County Civil Court: CONSUMER LAW— Florida Consumer Collection Practices Act—Trial court did not err in finding that as a matter of law the communications at issue did not violate § 559.72(18), Fla. Stat. Plaintiff failed to demonstrate a genuine issue of material fact as to whether the challenged communications were attempts to collect a debt. *James A. Hurtubise v. P.N.C. Bank, N.A.*, No. 13-AP-0015-WS (Fla. 6th Cir. App. Ct. January 5, 2015).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

JAMES A. HURTUBISE,
Appellant,

v.

P.N.C. BANK, N.A.,
Appellee.
_____/

UCN: **512013AP000015APAXWS**
Appeal No: **2013-AP-0015-WS**
L.T. No: **2011-CC-4432-WS**

On appeal from County Court,

Honorable Paul Firmani,

Carl J. Hognefelt, Esq.,
Barry M. Elkin, Esq.
for Appellant,

Suzanne Youmans Labrit, Esq.,
Ryan C. Reinert, Esq.,
for Appellee.

ORDER AND OPINION

We find the communications received by Appellant did not constitute attempts to collect a debt in violation of § 559.72(18), Fla. Stat., as a matter of law, and therefore affirm the order of the trial court granting Appellee's motion for summary judgment. The award of attorney's fees is also affirmed and Appellee's motion for appellate attorney's fees is granted.

STATEMENT OF THE CASE AND FACTS

This case is before the Court on appeal of an order granting Appellee's motion for summary judgment. On June 23, 2010, Appellee instituted an action seeking to foreclose on a mortgage executed by Appellant, after which Appellant obtained counsel, who did not file a notice of appearance in the foreclosure action. Counsel for Appellant sent two letters to counsel representing Appellee in the foreclosure action, Ben-Ezra & Katz ("Ben-Ezra"), informing them Appellant had retained him for representation in the foreclosure action. Appellee maintains it did not receive these letters or acquire actual knowledge that Appellant had obtained counsel in the foreclosure action at any time prior to the proceedings in this case. Appellee maintains the foreclosure action is distinct from any activity to collect the debt owed by Appellant, and Ben-Ezra was only authorized to act as Appellee's agent regarding the foreclosure action and not debt collection matters, therefore even if notice received by Ben-Ezra could be imputed to Appellee, Appellee did not have actual notice as required by the Statute.

On August 31, 2011, Appellant received what Appellee characterizes as an advertisement for a locally sponsored workshop to assist homeowners in preservation of their property. The communication was addressed to "PNC Mortgage Customer," rather than Appellant personally, did not contain any information to identify Appellant, such as an address, account number, or balance, and did not include a request for payment.

On September 7, 2011, Appellee sent Appellant a letter providing contact information at PNC for questions relating to loss mitigation, which also did not request payment from Appellant. Appellee contends this notice was required to be sent by directive of the Department of Treasury, authorized by Congress as part of the Emergency Stabilization Act of 2008, 12 U.S.C.A. § 519(a), which requires a creditor assign a relationship manager to be a single point of contact for the debtor during delinquency and the default resolution process.

Appellant filed an action alleging violation of § 559.72(18), Fla. Stat., claiming Appellee attempted to collect a consumer debt after having actual knowledge of

Appellant's representation by counsel. Appellee responded with affirmative defenses, including that the communications complained of did not attempt to collect consumer debt, and that Appellee lacked the required actual knowledge of Appellant's representation by counsel. Appellee moved for summary judgment, which motion included a request for attorney's fees. After hearing on the motion, the trial court granted summary judgment in favor of Appellee, and awarded Appellee attorney's fees and costs.

