IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

JAMES A. TURNER and TRACY
TURNER, husband and wife,

    Plaintiffs-Appellants,

v.

FIRST NEW MEXICO BANK,

    Defendant-Appellee.

NO. 33,303
Luna County
CV-2012-332

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY
J.C. Robinson, District Judge

BRIEF IN CHIEF

Respectfully submitted,

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I. Questions Certified for Review:

1. Did Judge Robinson err in finding that his court did not have jurisdiction, and then entering an order of dismissal with prejudice?

2. Did Judge Robinson err by failing to hold an evidentiary hearing and changing Judge Viramontes' Order of Dismissal *Without Prejudice* to an Order of Dismissal *With Prejudice*?

3. Did Judge Robinson err in finding that Judge Viramontes' Order of Dismissal *Without Prejudice* was a final order, thus terminating the matter at the trial court level and failing to allow the case to be decided on the merits?

4. Did Judge Robinson err in finding that the Fair Credit Reporting Act (FCRA) applies to commercial loans? The credit reporting matter in this case stems from a commercial, not consumer loan. This is an issue of fact, which needs to be heard by the trier of fact.

II. Arguments:

This suit arises out of actions taken by First New Mexico Bank against Appellants in Luna County. Appellants purchased a farm in 1999 and built a dairy on the farm. Appellants financed the purchase and construction with loans in excess of $1,000,000.00 from Appellees, which is

a bank that has offices in Deming and Silver City, New Mexico. Appellants'

dairy was successful. However, contrary to various loan documents between

Appellants and Appellees, First New Mexico Bank began refusing to

provide financing to the dairy operation for feed, upkeep, and overhead.

Appellees made oral commitments for financing and then refused to comply

with the commitments made. Appellees' course of conduct became so

egregious and oppressive that Appellants were forced to sell their dairy

operation, liquidate their herds, dispose of their real estate and water rights,

and totally abandon the dairy business they had been successful in operating.

As Plaintiffs stated in their Response to First New Mexico Bank's

Motion to Dismiss, the allegations here raise factual questions of whether

the conduct was so lacking in good faith and indicative of a lack of fair

dealing so as to deprive the Plaintiffs from receiving the fruits of their

bargain.

The Appellees' actions raise genuine issues of material facts that have

to be determined by a trier of fact. Appellants argue that the trier of fact

could find that the actions taken by Appellees were deliberate.

The duty of good faith and fair dealing is not limited to the Uniform

Commercial Code (UCC) or to a breach of contract, though. It is a concept

imposed upon all parties to be subject to a duty of good faith and fair dealing

in contractual performance and enforcement. It requires that neither party do anything that will deprive the other of the benefits of any agreement. The New Mexico Supreme Court has recognized the implied covenant of good faith and fair dealing in the context of a loan guaranty contract under the New Mexico UCC, *American Bank of Commerce v. Covolo*, 88 N.M. 405, 408, 540 P.2d 1294 (1975) See also, *Spencer v. J.P. White Bldg.*, 92 N.M. 211, 214, 585 P.2d 1092 (1978) (implied covenant of good faith and fair dealing in long term real estate lease).

Please note that the covenant does not need to be expressed. It is implied and acts to protect the parties to the contract from obstructing the other party's benefit whether the benefit is express or implied, and it requires one party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain; it requires that the parties act in a way that honors the parties' reasonable expectations. *Guidance Endodontics, LLC v. Dentsply International, Inc.*, 633 F.Supp.2d 1257; *City of Raton v. Arkansas River Power Authority*, 611 F.Supp.2d 1190; *Salas v. Mountain States Mutual Casualty Co.*, 202 P.3d 1200, 144 N.M. 449. Further, the New Mexico Court of Appeals has said that claims that may arise out of a breach of duty of good faith sounds in both contract

and tort. *Crawford v. American Employers' Ins. Co.*, 86 N.M. 612, 619, 526 P.2d 206 (Ct. App. 1974, rev'd on other grounds, 87 N.M. 375, 533 P.2d 1203 (1975)).

To compound the matter, First New Mexico Bank also sought to gain control of the management of the dairy and of the Appellants, including requiring Appellants to submit for First New Mexico Bank's approval all checks issued by Appellants, even those for minor household items. Appellees went so far as to return checks of $1000.00 or less when there was over $100,000.00 in the Appellants' operating account. This is in direct violation of §55-4-402 NMSA UCC-Negotiable Instruments. This is actionable in and of itself, and if found by the trier of fact to be willful, would support actual and punitive damages. *Loucks v. Albuquerque National Bank*, 76 N.M. 735, 418 P.2d 191 (1966) and *Allison v. First National Bank*, 85 N.M. 283, 511 P.2d 769 (1973).

