

15-0692

ix

RONNIE W. MATTHEWS
FILED
PUTNAM CO. CIRCUIT COURT
2015 JUN 18 PM 2:27

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

Diane Horton as Executrix for
Gene Ray Dudding,

PLAINTIFF,

CIVIL ACTION NO. 13-C-273
JUDGE PHILLIP STOWERS

Professional Bureau of Collections
of Maryland, INC.,

DEFENDANT.

**ORDER GRANTING DEFENDANT PROFESSIONAL BUREAU OF
COLLECTIONS OF MARYLAND, INC.'S MOTION FOR SUMMARY JUDGMENT**

On September 12, 2014, came the Defendant Professional Bureau of Collections of Maryland, Inc., by counsel, David P. Cook, Jr., and the Plaintiff, by counsel, Benjamin Sheridan, for a hearing on Defendant's Motion for Summary Judgment. Upon due and careful consideration of the motion, supporting memoranda, response, reply, legal authority, and oral arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On August 20, 2013, Gene Ray Dudding (hereinafter "decedent"), filed a Complaint in the Circuit Court of Putnam County, West Virginia, alleging various causes of action related to the actions of the Defendant Professional Bureau of Collections of Maryland, Inc. (hereinafter "Defendant") in the collection of a debt. The decedent alleged that the Defendant attempted to collect the debt via telephone calls, that he retained an attorney in connection with the consumer indebtedness, and that he "gave

the attorney's name and telephone number" to the Defendant. The decedent alleged that "thereafter, the Defendant continued to cause telephone calls to be placed to" him.

2. The decedent alleged various violations of the West Virginia Consumer Credit Protection Act (hereinafter "WVCCPA") including: (1) West Virginia Code § 46A-2-125; (2) West Virginia Code § 46A-2-125(d); (3) West Virginia Code § 46A-2-128(e); and (4) West Virginia Code § 46A-2-127(a) and (c). The decedent also asserted causes of action for common law negligence, intentional infliction of emotional distress, and common law invasion of privacy. The decedent demanded actual damages and statutory penalties under the WVCCPA, attorney's fees and costs under the WVCCPA, general damages for the Plaintiff's alleged annoyance and inconvenience, and general and punitive damages for the intentional infliction of emotional distress and invasion of privacy causes of action. The Defendant answered the decedent's Complaint and generally denied the allegations contained therein.

3. On March 5, 2014, the Court entered into a Scheduling Order setting the trial date for September 26, 2014. Written discovery requests and responses exchanged hands and the decedent's daughter, Diane Horton, was deposed. At that deposition, the Defendant learned that the decedent passed away on July 9, 2014.

4. On September 5, 2014, the Defendant filed a Suggestion of Death (regarding the decedent's death) and filed a Motion for Summary Judgment. The Summary Judgment Motion primarily focused on the lack of standing for the decedent's Estate to assert causes of action under the WVCCPA on behalf of the decedent and that the causes of action asserted in the Complaint do not survive the death of the decedent. On September 6, 2015, Ms. Horton, as executrix of the Estate of Gene

Dudding (hereinafter "Plaintiff"), filed a Suggestion of Death and a Motion to Substitute the Estate as the Plaintiff to assert the claims on behalf of the decedent. The Plaintiff filed a Response to the Defendant's Motion for Summary Judgment. The Defendant filed a Reply to the Plaintiff's Response to the Defendant's Motion for Summary Judgment. A hearing was held on the Defendant's Motion for Summary Judgment on September 12, 2014. On that date, the Court continued the trial date to allow additional time for the Court to consider the Defendant's Motion for Summary Judgment and the legal arguments contained therein.

