Circuit Court for Baltimore County
Case No. 03-C-13-005679

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1503

September Term, 2016

MID-ATLANTIC HOMES *ET AL.*

v.

MANUFACTURERS AND TRADERS TRUST CO.

Kehoe,
Nazarian,
Harrell, Glenn T., Jr.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: November 5, 2018

This is an appeal from a judgment entered by the Circuit Court for Baltimore County, the Honorable John J. Nagle, III, presiding, against Mid-Atlantic Homes, Inc., Jeffrey W. Bowers, and Robert M. Lisle, in favor of Manufacturers and Traders Trust Co. ("M&T") in the total amount of $999,678.31, plus post-judgment interest and costs. {E. 2898-99}. Appellants present four issues which we have reworded and reordered:

> 1. Did the trial court abuse its discretion when it denied appellants' motions in limine at trial to exclude testimonial and documentary evidence on the grounds that the evidence was not produced during discovery and was not disclosed until the week before trial and more than a year after discovery had closed?
>
> 2. Were the trial court's findings that M&T had standing and that M&T had proved its damages with reasonable certainty clearly erroneous?
>
> 3. Did the trial court err when it concluded that Lisle was not discharged as an obligor under the loan?
>
> 4. Did the trial court err in its determination of the attorneys' fee award to M&T?

Because our answer to each of these questions is "no," we will affirm the circuit court's judgment.

Background

On October 5, 2005, Mid-Atlantic borrowed $700,000 from Wilmington Trust FSB to fund the development of Drake's Landing, a proposed residential subdivision located near Accomac, Virginia. The loan was evidenced by a promissory note (the "Note") payable to Wilmington Trust. At the time the note was executed, Mid-Atlantic was owned by Jeffrey

W. Bowers and Robert M. Lisle.[1] In addition to other security documents, Bowers and Lisle signed personal guaranties to further secure repayment of the loan. The note provided for a variable rate of interest, which fluctuated over time. The original due date of the Note was October 5, 2007. The maturity date was extended from time to time by written agreements between Wilmington Trust and appellants. The last maturity date was April 5, 2009; Appellants were unable to repay the loan in full at that time.

Wilmington Trust did not weather the 2008 nation-wide banking and real estate crisis well and, in 2011, M&T purchased the bank's assets and assumed its liabilities. The acquisition and assumption agreement specifically states that the acquired assets included:

> All loans held by [Wilmington Trust], the collateral for the loans, servicing rights related to the loans and all loan files and other documentation relating to the foregoing.

On May 30, 2012, M&T sent a letter to appellants declaring the loan in default and demanding payment in the amount of $548,096.54 plus ongoing interest. Payment was not forthcoming.

The present action commenced on May 17, 2013, when M&T filed a complaint for judgment by confession against Mid-Atlantic, Lisle and Bowers. The action has been vigorously litigated by both parties: confessed judgments were entered and then vacated; appellants filed a counterclaim, and then an amended counterclaim; there were motions to

[1] Lisle's last name was misspelt in the trial transcript. We have corrected it without bracketing.

dismiss and for summary judgment; several discovery disputes; motions to strike; a motion to hold M&T and one of its vice presidents in contempt; and multiple motions to reopen discovery. Eventually, however, the case came to trial before the court on August 1, 2016.[2] After a three-day trial, the court issued a bench opinion and entered judgment on M&T's behalf in the amount of $999,678.31, which included an award of attorney's fees of $354,986. This appeal followed.

Analysis

1. The Alleged Discovery Violations

Immediately prior to and during the trial, appellants filed written and oral motions in limine to exclude certain documentary evidence and the testimony of three witnesses on the grounds that (1) M&T failed to disclose the documents and witnesses in pre-trial discovery; and (2) some of the documents in question were inherently unreliable and thus inadmissible under the business records exception to the hearsay rule. The trial court did not rule on the pre-trial motion and denied the motions made by appellants during trial.

On appeal, appellants assert that the trial court abused its discretion in denying the motions. They contend that M&T was guilty of several serious discovery violations, that

[2] At that point, there remained four pending counts in appellants' amended counterclaim: negligence, breach of contract, and two counts of fraudulent misrepresentation.

Appellants abandoned the negligence claim at trial and the court dismissed that count with prejudice. After trial, the court found that appellants had failed to meet their burden of persuasion as to the other causes of action and entered judgment in M&T's behalf on each. The court's disposition of these claims is not an issue on appeal.

the appropriate sanction was to bar admission of the evidence in question, and that the trial ccourt abused its discretion when it declined to do so. Appellants also assert that the documents in question were inadmissible hearsay. For its part, M&T contends that no discovery violations occurred, and that, in any event, the trial court did not abuse its discretion when denying the motions. M&T also takes the position that the documents in question, which were business records created and maintained by Wilmington Trust, were sufficiently reliable to warrant admission.

