

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA**

BARBARA HERNANDEZ,

Appellant,

v.

PRECISION RECOVERY ANALYTICS, INC.,

Appellee.

CASE NO.: 2011-CV-000036-A-O

Lower Case No.: 2010-CC-15845

Appeal from the County Court, for Orange County,
Florida, Heather L. Higbee, County Judge.

Heather A. Harwell, Esquire, for Appellant.

Juan C. Montes, Esquire for Appellee.

Before TURNER, KOMANSKI, and GRINCEWICZ, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant, Barbara Hernandez (“Hernandez”), timely appeals the Trial Court’s “Final Judgment for Plaintiff” entered on April 14, 2011. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

Summary of Facts and Procedural History

This appeal arose from an action to collect credit card debt incurred by Hernandez and originally owed to GE Money Bank, which sold and assigned the past due credit card account to Appellee, Precision Recovery Analytics, Inc. (“Precision”) (f/k/a Collins Financial Services, Inc.), a debt buyer. On April 14, 2011, a non-jury trial was held that included testimony from Precision’s Vice President of Operations and Records Custodian and testimony from Hernandez. Upon conclusion of the trial, the Trial Court entered a judgment in favor of Precision in the amount of \$5,892.73 as principal and \$353.00 in court costs, plus interest.

Arguments on Appeal

Hernandez argues: 1) The testimony, by affidavit or otherwise, of a party who is neither a representative or an employee of the original creator of the hearsay business records lacks personal knowledge as to the records submitted and is not qualified to testify under the business records exception, short of proving specific and special knowledge that a proper records custodian would have and 2) The failure to prove compliance with the pre-filing notice requirement under section 559.715, Florida Statutes, is fatal to the assignee’s/debt buyer’s claim. Lastly, Hernandez seeks an award of appellate attorney’s fees should she prevail in this action per sections 57.104, 57.105(7), 59.46, Florida Statutes, and Florida Rule of Appellate Procedure 9.400(b).

Conversely, Precision argues: 1) The testimony of a “qualified witness”, although not a representative or employee of the original creditor, is sufficient to establish the qualification of documents as business records and 2) Section 559.715, Florida Statutes, does not create a condition precedent, but nonetheless, the evidence at trial proved that Precision had complied with the statute.

Standard of Review

De Novo: A trial court's interpretation of a statute involves a question of law and thus, is subject to de novo review. *In re Guardianship of J.D.S.*, 864 So. 2d 534, 537 (Fla. 5th DCA 2004); *Shands Teaching Hospital and Clinic, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 1st DCA 2007) (holding that an error in applying a provision of the evidence code is an issue of law subject to the de novo standard of review). Also, a trial court's interpretation of a written contract such as an assignment of a contract is a question of law and thus, subject to de novo review. *Peacock Construction Company, Inc. v. Modern Air Conditioning, Inc.*, 353 So. 2d 840, 842 (Fla. 1977).

Abuse of Discretion: A trial court's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *Carpenter v. State*, 785 So. 2d 1182, 1201 (Fla. 2001).

Competent Substantial Evidence: When the sufficiency of evidence is challenged on appeal, the appellate function is to determine if there is competent substantial evidence in the record to support the trial court's ruling. *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (defining competent substantial evidence as relevant evidence as a reasonable mind would accept as adequate to support a conclusion); *Wekiva Springs Reserve Homeowners v. Binns*, 61 So. 3d 1190, 1191 (Fla. 5th DCA 2011) (explaining that a lower court's ultimate factual determinations during a non-jury trial may not be disturbed on appeal unless shown to be unsupported by competent and substantial evidence); *Tonnellier Construction Group, Inc. v. Shema*, 48 So. 3d 163, 166 (Fla. 1st DCA 2010) (explaining that a trial court's findings of fact are presumed correct unless clearly erroneous); *Commercial Credit Corp. v. Varn*, 108 So. 2d 638, 639 (Fla. 1st DCA 1959) (explaining that the testimony reviewed on appeal must be considered in a light most favorable to the appellee).