5. Upon due and careful consideration of the motion, supporting memoranda, response, reply, legal authority, and oral arguments of counsel, the Court is of the opinion that the Defendant's Motion for Summary Judgment should be granted. The decedent's Estate is not a "natural person" as that term is defined for purposes of asserting an action under the WVCCPA. There is no evidence that the Defendant directly communicated with the Estate regarding the alleged debt. As such, the Plaintiff does not have standing to assert causes of action under the WVCCPA on behalf of the decedent. Further, none of the causes of action asserted in the Complaint survive the death of the decedent. As such, based on the factual record and the legal authority, this case should be dismissed, with prejudice.

CONCLUSIONS OF LAW

1. Under Rule 56, "summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has a burden to prove." *Celotex Corp. v. Catrett*, 477 U.S.

317 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986).” *Painter v. Peavey*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994).

2. This Court’s standard of review concerning summary judgments is well settled. As syllabus point 3 of *Aetna Casualty and Surety Company v. Federal Insurance Company of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963), holds: “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. pt. 2, *Jackson v. Putnam County Board of Education*, 221 W.Va. 170, 653 S.E.2d 632 (2007); syl. pt. 1, *Mueller v. American Electric Power Energy Services*, 214 W.Va. 390, 589 S.E.2d 532 (2003); *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994).

3. The provision creating a private cause of action for a “consumer” under the WVCCPA is found in West Virginia Code § 46A-5-101(1). It provides that “if a creditor has violated the provisions of this chapter applying to collection of excess charges,... statements of account,... illegal, fraudulent or unconscionable conduct,... [or] any prohibited debt collection practice,... the consumer has a cause of action...” As that text plainly shows, a Plaintiff must be a “consumer” in order to maintain a private cause of action under the WVCCPA. The definition of “consumer” for the purpose of the WVCCPA claims asserted in the Complaint is found at West Virginia Code § 46A-2-122(a) as follows: “consumer means any natural person obligated or allegedly obligated to pay any debt.”

4. An estate is not a “natural person” for the purposes of a WVCCPA claim. West Virginia Code § 46A-1-102(29) defines an “organization” as a “corporation,

governmental subdivision or agency, trust, estate, partnership, cooperative or association." West Virginia Code § 46A-1-102(31), in turn, defines a "person" to include "a natural person... and an organization." *Id.* Thus, while the definition of a "person" as it applies to the WVCCPA is broad enough to encompass "natural persons" and legal entities, those two subcategories are clearly distinct and not coterminous. Moreover, the fact that estates are defined in a group with other artificial legal entities, such as corporations, reinforces the conclusion that estates are not "natural persons." *Cf. Shenandoah Sales & Serv., Inc. v. Assessor of Jefferson Cnty.*, 724 S.E.2d 733, 738 (2012) ("A corporation is not a natural person. It is an artificial entity created by law."); see also *Black's Law Dictionary* 1257 (9th ed. 2009) (defining natural person as "[a] human being").

5. Based on the Court's review of the applicable statutes and case law, the Estate does not have standing to assert WVCCPA claims on behalf of a deceased "consumer." The Estate is not a "natural person" for purposes of the statute. There is no evidence that any communications were directed to the Estate or to Ms. Horton in her capacity as executrix of the Estate. There is no evidence that the Estate is personally obligated to pay the alleged debt. Accordingly, under the facts of this case, the Estate lacks standing to maintain a private right of action as a "consumer" within the meaning of the WVCCPA. Please see *Ballard v. Bank of America, N.A.*, No. 13-1418 (4th Circuit of Appeals, 2013).

6. Even if the Estate were considered a "natural person" for purposes of the statute, none of the WVCCPA claims survive the death of the "consumer."

7. According to West Virginia Code § 55-7-8a(a), "... causes of action for injuries to property, real or personal, or injuries to the person and not resulting in death, or for deceit or fraud,... shall survive; and such actions may be brought notwithstanding the death of the person entitled to recover or the death of the person liable."