By way of background, the witnesses in question were Andrea Kozlowski, Esquire, Kimberly Edwards, and Lisa Bittle Tancredi, Esquire. Ms. Kozlowski was a member of M&T's in-house legal department who worked on M&T's acquisition of Wilmington Trust's loan portfolio. She was personally present when the acquisition and assumption agreement was executed by M&T representatives and attested to the execution of the agreement by M&T. She also authenticated the Acquisition Agreement but provided no other substantive testimony at the trial of this case. Ms. Edwards was a research librarian for Gebhardt & Smith LLP, M&T's trial counsel. She prepared a worksheet that computed the interest due on the unpaid principal balance on the loan based upon evidence introduced at trial through other witnesses. Ms. Tancredi, the third witness, was one of M&T's trial lawyers. She testified as an expert witness in the attorneys' fees portion of the trial.

The exhibits in question were M&T trial Exhibits 5, 5(a), 6, 7, and 9. Exhibits 5 and 5(a) are computer screen shots of Wilmington's loan history for the Mid-Atlantic Loan as of the date of the acquisition and assumption agreement. (E. 3543.52). Exhibit 6 was a

screen shot of M&T's accounting system reflecting changes in the interest rate charged on that loan. Exhibit 7 was a photocopy of a check in the amount of $35,000 paid by an Accomac, Virginia lawyer to M&T. This was apparently a release fee for one of the lots in the Drake's Landing subdivision. Exhibit 9 consisted of copies of about 300 of pages of redacted invoices and time records generated by Gebhardt & Smith, dating back to 2012.

Appellants assert that M&T did not disclose the fact that it intended to call Ms. Tancredi, Ms. Kozlowski and Ms. Edwards as witnesses until July 28, 2016, just a few days before the August 1, 2016 trial date. Additionally, appellants contend that although M&T previously stated it would not introduce the loan histories at trial, it nonetheless offered into evidence five exhibits that were produced just a week prior to trial. {Appellants' brief, 23}. Appellants claim that, by failing to disclose the witnesses and documents earlier, M&T deprived them of their opportunity to investigate and seek additional discovery with respect to those witnesses and documents. {Appellants' brief, 27}. Appellants assert that *Hadid v. Alexander*, 55 Md. App. 344 (1983), instructs that the trial court abused its discretion when it allowed M&T to introduce the exhibits and witnesses at trial. We will address these contentions separately.

Whether to impose a sanction for a discovery violation is a matter of the trial court's expansive discretion. *Rodriguez v. Clarke*, 400 Md. 39, 56 (2007); *Cumberland Insurance Group v. Delmarva Power*, 226 Md. App. 691, 698, *cert. denied*, 447 Md. 298 (2016). In exercising this discretion, courts typically employ the "*Taliaferro* factors":

> whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure, the reason, if any, for the violation, the degree of prejudice to the parties respectively offering and opposing the evidence, whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance. Frequently these factors overlap. They do not lend themselves to a compartmental analysis.

Taliaferro v. State, 295 Md. 376, 390–91 (1983).

Although *Taliaferro* was a criminal case, its approach is often used in civil cases. *See, e.g.*, *Butler v. S & S Partnership*, 435 Md. 635, 650–51 (2013); *Attorney Grievance Comm'n of Maryland v. Kent*, 447 Md. 555, 577 (2016). In performing a *Taliaferro* analysis, "the court is not required to discuss each factor considered." *Hossainkhail v. Gebrehiwot,* 143 Md. App. 716, 725 (2002). If the trial court exercises its discretion, "the court's exercise of discretion is presumed correct until the attacking party has overcome such a presumption by clear and convincing proof of abuse." *Id.* (citing *Langrall, Muir & Noppinger v. Gladding*, 282 Md. 397, 401 (1978)).

Our first step is to decide whether there were discovery violations. In their brief, appellants assert vigorously and repeatedly that M&T failed to disclose Exhibits 5, 5(a), 6, 7, and 9 during discovery, and M&T is equally vociferous in its position that these documents, with a few exceptions, were provided to appellants well in advance of trial.[3]

[3] At trial, M&T conceded that it did not provide its most recent time records to appellants until July 28, 2016. However, its position was that this information merely updated prior disclosures.

