The question then becomes, Your Honor, is there any bona fide dispute as to any document or any issue in the case? You look at what we have Your Honor, Your Honor there is none.

Let's start with the argument that the statements are not admissible. Might not have been admissible without more had defendant said hey, wait a minute that's my account or had the defendants said, hey, wait a minute. I never got those statements. Why? Because there are strict federal laws that severely limit a credit account issuer's ability to share, disclose personal information to nonaffiliates.

So the mere fact that the plaintiff is in possession of statements is in and of itself indicia of ownership of the account. Add to that the fact that the statements are sent to the very same address defendants hand writes on her answer to the complaint or it's on her answer to the complaint. No one can seriously be heard to say how do we know that these are her statements, her account.

We also have what is known in the vernacular, Your Honor, as the charge off statement but it should more correctly be referred to as the periodic billing statement for the last billing cycle. That is the



exact language, I will quote it, set forth in Rule 6:6 --

THE COURT: 3?

MR. LANG: 3(a), I want to say Your Honor, as well as Cavell (phonetic) and let me dispose immediately of this argument that that last periodic account statement is insufficient in and of itself. That is perhaps the most tortured reading of Cavell that I've ever seen. It flies in the face of Cavell and it flies in the face of the specific language of 6:6-3.

And I would respectfully direct Your Honor's attention to the 2012 Rules of Court, page 232A, first full paragraph. If plaintiff's records are maintained electronically, and the claim is founded on an open end credit plan as defined in 15 USC Section 1602(i) and 12 C.F.R. Section 226.2(a)(20), a copy of the periodic statement for the last billing cycle as prescribed by 15 USC Section 1637(b) and 12 C.F.R. Section 226.7 or. So anything that comes after or is what you would need if you don't have that which becomes before the or.

And in either case if you have either that periodic statement for the last billing cycle, and/or a computer generated report setting forth the information set forth in the other clause of 6:6-3, that's

sufficient.

It is sufficient to support the entry of judgment at least for purposes of a default judgment. The point being that these are --

THE COURT: And according to Cavell before a summary judgment.

MR. LANG: That would be my position, Your Honor. Let's look at other indicia of reliability, Your Honor. Again, I understand and do not disagree with the proposition that one doesn't have to come forward with rebuttal evidence, but in the face of a mountain of evidence, the mere fact that one does not deny it, is additional indicia of reliability. It is incomprehensible that one who did not have the account, legitimately, it was not this person's account would not say so. Your Honor sees that frequently.

Your Honor sees that claim frequently whether it's a bona fide claim or not. Irrespective of whether it's bona fide or not, it creates a material issue of fact to be decided by the trier of fact. We have nothing here. What do we have? A general denial. Now, recognizing the deficiency in that general denial, in the complaint, we see it repeated in the certification.

And the certification is straightforward,



honest. The reason I denied the claims in the complaint is I've never seen anything as to ownership. Well, first of all, actually that statement was not true as I point out, the defendant did get a letter from my firm advising that MSW Capital did own the account. I say that not to establish liability but to dispute the contention that I never heard of this before. So we have all these elements, Your Honor, that we've met, that the periodic statement for the last billing cycle that sets forth the amount owed.

We have Mr. Whipple's certification, I own this account. We have sufficient indicia of the account. What is in fact, we have the seller account data that my client received from its assignee. We have the billing statements themselves that verify that number. We have a credit report.

Now, I know that defense counsel vigorously objects to the introduction of a credit report but the fact of the matter is, Your Honor, as I point out in my papers, federal law states unambiguously that credit reporting serves a vital interest. The whole industry relies on the accuracy of those reports to claim that gee, that report we can't rely on it, Your Honor, to me just doesn't hold any water that claim.

We then get to the issue of the so-called

chain of title issues. First of all, again the testimony that I own it without more is sufficient. In this case, we don't have to really decide the case based on that. My position quite frankly Your Honor, is I don't need a chain of title if I have a bill of sale in to my client, something that indicates that this account was included in the accounts transferred pursuant to that bill of sale, that's it. If a jury believes my guy, I win.

Now, certainly it's incumbent upon defendant in that instance to say wait a minute, somebody else has been claiming they have the right to collect this account. I never had that account. I was never, I paid this account off. What are you talking about? Didn't happen here.