Appellants argue that a finder of fact would have found that Appellees' actions amounted to interference with Appellants' business. In *State National Bank of El Paso v. Farah Manufacturing Company, Inc.*, 678 S.W.2d 661 (1984), the Court of Appeals of Texas (COAT) ruled that for an action of interference with a contract,

> It must be established that (1) there was a contract subject to interference, (2) the act of interference was wilful (sic) and

intentional, (3) such intentional act was a proximate cause of Plaintiff's damage, and (4) actual damage or loss occurred … The proof of these elements establishes a prima facie case of interference. It then becomes incumbent upon the part of the defendant to show that his acts were either justified or privileged. In all cases, the act of interference must be without legal right or justifiable cause on the part of the defendant.

Id. (internal citations omitted). The COAT also stated:

Interference embraces within its scope all intentional invasions of contractual relations, including any act injuring or destroying property and so interfering with the performance of the contract itself, regardless of whether breach of contract is induced. It presupposes knowledge of the plaintiff's interests or, at least, of facts that would lead a reasonable man to believe in their existence.

Id. (internal citations omitted). Additionally, the COAT found that an act is wrongful if it does not rest on a legitimate interest or if there is a sharp dealing or overreach or other conduct below the behavior of men similarly situated. *Id.* (internal citation omitted). Even if there is a justifiable business interest, that does not grant an absolute privilege to interfere with a contract between others. *Id.* (internal citation omitted). Interference requires only that acts be done willfully and intentionally, not necessarily with intent to harm. *Id.* (internal citation omitted).

Judge Robinson did not hear facts in this case that would have allowed a finder of fact to find that Appellees actions interfered in Appellants' business to the extent that Appellants were unable to run the

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dairy in a normal manner. Appellants argue that a finder of fact would have found that Appellees' actions in this matter amounted to interference, and were therefore actionable.

In addition, during the year 2008, Appellants had borrowed money from Appellees, which Appellants paid in full prior to October 22, 2008. Appellees, however, filed an erroneous credit report that caused damage to the Appellants. Appellants have sent letters demanding corrections to an attorney for Appellees informing them of this error, but Appellees have failed and refused to remove the adverse credit information sent to the various credit reporting agencies, and to this date continue to refuse to do so.

Judge Robinson incorrectly held that this matter was a consumer debt and found that the Fair Credit Reporting Act (FCRA) was not only applicable, but dispositive to this case, thus the District Court did not have jurisdiction to hear this matter. However, the FCRA was drafted to address the problems of consumers and credit cards. The Fair Credit Reporting Act, 15 U.S.C. §1681 et seq., and *Apodaca v. Discover Financial Services*, 417 F.Supp.2d 1220 (2006) ("the relevant provisions of the FCRA… are limited to consumer credit reports, not business credit reports").

The facts of this case show that this was not a consumer relationship, but a commercial loan to finance a large dairy operation. Further, this is not

a case of erroneous reporting due to negligence or other erroneous acts. As stated above, this is a deliberate and malicious act by Appellee. Appellees's actions resulting in the erroneous reporting, compounded by their failure to correct the error, are one of the bases for this suit, and were misinterpreted by Judge Robinson as a violation of a consumer loan. The evidence and witness testimony would have shown that the loan subject of this suit is a commercial, not a consumer, loan.

Finally, Appellants acknowledge that punitive damages are not an independent cause of action. However, there are damages that can be awarded by the trier of fact deriving out of the other above actions. The actual damages must be pled before punitive damages can be awarded, and Appellants did that in this matter.

The case was originally brought before the Sixth Judicial Court under case number D-619-CV-2010-374. Judge Viramontes dismissed the case *without prejudice*, and not on the merits. Judge Viramontes dismissed all claims for failure to state a claim pursuant to Rule 1-012(b)(6) and for federal preemption as to Count 2, which formed the basis of the dismissal *without prejudice* (see Exhibit A, Judge Viramontes' Order of Dismissal *Without Prejudice*). Appellants re-filed the case in the same District Court, where Judge J.C. Robinson again stated that Appellants failed to state a

claim and were barred by federal preemption. However, Judge Robinson, after reviewing the case, changed the dismissal *without prejudice* to a dismissal *with prejudice*. It would be an exercise in futility to ask for reconsideration in the District Court, thus Appellants chose to appeal to the Court of Appeals.

The oppressive, malicious, reckless, and wanton actions of Appellees have resulted in injuries to Appellants to the extent that they had to abandon their dairy farm business. Appellants have also suffered damages to both their business and their personal estate because of the false and adverse credit reporting of the Appellees. Appellants sought damages against Appellees in such amount as may be proven at trial.

The Court of Appeals should find that this is a fact issue: Is this a consumer or commercial loan? If the debt at issue in this matter is a consumer debt, it has to go to Federal Court. If it is not a consumer debt, but a commercial debt, it can be brought in State District Court. This is a matter of fact that needs to be heard by a trier of fact; however, Judge Robinson heard no facts in this matter.

