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

REPLY BRIEF

Respectfully submitted,

Martin E. Threet, Esq.
Martin E. Threet and Associates
6605 Uptown Blvd. NE Ste. 280
Albuquerque, NM 87110
Phone: 505-881-5155
Fax: 505-881-5356

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INTRODUCTION

Appellants incorporate their Brief in Chief in its entirety with this Reply Brief.

Black's Law Dictionary defines "Dismissal without prejudice" as follows: "Term meaning dismissal of action without prejudice to the right of the complainant to sue again on the same cause of action. The effect of the words 'without prejudice' is to prevent the decree of dismissal from operating as a bar to a subsequent suit." It is unclear how Appellees came to the conclusion that Appellants were barred from bringing the same cause of action before the lower court. A dismissal without prejudice, ***by its very definition***, does not bar the complainant from suing again on the same cause of action. Contrary to Appellees' assertion in their first paragraph of their Answer Brief, Appellants were under no duty to appeal Judge Viramontes' ruling in 2012 dismissing their claim. Judge Viramontes dismissed the case without prejudice, clearly indicating that it could be re-filed.

Defendants/Appellees are attempting to portray this as a misguided effort that should not even be appealable, citing that Appellants "have failed to challenge Judge Robinson's ruling that their claims are barred by collateral estoppel"; that Appellants failed to preserve their arguments regarding proper form of order for appeal; and that Appellants' questions did

not relate to the rulings on Counts I or III and Appellants have conceded that Count III was properly dismissed; and that Count II is preempted by the FCRA. Appellees' arguments are off base, and this Court should overturn the lower Court's ruling dismissing Appellants' claims with prejudice.

I. FACTS

Appellants feel it is imperative to correct the record as to the facts in this case. Appellees have attempted to skew the facts in this matter to suit their needs. For example, Defendants argue that "[i]n 2007, during the economic downturn, Appellants chose to sell their business." (Answer Brief, pg. 2) However, Appellees present no evidence of an economic downturn in 2007, and did not present any evidence of such at the lower court level. Further, this was something that should have been expounded on through an evidentiary hearing or a trial, not through Motions or before the Court of Appeals. By bringing this up, Appellees have only shown that there was an actual issue of fact as to why Appellants had to sell their business, which should have been heard at the lower court. Instead, the lower court chose to dismiss with prejudice, not allowing any evidence to be introduced in the record.

Appellants maintain that the facts are as they discussed in their Brief in Chief.

II. PROCEDURAL HISTORY

Appellees' Answer Brief goes into the procedural history of the instant matter. There are several points that Appellants take issue with, as follow.

First, Appellees state that "Judge Viramontes held that New Mexico does not recognize a separate cause of action for punitive damages and that punitive damages are not available as a remedy for violation of the UCC." (Answer Brief, pg. 3) Appellants agree that this is correct. However, Appellants' argument is that punitive damages are not a separate cause of action; rather, it is one that results from the breach of good faith and fair dealing.

Appellees also state that Appellants were required to appeal Judge Viramontes' Order by August 15, 2012. (Answer Brief, page 3) As stated above, there is no basis in procedure or law that would require Appellants to appeal Judge Viramontes' Order. When Judge Viramontes dismissed the case without prejudice, it signaled that Appellants could file suit again on the same cause of action. Appellees contention that Appellants gave up their right to appeal Judge Viramontes' ruling is not factually or legally correct.

Appellees want to make an issue out of the fact that Appellants "never asked him," Judge Robinson, "to modify his order." (Answer Brief, page 4)

Again, as mentioned above, Appellants were under no obligation, legally or procedurally, to ask Judge Robinson to modify his order. Judge Robinson dismissed the case with prejudice, upon which Appellants were within their rights to bring this matter before this Court.

III. APPELLEES' ARGUMENTS ARE FULL OF ERRORS

Appellees argue first that Appellants failed to preserve an objection to Judge Robinson's ruling that Appellants' claims are barred by collateral estoppel. Simply put, Appellants did not have opportunity to do so. There were no hearings held in this matter. Judge Robinson issued his ruling *sua sponte*, leaving no room for any objections to be raised. Appellants find Appellees lack of candor with regards to this matter troubling, as Appellees themselves know that there were no hearings held in this matter, thus Appellants were unable to raise any objections.