The trial court, after hearing argument from trial counsel as to Exhibits 5 and 5(a), overruled appellants' objections, stating:

> Based on everything I've heard and representation from Counsel about this information, I'm going to deny the motion or objection to Exhibit 5 and 5A. I'm not in a position to resolve discovery disputes and this is a discovery dispute. Again, where I'm hearing different stories about what has been produced or not and I'm not going to make — I cannot and it's unfair to this court to be asked to do that on the morning of trial. Both Counsel well know that there is recourse available to this court if I determine, and I'm not making such determination right now, let's make that clear, but if this issue, these discovery related issues continue to come up and if there is indication that Counsel is not being completely candid with this court, there would be recourse.

{E.2990—91.}

We interpret this ruling as being based on two grounds. The first, and explicit, one was the appellants' attempt to raise the issue for the first time at trial was procedurally inopportune. The second, albeit implicit, basis was that the trial court credited the factual representations made by M&T's trial counsel. The record supports the latter conclusion as to the copies of the loan history (Exhibits 5 and 5(a)). They were disclosed to appellants' counsel on April 6, 2015, approximately three and a half months prior to trial, which began on August 1, 2015. At trial, appellants' counsel explicitly waived his objection to Exhibit 6.[4] Exhibit 7 was a $35,000 check from lawyer to M&T, representing the release fee for a

[4] During argument to the trial court regarding admissibility of the exhibits, trial counsel stated "I'm comfortable with Exhibit 6 because it is a business record kept in the ordinary course." {E2971}

lot in Drake's Landing. The trial court overruled appellants' objection to the introduction of the check on the basis that it was not prejudicial to them.[5]

On the third day of trial, M&T sought to introduce Exhibit 9, the compilation of Gebhardt & Smith's billing records. Appellants' counsel stated that he had not received the documents until three days prior to trial, while M&T's lawyer asserted that most of the billing records had been provided earlier and the July disclosure was an update to reflect the most recent invoice sent to M&T. The court eventually overruled appellants' objection to the admission of the compilation because it believed that "everybody came into this Court with opened eyes knowing what was going to be presented to the Court."

We turn to the witnesses.

M&T disclosed that it intended to call Tancredi, Kozlowski and Edwards three days before trial began. The trial court ruled, in its discretion, that it could permit Kozlowski, M&T's in-house counsel, to testify in light of the limited scope of her proffered

[5] Specifically, the court stated: "I'm denying the . . . objection to this exhibit. Quite frankly, I can't understand why it is being objected to since it does appear to be favorable to the Defendants[.]" {T 2972}

Even if we were to find the court abused its discretion in admitting this exhibit, any error in admitting Exhibit 7 was harmless because Best later testified without objection that M&T had received the $35,000 payment. {E. 2953, 2997*}. See, e.g., Marlow v. Davis*, 227 Md. 204, 208 (1961) (Even though the trial court erred in excluding testimony as to the existence and location of a traffic sign, the error was harmless "inasmuch as evidence of the existence of the sign had already been offered and received"); *Angelakis v. Teimourian*, 150 Md. App. 507, 511 (2003).

testimony—authentication of the Acquisition and Assumption Agreement—and the fact that appellants could have asked for her deposition even through disclosure was not timely. {E. 2931} The trial court made the same ruling with regards to Edwards, the reference librarian who testified as to the calculation of damages. {E 3126—27} Appellants did not object to Tancredi's testifying.

Summarizing all of this, it appears that, although M&T may not have formally updated its discovery responses as to all of the documents it intended to rely upon at trial, appellants had copies of all of these documents months before trial. The significance of the appellants' loan history to this collection action is obvious and we are hard-pressed to understand how appellants were prejudiced because M&T did not explicitly state that it was going to present evidence of the loan history at trial, particularly as the loan history had been presented to appellants' counsel months prior to trial. We agree with the trial court that appellants were not prejudiced by the introduction of evidence that a payment had been made on the loan after it was acquired by M&T. Appellants did not request an opportunity to depose Kozlowski or Edwards, and, as we have noted, did not object to Tancredi's testifying.

Although the trial court did not explicitly refer to the *Taliaferro* factors, it weighed the nature of the discovery violations, the fact appellants did not request an opportunity to depose either witness, and the possible prejudice to the parties if the evidence was, or was

not, admitted. This is sufficient. Appellants have not presented clear and convincing proof that the trial court abused its discretion. *Hossainkhail*, 143 Md. App. at 725.[6]

We hold that the trial court did not abuse its discretion in allowing the witnesses to testify or the exhibits to be admitted.

