

2008

# Key Bank National Association v. Wayne R. Weston : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

KEY BANK NATIONAL  
ASSOCIATION,

Plaintiff/Appellee,

Vs.

WAYNE R. WESTON,

Defendant/Appellant.

:

Case No. 20080511-CA

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**BRIEF OF APPELLANT**

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From Order and Judgment Entered May 6, 2008  
by the Fourth Judicial District Court, Utah County  
Honorable Gary D. Stott, Presiding

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OCT 08 2008

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## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(j).

### **STATEMENT OF ISSUES /STANDARD OF REVIEW**

1. Whether the trial court erred in granting Key Bank's Motion for Summary Judgment. The trial court's ruling is reviewed for correctness, granting no deference to its legal conclusions. *Johnson v. Hermes Associates, Ltd.*, 2005 UT 82, ¶12, 128 P.3d 1151. The facts and all reasonable inferences drawn therefrom are viewed in the light most favorable to Appellant, Wayne R. Weston. *Id.* This issue was raised in Weston's Memorandum in Opposition to Key Bank's Motion for Summary Judgment (R. 318); and Memorandum in Reply to Memorandum in Opposition to Defendant's Motion to Strike the Affidavit of Helen M. Rozich (R. 358).

2. Whether the trial court erred in denying Weston's Motion to Strike Affidavit of Helen M. Rozich (R. 320). The trial court's ruling is reviewed for correctness, granting no deference to its legal conclusions. *Johnson v. Hermes Associates, Ltd., supra*. This issue was preserved in Defendant's Motion to Strike Affidavit of Helen M. Rozich (R. 320); Memorandum in Support of Motion to Strike Affidavit of Helen M. Rozich (R. 318); Memorandum in Reply to Memorandum in Opposition to Defendant's Motion to Strike the Affidavit of

Helen M. Rozich (R. 358); and Weston's Objections to [Proposed] Order and Judgment on Key Bank's Motion for Summary Judgment and Wayne R. Weston's Motion to Strike the Affidavit of Helen M. Rozich (R. 371).

3. Whether the trial court abused its discretion in awarding attorney's fees when the basis for the award did not appear in the Affidavit in Support of Attorney's Fees (R. 389) and no other lawful basis has appeared in the case. The trial court has broad discretion in determining what constitutes a reasonable attorney's fee, and that determination is considered against an abuse-of-discretion standard. *Dixie State Bank v. Bracken*, 764 P.2d 985, 991 (Utah 1988) This issue was preserved in Weston's Objections to [Proposed] Order and Judgment on Key Bank's Motion for Summary Judgment. (R. 371)

### **STATEMENT OF CASE**

Key Bank filed this action to collect a loan (Preferred Credit Line) it claimed to have made to Appellant, Wayne R. Weston. (R. 009) Weston denied that the loan was made to him and affirmatively alleged it was "between May Corporation and Key Bank, N.A. Defendant is not liable to Key Bank for

corporate debts.” (R. 015)<sup>1</sup> Both parties conducted discovery (*e.g.*, RR. 026-65), and Key Bank moved for summary judgment. (R. 186)

As detailed in the Memorandum of Points and Authorities in Support of Key Bank’s Motion for Summary Judgment (R. 259), there were three parts to Key Bank’s motion. First, was a claim for breach of express contract. Second, a claim in *quantum meruit*. And third, a claim on the Commercial Guaranty attached as Exhibit A to the Affidavit of Helen M. Rozich. (R. 182)

Key Bank averred that the Preferred Credit Line “was a loan product offered by Key Bank solely and exclusively to individuals.” (R. 257, ¶3) Key Bank claimed that the credit line “was opened exclusively in the name of Wayne Weston.” (RR. 256, ¶8) Key Bank claimed that Weston provided his home address of “303 West 100 North, Provo, Utah.” (R. 255, ¶9) Key Bank claimed that the checks “bore only the name of the Defendant Wayne Weston....” (R. 255, ¶10) Key Bank claimed that Weston “personally negotiated and endorsed a check drafted by him and drawn on the Preferred Line of Credit...and that the Defendant deposited this check into his personal checking account owned jointly by the Defendant and his wife.” (R. 253, ¶17)

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<sup>1</sup> There was a Counterclaim, but it was dismissed and the dismissal forms no part of this appeal.



However, Key Bank conceded that the loan application was taken over the telephone and that, for whatever reason, there existed “no written contract which evidences the Defendant’s personal obligation on the loan...” (R. 258) Key Bank explained:

In order to provide greater flexibility and convenience to borrowers, Key Bank accepted applications for Preferred Credit Lines over the telephone and without a mutually signed contract. Instead of a signed contract, Key Bank provided borrowers with the Preferred Credit Line Agreement, which clearly states that use of the Preferred Credit Line constitutes acceptance of the terms of the Preferred Credit Line Agreement.

R. 256, ¶5

Key Bank also conceded that Weston had testified consistently, during his deposition and in answers to interrogatories “that all proceeds from the Preferred Credit Line were used solely and exclusively for the pecuniary benefit of May Corporation.” (R. 254, ¶16) This served to controvert some of the factual statements on which Key Bank’s motion was based:

The Defendant personally applied for, and obtained a Preferred Line of Credit with a credit limit of thirty thousand dollars (\$30,000.00).

The Preferred Line of Credit was opened exclusively in the name of Wayne Weston.

RR. 256-55, ¶¶7-8

As the Court can see, these statements were allegedly based on Weston's deposition. (R. 259, Exhibit A) However, nothing in Weston's deposition supports these averments. Weston testified that when the account was opened, he was asked for financial statements, and Key Bank was sent "financial statements of May Corporation." (R. 217, pp. 170-71) Weston testified that he negotiated the account "as secretary/treasurer of May Corporation." (R. 217, pg. 175) In case the point was not sufficiently clear, Weston also testified:

- Q. Earlier you testified that you negotiated with Key Bank for a loan. Are you now saying that you did not negotiate with Key Bank for a loan?
- A. No. I'm saying that on behalf of May Corporation I sent paperwork in for a credit line.

