LTD Financial Services, L.P. vs. Brian Collins

2019 | Cited 0 times | West Virginia Supreme Court | March 15, 2019

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

LTD Financial Services, L.P., Defendant Below, Petitioner

vs.) No. 18-0008 (Raleigh County 15-C-41)

Brian Collins, Plaintiff Below, Respondent

MEMORANDUM DECISION

Petitioner LTD Financial Services, L.P., by counsel Albert C. Dunn, Jr., appeals the Circuit Court of Raleigh November 30, 2017, order granting a directed verdict in

violations of the West Virginia Consumer Credit and Protection . Respondent Brian Collins, by counsel Steven R. Broadwater, Jr., filed a response in support of the circuit Petitioner filed a reply. On appeal, petitioner argues that the circuit court erred in finding that respondent satisfied the applicable burden of proof and in applying an incorrect legal .

arguments are adequately presented, and the decisional process would not be significantly aided

by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these e 21 of the Rules of Appellate Procedure.

In January of 2015, respondent filed a complaint against petitioner alleging multiple violations of the WVCCPA as set forth in West Virginia Code § 46A-1-101 to -8-102. As it relates to the current appeal, the facts of the suit turned on the following. On December 19, 2014, petitioner placed a telephone collection call to respondent concerning outstanding debt. The call in question was recorded. During the call, respondent informed petitioner that he was represented As the circuit

was clearly s speaking over [respondent] and interrupted him as he attempted to provide Following the call in question, petitioner contacted respondent at least eleven additional times.

judgment. Petitioner sought dismissal of the proceedings based on the affirmative defense of

bona fide error. Respondent sought summary judgment as to liability for all communications FILED March 15, 2019 EDYTHE NASH GAISER, CLERK SUPREME COURT OF APPEALS OF WEST VIRGINIA directed toward him after he informed petitioner he was represented by counsel. Ultimately, the circuit court denied pe violations of West Virginia Code § 46A-2-128(e).

affirmative defense under West Virginia Code § 46A-5-101(8) and the issues of damages and

statutory penalties. testified in support of the affirmative defense. collectors are not allowed to listen to recordings of their conversations, which precluded the The circuit court found that Mr. John established ed by counsel

, [the collector] should have entered a substitute telephone number circuit court further In fact, Mr. John admitted that he

could not point to anywhere in the policies and procedures provided where such a policy existed.

did not satisfy its burden of proof in asserting its affirmative defense because it failed to prove the existence and maintenance of procedures reasonably adapted to avoid violating the WVCCPA and further failed to establish any mistake of fact that resulted in the eleven additional calls to respondent. Moreover, the circuit court found that petitioner had not even claimed that the calls in question were unintentional. Turning to the issue of damages, the circuit court found that awarded 30, 2017, verdict order that petitioner appeals.

This Court has previously held as follows:

court made after a bench trial, a two-pronged deferential standard of review is

applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard reviewed under a clearly erroneous standard. Questions of law are subject to a de

novo Public Citizen, Inc. v. First National Bank in Fairmont, 198 W.Va. 329, 480 S.E.2d 538 (1996).

Syl. Pt. 1, Valentine & Kebartas, Inc. v. Lenahan, 239 W. Va. 416, 801 S.E.2d 431 (2017). Upon our review, we find no error in the proceedings below.

s argument in support of its first assignment of error turns on an assumption that intent was a necessary element for respondent to establish in his case-in-chief and that, agree, as the plain language of West Virginia Code § 46A-2-128(e) does not require proof of

intent. Instead, that statute indicates that [a]ny communication with a consumer whenever it appears that the consumer is represented s name and address are known, or could be easily ascertained,

unless the attorney fails to answer correspondence, return phone calls or discuss the obligation in question or unless the attorney consents to direct communication [is deemed to violate this section.]

W. Va. Code § 46A-2-128(e) (1990). 1 The plain language of this statute does not make reference statute] that which it does not say. Just as courts are not to eliminate through judicial

interpretation words that were purposely included, we are obliged not to add to statutes Huffman v. Goals Coal Co., 223 W. Va. 724, 729, 679 S.E.2d 323, 328 (2009) (quoting Banker v. Banker, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996)).