2. Standing and Proof of Damages

M&T's theory at trial was that it had the right to enforce the Note and the guaranties because it was a nonholder in possession of these instruments with the right to enforce them as a result of the Acquisition and Assumption Agreement. As is typical in a collection

[6] Appellants' reliance on *Hadid v. Alexander*, 55 Md. App. 344, 351–52 (1983), is unpersuasive. This was a legal malpractice case against Alexander. Hadid had served him with a notice of deposition and request for production of documents that included "any and all documents that you intend to use at trial[.]" *Id.* at 348. Alexander failed to appear for the deposition or to produce any documents, and he ignored an order to compel discovery. *Id.* Finally, the trial court ordered him to appear for a deposition and to produce the requested documents at that time. The deposition was scheduled *two days* before trial. *Id.* During the deposition, Alexander was asked (i) if he had produced everything that he planned to introduce at trial, and (ii) if he had disclosed all persons whom he intended to call as witnesses. He answered both queries in the affirmative. *Id.*

At the trial, and contrary to his statement made under oath two days earlier, Alexander sought to introduce a document that was directly relevant to a critical issue in the trial, and called a previously-undisclosed person as a witness. *Id.* at 349–49. The trial court overruled Hadid's objections to each. *Id.* at 349–50. This Court held that the trial court abused its discretion in each evidentiary ruling. *Id.* at 350. However, we made it clear that an important factor in our analysis was what we characterized as the appellee's "contumacious" conduct and his "blatant, willful abuse of the discovery process," *Id.*

Appellants' characterizations notwithstanding, our review of the record leads us to conclude that none of these terms can be fairly applied to M&T's conduct in the present case.

action, M&T relied on business records, specifically, the records of Wilmington Trust and M&T regarding the Drake's Landing project.

In their brief, appellants point to two factors which, according to them, should have precluded admission of the business records. The first is that M&T did not present any witnesses who could testify from first-hand knowledge as to Wilmington Trust's record-keeping practices at the time that the loan documents were executed or during the period that Wilmington Trust administered the Loan. The second factor is the circumstances surrounding M&T's acquisition of the assets and liabilities of Wilmington Trust. It was not a routine transaction between two financially healthy institutions. Instead, according to appellants, Wilmington Trust was on the verge of collapse, a state of affairs brought about by economic conditions and mismanagement but exacerbated by conduct of executives of Wilmington Trust's parent company, who allegedly hid the actual financial condition of the bank from federal regulators.

Against this background, appellants argue that M&T failed: (1) to prove that it had standing to enforce the Loan Documents; and (2) to prove its damages. Appellants presented these arguments both at the close of M&T's case (in the form of a motion for judgment pursuant to MD. Rule 2-519), and at the conclusion of the trial.

Initially, and as M&T notes in its brief, appellants waived their argument that the trial court erred in denying their motion for judgment at the close of M&T's case by presenting evidence on their own behalf after the motion for judgment was denied. Md. Rule 2-519(c) states (emphasis added):

> A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. *In so doing, the party withdraws the motion*.

This leaves us with appellants' alternative contention, namely, that the trial court's findings as to M&T's standing and the amount of damages were clearly erroneous. A finding is clearly erroneous if there is no competent evidence supporting the trial court's findings of fact. *Della Ratta v. Dyas*, 414 Md. 556, 565 (2010). In deciding whether there is competent evidence, we must consider the evidence in the light most favorable to the prevailing party. *Id.*

A. M&T's Standing

The trial court found that M&T was a "non-holder in possession," and therefore had "the right to enforce the note under the [Commercial Law Article ("CL")] section 3-203, and section 3-301." Appellants contend that this finding was clearly erroneous because there was no evidence before the trial court that Wilmington Trust had the right to enforce the note before it was transferred to M&T by the Assumption and Acquisition Agreement. This argument is without merit.

At this point in the litigation, the parties do not disagree about the underlying legal principles. In the Acquisition and Assumption Agreement, M&T purchased the assets and assumed the liabilities of Wilmington Trust's banking business. {E. 3469}. In the parlance of the Uniform Commercial Code, this constituted a "transfer" of all rights in the promissory notes and related security instruments held by Wilmington Trust at the time of

transfer. *See* CL § 3-203(a) ("An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument."). A transfer "vests in the transferee only the rights enjoyed by the transferor, which may include the right to enforce the instrument." *Anderson v. Burson*, 424 Md. 232, 246 (2011).[7]

The Acquisition and Assumption Agreement stated that the acquired assets included all loans, collateral, loan files and other documentation held by Wilmington Trust at the date of the agreement. As the transferee in a bulk transfer of negotiable instruments, M&T is a non-holder in possession with the rights of a holder to enforce the Promissory Note. *See* CL § 3-301(ii). In short, as a result of the Acquisition and Assumption Agreement, M&T obtained all the rights that Wilmington Trust had to enforce the Note and the other Loan Documents. The trial court found that M&T had standing to enforce the Note.