We also get an objection that they are entitled to notice of an assignment. Your Honor, that argument with all due respect is equivalent to a clock striking 13. There is no 13. The whole law of assignment except in one instance that's completely irrelevant to this case, that being the loss secured transactions, the body of law relating to assignment disputes relates to disputes between an assignor and an assignee. Those disputes are of no moment whatsoever as to who is obligated on the debt.



The debtor has to pay somebody. Who she has to pay is an issue between the assignees and the concern that well if I pay you, how do I know somebody else isn't coming down the pike, that's what a final judgment is called. You come. You show the final judgment and you're done. You come. You show, here this account was paid and you're done.

Now, as I point in my papers it nonetheless behooves an assignee to notify the debtor of the assignment because if you don't, you run the risk that the debtor pays the assignor before receiving notice. We have to worry about that here because it didn't happen. Your Honor, I can go on and on. I won't.

I reserve, with Your Honor's permission the right to speak in response to whatever arguments opposing counsel makes in support of his motion or by way of opposition to our summary judgment motion but I would close with Your Honor, Rule 101(a)(4), federal, I'm sorry, New Jersey Rule of Evidence 101(a)(4). I know I cited it in my briefs, Your Honor, but I think it bears repeating because this case is the case envisioned by Rule 101(a)(4).

And it says undisputed facts, if there is no bona fide dispute between the parties as to a relevant fact, the Judge may permit that fact to be established

by stipulation or binding admission, and here comes the key language. In civil proceedings, the Judge may also permit that fact to be proved by any relevant evidence and exclusionary rules shall not apply except Rule 403 or a valid claim of privilege. The exclusionary rules, Your Honor, of course include the hearsay rules. Again, that rule is quite sensible.

One cannot sit back and say hey, I don't have to say anything. I'm going to hope the Judge doesn't like your proofs. Aside from everything else I've said Your Honor, I know opposing counsel does not like the fact that 101(a)(4) is in the rules, but it's there and it's there for a purpose. And its purpose, Your Honor, could not be clearer than when applied to this case. And respectfully if Your Honor has no questions for me, I appreciate the length of time you've given me and I would defer to opposing counsel.

THE COURT: All right, Mr. Stern.

MR. STERN: Thank you, Your Honor. The key difference in the most general sense between plaintiff's view and defendant's view is plaintiff may exist in a world where they rely upon things that are transmitted back and forth but those things that they rely upon, whether rightly or wrongly, are not evidence. This Court deals, every court deals with



evidence, admissible evidence.

Documents don't come into evidence unless you have a competent witness who can lay the proper foundation for authenticating those documents and when it's hearsay for laying the foundation for admission into evidence of those documents. Can't get in hearsay records like credit reports or documents that look like billing statements that because somebody said, somebody told me they got it from somebody else, that's not enough to make it admissible in evidence.

So that's the problem with plaintiff's arguments. And that's sort of the general gloss on it. And that takes me then to actually talk about the last thing that plaintiff raised which is 101(a)(4). 101(a)(4), it's complete misconstruction. There's no case that stands for the proposition that a plaintiff comes forward and says this is my case and now they don't have to prove by competent, admissible evidence their case because the defendant doesn't come forward and give affirmative evidence to contradict it beforehand.

That turns civil litigation completely on its head. We have burdens of proof. Burdens of proof means we bear the burden of proof, you have to come forward with competent admissible evidence. All the

cases, ever since Brill, we've injected into the summary judgment analysis the standard of the burden of proof. Who has the burden of proof and coming forward with competent admissible evidence. We have cases, I've cited to the Court that stand for the proposition that you don't consider submissions on a summary judgment motion which are not capable of being admissible evidence.

The standard under Brill is the same as the standard at the end of a plaintiff's case at trial. It's the same standard we look at. What is the evidence that they've submitted, at least in the context that we're talking about here, the summary judgment, the applications on the summary judgment standard.

In other words, the summary judgment standard looking at a plaintiff who has the burden of proof and what is the evidence if the plaintiff can submit if this information, if we took the record that has been proffered by the plaintiff, first subjected to the question of what's admissible and look at what's left, it cannot prove a prima facie case.

This is the evidence. If we had a trial, it would be dismissed at the end of plaintiff's case and here's why. Number one, there is no sufficient proof



of assignment. I've set forth to the Court the cases that establish what are the elements for a prima facie case as to proving the validity of assignment. And I've identified for the Court that it has, there are basically four elements, has to demonstrate an intent to transfer. And here's the real critical one. The account being transferred has to be readily identified.