It appears that petitioner believes intent is a necessary element of this cause of action because of its assertion of affirmative defenses thereto and our prior holdings interpreting other sections of the WVCCPA. Specifically, affirm f the creditor establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error Va. Code § 46A-5-101(8) (1996). While petitioner is correct that establishing the calls in question were unintentional would constitute an affirmative defense, nothing in this statute alters the language quoted above from West Virginia Code § 46A-2-128(e) setting forth a cause of action under the WVCCPA. The language of West Virginia Code § 46A- 5-101(8) is clear that the creditor in this case, petitioner must establish that the calls were unintentional, not the debtor in this case, respondent. As such, any argument petitioner

making any factual fi the applicable statute is entirely without merit.

asserting a violation of the [WVCCPA] and, specifically those provisions governing debt

ome evidence of . . . intent to annoy, abuse, oppress or threaten . . . is necessary in order to find liability under West Virginia Code § 46A-2-125(d). Lenahan, 239 W. however, as Lenahan was predicated on a violation of West Virginia Code § 46A-2-125(d), alling any person more than thirty times per week or engaging any person in telephone conversation more than ten times per week, 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. Because respondent in this matter asserted violations of West 1 In the order on appeal, the circuit court notes that the WVCCPA was amended in 2015, but that the case was tried under an older version of the statutes because the violations in question took place prior to the amendment. Virginia Code § 46A-2-128(e) and not § 46A-2-125(d), and because the former statute does not include language similar to the latter regarding intent, this case is inapplicable to the current matter. Accordingly, petitioner is entitled to no relief.

Petitioner next argues that the circuit court erred in analyzing the affirmative defenses available to it under West Virginia Code § 46A-5-101(8). According to petitioner, the circuit of two. Specifically, petitioner argues that the circuit court failed to recognize the defense that

the calls were made unintentionally, but this argument does not accurately reflect the record. In the order on appeal, the circuit court plainly recognized that two defenses were available, finding that West Virginia Code § 46A-5-101(8)

takes a two-tiered approach to proving the defense. First, a defendant must prove that it maintains procedures reasonably adapted to avoid violating the law. Once the maintenance o[f] reasonable procedures is proven by a preponderance of the evidence, the next tier of inquiry is whether the violation alleged was of fact

calls to [respondent] . . . were made that

the calls were unintentional, let alone produce evidence in support of such a defense, the circuit court instead focused its analysis on the second defense of bona fide error of fact. As such, it is

statute in question as providing only one possible affirmative defense, and we find no error in this regard.

To the extent that petitioner argues that the circuit court erred in finding that it failed to establish its affirmative defense by a preponderance of the evidence, we similarly find no error. 2 2 petitioner alleges that it did, in fact, claim the calls were unintentional, as it asserted this

However, petitioner does not attempt to cite to any evidence in support of this defense. As noted above, West Virginia Code § 46A-5-101(8) requires the creditor to establish, by a preponderance of the evidence, that the violation was unintentional. Instead of citing to evidence it presented in support of this element of intent was -in-chief. Because respondent did not

issue precluded it from successfully asserting an affirmative defense based on unintentional violations of the statute at issue. As such, petitioner is entitled to no relief in this regard on appeal.

can be supported by a lack of intent to call the consumer known although i

further examination it became clear . . . that [petitioner] had not reasonably adapted any should Mr. John

testified to what the collector should have done to prevent the additional calls y such . . . procedure in the

policies and procedures provided by [petitioner] and entered into evidence in support of its

provide any evidence th

the statutory requirement that its policies and procedures were maintained in any meaningful

Petitioner also argues that the circuit court conclusi evidence . . . ; are the result of a failure to properly assess the argument of [petitioner] throughout

court basically did was to substitute its judgment for what policy and procedure it felt SHOULD

respondent, was not contained anywhere within its policies and procedures produced at trial. Accordingly, the policies and procedures petitioner did produce were clearly unreasonable, given that they resulted in eleven additional attempts to contact respondent after the collector was informed that respondent was represented by counsel.

under certain ci liability for [a] call [that violates the applicable statute] because the attempted contact would be by error and not evidence of an intent to violate the law by hese arguments, given that the Legislature has clearly provided for two separate and distinct affirmative defenses for a violation that is either (1) unintentional or (2) the result of a bona fide error of fact. Accordingly, any argument petitioner advances that attempts to predicate its bona fide error of fact argument upon a lack of intent is misplaced. that the circuit court found that petitioner did not, in fact, have any policies or procedures to address this issue or establish that the collector in question had been trained or tested on these is not as if [petitioner] did not believe

[respondent] was represented by counsel, or that [petitioner] had incorrect information for follow a procedure which . . . was not contained anywhere in the policies and procedures

As such, petitioner is entitled to no relief in this regard.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 15, 2019

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker Justice Margaret L. Workman Justice Tim Armstead Justice Evan H. Jenkins Justice John A. Hutchison