IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 3, 2022

STEPHEN FARBER ET AL. v. NUCSAFE, INC. ET AL.

Appeal from the Chancery Court for Anderson County
No. 21CH3012 M. Nichole Cantrell, Chancellor

No. E2022-00428-COA-R3-CV

This is a breach of contract action between a lender, borrower, and guarantor on a promissory note. When the borrower ceased payment on the promissory note and the borrower and guarantor failed to cure the default, the lender commenced this action against the borrower and the guarantor. After extensive discovery, the lender passed away, and the personal representatives of the lender's estate were substituted as the party plaintiffs. The estate filed a motion for summary judgment based on two grounds. The first ground was that in their discovery responses, the defendants admitted that they failed to remit payments as required by the promissory note. Second, the defendants' discovery responses denied that the defendants had any facts or evidence upon which to support the affirmative defenses that the lender violated the doctrine of good faith and fair dealing and/or that the note was unenforceable. The defendants filed a response in opposition to the summary judgment motion, supported by the affidavit of the president of both defendants. Relying on the affidavit, the defendants asserted, for the first time, that neither defendant was ever liable for the debt because the lender had never remitted the loan proceeds to the borrower. The trial court ruled that the bulk of the affidavit was inadmissible on three grounds. First, it found the officer's testimony regarding conversations with the deceased lender inadmissible under the Dead Man's Statute, Tennessee Code Annotated § 24-1-203. Second, it found certain statements were directly contradictory to previous discovery responses, so the court accordingly rejected the evidence under the Cancellation Rule. Third, it found the business records the affiant referenced in his affidavit but did not produce failed to satisfy the best evidence rule. After considering the statement of undisputed facts, discovery responses, and the defendants' admissions, the trial court concluded that the material facts were undisputed and that the estate was entitled to judgment as a matter of law. Accordingly, it granted the estate's motion and awarded a judgment for the outstanding principal and interest totaling $260,710.00 and $12,445.28 in attorneys' fees and expenses. The defendants appealed. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which CARMA DENNIS MCGEE and KRISTI M. DAVIS, JJ., joined.

Mark E. Brown, Knoxville, Tennessee, for the appellants, Nucsafe, Inc. and Breton Equity Company Corp.

J. Chadwick Hatmaker, C. Gavin Shepherd, Knoxville, Tennessee, for the appellees, Stephen Farber and John Maisel, as Personal Representatives for the Estate of Richard Seymour.

OPINION

FACTS AND PROCEDURAL HISTORY

In October 2015, Nucsafe, Inc. ("Nucsafe") and Breton Equity Company Corp. ("Breton Equity") (collectively "Defendants") executed a Modified and Amended Promissory Note ("the Note") in favor of Richard Seymour in the principal amount of $1,748,198.26. Nucsafe was primarily obligated to make payments toward the debt, and Breton Equity was the guarantor.[1]

Paragraph 1 of the Note provided that it would gather interest at a rate of three percent per year and that Nucsafe would make the monthly interest payments in the amount of .25% of the remaining balance each month with the first payment being $4,370.50. Beginning January 1, 2016, Nucsafe became obligated to pay Mr. Seymour $6,000.00 per month. The Note also provided for the award of the cost of collection and all reasonable attorneys' fees in the event of default. Upon execution, Nucsafe began making payments pursuant to the terms of the note.

Defendants and Mr. Seymour subsequently executed four separate addendums or modifications to the Note on February 26, 2016; April 21, 2016; August 3, 2016; and September 2, 2016, respectively. Under the February 2016 modification, the scheduled due dates for monthly payments were changed, and the modification provided that the principal

[1] For a period of years prior to this transaction, Mr. Seymour served as the President and CEO of Nucsafe. At the time of the note's execution, Lester Sideropoulos served as President and signed the 2015 Note on behalf of Nucsafe. Ted Doukas, who was President of Breton Equity, signed the guaranty on its behalf. Mr. Doukas subsequently became President of Nuscafe as well as Brenton Equity.