If you bring a document, like these bills of sale that simply say is a) transfers to b) receivables. As identified someplace else. And you don't show what, you don't bring out that external document that identifies my client's account that doesn't prove anything. It doesn't prove or the question, not a question of what it does prove. The fact is it doesn't prove that my client's account was transferred.

It's just not there. And the cases consistently say readily identified, that's the term that has been used. I've cited the cases to the Court. That's what required to prove a valid transfer of an account. Mr. Whipple who is a representative from MSW, he can't testify as to what, the assertion here, let's go through the chain of what the assertion is.

The assertion is that Washington Mutual had an account. The assertion is that Washington Mutual failed and that the assets of Washington Mutual were

then purchased by JP Morgan Chase. Then the assertion is that not JP Morgan Chase but Chase Bank USA sold an account to Main Street Acquisition. And that Main Street Acquisition then sold that account to MSW.

So where's the evidence, talking about evidence, of that chain of assignment? It's not here. You have Mr. Lang submits, refers to a filing by JP Morgan Chase that says Chase Bank is a subsidiary. So what? They're separate entities. The fact that they may be subsidiaries or affiliates they obviously set them up as separate legal entities.

Those separate legal entities, if an asset is transferred from one to the other, there needs to be a trail to show it. His client needs to show that. Here's the most critical factor of it. The bill of sale, which they submit, which they contend evidences the transfer from Chase Bank to Main Street, Chase Bank says we're not representing that we own it. They say is they expressly disclaim any representation or warranty of title to what they're selling.

So you've got tremendous break and here they want, plaintiff wants the Court to accept that since we happen to have these photocopies of what appear to be billing statements, that that proves we own the debt. That doesn't prove we own the debt. That just proves



you got copies of something that look like billing statements. And by the way, on the face of them they say that they're not the original. They don't say that they're even duplicates of the original. They just say they're billing statements.

And getting back to Mr. Lang made this argument about, he said the last periodic statement or last periodic billing statement and citing the statute on an open end credit plan. First of all, who has testified that this was an open end credit plan? I don't know that there was any evidence of that. I don't recall that in the record.

And I don't recall that there was any witness who was even competent to testify to that. But then you also have, he says there's a last billing statement. I haven't found the last billing statement that matches the number that they claim is what's due. THE amount claimed do not match up.

The last billing statement I see is a statement that says has an ending date of January 12th, 2011 that reflects a balance of $12,487.38 and they're claiming that they're entitled to $12,563.38.

THE COURT: I think they're adding on the 442 interest.

MR. STERN: From what? Let's talk about

interest.
THE COURT: On that figure.
MR. STERN: Okay.
THE COURT: Which I normally don't grant anyway so.
MR. STERN: Okay. But let's talk about interest and let's talk about late charges. An account arises from some form of an agreement. It's a contract. There's not even a contract here that has been submitted. There's no agreement that has been submitted. What's the basis for charging a late fee? What's the basis for charging a particular amount of interest? They have not, if you're proving a contract claim, you need to prove that my client accepted, entered into an agreement with their predecessor and that the term of that agreement was breached.
There's no evidence for it. There's no evidence to support it. So the point comes back to what I originally started off by saying is. There is no competent admissible evidence as to assignment. At the most that Mr. Whipple could testify to is that he bought something from somebody else and here's what somebody else told him that somebody else told him about what he bought. That's hearsay. There's no exception to the hearsay rule for that information to



come in.
If there's no foundation for any of the records that supposedly are Chase's records. There's not even an affidavit, you know, that supports from Chase saying these are documents created in the regular course of business. You know, all the requirements of Evidence Rule 803(c)(6), we call it the business records exception, you know, records are regularly kept activities.
What you do have is, you have Mr. Lang who testifies, gives an affidavit about settlement discussions, gives an affidavit and talks about things he found on the Internet filed on the SEC website. You have Mr. Kipnist (phonetic) who attaches credit reports. I think I've touched upon that in the reply. The credit reports are multiple levels of hearsay. There's no basis for that coming in.
The fact that you know, I mean, Mr. Lang argues now that, you know, the entire industry relies upon the accuracy of those reports. Yeah, but there's also tons of litigation about why those reports are a bit inaccurate and it's an ongoing problem. But it really doesn't matter whether they're accurate or they're not accurate.
The point is that at best without knowing it,

at best they're saying is we got something presumably I'm assuming that Pressler or Pressler's client have access to a credit reporting service. They don't identify what that credit reporting service is but they've produced this printout that has some information on it. At best, a credit report would be something that a creditor gave information to the credit reporting agency. So we have multiple levels of hearsay with no basis for showing why that comes into evidence.

