

13CA2099 Ramsdale v LVNV Funding 01-15-2015

COLORADO COURT OF APPEALS

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Court of Appeals No. 13CA2099  
City and County of Denver District Court No. 12CV7079  
Honorable Kenneth M. Laff, Judge

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LVNV Funding, LLC,

Plaintiff-Appellee,

v.

David Ramsdale,

Defendant-Appellant.

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JUDGMENT AFFIRMED IN PART, REVERSED IN PART,  
AND CASE REMANDED WITH DIRECTIONS

Division VII  
Opinion by JUDGE LICHTENSTEIN  
Navarro and Berger, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**  
Announced January 15, 2015

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In this credit card debt collection case, defendant, David Ramsdale, appeals the district court's order granting summary judgment in favor of plaintiff, LVNV Funding, LLC (LVNV). We affirm in part and reverse in part.

### I. Background

Ramsdale accumulated debt on a credit card issued by a bank. LVNV brought this action to collect that debt, alleging that it had been assigned Ramsdale's account by the bank and another intermediary corporation.

LVNV moved for summary judgment on its debt collection claim. It provided the court with affidavits, including an affidavit from LVNV's authorized representative, Matthew Sowell (Sowell affidavit); a Bill of Sale and Assignment of Loans (Bill of Sale); a Declaration of Account Transfer (Declaration); and Ramsdale's credit card account statements. The Bill of Sale and Declaration are assignment contracts, but they refer to a group of loans being assigned and do not list Ramsdale's account individually. The Sowell affidavit identifies Ramsdale's account as one of the

accounts in the group of loans, “Portfolio 18129,” being assigned under the Bill of Sale and Declaration.

Ramsdale responded that, among other things, the Bill of Sale and Declaration did not “establish [LVNV] was assigned the subject credit card agreement” because “it is impossible to determine if the credit card agreement at issue in this case was included in the sale.” Ramsdale also moved for summary judgment in his favor.

The district court denied Ramsdale’s motion and granted summary judgment in favor of LVNV in the amount of \$25,595.10 for the debt, \$299.00 for costs, and interest to accrue on the judgment at the statutory rate of 8%.

Ramsdale appeals and contends that the district court erred in not granting summary judgment in his favor and in granting summary judgment in LVNV’s favor because LVNV did not establish that it was assigned Ramsdale’s account and, thus, that LVNV was not a real party in interest with standing.

As an initial matter, we reject LVNV’s argument that Ramsdale did not preserve his contention at the district court and thus waived his right to raise real-party-in-interest or standing issues on appeal. Upon our review of the record, Ramsdale’s answer to the complaint

expressly raised, as an affirmative defense, that “[LVNV] is not the real party in interest, and therefore lacks standing to pursue the claims made herein.” Consequently, we conclude that the issue is preserved.

We now turn to the summary judgment.

## II. Summary Judgment

Ramsdale contends that the district court erred in granting summary judgment in favor of LVNV and in denying his motion for summary judgment because LVNV did not establish that it was assigned Ramsdale’s account because (1) LVNV Funding did not attach any of the “business records” that the Sowell affidavit references, and the other exhibits do not establish an assignment because these documents did not list his account; (2) LVNV Funding did not produce the original business records establishing an assignment as required by the best evidence rule, CRE 1002; and (3) the Sowell affidavit is extrinsic evidence and inadmissible as a substitute for the records of the assignments.

### A. Standard of Review and Applicable Law

We review de novo an order granting summary judgment.

*CapitalValue Advisors, LLC v. K2D, Inc.*, 2013 COA 125, ¶ 14.

Summary judgment is appropriate when the pleadings, affidavits, and other supporting documents demonstrate that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Gibbons v. Ludlow*, 2013 CO 49, ¶ 11. The nonmoving party is entitled to the benefit of all favorable inferences that reasonably may be drawn from the evidence, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Amos v. Aspen Alps 123, LLC*, 2012 CO 46, ¶ 13.

Where a court is presented with cross-motions for summary judgment, it must consider each motion separately, review the record, and determine whether a genuine dispute as to any fact material to that motion exists. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1340 (Colo. 1988). If there are genuine disputes regarding facts material to both motions, the court must deny both motions. *Id.*

Where a party provides an affidavit with the motion for summary judgment, “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” C.R.C.P. 56(e); see *Struble v. Am. Family Ins. Co.*,

172 P.3d 950, 955 (Colo. App. 2007). If an affidavit refers to documents that are not attached, we will not consider the “documents that are not attached to the affidavit.” *Struble*, 172 P.3d at 955. But, we may consider “the portions of the affidavit that do not depend entirely on the [unattached] documents.” *Id.*

As relevant to this debt collection action, an assignee plaintiff can recover against a defendant debtor on summary judgment if it shows, among other things, that no genuine issues of material fact exist as to its status as the assignee for the debt. *See Platte Valley Mortg. Corp. v. Bickett*, 916 P.2d 631, 633 (Colo. App. 1996); *Alpine Assocs., Inc. v. KP & R, Inc.*, 802 P.2d 1119, 1121 (Colo. App. 1990). An assignee plaintiff generally meets this burden “by proving a full and complete assignment of the claim from an assignor who was a real party in interest with respect to the claim.” *Alpine Assocs., Inc.*, 802 P.2d at 1121. No specific formality is required to execute a valid assignment, but the intent to make an assignment must be clearly reflected in the plain language of the parties’ agreements. *People v. Adams*, 243 P.3d 256, 263 (Colo. 2010); *Med. Lien Mgmt., Inc. v. Allstate Ins. Co.*, 2013 COA 88, ¶ 14.