Appellants contend that the trial court erred because M&T failed to present any evidence that Wilmington Trust owned the Loan or had the right to enforce the Note or the other Loan Documents against them on the date that the Acquisition and Assumption Agreement was executed. Appellants are incorrect. There was ample evidence introduced at trial that supported the trial court's conclusion. This evidence included:

[7] CL § 3-203(b) states that a transfer also conveys hold in due course status in the transferor was a holder in due course. No one asserts that Wilmington Trust was a holder in due course. Thus, M&T's right to enforce the Note is subject to any defenses that could have been raised against Wilmington Trust. Lisle raised such a defense, and we will deal with it in part 3 of this opinion.

First, by its terms, the Note was payable to Wilmington Trust. As the payee, Wilmington Trust was a holder of the Note, and thus entitled to enforce it. *Anderson v. Burson*, 424 Md. at 248.

Second, Lisle and Bowers executed three extension agreements with Wilmington Trust before the Acquisition and Assumption Agreement was executed. This would not have occurred if Wilmington Trust had not been the holder, or at least able to enforce, the Note.

Third, appellants entered into evidence the transcript of the deposition of Gray Warrington, an officer of Wilmington Trust who worked on the Mid-Atlantic loan. He testified to interactions that he had with Lisle and Bowers in the months before the Acquisition and Assumption Agreement was executed. There would have been no reason for him, Lisle or Bowers to do this if Wilmington Trust had not been able to enforce the Note.

Fourth, Glenn Best, who handled the Mid-Atlantic Homes account for M&T, testified that the Loan was transferred to his employer in the Acquisition and Assumption Agreement.

This evidence, and the inferences that can logically be drawn from it, was sufficient for the trial court to find that M&T had standing to enforce the Note and the Loan Documents.

B. Proof of Damages

At the conclusion of trial, and based almost entirely on the loan histories maintained by M&T and Wilmington Trust, the trial court found that the total principal and interest

due on the Loan was $644,383.27. Appellants contend that the court failed to calculate damages with reasonable certainty because the loan histories were inadmissible hearsay. Our review of the trial court's decision to admit the loan histories is a two-step process:

> [A] trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but [any] factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed de novo, but the trial court's factual findings will not be disturbed absent clear error[.]

Gordon v. State, 431 Md. 527, 538 (2013) (quotation marks omitted).

Assuming that we conclude that the trial court did not err in admitting the loan histories into evidence—and we will—we review the circuit court's findings that M&T proved its damages with reasonable certainty under the clearly erroneous standard. *See* Md. Rule 8-131(c).

As a general rule, hearsay evidence is inadmissible unless admission is specifically permitted by the Maryland Rules of Evidence or otherwise required by law. Md. Rule 5-602. Section 10-101 of the Courts and Judicial Proceedings Article ("CJP") states in pertinent part (emphasis added):

> (b) A writing or record made in the regular course of business as a memorandum or record of an act, transaction, occurrence, or event is admissible to prove the act, transaction, occurrence, or event.
>
> (c) The practice of the business must be to make such written records of its acts at the time they are done or within a reasonable time afterwards.
>
> *(d) The lack of personal knowledge of the maker of the written notice may be shown to affect the weight of the evidence but not its admissibility.*

At trial, M&T sought to introduce the loan histories under the business records exception to the hearsay rule. Md. Rule 5-803(b)(6) provides the definition of a business record. It states in pertinent part (emphasis added):

> A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. *A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness*.

Business records must be authenticated, that is, there must be a showing that the record is what its proponent claims it is. At trial, M&T sought to authenticate the screen shot of Wilmington Trust's loan history through the testimony of Glenn Best. He testified that the data received from Wilmington Trust after the date of the Acquisition and Assumption Agreement was incorporated into M&T's own records, but he conceded that he did not have personal knowledge of Wilmington Trust's record-keeping procedures. However, Best further testified that, when M&T acquired the portfolio of loans from Wilmington Trust, M&T "would in essence take the business records of Wilmington Trust at the time, which would consist of information from the computer system, and review it and place it on to the M&T system." Specifically, Best testified that M&T "place[d] a very strong reliance on the accuracy of those records [documents such as Exhibits 5 and 5A] in making sure that the transfer of information is correct and accurate." {E. 2993}. Best answered

questions to "corroborate the authenticity and accuracy" of Exhibits 5 and 5A, including the fact that Exhibits 5 and 5A indicate that the loan was first processed in Wilmington Trust's bookkeeping system in October of 2005, which is when the loan documents were executed. {E. 2994}.

Appellants present two reasons as to why the trial court erred as a matter of law in admitting the records. We do not agree with either of them.