STANDARD OF REVIEW

Summary judgment should only be granted when there is no genuine issue of material fact and one party has demonstrated entitlement to relief as a matter of law. *Shaw v. Tampa Elec. Co.*, 949 So. 2d 1066 (Fla. 2d DCA 2007). All inferences should be drawn in favor of the non-moving party. *Id.* When "reviewing the trial court's interpretation and application of Florida law, the standard of review on appeal is de novo." *Pichowski v. Florida Gas. Transmission Co.*, 857 So. 2d 219, 220 (Fla. 2d DCA 2003). We review the trial court's award of attorney's fees pursuant to an abuse of discretion standard. *D'Alusio v. Gould & Lamb, LLC*, 36 So. 3d 842 (Fla. 2d DCA 2010). Although questions of law are reviewed de novo, "findings of fact on the issue of attorney's fees are presumed correct." *See Grapski v. City of Alachua*, 134 So. 3d 987, 989 (Fla. 1st DCA 2012).

LAW AND ANALYSIS

Appellant first contends the trial court erred by applying federal law when granting summary judgment, rather than the standard provided by Fla. R. Civ. P. 1.520, based on the citation in the trial court's order to federal case law which is not applicable to motions for summary judgment in Florida.[1] The summary judgment standard in Florida differs from the more stringent federal standard and is more favorable to the non-moving party. *See Shaw*, 949 So. 2d at 1069. Although it appears the trial court

[1] We note that Appellant failed to file a post-judgment motion pursuant to Fla. R. Civ. P. 1.530, challenging the trial court's citation to federal summary judgment law, which would have given the trial court the opportunity to correct any alleged error. *See Pensacola Beach Pier*, 66 So. 3d 321, 325 (Fla. 1st DCA 2011); *D.T. v. Fla. Dep't of Children and Families*, 54 So. 3d 632, 633 (Fla. 1st DCA 2011).

may have relied in part on federal law when granting the Motion, the court also referenced the appropriate standard in Florida, and we find that pursuant to Florida law summary judgment was appropriate, and find no error on this basis.

Appellant contends the trial court's findings that the two communications were not for the purpose of collecting payment on a debt were in error, citing *Gburek v. Litton Loan Servicing, LP*, 614 F. 3d 380, 386 (7th Cir. 2010). In *Gburek*, the Court found the communications sent were prohibited by the FDCPA where they stated plaintiff was in default on her loans, offered to discuss foreclosure alternatives, and asked for financial information to initiate that process. *See id.* In this case, the first communication sent advertises a seminar for a "home rescue event" and provides that should a debtor choose to attend one of the seminars, certain financial information should be provided at that time. The Advertisement contained no personal identifying information.

Section 559.72(18), Fla. Stat. provides:

In collecting consumer debts, no person shall:

> Communicate with a debtor if the person knows that the debtor is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the debtor's attorney fails to respond within 30 days to a communication from the person, unless the debtor's attorney consents to a direct communication with the debtor, or unless the debtor initiates the communication.

"The Fair Debt Collection Practices Act generally prohibits 'debt collectors' from engaging in abusive, deceptive, or unfair debt-collection practices." *Gburek*, 614 F. 3d at 384 (citing 15 U.S.C. § 1692 *et seq*). "Among other things, the FDCPA regulates when and where a debt collector may communicate with a debtor, restricts whom a debt collector may contact regarding a debt, prohibits the use of harassing, oppressive, or abusive measures to collect a debt, and bans the use of false, deceptive, misleading, unfair, or unconscionable means of collecting a debt." *Id.* (citing 15 U.S.C. § 1692(c)-(f)). "For the FDCPA to apply, two threshold criteria must be met: (1) the defendant must qualify as a debt collector; and (2) the communication must have been made in connection with the collection of any debt." *Parker v. Midland Credit Mgmt., Inc.*, 874 F. Supp. 2d 1353, 1355 (M.D. Fla. 2012).

Appellee does not dispute that is a "debt collector" pursuant to the statute, but claims the communications were not attempts to collect consumer debt. "In Florida, consumer debt collection practices are regulated by both the FCCPA and the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (FDCPA)." *Read v. MFP, Inc.*, 85 So. 3d 1151, 1153 (Fla. 2d DCA 2012). "Both acts generally apply to the same types of conduct, and Florida courts must give 'great weight' to federal interpretations of the FDCPA when interpreting and applying the FCCPA." *Id.* (citing § 559.77(5), Fla. Stat.).

Appellant relies on language in both communications which states: "This is an attempt to collect a debt. Any information obtained will be used for that purpose . . . ." The trial court held that this language is required to be included in such communications by federal law, and this language alone did not constitute a basis for a violation of § 559.72(18), Fla. Stat. *See Gburek*, 614 F. 3d at n.3 (including a disclaimer that a communication is "an attempt to collect a debt . . . does not automatically trigger the protections of the FDCPA, just as the absence of such language does not have dispositive significance.") (citing *Lewis v. ACB Bus. Servs., Inc.*, 135 F. 3d 389, 400 (6th Cir.1998)). We find no error with the trial court's findings on this issue.

In order "for a communication to be in connection with the collection of a debt, an animating purpose of the communication must be to induce payment by the debtor." *Grden v. Leikin Ingber & Winters, PC*, 643 F. 3d 169, 173 (6th Cir. 2011). In the event "the FDCPA does apply, then it is for the fact-finder to decide whether the correspondence constituted a collection not permitted by law." *Lara v. Specialized Loan Servicing, LLC*, not reported in F. Supp. 2d, 2013 WL 703854 at *2 (S.D. Fla. 2013). Appellant alleges a genuine dispute of material fact as to the animating purpose of the communications, and that the question should have been submitted to a jury. In *Lara,* the court concluded that communications including statements that "this communication is from a debt collector . . . please be advised that we are attempting to collect a debt," and "this is an attempt to collect a debt and any information obtained will be used for that purpose," presented a possible jury question of whether the communications constituted violations of the FDCPA pursuant to the "least sophisticated consumer

standard" set forth in *Jeter v. Credit Bureau, Inc.*, 760 F. 2d 1168 (11th Cir. 1985). *Id.* at *3.

Appellant relies on a deposition of Appellee's corporate representative to demonstrate an issue of material fact, in which it was acknowledged that the purpose of the Advertisement was to provide an opportunity to work on "loss mitigation or homeowner preservation" to help "borrowers keep their properties." The representative acknowledged that "one of the purposes" of the loan modification encouraged by the letter was repayment of the debt. The trial court properly determined the testimony that one goal of loan modification is payment of a debt, does not support the contention that the "animating purpose" of the communication advertising a loan modification seminar was to collect the debt owed by Appellant.

The trial court may determine whether a communication is sent in connection with collection of an existing debt as a matter of law pursuant to the FCCPA and FDCPA. *See Read*, 85 So. 3d at 1153; *Parker*, 874 F. Supp. 2d 1353. The trial court correctly found Appellant failed to demonstrate a genuine fact issue as to the nature of the communications, and therefore summary judgment was appropriate. *See Schauer v. Morse Operations, Inc.*, 5 So. 3d 2, 5-6 (Fla. 4th DCA 2009).

Federal courts have held that not all communications between a debt collector and a debtor are covered by the statutes, and communications which are informational in nature are outside the application of the debt collection statutes. *See Parker*, 874 F. Supp. 2d at 1356-57; *Grden*, 643 F. 3d at 173; § 559.72, Fla. Stat. The trial court correctly concluded the Advertisement was informational only and not an attempt to collect a debt. The cases relied on by Appellant are distinguishable from this case. In *Gburek*, the communications were directed to the homeowner individually and made specific demands for financial information, stating that "ongoing legal action on your home" will not be delayed "until your financial information has been received and processed." 614 F. 3d at 382. The communications requested the debtor explain the reason for defaulting on the loan and propose ways to resolve the delinquent status. *See id.* at 382-83. The Advertisement in this case contained no similar language. The trial court also correctly rejected the argument that language in the Advertisement

required to be included by the FDCPA created an issue of fact in this case. *See Lewis v. ACB Bus. Servs., Inc.*, 135 F. 3d 389 (6th Cir. 1998) (including such language "does not transform the letter into an unlawful demand for payment," rather, "such a statement is required by the FDCPA") (citing 15 U.S.C. § 1692e(11) (1987)).