Next we go to Mr. Whipple and Mr. Whipple says his knowledge of the transaction between Main Street and MSW is based upon the bill of sale, the July 18th, 2011 bill of sale. That document says the terms that are in this document are as defined in a purchase and sale agreement. No purchase and sale agreement. So how do we even know what those terms mean?

There's no identification of an account in that document, in his bill of sale. That's the extent of his knowledge. He can't possibly know anything about the account by way of personal knowledge. He can't possibly know anything by way of prior transactions between Main Street and Chase and WAMU. He doesn't have that personal knowledge. The most he could have is based upon records. So what are the



records?

The records are documents which are not even admissible and don't even stand for the proposition of what, don't even state what he says the information that he's asserting. And then, he's the one who submits the account statements. How could he possibly know that these are the account statements? Well, the only way he could know is what he says.

I asked Main Street to go get them from Chase and this is what Main Street gave me. And that's simply not admissible evidence. Certainly not to prove what the statements contained in those statements. Then they submit, the last thing is a certification from a Mr. Labreto (phonetic) at Main Street. Mr. Labreto says oh yes, Mr. Zaidi owes so much on an account. How could Mr. Labreto in any way know what's in the account, because he's assuming that the information he got, the records he's looking at were accurate. That's fine. He's entitled to assume that. But that doesn't make it admissible evidence.

The records have to be submitted into evidence that he's relying upon. They haven't done that. But I want to close by just referring to, well, actually there's two comments, typical lawyer, right? I'm almost done. I'm done, but I'm almost done. I

just want to quickly talk about Cavell. I cited in the brief already what I think Cavell clearly stands for with respect to showing all transactions on the account. But I do want to comment because I'm not sure, I know there's a little colloquy on this with Mr. Lang, Your Honor, on what Cavell stands for.

I think it's a misreading of Cavell to say that you satisfy your standard for summary judgment by satisfying what's required under the default judgment rule. I think it was just the opposite of what Cavell was saying.

THE COURT: But they took great pains in citing that.

MR. STERN: What's that?

THE COURT: They took great pains in citing that.

MR. STERN: They took great pains in talking about it but what they started with, they said is look, what LVNV had submitted did not even satisfy what's required under the default judgment rule. And then they spoke, then they went into great detail talking about what's required under the default judgment rule. But I submit that it is a misreading of that case to say that a plaintiff satisfies the requirements for summary judgment simply by satisfying the requirements



under the default judgment rule.

We have a whole body of jurisprudence as to what's required on summary judgment. And that's what they were dealing with. They were saying is look, there's some notion, I acknowledge that, I don't think there's a clear, bright line test as to what's required in a default case. Whether you have to prove everything that you have to prove as if you were proving a prima facie case.

You know, certainly the question is how much less than that you have to prove and I think it depends on the circumstances because accepting the fact that there are certain things like you haven't had the opportunity to get discovery from the other side in a default case. We're talking about a default, a proof hearing is really what I'm talking about.

And that's what, you know, so there's some standard, and what I'm getting at is, the default judgment standard may be something less than what's required on summary judgment. And what the Appellate Division was saying in Cavell is that what LVNV had submitted did not even hit that standard. So if it didn't hit that standard, it certainly did not satisfy the summary judgment standard.

Now, I will get to my final point which gets

back to the issue of the assignment. I very much disagree with plaintiff's contention that all they had to do is say we own it. The cases are very clear and we go back and I cited cases that I think span more than a century. But going back to that first case, Sullivan versus Visconti case, I think that the nut of it was clearly articulated in a quote that's at page 551 of the opinion.

They say that given a chosen action with an assignment that, "makes known to all persons concern that the subject matter has been or is thereby transferred." That's what we're talking about. If anyone, in particular, I'm concerned with Your Honor, with the Court, picks up a bill, one of these bills of sale, you cannot read the bill of sale and conclude that this makes known to Mr. Zaidi that his account was transferred. You can't look at that document and say that.