payment amount due each month would be no less than $10,000.00. The other modifications are not germane to the issues on appeal.[2]

Nucsafe made its scheduled monthly payments pursuant to the terms of the Note and all subsequent modifications until July 1, 2020, at which time Nucsafe ceased making any monthly payments. As a result, Mr. Seymour sent a demand letter and notice of default demanding payment of the outstanding balance in August of 2020. When Defendants did not cure the default, Mr. Seymour filed the present action for breach of the Note. At the time Mr. Seymour filed his complaint in March 2021, the outstanding balance on the Note was $117,544.50. In response, Defendants filed a joint answer in which they asserted various affirmative defenses including, inter alia, breach of the implied covenants of good faith and fair-dealing, lack of consideration, and estoppel.

Mr. Seymour passed away on June 11, 2021. Subsequently, the personal representatives of Mr. Seymour's estate, Stephen Farber and John Maisel (collectively "Plaintiffs") were substituted as parties in interest.

On July 9, 2021, Defendants responded to Plaintiffs' interrogatories. In their response, Defendants denied having knowledge of any facts to support the contentions in their Answer to the Complaint that Mr. Seymour breached the implied covenants of good faith and fair dealing or that the Note and subsequent addendums were otherwise unenforceable.

Relying on the discovery responses, Plaintiffs filed a Motion for Summary Judgment arguing that, because it was undisputed that Nucsafe did not make any payments in accordance with the terms of the Note and all subsequent modifications, the estate was entitled to judgment as a matter of law on the breach of contract claim.

Defendants filed a response opposing summary judgment, arguing that material facts were in dispute such that summary judgment was not appropriate. To support this contention, Defendants filed an affidavit by Ted Doukas, the President of Nucsafe and Breton Equity. In his affidavit, Mr. Doukas stated that his review of Nucsafe's business

[2] The April 2016 addendum added a new paragraph to the language of the Note which provided that if either Defendant paid Mr. Seymour $1,400,000.00 within 120 days of the execution of the addendum, Mr. Seymour would consider the 2015 Note paid in full. The August 2016 addendum later changed the date for payment of the same $1,400,000.00 lump sum payment to any time on or before February 28, 2017. Finally, the August 2016 addendum changed the same lump sum payment date to on or before August 31, 2017.

records revealed that Mr. Seymour had never loaned any money to Nucsafe. To that end, Defendants then also argued fraud in the inducement.

The trial court, however, declined to consider all of Mr. Doukas's affidavit for several reasons and ultimately concluded that Defendants failed to create any genuine issue as to any material fact for the following reasons:

> 1. The Court is of the opinion that Plaintiffs are entitled to summary judgment. There is no material issue of fact that Defendants executed the Modified and Amended Promissory Note and subsequent addendums/modifications, Defendants are in default as they have not made any payment pursuant to the Modified and Amended Promissory Note and subsequent addendums/modifications since June 2020, or that Defendants made payments pursuant to the Modified and Amended Promissory Note and subsequent addendums/modifications prior to July 2020.
>
> 2. The Court is of the opinion that Tenn. Code Ann. § 24-1-203, commonly known as the Dead Man's Statute, bars Mr. Doukas' Affidavit testimony with regard to any transaction with or statement by Richard Seymour ("Mr. Seymour"). The remaining Affidavit testimony of Mr. Doukas does not create any material issue of fact.
>
> 3. The Court is of the opinion that Defendants' purported fraudulent inducement defense has been waived for the failure to plead fraud and/or fraudulent inducement in an answer as required by Tenn. R. Civ. P. 8.03.[3]
>
> 4. The Court is of the opinion that Tennessee's cancellation rule precludes consideration of the assertions made by Mr. Doukas in the Affidavit. *See Church v. Perales,* 39 S.W.3d 149, 169–70 (Tenn. Ct. App. 2000) (holding "Tennessee follows the rule that contradictory statements by the same witness regarding a single fact cancel each other out."). On July 9, 2021, Defendants responded to interrogatories denying that they have any facts and evidence upon which they rely in support of the affirmative defenses in their Answer that Mr. Seymour violated the doctrine of good faith and fair dealing and/or that the agreements referenced in Mr. Seymour's Complaint are