R. 216, pg. 177

The same goes for Key Bank's claim that Weston "personally negotiated a number of the checks sent to him by Key Bank,...." (R. 255, ¶12) The Court can see that the record evidence for this averment is pg. 178 of Weston's deposition, lines 19-25. (R. 216) However, Key Bank omitted what Weston stated immediately after, which is now read in perfect context with the deposition testimony cited by Key Bank:

Q. When you received the checks, they showed only the name of Wayne Weston; correct?

A. In the upper address corner, that's correct.

Q. The checks were void of any reference to May Corporation, correct?

A. Yes.

Q. Approximately when did you receive those checks?

A. A long time ago.

Q. Do you recall when?

A. I don't.....

Q. And you used them, correct?

A. I've used two, maybe three.

Q. Okay.

A. Let me retract that. I have not used any. I have signed two or three.

Q. Okay. You've negotiated the checks?

A. On behalf of the corporation. That was my intent.

R. 216, pp. 178-79

The same goes for the following factual averments:

Defendant admitted that at times, he used his own personal money to pay down May Corporation's business debts. Specifically, the Defendant admitted under oath that, "I deposited Wayne Weston's money into the May Corporation's account, and the money was paid out of the May Corporation account to the outstanding obligations."

Defendant also testified that he "gifted" his personal money to May Corporation in order to satisfy May Corporation's corporate debts out of a personal sense of obligation and responsibility.

R. 254, ¶¶13-14

The problem is that Weston did not identify the Preferred Credit Line as the source of any of these funds. In fact, he expressly denied that the Preferred Credit Line was the source of these funds:

Q. Do you acknowledge that the funds were made available to Key Bank under the name of Wayne Weston?

A. No.

Q. Do you dispute that you, Wayne Weston, drafted a check drawn on the Key Bank line of credit in which you, Wayne Weston, paid monies into the May Corporation account?

A. I acknowledge that statement with the understanding that I did it as an officer of the corporation.

R. 214, pp. 198-99

Defendant gave further explanation:

Typically if I haven't solicited them [credit cards] in some form or another I cut them in several pieces and throw them away. But if I have solicited them, which is your contention, then I would use them based upon the purpose of my solicitation. And when those checks came to me in the mail as a result of solicitation on behalf of the company, I made the checks payable to the company.

R. 215, pg. 186

This is why there was no record reference, deposition, affidavit or otherwise, for the following averments:

One such transfer of Defendant's personal funds to May Corporation is evidenced by Check No. 1001, in which the Defendant paid to Autocraft (an undisputed d/b/a for May Corporation) the sum of \$10,000.00. The check is drawn on Defendant's Preferred Line of Credit and is signed personally by the Defendant.

[W]hen confronted with personal banking records obtained by Plaintiff from Zion's Bank, the Defendant admitted that on April 5, 2004, he personally negotiated and endorsed a check drafted by him and drawn on the Preferred Line of Credit in the amount of Four Thousand Five Hundred Dollars (\$4,500.00) and that the Defendant deposited this check into his personal checking account owned jointly by the Defendant and his wife. This transaction admittedly had no connection whatsoever to May Corporation.

R. 254-53, ¶¶15, 17 ·

Defendant admitted no such things. Defendant actually "dispute[d] that the check came from the line of credit." (R. 212, pg. 211) Part of the reason is that Key Bank (admittedly) is missing the account statement that would have shown

this check. (*Id.* at pg. 213) More importantly, Weston never admitted that the transaction “had no connection whatsoever to May Corporation.” The referenced deposition testimony (pp. 210-13) says nothing of the kind. Weston testified that May Corporation continued making payments on the Preferred Credit Line for two (2) years after the \$4,500 payment. (R. 211, pg. 222) Key Bank’s own records show this to be true. Deposition Exhibit 8 (R. 259, Exhibit A) is an account statement for June 24, 2004 showing a balance of \$30,366.76. However, Ms. Rozich testified that the account balance “as of December 13, 2006,” was \$28,078.44. (R. 178, ¶19) There is every indication that May Corporation continued making payments on the account after the \$4,500 check. Key Bank has no evidence that the \$4,500 did not find its way back, through May Corporation, just as Weston testified. (Answer to Interrogatory Nos. 4 and 5 (R.195))

Weston responded to the motion for summary judgment with a Memorandum in Opposition to Key Bank’s Motion for Summary Judgment (R. 318), supported by two (2) affidavits, in which Weston controverted the material averments appearing in the Memorandum of Points and Authorities in Support of Key Bank’s Motion for Summary Judgment.

Specifically, Weston demonstrated that Key Bank had failed to produce the application or any of the original account documents showing that the loan was

created in Weston's name. (R. 315, ¶1)<sup>2</sup> More importantly, Weston demonstrated that none of the documents Key Bank did produce had his Social Security Number. (*Id.*) Weston also demonstrated that some of the documents were proof that the loan was to May Corporation, not Weston. Specifically, Weston demonstrated that 303 West 100 North, Provo UT 84601 was May Corporation's address and that he was living somewhere else at the time the account was created. (R. 313, ¶¶9-11) Finally, he produced the affidavit testimony of his daughter (R. 318, Exhibit A) to the effect that she tried to make an online payment on the account, but was told "Key.com doesn't support commercial loan payments." (R. 296, ¶7) She was then told, by "Sariah," the customer service representative, that the account could be "re-registered under [Weston's] SS#," (R. 296, ¶9) an obvious indicator that Key Bank did not have Weston's SSN.