You can't look at anything that they have submitted and be able to say is this makes, and again to quote from Sullivan versus Visconti, this makes known to all persons concern that the subject matter has been or is thereby transferred. It doesn't do it. And that's when we get into the other elements and specifically the proper identification and notice to



the obligor.

You do need notice to the obligor. The whole point of an assignment. Your Honor, I would ask Your Honor consider the fact of someone standing in the (inaudible) reasonably prudent person, standing in the position of saying I'm interested in purchasing a chosen action, a claim that you have against a third party.

THE COURT: Excuse me just one second.

MR. STERN: Go ahead.

THE COURT: Sorry.

MR. STERN: You have against a third party. You're going to want to know that that third party who is obligated knows that you now own the obligation and you're going to want to make sure that the person who's selling it to you is properly and clearly identifying what it is they're selling to you and that they are in fact articulating that they're selling it to you. So that you can stand in the position of saying to the exclusion of everybody else that you own that account. Because it's not something like real estate where we've got a recording office. It's not something like negotiable instrument where we've got endorsement and delivery of the document.

This is very loose kind of stuff so you want

to make sure that it's clear and that's why the elements talk about clear and not ambiguous language. Clear intent to transfer. Readily identifying the account. That's why those elements are there. It's not simply you stand up and say hey I own it without proving anything. And the last thing I would add to that is, further indication of why that's important is my understanding is the Court is in the process of adopting rules to be effective in September.

THE COURT: Regarding assignment?

MR. STERN: Where the assignments have to be disclosed in the complaint. The whole chain of assignment needs to be disclosed. So that's where I come back to. It's not a matter of just simply saying I own it. With that said, you know, I come back to, I just want to reiterate my initial point which is the difference here is yes, they've submitted documents. Those documents are not admissible to the extent, people have testified to stuff they're not competent witnesses to testify to what they've testified to. And none of that amounts to establishing a prima facie case. Thank you, Your Honor.

THE COURT: All right, thank you.

MR. LANG: Your Honor, again, I was waiting for opposing counsel to point to one case, one, just a



single case that said that the requirement of specificity in an assignment applies to a claim against the obligor. Of course one wants to make sure that that which he or she is purchasing can be sold. The idea that somebody would do that without ascertaining to that person's satisfaction yes, that which I am buying, this person has the right to sell me, is inane.

So what we are hearing now, is that the debtor, the person who defaulted on the account should have the right to go back to the person who bought that account and say you know what? You should have made a better deal. You should have insisted on more specific language.

That argument can't hold water, Your Honor. I was also somewhat taken aback by the claim that there's no proof that this is an open ended account. Well, if there's not an open ended account, if they're taking the position that there's no proof of that, we can disregard Cavell and we can disregard 663 altogether. Doesn't apply.

What that boils down to, Your Honor, is one doesn't get to pick and choose the rules that one would like to have apply, either the rules of evidence apply in their entirety or they don't. If they apply in their entirety, both 101(a)(4) and 901 are part of

those rules. Like it or not, they're there. And Your Honor, 901 is as important if not more important in a case like this as is pointed out on page 13 of my brief in response to the opposition, the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what each proponent claims.

Mr. Whipple claims that this is the account MSW purchased. Mr. Whipple claims these are the account statements. Mr. Whipple claims this is the bill of sale. That's sufficient to get it in. The burden then shifts to them, strike that. Jury might believe it, might not believe it but for purposes of today, you look at what does he have, the defendant to dispute this?

We have absolutely nothing, zero. One last point, Your Honor, I want to clear up this confusion, actually two last points. As Your Honor is probably well aware, rules changes have not been adopted yet and we'll look at those rules as and when they're adopted. Today we deal with what's the law now. And in that, oh, I do not understand the argument that a bill of sale disclaims any warranty of collectability. If it was collectible, why would they, if they thought they



could collect it, it wouldn't have written it off. Strike that. They would have written it off after six months as required by federal law but who on earth would give a warranty of collectability of a defaulted account? The idea does not compute. And --

THE COURT: Mr. Stern's position not the bills of sale don't identify, I know they, -- I forget what the price was, $33 million or something like that, but what about if it doesn't identify the specific account?