[3] We acknowledge that Defendants make an abbreviated argument in their appellate brief that the trial court erred by holding that Defendants waived the defense of fraud because they failed to include the defense in their answer as an affirmative defense pursuant to Tennessee Rule of Civil Procedure 8.03. Specifically, they contend that the trial court erred by failing to give Defendants the opportunity to amend their Answer. We note, however, that Defendants did not file a motion to amend their pleadings to assert fraud as an affirmative defense. Accordingly, this issue is waived.

unenforceable. Because these responses were not supplemented, the cancellation precludes any assertion made by Mr. Doukas to the contrary.

5. The Court is of the opinion that Mr. Doukas' Affidavit testimony that "books and records" of Nucsafe, Inc. show fraudulent actions by Mr. Seymour does not create any material issue of fact as such books and records have not been produced as required by Tennessee's best evidence rule. *See* Tenn. R. Evid. 1001, 1002, and 1003.

7. The Court is of the opinion that Plaintiffs are entitled to a monetary judgment in the amount of $260,710 as of March 2, 2022 pursuant to terms of the Modified and Amended Promissory Note and subsequent addendums/modifications. Plaintiffs are further entitled to the award of reasonable attorneys' fees pursuant to the terms of the Modified and Amended Promissory Note and subsequent addendums/modifications.

In a subsequent order, the trial court awarded the estate $12,445.28 in attorneys' fees and expenses, resulting in a total judgment of §273,155.28.[4]

This appeal followed.

ISSUES

Defendants raise one issue for review, stated as follows:

Whether the Chancery Court for Anderson County erred in granting the Plaintiff's Motion for Summary Judgment and entering Judgment in favor of the Plaintiffs as there were disputed issues of material fact precluding Judgment as a matter of law.

STANDARD OF REVIEW

This court "review[s] a trial court's decision on a motion for summary judgment de novo, without a presumption of correctness." *See Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). Accordingly, this court must "make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *See id*. In so doing, we "must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor." *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002).

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there

[4] In their appeal, Defendants do not challenge the amount of the awards.

is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). A "genuine issue" exists if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id*.

"The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Martin v. Norfolk S. Ry. Co*., 271 S.W.3d 76, 83 (Tenn. 2008). The moving party must support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph" and "supported by a specific citation to the record." *Id.*

ANALYSIS

Defendants argue that the trial court erred by finding that Mr. Doukas's affidavit was inadmissible. First, they contend that parts of his testimony do not violate the Dead Man's Statute. They likewise contend that had this testimony been considered, it would have created a dispute of material fact regarding whether Mr. Seymour ever transferred any money to Nucsafe. More specifically, Defendants insist that the Dead Man's Statute does not preclude the court from considering facts Mr. Doukas discovered while reviewing Nucsafe's business records. Second, Defendants also argue that Tennessee's "cancellation rule" does not preclude consideration of the affidavit because none of the statements contained in the affidavit contradict prior statements made by Mr. Doukas. Third, while Defendants do not discuss this issue in their brief, Plaintiffs posit that the trial court was correct to exclude Nucsafe's "books and records" under the best evidence rule because Defendants failed to produce originals of the books and records to prove its contents. We will consider each argument in turn.

I. TENNESSEE'S DEAD MAN'S STATUTE

Evidence presented in opposition to summary judgment must be substantively admissible. *Byrd*, 847 S.W.2d at 215–16 ("To permit an opposition to be based on evidence that would not be admissible at trial would undermine the goal of the summary judgment process to prevent unnecessary trials since inadmissible evidence could not be used to support a jury verdict.").

