

STATE OF VERMONT
VERMONT SUPERIOR COURT

LAMOILLE CIVIL DIVISION
DOCKET NO. 141-9-18 Lecv

AMERICAN EXPRESS NATIONAL BANK

FILED

DEC 12 2019

v.

SANDRA L. AMES

VERMONT SUPERIOR COURT
LAMOILLE UNIT

DECISION AND ORDER

This debt collection action is before the court after final hearing on October 28, 2019, at which the presentation of evidence was completed and the case submitted to the court on the controlling issue of the admissibility of Plaintiff American Express's documentary/business records evidence pursuant to VREv 803(6). More specifically, at issue is the admissibility of Plaintiff's Exhibits 1, 2 and 3,¹ which purport to be copies of (a) the Cardmember Agreement between Defendant Sandra Ames and American Express governing her use of an American Express card linked to a revolving credit account maintained by American Express; (b) interim account statement(s) showing charges and payments on the account; and (c) the last account statement sent to Ames (with closing date 9/8/17) showing a balance due of \$20,350.45. Defendant Ames did not appear at or participate in the final hearing. The parties orally stipulated at the final hearing that the case would be decided solely on the documentary records submitted by American Express, if the same were admitted into evidence.

If this were an administrative action, or even a Small Claims case where the rules of evidence are not applicable and "evidence is admissible if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs," *see* VRSCP 6(b), American Express would in this case have made a sufficient showing that it had advanced credit to Defendant Ames (or another authorized cardholder on her account) in the amount claimed, and that Ames has not paid that balance due in accordance with the terms of the credit agreement. The September 2017 monthly statement to Ames bears all the indicia of a regular credit card account and billing statement. It is not genuinely disputed that it is addressed to her at her then last-known (if not current) address; she (or someone) actually made a payment on the account of \$475 and new charges were made during August 2017; and it is clearly the type of credit card billing statement which millions of people receive, rely on and accept as an accurate accounting of their credit card usage and corresponding payment obligations.

¹ There may be some question whether Exhibit 1 was withdrawn and is not before the court; the court will address the principal issue of admissibility as if Exhibit 1 is still proffered, inasmuch as the court's ultimate conclusion is not dependent on whether Exhibit 1 is admitted (or not).

As noted below, there is no indication here that Defendant lodged any challenge or complaint over the years to usage of the American Express card issued in her name, or to the running account tally and resulting monthly billing statements, or even to any particular transactions. And, importantly, this is not a “debt buyer” action where additional evidentiary issues are commonly present regarding the accuracy of the record evidence purporting to show the acquisition of the debt and the ability to recover any particular amount. *See, e.g., Unifund CCR Partners v. Zimmer*, 2016 VT 33, 201 Vt. 474; *cf.* VRCP 9.1, VRSCP 3(h). Here American Express sues on its own behalf, to recover for unpaid credit directly advanced by American Express to (or for the benefit of) Defendant Sandra Ames.

But for the applicability of VREv 803(6) in this civil action seeking an amount greater than \$5,000, the court on this record, as minimal as it might be, would likely conclude that American Express had prevailed and that it should be granted a judgment in the amount sought of \$20,350.45.² Putting aside issues such as penalty interest and late fees – legitimate issues which should be resolved legislatively, not by courts in individual cases – there is nothing inherently evil in allowing credit card companies to recover for funds advanced to their credit card users, where those customers have voluntarily chosen to utilize the ready availability of that credit for their own purposes. But the rules governing debt collection actions for more than \$5000 require that the creditor prove the debt owed with records that demonstrate sufficient “trustworthiness” and reliability that the court is justified in basing its judgment on them. *See* VREv 803(6); *Unifund CCR Partners v. Zimmer, supra*, ¶s 14-16, 201 Vt. at 479-81.

The witness proffered by American Express to substantiate Exhibits 1-3 as complying with VREv 803(6) was generally credible, but her actual personal knowledge was limited, if not wholly non-existent, as to the foundational requirements that the content of the records submitted was “kept in the course of regularly conducted business activity” and was created “at or near the time by, or from information transmitted by, a person with knowledge” of how such records are in fact generated and maintained. Indeed, she was essentially honest about the limits of her personal knowledge as to how American Express cardmember account statements are routinely generated and maintained, and what American Express does to assure the accuracy of those monthly statements. She demonstrated even less actual personal knowledge as to how records of individual Cardmember Agreements are generated and maintained.

The business records at issue that are actually of consequence are the digital, or electronic renderings of the cardmember’s account, and the running tally of charges and payments on that account, which are only secondarily captured in hard-copy form and

² To be sure, there are charges even on the last bill (Exhibit 3) that might arouse some initial suspicion, such as charges in Sparks and Reno, Nevada; New Jersey; Lake George, NY; and a bridge toll in Staten Island, NY, all within 2 weeks of each other. But, again, Defendant Ames has not challenged any particular transactions, only Plaintiff’s ability to prove that she owes anything at all.

reproduced as a paper document for introduction as evidence in a court proceeding. Plaintiff's witness could only authenticate the latter, not the former. She could credibly say that the papers in front of her on the witness stand were the same as what she saw on her American Express computer terminal screen, before the print button was clicked and the documents themselves were created. And, the witness credibly testified that in reviewing Defendant's account electronically, she saw no indication of any complaints, challenges to or inquiries about any particular transaction(s), or any other anomalies or "red flags."

