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Rule 803(7): Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6)

RULE 803(7): ABSENCE OF ENTRY IN RECORDS KEPT IN ACCORDANCE WITH THE PROVISIONS OF PARAGRAPH (6)

Federal Rule of Evidence 803(7) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (7) Absence of entry in records kept in accordance with the provisions of paragraph (6).
>
> Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.[1]

The language of Rule 803(7) provides that when there is a duty to record certain business transactions, the omission or absence of a record may be offered as evidence to show that the event never occurred.[2] The absence of entry exception to the hearsay rule may only be applied as long as an adequate foundation is established pursuant to the provisions of Rule 803(6).[3]

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1. FED. R. EVID. 803(7). *See infra* note 3.

2. *Id. See* Bowman v. Kaufman, 387 F.2d 582, 587 n.5 (2d Cir. 1967); *Kaiser Aluminum & Chem. Corp. v. Illinois Cent. Gulf R.R. Co.* 615 F.2d 470, 476 (8th Cir. 1980) (stating that "Rule 803(7) provides that evidence of the absence of an entry in records regularly kept is admissible as affirmative proof of the nonoccurrence or nonexistence of a matter normally recorded.").

3. FED. R. EVID. 803(6). Rule 803(6) provides:

> A memorandum report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the

In three circuits, courts have held that the following four criteria must be met: "(1) [the record] must have been made in the course of a regularly conducted business activity; (2) it must have been kept in the regular course of that business; (3) the regular practice of that business must have been to have made the memorandum; and (4) the memorandum must have been made by the person with knowledge of the transaction or from information transmitted by a person with knowledge."[4]

In *United States v. Robinson*,[5] the Second Circuit held that the evidence was properly excluded because the investigator of the records "had concluded that the records were 'confused' and 'indefinite'. . . ."; however, the court did not explicitly adopt a

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testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Id.

4. *Brodersen*, 1995 WL 558592, *20. *See* Redken Labs, Inc. v. Levin, 843 F.2d 226, 229 (6th Cir.) (stating the four criteria to be met before the absence of a business record may be admissible under Rule 803(7)), *cert. denied*, 488 U.S. 852 (1988); *see also* Igo v. Coachmen Indus., Inc., 938 F.2d 650, 658 (6th Cir. 1991) (quoting the four criteria from *Redken* to analyze whether repair invoices offered into evidence were hearsay); United States v. Fawaz, 881 F.2d 259, 266 (6th Cir. 1989) (citing *Redken* in holding that taxpayer personal balance sheet prepared by third party was admissible, pursuant to Rule 803(7), in tax evasion prosecution); Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1258 (9th Cir. 1984) (holding accounting firm's audit reports inadmissible under Rule 803(6)); Keogh v. Commissioner of Internal Revenue, 713 F.2d 496, 499 (9th Cir. 1982) (holding that personal records kept for business reasons may qualify as business records if they are systematically checked and regularly maintained); *cf. In re* Custodian of Records of Variety Distrib., Inc., 927 F.2d 244, 248 (6th Cir. 1991) (citing the criteria in *Redken* to hold that a custodian of records will not have the right to refuse to identify or authenticate business records because he does not have control or personal knowledge of the particular records but need only be familiar with the company's recordkeeping practices).

5. 544 F.2d 110, 114 (2d Cir. 1976), *cert. denied*, 434 U.S. 1050 (1978). In *Robinson*, the court stated that "[t]he absence of a record of an event which would ordinarily be recorded gives rise to a legitimate negative inference that the event did not occur." *Id.*

test for determining the admissibility of "absence of entry" evidence.[6]

It should be noted that, in addition to the threshold requirements,[7] the sufficiency of the foundational requirements is determined by the trial court[8] which may include an examination of the reliability and trustworthiness of the record,[9] the timeliness of the record,[10] and the qualifications of the witness.[11]

Despite momentum to change, New York law differs from the federal rule regarding the admissibility of the "absence of entry" in a business record as non hearsay. C.P.L.R. section 4521 provides that a lack of a public record "is prima facie evidence that the record contains no such record or entry."[12] However,

6. *Id.* at 114.

7. These requirements are satisfied when Federal Rule of Evidence 803(6) is established. *See infra* note 3.

8. Wallace Motor Sales, Inc. v. America Motor Sales Corp,. 780 F.2d 1049, 1060 (1st Cir. 1985) (stating that the evaluation of circumstances indicating lack of trustworthiness and the adequacy of foundation requirements are within the discretion of the trial court). *See also* FED. R. EVID. 104 (preliminary matters of admissibility are within the trial court's discretion).

9. Keogh v. Commissioner of Internal Revenue, 713 F.2d 496, 500 (relying on the evidence because it corroborates with corresponding entries made in another document and trusting the evidence because there was no reason to fabricate entries).