Tennessee Code Annotated § 24-1-203, commonly known as the Dead Man's Statute, renders certain testimony inadmissible in order to "protect estates from spurious claims and prevent interested parties from giving self-serving testimony regarding conversations or transactions" with a decedent. *Mitchell v. Johnson*, 646 S.W.3d 754, 765 (Tenn. Ct. App. 2021) (citations omitted). The statute provides:

> In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. If a corporation is a party, this disqualification shall extend to its officers of every grade and its directors.

Tenn. Code Ann. § 24-1-203.

The statute does not, however, render a witness "wholly incompetent" to testify when it is applied. *Holliman v. McGrew*, 343 S.W.3d 68, 73 (Tenn. Ct. App. 2009). Instead, the statute simply limits the subjects that a witness may address. *Id*. For example, the Dead Man's Statute prevents "interested parties from giving self-serving testimony regarding conversations or transactions with the deceased when the testimony involves transactions or statements that would either increase or decrease the deceased's estate." *Mitchell*, 646 S.W.3d at 765 (citing *In re Est. of Marks*, 187 S.W.3d 21, 28 n.2 (Tenn. Ct. App. 2005)). As an exception to Tenn. R. Evid. 601's general rule that every person is presumed competent to be a witness, the Dead Man's Statute "must be strictly construed against the exclusion of testimony and in favor of its admission." *Haynes v. Cumberland Builders, Inc.*, 546 S.W.2d 228, 230–31 (Tenn. Ct. App. 1976).

Here, the trial court declined to consider the entirety of Mr. Doukas's affidavit. The transcript from the hearing on the motion for summary judgment reveals the trial court's reasoning for excluding Mr. Doukas's testimony. The Court found that "the requirements for the Dead Man's Statute to kick in have been met." Noting that Mr. Doukas was the president of both defendant entities, Nucsafe and Breton Equity, the court ruled that Mr. Doukas

> falls within the statutes encompassing of those persons that would be barred under a corporate entity, as he is the president of both. And the subject matter that is being barred is a transaction with or a statement made by the testator in this case which would have been Richard Seymour.[5]

We respectfully disagree with this reasoning, at least, in part.

As noted earlier, the Dead Man's Statute does not preclude testimony regarding *all* conversations and transactions a party had with the decedent. Instead, it prevents

[5] While Defendants concede on appeal that some statements contained in Mr. Doukas's affidavit may be inadmissible under the Dead Man's Statute, they argue that information Mr. Doukas obtained while reviewing Nucsafe's business records is not subject to the Dead Man's Statute.

"interested parties from giving self-serving testimony regarding conversations or transactions with the deceased *when the testimony involves transactions or statements that would either increase or decrease the deceased's estate*." *Mitchell*, 646 S.W.3d at 765 (emphasis added). Furthermore, because the Dead Man's Statute must be strictly construed against the exclusion of testimony and in favor of its admission, *see Haynes*, 546 S.W.2d at 230–31, evidence Mr. Doukas obtained from Nucsafe's business records, independent of any transaction or conversation with Mr. Seymour, would not violate the Dead Man's Statute. For this reason, we find that the Dead Man's Statute does not render the entirety of Mr. Doukas's affidavit inadmissible. *See Haynes*, 546 S.W.2d at 230–31. Accordingly, we find the decision to exclude all of Mr. Doukas's testimony based on the Dead Man's Statute was error. Nevertheless, we find the error was harmless because, as we explain below, the trial court acted within its discretion to exclude the bulk of Mr. Doukas's testimony based on the cancellation rule and the best evidence rule.