Discussion of Evidence Presented at Trial

The arguments in this appeal primarily address the testimony and documents admitted into evidence that were provided by Precision at the non-jury trial. From review of the trial transcript, Precision presented evidence through the testimony of its Vice President of Operations and Records Custodian, Michael Crossae (“Crossae”) as follows:

Bill of Sale from GE Money Bank (“GEMB”) to Precision f/k/a Collins Financial Services, Inc. (“Collins Financial”): Crossae testified that the account was purchased from GEMB by Precision on May 22, 2009 and memorialized in a Bill of Sale document. He identified the Bill of Sale as an accurate copy of the original document that was executed on May 22, 2009 and maintained by the company. He also testified that the Bill of Sale was prepared by someone with knowledge of the transfer and that the document was part of the records maintained in the regular course of business by Precision. He further testified that, after execution by GEMB, the document was immediately forwarded to Precision’s General Counsel on May 22, 2009 and then forwarded to him. The Bill of Sale was then admitted into evidence as Plaintiff’s Exhibit “1”.

Assignment of Hernandez’s account: Crossae testified about his six years of previous employment in the financial industry working for a bank and his familiarity of the procedures typically used by banks for the purposes of generating and maintaining its records. He testified that banks are subject to significant federal regulation governing how they maintain and prepare their records. He also testified that bank records tend to be very accurate and trustworthy and stated: “Because the systems for most banks nowadays are all computer generated. It’s when a payment comes in, they are typically just like your banks nowadays. They are scanned in and it’s read directly off the checks and it’s applied electronically. There is very little human

interaction.” Crossae also provided evidence regarding the process of how creditor data is maintained and transferred to Precision, stating that: “We receive a file from the original creditor, and it is usually a CSB file. A CSB file is similar to an excel file or a text file, and it’s commonly unlimited and it’s entered into our system. So it goes directly out of theirs and directly into ours.” He further testified that Precision relies on such records and incorporates those records into its own activities.

Crossae presented additional testimony regarding the forward flow receivable agreement from GEMB to Precision and the procedure for obtaining the data whereby GEMB directly sends Precision an electronic file that “is cut directly off their system that has a list of all the accounts that are commemorated in this bill of sale.” He further testified that Precision was also provided with a series of account statements for Hernandez that were immediately scanned into Precision’s computer system and attached to the particular account through a unique account number.

Billing statements: Next, Crossae identified the billing statements that Precision maintained in its records as to Hernandez’s account that showed the account number, due dates, credit limit, amount owed, and mailing address. At that point, the billing statements were admitted into evidence as Plaintiffs Exhibit “2”. Crossae testified regarding the two significant charges incurred by Hernandez, the payments made, and the final amount due and owing of \$5,892.73 with no additional payments or credits. These statements were further authenticated by Hernandez who testified that she recognized the statements and recalled receiving them at her home. Hernandez also recognized one of the two charges and recalled making some payments in the past with checks, but due to the passage of time, she could not recall the other charge or the total amount of payments she made.

Demand letter advising of assignment/transfer of Hernandez's account: Documents were presented and admitted into evidence through Crossae's testimony that addressed the demand letter mailed to Hernandez advising her of the transfer of her account to Precision's collection agency, LTD Financial Services ("LTD"). The documents included the Affidavit of Leonard Pruzinsky ("Pruzinsky"), an employee of LTD. In the Affidavit, Pruzinsky attested: 1) Prior to the instant litigation, Hernandez's account was assigned to LTD for collection; 2) At that time, he was LTD's record custodian and the process of sending demand letters was under his review and control; 3) A demand letter was mailed to Hernandez on or about May 24, 2009 at her last known address and that to the best of his knowledge and belief that demand letter was not returned by the post office. Also, a copy of the demand letter to Hernandez was not provided but instead, a demand letter that was sent to another account holder/debtor was attached to the Affidavit as a sample. Thus, in the Affidavit, Pruzinsky attested that, to the best of his knowledge and belief, the demand letter sent to Hernandez was identical or similar to the language in the attached sample letter.

Crossae further testified that LTD is directed to meet company-wide standards for the collection of accounts and that Hernandez's account was placed with LTD on the same date of its purchase on May 22, 2009. He also testified that the internal standards of Precision require that initial demand letters be sent within 48 hours of the account being provided to LTD. Further, he testified that the demand letters advised of the assignment from GEMB to Collins Financial Services, Inc. n/k/a Precision. Crossae further testified that he had knowledge that the demand letter was sent to Hernandez on May 24, 2009 and that Precision's business practice required its agents to maintain records showing when such letters are sent and that LTD did maintain records in accordance with said mandates. When asked to elaborate, Crossae testified as follows:

Because we audit. We have very stringent audit criterium. We do electronic monitoring of all of our -- a random sampling of all of our accounts every month for all of our agencies and then we do on-site visits every six months. So we go through everything with a fine tooth comb and look to make sure. In this particular case we pulled it directly off their system when they sent the letter out, and it comes directly from my audit findings from their system.

