

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

LINDA CASS, an individual,)
NICOLE FITZER, an individual, and)
GRANDMA’S GROCERY, INC., an)
Oklahoma Corporation,)
Plaintiffs,)

vs.)

CASE NO. 13-CV-483-SPS

BALBOA CAPITAL, a Delaware Corporation,)
which has a primary place of business in)
California,)
Defendants.)

COMPLAINT

COMES NOW, the Plaintiffs, by and through their attorney, Brian R. McLaughlin, and for their *Complaint* allege and state as follows, to-wit:

ALLEGATIONS OF FACT

- 1) The Plaintiffs Linda Cass and Nicole Fitzer are Oklahoma citizens and residents of Pittsburg County, OK.
- 2) Plaintiff Grandma’s grocery is an Oklahoma Corporation.
- 3) All relevant material negotiations, conversations, and execution of contract(s) occurred in Pittsburg County, Oklahoma, and the personal property which serve as a basis for this action is located in Pittsburg County, Oklahoma, in the Eastern District of Oklahoma.
- 4) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1332 in that there is complete diversity of citizenship between Plaintiffs and Defendant and because more than seventy-five thousand dollars (\$75,000.00) is at issue.
- 5) The Defendant has had both systematic and continuous contact with this forum and

have further have specific contacts which the causes of action herein.

- 6) On June 29, 2011, Plaintiffs began the process of securing a Subway franchise to be opened in Grandma's Grocery, owned by Grandma's Grocery, Inc., an Oklahoma Corporation.
- 7) That as part of securing the franchise, the Plaintiffs had to attend classes and training in Connecticut, post a franchise fee, and prepare Grandma's Grocery to meet Subway specifications at great personal and corporate costs for the Plaintiffs.
- 8) That in addition to the preparation listed in paragraph No. 7, the Plaintiffs' also had to secure equipment that met Subway specifications.
- 9) That to secure financing for said equipment; the Plaintiffs used the Defendant's corporation.
- 10) Upon being approved, the Plaintiffs were faxed a barely legible contract from California to execute under the assurance that it resembled prior contracts between Defendants and Plaintiffs.
- 11) The Plaintiffs signed and faxed the contract to the Defendants in California.
- 12) Prior to signing the contract which was illegible in parts the Plaintiffs contacted the representative of Balboa to see if there was anything they needed to know in the parts that they could not read and they were told that it was just a contract and there was nothing other than standard language.
- 13) Relevant facts contained in the contract included that the payments would be deducted automatically from the Grandma's Grocery, Inc., account when due.
- 14) The Plaintiffs opened and operated the Subway for which the equipment was procured successfully starting November 28, 2011.

- 15) The Plaintiffs, in reviewing their online account, were notified that their first payment would be drafted out in May 5, 2012.
- 16) The Plaintiffs received no other notification of payments due, drafted, or otherwise except through their online account.
- 17) The Plaintiffs were contacted by Balboa, from the State of California on June 8, 2012, stating they had drafted previously due payments from an unrelated third-party account and that the Plaintiffs payments were to have started December 7, 2011,
- 18) Based on the Balboa, Inc. notification, the Plaintiffs' account had been credited for payments in the amount of \$15,254.98, that had been drafted from someone else's checking account,
- 19) The Defendants acknowledged that they had not sent any notice of payments due, made, etc. to the Plaintiffs.
- 20) Even with the acknowledgment that the Plaintiffs were not aware of the Defendants error in drafting payments and that they had no notice contrary to the one indicating the first payment was due on May 5, 2012 the Defendants e-mailed the Plaintiff three invoices and **demanded** that the Plaintiffs either pay the amount to them that they have negligently drafted from someone else or pay the note in full.
- 21) Plaintiffs were unable to come up with the total amount the Defendant had taken from a third-party's account and were unable to finance the entire balance either.
- 22) The Plaintiffs, in order to try and protect the sizeable investment that they had already made to prepare for the Subway offered to make a payment in the amount of the last payment the Defendant negligently took from a third-party account, and pay out the balance based on a malicious and fraudulent representation made by Balboa Capital,

Inc. employee(s).