The first contention focuses on Best's lack of personal knowledge about Wilmington Trust's bookkeeping system. The Court of Appeals and this Court considered similar arguments in, respectively, *Killen v. Houser*, 251 Md. 70, 76 (1968), and *Mattvidi Associates v. NationsBank of Virginia*, 100 Md. App. 71, 86–89 (1994). In *Killen*, the Court held that a successor trustee could testify from corporate records even though he did not testify that the records were made in the ordinary course of business:

> Houser received the corporate records when he purchased the companies and has been their custodian since. The records were those that normally and customarily are kept by corporations in ordinary course. There was nothing to show these were not the records received by Houser or that they were not bona fide and unaltered. The statute[8] does not specify that the custodian of the record be he who was such at the time the record was made. If it did, it would lose much of its utility and effectiveness.

251 Md. at 76.

[8] The predecessor to what is now CJP § 10-101.

In *Mattvidi,* Sovran Bank entered into a loan agreement with Mattvidi and associated entities that Mattvidi eventually defaulted upon. In the interim, however, Sovran was acquired by NationsBank. NationsBank filed a collection action and, at the trial, sought to introduce Sovran's business records pertaining to the loan through the testimony of a NationsBank employee. That official did not have personal knowledge of Sovran's bookkeeping procedures. *Id.* 87–88. Citing CJP § 10-101, we held that:

> Thus, the bank laid a proper foundation for admission of the summary with Ms. Gilberg's testimony. Her lack of personal knowledge of the records affects "the weight of the evidence but not its admissibility." § 10–101(d) of the Courts & Judicial Proceedings Article.

Id. at 88.

Second, appellants argue that the holdings of *Killen* and *Mattvidi* should not apply to this case because "the computer screen shots of Wilmington's loan history are patently unreliable[.]" They base this contention on a federal grand jury investigation that resulted in the indictment of the Wilmington Trust Corporation, and some of its corporate officers.[9] The short answer to this contention is that appellants did not raise this issue at trial as a

[9] Although the indictment was not introduced at trial, it is in the record. Wilmington Trust Corporation was the parent company of Wilmington Trust FSB. In summary, it alleges that the individual defendants manipulated the bank's computerized internal bookkeeping system so that Wilmington Trust Corporation could file false reports with the Federal Reserve Board and the Securities and Exchange Commission.

reason not to admit the Wilmington Trust business records.[10] We will not consider it for first time on appeal. *See* Md. Rule 8-13(a).

We conclude that the trial court did not err in admitting the business records of M&T and Wilmington Trust into evidence. This evidence, together with Edwards's testimony was sufficient to satisfy Maryland's requirement that a plaintiff in a breach of contract action must prove its damages by a "reasonable certainty." *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 344, (2011), *aff'd*, 429 Md. 387, 56 A.3d 170 (2012); *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 594 (2007). Appellants do not argue otherwise.

3. Was Lisle discharged as an obligor?

Lisle asserts that Wilmington Trust agreed to release him from his obligations as a guarantor of the loan but then reneged on the agreement. This contention is based in large part on a March 25, 2009 from Warrington, the Wilmington Trust loan officer, to letter to Lisle, in which Warrington stated that the Wilmington Trust would be willing to release four lots in the development to Lisle if various things occurred, including a payment of $149,000 to the bank and Lisle's relinquishment of his ownership interest in Mid-Atlantic Homes. This letter does not mention releasing Lisle from his obligations as a guarantor. In

[10] On June 3, 2016 (about two months prior to trial), appellants sought to reopen discovery on the basis of the ongoing criminal investigation against Wilmington Trust and several of its executives. It is unclear from the record extract whether the trial court formally ruled on that motion, but no additional discovery occurred. Appellants do not challenge this result on appeal.

an intra-company memorandum dated June 29, 2009, Warrington proposed a series of modifications to the loan documents that would result in, among other things, the bank's releasing Lisle from his obligations as a guarantor. The intra-company memorandum was not distributed to Bowers or Lisle and there was no evidence that Wilmington Trust approved it or acted on it.

In its bench opinion, and after discussing this evidence as well as the testimony of Bowers, Lisle and Warrington, the trial court concluded:

> On cross-examination Lyle candidly admitted he had no documents releasing him from liability. He admitted that he did not complete any of the terms set forth in the [March 25, 2009] letter from Warrington [to Lisle and Bowers]. Lyle has not relinquished his shares to Bowers as he's still an equal owner of Mid-Atlantic, and he never paid the $149,000 to Wilmington Trust which is stated in that [letter].
>
> The position of M&T that Lyle was never discharged from the loan is further strengthened by the deposition testimony of Warrington. At his deposition Warrington testified that the letter he sent Defendants . . . was a general overview of the conversation between him, Lyle and Bowers. Warrington stated that his understanding was that Lyle was not to be released as a guarantor.
>
> The problem that this Court has with Defendants' position regarding the so-called discharge agreement is that it was never completed or realized. Both Lyle and Bowers testified that no documents from Wilmington Trust memorializing Lyle's release were ever received by Defendants. Defendants argue that Wilmington Trust frustrated the purpose of the agreement by not preparing documents that would have released Lyle from the loan. However, this Court does not find credible or sufficient evidence that this, in fact, occurred. The Court also finds that . . . the Warrington letter to Defendants, does not contain any language that Lyle was to be released from the loan.