Weston also supplied evidence that the \$4,500 payment about which Key Bank has made so much (R. 182, Exhibit D), found its way back to Key Bank, from May Corporation. (R. 318, Exhibit B) The Court will see a Central Bank account statement dated June 30, 2004 for "May Corporation." (RR. 287-86) Reference is to the first page (R. 287) and the debit entry for June 28, 2004:

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<sup>2</sup> This is undisputed by Key Bank.

“Garnishment—Utah State Tax Com.”<sup>3</sup> The Court will see that the Tax Commission garnishment “zeroed” May Corporation’s checking account on that date. Reference is then to the second page (R. 286) and the June 30, 2004 deposit of \$6,570.09. The third page (R. 285) is Weston’s Zion’s Bank check register, and it shows that the \$6,570.09 was intended to “replace the garnished funds.” Weston testified (R. 291, ¶7) that the \$4,500 made up the largest part of those funds, putting Key Bank’s contention completely to the lie.

Weston also controverted allegations about the Commercial Guaranty. Weston demonstrated that the Commercial Guaranty had a different account number from the Preferred Credit Line and was in the name of May Corporation as “Borrower.” (R. 306, ¶2) More importantly, on July 30, 2003, the transaction was restructured with Weston as the “Borrower” on a new \$278,059.00 Promissory Note. (*Id.* & R. 318, Exhibit B (incorrectly identified as Exhibit “C”)) Commercial Guaranties were then executed by May Corporation and Mary B. Weston. (RR. 277-70) But this was a completely new account, which was intended to replace the one for which Weston had issued the Commercial Guaranty. (RR. 291-90, ¶¶11-

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<sup>3</sup> Defendant testified in his deposition about May Corporation’s problems with the State Tax Commission. (R. 259, Exhibit A, pp. 126-27, 128-29, 141-42, 151-52)



16) Therefore, the Commercial Guaranty on which Key Bank based its claim (R. 182, Exhibit A) was of no further force or effect.

As the Court can see, Key Bank's Motion for Summary Judgment was based on the Affidavit of Helen M. Rozich. (R. 182) Ms. Rozich testified that she was employed by Key Bank as a "collections officer." (*Id.* at ¶1) Ms. Rozich testified that as a basis for her affidavit testimony, she "reviewed the files and records kept by Key Bank pertaining to the Preferred Credit Line...." (R. 181, ¶2) Ms. Rozich claims that her review "occurred in the ordinary course of business," (*id.*) but this was obviously long after the loan had been taken.

Therefore, in his Motion to Strike Affidavit of Helen M. Rozich (R. 320), Weston questioned the foundation for testimony that would have required personal knowledge (RR. 181-78. ¶¶4-20), such as: "In order to obtain a Preferred Credit Line, the Defendant provided his personal financial information such as social security number, personal address, and employment history." (R. 180, ¶9) Ms. Rozich was not the one who took this information so Weston questioned where she got it. Presumably, it came from one of the "files and records" Ms. Rozich claimed to have reviewed, but she never specifically identified any such files or

records, and there was no way to know if they were produced as part of Key Bank's Motion for Summary Judgment.<sup>4</sup>

Both these statements are true, but Key Bank understood them to say that no such documents had been produced in the litigation. (R. 350)<sup>5</sup> As the Court can see, Weston stated no such thing. (R. 315, ¶1) However, this misunderstanding confirmed what Weston had been saying all along: "Plaintiff has produced nothing to show that the account was opened in Defendant's name. Significantly, Plaintiff has produced nothing with Defendant's SSN." (R. 317)

None of the documents produced by Key Bank during the litigation had Weston's SSN. This can be seen from the documents Key Bank claimed to have produced in the litigation: "Preferred Credit Line Agreement, years of the Defendant's statements and invoices in Key Bank's possession, copies of negotiated checks drawn on the Defendant's Preferred Credit Line Account and various other [unidentified] documents." (R. 350 n.1)

These documents were attached as Exhibits C and D to Key Bank's Memorandum of Points and Authorities in Support of Key Bank's Motion for Summary Judgment (R. 259) and Exhibits B and C to the Affidavit of Helen M.

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<sup>4</sup> In his motion to strike (R. 320), Weston also asserted that the files and records were inadmissible hearsay.

<sup>5</sup> Memorandum in Opposition to Defendant's Motion to Strike the Affidavit of Helen M. Rozich. (R. 352)

Rozich. (R. 182) The Court can see that Weston's SSN does not appear on any such documents.

In response to this contention, Key Bank finally produced a document with Weston's SSN. (RR. 344-43) However, this "Business Service Center Worksheet" was generated before the Preferred Credit Line that is the subject of this action, and it does not show that the subject account was created in Weston's name:

It shows a \$30,000 line of credit in [Weston's] name with a balance of over \$27,000 (the copy is not quite legible). However, the Worksheet appears to have been generated in December, 1999 and faxed to a number in Idaho on January 26, 2000, which would have been around the time when Ms. Rozich testified the [Preferred Credit Line] account was created (¶4[<sup>4</sup>, Affidavit of Helen M. Rozich (R. 182)]). There is nothing (an account number, say) to indicate that it is the same Preferred Line of Credit that is the subject of this action. In fact, we know it is not. As it turns out, [Weston] had a \$30,000 line of credit with [Key Bank] that was opened February 1, 1997. [Key Bank] can confirm this with Account No. 4616031227. [Key Bank's] document does prove two (2) of [Weston's] points: First, 303 West 100 North, Provo UT 84601 was May Corporation's address; and second, [Weston] lived somewhere else at the time the Preferred Line of Credit was created.