II. THE CANCELLATION RULE

Under Tennessee's cancellation rule, "contradictory statements by the same witness regarding a single fact cancel each other out." *Helderman v. Smolin*, 179 S.W.3d 493, 501 (Tenn. Ct. App. 2005) (citations omitted). Thus, once a court determines two statements to be contradictory, both statements are "considered to be 'no evidence' of the fact the party seeks to prove." *Id*. (quoting *Wilson v. Patterson*, 73 S.W.3d 95, 104 (Tenn. Ct. App. 2001)). "The cancellation rule only applies, however, 'when the inconsistency in the witness's testimony is unexplained and when neither version of his testimony is corroborated by other evidence.'" *Hill v. Tapia*, No. M2012-00221-COA-R3CV, 2012 WL 6697308, at *5 (Tenn. Ct. App. Dec. 21, 2012) (quoting *Taylor v. Nashville Banner Publ'g Co.*, 573 S.W.2d 476, 483 (Tenn. Ct. App. 1978)).

The trial court's ruling on this issue reads as follows:

> 4. The Court is of the opinion that Tennessee's cancellation rule precludes consideration of the assertions made by Mr. Doukas in the Affidavit. *See Church v. Perales,* 39 S.W.3d 149, 169–70 (Tenn. Ct. App. 2000) (holding "Tennessee follows the rule that contradictory statements by the same witness regarding a single fact cancel each other out."). On July 9, 2021, Defendants responded to interrogatories denying that they have any facts and evidence upon which they rely in support of the affirmative defenses in their Answer that Mr. Seymour violated the doctrine of good faith and fair dealing and/or that the agreements referenced in Mr. Seymour's Complaint are unenforceable. Because these responses were not supplemented, the cancellation precludes any assertion made by Mr. Doukas to the contrary.

We agree with the trial court that Mr. Doukas's statements regarding the existence of records demonstrating that Mr. Seymour never advanced the loan proceeds to Nucsafe

contradict Defendants' discovery responses to Plaintiffs' interrogatories on this subject. In July 2021, Plaintiffs asked Defendants to respond to a series of interrogatories regarding evidence Defendants relied on to support their affirmative defenses. Acting on behalf of Defendants in his capacity as their president, Mr. Doukas responded to the relevant interrogatories as follows:

> 7. Please describe specifically, completely and in full detail all facts and evidence upon which Defendants rely in support of the affirmative defense in their Answer that Mr. Seymour's Complaint is barred in whole or in part by the equitable doctrines of laches, estoppel and waiver.
>
> RESPONSE: Nucsafe and Breton Equity do not have responsive information at this time as discovery is on-going. Nucsafe and Breton Equity will supplement as appropriate under the Tennessee Rules of Civil Procedure.
>
> . . .
>
> 9. Please describe specifically, completely and in full detail all facts and evidence upon which Defendants rely in support of the affirmative defense in their Answer that the agreements referenced in Mr. Seymour's Complaint fall for lack of consideration.
>
> RESPONSE: Nucsafe and Breton Equity do not have responsive information at this time as discovery is on-going. Nucsafe and Breton Equity will supplement as appropriate under the Tennessee Rules of Civil Procedure.
>
> . . .
>
> 11. Please describe specifically, completely and in full detail all facts and evidence upon which Defendants rely in support of the affirmative defense in their Answer that one or more of the agreements referenced in Mr. Seymour's Complaint was not properly executed and is unenforceable.
>
> RESPONSE: Nucsafe and Breton Equity do not have responsive information at this time as discovery is on-going. Nucsafe and Breton Equity will supplement as appropriate under the Tennessee Rules of Civil Procedure.
>
> . . .

> 13. Please describe specifically, completely and in full detail all facts and evidence upon which Defendants rely in support of the affirmative defense in their Answer that Mr. Seymour violated the doctrine of good faith and fair dealing associated with the agreements at issue.
>
> RESPONSE: Nucsafe and Breton Equity do not have responsive information at this time as discovery is on-going. Nucsafe and Breton Equity will supplement as appropriate under the Tennessee Rules of Civil Procedure.

Notably, Defendants never supplemented their interrogatory responses and never informed Plaintiffs of the existence of facts, evidence, or business records that supported such claims. Considering these facts, we agree with the trial court that Defendants' answers to the first set of interrogatories constituted an admission by Defendants that they had no knowledge of any facts, evidence, or business records to support their claims or affirmative defenses.