- 23) After they authorized the payment listed in paragraph No. 22, the Defendant told the Plaintiffs that they would now need the entire past due balance or payoff for the whole amount or they would take the equipment needed for the Subway operations.
- 24) The Plaintiffs, being unable to pay off the balance that was accrued due to the negligent, fraudulent and malicious conduct of the Defendant, requested counsel to try and resolve the matter.
- 25) Plaintiffs were given no further notice of action until they were contacted by a recovery agent who set up a date to pick up the equipment. This recovery agent called within 30 days of initial notice of past due invoices.
- 26) Defendant, although they had already started to attempt recovery, proceeded to file suit in California claiming breach of contract by the Plaintiffs,
- 27) The combination of law suit in California, breach of contract by Balboa Capital, Inc., fraudulent and malicious representations by Balboa Capital, Inc. and contact from recovery agents forced the Plaintiffs to shut down the Subway restaurant.
- 28) In addition to the lost costs of starting the Subway, the Plaintiffs lost prospective revenue from the operation of the Subway restaurant.
- 29) Not only did the Plaintiffs lose money from the Subway closing, but the controversy of the first fast food chain in their small town closing created by the Defendant also caused sales at Grandma's Grocery and Simple Simon pizza to diminish because of the defaming rumors that Grandma's Grocery and Simple Simon pizza were also closed. This ultimately led to the closing of Grandma's Grocery.
- 30) On July 26, 2012, the Subway equipment was repossessed by an agent contacted by

the Defendant.

WHEREFORE, Allegations of facts considered, Plaintiff prays this Court to grant their Complaint based on the following causes of action against the Defendants individually and as a Committee:

30) Conversion:

- a. In *Aylesbury Mercantile Company v. Fitch*, 22 Okla. 475, 99 P. 1089, Conversion was defined as, “any distinct act of dominion wrongfully exerted over another’s personal property in denial of or inconsistent with his rights therein.”
- b. *The Restatement 2d. Of Torts* defines conversion as “An intentional exercise of dominion and control a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other full value of the chattel.” At § 222.
- c. Modern law has determined that the chattel can include intangible objects such as promissory notes, checks, monies, payables, etc.
- d. The actions of the Defendant relevant to this cause of action are:
 - i. They negligently sent a notification for payment to the Plaintiffs that indicated the first payment was due in May when, according to the Defendant post facto was untrue,
 - ii. They negligently took the payment they alleged was due from the account of a third party and sent no notice to

the Plaintiffs that:

1. a payment was due and
 2. a payment was processed.
- iii. The proffered a resolution tot he negligent actions they performed and then denied the relief that promised
- e. The actions above create an intentional exercise of dominion over the Plaintiffs businesses by:

- i. So interfering with their ability to operate their Subway that they were forced to close their business and fire their employees,
- ii. By damaging the good name of Grandma's Grocery to the point that the sales of the store have significantly diminished.
- iii. The actions of the Defendant have so damaged the actual business and the good name of the Plaintiffs businesses that their usual purpose had diminished and has been completely eliminated.
- iv. Plaintiffs note that Conversion applies to "wrongful" and "intentional" dominion inconsistent with the rights of another.

And the actions of the Defendant meet both qualifications as:

1. The initial action of taking the payments from the wrong account without ANY notice to the Plaintiffs,
2. Denying the proposed remedy (that THE DEFENDANT proposed) by taking the payment, the

performance required by the Plaintiffs, with no *intention* to resolve the matter as witnessed by their subsequent actions, or in the alternative making a promise to resolve the issue without actual ability to do so, *wrongfully*.

- f. REMEDY: the available remedy for Conversion is the current value of the chattel or the highest value at any point from the act of conversion to present. The value of the Subway includes the upfront costs and the subsequent projected profits and the mitigated profits of Grandma's Grocery, Inc. additionally, the costs of this action should be available under this remedy.

31) Promissory Estoppel:

- g. The theory of promissory estoppel is grounded in the *Restatement (Second) of Contracts* §90 and is incorporated into Oklahoma common law. *Russell v. Board of County Commissioners, Carter County*, 1997 OK 80, ¶ 27, 952 P.2d 492, 503. Section 90 of the *Restatement (Second) of Contracts* state in relevant part: "(1) A promise which the promisor should reasonable expect to induce action for forbearance on the part of the promisee or third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."
- h. The Promise must be explicit but need not be a verbal or written promise directly to the third person.

- i. The Defendant, through its agents, made a representation that if the Plaintiff made the payment of \$4,238.34 in June, that it would allow them an opportunity to pay out the balance.
- j. Upon hearing, believing, and relying on this promise the payment was made.
- k. After the payment was made, the Defendants informed the Plaintiffs that the only payout option was to pay the entire balance.
- l. Due to the refusal of the Defendant to put any payment plan in writing, it is clear the promise of the Defendant was meant to induce an action, which it did, and clearly there is no indication that the remedy promised to be performed by the Defendant was actually intended to happen by the Defendant.
- m. REMEDY: Reinstatement at this point would be fruitless as the capacity to do Subway business is not longer feasible as all employees have been laid off and the franchise will likely be cancelled. The proper remedy is to place the Plaintiffs in the position they would have been in had the Defendant performed the action promised.

