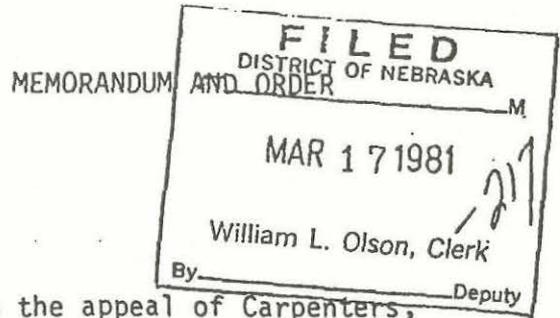


IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

IN RE
CAGLE, INC.,
Bankrupt.
MERLE NICOLA, Trustee,
v.
CARPENTERS, INC., and
NEIL RONFELDT,
Claimants.

CIV. 80-0-112

BK. 77-0-1009



This matter is before the Court on the appeal of Carpenters, Inc., and Neil Ronfeldt from the denial of their claim in the bankruptcy proceedings of Cagle, Inc. The claimants contend that Cagle, Inc., is liable for unpaid withholding taxes of the employees of Carpenters, Inc., incurred on the Peppertree Apartment project in Council Bluffs, Iowa. Having carefully considered the record and the briefs and arguments of counsel, the Court affirms the order of the bankruptcy court in all respects.

The claimants' contention on appeal is that the bankruptcy court erroneously refused to admit into evidence the general ledger and other books of account allegedly belonging to Cagle, Inc., and a summary based upon these records which was prepared by an accountant for the claimants. Without this evidence, claimants concede they could not prevail at trial. The bankruptcy court sustained the objections of the trustee to the above exhibits on the grounds of insufficient foundation. To authenticate the offered exhibits, claimants relied on the contents of the exhibits themselves, the testimony of an accountant for the claimants, and the testimony of the trustee. The records in question are labeled as ledgers and consist of computer printout sheets with the name of Cagle, Inc., printed at the top of each page. Claimants' accountant testified that he reviewed the

were various ledgers of Cagle, Inc. No testimony was presented, however, showing how the accountant identified the records as ledgers of Cagle, Inc.

The trustee testified only that he removed and placed in storage any and all records that were in the offices of Cagle, Inc., and that the records in question were removed with his permission from the storage area by the attorneys for the claimants. No other testimony was offered by claimants to authenticate the exhibits.

Rule 901(a) of the Federal Rules of Evidence provides that "[t]he requirement of authentication or of identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Based on the record before it, the Court concludes that the evidence presented by claimants was not sufficient to support a finding that the records in question were the relevant ledgers of Cagle, Inc. It is well established that the trial court has broad discretion in determining the adequacy of the foundation for the admission of documents such as business records, *see, Vesper Construction Co., Inc. v. Rain for Rent, Inc.*, 602 F.2d 238, 242 (10th Cir. 1979), *United States v. Wyant*, 576 F.2d 1312, 1316 (8th Cir., 1978), and this Court is not persuaded that the bankruptcy court's exclusion of the records in question was an abuse of discretion.

Alternatively, the Court finds that even if the evidence is considered sufficient under Rule 901, it would nevertheless be excludable as hearsay. Claimants urge the applicability of Rule 804(b)(3), which provides that a statement against interest is not excludable as hearsay if the declarant is unavailable as a witness. Under the circumstances here, however, claimants made no attempt to make any showing below with regard to the unavailability of any witness who may have been able to authenticate the documents offered by the claimants. Rule 803(6), which provides an exception to the hearsay rule for business records, is also unavailing since no qualified testimony was presented to authenticate the records and to explain the record-keeping system of the corporation. *See,*

Vesper Construction Co., Inc. v. Rain for Rent, Inc., supra, 602 F.2d at 242; *Coughlin v. Capitol Cement Company*, 571 F.2d 290, 307 (5th Cir. 1978); 4 *Weinstein's Evidence*, Par. 803(6) (02) at 803-151 to 153 (1979). Finally, claimants contend that the records should have been held admissible under Rule 803(24), which provides for the admission of statements not specifically covered by any of the express exceptions to the hearsay rule but which have equivalent circumstantial guarantees of trustworthiness. The Court finds, however, that the residual exception to the hearsay rule is not applicable to the records in question here for the same reason that the records were not within the business records exception, namely, that no testimony was presented to authenticate the records and to explain the record-keeping system of the corporation.

For all of the above reasons, the order of the bankruptcy court is affirmed.

BY THE COURT:

William E. Aulitz

JUDGE, UNITED STATES DISTRICT COURT