IN THE COURT OF APPEALS OF IOWA

No. 9-944 / 09-0762
Filed December 17, 2009

CITIBANK (SOUTH DAKOTA), N.A.,
Plaintiff-Appellee,

vs.

RICHARD MAKOHONIUK,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, Paul R. Huscher, Judge.

A consumer appeals from the summary judgment entered by the district court in favor of a credit card issuer. **REVERSED AND REMANDED.**

Theodore Sporer, Des Moines, for appellant.

Jaci Rase, Des Moines, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Richard Makohoniuk appeals a district court's grant of summary judgment in favor of a credit card issuer. Because we find a genuine issue of material fact as to whether the credit card issuer mailed Makohoniuk the required notice of right to cure, we reverse and remand.

Citibank (South Dakota), N.A. sued Makohoniuk on September 22, 2008, alleging that he owed it a credit card debt of approximately $30,084.82. Makohoniuk answered, denying liability. On March 6, 2009, Citibank moved for summary judgment. Accompanying the motion was a document entitled "Affidavit of Attorney for Plaintiff." The "Affidavit" was signed by Citibank's attorney. However, it was not notarized or dated, and it did not state that it was sworn or made under penalty of perjury. It did say,

> Attached hereto as Exhibit "A2" and a [sic] made a part hereof is a true and correct copy of the Notice to Cure sent to the Defendant. It is our regular practice to mail all Notices to Cure on the date so noted on the Cure.

Accompanying the "Affidavit" was a copy of what purported to be a June 26, 2008 "Notice of Right to Cure Default" addressed to Makohoniuk by Citibank's law firm.

Makohoniuk filed a resistance to Citibank's summary judgment motion. Makohoniuk argued there was a genuine issue of material fact as to whether the notice of right to cure had been sent. His resistance was supported by an affidavit where he denied receiving the June 28, 2008 notice, although he conceded the address reflected in the notice was the correct address of his residence.

Following oral argument, the district court granted summary judgment. Makohoniuk now appeals, arguing there was a genuine issue of fact as to whether Citibank provided the required pre-suit notice.

We review the entry of summary judgment for correction of errors at law. *Fennelly v. A-1 Mach. & Tools Co.*, 728 N.W.2d 181, 185 (Iowa 2007).

> A motion for summary judgment should only be granted if, viewing the evidence in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Id. (quoting Iowa R. Civ. P. 1.981(3)).

The parties do not dispute that under the Iowa Consumer Credit Code, Citibank was obligated to give a notice of right to cure before commencing legal action. *See* Iowa Code §§ 537.5110, 537.5111 (2007). The giving of a notice to cure is a condition precedent to bringing suit; it is the creditor's burden to prove the notice has been given. *Montgomery Ward, Inc. v. Davis*, 398 N.W.2d 869, 870 (Iowa 1987) (holding a creditor has the burden of proving it gave notice to cure under Iowa Code section 537.5110); *Pub. Fin. Co. v. Van Blaricome*, 324 N.W.2d 716, 718 (Iowa 1982) (same). There is a six-pronged test for meeting the burden of proof of mailing. *Van Blaricome*, 324 N.W.2d at 718. Specifically, there must be evidence:

> 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 postage was prepaid; and
> 6) That the article was deposited in the mail.

See id. at 718-19. Yet, proof of "standard office procedure" or "office custom" is sufficient to raise a presumption that the notice was mailed. *Id*. at 721. It is not necessary that the witness have recollection about the specific mailing (or even that he or she be the actual person who made the mailing). *Id*.; *see also Davis*, 398 N.W.2d at 370.

Makohoniuk argues that there is a genuine issue of material fact as to whether the notice was sent. We agree with Makohoniuk, for at least two reasons. First, the "Affidavit" of Citibank's attorney does not comply with Iowa Rule of Civil Procedure 1.981(5) because it is not actually an affidavit or a permissible substitute therefor. It is not dated, notarized, sworn, or made under penalty of perjury. *See* Iowa Code § 622.1 (allowing unsworn declarations made under penalty of perjury to be used in lieu of affidavits). Second, even if the "Affidavit" had been properly verified, we believe it would still be deficient under rule 1.981(5). An attorney's conclusory statement that it is "our regular practice to mail all Notices to Cure on the date so noted on the Cure" does not meet the rule's requirements that affidavits be "made on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to the matters stated therein." Many attorneys in law firms do not handle the mailing of correspondence, and there is no indication in the record that this attorney had personal knowledge of the mailing practices in the firm. In addition, there is no description or detail regarding those practices.

We do not, because we need not, reach the question whether Makohoniuk's affidavit would create a genuine issue of material fact even if Citibank had properly supported its summary judgment motion on an issue, i.e.,

the giving of notice, where it had the burden of proof. Iowa Code section 537.5111(3) does not require that the notice to cure be received; it just requires that it be *mailed* to the consumer's residence. *See Midwest Checking Cashing, Inc. v. Richey*, 728 N.W.2d 396, 400-01 (Iowa 2007) (holding that a notice to cure complied with the Iowa Consumer Credit Code when it was mailed to the consumer's residence address as defined in the statute, even though the consumer did not receive it because she had moved). *Van Blaricome* indicates that proper testimony regarding "office custom" is "sufficient, absent proof to the contrary, to raise a presumption that the notices of default were mailed." 324 N.W.2d at 721. Yet, all this leads to another question (which we do not answer today): Can a consumer's sworn denial that he received a notice to cure at the address listed thereon raise a genuine issue of fact for summary judgment purposes as to whether the notice was mailed, even assuming the creditor provides competent proof of "office custom" regarding mailing?

Finally, we reject Citibank's argument that Makohoniuk waived his right to appeal the summary judgment ruling because he did not order a transcript of the summary judgment hearing. Citibank suggests that some additional explanation of the law firm's business practices was provided at that hearing. However, the purpose of a summary judgment hearing is to allow attorneys to present argument, not to receive additional evidence. Thus, a summary judgment hearing is ordinarily not the kind of hearing covered by Iowa Rule of Appellate Procedure 6.803. Absent a special circumstance, which has not been shown here, Makohoniuk was not required to order a transcript of the summary judgment hearing.

For the foregoing reasons, we reverse and remand for further proceedings.

REVERSED AND REMANDED.