

16-0127

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

GARY J. LENAHAN,

PLAINTIFF

V.

CIVIL ACTION NO. 13-C-190 (B)
Judge Robert A. Burnside, Jr.

VALENTINE & KEBARTAS, INC.,

DEFENDANT

VERDICT ORDER

On the 2nd day of February 2015 came the Plaintiff, Gary J. Lenahan, and the Defendant Valentine & Kebartas, Inc., for the trial of the issues joined. Thereupon the Court, sitting without a jury heard the evidence and issued its decision in a four-page memorandum from the Court to counsel dated May 22, 2015, a copy of which is attached to this order and incorporated herein by reference.

As reflected by the Court's Memorandum Opinion: The primary factual and legal issue is grounded on *West Virginia Code* §46A-2-125(d) which in pertinent part prohibits a debt collected from "[c]ausing a telephone to ring... with the intent to annoy, abuse, oppress or threaten any person at the called number."

It is undisputed that during the period between March 10 and November 17, 2012 the defendant placed 252 collection telephone calls to plaintiff's telephone. None of these calls were answered. Plaintiff argues that the continued calls, in the face of Plaintiff's refusal to answer, is sufficient to support a cause of action under §125(d). Defendant's position is that absent a specific communication to alert the defendant that the plaintiff deemed the calls to be annoying, abusive, or oppressive, a claim under §125(d) is not

supported. Plaintiff's position, as derived from the evidence presented at trial, was that he simply did not want to talk to defendant.

At the conclusion of Defendant's case in chief, the Court requested proposed findings of fact and conclusions of law on the issue of violations of *W. Va. Code* §46A-2-125(d). Those findings and conclusions are memorialized below.

FINDINGS OF FACT

1. Defendant Valentine and Kebartas communicated with the Plaintiff, Gary Lenahan, in an attempt to collect a debt allegedly owed to ADT, a home security company. As such, Defendant is a "debt collector" as defined by *W. Va. Code* §46A-2-122(d), and Mr. Lenahan, being a natural person, is a "consumer" as defined by *W. Va. Code* §46A-2-122(a).

2. Mr. Lenahan disputes that he owes any debt to ADT and maintains that he disputed the debt with ADT prior to receiving calls from Defendant.

3. According to Defendant's records, Defendant placed two-hundred fifty-two (252) telephone calls to Defendant's telephone.

4. Defendant only attempted to reach Mr. Lenahan at a single telephone number and no evidence was presented at trial to suggest that Defendant ever attempted to locate an alternative telephone number for Mr. Lenahan.

5. At the outset of its collection campaign, Defendant sent a single letter to Mr. Lenahan on March 9, 2012.

6. Of the two-hundred fifty-two (252) telephone calls place to Mr. Lenahan between March 10, 2012 and November 17, 2012, the first two-hundred fifty were not answered.

CONCLUSIONS OF LAW

1. *W. Va. Code* §46A-2-125 generally prohibits debt collectors from unreasonably oppressing or abusing any person in connection with the attempt to collect a debt. The statute expressly prohibits "Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously, or at unusual times or at times known to be inconvenient, with intent to annoy, abuse, oppress or threaten any person at the called number." *W. Va. Code Ann.* § 46A-2-125(d).

2. Though there is little analysis by the West Virginia Supreme Court of Appeals, this Court has reviewed and agrees with Judge Copenhaver's interpretation of §125: "The plain language of the section, broadly construed, warrants such a conclusion. The statute explains that calls can be unreasonably oppressive or abusive in three ways: (1) when the calls are made "repeatedly or continuously;" (2) when the calls are made "at unusual times;" or (3) when the calls are made "at times known to be inconvenient." *Ferrell v. Santander Consumer USA, Inc.*, 859 F. Supp. 2d 812, 816 (S.D.W. Va. 2012).

3. The question for the Court is: did Defendant's unanswered telephone calls constitute abuse or unreasonable oppression, or did Defendant intend to harass Mr. Lenahan when it continued to place collection calls to a number he never answered. In this

case, as in *Ferrell*, that question is focused on the "repeated or continuous" aspect of the telephone calls. Additionally, the Court will look to Defendant's testimony to determine Defendant's intent in making the telephone calls and to determine what legitimate purpose, if any, was advanced by the telephone calls.

4. It is clear from the testimony that Mr. Lenahan knew that Defendant was the entity causing his telephone to ring. The telephone Defendant was calling was equipped with Caller ID. Furthermore, a letter was sent to Mr. Lenahan's home which outlined the debt that Defendant was attempting to collect upon before the first call was placed.

