SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. NO. 18342

ELAINE BRAFFMAN, CUSTODIAN FOR DAVID BRAFFMAN, ET AL

VS.

BANK OF AMERICA CORPORATION

REPLY BRIEF OF THE PLAINTIFFS- APPELLANTS

[With Appendix]

TO BE ARGUED BY:

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I. PURPOSE OF REPLY BRIEF

This reply brief addresses defendant's arguments on appeal; its failure to address §10-50 of the Practice Book and cases construing that section; and defendant's alternate ground to affirm.

II. ARGUMENT

A. The defendant does not dispute the plaintiffs' assertion that Practice Book §10-50 establishes the respective burdens of proof for this matter.

The principal issue on appeal was discussed on pages 18-22 of the plaintiffs' brief in chief. Practice Book §10-50 provides, in relevant part, that "payment (even though nonpayment is alleged by the plaintiff) ... must be specially pleaded ... ." Further, that "[t]he burden to prove the special defense of payment rests upon the defendant." Selvaggi v. Miron, 60 Conn. App. 600, 601 (2000).

The defendant's brief does not address Practice Book §10-50, nor does it dispute the proposition that "the burden to prove the special defense rests upon the defendant." It does not distinguish Selvaggi and the other cases relied upon by the plaintiffs, nor does it cite any case law to the contrary.

B. The issue of the trial court's apportionment of the burden of proof is not unpreserved for appeal.

The trial court's decision regarding the defendant's special defense of payment is plainly stated on pages 17-18 of its Memorandum of Decision of 12/11/2008 ["MOD"]:

> [T]he plaintiffs have not sustained their burden of proof with regard to the claims of count one and count two. The plaintiffs have not provided persuasive evidence that the accounts in question have not been paid by the defendant or its predecessors.

The defendant argues on pages 13-14 of its brief that the issue of the trial court's allocation of the burden of proof on the defendant's special defense is not preserved for appeal. The defendant cites six cases, but not the one that controls.

The controlling case is Community Action for Greater Middlesex County v. American Alliance Insurance Co., 254 Conn. 387 (2000), wherein the parties had each filed motions for summary judgment. The trial court denied the plaintiff's motion and granted the defendant's. The trial court's order merely stated that the decision had been made for the reasons given in an unpublished case. Id. at 391.

The Appellate Court had dismissed the plaintiff's appeal, for the reason that the record was inadequate for review due to the lack of either a memorandum of decision or a signed copy of an oral transcript. Id. at 391-92. This court reversed and considered the plaintiff's appeal. "[Where] the facts are not in dispute and ... the reviewing court's review is de novo, the precise legal analysis undertaken by the trial court is not essential to the reviewing court's consideration of the issue on appeal." Id. at 396-96.

In the present case, the trial court's MOD leaves no doubt as to who bore the burden of proof on the defendant's special defense of payment. It was the plaintiffs who had not sustained their burden of proof to prove that the accounts had not been paid. The standard of review on appeal is a pure matter of law for which this court's review is plenary. The issue is preserved for appeal. Even if it were not, the issue would still be reviewed under the plain error doctrine. American Diamond Exchange v. Alpert, 101 Conn. App. 83, 105 n.14 (2007).

The six cases cited by the defendant are easily distinguished. In Stiffler v. Continental Insurance Co., 288 Conn. 38 (2008), the plaintiff had asked for attorneys'

fees but the trial court's judgment was completely silent on the issue. It was held that the record was inadequate under the rule requiring the appellant to move for articulation when the trial court overlooks a matter. Id. at 51-53. Similarly, the plaintiffs in Bingham v. Dept. of Public Works, 286 Conn. 698, 704 n.5 (2008), could not seek review for a claim on which the trial court had been completely silent. Accord, Dickenson v. Mullaney, 284 Conn. 673, 680 (2007) ("The habeas court's failure to make a finding of inexcusable delay therefore is an overlooked matter that must be addressed by appellant, here the petitioner, in order to provide an adequate record"); Schoonmaker v. Brunoli, 265 Conn. 210, 232-33 (2003) (finding that the record was silent with respect to the trial court's treatment of the plaintiff's statute of limitations arguments); Desrosiers v. Henne, 283 Conn. 361, 366-68 (2007) (the trial court's silence as to the admission of certain evidence precluded review); Evans v. Commissioner of Correction, 37 Conn. App. 672, 689 (1995) (the habeas court's silence regarding admission of testimony concerning the plaintiff's refusal to participate in questioning precluded review).