We review the circuit court's finding that Lisle was not discharged from the loan under the clearly erroneous standard. *See* Md. Rule 8-131(c). There was ample evidence to

support the court's conclusion, including Lisle's own testimony that he had neither paid $149,000 to Wilmington Trust nor transferred his interest in Mid-Atlantic Homes to Bowers.

4. The Attorneys' Fee Award

Before this Court, appellants assert that the circuit court's attorneys' fee award to M&T Bank was unreasonable and improper. {Appellants' brief, 28} First, the Appellants argue that the circuit court should have conducted a separate evidentiary hearing on M&T's claim for attorneys' fees separate from the trial on M&T's claim against appellants for money due under the Note, in accordance with a suggestion in the Rules Committee note to Md. Rule 2-704(c).[11] {Appellants' brief, 28} They contend that, because in light of the complexity of M&T's case against appellants for money due under the Note, and the large amount of attorney's fees requested ($367,869) by M&T, it would have been appropriate

[11] The note states (emphasis added):

> Unlike a claim under Rule 2-703 based on fee-shifting permitted by law, where attorneys' fees are an element of damages for breach of a contractual obligation, any award must be included in the judgment entered on the breach of contract claim. *In complex cases, however, where the evidence regarding attorneys' fees is likely to be extensive, it may be expedient to defer the presentation of such evidence and resolution of that claim until after a verdict or finding by the court establishing an entitlement to an award*. *See* section (d) of this Rule. In that event, the admonition in the committee note to Rule 2-703 (c) is especially critical—that, although the verdict or findings on the underlying cause of action should be docketed, no judgment should be entered thereon until the claim for attorneys' fees is resolved and can be included in the judgment.

to bifurcate the proceedings. As further support, they contend that they had no notice that M&T intended to call Tancredi as an expert witness until July 20, 2016, and that the 297-page compilation of Gebhardt & Smith billing records until the same day. Appellants assert that the timing of these disclosures was a discovery violation and that the trial court abused its discretion in permitting Tancredi to testify and permitting the billing records to be introduced into evidence. Further, they claim the timing of the disclosures prevented them from obtaining their own expert and materially, and unfairly, disadvantaged them in litigating the attorneys' fees issue.

Second, appellants object to the attorneys' fee award because of their belief that the amount awarded by the circuit court was unreasonable. M&T sought $367,869 in attorneys' fees, but was ultimately awarded $354,986. {Appellants' brief, 30}. Appellants contend that given the size of the Appellants' principal loan to M&T of $445,026, which increased to $644,383.27 due to accrued interest, {E. 3456} and the amount M&T received in attorneys' fees, the circuit court's determination was unreasonable. {Appellants' brief, 30}.

For its part, M&T argues that the trial court did not err when it decided to consider the attorneys' fee issue as part of M&T's case in chief, and that the fee award was a reasonable one. M&T argued to the trial court, but not to this Court, that "bifurcation would further delay the entry of a final judgment in its favor and its ability to collect what was owed to

it" because an award of attorneys' fees based on a contractual provision, must be included in the judgment on the underlying cause of action. *See* Md. Rule 2-704(f).[12]

As to appellants' first contention, we cannot say that the trial court abused its discretion in permitting M&T to present evidence as to attorneys' fees in its case-in-chief. As we previously related, the trial court denied appellants' request for a separate evidentiary hearing on attorneys' fees. Md. Rule 2-704(d)(1) provides that evidence relevant to a party's claim for attorneys' fees should be presented in the party's case-in-chief. To be sure, in "complex cases" in which the evidence regarding fees "is likely to be extensive," bifurcation may be appropriate. Rule Committee Comment to Rule 2-704(c). But the evidence regarding M&T's fee request was limited to one exhibit (albeit a lengthy one) and one witness.

[12] At the trial and appellate levels, both parties proceeded under the assumption that Maryland's current rules regarding claims for attorneys' fees and related expenses, found in Subtitle 7 of Title 2 of the Maryland Rules, apply to this case. In its bench opinion, the trial court referred to Subtitle 7 as well. In fact, Subtitle 7 does not apply to this action because it was filed on May 15, 2013. The October 17, 2013 order of the Court of Appeals adopting Subtitle 7 states that it "shall take effect and apply only to actions commenced on or after January 1, 2014, and shall not apply to any action commenced on or before December 31, 2013[.]" *See* 40 Md. Reg. 1 (November 1, 2013); Paul V. Niemeyer et al., MARYLAND RULES COMMENTARY 761 (4th Ed., 2014).