MR. LANG: Bill of sale doesn't. Bill of sale refers to the attachment to the bill of sale. We have, and if I understand Mr. Stern's point --

THE COURT: But I mean is there not something that goes with the bill of sale that will identify the account numbers that they're sold?

MR. LANG: Yeah, it comes by way of an electronically transmitted file with however many accounts are being purchased that has all of the information as to that specific account that would enable, strike that. The seller account that's referred to Mr. Stern attempts to make much of the fact that there is no affidavit from somebody at Chase Bank saying yup, this account was amongst those transferred.

Now, defendant was certainly free to take

discovery of somebody at Chase Bank. The fact of the matter is the proofs that are before the Court that this is the account are mountainous. They are reliable. The idea that an SEC filing is not a reliable document, Your Honor, I think is perhaps the best proof of the lack of merit of defendant's arguments. That document is publicly available on the Internet on the FDIC's website.

As I understand the argument, I had to get an affidavit from the FDIC that yup, this is what's on our website. In sum, Your Honor, every element of our claim has been proven. There are sufficient proofs. There is nothing to rebut it. My client is entitled to summary judgment. And even if my client hadn't moved for summary judgment, Your Honor, there's would have to be denied simply because they did no discovery and cannot now be heard to say well, this is what you're limited to.

MR. STERN: Let me address first that Mr. Lang's first comment about 901 and 101(a)(4). I cited to the Court the Hahnemann case. The Hahnemann case specifically talks about when a witness is competent to lay the foundation for identifying electronic records. Mr. Lang says all he has got to do is say this is what it is. Well, I would say that Mr. Whipple is no more



competent to identify those documents as periodic account statements then if we just randomly picked somebody off the street and say look at this. What is this?

They're going to say exactly what this appears to be an account statement. That's exactly what it appears to be. He has no basis for knowing that that's the account statement other than the fact that someone told him that. So there is none there.

Hahnemann says a witness is competent to lay the foundation if the witness can one, I'm quoting, "one, can demonstrate that the computer record is what the proponent claims," okay and "two, is sufficiently familiar with the record system used, and three, can establish that it was the regular practice of the business to make the record."

That's only to get him to be a competent witness. He hasn't even testified to that, that he knows anything about Chase keeps record or WAMU kept records or whether these were created in the ordinary course. I submit, Your Honor, that I think that if there was, well, I'm not going to (inaudible) but basically I was going to make a comment about whether these were originals or not but we talked about that already.

The bottom line is he's not competent under Hahnemann Hospital versus Dudek and he just can't. It's no different, Your Honor, than someone testifying about an accident, an automobile accident because they read about it in the newspaper. Mr. Watner (phonetic) is no different than anybody else with respect to these records. He got them from somebody who said they got them from somebody else so that he believes that that's what they are.

His belief that what they are doesn't make him a competent witness to have them admitted into evidence. The 101(a)(4) again that argument turns, I said it before, I don't want to repeat myself too much, but it turns civil litigation on its head. That rule exists and the commentary says that I know New Jersey practice, it was not addressed in the paperwork, talks about two things. Number one, when you have a stipulation, the Court can take stipulated facts. That's 101(a)(4) is.

This is preliminary, tangential stuff. Things that are stipulated to or things, the example I know in New Jersey practice that the New Jersey practice here is it talks about this rule, says it also deals with the situation where you may have like a lay witness on the stand who may testify, give some opinion



testimony that's not objected to, that the trier of fact can rely upon that nevertheless.

That's what it deals with. 101(a)(4) does not deal with a situation where a plaintiff says this is, here's what my case is without giving evidence. And defendant, you're barred from objecting to that evidence because unless you come forward with evidence to say that my case is wrong. And that's essentially what plaintiff is arguing, that 101(a)(4) means. It just simply doesn't mean that.

And last, I just want to --Mr. Lang was talking about warranty of collectability. There is a disclaimer of warranty of collectability. What I talked about was a disclaimer of a warranty of title. That goes to ownership. Collectability really has nothing to do with oral argument, but I think what it reflects is that Chase, if that is in fact a Chase document and I will tell you from my own experience in seeing a number of these cases, that document is typical of what I see for Chase, of bills of sale.

But Chase, they want nothing to do with these accounts anymore. So they're disclaiming without recourse. It's without warranty of title. It's without representation and it's all in accordance with an agreement that's never produced. So we don't even

know what really are the real terms of the transaction. We only know what's represented in the bill of sale.

