IN THE COURT OF APPEALS OF IOWA

No. 9-348 / 08-1782
Filed June 17, 2009

FIRST NATIONAL BANK OF OMAHA,
Plaintiff-Appellee,

vs.

CARROLL BRANNEN and JANE BRANNEN,
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

The defendants appeal from the district court's order finding the plaintiff mailed proper notice to cure and entering judgment against the defendants and in favor of the plaintiffs. **AFFIRMED.**

Theodore Sporer of Sporer & Flanagan, P.C., Des Moines, for appellant.

Mark Quandahl and Sarah Miller of Brumbaugh & Quandahl, P.C., Omaha, Nebraska, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Carroll and Jane Brannen opened a credit card account with First National Bank of Omaha (the Bank) in 1976. In 2004, the account became delinquent and in September 2006, the Bank filed suit to collect on the account. On September 30, 2008, a bench trial was held. The Brannens asserted the Bank did not prove it mailed a proper notice of right to cure. However, they did not dispute they were in default or the amount owed.

On October 3, 2008, the district court found that on December 10, 2004, the Bank's

> automated system generated a letter containing a notice of right to cure to the Brannens. The Bank does not have a copy of the letter sent to the defendants. However, the Bank's computer system contains the information contained in the letter and shows the date the letter was created. . . . The Bank has proven that it generated a notice on December 10, 2004, and that the notice substantially complied with Iowa Code section 537.5111.

Further, the district court found that the notice was in fact mailed to the Brannens. The court also noted that Jane Brannen "did not testify that she never received the notice to cure letter, only that she did not receive a document in the format of Exhibit 5."[1] Judgment was entered against the Brannens and in favor of the Bank in the amount of $9168.36 together with interest and costs.

The Brannens appeal and assert the district court erred in finding there was a statutorily compliant notice to cure and there was sufficient proof of mailing. Our review is for correction of errors at law. Iowa R. App. P. 6.4. The district court's factual findings are binding if supported by substantial evidence.

[1] When Jane Brannen was asked whether she had ever seen a document like Exhibit 5, which was the multi-page computer printout of the notice to cure, she replied: "No, not this setup."

Iowa R. App. P. 6.14(6)(*a*). Prior to filing an action to collect a debt, a creditor must give the consumer notice of right to cure. Iowa Code §§ 537.5110, 537.5111 (2007). The creditor has the burden of proving the notice was given. *Pub. Fin. Co. v. Van Blaricome*, 324 N.W.2d 716, 718 (Iowa 1982).

The Bank introduced computer records demonstrating that a notice to cure letter was generated by an automated system.[2] Dan Tlustos, a recovery representative with the Bank who handles delinquent accounts, testified that the Bank's records were maintained electronically. He also described how the Bank's automated computer system functions, including how a notice to cure letter is generated and mailed. He stated that the Bank sent a notice to cure letter to the Brannens and described the content of that letter, which was supported by the computer records offered and received as exhibits. Additionally, he testified as to the address the notice to cure was mailed, which was the Brannens' address, and that the notice was not returned as undeliverable. *See Pub. Fin. Co.*, 324 N.W.2d at 718 (holding testimony of office custom may provide sufficient foundation to raise a presumption that mailed notices were in fact received). The Brannens had previously received mail from the Bank at this address.

The Brannens argue that "[t]he only witness testifying as to bank procedures has no personal knowledge of mailing." However, our supreme court

[2] Our supreme court has acknowledged that records "created through a fully automated and reliable process involving no human declarant . . . are arguably not hearsay at all, as they would not have been made by a human declarant." *State v. Reynolds*, 746 N.W.2d 837, 843 (Iowa 2008) (citing *State v. Armstead*, 432 So.2d 837, 839 n. 2 (La. 1983) (discussing the distinction between computer-stored (hearsay) and computer-generated (non-hearsay) data); *State v. Hall*, 976 S.W.2d 121, 147 (Tenn. 1998) (noting computer-generated records are not hearsay, and their admissibility is measured by the reliability of the system)).

has "held that testimony of office custom may provide sufficient foundation to raise a presumption that mailed notices were in fact received." *Montgomery Ward, Inc. v. Davis*, 398 N.W.2d 869, 871-72 (Iowa 1987) ("Although Ward presented no direct evidence of the process by which the notice to cure was mailed, the jury reasonably could infer from circumstantial evidence that the computerized system operated the way its witnesses described. So too could the jury conclude that Davis received the mailed notice document at the address she had given Ward just as she had [] received the earlier computer-generated mailings."). From Tlustos's testimony, a fact finder could reasonably conclude that the automated system operated the way described, identifying the Brannens' delinquent account, providing the required information, and mailing the notice to cure. We therefore agree with the district court's findings as substantial evidence supports the finding the Bank mailed a notice to cure that complied with statutory requirements. We affirm the judgment of the district court.

AFFIRMED.