

To be argued by: Mikhail  
Usher, Esq

10 Minutes

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

**CASE NO. 20180401**

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**RODENBURG LAW FIRM,  
Plaintiff- Appellant,**

**v.**

**KATHY SIRA, A/K/A KATHY JIMENEZ, MIKHAIL USHER,  
USHER LAW GROUP P.C.**

**Defendants-Appellees.**

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On Appeal from the Judgment of the District Court,  
For Cass County, North Dakota, No. 09-2017-CV-01712  
Dated September 13<sup>th</sup>, 2018  
Honorable Steven L. Marquart, Presiding

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**APPELLEE'S BRIEF IN RESPONSE TO APPELLANT'S APPEAL**

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## PRELIMINARY STATEMENT

¶1. This is an appeal taken from a Judgment of the District Court for Cass County North Dakota dated September 13<sup>th</sup>, 2018. The Court in the instant case heard the case of Rodenburg Law Firm in regards to whether the Defendants specifically Mikhail Usher, Esq. and Usher Law Group P.C. complied with their obligation to make a proper investigation of the claims prior to filing the law suit against the Rodenburg Law firm pursuant to the Fair Debt Collection Practices Act. Additionally the Court heard arguments in regard to all the Defendants'/Appellee's allegedly engaging in malicious prosecution and abuse of process.

¶2. In the early part of the case the Defendants-Appellees filed a motion to dismiss on jurisdictional grounds as the Defendants-Appellees argued that the Defendants-Appellees would reasonably not expect to be hauled into Court in North Dakota since there were no minimum contacts with the forum state – ie. North Dakota. The matter then proceeded through both motion practice and finally trial. At Trial the Plaintiff testified only via the testimony of Eva Greenly and the Court declined to compel Mr. Clifton Rodenburg to testify despite the fact he had a great deal of information in regards to the matter and was the named partner in question. The reason that the Court gave that it would not compel Mr. Rodenburg to testify was that he was trial counsel; despite the fact that he could have both hired trial counsel and used another attorney in his firm to conduct the questioning.

Finally the Defendants testified; First Ms. Sira testified by telephone and Mikhail Usher testified both on behalf of himself and on behalf of Usher Law Group P.C. As its Principal and owner.

¶3. It should be noted that prior to the beginning of trial, the Plaintiff withdrew their claim for damages based on reputation damage and decided that the totality of the damages they were seeking were their legal fees and punitive damages calculated therefrom. (See TR)

¶4. After carefully reviewing all evidence both testimonial, documentary as well as legal; the Court decided that the Plaintiff simply did not prove their case. Indeed as will be aptly demonstrated in this instrument the Court's decision was well thought out, based solidly in law and fact and was not erroneous in any way.

### **STATEMENT OF THE ISSUES**

1. Did the Trial Court correctly applied the law regarding probable cause to bring the FDCPA claims in New Jersey?
2. Did the Trial Court correctly apply the law in dismissing the malicious prosecution action with respect to the FDCPA claims?
3. Did the Trial Court properly dismiss the abuse of process claim?

## STATEMENT OF THE CASE

### **Factual and Procedural History**

¶5. On June 20<sup>th</sup>, 2017, Plaintiff Rodenburg Law Firm (hereinafter “Rodenburg”) filed an action against Defendants-Appellees alleging inter alia that Defendants-Appellees maliciously prosecuted the Plaintiff-Appellant by filing a Fair Debt Collection Practices Act (hereinafter “FDCPA”).

¶6. Subsequently the complaint was amended to include claims of abuse of process and punitive damages. This matter came before the Honorable Judge Steven L. Marquart, the matter was set for a bench trial on August 23<sup>rd</sup>, 2018.

¶7. After all testimony and evidence was heard by the Court Judge Marquart found after the all evidence has been submitted found that the Defendants-Appellees were not liable for malicious prosecution, abuse of process or any type of punitive damages.

¶8. Specifically the Judge found that based on the statements of Defendant-Appellee Sira, as well as the documentary evidence provided by Sira. As opposed to what the Plaintiff-Appellant stated in his brief the Court did not find that Defendant-Appellee Usher did not need to conduct an investigation – to the contrary the Court found that a proper investigation was conducted and that Defendants-Appellees acted properly under the Federal Rules of Civil Procedure. (See ¶¶ 34-39 App.A019)

¶9. The Court concluded that the investigation that was conducted by Usher Law Group P.C. was reasonable enough to initiate the lawsuit in question.

¶10. The Court concluded Defendants-Appellees reasonably believed that they could succeed on the merits of the matter as well as personal jurisdiction and venue based upon the reasoning that telephone calls made to New Jersey would establish both. (See ¶ ¶ 45-46 App.A020)

¶11. The Court found the argument proffered in regards to Defendants-Appellees Usher's failure to disclose other law suits by the same Plaintiff filed the same day unpersuasive. Indeed, the Court found firstly, that Defendant-Appellee Usher followed the Federal Rules of Civil Procedure correctly and even went as far as quoting the comments associated with the rules in question. (See ¶ ¶ 40-46 App.A019-20)

¶12. The Court further found that there was no abuse of process as the law suit brought by Defendants-Appellants for the purpose the process was designed and not for any other purpose. (See ¶ ¶ 47 App.A020).