In his affidavit, Mr. Doukas stated that, sometime around August 2020, he discovered Nucsafe business records showing that Mr. Seymour had never paid Nucsafe the original loan amount. Mr. Doukas stated:

> 26. Before all of the funds could be distributed, in August 2020, one of Nucsafe's major creditors filed an involuntary Chapter 7 Bankruptcy against Nucsafe.
>
> 27. It took months to negotiate a resolution of Nucsafe's Chapter 7 case.
>
> 28. Around that period of time, began to look more closely into the books and records of Nucsafe and discuss the finances with those who were employed at the time. It then became apparent that Seymour had lied to us the entire time.
>
> 29. Contrary to what he expressly represented to me prior to him being provided with the October 2015 Note, Seymour never loaned Nucsafe the money for which he received the original 'demand note' that was later replaced by the October 2015 Note.

Thus, Mr. Doukas's discovery responses on behalf of Defendants cancel out the evidence Mr. Doukas offered in his affidavit in opposition to Plaintiffs' motion for summary judgment. Nevertheless, Defendants argue on appeal that there is no inconsistency between the interrogatory responses and Mr. Doukas's affidavit because the interrogatory answers only asserted that Defendants "did not have any information at [the] time." While we recognize that the cancellation rule does not apply to inconsistent

responses resulting from inadvertence or misunderstanding, *see Hill*, 2012 WL 6697308, at *6 (citations omitted), it is significant that Mr. Doukas's affidavit asserts he discovered the discrepancy in the time prior to responding to Plaintiffs' first set of interrogatories. Thus, the discovery responses provided on behalf of Defendants stating that Defendants did not possess the relevant information at the time of the July 2021 interrogatories is in conflict with the statements made by Mr. Doukas in his affidavit.

As noted earlier, the cancellation rule only applies "when the inconsistency in the witness's testimony is unexplained and when neither version of his testimony is corroborated by other evidence." *Hill v. Tapia*, 2012 WL 6697308, at *5 (quoting *Taylor v. Nashville Banner Publ'g Co.*, 573 S.W.2d at 483). The testimony offered by Mr. Doukas in his affidavit is not only inconsistent with his prior testimony, it is also unexplained and neither version of his testimony is corroborated by other evidence. Thus, as the trial court concluded, the cancellation rule applies to Mr. Doukas's testimony.

For these reasons, we affirm the trial court's decision to not consider that portion of Mr. Doukas's testimony that conflicts with the discovery responses he provided on behalf of Defendants.[6]

III. BEST EVIDENCE RULE

The trial court found "that Mr. Doukas' Affidavit testimony that 'books and records' of Nucsafe, Inc. show fraudulent actions by Mr. Seymour does not create any material issue of fact as such books and records have not been produced as required by Tennessee's best evidence rule." We agree.

"To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided[.]" Tenn. R. Evid. 1002. "A duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original." Tenn. R. Evid. 1003. The original writing is not required, and other evidence of the writing is admissible, if all originals are lost or destroyed; no original can be obtained; if the original is under the control of the party

[6] We also note that the trial court had another basis on which to exclude this evidence. Because Defendants failed to supplement their discovery responses on the very subject Mr. Doukas offered in his affidavit, the trial court had discretion to disregard or exclude Mr. Doukas's affidavit testimony. *See Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 133 (Tenn. 2004) ("Excluding a witness's testimony may be an appropriate sanction for failure to supplement answers to interrogatories."); *see also Lyle v. Exxon Corp.*, 746 S.W.2d 694, 699 (Tenn. 1998); *Ammons v. Bonilla*, 886 S.W.2d 239, 243 (Tenn. Ct. App. 1994); *Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981) (stating that trial courts have wide discretion to determine appropriate sanctions for abuse of the discovery process). However, neither party raised this issue; accordingly, we shall not consider it. *See State v. Bristol*, 654 S.W.3d 917, 927 (Tenn. 2022).