C. Subsections I(C) & I(D) of the defendant's brief, appearing at pages 14 through 27, are not responsive to the issues on appeal.

Subsections I(C) & I(D) of the defendant's brief are a scattergun of various misstatements and other issues that are not properly before this court.

1. The heading of subsection I(C) misstates the legal effect of Practice Book §10-50.

The heading states that the plaintiffs had the "responsibility to prove the defendant's nonpayment of the proceeds of their accounts." In fact, the defendant hasn't undertaken to oppose the plaintiffs' contention that Practice Book §10-50 places the responsibility to prove the special defense of payment on the defendant.

2. The defendant's argument regarding the legal effect of the uncancelled passbooks on the allocation of the burden of proof is specious.

The defendant states on page 14 of its brief that "[t]he plaintiffs argue that their mere introduction of the uncancelled passbooks into evidence, in and of itself, was sufficient to establish a prima facie case ... Their contention is that such evidence automatically and immediately shifted the burden of persuasion to the defendant to prove payment."

The defendant's mischaracterization of the plaintiffs' argument is in the nature of a straw man. This is reflected in the conspicuous absence of any mention of Practice Book §10-50 or the case law construing that provision.

The principal issue on appeal is that the trial court improperly placed the burden to disprove the defendant's special defense on the plaintiffs. In this regard, the plaintiffs introduced abundant evidence to show that they had entered into a debtor-creditor relationship with the bank. See, e.g., Fleet Bank Connecticut v. Carillo, 240 Conn. 343, 348 n.6 (1997). Further, that the defendant had failed to honor its passbooks. This evidence was provided not only by the uncancelled passbooks themselves, but also by the unequivocal testimony of the plaintiffs as to their deposit of the funds, the fact that they had never withdrawn any of the funds, and the banks refusal to pay over the funds when requested. See, e.g., App. A3-A4, A7-A13, A17-A18 & A20-A23.

The issue is whether the trial court properly allocated the burden to prove payment pursuant to Practice Book §10-50, not merely in response to the introduction of the uncancelled passbooks.

The straw man argument is repeated on page 15, wherein the defendant states that "much of the plaintiffs' argument is devoted to the incorrect proposition, supported by the case law from other states ... that possession of [an uncancelled] passbook shifts the burden of proof to the defendant." In fact, the plaintiffs' argument is that the burden in a Connecticut court to prove the special defense of payment belongs with the defendant by operation of Practice Book §10-50. The plaintiffs have cited the case law from other states to demonstrate that the *result* is not an anomaly, many other states having reached the same allocation of the burden by different means. In other words, the allocation is the norm throughout the United States even though §10-50 is unique to Connecticut.

3. The defendant misquotes Schiavone v. Bank of America, 102 Conn. App. 301 (2007).

On pages 15-16 of its brief, the defendant quotes the Appellate Court decision in Schiavone for the proposition that:

> the burden of proof that a certificate of deposit has not been paid *lies with the plaintiff*." Schiavone v. Bank of America, N.A., 102 Conn. App. at 304 (emphasis added).

This quote does not appear in the Appellate Court's decision. A word search within Westlaw reveals that the word "lies" does not occur even once within the Appellate Court's opinion. A search for the words "with" or "plaintiff" reveals numerous instances of the words, but not in the context of the purported quote.

The only claim on appeal in Schiavone was that certain factual findings of the trial court were clearly erroneous. Id. at 301-02. There were no claims of law. The case is discussed in the plaintiffs' brief in chief in section IV(D). Recall that the plaintiff

in Schiavone relied solely on his possession of a certificate of deposit. He freely admitted that he may have cashed in the account. He just couldn't recall.

The only holding of Schiavone is that the trial court's finding of fact was not clearly erroneous. The Appellate Court made no attempt to determine the proper allocation of the burden of proof when a special defense of non-payment is made pursuant to Practice Book §10-50. Given that the trial court was affirmed per curiam, no attempt should be made to stretch the holding of Schiavone beyond its four corners.

4. The defendant mischaracterizes the plaintiffs' testimony by implying that they were unsure as to whether they had redeemed the passbook accounts.