But the bill of sale clearly says one of these says that it's an exhibit to the agreement which is another issue that we've raised in our papers by the way, Evidence Rule 106 which is completeness doctrine. You can't submit a document that's part of a bigger document without submitting the entire document if the opponent objects and we do object.

But putting that aside, the bottom line is that Mr. Lang's discussion about warranty of collectability is really irrelevant and that's not the point we're making. It has to do with the warranty of title, disclaimer of the warranty of title. Thank you, Your Honor.

MR. LANG: Your Honor, I'm sorry. I thought that when opposing counsel pointed out the disclaimer of the warranty of collectability he thought it relevant. That said, I just need to point out two things. First, to equate the nature of the evidence before Your Honor, materials before Your Honor with a newspaper article, I think underscores the difference between the law and what defendant hopes will happen, that being getting out from under a debt.

Lastly, I would like to correct opposing



counsel's reading of 101(a)(4). Your Honor will search in vain for anything in that rule that says you can disregard the rules of evidence if there's no objection. Your Honor can disregard the rules of evidence without a rule of evidence if there's no objection. The rule is there for a purpose. 901 is there for a purpose.

There is no bona fide dispute as to any of these documents to challenge the reliability of a document filed with the SEC with a claim that a periodic account statement that's not reliable because I don't know, you know, maybe somebody went to a printing place and printed it out and just happened to get the person's address, happened to get everything else right, defendant has had every opportunity to come forward with something that would create a bona fide dispute.

So aside from the fact that everything I've presented to the Court is admissible under the rules themselves, I don't have to be because defendant having had every opportunity to create, show a bona fide dispute i.e., hey wait a minute, Chase Bank never acquired WAMU. JP Morgan Chase has nothing whatsoever to do with Chase Bank. Nobody files anything with the SEC. Yeah, then maybe you create a bona fide dispute.

You don't get to sit and say I don't like your proofs and now you have a bona fide dispute. That cuts out two rules right out of the evidence rules, 901 and 101(a)(4). Thank you, Your Honor.

THE COURT: All right, thank you. This is a motion for summary judgment. It's a revolving credit account. The plaintiff seeks $12,487.36 plus $75.97 interest. The plaintiff includes a certification from the plaintiff's agent, a computer generated account which attest to the amount sought. The plaintiff also includes account statements from August 12th, 2009 to January 12th, 2011, all of which bear the defendant's name. The last shows a balance equal to the plaintiff's demand and the address on the account statements is the same as the address on the answer.

Defendant opposes due to a lack of proof of the assignment, the lack of proof of the establishment of the debt from Chase Bank. The plaintiff argues that at no point did the defendant argued that the account was not his. I should note that there was, defendant was informed of the transfer to MSW on January 27th, 2012.

The assignments are attached here. The plaintiff, rather defendant takes the position that the -- just bear with me a second. Defendant rather the



plaintiff attaches an assignment from affidavit of assignment from Paul Labreto who is the vice president of Main Street Acquisition. In that affidavit, he swears that in addition to his position that there was due and payable from Azeem Zaidi, and he identifies the account number with the last four digits of his social security number, $12,487.36 and that the account originated with Chase.

That the seller purchases account, seller being Main Street Acquisition with full power and authority to do so. The second transfer, I should note just backing up one step that the plaintiff attaches proof, attaches documents filed with the SEC which he states established that JP Morgan Chase was a part of JP Morgan Chase.

That they've acquired all of Washington Mutual's banking operations. He also attaches a certification from Lawrence Whipple who is the managing director of MSW Capital who refers to the account number in question indicating that there's 12,487.36 due and that they received proof the transfers although the account is not as specified by -- bear with me a second. They testify that they are the owner of the account, does Mr. Whipple in the affidavit that they own the account.

And Mr. Labreto in his affidavit indicates that the account was sold to MSW. They both identified the account number. The Cavell case concludes, Cavell case dealt with a computer generated report. In this case, the trial court had granted the summary judgment motion based on the computer generated report.

But the Appellate Division cited how that was lacking and in doing so, cited Rule 6:6-3(a) and the relevant part of that reads that if plaintiff's records are maintained electronically and a claim is founded on an open end credit plan as defined in 15 USC 1602(i). It's in 12 C.F.R. 226.2(a)(20). A copy of the periodic statement for the last billing cycle as prescribed by 15 USC 1637(b) and 12 C.F.R. 226.7 or a computer generated report setting forth the previous balance.

