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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed August 27, 1986

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6-231
85-1147

MONTGOMERY WARD, INC.,

Plaintiff-Appellee,

vs.

PEGGY DAVIS,

Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County (26414) - Ray A. Fenton, Judge.

Defendant appeals the adverse judgment entered by district court in plaintiff's action to recover the outstanding balance in default on defendant's open account with plaintiff. **REVERSED AND REMANDED.**

Joseph L. Marks of Marks, Marks & Marks, Urbandale, Iowa, for defendant-appellant.

William C. Purdy, Des Moines, Iowa, for plaintiff-appellee.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ.

The plaintiff filed a petition on November 18, 1982, asserting that defendant purchased goods and merchandise from the plaintiff, defaulted on her payments, and owed $1,596.61 on the account. The defendant filed an answer denying all allegations and asserting that the plaintiff failed to comply with Iowa Code sections 537.5110 and 537.5111 (1981) regarding the sending of a notice of the right to cure the default. The defendant also asserted a counterclaim on the basis of the alleged failure to send a proper notice of the right to cure, praying for actual damages of $1,500, a penalty of $1,000, reasonable attorney fees, interest, and costs.

The case was tried to a jury. At the trial, the defendant did not contest that she had an outstanding balance with the plaintiff. An account representative for the plaintiff who handled the collection of defendant's account testified as to the office practice used in requesting a notice of the right to cure letter to be sent to an accountholder and the procedure followed in this case. The account representative testified that she electronically requested that the notice be sent to the defendant and that a computer generated such a notice. Apparently, there were safeguards to insure that the computer generated the notice when requested by an account representative.

A credit supervisor for the plaintiff testified about the credit records kept by the plaintiff. He stated that a computer file indicated that the plaintiff had given the defendant a notice of the right to cure the default before bringing the lawsuit. A reproduction of the actual notice of right to cure was introduced into evidence. Neither the account representative nor the credit supervisor had personal knowledge of the mailing of the notice.

The defendant denied that she ever received the notice. However, she did admit to receiving bills from the plaintiff at the same address where the notice to cure was to be sent. The defendant also admitted to having extensive alcohol abuse problems during the time when the notice would have been sent to her.

At the close of the plaintiff's case and at the close of the entire case, the defendant moved for a directed verdict, asserting that there was no showing that plaintiff mailed the notice to the defendant. The trial court overruled the motion.

The jury returned a verdict in favor of plaintiff and against the defendant on her counterclaim. In response to two special interrogatories the jury answered that plaintiff had given defendant proper notice of the right to cure. On July 10, 1985, the court entered a judgment consistent with the verdict. Defendant filed a timely Notice of Appeal.

Defendant contends that the trial court erred in failing to direct a verdict in her favor in that plaintiff failed to meet its burden of proof establishing that a notice of right to cure was in fact mailed to plaintiff. Defendant also claims that if a finding is made that plaintiff failed to send the correct notice, then she is entitled to a penalty, reasonable attorney fees, interest, and costs pursuant to Iowa Code sections 537.5110(1)(2), 537.5201(1)(b), and 537.5201(8) (1981).

We note that our review of the trial court is limited to errors of law. Iowa R. App. P. 4. Therefore, this case is reviewed as tried in the court below. Mosebach v. Blythe, 282 N.W.2d 755, 758 (Iowa 1979). If supported by substantial evidence and justified as a matter of law, the judgment will not be disturbed on appeal. Atlantic Veneer Corp. v. Sears, 232 N.W.2d 499, 502 (Iowa 1975);

Iowa R. App. P. 14(f)(1). We are able to inquire into whether a conclusion of law is correct or whether the lower court erred in ruling upon a question of law which materially affects the decision. Iowa Power and Light Co. v. Board of Water Works Trustees of Des Moines, 281 N.W.2d 827, 830 (Iowa Ct. App. 1979).

A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). Movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). In determining whether the evidence was sufficient to justify the submission of the evidence to the jury, we consider the evidence according to the same standards as the trial court. Randa v. U.S. Homes, Inc., 325 N.W.2d 905, 908 (Iowa Ct. App. 1982).

I.