RR. 357-56

If anything, the Business Service Center Worksheet showed that May Corporation was using the address given for the Preferred Credit Line, and Weston was living somewhere else when it was created. These facts supported Weston's

claim that the Preferred Credit Line was opened by May Corporation, and not by him. Therefore, Key Bank's Motion for Summary Judgment was based entirely on the fact that the checks and account statements were in Weston's name, but Weston had produced credible evidence showing that the account had been created in the name of May Corporation.

Hearing on Key Bank's Motion for Summary Judgment and Weston's Motion to Strike was held March 31, 2008. (R. 359) The trial court ruled on the motions from the bench. It granted the first part of Key Bank's Motion for Summary Judgment (breach of express contract): "The Court's finding is that the funds were received. Monies were received with blank checks; not for corporate use. The monies are due and owing to Key Bank." (*Id.*) As appears more fully below, Key Bank's claim on the Commercial Guaranty formed no part of the trial court's ruling. (*Id.*) The trial court also denied Weston's Motion to Strike. (*Id.*)

The trial court's ruling was written up by Key Bank in an Order and Judgment on Key Bank's Motion for Summary Judgment and Wayne R. Weston's Motion to Strike the Affidavit of Helen M. Rozich. The proposed form of Order and Judgment was accompanied by an Affidavit of Attorney's Fees. Some changes were made to the Order and Judgment after Weston's counsel objected, but Key Bank's counsel made clear that no further changes would be considered.

Therefore, Weston filed Objections to [Proposed] Order and Judgment on Key Bank's Motion for Summary Judgment and Wayne R. Weston's Motion to Strike the Affidavit of Helen M. Rozich. (R. 371) Specifically, Weston's objections concerned Key Bank's claimed exception under Utah R. Evid. 803(6), and also a claimed award of attorney's fees, which was not the subject of the trial court's ruling. Key Bank filed a Reply (R. 394), and the matter was submitted to the trial court for decision.

In this case, the trial court made a written Ruling. (R. 401) It overruled the objection on Utah R. Evid. 803(6), stating this was necessarily part of the trial court's ruling on Weston's Motion to Strike. (*Id.* at pg. 2 of 3) It then overruled objection on the attorney's fees though it conceded that "the Court did not explicitly state in the Minutes for which of the three reasons it was granting attorney fees. (*Id.* at pg. 3 of 3)

The trial court did so with the following statement:

The basis upon which the Court granted attorney fees is from both the Preferred Line of Credit Agreement that allowed attorneys fees and the Commercial Guaranty that did the same. The defendant never disputed receipt of the Preferred Line of Credit Agreement and the Rozich Affidavit stated the Agreement was sent with the blank checks from Key Bank that the defendant undisputedly received. Furthermore, there were three Commercial Guaranties involved in this action, two of which were abrogated. The final one remains in force.

It required attorney fees as well; therefore, Defendant is liable for reasonable attorney fees as he contracted to be in both agreements.

*Id.* at pg. 3 of 3

There is a problem with both such statements. Weston never admitted to having received the Preferred Line of Credit Agreement. In fact, in his Objections (R. 371), Weston quoted from his deposition testimony as follows:

Mr. Weston, you've been handed what's been marked as Deposition Exhibit No. 3. Take a moment and familiarize yourself with this document. You may not have seen it prior to now.

A. Yeah, I've never seen this document.

Q. Nor would you have any reason to see this document. It's an internal document from Key Bank regarding the preferred line of credit that was issued to you.

R. 216, pg. 181, lines 6-14) (emphasis added)

Deposition Exhibit 3 was Exhibit B to the Affidavit of Helen M. Rozich (R. 182) and Exhibit A to the Memorandum of Points and Authorities in Support of Key Bank's Motion for Summary Judgment. (R. 259) Therefore, despite the statement in Ms. Rozich's Affidavit (R. 180, ¶7), Key Bank never contended that Weston had received a copy of the Preferred Credit Line Agreement. We have no idea how the trial court could have missed this important point.

As the Court can see, Key Bank's claim on the Commercial Guaranty (R. 182, Exhibit A) did not form part of the trial court's ruling on summary judgment. (R. 406) This was because, as the trial court correctly noted in its Ruling, the Commercial Guaranty on which Key Bank based its claim was abrogated by a later transaction between the parties. (R. 401, pg. 3 of 3) However, the trial court (evidently) hung its ruling on one of the Commercial Guaranties given by May Corporation or Weston's wife. We say "evidently" because the trial court was not exactly clear about which of the three Commercial Guaranties remained in force.<sup>6</sup> There were two "final ones," (R. 401, pg. 3 of 3) but neither was in Weston's name and could not support the award of attorney's fees. Once again, we have no idea how the trial court could have missed this important point.

### **STATEMENT OF FACTS**

Facts relevant to the issues presented for review have been stated in the foregoing Statement of Case.

### **SUMMARY OF ARGUMENTS**

1. Key Bank's Motion for Summary Judgment was based on factual averments that are not supported by the record evidence. Worse, some of the

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<sup>6</sup> "Furthermore, there were three Commercial Guaranties involved in this action, two of which were abrogated. The final one remains in force." (R. 401, pg. 3 of 3)

averments are directly contradicted by the record evidence Key Bank supplied. In the end, the only factual averments that have not been placed in dispute are that Weston was supplied with blank checks, with his name on them, and some of those checks were used. In the face of all the other record evidence showing that the account was opened in the name of May Corporation, it was error for the trial court to grant Key Bank's Motion for Summary Judgment.

2. The Affidavit of Helen M. Rozich figured prominently in Key Bank's Motion for Summary Judgment. However, it was based, entirely, on Ms. Rozich's review of "files and records" that she never identified. Key Bank tried to excuse Ms. Rozich's testimony under Utah R. Evid. 803(6), but that rule merely addresses the admissibility of the records on which Ms. Rozich allegedly relied. It did nothing to establish the foundation for the statements that Ms. Rozich did not have the personal knowledge to make.