32) Fraud:

- n. In *Rucker v. Tietz*, Okl., 37 P.2d 341, it is stated: “The elements of actionable fraud are material, false representations made with knowledge of their falsity, or recklessly made without knowledge of their truth and as a positive assertion, with intention they be acted upon by another, and relied thereon by another party to his injury.”
- o. The Defendant made three clearly false representations or reckless

representations without knowing their falsehood:

- i. They falsely represented the initial due date of the Plaintiffs payment,
 - ii. That recklessly represented the account as current while they recklessly withdrew payments from a third parties account without giving them notice of any payment to the Plaintiffs,
 - iii. They falsely represented that a payment made by the Plaintiffs would allow them to make an arrangement to pay the amount out over time.
- p. These three items were clearly relied on by the Plaintiffs and have caused them significant harm.
- q. REMEDY: The remedy, at a minimum requires that the Plaintiffs be reinstated to the position that they would have been in and should find that the intentional and malicious actions of the Defendant warrant punitive damages in addition to the actual damages.

33) Intentional Infliction of Emotional Distress:

- r. The law of Intentional Infliction of Emotional distress is outlined in *Miller v. Miller*, 956 p.2d 887, and (OKLA. 1998).
- s. “In *Breeden v. League Services Corp.*, this court delineated the scope of the tort of intentional infliction of emotional distress of Oklahoma jurisprudence by adopting the narrow standards of §46 of the Restatement of Torts (Second) (1997). An action for intentional infliction of emotional distress will lie only where there is extreme and outrageous conduct coupled with severe emotional distress. Intentional infliction of emotional distress does not provide redress for every invasion of emotional serenity or every anti-social act, and it does

not protect mere hurt feelings, no matter how justified. [956 P.2d 901] Liability does not extend “to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The test is whether the alleged tortfeasor’s conduct is simply one of those unpleasant examples of human behavior which we all must endure from time to time, or whether it has so totally and completely exceeded the bounds of acceptable social interaction that the law must provide redress. This court has agreed that the line between the acceptable and the unacceptable should be drawn in accordance with Comment d to §46 of the Restatement (Second):” . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim. ‘Outrageous!’ . . .”

- t. The conduct of the Defendant as delineated above is so extreme, and beyond the degrees of both business practice and general dignity that it literally has had members of the community of Quinton, OK exclaim that it is outrageous with their words and with their actions.
- u. The actions are not a mere petty insult, threat, or oppression; they are actions which are beyond the bounds of decency in both the business and personal sense.
- v. The Plaintiffs have experienced monetary and personal damages as a result

of the actions of the Defendant.

w. REMEDY: As the Court sees fit.

34) Tortious Interference (prospective and contractual)

x. According to *FULTON v. PEOPLE LEASE CORPORATION*, 2010 OK CIV APP 84, 241 P.3d 255, “In *Ellison v. An-Son Corp.*, 1987 OK CIV APP 71, ¶13, 751 P.2d 1102, 1106... “malicious interference with business or contract relations: 1. That he or she had business or a contractual right that was interfered with, 2. That the interference was malicious and wrongful, and that such interference was neither justified, privileged nor excusable, 3. That damage was proximately sustained as a result of the complained of interference.”

y. At paragraph 28, *id.*, “The Supreme Court recently explained “the intentional tortious interference claims” Oklahoma has long embraced are found in *Restatement (Second) of Torts* (R.S. Torts) § 766, which “applies to interference with a third party’s performance of an existing contract,” and § 766B, which “applies to interference with prospective contractual relations not yet reduced to contract.” *Wilspec Technologies, Inc. v. DunAn Holding Group, Co., Ltd.*, 2009 OK 12, ¶6-7, 204 P.3d 69, 71. However, these torts are not synonymous. *Overbeck*, ¶6, 757 P.2d at 848.”

z. The Plaintiffs plead as to both causes of action delineated above as:

i. The Plaintiffs had both:

1. Existing contracts with the Subway corporation and its grocery suppliers and

2. Potential future contractual relations and economic benefits including future contracts with Subway and suppliers, future grocery contracts, bonuses, and incentive deals.

aa. The interference with these contracts was wrongful, not justified, nor privileged or excusable as:

i. It was wrongful for the allegations listed above and the Defendant had no justification as the alleged breach was caused by the wrongful and negligent actions of the Defendant,

ii. The excuse given for the alleged breach by the Plaintiffs was in fact based on negligent actions of the Defendant and hence not excusable either.

bb. There can be no argument that the damage caused by the loss of the Plaintiffs Subway was caused directly by the wrongful, unjustified, unprivileged and inexcusable actions of the Defendant.

cc. Further, the link with the loss of sales and consequently the loss of future incentive bonuses, etc. can be linked to the loss of the Subway and further ill will created by the actions taken by the Defendant toward the Plaintiffs.

dd. REMEDY: The Plaintiffs are entitled to the value to the lost contracts and loss of future profits and contracts.