The identification of transactions and credits if any periodic rates, balance on which the finance charges computed in the amount of finance charge, the annual percentage rate of the charges, if any, the closing date of the billing cycle, new balance if attached to the affidavit shall be sufficient to support the entry of the judgment.

I read that as requiring either the last billing statement or the computer generated report containing that information. They went on to say, the



Court in that case said the computer generated report does not comply with Rule 6:6-3(a) because it does not specify any transactions comprised of the debt owed by defendant.

Additionally, and credibly is zero finance charge rate and a zero annual percentage rate are reflected. The closing date of the billing cycle is described as not applicable. Although the defendant does not challenge that she did not use this card or hold this account, LVNV does not read the requirements set forth in federal law and repeated in Rule 6:6-3(a) to collect on a revolving credit card debt, LVNV is required to prove the transaction from which payment has not been made.

Any payments that have been made, the annual percentage and finance charge, charge percentage rates and the billing cycle information, Rule 6:6-3(a). Here LVNV did not provide any documentation regarding the original Master Card transactions by defendant other than the account number of the alleged balance reversed.

I read that, I don't see that as drawing a distinction in this case, as drawing a distinction between for the purpose of a summary judgment between, drawing a distinction between a summary judgment and a

default. This was a summary, this case had its genesis in the summary judgment motion. And it seems to me they're saying that 6:6-3(a) is the poll star That being the case, in this case not only was the final billing statement attached but a number of them were attached in this case. There's no evidence that has been adduced, I think you have to look at obviously the evidence in total. The defendant is really taking a very passive position and it certainly is the plaintiff's burden to prove their case.

I think the defendant is taking a very passive position here saying he has not offered anything to indicate that he disputed any, that he didn't receive any of these bills, all these bills went to the present address of the plaintiff, rather defendant.

He offers nothing to indicate that has disputed any of the bills in this case as they were sent to him. He doesn't offer anything to indicate that, he didn't make any of the transactions. He doesn't offer any information that he has been paying the debt to some other entity besides MSW.

I think in taking the evidence as a whole, the billing statements I find satisfy 6:6-3(a). As I say, there's no dispute as to any of the billing



statements. He just simply, many of, the answer to the complaint reads quite simply that defendant at this time is without knowledge or information sufficient to form a belief as to the truth of the allegations obtained herein and on that basis generally and specifically denies the allegation and leaves the plaintiff to provide proof. He doesn't state anywhere that this is not his account.

So I think the amount there have been sufficient proof adduced to prove the amount in the account. As to the assignment, Mr. Mistreta (phonetic) and Mr. Whipple both indicate that based on his personal knowledge in referencing the account number was transferred to their respective companies. So I think what's contained in their affidavits or certifications satisfies, reference this specific account, satisfies the proof that this specific account was transferred to their companies.

That taken in conjunction with the transfers themselves, I find is sufficient to establish proof that it was transferred. There was also notice of the transfer sent by January 27th which is included in page 5 of the initial motion for summary judgment. So I find that the requirements of Cavell have been met. That there's no genuine issue of material fact and I

will enter a judgment for 12,487.36. I don't include the prejudgment interest so it's 12,487.36 plus costs.

MR. LANG: Thank you, Your Honor.

THE COURT: All right, thank you both.

MR. LANG: I would also like to thank you for staying this late.

THE COURT: I like to thank everyone here but they're not through yet. We do have that one case. Would you like, a few minutes to talk about with the individuals back here about the case?

MR. LANG: Yes, I would, Your Honor.

MR. STERN: Your Honor, thank you. And thank Your Honor for staying also. If you don't mind, thank your staff for staying, I thank your staff as well.

THE COURT: Oh, yes, absolutely.

MR. STERN: For staying. Thank you. I appreciate that.

THE COURT: Okay.

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**C E R T I F I C A T I O N**

I, TRACY GRIBBEN, Certified Agency Director /Transcriber, do hereby certify that the foregoing transcript of proceedings on Digital Time 04:33:28 to 05:41:28, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded in the matter of MSW CAPITAL LLC vs. AZEEM ZAIDI, heard by the Monmouth County Superior Court, on **July 13, 2012.**

Tracy Gribben

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