3. There is absolutely no basis for the award of attorney's fees. Key Bank never claimed that Weston received the Preferred Credit Line Agreement even though that was the primary basis for its claim. The Commercial Guaranty on which Key Bank also based its claim had been abrogated by a subsequent transaction between the parties. The trial court made no findings of "bad faith" that would support an award of attorney's fees under Utah Code. Ann. § 78B-5-



825(1). Therefore, it was an abuse of discretion for the trial court to make an award of attorney's fees.

## **ARGUMENTS**

### **I. THE EVIDENCE SHOWS THAT THE PREFERRED CREDIT LINE WAS OPENED IN THE NAME OF MAY CORPORATION, NOT WESTON.**

Weston admitted receiving a "packet of checks" with his name on them and that some of the checks were used. This is the sum total of Key Bank's undisputed evidence on the subject of Weston's alleged liability for the subject account. To the contrary, Weston demonstrated that the address on the checks was the registered address of May Corporation, not his home; May Corporation made all the payments on the account; a Key Bank customer service representative confirmed it was a "commercial loan" account; and none of the account documents has Weston's SSN.

Weston testified that when the account was opened, he delivered "financial statements of May Corporation." (R. 217, pp. 170-71) Weston testified that he negotiated the account "as secretary/treasurer of May Corporation." (*Id.* at pg. 175) The account was negotiated by Weston, on behalf of May Corporation:

**Q.** Earlier you testified that you negotiated with Key Bank for a loan. Are you now saying that you did not negotiate with Key Bank for a loan?

A. No. I'm saying that on behalf of May Corporation I sent paperwork in for a credit line.

R. 216, pg. 177

Weston testified that when he negotiated the checks from the account, he did so on behalf of May Corporation:

Q. When you received the checks, they showed only the name of Wayne Weston; correct?

A. In the upper address corner, that's correct.

Q. The checks were void of any reference to May Corporation, correct?

A. Yes.

Q. Approximately when did you receive those checks?

A. A long time ago.

Q. Do you recall when?

A. I don't.....

Q. And you used them, correct?

A. I've used two, maybe three.

Q. Okay.

A. Let me retract that. I have not used any. I have signed two or three.

Q. Okay. You've negotiated the checks?

A. On behalf of the corporation. That was my intent.

R. 216, pp. 178-79

Weston made plain that the money in the account belonged to May

Corporation:

Q. Do you acknowledge that the funds were made available to Key Bank under the name of Wayne Weston?

A. No.

Q. Do you dispute that you, Wayne Weston, drafted a check drawn on the Key Bank line of credit in which you, Wayne Weston, paid monies into the May Corporation account?

A. I acknowledge that statement with the understanding that I did it as an officer of the corporation.

R. 214, pp. 198-99

In further support, Weston testified: "Typically if I haven't solicited them [credit cards] in some form or another I cut them in several pieces and throw them away. But if I have solicited them, which is your contention, then I would use them based upon the purpose of my solicitation. And when those checks came to

me in the mail as a result of solicitation on behalf of the company, I made the checks payable to the company.” (R. 215, pg. 186)

Key Bank thought it was enough that some small portion of the money (\$4,500) was deposited in Weston’s personal banking account. However, Key Bank never credited sworn testimony in its own papers that the money found its way back to Key Bank, through May Corporation:

Any use of the “Preferred Line of Credit” was by and for May Corporation which company made monthly repayments for many years.

The funds were placed by Key Bank in an account issued under the name of Wayne Weston, an officer of the corporation who transferred, by check, the disputed funds to the May Corporation account and identified as a loan which May Corporation repaid directly to Key Bank.

Answer to Interrogatory Nos. 1 and 4 (RR. 196, 195)

Weston showed exactly how this happened in his affidavit (R. 291, ¶¶3-8), which was filed in support of his Memorandum in Opposition to Key Bank’s Motion for Summary Judgment. (R. 318) Key Bank never disputed that May Corporation made all the payments on the account.

Key Bank’s unjust enrichment claim does not appear to have factored in the trial court’s ruling, for good reason. By Key Bank’s own authority, *Davies v.*

*Olsen*, 746 P.2d 264, 268 (Utah App. 1987), its *quantum meruit* claim fails as a matter of law (“Recovery under quantum meruit presupposes that no enforceable written or oral contract exists”). Key Bank’s recourse is and has been against May Corporation, but it has not been named in the action.

Finally, there was evidence that the Commercial Guaranty on which Key Bank also based its claim (R. 182, Exhibit A) had been replaced in a subsequent refinancing of this unrelated loan transaction. The transaction may have been between these same parties (Key Bank, May Corporation and Weston), but it concerned a real estate loan of \$323,191.00.

By July 30, 2003, the loan was paid down to \$278,059.00 and then restructured with Weston’s substitution as “Borrower” and May Corporation and Mary B. Weston as guarantors. As a result, the Commercial Guaranty signed by Weston was replaced, and is no longer of any force or effect. This is confirmed by the Recitals in the Settlement Agreement that resolved litigation between the parties concerning the real estate loan transaction. (*See* R. 318, Exhibit B)

This is more than enough to demonstrate that the issue of the responsible party on the subject account should not have been determined as a matter of law. Utah R. Civ. Proc. 56(c) Therefore, it was error for the trial court to grant Key Bank’s Motion for Summary Judgment.

**II. THERE WAS NO FOUNDATION FOR MS. ROZICH'S TESTIMONY, AND HER AFFIDAVIT SHOULD HAVE BEEN STRICKEN.**

In her Affidavit (R. 182), Ms. Rozich testified (§2): "I have reviewed the files and records kept by Key Bank pertaining to the Preferred Credit Line extended to Mr. Wayne Weston....." But, nowhere in her affidavit did she identify those documents. We are left to guess to what documents Ms. Rozich was referring.