We first consider whether plaintiff met its burden of proof regarding the notice to cure. A notice to cure is a condition precedent to bringing suit and failure to comply is cause for dismissal. Farmers Trust and Savings Bank v. Manning, 311 N.W.2d 285, 290 (Iowa 1981). Plaintiff had the burden to prove that a notice to cure was given. Id.

Regarding the notice to cure, Iowa Code section 537.5110 (1981), provides in pertinent part:

> 1. Notwithstanding any term or agreement to the contrary, the obligation of a consumer in a consumer credit transaction is enforceable by a creditor only after compliance with this section.
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> 2. A creditor who believes in good faith that a consumer is in default may give the consumer written notice of the alleged default, and, if the consumer has a right

> to cure the default, shall give the consumer the notice of right to cure provided in Section 537.5111 before exercising any right he may have to enforce.

The creditor may give notice by delivery to consumer or through the mail, to the consumer's residence. Iowa Code § 537.1201(4) (1981). When a statute or rule states that written notice may be given by mail, service is ordinarily accomplished by depositing the notice in the mail with proper address and postage. Liberty Mutual Insurance Co. v. Caterpillar Tractor Co., 353 N.W.2d 854, 857 (Iowa 1984).

"Proof of mailing a statement or letter properly addressed and otherwise conforming to postal laws and regulations concerning postage raises a presumption of fact it was received." Reserved Insurance Co. v. Johnson, 260 Iowa 740, 744, 150 N.W.2d 632, 634 (1967) (quoting Boshek Realty Co. v. Boshek Brothers Co., 249 Iowa 349, 356, 87 N.W.2d 8, 12 (1957)). To establish the presumption that it was received, evidence must be introduced:

1) of the contents and execution of the paper;

2) that it was enclosed in a wrapper or otherwise prepared for transmission through the mail;

3) of the correct address of the person to receive it;

4) that the wrapper was properly addressed;

5) that the postage was prepaid; and

6) that the article was dropped in the mail.

Public Finance Co. v. Van Blaricome, 324 N.W.2d 716, 718-19 (Iowa 1982); Central Trust Co. v. Des Moines, 205 Iowa 742, 746, 218 N.W. 580, 582 (1928).

Throughout the trial and in her appellate brief defendant has asserted that plaintiff failed to show any of the six factors needed to establish the presumption that the notice was in fact mailed and received. Therefore, she

contends that the court erred in failing to direct the verdict in her favor. To enable this presumption to arise plaintiff must have introduced evidence of all six factors. Plaintiff failed in this burden regarding the sixth factor: that the article was deposited in the mail.

We recognize that in our computer-enhanced world it would be unreasonable to require evidence as to the actual mailing of a particular letter to prove that the letter was "in fact" mailed and received. Furthermore, the Iowa Supreme Court held in Public Finance Co. v. Van Blaricome that testimony of office custom is sufficient, absent proof to the contrary, to raise a presumption that a notice of default was mailed and received. Id. at 721.

In the present case an account representative, Ms. Lamberti, testified that the right to cure was sent automatically to the address on record when the applicable code was inputed into the computer. She testified that beyond inputing the information into the computer she did not know the rest of the process. She did not mail the notice herself.

A credit supervisor, Mr. Ness, testified regarding billing summaries and the procedure in the Minnesota office. In a discussion outside the presence of the jury he commented that the mailing was done "by the machine" in Chicago, Illinois. Mr. Ness testified that he had never been to the Illinois office and that he had never observed the mailing procedures in action. All of his knowledge regarding plaintiff's mailing procedure was secondhand.

As pointed out, a variance has been carved out which allows testimony of office custom relating to the actual mailing. Here the trial court only received vague allusions regarding plaintiff's office custom. No evidence was produced proving the custom as to the standard office procedure of mailing.

Viewing the evidence in a light most favorable to plaintiff, we find no evidence that plaintiff sustained its burden of proof. Under the laws of Iowa certain factors must be shown to establish the presumption regarding proof of mailing. Defendant asserts that she never received notice, thereby making plaintiff's proof of this presumption critical to its case. Under Iowa Code section 537.5110 (1981), if no notice is given then the creditor is not entitled to bring suit on the obligation. Notice is a condition precedent, failure to prove notice is a basis of dismissal. The trial court committed reversible error in submitting this case to the jury and in failing to direct the verdict in defendant's favor. We reverse.