Perhaps in an attempt to make the present case appear to be more like Schiavone, the defendant states on page 18 of its brief that the plaintiffs only recalled *not* redeeming the passbook accounts. This is a gross mischaracterization of the plaintiffs' testimony. The defendant has not cited to the transcript.

Plaintiff Gerald Braffman testified unequivocally that the passbooks had been kept in his safe deposit box at all times and that they had never been redeemed:

> Q: Now the passbooks themselves, Jerry, they -- did they remain in the safe deposit box that was in Union Trust and then in Bank Fleet?
>
> A: Continuously.
>
> Q: All right. And who had the key to the safe deposit box?
>
> A: I did. I think my wife may have had another key.
>
> * * * * * * *
>
> Q: All right. Now, did you ever cash these things in or request that they be -- the funds be sent to you at any time in the past?
>
> A: No, never.
>
> Q: All right. Did you ever receive any money from the bank --

A: No.

Q: at any time over the years since they were taken out representing all or part of these investments?

A: No, I didn't.

Q: All right. Did you ever authorize anyone else to receive the funds or cash them in or get the money in one way or another?

A: No, I did not.

Q: All right. Did you ever request the bank to issue replacement passbooks of any kind?

A: No.

Q: All right. When you opened this account, did you instruct the bank to mail the money to you on maturity?

A: No.

* * * * * * *

Q: All right. So you contend that the bank still has your children's money but refuses to hand it over?

A: That's exactly right.

(T. 6/19/2009; App. A20(a)-A23).

Plaintiff Elaine Braffman is plaintiff Gerald Braffman's spouse. Her testimony that she had never redeemed the passbooks was equally unequivocal:

Q: And then you left [Society for Savings] with the passbook that's been marked as an exhibit?

A: Yes, I did.

Q: And what did you do with it?

A: I gave it to Jerry, my husband, and I assume that he put it in a safe deposit box.

Q: Okay. And we'll let Jerry testify as to that. Then when did you -- and did you see it again in the 1980s or 1990s?

A: No.

Q: When's the next time you saw that certificate?

A: When Jerry took it out of the -- the safe deposit box. ...

* * * * * *

Q: Now, did you ever have occasion to go to the safe deposit box all of these years that -- back from 1988 to 2004?

A: I don't think I ever went to the safety deposit box.

Q: Who had the key?

A: My husband.

Q: All right. Did you ever receive the funds; that is, from the $100,000 certificate of deposit from Society for Savings or any subsequent bank?

A: Never.

Q: -- up to the present time? Did you -- you never cashed it in and never were paid?

A: Never.

Q: Now, did you ever authorize anyone else to receive the money --

A: No.

Q: -- or part of the money?

A: No.

Q: Did -- did anyone attempt to, to your knowledge, obtain the money or part of it?

A: No.

Q: Did you at any time ever request any bank, Society for Savings or any subsequent bank, to issue a replacement passbook/

A: No.

(T. 6/19/2009; App. A12-A13).

Plaintiffs David Braffman and Susannah Joy Braffman Amen are the children of plaintiffs Gerald and Elaine Braffman. Although they are both adults and admitted to the practice of law now, it was undisputed at trial that David and Susannah had been children when the passbooks had been opened for their benefit. Both plaintiffs testified that they had never been told about these accounts until demand on the defendant was attempted during 2004. Their testimony appears at App. A14-A15 & A34-41. David testified before the trial court. Susannah's deposition was admitted by the consent of the parties because she resides in California and was in poor health at the time of the trial. See App. A24-A24.

5. The defendant's ad hominem attacks upon the plaintiffs are not a part of the record on appeal.

Pages 20-22 of subsection I(C) of the defendant's brief contain a number of ad hominem attacks, culminating with a comparison on page 22 between the plaintiffs and a disgraced judge of probate. The defendant has even included a newspaper article about the judge of probate in its appendix, despite the fact that the judge has no connection whatsoever to either the plaintiffs or this matter, the fact that this line of questioning was not pursued at trial, and the fact that the newspaper article was never offered to the trial court. It is not a part of the record. To the extent that the record does demonstrate that any witness's testimony before the trial court lacked candor, it was the testimony of the defendant's fact witness, Christian Muller.[1]

[1] Muller was called by the defendant as a fact witness. He testified that he had worked in the banking industry for 40 years, much of that time as a vice president. He testified that he had left a vice presidency at Webster Bank during the June 2006 time

6. Subsection I(D) of the defendant's brief argues for the sufficiency of the evidence, an issue that is not before this court:

This subsection, as well as parts of subsection I(C), reviews the evidence before the trial court in the light most favorable to the defendant. However, the defendant never links its review to the issue of law that is before this court. No argument is made that the proper application of Practice Book §10-50 is affected by the defendant's evidentiary review.