10. *See* MCCORMICK ON EVIDENCE § 289, at 500 (John William Strong ed., 4th ed. 1992) ("Whether an entry made subsequent to the transaction has been made within a sufficient time to render it within the exception depends upon whether the time span between the transaction and the entry was so great as to suggest a danger of inaccuracy by lapse of memory."); Seattle First National Bank v. Randall, 532 F.2d 1291, 1296 (9th Cir. 1976) (stating that a bank record not made contemporaneous with the transaction or reasonable time thereafter was inadmissible).

11. *Wallace Motor Sales*, 780 F.2d at 1061. (stating "[a] qualified witness is simply one who can explain and be cross-examined concerning the manner in which the records are made and kept" and "need not be the person who actually prepared the record.")

12. N.Y. CIV. PRAC. L & R. 4520 (McKinney 1992). Section 4521 states:

> A statement signed by an officer . . . having legal custody of specified official records . . . that he has made a diligent search of the records and has found no record or entry of a specified nature, is prima facie evidence that the records contain no such record or entry.

there is no provision the lack of entry in any business record is admissible as non hearsay. At common law, in *People v. Ebramha*,[13] the defendant was charged with operating as a vendor without the requisite vending license.[14] The Department of Consumer Affairs attempted to introduce evidence that showed that the records were devoid of any issuance to defendant of such license.[15] In court stated "[a]bsent the record itself, or the relevant portion of the record, any reference to the contents of the record would be hearsay."[16] Therefore, the New York common law excludes the "absence of entry" evidence as admissible hearsay.[17]

However, in *People v. Niang*,[18] the court chose not to follow *People v. Ebramha* and held that the absence of the report is a common law exception to the hearsay rule and concluded that the defendant did not have a vending license at time of arrest because

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Id.

13. 157 Misc. 2d 217, 596 N.Y.S.2d 295 (Crim. Ct. New York 1992).

14. *Id.* at 218, 596 N.Y.S.2d at 296.

15. *Id.*

16. *Id.*

17. *Id.* at 222, 596 N.Y.S.2d at 297. *See* Boor v. Moschell, 55 Hun. 604, 28 N.Y. St. Rep. 594, 8 N.Y.S. 583 (N.Y. Sup. Ct. 1889). On appeal, the defendant firm argued that, because the defendant had consistently kept entries of moneys advanced to it, the absence of such an entry regarding the occasion in dispute proved the advance was never made. *Id.* at 584. Unfortunately for the defendant, the court held that "such evidence has been uniformly regarded as hearsay in character and should have been rejected by the court." *Id.* at 604, 28 N.Y. St. Rep. at 595, 8 N.Y.S. at 584; Gravel Products Division of Buffalo Crushed Stone Corp. v. Sunnydale, Inc., 10 Misc. 2d 323, 325, 171 N.Y.S.2d 519, 522 (Sup. Ct. Erie County 1958) (stating that "[s]uch evidence, completely negative, has uniformly been held to be hearsay in character and incompetent and irrelevant."); *cf.* Hotopp v. Huber, 160 N.Y. 524, 530, 55 N.E. 206, 208 (1899) ("[T]he absence of entries of payment in regular books of account, which, in the regular and ordinary course of business, would appear, if payment had in fact been made, furnishes some evidence of non-payment."); White v. Benjamin, 150 N.Y. 258, 44 N.E. 956 (1896) ("The absence of entries required by commercial usage, especially when transactions with other parties[] . . . are duly entered, it is regarded as a competent fact, whenever the entries themselves, if duly made, would have been competent.").

18. 160 Misc. 2d 500, 609 N.Y.S.2d 1017 (1994).

no record that one was issued could be found.[19] The *Niang* court indicates a trend in New York toward accepting absence of entry evidence as non hearsay exceptions particularly when the records at issue are "made and maintained in the regular course of . . . business."[20]

New York courts have been a little sluggish in following the Federal Rules of Evidence with regard to the adoption of the absence of a business entry as admissible non hearsay. However, judging from the recent *Niang* court ruling, New York is progressing toward accepting the absence of a business record as a hearsay exception as the federal courts have done.

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19. *Id.* at 502, 609 N.Y.S.2d at 1019.

20. *Id. See Ebramha*, 157 Misc. 2d at 225 n.2, 596 N.Y.S.2d 299 n.2 (citation omitted). The court noted in a footnote that:

> It may be that the time is ripe for New York to bring itself in line with the federal and state courts recognizing a hearsay exception for evidence of absence of a public record. This Court is of the opinion, however, that any such reconsideration of New York law should be undertaken by an appellate court.

Id.