¶13. Furthermore the trial Court found that Defendants-Appellees had “*trustworthy information that caused both of them to believe that there was a chance that Sira/Jimenez's may be held valid upon adjudication,*” The Court therefore found that the maledictions prosecution claim failed. (See ¶ 51, App.A21)

¶14. Rodenburg argues both at trial and in the instant appeal that

Defendants-Appellees initiated both a malicious prosecution action as well as abuse of process. Rodenburg makes this argument based on:

- A) Rodenburg's assertion that Usher should have conducted additional investigation prior to filing the law suit: despite the fact that the investigation Usher by testimony of all parties interviewed his client, reviewed the documents available and reviewed Rodenburg's litigation history which included collection from various individuals, various violations of the FDCPA and a malicious prosecution matter which resulted in a finding against Rodenburg.
- B) Rodenburg's assertion more than one complaint was filed on the same day against multiple Defendants.
- C) Rodenburg's assertion, without verification that the case-file was opened and the matter initiated on a particular day which was more than a year prior to the initiation of the lawsuit which would put it out of the statute of limitations set by the FDCPA. (See 15 U.S.C. § 1692k(d)).

¶15. As will be amply demonstrated in this instrument and which is also self-evident from the Appellant's submissions themselves all of the the Appellant's argument are without merit and are indeed not only bordering on frivolity, but are indeed willful misrepresentations of the record and in and of themselves malicious prosecution by Plaintiff-Appellant.



¶16. Indeed as is amply clear by the record, Usher contacted the Plaintiff-Appellant numerous times, at no point during any of these conversations did the Plaintiff-Appellant ever provide any evidence to the Defendants-Appellees of their assertions that they did not make any telephone calls. Indeed, it seems odd that the Plaintiff-Appellant insists that Usher should have obtained phone records from his individual client while no such evidence was ever provided by the Plaintiff-Appellant.

¶17. The Appellant makes repeated reference to Usher's attempt to settle the matter, and asserts that the Defendant-Appellee had an obligation to provide facts to the Plaintiff-Appellant without the formal institution of discovery. (See Appellant's Brief Pg 7 ¶¶ 29-30).

¶18. However as Usher testified and as noted by the Court attempts to settle are in no way evidence of malicious prosecution, and indeed the Responsibility of any good attorney attempting to resolve the matter. Indeed, correspondence between Usher Law Group P.C. and the Rodenburg Law Firm clearly shows that the Plaintiff-Appellant continued to demand that Usher Law Group drop the case without any evidence whatsoever and only on the word of the Plaintiff-Appellant. ( See Court's decision Pg 6 ¶¶ 28-29 )

¶19. Additionally as is clearly depicted in the Appellant's brief, once a motion was filed by the Plaintiff-Appellant that actually contained real information

and additional proof the Defendant's-Appellees decided to withdraw the matter on the off chance that the Plaintiffs-Appellants could be correct. Although, even when withdrawing the matter from the New Jersey Federal District Court there was no dispositive evidence that the Plaintiff-Appellant did not commit misconduct pursuant to the FDCPA, but after Usher discussed the matter with Sira they mutually decided to withdraw the matter. (See Appellant's Brief Pg 7 ¶¶ 31-32 )

¶20. When Usher asked Rodenburg's attorney Christopher Curci if Rodenburg intended to sue Usher because of the insistence of Curci not to include that the matter would be dismissed without attorney's fees; Curci replied that he did not know what Rodenburg's intentions were. However, during Curci's deposition he admitted that he knew since he was hired that Rodenburg intended to sue Usher. (Tr. Pg. 416 )

¶21. The matter was then dismissed, and Rodenburg initiated a law suit against Defendants-Appellees.

## **ARGUMENT**

### **The Trial Court correctly applied the law regarding probable cause to bring the FDCPA claims in New Jersey**

¶22. Mrs. Sira/Jimenez contacted Mr. Usher and provided an account of collection efforts against her. She additionally provided documentary evidence showing that collection efforts from both Rodenburg (under a different Firm name)

and others. ( Tr. Pg. 235 )

¶23. Usher then filed a law suit in good faith in New Jersey Federal District Court. Indeed the law suit in question alleged violations of the Fair Debt Collection Practices Act. (See 15 USC Section 1692 at sec (hereinafter “FDCPA)).