Crossae then stated: "We have access to their computer system -- we log in as if we were an employee." Lastly, Crossae testified that the demand letter was addressed correctly to Hernandez's home address and that there was no indication that it was returned. In addition, Hernandez admitted at trial that the address where Precision contends the letter was sent, was her correct address and she did not offer any further testimony or other evidence to dispute the debt or the mailing of the letter to her.

Analysis of Arguments and Evidence

Argument I: The crux of Hernandez's first argument is that Crossae was not qualified to testify under the business records exception. Section 90.803(6)(a), Florida Statutes (2011), addresses the hearsay exception for business records and provides:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, 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 such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

From review of the trial transcript, Crossae's testimony addressing the business records included a detailed process as to how Precision integrated the GEMB business records, including Hernandez's account, into Precision's records and how it relied upon the records. Thus, this Court finds that Crossae's position as Precision's Vice President of Operations and Record

Custodian combined with his detailed testimony, provided competent substantial evidence for the Trial Court to find that he was a “qualified witness” as required under section 90.803(6)(a), Florida Statutes (2011). Further, this Court finds that Crossae, as a qualified witness under the business records exception, provided the proper foundation for admittance of the documents discussed above including the Bill of Sale, billing statements, and the Affidavit of Leonard Pruzinsky sans the sample demand letter attachment. This Court finds that the sample demand letter was not relevant to the instant case and thus, the trial court erred in allowing the admittance of the letter into evidence. However, notwithstanding the admittance of the demand letter, the error was harmless as the other documents combined with Crossae’s testimony that were properly admitted into evidence provided competent substantial evidence in support of the Trial Court’s entry of judgment in favor of Precision.

Argument II: The crux of Hernandez’s second argument is that Precision failed to comply with the pre-filing notice requirement under section 559.715, Florida Statutes, that addresses the assignment of consumer debts. When Precision filed its suit on October 4, 2010, the subject statute had recently been amended effective October 1, 2010 as follows:

This part does not prohibit the assignment, by a creditor, of the right to bill and collect a consumer debt. **However, the assignee must give the debtor written notice of such assignment as soon as practical after the assignment is made, but at least 30 days before any action to collect the debt.** The assignee is a real party in interest and may bring an action to collect a debt that has been assigned to the assignee and is in default. [Emphasis added] ¹

¹ The prior version of section 559.715, Florida Statutes, read as follows: This part does not prohibit the assignment, by a creditor, of the right to bill and collect a consumer debt. **However, the assignee must give the debtor written notice of such assignment within 30 days after the assignment.** The assignee is a real party in interest and may bring an action in a court of competent jurisdiction to collect a debt that has been assigned to such assignee and is in default. [Emphasis added]

From the plain meaning of the statute in its entirety, including the language as amended, it is reasonable to conclude that notice of the assignment must be provided to the debtor at least 30 days prior to filing an action to collect the debt. However, there is no definition or language in the statute or anywhere in chapter 559 that sets out the form or contents for the notice of assignment nor how it should be mailed or delivered. Thus, the next step is to determine whether Precision's evidence at trial satisfied the requirement.

This Court finds that Crossae's testimony and supporting documentation provided competent substantial evidence that the demand letter was mailed to Hernandez on May 24, 2009 and advised her of the transfer of her account to Precision's collection agency, LTD, well before October 4, 2010 when Precision filed suit. Thus, the demand letter complied with the statute's notice requirement.

Conclusion

The Trial Court rulings correctly followed the applicable statutes including sections 90.803(6)(a) and 559.715, Florida Statutes, was not an abuse of discretion, and was based on competent substantial evidence.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Trial Court's "Final Judgment for Plaintiff" entered on April 14, 2011 is **AFFIRMED**. Also, "Appellant's Motion for Attorney's Fees on Appeal" filed January 17, 2012 is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 18th day of November, 2013.

/S/ _____
THOMAS W. TURNER
Presiding Circuit Judge

KOMANSKI and GRINCEWICZ, J.J., concur.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished to: **Heather A. Harwell, Esquire**, Law Office of Heather A. Harwell, P.A., 3632 Land O'Lakes Blvd., Suite 10620, Land O'Lakes, Florida 34639, HHarwell@HarwellLawPA.com and **Juan C. Montes, Esquire**, Lidsky & Montes Law Firm, PL, 145 E. 49th Street, Hialeah, Florida 33013, jcmontes@mllaw-fla.com on the 18th day of November, 2013.

/S/ _____

Judicial Assistant