D. Nothing in C.G.S. §36a-40 establishes a statute of limitations.

The plaintiffs have discussed the document retention statute, C.G.S. §36a-40, in their brief in chief at subsection IV(D). In general, an appellant is expected to address the anticipated arguments of the appellee in its brief in chief. The defendant criticizes the plaintiffs' inclusion of this discussion as a misinterpretation of the trial court's holding (defendant's brief p. 27), but later argues, as anticipated, that "while not expressly incorporating a provision equating the retention period with a statute of limitations period, clearly this was in the mind of our legislators in defining the objectives and

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frame to take early retirement. He was now employed by a temporary services agency. (App. A27-A30). After the testimony had concluded, the marshal returned the plaintiffs' subpoena for Muller unserved. (App. A42). The marshal's comments led to the revelation that Muller's address was a trailer in a trailer park. (Compare App. A43 to A31). Further, that Muller had filed for Chapter 7 bankruptcy on or about 6/7/2005. (App. A42). His debts totaled $235,901.45 (App. A52), most of it consisting of credit card debt. (App. A45-A53). No debts for medical bills were listed. His first Trustee had asked to be excused because a diligent search had not revealed any assets that could be distributed to the creditors. (App. A54). These materials were all appended to the plaintiffs' reply brief to the trial court dated 8/29/2008 and were admitted over the defendant's objection. (MOD at p.4; App. to plaintiffs' brief in chief at App. A37). Query, what older worker who has achieved a vice presidency at an institution like Webster Bank, and faced with over $235,000 of debt and no assets, would take early retirement in favor of working at a temporary agency?

purposes of [C.G.S. §36a-40]." (Defendant's brief p. 29). The plaintiffs' prior argument need not be repeated, but two brief rebuttals are required.

First, there was no evidence at trial to demonstrate that the defendant would have incurred any particular burden by maintaining sufficient records to memorialize the disposition of purportedly closed accounts. Recall that the defendant's witness, Muller, was called as a fact witness, not an expert. He was not asked by either party to specify the amount of the electronic storage required to maintain a record of purportedly closed accounts, nor was he asked to specify the cost of such electronic storage in any particular year. His testimony did not include facts to establish that maintaining such electronic records would have been impractical or would have required limitless resources, as the defendant implies on page 28 of its brief. Muller did admit that all of the defendant's records had been maintained electronically during all years at issue and that no paper storage was at issue. (App. A32-A33). Note that the Legislature's concern for the cost of record keeping was expressed in 1963, prior to the advent of electronic records. (Defendant's brief p. 29).

Second, the defendant argues at least twice that the very absence of the defendant bank's records is substantive evidence in this case. To the contrary, the only conclusion that can be drawn from the absence of the defendant's records is that it, or a predecessor, voluntarily destroyed all of its own records. The defendant does not contend on appeal that the plaintiff's lawsuit was brought in violation of any statute of limitations. The risk of the defendant's document destruction policy should fall upon the defendant. Albert Mendel & Son, Inc. v. Krough; 4 Conn. App. 117, 124-45 (1985).

E. The original passbooks from the defendant's predecessor in interest were properly admitted as full exhibits by the trial court.

The defendant's alternate ground for affirmance relies on two false propositions. First, that the trial judge's admission of the original passbooks from Society for Savings was an abuse of discretion. Second, that the error affected the result because the defendant would have been entitled to a directed judgment if the passbooks had not been admitted.

The defendant cannot make an argument that wasn't advanced at trial. Except in the most unusual of circumstances, an object to the admission of evidence will not be considered on appeal where the claim raised on appeal is different from the objection made to the trial court. Hartford Div., Emhardt Industries v. Amal. Local Union 376, 190 Conn. 371, 387-88 (1983).

At trial, the defendant admitted that the passbooks were business records. However, the defendant stated that the passbooks were the business records of Society for Savings, not the plaintiffs. (App. A4).