Further, Appellees argue that "an appellant may prevail on appeal only after demonstrating that each basis for the court's decision was erroneous...Appellants failed to respond after the Bank expressly argued that Appellants' claims were barred by collateral estoppel... they failed to preserve any objection to the trial court's ruling, and cannot seek reversal of that ruling on appeal." (Answer Brief, pgs. 6-7) Appellees are attempting to rewrite history. Appellants did respond but were not given the opportunity

to make their arguments before the lower court, as Judge Robinson ruled without hearing any evidence. As mentioned above, since there were no hearings held on this matter, Appellants were unable to raise any objections. This appeal followed.

Appellees next argue that Appellants' claims are barred by both collateral estoppel and res judicata. Appellees first argument is that there is claim preclusion in this matter. However, part of Appellees own four-prong analysis is that "there was a final decision in the first suit" (Answer Brief, page 9); in this matter, there was never a final decision in the first suit. The first suit was dismissed without prejudice without any hearings taking place. Appellees fail to make their point through their own analysis. Appellees attempt to use a 9th Circuit opinion to buttress their point that "[a] dismissal based on preemption is a decision on the merits" (Answer Brief, page 9); however, the case they cite is neither persuasive, mandatory, nor binding, and is not reflective of New Mexico law. There was nothing final about Judge Viramontes' ruling, and it was not on the merits as there was no evidence presented. Appellees then argue that the same reasoning applied to Judge Viramontes' other rulings in the matter. Unfortunately for Appellees, their reasoning did not work to begin with, thus it does not work for the other rulings in the matter as well.

Appellees also attempt to argue that Appellants' claims are barred by issue preclusion. To buttress their position, they cite to a 6th Circuit decision, again, neither persuasive, mandatory, nor binding, and is not reflective of New Mexico law, as well as secondary sources. (Answer Brief, pgs. 10-11) While those may work for a law school research paper, this matter involves real people, real livelihoods, and real lives. Appellees fail to cite New Mexico case law to buttress their position. The bottom line is that, contrary to Appellees assertions, there was no litigation before either Judge Viramontes or Judge Robinson with regards to any of the issues in this matter, no evidentiary hearings, no trial. This matter is not barred by issue preclusion, regardless of how Appellees try to paint it.

Appellees argue that Count I was properly dismissed because there is no independent cause of action for violating the duty of good faith and fair dealing under the UCC. Appellees again cite to a case that is neither persuasive, binding, nor mandatory, and is not reflective of New Mexico law, and conveniently skip over New Mexico's own case law. As Appellants argued in the Brief in Chief:

> 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...
>
> 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. 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.

(internal citations omitted) Note that Appellees did not attempt to rebut this argument; rather, they attempted to distract this Court with cases from other jurisdictions that do not have relevance to our own case law. Clearly Appellees are reaching for straws here, going so far as to attempt to convince this Court that it should follow the law of other jurisdictions while ignoring New Mexico's own law.

Appellees next state that Appellants failed to develop their arguments regarding preemption. Appellees argue that Appellants' section with regards to this issue is only two sentences long, to wit, "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." Appellants did not see the need to delve into that further. Appellants claimed and continue to claim that Judge Robinson erred in finding that the FCRA applies to commercial loans, and that Appellants were not given the opportunity to present evidence showing that the loan at issue in this matter did not fall under the FCRA. Appellants' two-sentence section is a clear and concise statement made to this Court that shows that Judge Robinson did not allow evidence which would have showed that the FCRA did not apply in this matter, and Appellants are asking this Court to find that Judge Robinson erred in his finding. Nothing more needed or needs to be said.

In addition, Appellees argued:

> First, the brief contains a sentence in which Appellants assert that 'the FCRA was drafted to address the problems of consumers and credit cards,' followed by a citation to a case holding generally that 'the relevant provisions of the FCRA...are limited to consumer credit reports, not business credit reports.' BIC 9. Appellants also attempt to label the Bank's alleged failure to correct its reporting regarding Appellants' loan as a 'deliberate and malicious act.' BIC 10. But Appellants fail to provide any analysis of FCRA's preemption provision or direct the Court to any authority supporting their contention that their claim is not preempted. Because they have failed to develop this argument on appeal, the Court should not consider it.