35) Negligence

ee. The common law regarding negligence requires: (1) Breach of a, (2) duty, which (3) is the proximate cause of, (4) damages to the aggrieved party.

ff. The duty can be implied using the reasonable person standard. In cases of

business transactions and relationships the standard is to act in a manner not inconsistent with accepted business practices.

- gg. In the case at bar, the Defendant had a duty to:
 - i. Properly notify the Plaintiffs of payment due dates,
 - ii. Provide receipt(s) or acknowledgments of the payments received, and
 - iii. Draft the payment from the Plaintiffs' account properly.
- hh. The Defendant breached these simple duties by:
 - i. Giving the Plaintiffs the wrong due date for the initial payment,
 - ii. Not providing receipt(s) or acknowledgments of the payment(s), and
 - iii. Drafting the payments from an account not belonging to the Plaintiffs and not listed by the Plaintiffs in ANY documents to the Defendant as their account.
- ii. These breaches of the most basic of business duties was the proximate cause of the damages, namely:
 - i. Loss of the Subway contracts,
 - ii. Loss of profits from their grocery store and loss of credit
 - iii. Loss of money invested in the Subway, and
 - iv. Loss of future profits and contracts.
- jj. REMEDY: To restore the Plaintiffs that they would have been in had the Defendant not acted negligently.

36) Defamation

- a. As Oklahoma is a Notice pleading State the Plaintiffs fully allege the statutory and common law elements of Defamation and further allege that the actions

of the Defendant are such that they, through their actions, have committed actions sufficient to have caused defamation of character.

37) Willful deceit

kk. Pursuant to *Title 76 §2, Oklahoma Statutes, et seq.*, “One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.” and “A deceit, within the meaning of the last section is either: 1. The suggestion, as a fact, of that which is not true by one who does not believe it to be true. 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true. 3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or, 4. A promise, made without any intention of performing.”

ii. A simple application of the statute to the case at hand is:

- i. The Defendant suggested that a payment to reinstate the account as current was made without any reasonable belief of the truth thereof as the Defendant had not received authorization to make that arrangement,
- ii. Not disclosing that fact that the Defendant had no authorization to make a deal to resolve the problem at hand and had no grounds to believe that their assertion was true, and
- iii. The promise of the Defendant was made without any intention of performing the promise

mm. There are several other applications not made specifically herein that are equally compensable under the statute.

nn. REMEDY: As stated in the Statutes listed.

38) Malicious Wrong

oo. According to *FULTON v. PEOPLE LEASE CORPORATION*, 2010 OK CIV APP 84, 241 P.3d 255,”... (at paragraph 42) the tort of “malicious wrong” was first discussed in *Mangum Electric Co. v. Border*, 1923 OK 547, ¶9, 222 P. 1002, 1005, as follows: [t]he intentional doing of that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another, or that other person’s property or trade is actionable, if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong. (Emphasis added.)”

pp. At paragraph 43, “Although...there is no express adoption of the R.S. Torts § 870 in either *Ward* or *Mangum*, there are similarities between the two torts. Section 870, entitled “Liability for Intended Consequences - General Principle,” provides, “[o]ne who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances.” Intentional conduct “when done without just cause or excuse,” as required for a malicious wrong claim, clearly equates to conduct that is “not justifiable.... (further down) See also Comment (a) to R.S. Torts § 870 (“It is intended to serve as a guide for determining when liability should be imposed for harm that was intentionally inflicted, even though the conduct does not come within the requirements of

one of the well established and named intentional torts.”)

- qq. In the alternative if the Court finds no other just cause of action to entitle the Plaintiffs to recovery, the Plaintiffs allege this final cause of action for recovery.

WHEREFORE, premises considered, Plaintiff requests the relief as outlined above, in an amount in excess of seventy-five thousand dollars (\$75,000.00), both actual and Punitive, for attorney fees and costs associated with the prosecution of this action to correct the damages caused by the actions of the Defendant, and for all other relief that this Honorable Court may deem just and proper.

Respectfully submitted,



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VERIFICATION

STATE OF OKLAHOMA)
) ss.
COUNTY OF HASKELL)

Linda Cass and Nicole Fitzer, being of lawful age, being first duly sworn upon oath, state that:

We are the above named Plaintiffs. I have read the within and foregoing *Complaint*, know the contents thereof, and the matters and things herein stated are true and correct to the best of my knowledge and belief.

Linda Cass
Linda Cass

Nicole Fitzer
Nicole Fitzer

Subscribed and sworn to before me this 24th day of October, 2013, by Linda Cass and Nicole Fitzer.

My Commission Expires: 01-18-2017
My Commission No. 13000663

Erica Sosa
NOTARY PUBLIC