C.G.S. §52-180 only requires the document to have been made in the ordinary course of business, that it was the regular course of business to make such a document, and that the record was made during or shortly after the event. Nothing in the statute requires the proponent to admit a business record through the creator of the record. "All that is necessary is that some witness authenticate the document as a business record." Colin C. Tait & Eliot D. Prescott, TAIT'S HANDBOOK OF CONNECTICUT EVIDENCE, section 8.28.4 (4th ed. 2008).

The testimony of Elaine Braffman established that she was present when Society for Savings created the passbook dated November 1988, that she left the bank with the

passbook, and that the passbook admitted into evidence was the same passbook. (App. A3-A13). Gerald Braffman's testimony was similar regarding the passbook created by Society for Savings during November 1987. (App. A17-A23).

The passbooks that were admitted by the trial court were the originals, not copies. The defendant does not claim that it presented any evidence to dispute the testimony of Gerald Braffman and Elaine Braffman. In other words, the authenticity of the exhibits was not placed into contention before the trial court. The original passbooks were repeatedly inspected by the defendant's witness, Muller, who had worked at Society for Savings. Muller never suggested that there was anything irregular about the pass-books, and the defendant never questioned its own witness on the subject. To the contrary, the defendant admits that it entered into a stipulation of facts at the trial court's request, wherein true copies of the passbooks were referenced. (Defendant's brief, p.33).

"[B]ecause the [business record] statute is to be liberally interpreted, records should not be excluded when the statutory requirements can be reasonably assumed to have been met. [Hartford Division, above, at 388-89]. This practical approach to the statute is commendable, as it furthers the statute's purpose. In fact, there seems to be a presumption of regularity, with the burden on the objector to show a lack of it." Colin C. Tait & Eliot D. Prescott, TAIT'S HANDBOOK OF CONNECTICUT EVIDENCE, section 8.28.4 (4th ed. 2008). "The reliability of business records arises in part, from the fact that the habit and system of making such a record with regularity calls for accuracy through the interest and purpose of the entrant." Hartford Division at 390.

Moreover, an appeal of a trial court's admission of evidence will only be considered where it can be demonstrated that the "impropriety was harmful in the broader context of the entire trial. ... The absence of such a record is an insurmountable obstacle to review ... ." DesRosiers v. Henne, 283 Conn. 361, 368 (2007). Here, the defendant makes the bald assertion that the plaintiffs would have been precluded from proving any aspect of their case had the passbooks not been admitted. In fact, the passbooks merely corroborated the testimony of plaintiffs Gerald and Elaine Braffman as to the creation of the accounts and the defendant's failure to release the funds when requested.

III. CONCLUSION

For the foregoing reasons, this case should be remanded for retrial. The trial court did not undertake to determine whether the defendant had proved that the accounts had been paid to the plaintiffs. That burden belonged to the defendant.

The defendants have cited several cases that merely hold that where a lawsuit contains several causes of action subject to different burdens of proof, an error as to the burden of proof on one claim does not require a remand of the entire lawsuit. However, the remand of the cause of action as to which an erroneous burden of proof was applied is a remand for a trial de novo.

John Barber, et al. v. Skip Barber Racing School, 106 Conn. App. 59 (2008), cited by the defendant, illustrates the point. The operation of a racing school had been transferred from the plaintiff to the defendant. The parties to the transfer had retained

continuing, mutual obligations to each other. Later, the parties had fallen out. Both parties brought claims under different theories for different items of damage.

Barber had been tried to the court, not a jury. The trial court had properly resolved the causes of action brought by the plaintiffs. However, the trial court had applied an erroneous burden of proof when deciding upon a cross claim brought by the defendant regarding improper transfers of $170,000 per year between certain accounts. The appellate court remanded the case to the trial court for further proceedings as to this one cause of action due to the erroneous allocation of the burden. Id. at 76.

As to the one cause of action that was remanded, the further proceedings appear to have contemplated a full rehearing. Regarding the possibility that the trial judge may have misunderstood the import of certain facts, the Appellate Court stated that "[a]s we are remanding the case for a rehearing to apply the proper standard of proof, we need not reach this issue." Id. at 75 n.7.

Unlike Barber, there are no severable causes of action in the present matter. There is no opportunity to remand the case for further proceedings as to one cause of action but not another. Therefore, the defendant's request within its conclusion for a limited remand is inapposite to the facts of this case.

RESPECTFULLY SUBMITTED,

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CERTIFICATION RE §67-2

This brief complies with all the provisions of the rules in §67-2.

WILLIAM F. GALLAGHER