(Answer Brief, pgs. 16-17, internal citations omitted). Appellees are again attempting to distract this Court with half-truths. Appellees fail, again, to

point out that Appellants were not given the opportunity to make their arguments in the lower court that would have shown that the FCRA is limited to consumer credit reports, not business reports, and that the Bank's failure to correct its reporting Appellants' loan was a "deliberate and malicious act." These are questions of fact that Appellants were never given the opportunity to argue before the lower court. Appellants are asking this Court to find that the lower court erred in finding that the FCRA applies to commercial loans because Judge Robinson never took evidence with regards to such.

The same applies to Appellees arguments that Count II is preempted. Appellees are trying to argue facts, when there were no facts entered into evidence in the lower court. The lower courts did not take any evidence in this matter, ruling *sua sponte* that it is preempted. Appellants are arguing that the facts should have been heard in the lower courts, and that the facts would have led the lower court to determine that this matter is not preempted by the FCRA.

Interestingly enough, Appellees state that the trial court made no finding regarding the nature of the loan to Appellants, but now concede that "the loan to Appellants was made for commercial purposes." (Answer Brief, page 18) Appellees also misread Appellants Brief in Chief, page 14, when

Appellees state that "the trial court's ruling is based on a determination that the FCRA preemption provisions apply even when a report relates to a commercial loan." (Answer Brief, page 19) In actuality, the following is what Appellants argued in their Brief in Chief:

> 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.

(Emphasis added) Nowhere in that argument do Appellants "recognize... that the FCRA preemption provisions apply even when a report relates to a commercial loan." Note the emphasis above. Appellants were not arguing that it was definitely preempted; rather, Appellants argue that ***IF*** the matter was preempted by federal law, then what followed applies, i.e. the case should not have been dismissed with prejudice. The matter should have been dismissed without prejudice so that the case could be heard in the correct venue.

Appellees again attempt to assert facts where there are no facts to assert, since there were no evidentiary hearings in this matter. Appellees jump to the conclusion that the loan at issue in this matter was made to

individuals for commercial purposes. (Answer Brief, pgs. 20-21) There is no evidence to that effect. There were no hearings held to determine if the loan was commercial or consumer in nature. Appellants argue that through discovery and evidence, they would have shown that the loan at issue was made to a commercial entity which no longer exists. The fact that it no longer exists explains why the Appellants filed the lawsuit under their names, and not under the commercial entity.

Appellees next attempt to frame this matter as one of a consumer loan, thus a consumer credit report. (Answer Brief, pgs. 21-22) However, this was never established in the lower court. As Appellants have argued throughout, the lower court never held an evidentiary hearing, much less a trial, which would have established facts in this matter. Appellees cannot argue facts that have not been established; to that end, Appellants would have been more than happy to argue facts before the trial court, but since the trial court dismissed the matter with prejudice, there are no facts that Appellees can point to that would support their contention that this matter is one of a consumer loan and consumer credit report. In addition, Appellees again cite to a case that is neither persuasive, binding, nor mandatory.

Appellees next argue that Appellants are wrong to argue that the Bank's conduct was deliberate. (Answer Brief, pgs 24-28) However, again,

this is a factual issue that the lower court never took up. This is a point that needed to be heard before any final ruling could have come from the lower court. Appellees argument in this matter rests on assumptions, not on facts that should have been argued in the lower court.

Appellees continue their argument by, again, using cases that are neither persuasive, binding, nor mandatory. Further, their arguments still rely on facts presented before the court, of which there were none in this matter. Appellees arguments, and the case law they cite to, are predicated upon findings of fact. Again, there were no findings of fact in the instant matter, so Appellees arguments and case law fail.