At this point, it is not appropriate for us to speculate as to how the result would have been different had the parties couched their contentions in terms of the applicable law. *See Master Financial, Inc. v. Crowder*, 409 Md. 51, 80 n.1 (2009) ("For good reason, it is rare that the Court will add an issue not raised by the parties in either the lower courts or this Court.").

We reach the same conclusion as to appellants' assertion that they were not able to fully prepare for the attorneys' fees phase of the litigation. We do not think the trial court can be faulted for observing that both parties must have been aware that M&T's attorneys' fees would be litigated in M&T's case-in-chief. We now turn to the amount of the award.

In reviewing the court's decision, we are aware that a trial court's "determination of the reasonableness of attorney's fees is a factual determination within the sound discretion of the court, and will not be overturned unless clearly erroneous." *Myers v. Kayhoe*, 391 Md. 188, 207 (2006*)*; *Weichert v. Faust*, 191 Md. App. 1, 15 (2010*), aff'd*, 419 Md. 306, (2011). In cases, such as the one before us, in which an award of attorneys' fees may be permitted as an element of damages in a contract claim, Md. Rule 2-704(d) directs that the trial court employ the criteria set out in Rule 2-703(f)(3), which states:

> (3) Factors to Be Considered.
> (A) the time and labor required;
> (B) the novelty and difficulty of the questions;
> (C) the skill required to perform the legal service properly;
> (D) whether acceptance of the case precluded other employment by the attorney;
> (E) the customary fee for similar legal services;
> (F) whether the fee is fixed or contingent;
> (G) any time limitations imposed by the client or the circumstances;
> (H) the amount involved and the results obtained;
> (I) the experience, reputation, and ability of the attorneys;
> (J) the undesirability of the case;
> (K) the nature and length of the professional relationship with the client; and
> (L) awards in similar cases.

M&T sought to recover $367,860 worth of attorneys' fees from the appellants. {RE 3457} Ultimately, the circuit court awarded it $354,986 in attorneys' fees, subtracting only

$12,874 from the original request due to associate and support staff time that the court found to be "administrative and/or clerical in nature." {RE 3461} In reaching this result, the court characterized the case as "complex, commercial" litigation and noted that Tancredi testified that Gebhardt & Smith discounted its invoices by 20% because of its relationship with M&T. The court continued:

> I note that I am the fourth judge who has been involved in this case. As I stated during trial, the court file consists of nine volumes. This is an indication of the work performed by all counsel as well as the Court in this case.
>
> Ms. Tancredi testified concerning the discovery disputes and disagreements that regularly occur between the parties throughout this litigation, all of which caused a significant amount of time to be expended by Gebhardt and Smith. Ms. Tancredi was of the opinion that the Gebhardt and Smith bills are fair and reasonable.
>
> Defendants presented no evidence to challenge Ms. Tancredi's qualifications as an expert or her opinion that the Gebhardt and Smith bills are fair and reasonable. Defendants do, however, maintain the position that they have been unable to adequately review the bills contained in Plaintiff's Exhibit 9.
>
> Defense counsel argue that from an initial review of the bills, there appears to be a turning of overstaffing, including duplicative attorney and support staff time with respect to attendance at depositions and court hearings. . . .
>
> The Court would note that it would be usual and commonplace in complex civil litigation to have more than one attorney and support staff involved. This case has been document-intensive and has also involved significant motions. The Court also observes that in the three-years--plus history of this case, the case has been hard fought by both sides, and that there has been acrimony between the parties and counsel at times. The Court finds that Gebhardt and Smith's billing rates are fair and reasonable. The Court must now determine the amount of fees to be awarded.

> In jury trials jurors are instructed that in making their decision they may apply their own common sense and everyday experiences. Likewise, as the trier of fact in this case, I am permitted to do the same. This Court has reviewed each line on each page of the large stack of legal bills presented in Plaintiff's Exhibit 9.
>
> * * *
>
> After reviewing the bills in detail, this Court has determined that some reductions in the amount of attorneys' fees is appropriate, primarily as it pertains to associate and support staff time and work that I consider to be administrative and/or clerical in nature. I am therefore reducing the requested fees in the amount of $12,874. As a result, this Court finds that a reasonable award of attorneys' fees is $354,986.

The trial court's findings are not clearly erroneous as they are supported by Tancredi's testimony. We cannot say that the award constituted an abuse of the court's discretion.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS AFFIRMED. APPELLANTS TO PAY COSTS.