

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20368
Summary Calendar

FDIC,
as Assignee of Assets of City National Bank,
Plaintiff-Appellee,

VERSUS

A. J. HOWETH,
Defendant-Appellant.

FDIC,
as Assignee of Assets of City National Bank,
Plaintiff-Appellee,

VERSUS

JACK W. HOWETH, ET AL.,
Defendants.

JACK W. HOWETH, and LLOYD POE,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-2055 c/w CA-H-91-3089)

(January 11, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."

In this collection action, pursuant to their objection at a bench trial, appellants challenge, on hearsay grounds, the admission into evidence of computer generated printouts, prepared by the Federal Deposit Insurance Corporation (FDIC) and based on an insolvent bank's records, indicating the outstanding principal and interest owed by the defendants. We **AFFIRM**.

I.

The FDIC, as receiver for City National Bank (CNB), sought to collect on two promissory notes that had matured and were in default; one, A. J. Howeth gave CNB for \$200,000; the other, for \$56,858, was given by Jack W. Howeth, Lloyd Poe, and Ray Christian.² During a bench trial, the parties stipulated that the Howeths had signed the notes; that the FDIC was the owner and holder of them; and that they had matured and were in default. In order to prove the amounts due, the FDIC sought to introduce computer printouts it had prepared. The Howeths objected, on the basis that the printouts were inadmissible hearsay.

To lay the foundation for the printouts, the FDIC presented the testimony of Craig Cady, an FDIC Liquidation Assistant. Among the assets under his responsibility were the two notes at issue. Cady testified that information from CNB's records was entered into the FDIC's computer database; information from that database was

Pursuant to that Rule, the court has determined that this opinion should not be published.

² Ray Christian did not appeal the district court's judgment. A. J. and Jack Howeth, and Lloyd Poe will be referred to collectively as "the Howeths".

then utilized to produce the printouts. Although Cady indicated that CNB maintained its records as part of its banking operations, he could not personally attest that the information in CNB's records was placed there either at or near the time of the transaction, or by a person with knowledge of the transaction. On the other hand, Cady testified that the bank records were maintained in connection with CNB's operations as a bank. Furthermore, he recounted how, when the FDIC took control of CNB, teams from the FDIC examined and pulled together CNB's records. Finally, Cady compared the original loan documents and the records at the FDIC office to the printouts.

In objecting to the admission of the printouts, the Howeths claimed that Cady had no personal knowledge of how the business records were kept by the original holder, CNB; thus, he could not attest that CNB's records complied with the "business record" exception to the hearsay rule. The district judge, who had questioned Cady extensively, admitted the printouts into evidence.

II.

It goes without saying that district courts enjoy broad discretion in evidentiary rulings. This court "will reverse an evidentiary ruling only when the district court has clearly abused this discretion and `a substantial right of [a] party is affected'". *Rock v. Huffco Gas & Oil Co.*, 922 F.2d 272, 277 (5th Cir. 1991) (citing Fed. R. Evid. 103(a)). In light of this deferential standard of review, we hold that the district court did not abuse its discretion in admitting the printouts.

The "business record" exception to the hearsay rule permits the admission of records

... made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and it was the regular practice of that business activity to make the [record] ... all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstance of preparation indicate lack of trustworthiness...

Fed. R. Evid. 803(6) (emphasis added). The Howeths contend that because Cady could not testify how CNB's records were kept, prior to the FDIC taking over CNB, no foundation was laid for the use of the underlying records.

"Rule 803(6) does not require that the records be prepared by the [entity] which has custody of them. Where circumstances indicate that the records are trustworthy, the party seeking to introduce them does not have to present the testimony of the party who kept the record or supervised its preparation." ... The issue of admissibility under Rule 803(6) is chiefly a matter of trustworthiness. In this inquiry the trial court is given great latitude.

Mississippi River Grain Elevator, Inc. v. Bartlett & Co., Grain, 659 F.2d 1314, 1319 (5th Cir. 1981) (quoting **United States v. Veytia-Bravo**, 603 F.2d 1187, 1191-92 (5th Cir. 1979), cert. denied, 444 U.S. 1024 (1980)).

The Tenth Circuit recognized that "a foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in case of banks and similar statements." **Federal Deposit Ins. Corp. v. Staudinger**, 797 F.2d 908, 910 (10th Cir. 1986) (quoting 4 Jack B. Weinstein, Weinstein's Evidence ¶

803(6)[02] (1985)) (emphasis added); see also **United States v. Johnson**, 971 F.2d 562, 571 (10th Cir. 1992) ("bank records are particularly suitable for admission under Rule 803(6) in light of the fastidious nature of record keeping in financial institutions, which is often required by governmental regulation"). In light of the situation the FDIC often finds itself (having to take control of insolvent banks), as well as the statutory provision (12 U.S.C. § 1823(e)) which allows the FDIC to rely upon the bank's records, it follows that the circumstances under which the banking records were made indicates a sufficient amount of trustworthiness. See **Veytia-Bravo**, 603 F.2d at 1189; **Burgess v. Premier Corp.**, 727 F.2d 826, 836 (9th Cir. 1984) ("any error in admitting ... documents without testimony by a qualified witness was not prejudicial because there was no real dispute as to the trustworthiness of the records").

III.

For the foregoing reasons, the judgment is

AFFIRMED.