Appellees next argue that Appellants failed to preserve any objection to the form of order of dismissal. (Answer Brief, page 31) However, Appellants again point out that there was no opportunity to object; the order was entered *sua sponte* without a hearing. The order was not sent to the parties as a form of order; rather, it was sent as an order effective immediately. Further, Appellees state, "If Appellants indeed had convincing reasons why the dismissal should be without prejudice... Appellants could have and should have presented those reasons to the trial court." (Answer Brief, page 31) Again, Appellees are intentionally avoiding the fact that there was no opportunity for Appellants to present their reasons to the trial

court; the trial court did not hear facts, did not hold a trial, and dismissed the matter with prejudice *sua sponte*. Appellees know this, yet are attempting to deceive this Court into believing that there was actual opportunity for Appellants to raise objections to the order. The reality of the matter is that there was no opportunity to do so, and since it was an order of dismissal with prejudice, Appellants did not see the point in wasting the lower court's time by asking it to amend its ruling. Appellants saw it fit to move this Court to review the matter on Appeal, rather than spend more of its resources with the lower court that did not want to make a determination based on the facts in the matter. Surely, Appellees could see how approaching the lower court in this matter would have been an exercise in futility. If Appellees cannot see that, they are being intellectually dishonest in how they would have approached this same issue for one of their own clients.

Appellees next argue that by claiming the matter should have been dismissed without prejudice, Appellants "ask the Court to permit them to re-file the same claims a third time, and to indeed permit them to endlessly re-file the same meritless claims against the same party in hopes that they can obtain a different result, while forcing the Bank to expend time and resources to re-litigate the same issue." (Answer Brief, page 32)

Apparently Appellees did not read Appellants' Brief in Chief. Appellants are saying that if the trial court determined that Count II was preempted by the FCRA, it should have been dismissed without prejudice so that Appellants could file the matter with the federal courts, not so that Appellants could re-file with another state court. By finding that the matter was preempted by the FCRA ***AND*** dismissing the matter with prejudice, the lower court in essence told Appellants that it was not allowed to rule on the case, but it would not allow the case to be brought before the correct venue either. This is not difficult to comprehend; however Appellees are attempting to make their client look like the poor innocent bank who is being run through the mud. The reality is far different from what Appellees try to portray the matter.

Appellees also argue the following:

> Appellants also fault Judge Robinson for "changing" Judge Viramontes (sic) Order, and argue that Judge Robinson was in some way bound to enter an order dismissing without prejudice because Judge Viramontes chose to do so. BIC 12-13. It was Appellants, however, who invited a second court to consider the merits of their claims, and they cannot be heard to complain that the result was different.

(Answer Brief, page 32) Appellees are off base in their argument here. First of all, Appellants said that Judge Robinson changed Judge Viramontes Order insofar as Judge Viramontes' Order was a dismissal without prejudice, and

Judge Robinson changed it to a dismissal with prejudice. However, Appellants argument stems from the fact that Judge Robinson changed the dismissal to one with prejudice without getting to the merits of the claim. Judge Robinson, in essence, heard no evidence and did nothing more than what Judge Viramontes did, yet changed the order to a dismissal with prejudice.

This goes to the second point in Appellees argument above. Yes, Appellants invited a second court to consider the ***MERITS*** of their claims. However, Judge Robinson did not consider the merits of Appellants' claims, same as Judge Viramontes did not consider the merits of Appellants' claims. The result, then, should not have been different. Had Judge Robinson actually heard and decided on the merits, he could have come to a different conclusion. However, in light of the fact that he did not allow facts to be presented and in essence predicated his decision on Judge Viramontes' ruling, it goes without saying that it should have been the same as Judge Viramontes' ruling, a dismissal without prejudice. Even if Judge Robinson had said the FCRA preempted the matter from being heard in his court, Appellants would still have had the ability to file the matter in federal court.

Finally, in regards to Appellees' argument above, Appellees also state that "Appellants cite no authority that would legally sanction such a

campaign of harassment..." (Answer Brief, page 32) Appellants are taken back that a bank would now be accusing someone else of harassment. Appellants' counsel has been practicing law for 54 years, and cannot remember one instance of a bank being taken seriously when accusing a borrower of harassment.

Appellees next argue that a dismissal based on preemption is a ruling on the merits. (Answer Brief, page 33) Appellees, yet again, cite to cases that are neither persuasive, binding, nor mandatory in an attempt to buttress their point. As a matter of fact, Appellees cite to over 25 cases, but none from New Mexico. However, the New Mexico Supreme Court, in *Smith v. Walcott*, 1973-NMSC-074, 85 N.M. 351, 512 P.2d 679 (S.Ct. 1973), stated the following:

> The trial court's finding, that "[b]y reason of such disposition [the disposition of the prior suit by the order of November 9, 1970 and the purported order of April 25, 1972], the issues in the present case are res judicata," is also unsupported by the record. The order of dismissal entered sua sponte by the trial court did not constitute an adjudication upon the merits. Hence, the doctrine of res judicata is not applicable to the issues presented in the case now before us on this appeal.