Key Bank finally identified those documents in its Memorandum in Opposition to Defendant's Motion to Strike. (R. 350 n.1) However, this was done by Key Bank, not by Ms. Rozich, and it did not solve the foundational problem with Ms. Rozich's Affidavit.

For example, none of these documents explains why Ms. Rozich has personal knowledge of the following statement: "Early in 2000, the Defendant contacted Key Bank by telephone, and applied for an individual Preferred Credit Line." (R. 181, §4)

Was Ms. Rozich the one who took the call? Did she speak with the person who took the call? Where are the documents that evidence the call? Certainly, none of the documents identified by Key Bank ("Preferred Credit Line Agreement, years of the Defendant's statements and invoices in Key Bank's possession, copies

of negotiated checks drawn on the Defendant's Preferred Credit Line Account and various other documents" (R. 350 n.1)) make reference to this call. We have been searching, in vain, for anything that might be characterized as an "original account document."

Therefore, we continued to question the basis for Ms. Rozich's testimony in the paragraphs that follow, *e.g.*: "In order to obtain a Preferred Credit Line, the Defendant provided his personal financial information such as social security number, personal address, and employment history." (R. 180, ¶9)

Where is the evidence for this? If the basis for Ms. Rozich's affidavit testimony is her "review of Key Bank's files and records," (R. 181, ¶2) there must be something in those files and records with Weston's SSN. Yet, Key Bank identified no such document in any of its summary judgment papers.

Key Bank finally produced an unauthenticated "Business Service Center Worksheet," (R. 344-43) which was attached to its Memorandum in Opposition to Defendant's Motion to Strike. Weston's SSN appears on the first page. (R. 344) Key Bank claimed this was one of the "hundreds of documents previously produced to the Defendant and relied upon by Ms. Rozich in preparing her affidavit,..." (R. 349)

However, Ms. Rozich said no such thing, and we demonstrated (RR. 357-56) that this was for a different account (No. 4616031227), which was opened before the Preferred Credit Line that is the subject of this action. (Even so, the document proved two (2) of Weston's points: 303 West 100 North, Provo UT 84601 was May Corporation's address (R. 344) and Weston lived somewhere else at the time (419 East 1730 North, Orem UT 84057). (*Id.*))

Therefore, Key Bank attempted to hang Ms. Rozich's Affidavit on Utah R. Evid. 803(6). (R. 349) However, Rule 803(6) merely serves to excuse certain business records from operation of the hearsay rule. It does not provide a foundational basis for Ms. Rozich's testimony.<sup>7</sup> This is the province of Utah R. Evid. 602, and Plaintiff has done nothing to prove that Ms. Rozich had "personal knowledge" of any of the facts stated in her Affidavit (§§4-20).

### **III. THERE IS NO BASIS FOR AN AWARD OF ATTORNEY'S FEES.**

Utah R. Civ. Proc. 73(b)(1) requires an "affidavit supporting a request for or augmentation of attorney fees" setting forth "the basis for the award;...." (emphasis added) The Affidavit in Support of Attorney's Fees (R. 389) is

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<sup>7</sup> Nowhere did Ms. Rozich testify that the unidentified "files and records" on which she allegedly relies were "made at or near the time by, or from information transmitted by, a person with knowledge," or that they were "kept in the course of a regularly conducted business activity," or that it was "the regular practice of that business activity to make the memorandum, report, record, or data compilation."



deficient in this material regard. There is absolutely no statement about the basis for an attorney's fee award in this case.

However, Key Bank claimed attorney's fees on the basis of the Preferred Credit Line Agreement attached as Exhibit C to the Memorandum of Points and Authorities in Support of Key Bank's Motion for Summary Judgment. (R. 259)

The problem is, Key Bank concedes it was never delivered to Weston:

Mr. Weston, you've been handed what's been marked as Deposition Exhibit No. 3. Take a moment and familiarize yourself with this document. You may not have seen it prior to now.

A. Yeah, I've never seen this document.

Q. Nor would you have any reason to see this document. It's an internal document from Key Bank regarding the preferred line of credit that was issued to you.

R. 216, pg. 181, lines 6-14

If the Preferred Credit Line Agreement is an "internal" document that was never meant for delivery to customers, how can it be the basis for a claim of attorney's fees under Utah law? *See Hughes v. Cafferty*, 2004 UT 22, ¶21, 89 P.3d 148

The problem with the Commercial Guaranty is worse. Weston demonstrated that the Commercial Guaranty was abrogated as part of a subsequent

refinancing, and in any event, it formed no part of the trial court's ruling. The Commercial Guaranty serves as no basis for an award of attorney's fees.

Finally, there is Key Bank's statutory claim made under Utah Code Ann. § 78-27-56, but which should have been Utah Code Ann. § 78B-5-825. In either event, Weston demonstrated that Key Bank's showing in this regard was totally deficient. (R. 368)

### **CONCLUSION**

This was not a close case. Given the absence of any of the originating documents, as well as the lack of record support for many of the factual statements made by Key Bank in support of its summary judgment motion, not to mention the contrary evidence produced by Weston, there should have been a trial on the question of liability for the Preferred Credit Line. There is, at the very least, a genuine issue whether the account was opened by May Corporation, or Weston.

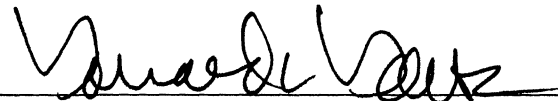
Key Bank's motion was based in largest part on the Affidavit of Helen M. Rozich. (R. 182) However, Key Bank failed to demonstrate that she had personal knowledge for many of the statements appearing therein. Utah R. Evid. 803(6) may serve to excuse certain documents on which Key Bank relied (we do not know), but it cannot provide the foundational basis for Ms. Rozich's testimony.