against whom it is offered; or if the writing is not related closely to a controlling issue. *See* Tenn. R. Evid. 1004. The party seeking to prove the contents of a writing generally is required to introduce the original writing or a duplicate. *Integon Indem. Corp. v. Flanagan*, No. 02A01–9812–CH–00382, 1999 WL 492656, at *4 (Tenn. Ct. App. July 13, 1999) (citing Tenn. R. Evid. 1002, 1003)). "The rule is premised on the theory that 'only the best or most accurate proof of written or similar evidence should be admitted, to the exclusion of inferior sources of the same proof, absent some extraordinary justification for the introduction of secondary evidence.'" *Iloube v. Cain*, 397 S.W.3d 597, 602 (Tenn. Ct. App. 2012) (citations omitted).

A nonmoving party can defeat a summary judgment motion by offering evidence in an inadmissible form, so long as the evidence can be reduced to an admissible form at trial. *Byrd*, 847 S.W.2d at 215–16; *see also Benjamin v. Thomas*, 766 F. App'x 834, 837–38 (11th Cir. 2019) ("Because the accounts in the [nonmoving party's] affidavits are inadmissible [under Fed. R. Evid. 1002 and 1004] and irreducible to admissible form at trial, we may not consider them on summary judgment."). As noted above, the Tennessee Rules of Evidence requires a party seeking to prove the contents of a writing to produce the original under 1002, a duplicate under 1003, or other evidence under 1004, provided one of the exceptions apply.

Here, Defendants merely offered Mr. Doukas's affidavit testimony to prove that "books and records" of Nucsafe show fraudulent actions by Mr. Seymour. Significantly, however, no "books and records" or copies of such were produced or attached to Mr. Doukas's affidavit or produced on summary judgment. While Mr. Doukas's affidavit testimony qualifies as "other evidence" under Tenn. R. Evid. 1004, Defendants have not offered any proof that the originals have been lost or destroyed, are not obtainable, are in the possession of the opponent, or are related to collateral matters.

Furthermore, in their July 2021 interrogatories to Defendants, Plaintiffs asked Defendants to:

> 5. Identify each document or other tangible item of which Defendants have knowledge, whether or not such item is in Defendant's possession, custody, or control, that Defendants believe to be relevant to this lawsuit, including but not limited to any document relied on by Defendants or their attorney in preparing these answers.

Mr. Doukas responded to the interrogatory on behalf of Defendants stating, "See Exhibits attached to Complaint." The only documents attached to Mr. Seymour's Complaint were the 2015 Note and each subsequent addendum or modification. Essentially, Defendants have failed to produce an original, a duplicate, or any proof that one of the exceptions in 1004 apply.

For these reasons, we agree with the trial court that Mr. Doukas's statements regarding the existence of business records demonstrating that Mr. Seymour never paid Nucsafe the original loan amount may not be considered evidence of that fact. Defendants failed to present any evidence that can be reduced to an admissible form at trial. Accordingly, we agree with the trial court's finding that there is no genuine dispute as to material fact, and we affirm the decision to grant Plaintiffs' motion for summary judgment

Having considered that portion of Mr. Doukas's affidavit that is admissible, we agree with the trial court's ruling that

> [t]here is no material issue of fact that Defendants executed the Modified and Amended Promissory Note and subsequent addendums/modifications, Defendants are in default as they have not made any payment pursuant to the Modified and Amended Promissory Note and subsequent addendums/modifications since June 2020, or that Defendants made payments pursuant to the Modified and Amended Promissory Note and subsequent addendums/modifications prior to July 2020.

Accordingly, we affirm the judgment of the trial court in all respects.

IN CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Nucsafe, Inc., and Breton Equity Company Corp.

_____

FRANK G. CLEMENT JR., P.J., M.S.