¶24. Firstly, in regards to the jurisdiction and venue in New Jersey the Court properly found that Sira sought out an attorney licensed in New Jersey; and moreover the Court found that Usher testified credibly that Sira told him she received the telephone calls in New Jersey where she was living at the time. As such the Court properly found based on the facts that Appellees had a reasonable belief that the Plaintiff could prevail on the issues in question. (See Court's decision Pg. 3-5 ¶¶ 19-27) (See also Brody v. Ruby, 267 N.W. 2D 902, 905 (IA 1978))

¶25. Secondly the Court found that Usher acted properly after being contacted by Rodenburg as Rodenburg did not provide any documents other than the law suit initiated against Sira in Montana. The Judge noted Usher's testimony as he was aware of the practice of sewer service and as such, since no other documents were provided by Rodenburg there was no cause for Usher not to reasonably continue to believe Sira. (See Court's decision Pg 6 ¶¶ 29-32)

¶26. The Court further found that Usher complied with both Rule 8 and Rule 11 of the FRCP; specifically the Court notes that Usher made an inquiry reasonable

under the circumstances as the law requires. (See Court's decision Pg 6-7 ¶¶ 33-35)

¶27. The Court points out that both the oral information provided by Sira and the documentary evidence provided to him suffices legally as a reasonably inquiry under the circumstances; the Court even goes as far as to quote the comment of Rule 11 of the Federal Rules to point out that Usher's inquiry was reasonable under the circumstances.. (See Court's decision Pg 7 ¶¶ 36-39)

¶28. The Court also found that, Rodenburg's argument that there was something nefarious about Usher filing 3 law suits with the same Plaintiff in New Jersey Federal District Court was invalid. Indeed, the Court correctly points out that Usher properly complied with the instructions on the Civil Cover Sheet which discuss pending cases with existing docket numbers. The Court properly concluded that Usher was not required to disclose the additionally filed cases pursuant to the rules. (See Court's decision Pg 8 ¶¶ 40-43)

¶29. In order to further their argument during trial Rodenburg offered an unpublished decision from the Eastern District of New York to prove its case. This was neither binding authority, nor was the case at all on point. (See *Majerowitz v. Stephen Einstein & Associates P.C.*, No. 12 Civ. 4592 (ILG)(RLM), 2013 WL 4432240 (EDNY 08-15-2013).

¶30. The Court properly found that this unpublished decision proved nothing at trial and was binding on absolutely no action of Usher's. (See Court's decision

¶31. The Court further found that venue and long arm jurisdiction was proper against Rodenburg in New Jersey under the circumstances. (See *Reliance Nat'l Ins. Co. v. Dana Transp. Inc.*, 871 A.2d 120 (N.J. Super. Ct. App. Div. 2005).

¶32. Moreover, the Court found that numerous telephone calls to a jurisdiction constituted minimum contacts. (See *Salpoglou v. Shlomo Widder. M.D., P.A.*, 899 F. Supp. 835 (D. Mass 1995))

**The Trial Court correctly applied the law in dismissing the abuse of process action with respect to the FDCPA claims**

¶33. The Court found that Defendants-Appellees were not liable for Abuse of Process primarily because the law suit was initiated for the proper purpose and for a purpose for which the action was designed and for no other reason. (See *Wacher v. Gratech Co. LTD.*, 2000 ND 62 ¶ 33, 608 N.W. 2.d 279; *Stoner v. Nash Finch Inc.*, 446 NW. 2.d 747, 741 (N.D. 1989))

¶34. In this action after hearing all testimony the Court determined that there was no other reason that the Defendants-Appellees initiated the underline action, and there was no evidence to the contrary.

**The Trial Court correctly applied the law in dismissing the Malicious Prosecution action with respect to the FDCPA claims**

¶35. The Trial Court correctly found that the Plaintiff-Appellant did not

establish the elements of Malicious Prosecution in this action. Indeed, the Court states that at a minimum to maintain an action for Malicious Prosecution the Plaintiff must show:

1. A criminal proceeding instituted or continued by Defendant against Plaintiff.
2. Termination of the proceeding in favor of the accused.
3. Absence of probable cause for the proceeding.
4. “Malice” or primary purpose other than bringing the offender to justice.

(See *Richmond v. Haney*, 480 NW. 2d 751, 755 (N.D. 1992))

¶36. Here the court correctly noted that the action terminated in Rodenburg's favor and was a withdrawal rather than a negotiated settlement. As such the Court noted that a dismissal of a matter is seen as a favorable resolution if it is dismissed pursuant to Rule 41 (a)(1)(ii) of the FRCP. (See *Liberty Synergistics, Inc, v. Microflo Ltd.*, 50 F.Supp 3d 267 (EDNY 2013)).

¶37. Moreover, the Court has previously noted that all that is necessary for probable cause is the reasonable belief of the claimant that the claim may be held valid upon adjudication. As noted in the abuse of process decision by the Court as well the Court found that there was valid and reasonable reason to file this matter in New Jersey District Court. (See Court's decision Pg 9-10 ¶¶ 48-51)

## CONCLUSION

¶38. It is therefore respectfully submitted that the Court's found appropriately in favor of the Defendant-Appellee and there was no abuse of process and no malicious prosecution in this matter. Defendants-Appellees therefore respectfully request that this Honorable Court upheld the finding of the Trial Court and dismiss the Plaintiff-Appellant's appeal.

May 24<sup>th</sup>, 2019  
Brooklyn, New York

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY, on May 30, 2019, that a true copy of the foregoing DEFENDANTS-APPELEES BRIEF have been served upon the following by placing a true and correct copy thereof by email and USPS First Class Mail to the Following:

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