#### B. LVNV’s Summary Judgment Motion

As stated above, LVNV provided the district court with the Declaration, the Bill of Sale, the Sowell affidavit, and Ramsdale's credit card statements. It is undisputed on appeal that the Declaration and Bill of Sale relate to the assignment of a group of accounts from the bank to the intermediary corporation and then to LVNV. It is also undisputed that these two documents do not specifically list Ramsdale's account as part of the group of accounts that were assigned. As pertinent here, the Sowell affidavit states as follows:

5. Based upon the business records maintained on account [number ending in] []2476 (hereafter "Account"), which are a compilation of the information provided upon acquisition and information obtained since acquisition, the Account is the result of the extension of credit to David Ramsdale by Bank of America on or about 11/6/2007 (the "Date of Origination"). Said business records further indicate that Account was then owned by Bank of America, that Bank of America later sold and/or assigned Portfolio 18129 to Plaintiff's assignor which included the Defendant's Account on 4/30/2012 (the "Date of Assignment") and on the Date of Assignment, all ownership rights were assigned to, transferred to, and became vested in Plaintiff, including the right to collect the purchased balance owing of \$25,595.10.

On Ramsdale’s argument that LVNV’s exhibits did not establish an assignment, the district court ruled as follows: “The assignment of [Ramsdale’s] account to [LVNV] (as well as the underlying debt) is established by paragraph 5 of the Sowell Affidavit” and “the absence from the record of an attachment to the assignment specifically listing [Ramsdale’s] account is cured by the Sowell Affidavit.”

We do not agree with the district court. Sowell’s averment in the affidavit was “[b]ased upon the business records” as establishing that Ramsdale’s account was part of the group transfer. Although LVNV attached assignment contracts for a group transfer of accounts — the Declaration and the Bill of Sale — and Ramsdale’s credit card statements, none of these documents identifies Ramsdale’s account as one of the accounts being assigned in the group transfer. *See Struble*, 172 P.3d at 955-56 (disregarding references to the substance of an insurance policy that was not attached); C.R.C.P. 56(c). Instead, the assignment contracts refer to “Schedule 1” and “Exhibit A” as other documents that identify the loans that are part of the group transfer. But neither of these referenced documents are attached to the affidavit. Thus, because

LVNV referred to, but did not provide, these other documents, or any other evidence showing that Ramsdale's account was part of the group transfer, we conclude that LVNV did not establish that no genuine issues of material fact existed as to whether it had been assigned Ramsdale's account.

### C. Ramsdale's Motion for Summary Judgment

Ramsdale contends that, because LVNV's evidence did not establish the assignment, the district court should have granted summary judgment in his favor. But, denying LVNV's motion for summary judgment does not automatically indicate that Ramsdale has satisfied his burden to prove no genuine issue of material fact on his contention that there was no assignment. *See Churchey*, 759 P.2d at 1340.

Ordinarily, there can be no appeal from an order denying a motion for summary judgment because it is not a final judgment. However, here, the court's order denying Ramsdale's motion for summary judgment is a final, appealable order because the summary judgment for LVNV effectively ended litigation in the trial court. *See Geiger v. Am. Standard Ins. Co.*, 192 P.3d 480, 482

(Colo. App. 2008) (citing *Glennon Heights, Inc., v. Cent. Bank & Trust*, 658 P.2d 872, 875 (Colo. 1983)).

In our review, we give LVNV the benefit of all favorable inferences that reasonably may be drawn from the evidence and resolve all doubts about the existence of a genuine issue of material fact against Ramsdale. *Amos*, ¶ 13.

Upon review of the record — the affidavits, Declaration, Bill of Sale, and credit card statements — we are compelled to conclude that there is at least a doubt about whether LVNV is or is not the assignee. The Sowell affidavit states that LVNV acquires credit accounts and attached what he stated were the business records maintained on the account [§]2476, which matches the account number on Ramsdale’s credit card statements. And, the second affidavit, Jay M. Brammer’s affidavit, states that he has “knowledge” that Ramsdale owes LVNV \$25,595.10. Giving LVNV the benefit of all favorable inferences about its status as an assignee that can be drawn from this evidence, we conclude that the district court properly denied Ramsdale’s motion for summary judgment.

### III. Conclusion

The summary judgment in favor of LVNV is reversed, the denial of summary judgment for Ramsdale is affirmed, and the case is remanded for further proceedings consistent with this opinion.

JUDGE NAVARRO and JUDGE BERGER concur.