5. Likewise, it is clear that Defendant knew that it was calling Gary Lenahan. His telephone number was provided to Defendant by ADT. Additionally, Defendant's collection records repeatedly show that an answering machine was detected and Mr. Lenahan has already established through testimony that his outgoing message identified himself as the owner of the telephone number.

6. Defendant asserted, and this Court agrees, that debt collectors such as Defendant may call consumer debtors for a legitimate purpose such as to inform them of the delinquency or to make payment arrangements. Therefore, the initial communications with Mr. Lenahan do not violate *W. Va. Code* §46A-2-125.

7. However, the Court does not agree that debt collectors such as Defendant have an absolute right to call debtors *ad nauseam*. As *W. Va. Code* §46A-2-125 makes clear,

a debt collector may not repeatedly call a debtor with the intent to harass simply because they refuse to answer telephone calls.

8. The Court finds no fault in Defendant's first twenty-two (22) calls placed by Defendant. These calls were placed on nine (9) separate days during a fourteen (14) day period, and the Defendant never called more than three (3) times in a single day. Sending a debtor a collection letter and calling them twenty-two times in the initial two weeks of collection is not something that this Court finds to be oppressive without something further.

9. Had the calls stopped after two weeks, then Defendant would have done nothing wrong. However, rather than stop the collection calls, Defendant ramped up its collection campaign. On March 26, 2012, Defendant placed six (6) calls to the Mr. Lenahan, three (3) of which were separated by less than an hour. Like the 22 before it, these calls went unanswered. The next day, Defendant placed five (5) additional calls to Mr. Lenahan with as little as twenty-eight (28) minutes separating calls. None of these calls were answered. On the third day, March 28, 2012, Defendant again placed six (6) calls to Mr. Lenahan with some calls separated by only thirty-two (32) minutes. The Court cannot fathom any possible legitimate purpose that could be served by increasing the volume and frequency of collection calls to a consumer who is known to exercise dominion over the telephone number being called and who has already been informed that Defendant was collecting a debt by mail. Therefore, the only logical conclusion is that Defendant

increased its volume and frequency of collection calls to Mr. Lenahan in an attempt to harass or oppress him into answering Defendant's telephone calls. Beginning with the first call on March 26, 2014, placed at 11:22 a.m. EST, Defendant's collection calls violate *W. Va. Code §46A-2-125*.

10. Regarding statutory penalties, the Court is tasked with attaching a penalty based upon a scale of \$100 to \$1,000.00 per violation of the Act.

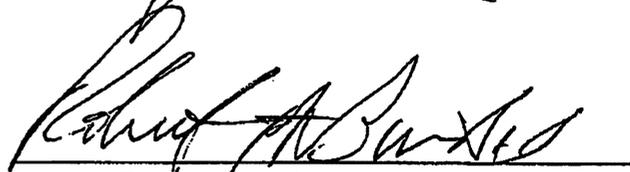
11. The Court may adjust this damage award for inflation from the date these prohibitions became operative on September 1, 1974. The Court finds that the damages should be so adjusted to allow the award to reflex current monetary values. The Consumer Price Index ("CPI") in effect on September 1, 1974 was 49.4. The CPI in effect on the day of this trial was 234.812. As Such, the penalties must be adjusted with a multiplier of 4.75328 to account for inflation. As adjusted, the penalties shall be assessed as follows:

12. The minimum statutory penalty of \$475.33 times 230 calls would produce a statutory penalty of \$109,325.90. However, Plaintiff voluntarily stipulated that in no event would his recovery be more than \$75,000. A penalty of \$326.08 for each of the 230 calls equals \$75,000, Plaintiff's stipulated cap on all damages. For this reason the stipulated limit of \$75,000 is found by the Court to be reasonable and to be supported by the evidence. The Plaintiff's additional claims for actual damages, attorney fees and costs are moot as the award of statutory penalty equals the stipulated cap on damages in this case.

Defendant's objections and exceptions are preserved by the Court.

It is further **ORDERED** that the Clerk of this Court mail a certified copy of this Order to counsel of record.

ENTERED this the 15 day of Jan, 2016.



JUDGE ROBERT A. BURNSIDE, JR.

PREPARED BY:



Ralph C. Young (*WV Bar #4176*)
Christopher B. Frost (*WV Bar #9411*)
Steven R. Broadwater, Jr. (*WV Bar #11355*)
Jed R. Nolan (*WV Bar #10833*)
Counsel for Plaintiff

The foregoing is a true copy of an order entered in this office on the 15 day of Jan, 2016.
PAUL H. FLANAGAN, Circuit Clerk of Raleigh Co., WV
By ADV Deputy