There was no basis for an award of attorney's fees. Weston never received the Preferred Credit Line Agreement. The Commercial Guaranty was abrogated in a later transaction between the parties. The trial court made no findings of "bad faith" that would support an award of attorney's fees under Utah Code Ann. § 78B-5-825.

For the foregoing reasons, the trial court's Order and Judgment on Key Bank's Motion for Summary Judgment and Wayne R. Weston's Motion to Strike the Affidavit of Helen M. Rozich (R. 406) should be REVERSED and the case REMANDED for further proceedings consistent therewith.

DATED this 8<sup>th</sup> day of October, 2008.

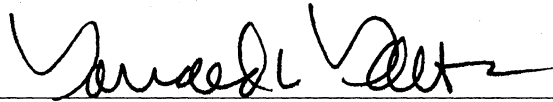
DALTON & KELLEY, PLC

By   
Donald L. Dalton  
Attorneys for Appellant

## CERTIFICATE OF SERVICE

THIS WILL CERTIFY that true and correct copies of the within and foregoing "Brief of Appellant" were mailed, First Class, postage prepaid, this 8<sup>th</sup> day of October, 2008, to:

Arnold Richer  
Robert A. Ponte  
Richer & Overholt  
901 West Baxter Drive  
South Jordan UT 84095



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# ADDENDA

**FILED**

**MAY 06 2008**

**4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY**

Arnold Richer, USB# 2751  
Robert A. Ponte, USB# 10038  
**RICHER & OVERHOLT, P.C.**  
901 West Baxter Drive  
South Jordan, UT 84095  
Telephone: (801) 561-4750

Attorneys for Plaintiff, Key Bank, N.A.

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**IN THE FOURTH DISTRICT COURT OF THE STATE OF UTAH**

**UTAH COUNTY, PROVO DEPARTMENT**

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KEY BANK, NATIONAL  
ASSOCIATION,

Plaintiff,

v.

WAYNE R. WESTON, an individual

Defendant and  
Counterclaim Plaintiff.

v.

KEY BANK, NATIONAL  
ASSOCIATION,

Counterclaim Defendant

**ORDER AND JUDGMENT ON KEY  
BANK'S MOTION FOR SUMMARY  
JUDGMENT AND WAYNE R. WESTON'S  
MOTION TO STRIKE THE AFFIDAVIT OF  
HELEN M. ROZICH**

Civil No. 060403535

Judge Stott

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On or about February 6, 2008, Plaintiff and Counterclaim Defendant Key Bank, N.A.,(hereafter "Key Bank") moved for summary judgment on its Complaint against the Defendant Wayne R. Weston (hereafter "Mr. Weston") and on Mr. Weston's Counterclaim against Key Bank. Key Bank's Motion for Summary Judgment was supported in part by the Affidavit of Helen M. Rozich (hereafter the "Rozich Affidavit"). Mr. Weston moved to

strike the Rozich Affidavit. The Parties' respective briefing on both Key Bank's Motion for Summary Judgment and Mr. Weston's Motion to Strike the Rozich Affidavit was completed on or about March 13, 2008. A hearing was requested, which request was granted. On March 31, 2008, this Court heard oral argument on both Key Bank's Motion for Summary Judgment and Mr. Weston's Motion to Strike. Robert A. Ponte, of the law firm of Richer & Overholt, P.C., appeared on behalf of Key Bank. Donald L. Dalton appeared on behalf of Mr. Weston.

After having fully analyzed the pleadings on file and after having received oral argument on the matter, the Court finds and holds as follow:

1. The Rozich Affidavit relied upon documents kept by Key Bank in the ordinary course of business and previously produced by Key Bank.
2. The documents attached as exhibits to Key Bank's Memorandum in Support of Motion for Summary Judgment and referenced in the Rozich Affidavit fell within the business exception to the Hearsay Rule.
3. The Rozich Affidavit adequately identified the documents upon which Ms. Rozich relied in offering her affidavit testimony.
4. The Rozich Affidavit contains sufficient foundation for the Court to consider the testimony of Ms. Helen M. Rozich as set forth therein.
5. No genuine issues of material fact exist.

6. The undisputed facts evidence that:

- a. Mr. Weston personally applied for and received a line of credit from Key Bank;
- b. Mr. Weston was provided a book of blank checks which bore his personal name and made no reference whatsoever to any corporate entity;
- c. There was no indication that the checks or funds made available to Mr. Weston pursuant to the credit line were made available for corporate use;
- d. Mr. Weston personally took advantage of the credit line and funds made available therefrom; Mr. Weston personally used the money from the credit line and deposited money from the credit line into his personal banking account;
- e. Neither the issue of whether Mr. Weston provided Key Bank with his social security number, or whether Mr. Weston provided Key Bank with his home or business creates any genuine issue of material fact;
- f. Mr. Weston owes to Key Bank the sum of \$28,078.44 as of December 13, 2006, together with interest thereon at the statutory rate, plus reasonable attorney's fees and costs of court.

Based upon the foregoing, and for good cause showing, it is hereby ORDERED:

- 1. Key Bank's Motion for Summary Judgment is hereby GRANTED.
- 2. Mr. Weston's Motion to Strike the Rozich Affidavit is DENIED.




