

DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Plaintiff: <p style="text-align: center;">CONSUMER CRUSADE, INC., a Colorado corporation</p> Defendants: <p style="text-align: center;">NEW YORK DELI NEWS, INC.; and ALBERT BELSKY, its officers and directors</p>	
<u>O R D E R</u>	

THIS MATTER comes before the court subsequent to a trial in which plaintiff was unable to present any evidence in support of its complaint. The motions which have been filed are plaintiff's motion to reconsider and defendants' request for attorney fees.

Plaintiff is a company formed to obtain assignments of claims under the Telephone Consumer Protection Act (hereafter TCPA) and to pursue claims under that federal statute. Plaintiff filed this action May 26, 2004. The matter came for trial September 9, 2005, approximately 16 months after it was filed. Prior to trial the court had issued various rulings including that the case was proceeding under Rule 16.1, C.R.C.P., and including a lengthy written ruling concerning evidence of the assignments and authorization to send the faxes at issue.

On the day of trial the court concluded that under C.R.C.P. Rule 16.1(k)(4) that it would not allow plaintiff to call defendant Belsky because defendant Belsky had been deposed and therefore could not be offered as a witness by the party deposing him. Plaintiff sought to offer the deposition of excerpts from Mr. Belsky but had not brought those transcripts to the trial. Because plaintiff presented no evidence the court dismissed the case.

Plaintiff's motion to reconsider that dismissal and the other rulings made on the day of trial is denied. Nothing stated in plaintiff's motion gives this court any reason to reconsider any of the rulings it made on the day of trial. Indeed, plaintiff brought the case, plaintiff had more than ample time to prepare the case, and plaintiff was given full opportunity to present evidence under Rule 16.1 and the Colorado Rules of Evidence at the trial and failed to do so. The dismissal is reaffirmed.

Defendants move for attorney fees based upon the failure of plaintiff to present any evidence on the day of trial. Defendants urge that therefore plaintiff's action was groundless and frivolous.

The seminal case on groundless and frivolous actions under C.R.S. §13-17-101 *et seq.* is *Western United Realty v. Isaacs*, 679 P.2d 1063 (Colo. 1984). In that case the Colorado Supreme Court distinguished the words "frivolous" and "groundless" and gave unique definitions to each term. It held:

Based on the authorities cited above, we are satisfied that the analysis and the standards adopted in *International Technical Instruments [v. Engineering Measurements Co.]*, 679 P.2d 558 (Colo. Ct. App. 1983) (*cert. denied* 1984) are correct. The claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. This test encompasses the variations used in *Morton [v. Allied Stores Corp.]*, 90 F.R.D. 352 (D. Colo. 1984), [*Mission Denver Co. v. Pierson and Anderson [v. Jenkins Construction Co.]*, 83 N.M. 47, 487 P.2d 1352 (1971)] but does not apply to meritorious actions that prove unsuccessful, legitimate attempts to establish a new theory of law, or good-faith efforts to extend, modify or reverse existing law. Similarly, the claim or defense is groundless if the allegations in the complaint, while sufficient to survive the motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial. This test assumes that the proponent has a valid legal theory but can offer little or nothing in the way of evidence to support the claim or defense. Both of these tests presuppose a certain professionalism on the part of trial counsel. Certainly, if the record reveals that counsel or any party has brought, maintained or defended an action in bad faith, the rationale for awarding attorney fees is even stronger. Bad faith may include conduct which is arbitrary, vexatious, abusive, or stubbornly litigious. It may also include conduct aimed at unwarranted delay or disrespectful of truth and accuracy.

(*Western United Realty, Inc. v. Isaacs*, 679 P.2d at 1069.)

Under these definitions the court concludes that plaintiff's claim is not frivolous. The TCPA is a federal statute and the court denied any and all motions which would have prevented this matter from going to trial.

The court is then faced with the question of whether the claim was "groundless" as defined above. Certainly based on the court's rulings including applying Rule 16.1 and plaintiff's counsel's failure to have evidence to present on the day and time of trial there was no evidence to support plaintiff's claim. Under the *Western United Realty, Inc. v. Isaacs*' test when

plaintiff presents no evidence at trial, having been given ample opportunity and time to prepare for trial, the court must conclude the claim is groundless.

Having concluded that the action is groundless under the *Western United Realty, Inc. v. Isaacs*' case the court then turns to the request for attorney fees. Attorney fees certainly may be allowed under C.R.S. §13-17-102 provided that the court follows the procedures and outlines its considerations of the elements in C.R.S. §13-17-103. Case law has directed that: "If a party requests a hearing concerning the award of fees and costs under either statute [C.R.S. §13-17-102 or §14-10-119], then the district court must hold a hearing." *In re Marriage of Aldrich*, 945 P.2d 1370 (Colo. 1997). In its motion to reconsider and response to defendants' request for attorney fees, plaintiff requested a hearing. (Motion to Reconsider and Response to Defendants' Request for Attorney Fees, page 13.)

Accordingly the court orders that a hearing be set by defendants on notice to plaintiff for consideration of attorney fees. The hearing shall not include any further discussion or argument on plaintiff's motion to reconsider this court's previous rulings and shall address only the reasonableness and appropriateness of an amount of attorney fees to be assessed with an eye towards those considerations outlined in C.R.S. §13-17-103.

Done this 10th day of December, 2005.

BY THE COURT:



H. Jeffrey Bayless
District Judge

cc: