Proof of Expenses: Time for an Amendment to CPLR 4533-a

By **Marilyn T. Sugarman** | November 16, 2021

In determining spousal maintenance or child support, attorneys often find themselves having to prove payment for costs of goods or services. How is this accomplished?

Imagine, for example, trying to enter into evidence proof of payment for extracurricular activities. You have a receipt for $1,800 for gymnastics classes, and an email confirmation for private figure skating lessons in the amount of $3,600. Your client is prepared to testify as to enrolling the parties' children in these activities and paying for the classes and the coaching. Opposing counsel objects to the admissibility of these documents on the grounds that they constitute hearsay. Will the documents be entered into evidence? If not, would you really be required to produce the purveyor?

When I presided over matrimonial cases as a Special Referee in New York County, I urged attorneys to stipulate to the admissibility into evidence of any document that appeared to be a bona fide financial document. In an effort to seek a concession, I would joke that if a document does not look like it was printed in Bernie Madoff's basement, it should be allowed into evidence. Surely, I hoped, defendant's counsel would agree that plaintiff could testify to such an expense and the document would be admitted into evidence since it was likely that defendant's counsel could have the same issue later in the case. But counsel would not always consent. If the adversary happened to be a pro se litigant with some basic knowledge of the rules of evidence, the odds were even less likely.

While there is no evidentiary rule in New York codifying the admission of such a document as a business record (and there is no residual hearsay exception, as in the Federal Rules of Evidence (see Fed. R. Evid. 807)), a number of appellate cases have endorsed a hearsay exception to allow the admissibility of bills or invoices so long as there is competent testimony to accompany the written document. In *Schiero v. Perrotta*, 140 A.D.3d 970 (2d Dep't 2016), the Second Department reversed the evidentiary ruling of a Support Magistrate who precluded the mother from introducing evidence to show unreimbursed medical expenses. The appellate court held that the mother should have been permitted to introduce medical bills into evidence because her testimony "provided a sufficient foundation for the admission of the medical bills and her proof of payment of the bills, as she had personal knowledge of their contents." The court held that she should have been allowed to meet her initial burden of presenting prima facie evidence of nonpayment. Similarly, in *Barmoha v. Eisayev*, 146 A.D.3d 946 (2d Dep't 2017), a letter from the child's day care provider was admitted into evidence in

a Family Court support proceeding to show proof of the mother's payment of the monthly bill. The letter most certainly was not the mother's business record, but court allowed it, together with her testimony, as proof of "sufficient evidence of the costs of child care [sic] expenses."

Most recently, in *Anthony L. v. Bernadette R.*, 193 A.D.3d 510 (1st Dep't 2021), the First Department endorsed the evidentiary ruling of the Support Magistrate with respect to admissibility of proof of childcare expenses, noting that "[i]t was a provident exercise of discretion for the Support Magistrate to assess the documentary evidence provided by the mother in light of the mother's credible testimony about payments to the childcare workers, as well as that of a corroborating neighbor." The decision is silent as to the amount of the expense.

In all of these cases, litigants relied on the Support Magistrate or Judge to assess the testifying party's credibility to determine whether there was sufficient corroboration to allow a hearsay document into evidence. But a little known and even less utilized provision of the C.P.L.R. can be employed in such instances to ensure that a document is admissible. C.P.L.R. Rule 4533-a, titled "Prima facie proof of damages," provides that

[a]n itemized bill or invoice, receipted or marked paid, for services or repairs of an amount not in excess of two thousand dollars is admissible in evidence and is prima facie evidence of the reasonable value and necessity of such services or repairs itemized therein in any civil action provided it bears a certification by the person, firm or corporation, or an authorized agent or employee thereof, rendering such services or making such repairs and charging for the same, and contains a verified statement that no part of the payment received therefor will be refunded to the debtor, and that the amounts itemized therein are the usual and customary rates charged for such services or repairs by the affiant or his employer; and provided further that a true copy of such itemized bill or invoice together with a notice of intention to introduce such bill or invoice into evidence pursuant to this rule is served upon each party at least ten days before the trial. No more than one bill or invoice from the same person, firm or corporation to the same debtor shall be admissible in evidence under this rule in the same action.

As the Practice Commentaries note, Rule 4533-a derived largely as the result of a push to allow bills and invoices to be admitted into evidence in small cases to allow a litigant to prove damages. "[T]he rule creates a hearsay exception and self-proving method of authentication for itemized bills for services and repairs that do not exceed $2,000." Alexander, Vincent C., McKinney's Practice Commentaries, CPLR 4533-a.

Traditionally, the statute was employed in smaller cases so that the cost to plaintiff of proving damages would not exceed the damages themselves. Although a version of this Rule was enacted in 1966 relating to automobile repair bills, it became available in all civil actions as of Sept. 1, 1970. The statute is rarely utilized in matrimonial cases. The first reported references to the statute in a matrimonial case was in *Matter of Haroche v. Haroche*, 38 A.D.2d 957 (N.Y. App. Div.) in 1972, in which the wife sought to have the husband pay $150 to their child's orthodontist. The wife had tried, unsuccessfully, to use a Notice to Admit to have the husband acknowledge the necessity of the orthodontic services, which the court rejected as not being the proper subject of a Notice to Admit. The Second Department gratuitously observed, "[w]e note in passing that the evidentiary problem encountered as to the necessity for and reasonable value of most of the medical and dental expenses for which claim was made might have been avoided by the use of CPLR 4533-a, which became available in all civil actions as of September 1, 1970." Id.

One drawback of the statute is that the New York State Legislature has not increased the $2,000 cap since the Rule was last amended in 1988. Even only factoring in inflation, $2,000 in 1998 is equivalent to over $4,600 today. See Official Data Foundation/Alioth LLC, CPI Inflation Calculator. Bills have been introduced in virtually every legislative session to amend CPLR 4533-a to increase the maximum amount of the invoice to $10,000, but the legislation always died. A bill introduced in 2013 (A.911) failed to garner support, despite the support of the Committee on Civil Practice Law and Rules of the New York State Bar Association. Similar bills have been introduced in various legislative sessions since that time providing for the admission into evidence of up to two invoices or bills from the same creditor that do not total more than $10,000. (Bills were introduced in the following legislative sessions: 2009-10: A11196, A6563, A10153; 2011-12: A2627; 2013-14: A911; 2015-16: A3519; and 2017-18: A5351.) Most recently, a bill was introduced in the Assembly in February 2019 (A04512) and was referred to the Judiciary Committee but never advanced to a vote.

It is long past time to amend not only the dollar limitation set forth in the statute, but to allow a greater number of invoices from the same provider, particularly if there is testimony and/or other documentary evidence offered to substantiate the claims. A combination of bills or invoices; a credit card statement; canceled check; Venmo or Zelle message; or an email or text message—together with testimony of the party who paid the invoice or bill—should present a sufficient indicia of reliability to prove payment of an expense.

Conclusion

If New York state is not prepared to adopt a residual hearsay exception that codifies when any hearsay statement should be admissible—after the adverse party is given reasonable notice of the intent to

offer the statement—so long as there is a guarantee of trustworthiness (see Fed. R. Evid. 807), there should at least be an amendment to CPLR 4533-a to relax some of the onerous requirements under the Rule. This would benefit practitioners who want to be assured that their evidence will be admitted at trial, rather than trusting that the court will determine that a litigant has provided a sufficient foundation for the admission of bills and invoices into evidence.

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