

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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CSP

ESTHER J. TOLEDO,
Plaintiff,

v.

JOHN M. McNEEL,
Defendant.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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No. 94-1280 MV/DJS
Robert M. Marsh
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MAGISTRATE JUDGE'S ANALYSIS AND RECOMMENDED DISPOSITION¹

1. This matter comes before this Court to conduct an evidentiary hearing on damages. Plaintiff filed her Complaint on November 15, 1994. Plaintiff filed a Motion for an entry of default on January 12, 1995. The Clerk's Entry of Default was entered on January 13, 1995. On Order of Reference pursuant to the provisions of 28 U.S.C. §636(b)(1)(B) was entered January 25, 1995. An evidentiary hearing was held before this Court on April 11, 1995.

RECOMMENDED FINDINGS OF FACT

2. Plaintiff Esther Toledo is a 59 year old disabled widow.
3. Mrs. Toledo has been a sheepherder all her life.
4. At the time of the attempted debt collection in this case, Plaintiff's income was \$70 biweekly, in the form of a general assistance allotment from the Navajo tribe. Plaintiff earned approximately \$100 a month from weaving and an undisclosed amount from selling pinions.

¹ Within ten (10) days after a party is served with a copy of these proposed findings and recommendations, that party may, pursuant to 28 U.S.C. Section 636(b)(1), file written objections to such proposed findings and recommendations. A party must file any objections within the ten day period allowed if that party seeks appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.

5. Mrs. Toledo had never been in financial distress until her husband passed away in 1991.
6. On or about March 10, 1994 Mrs. Toledo was sent a letter, seeking to collect a delinquent account. The stationery bore the name of John M. McNeel, Attorney at Law, P.O. Box 740117, Houston, Texas 77274.
7. McNeel's letter sought to collect a debt of \$266.63 allegedly owed to Beall's by the Plaintiff.
8. McNeel failed to furnish Mrs. Toledo, either in this initial letter or in another letter within five days of the initial letter, written notice of her right to dispute the validity of the debt and to obtain verification of the debt.
9. McNeel's letter failed to disclose that all information obtained would be used to collect a debt.
10. McNeel threatened to take legal action to pursue collection of this debt.
11. McNeel's letter said that "this office has been retained by TRS Corporation to file a lawsuit against you, if necessary, to collect the money you owe."
12. McNeel's letter threatened that nonpayment of the debt would result in the seizure, garnishment, attachment or sale of property.
13. McNeel's letter demanded full payment in seven days, which panicked Mrs. Toledo because she believed that her property could be seized.
14. McNeel's letter caused Mrs. Toledo to suffer emotional distress and mental anguish, and it caused her sleeplessness, depression and crying.
15. As a result of McNeel's letter, Mrs. Toledo feared that she would be arrested.
16. McNeel's letter led Mrs. Toledo to believe and to fear that someone would seize

her livestock and deprive her of her food source and her meager livelihood.

17. Due to McNeel's letter Mrs. Toledo was afraid that someone would come into her house and take her most valuable possessions, including jewelry and blankets given to her by her late husband.

18. Mrs. Toledo continues to feel apprehension about the debt, due to McNeel's letter.

19. McNeel's letter was an intrusion into Mrs. Toledo's life.

20. McNeel's letter intruded on Mrs. Toledo's privacy and seclusion.

21. McNeel's letter was offensive to a reasonable person with ordinary sensibilities.

22. McNeel's letter intruded in a manner that was unreasonable and objectionable under the circumstances.

23. The Fair Debt Collection Practices Act sets forth simple, easy-to-follow rules for persons attempting to collect debts.

24. McNeel's conduct was done without the exercise of even slight care under the circumstances.

25. McNeel's conduct was intentional and done with knowledge that harm may result.

26. Mrs. Toledo reasonably incurred attorney's fees to bring this action.

PROPOSED CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction under the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692k(d).

2. Plaintiff Esther Toledo is a "consumer" as defined by the FDCPA, 15 U.S.C. 1692a(3).

3. Defendant John Marshall McNeel is a "debt collector," as defined by the FDCPA,


15 U.S.C. 1692a(6).

4. Defendant's actions constitute the transaction of business within New Mexico and the commission of tortious acts within this state.
5. This Court has in personam jurisdiction over Defendant John Marshall McNeel through service of process on him.
6. This Court has jurisdiction to hear the state law claims for the tort of unlawful debt collection (invasion of privacy) and unfair trade practices, arising out of the same conduct and circumstances as the FDCPA claim, through the doctrine of pendent jurisdiction.
7. Defendant has failed to appear or otherwise to defend, and judgment by default is appropriate.
8. The Defendant failed to provide proper notice to consumer of her rights to validate and to dispute the debt and thereby violated the FDCPA, 15 U.S.C. Section 1692g.
9. Plaintiff is entitled to judgment for statutory damages of \$1,000 under the FDCPA.
10. Plaintiff is entitled to actual damages of \$200 under the FDCPA.
11. The actions of Defendant constitute unfair or deceptive trade practices within the meaning of the New Mexico Unfair Practices Act, §57-12-2C N.M.S.A. 1978, as amended.
12. Defendant willfully engaged in these unlawful trade practices.
13. Plaintiff is entitled to judgment for statutory damages of \$100 under the New Mexico Unfair Practices Act.
14. Defendant willfully engaged in these unlawful trade practices.
15. Plaintiff is entitled to judgment up to treble her actual damages, in the amount of \$300.

16. Plaintiff is entitled to costs and reasonable attorney's fees under the FDCPA.
17. Plaintiff is entitled to costs and reasonable attorney's fees under the New Mexico Unfair Practices Act.
18. Plaintiff is awarded \$3,243.17 in costs and attorney's fees.
19. Defendant breached his duty not to invade plaintiff's privacy, which was the proximate cause of plaintiff's damages, including her emotional distress.
20. Plaintiff is entitled to damages in the amount of \$200 for unreasonable and tortious debt collection practices invading her privacy.
21. Plaintiff is entitled to judgment for punitive damages for willful, reckless, wanton, grossly negligent or malicious conduct, in the amount of \$10,000.
22. Plaintiff must elect between accepting actual plus punitive damages for tortious debt collection, or up to treble her actual damages for unfair trade practices, or actual damages under the FDCPA.

Recommended Disposition

For all the foregoing, I recommend that judgment be entered against the Defendant and for the Plaintiff in accordance with the above recommended findings of fact and recommended conclusions of law.



DON J. SVET
UNITED STATES MAGISTRATE JUDGE