Appellee claims the second communication, the "HAMP" letter, was issued in order to comply with the Home Affordable Modification Program, requiring that borrowers be assigned a manager to serve as a single point of contact for the borrower throughout the delinquency or default resolution process. The trial court correctly found no violation of § 559.72, Fla. Stat., where the communication was required by federal law, and that the Letter was not an attempt to collect a consumer debt.

Even if either communication could be construed as an attempt to collect a debt, Appellee claims it had no actual knowledge Appellant had obtained representation in the underlying foreclosure action, or the collection of the underlying debt, as required to demonstrate violation of § 559.72(18), Fla. Stat. *See Bacelli v. MFP, Inc.*, 729 F. Supp. 2d 1328, 1334-36 (M.D. Fla. 2010) (courts may not impute knowledge when actual knowledge is required by statute). The trial court found this issue was moot based on the finding that neither communication constituted an attempt to collect a debt, but nevertheless held that Appellant failed to demonstrate Appellee had actual knowledge of representation. Although Appellant contends notice was provided to Ben-Ezra that Appellant had retained counsel, Appellee contends it never received such notice, and that any such notice would be insufficient because Appellant was notified by letter to contact Ben-Ezra regarding the foreclosure action, but to contact PNC directly regarding any debt collection matters, and Ben-Ezra had no authority to act as Appellee's agent for matters related to debt collection. *See Trent v. Mortgage Electronic Registration Systems, Inc.*, 618 F. Supp. 2d 1356, 1360 (M.D. Fla. 2007) ("foreclosing on a mortgage is distinct from the collection of the obligation to pay money," and the "FDCPA is intended to curtail objectionable acts occurring in the process of collecting funds from a debtor," and not foreclosure actions). The trial court correctly found Appellant failed to demonstrate a fact issue as to the notice requirement.

ATTORNEY'S FEES

We find the order awarding attorney's fees is supported by the record. Although the order does not reference the specific statute, the order states that Appellant's pleadings were "bare legal conclusions or naked assertions," and the record was "devoid of facts" which would substantiate Appellant's claims. Appellee requested attorney's fees pursuant to § 559.77(2) in the Motion for Summary Judgment, for a failure to raise any justiciable issue of law or fact. Appellant correctly states that Appellee failed to request attorney's fees in a pleading, as is required. *See Sardon Found. V. New Horizons Serv. Dogs, Inc.*, 852 So. 2d 416 (Fla. 5th DCA 2003). However, Appellant waived this issue by failing to give the trial court an opportunity to correct any error below by filing a post-judgment motion pursuant to Fla. R. Civ. P. 1.530. *See Pensacola Beach Pier*, 66 So. 3d 321, 325 (Fla. 1st DCA 2011); *D.T. v. Fla. Dep't of Children and Families*, 54 So. 3d 632, 633 (Fla. 1st DCA 2011). Based on the facts in this case the award of fees did not amount to fundamental error. *See Stockman v. Downs*, 573 So. 2d 835, 838 (Fla. 1991) (when "a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement," any objection based on "failure to plead a claim for attorney's fees" is waived). Based on this finding, we grant Appellee's motion for appellate attorney's fees pursuant to § 59.46, Fla. Stat., and pursuant to Fla. R. App. P. 9.400(b), the cause is remanded to the trial court for a determination of a reasonable award of appellate attorney's fees.

CONCLUSION

We find that the communications at issue in this case were not attempts to collect a debt in violation of the Statute, as a matter of law. We therefore affirm the order granting summary judgment. The trial court's award of attorney's fees is also affirmed, and Appellee's motion for appellate attorney's fees is granted.

It is ORDERED AND ADJUDGED that the order of the trial court is AFFIRMED.

It is further ORDERED that Appellee's Motion for Appellate Attorney's Fees is GRANTED and the cause is remanded to the trial court for a determination of reasonable fees.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 5th day of January, 2015.

Original order entered on January 5, 2015, by Circuit Judges Stanley R. Mills, Daniel D. Diskey and Linda Babb.