If this Court finds that Judge Robinson's holding is correct and this is a consumer debt, jurisdiction would then be proper in the Federal courts, and Judge Robinson could not dismiss the matter with prejudice because the

State District Court would not have had jurisdiction to do so. Judge Robinson's dismissing the matter with prejudice had the effect of depriving the Federal Court from its jurisdiction.

Did Judge Robinson err in finding that his court did not have jurisdiction, and then entering an order of dismissal with prejudice?

Judge Robinson incorrectly dismissed this case *with prejudice*, while simultaneously stating that he didn't have jurisdiction because, in his opinion, it was preempted by federal jurisdiction. Judge Robinson held that the debt at issue was a consumer debt, thus his Court did not have jurisdiction over it. However, if Judge Robinson's court did not have jurisdiction, Judge Robinson had no jurisdiction to dismiss the case with prejudice. Judge Robinson would have been bound to be consistent and dismissed it in the same manner that Judge Viramontes did, *without prejudice* for a lack of jurisdiction.

As it stands, Judge Robinson's dismissal of this matter with prejudice deprived the Federal court from its jurisdiction in this matter. If, as Judge Robinson held, the State District Court did not have jurisdiction, he could not dismiss the matter with prejudice. At most, he would have had to dismiss this matter for lack of jurisdiction, and the Federal courts would then have taken up the matter.

Did Judge Robinson err by failing to hold an evidentiary hearing and changing Judge Viramontes' Order of Dismissal _Without Prejudice_ to an Order of Dismissal _With Prejudice_?

Yes, Judge Robinson erred by failing to hold an evidentiary hearing and changing Judge Viramontes' decision of dismissal without prejudice to dismissal with prejudice. Judge Robinson presumed findings without holding an evidentiary hearing and made a determination not based on any facts that this was a consumer loan when the description of 1000 head of cattle and the loan amount of $1,000,000.00 (one-million dollars) would have shown otherwise. This was a commercial loan executed by individuals who became the borrowers.

The allegations in this matter raise factual questions of whether the loan was a consumer loan or a commercial loan. This is a factual issue which would have determined whether the loan was commercial or consumer, but Judge Robinson did not hear facts, as he should have.

Did Judge Robinson err in finding that Judge Viramontes' Order of Dismissal _Without Prejudice_ was a final order, thus terminating the matter at the trial court level and failing to allow the case to be decided on the merits?

Judge Robinson did err in determining that Judge Viramontes' Order of Dismissal _Without Prejudice_ was a final order. Had Judge Viramontes

intended it to be a final order, Judge Viramontes would have dismissed the case *With Prejudice*. Further, the matter was not litigated to the extent that Judge Robinson stated in his order. The order of dismissal was not on the merits. Judge Viramontes dismissed the case on failure to state a claim and federal preemption, *without prejudice*.

Judge Viramontes understood that if the matter was preempted by federal law, he could not dismiss with prejudice. The matter was in the wrong venue, and he simply did not have jurisdiction to hear the case. Judge Robinson also said that he did not have jurisdiction to hear the case, so he, too, should have dismissed the matter without prejudice. If a Court does not have jurisdiction to hear a matter, it cannot dismiss said matter with prejudice. It simply cannot hear the matter, and must dismiss it without prejudice so that the correct venue can hear the matter.

Did Judge Robinson err in finding that the Fair Credit Reporting Act (FCRA) applies to commercial loans?

Judge Robinson erred in finding that the Fair Credit Reporting Act applies to commercial loans. Judge Robinson did not allow Appellants to present evidence showing that, as a commercial loan, the loan at issue did not fall under the Fair Credit Reporting Act.

III. Prayer for Relief:

Appellants pray that this matter be heard by oral argument before this Honorable Court, that this Court overturn the District Court's dismissal with prejudice in this matter, and that this Court remand the matter to the District Court so that the District Court hold a hearing to gather the factual evidence needed to determine whether the proper venue is State District Court or Federal Court.

Respectfully submitted this 12[h] day of May, 2014,
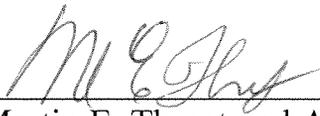
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-502(D)(3) NMRA, I certify that attached Brief in Chief uses 14 point proportionately spaced Times New Roman font and contains 2554 words in the body of the Petition as defined in Rule 12-502(D)(1). This word count was generated using Microsoft Word 2013.

Dated this 12th day of May, 2014.

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Martin E. Threet, Esq.

CERTIFICATE OF SERVICE

I, Martin E. Threet, HEREBY CERTIFY and duly swear that this the 12th day of May, 2014, that a true and correct copy of the foregoing Brief in Chief was served upon the persons listed below by mailing or delivering same to each party
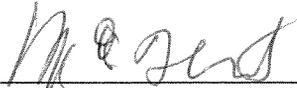
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