II.

Since we found for defendant on the notice issue, she contends that she is entitled to recover a penalty, reasonable attorney fees, and costs.

Regarding the award of a penalty and attorney's fees, Iowa Code sections 537.5201(1)(z) and 537.5201(8) (1981), provide:

> (1) The consumer has a cause of action to recover actual damages and in addition a right in an action other than a class action to recover from the person violating this chapter a penalty in an amount determined by the Court not less than $100.00 nor more than $1,000.00, if a person has violated the provisions of this chapter relating to:
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> * * *
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> (z) Failure to provide a proper notice of cure or right to cure under sections 537.5110 and 537.5111.
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> * * *
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> (8) In an action in which it is found that a person has violated this chapter, the court shall award to the consumer the costs of the action and to his attorneys their reasonable fees. Reasonable attorney's fees shall be determined by the value of the time reasonable [sic] expended by the attorney and not by the amount of the recovery on behalf of the consumer.

Defendant admits that she did not sustain actual damages. No evidence was presented regarding a penalty and/or attorney's fees, we have no basis to make such an award. We reverse and remand the trial court for an evidentiary hearing to determine the penalty, if any, reasonable attorney fees at district court and on appeal, and costs. Costs of appeal are assessed against plaintiff.

REVERSED AND REMANDED.

Schlegel, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I respectfully dissent. I believe that plaintiff sustained its burden of proof of showing the notice to cure was mailed.

The majority concedes that "in our computer-enhanced world it would be unreasonable to require evidence as to the actual mailing of a particular letter to prove that the letter was 'in fact' mailed and received." Computers have become an integral part of our everyday life, and the explosion in computer technology within the past decade has rendered many of the former business practices we have taken for granted obsolete. Gone are the days when a room full of secretaries typed individual letters, addressed them, and dropped them in the mailbox. In today's complex business world, it is clearly unreasonable to identify all participants in the preparation of a record, and even if those participants could be identified, few could be expected to have any helpful recollections concerning specific transactions. In recognition of this ever-changing growth in business practices, the Iowa Supreme Court has opined that testimony of office custom is sufficient, absent proof to the contrary, to raise a presumption that a notice of default was mailed and received. Public Finance Co. v. Van Blaricome, 324 N.W.2d 716, 721 (Iowa 1982).

Two principal witnesses testified on behalf of the plaintiff. Gary Ness, a credit supervisor for the Minneapolis office of Montgomery Ward, which handles Des Moines accounts, testified that Montgomery Ward has used a computerized method of sending bills and other correspondence since 1975 and that each office uses the same system. Ness testified that the records kept by Montgomery Ward indicated that the computer-generated file had in fact given the defendant a notice to cure default prior to the bringing of its actions in the open account. Patti Lamberti testified that she was the actual account representative who handled the defendant's account. Ms. Lamberti testified that upon being unable

to work out an arrangement for payment with the defendant she typed into the computer a request for a notice to cure to be sent to the defendant. Ms. Lamberti testified that she typed in the amount defendant was past due and the date. Ms. Lamberti then testified that this information is processed through the computer, and if any errors have been typed in, the computer will refuse to process the notice. If any mistakes were made, a printout is sent by computer to the credit office. In the instant case, no printout concerning defendant's account was sent. The request for a notice to cure by Ms. Lamberti was subsequently relayed to the Chicago computer terminal where such notices are then processed and sent out.

I believe that the testimony offered by these two employees was sufficient to establish business custom. As noted earlier, it would be impossible to bring in every employee involved in the complex chain resulting in the mailing of a notice to cure, and even if it were possible, few would have knowledge as to the other links in the chain. I therefore believe that we must extend the presumption of mailing to those systems which are today almost totally automated. Any other holding would make it virtually impossible to ever prove with reasonable certainty that a letter or bill was mailed to a customer. Furthermore, in the instant case, the defendant testified that she had received all her bills from Montgomery Ward and that she did not keep a complete file of all correspondence Montgomery Ward had sent her. She also testified that she was under extreme alcohol and drug dependency at the time she was to have received the notice to cure. I would therefore affirm the trial court's decision.