8. The Plaintiff asserts penalty claims and actual damages claims under the WVCCPA. There is no evidence of any actual damages sustained by the decedent. No itemized expenses, medical or otherwise, were submitted in discovery. Ms. Horton testified that the decedent did not treat with any medical care provider related to any alleged personal injury. There is no personal injury that would allow this claim to survive at common law. As such, the claim is not survivable and should be dismissed. Second, the West Virginia Supreme Court of Appeals has held that a penalty is statutorily created and is imposed as punishment for a specific act made unlawful by the statute. *Wilson v. Shrader*, 73 W.Va. 105, 79 S.E. 1083 (1913). The Supreme Court has further held that the amount authorized as a penalty ordinarily bears no relationship to the harm done. *Id.* The Supreme Court has explicitly held that that an action to collect a penalty is not assignable at common law and therefore does not survive the death of the person claiming the right. *Gawthrop v. Fairmont Coal Co.*, 74 W.Va. 39, 81 S.E. 560 (1914). As such, given the clear statement of law by the West Virginia Supreme Court, the WVCCPA claims were extinguished upon the death of the decedent.

9. The decedent's negligence claim was wholly based on the alleged violations of the WVCCPA. Discovery in this matter has disclosed no evidence of a personal injury sustained by the decedent related to the alleged acts or omissions of the Defendant. The West Virginia Legislature intended that the statute governing

survivability of certain tort actions to apply to those common law tort actions involving physical or bodily injuries. West Virginia Code § 55-7-8a(f), *Christman v. American Cyanamid Co.*, 578 F.Supp 63 (1983). As there is no evidence of bodily injury or physical injury, and as the negligence claim is wholly derivative of the WVCCPA claims, the negligence claim does not survive the death of the decedent.

10. Personal tort actions such as intentional infliction of emotional distress do not survive the death of an individual at common law or under the statute (West Virginia Code § 55-7-8a(a)). *Rodgers v. Corporation of Harpers Ferry*, 179 W.Va. 637, 371 S.E.2d 358 (1988). As such, the decedent's intentional infliction of emotional distress claim was extinguished upon the decedent's death.

11. Invasion of privacy is a personal action that does not survive the death of an individual at common law or under the statute (West Virginia Code § 55-7-8a(a)). *Slack v. Kanawha County Housing and Redevelopment Authority*, 188 W.Va. 144, 423 S.E.2d 547 (1992). Therefore, the decedent's invasion of privacy claim does not survive the decedent's death.

Accordingly, after careful consideration of the factual record, relevant case law, and arguments of the counsel, it is hereby **ORDERED** and **ADJUDGED** that the Defendant's Motion for Summary Judgment is well taken and that, pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, the claims asserted in the Complaint are dismissed, with prejudice.

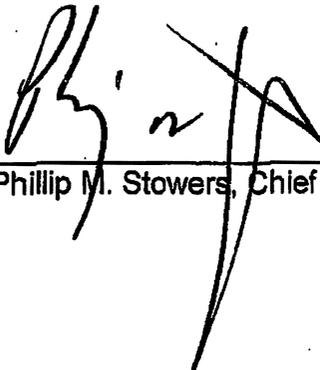
The Plaintiff's objections and exceptions to this Order are noted.

Upon entry, the Clerk is directed to serve a certified copy of this Order upon all counsel of record listed below.

David P. Cook, Jr., Esquire
MacCorkle Lavender & Sweeney PLLC
300 Summers Street, Suite 800
Post Office Box 3283
Charleston, WV 25332-3283
Counsel for Defendant

Benjamin Sheridan, Esquire
Klein, Sheridan, & Glazer, LC
Clyffeside Professional Building
3566 Teays Valley Road
Hurricane, WV 25526
Counsel for Plaintiff

Entered this 16th day of June 2015.

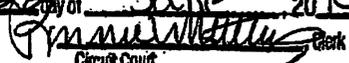


Phillip M. Stowers, Chief Judge

STATE OF WEST VIRGINIA
COUNTY OF PUTNAM, SS:

I, Fernie W. Matthews, Clerk of the Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court. Given under my hand and the seal of said Court

this 22 day of June, 2015



Circuit Court
Putnam County, W.Va.