But she could not testify as to the accuracy of the underlying digital record-keeping, or even explain the general methodology by which American Express receives, maintains and organizes in-house the billions of data bits it must necessarily deal with each day for millions of separate cardholder accounts. As to the latter all she could say (repeatedly) was that she was sure the digital records (and thus the paper records as well) were accurate because American Express uses a number of confidential and proprietary software programs – on which she could not, or would not elaborate – to ensure the underlying digital record-keeping was accurate. In the end her testimony was circular and conclusory, and an insufficient basis for the court to place its trust in the underlying accuracy of the content of Exhibits 1-3 as required by VREv 803(6) and *Unifund CCR Partners v. Zimmer, supra*.

Other courts in this State have been compelled to reach the same conclusion in applying VREv 803(6) to this type of "routine" debt collection case, notwithstanding the general observation that the extension and use of credit card debt has become an essential feature of the American economy, and that collection of delinquent debt is critical to the overall viability of this financial reality (not to mention the "moral hazard" of simply abandoning any attempt to enforce repayment obligations). *See, e.g., Bank of America v. Mohamed*, Dk. No. 690-8-18 Cncv (July 19, 2019)(Toor, J.). American Express dismisses Judge Toor's thorough analysis of the issue as simply "beg[ing] the question," but this court finds it persuasive and consistent with its own conclusion. Nor does it matter whether the legal theory of recovery is breach of contract, as here, or "unjust enrichment" or "account stated"; no matter what the legal claim is, the Plaintiff must still be able to prove it by admissible evidence and reliable, "trustworthy" business records. *Cf., e.g., Unifund CCR Partners v. Zimmer, supra*, ¶s 20-21, 201 Vt. at 482-83; *Unifund CCR Partners v. Jenkins*, Dk. No. 158-7-09 Oecv (Feb. 1, 2011)(Eaton, J.).

It seems plausible that credit card companies like American Express can present sponsoring witnesses (and possibly even just a single witness) who can bridge the gap and testify, on personal knowledge and actual experience, as to how the digital record-keeping system works and why an individual cardmember's digitally-stored cardmember agreement and digitally-generated monthly account statement(s) (and the hard-copy records thereof presented in court) are more likely than not to be accurate,

reliable, and “trustworthy.”³ That may not be cost-effective for the creditor in many cases, but given current law and the applicability of VREv 803(6) to debt collection cases in excess of \$5000, where a greater degree of reliability is required, it is a necessary cost of doing business. Supporting testimony that is essentially nothing more than “the exhibit I see here is the same as what I saw on my computer screen” and “there was no indication electronically of any inaccuracy” is not adequate and does not comply with VREv 803(6).

Admission of Plaintiff's Exhibits 2 and 3 is **denied**, and the exhibits are excluded, pursuant to VREv 803(6) and *Unifund CCR Partners v. Zimmer, supra*. Without any admissible evidence to support its complaint, there are no findings of fact to be made and no conclusions of law to be reached. Judgment must therefore be entered in favor of Defendant Sandra L. Ames and against the Plaintiff American Express National Bank.

IT IS SO ORDERED, at Hyde Park, Vermont this 12th day of December, 2019, pursuant to VREF 7(f).



Dennis R. Pearson, Superior Judge (Ret.),
Specially Assigned

³ Of course it would be unnecessary – indeed, absurd – that the sponsoring witness be able to testify with “personal knowledge” as to each and every individual transaction reflected on the monthly statement. The court would not expect, and Rule 803(6) does not require such granular specificity, but only sufficient verification, by someone who actually knows and has the relevant experience, that the digital record-keeping system as a whole, which is then reflected in and captured by the printouts submitted as actual exhibits in court, is reliable and “trustworthy.”

STATE OF VERMONT
VERMONT SUPERIOR COURT

LAMOILLE CIVIL DIVISION
DOCKET NO. 141-9-18 Lecv

AMERICAN EXPRESS NATIONAL BANK

v.

SANDRA L. AMES

FILED

DEC 12 2019

VERMONT SUPERIOR COURT
LAMOILLE UNIT

FINAL JUDGMENT

Pursuant to the Decision and Order entered herewith, judgment is hereby entered in favor of the Defendant Sandra L. Ames, and against the Plaintiff American Express National Bank, on all claims and causes of action made, or which could have been made herein. The Complaint and Amended Complaint are **dismissed, with prejudice**.

This action is concluded.

IT IS SO ORDERED, at Hyde Park, Vermont this 12th day of December, 2019, pursuant to VREF 7(f).



Dennis R. Pearson, Superior Judge (Ret.),
Specially Assigned