3. Mr. Weston's Counterclaim against Key Bank is DISMISSED WITH PREJUDICE.
4. Key Bank is awarded Judgment against Wayne R. Weston, in the amount of \$28,078.44 as of December 13, 2006, together with interest thereafter at the statutory rate.
5. Key Bank is further awarded Judgment against Wayne R. Weston, in the sum of \$15,633.75, representing attorney's fees expended herein, and in the sum of \$345.80, representing costs incurred herein, pursuant to the parties' contract.
6. Key Bank is awarded the right to augment this Judgment against Wayne R. Weston in the amount of reasonable costs and attorney's fees expended in collecting or enforcing said Judgment by execution or otherwise as established by Affidavit from Key Bank's counsel without further notice to Defendants.

**TOTAL JUDGMENT: \$44,057.99.**

DATED this 6 day of May, 2008.

BY THE COURT:

  
HONORABLE Gary D. Stoff  
Fourth District Court Judge



Approved as to Form:

\_\_\_\_\_  
Donald L. Dalton, Esq.  
Attorney for Wayne R. Weston

**COURT CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2008, I caused a true and accurate copy of the foregoing **ORDER AND JUDGMENT ON KEY BANK'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO STRIKE THE AFFIDAVIT OF HELEN M. ROZICH** to be served upon the following by placing the same in the United States mail, postage prepaid and addressed as follows:

Donald L. Dalton, Esq.  
**DALTON & KELLY, PLC**  
PO BOX 58084  
Salt Lake City, Utah 84158

Arnold Richer, Esq.  
**RICHER & OVERHOLT, P.C.**  
901 West Baxter Drive  
South Jordan, Utah 84095

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**IN THE FOURTH JUDICIAL DISTRICT COURT,  
UTAH COUNTY, STATE OF UTAH**

KEY BANK, NATIONAL ASSOCIATION,  Plaintiff/Counterclaim Defendant,  vs.  WAYNE R. WESTON,  Defendant/Counterclaim Plaintiff.	<b>RULING</b>  Date: April 22, 2008  Case No.: 060403535  Judge: Gary D. Stott
--	--

The matter before the Court is the Defendant's Objection to the Proposed Order submitted after an oral arguments hearing on March 31, 2008. There are two objections: (1) the Proposed Order includes references to hearsay; and (2) there is no basis for attorney fees in the Proposed Order. After consideration of the relevant information, the Court makes the following Ruling.

*Hearsay*

Some procedural history will help resolve the hearsay objection. The March 31, 2008 hearing addressed, in part, the Defendant's Motion to Strike Affidavit of Helen M. Rozich. As the basis for striking the affidavit, Defendant stated, "Ms. Rozich's testimony lacks foundation and is based on inadmissible hearsay." The Minutes of the hearing state, "The Court informs the parties that the Motion to Strike Affidavit of Helen M Rozich is denied." In accordance with the Court's Ruling, the plaintiff prepared and submitted the Proposed Order.

The Proposed Order states, “The documents . . . referenced in the Rozich Affidavit fell within the business exception to the Hearsay Rule” (as stated in point 2 of the Proposed Order). Defendant, however, objected, stating the Proposed Order “does not accurately reflect the Court’s ruling” and that the “undersigned has no recollection that the Court made ruling on Plaintiff’s claim for URE 803(6) exception.”

As the Minutes show, the Court denied Defendant’s Motion to Strike, which included denying the objection based on hearsay. The defendant’s current objection, therefore, is unfounded and the Court denies Defendant’s Objection to the Proposed Order’s reference to the outside documents.

#### *Attorney Fees*


In the Complaint, Plaintiff asked for “an Order permitting Plaintiff to augment any judgment in the amount of reasonable costs and attorney’s fees.” Plaintiff reiterated this request in its Motion for Summary Judgment: “Key Bank respectfully requests . . . an award of reasonable attorney’s fees” and listed three separate reasons: (1) the Preferred Line of Credit Agreement that allowed them, (2) a non-abrogated Commercial Guaranty that gave them, and (3) U.C.A. 78-27-56 that awards them for merit-less or bad faith defenses.

In the Minutes to the March 31, 2008 hearing, the Court stated, “The [plaintiff’s] motion [for summary judgment] is well taken and the plaintiff is entitled to their claim.” Because Plaintiff is entitled to their claim without any stated exceptions, it is entitled to all of its sub-claims within their claim for summary judgment. One of the sub-claims was for attorney fees; therefore, the Court

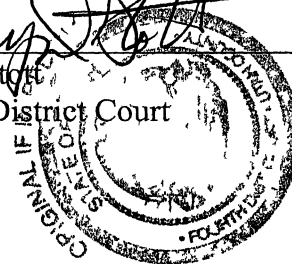
denies Defendant's objection to the Proposed Order's award of attorney fees, even though the Court did not explicitly state in the Minutes for which of the three reasons it was granting attorney fees.

The basis upon which the Court granted attorney fees is from both the Preferred Line of Credit Agreement that allowed attorneys fees and the Commercial Guaranty that did the same. The defendant never disputed receipt of the Preferred Line of Credit Agreement and the Rozich Affidavit stated the Agreement was sent with the blank checks from Key Bank that the defendant undisputedly received. Furthermore, there were three Commercial Guaranties involved in this action, two of which were abrogated. The final one remains in force. It required attorney fees as well; therefore, Defendant is liable for reasonable attorney fees as he contracted to be in both agreements.

Dated this 27 day of April, 2008.

  
\_\_\_\_\_  
Judge Gary D. Stott  
Fourth Judicial District Court

A certificate of mailing is on the following page.



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 060403535 by the method and on the date specified.

METHOD	NAME
--------	------

Mail	DONALD L DALTON Attorney DEF 2458 SUNNYSIDE AVE SALT LAKE CITY, UT 84108
Mail	ARNOLD RICHER Attorney PLA 901 BAXTER DRIVE SOUTH JORDAN UT 84095-4551

Dated this 25 day of Apr, 2008.

  
\_\_\_\_\_  
Deputy Court Clerk