New Mexico case law clearly states that an order of dismissal entered *sua sponte* by the trial court does not constitute adjudication upon the merits. All the non-persuasive, non-binding, non-mandatory case law cited by

Appellees does not supersede New Mexico's case law, which is clearly on the side of Appellants.

Appellees also want to infer, from out of thin air, that "it was the trial court's wording, and not its decision, that was in error" when the lower court determined it did not have jurisdiction over the claim. (Answer Brief, pgs. 34-35) Appellees jump to the conclusion that the trial court's wording was in error, without any facts to buttress their contention. Appellees then go on to say that a decision on preemption is not a decision on the jurisdiction of the court, and then point to their baseless arguments that it is a decision on the merits. (Answer Brief, page 35) However, again, Appellees do not cite to a single New Mexico case to buttress their position; Appellants cite to *Smith v. Walcott* above, to which Appellees have no viable argument.

In addition, Appellees claim that Appellants misunderstand federal preemption, and state that "state-law claims that are preempted by the FCRA cannot be brought in either state or federal court." (Answer Brief, page 35) However, in this matter, there was never evidence introduced that would allow a court to determine if this is a state-law or FCRA claim. It is impossible for a determination to be made on whether this is a state-law or FCRA claim if no factual evidence was argued before the lower court. Appellees put the cart before the horse in attempting to argue that this was a

state-law claim which was preempted by the FCRA, when in fact there was no determination made that this was a state-law claim, thus it is not clear whether it is preempted at all.

Finally, Appellees try to argue that Appellants' claim under the FCRA is untimely. Appellees state:

> Appellants were aware of the problem with the reporting on their loan by at least October 22, 2008, when they sent a letter to FNMB's counsel. R.P. 11. Appellants therefore were required to file any claim for relief under the FCRA by October 22, 2010. Appellants filed their original complaint in state court on October 21, 2010. It is likely that the time for them to file a claim for violation of the FCRA had already expired, as they likely discovered the reporting issue before October 21, 2008.

(Answer Brief, page 37) Appellees are clearly speculating that Appellants "likely discovered the reporting issue before October 21, 2008." The lower court did not hear facts in this case, which in turn is leading to Appellees making up their own facts on Appellants' appeal. This Court should see that without any sort of fact-finding in the lower court, this matter could not have been dismissed with prejudice; there are too many loose ends to tie before a ruling can be made in this matter.

The bottom line is that the lower court did not hear facts in this matter, yet changed the ruling from the previous court from dismissal

without prejudice to dismissal with prejudice. The lower court should have heard facts in this matter, instead of ruling on it *sua sponte*.

IV. 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 5th day of August, 2014,

Martin E. Threet and Associates
Martin E. Threet
6605 Uptown Blvd. NE Ste 280
Albuquerque, NM 87110
Phone: 505-881-5155
Fax: 505-881-5356
For Appellant

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 4394 words in the body of the Petition as defined in Rule 12-213(F)(3). This word count was generated using Microsoft Word 2013.

Dated this 5th day of August, 2014.

Martin E. Threet, Esq.

CERTIFICATE OF SERVICE

I, Martin E. Threet, HEREBY CERTIFY and duly swear that this the 5th day of August, 2014, that a true and correct copy of the foregoing Reply Brief was served upon the persons listed below by mailing or delivering same to each party.

Martin E. Threet, Esq.

WALKER & ASSOCIATES, P.C.
Thomas D. Walker, Esq.
500 Marquette Ave. NW, Suite 650
Albuquerque, NM 87102
Phone: (505) 766-9272
Fax: (505) 766-9287

-and-

PEIFER, HANSON & MULLINS, P.A.
Lauren Keefe
P.O. Box 25245
Albuquerque, NM 87125-5245
Phone: (505) 247-4800
Fax: (505) 243-6458