

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

ABRAHAM BEST,

Plaintiff,

v.

VISIBLE MUSIC COLLEGE,

Defendant.

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Case No.: 2:20-cv-02062-SHL-tmp

Plaintiff's Response to Defendant's Motion to Dismiss

Comes now Plaintiff, by and through her attorney, and respectfully requests that this Honorable Court deny Defendants' Motions to Dismiss, brought pursuant to Federal Rules of Civil Procedure 12(b)(6).

In opposition to Defendants' Motions, Plaintiff responds as follows:

Facts

1. Plaintiff incorporates, as if restated verbatim, his Complaint, which was filed on December 18, 2019, and supplemented on March 3, 2020. (Doc. 1 and 15).

Argument

In a motion to dismiss, when viewing the Complaint, all factual allegations in the Complaint must be presumed to be true, and reasonable inferences must be made in favor of the non-moving party. Great Lakes Steel v. Deggendorf, 716 F. 2d 1101, 1105 (6th Cir. 1983).

I. A Valid Claim Has Been Stated For Infliction of Emotional Distress.

Plaintiff has asserted sufficient grounds to support the claims of Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress. “The elements of an intentional infliction of emotional distress claim are that the defendant's conduct was (1) intentional or reckless, (2) so outrageous that it is not tolerated by civilized society, and (3) resulted in serious mental injury to the plaintiff.” Saint Rogers v. Louisville Land Co., 367 S.W. 3d 196, 205 (Tenn. 2012).

Citations omitted.

In this case, Plaintiff clearly alleged that Defendant’s conduct was intentional or reckless. (See Doc. 1, Complaint, in its entirety, but specifically numbered paragraphs 7, 11, 12, 15, 17, 18, 22, 25, 30, 31, 33, 34, 35, 36, 42, 43, 44, and 45). The Complaint alleges that the parties entered into a contract. (see Complaint numbered paragraph 7). That Defendant’s employee used Plaintiff’s work for his book without Plaintiff’s knowledge or permission. (see Complaint numbered paragraph 11). That this conduct was reported to Defendant. (see Complaint numbered paragraph 15). That Defendant wanted Plaintiff not to disclose this information to anyone. (see Complaint numbered paragraph 17). That Defendant wanted Plaintiff not to pursue the matter. (see Complaint numbered paragraph 18). That Defendant acknowledged that their employee was “mishandling” student’s papers. (see Complaint numbered paragraph 22). That Defendant had Plaintiff removed from its school because Plaintiff repeated that improper conduct was occurring. (see Complaint numbered paragraph 11). That Plaintiff was wrongfully removed for reporting that improper conduct was occurring, and that Defendant became aware of this fact. (see Complaint numbered paragraph 33). Therefore, the Complaint supports the fact that Defendant’s conduct was intentional or reckless.

The Complaint also clearly supports the outrageousness of the conduct, as represented in the Complaint in its entirety, as well as specifically, numbered paragraphs 7, 8, 11, 13, 15, 17, 18, 20, 25, 30, 31, 34, 35, 42, 43, 44, 45, 46, 47, 48, 49, 50, and 53.

Defendant entered into a contractual agreement with Plaintiff, and was obligated to educate and teach him. (see Complaint numbered paragraph 7, 8). Instead, Defendant used the work that Plaintiff was creating, in order to exploit him, and potentially profit from it. (see Complaint numbered paragraph 11, 13). Plaintiff reported this conduct to Defendant in hopes to be protected from the unjust and improper conduct. (see Complaint numbered paragraph 15). Defendant then encouraged Plaintiff not to tell anyone about the injustices that he was experiencing. (see Complaint numbered paragraph 17-18, 25). However, Defendant ultimately removed Plaintiff for reporting the injustices that occurred against him. (see Complaint numbered paragraph 30). To make matters worse, Defendant told Plaintiff not to pursue Defendant because it would not help. (see Complaint numbered paragraph 31). This was clearly designed to threaten and intimidate Plaintiff, who was the victim. Defendant did this to Plaintiff; all while not following the procedures as outlined in their contractual agreement. (see Complaint numbered paragraph 34). In addition, Defendant removed evidence and information from the investigative file that supported Plaintiff's allegations. (see Complaint numbered paragraph 34). Defendant took Plaintiff's money, used his work for Defendant's benefit, all while refusing to teach Plaintiff. (see Complaint numbered paragraph 35). Defendant took Plaintiff's tuition money, and caused Plaintiff to incur significant debt, only to improperly remove him. (see Complaint numbered paragraph 42). Defendant was also aware that Plaintiff was being subjected to racist comments by its staff, which Defendant condoned. (see Complaint numbered paragraph 43). Defendant also attempted to try to cover up the fact that it acted improperly. (see Complaint numbered paragraph 44). Defendant then went on to expel

Plaintiff based on knowingly false representations made by Defendant, all while denying Plaintiff access to the contractually agreed appeal process. (see Complaint numbered paragraph 45-50, 53). Therefore, no genuine dispute can exist that if taken as true, Defendant's conduct is sufficiently outrageous.

Defendant's conduct resulted in severe mental injury, which is also supported by the Complaint, when reviewed in its entirety.

In order to show serious mental injury, there are many types of proof that can be shown. "Such proof may include a claimant's own testimony, as well as the testimony of other lay witnesses acquainted with the claimant. Physical manifestations of emotional distress may also serve as proof of serious mental injury. Moreover, evidence that a plaintiff has suffered from nightmares, insomnia, and depression or has sought psychiatric treatment may support a claim of a serious mental injury. The intensity and duration of the mental distress are also factors that may be considered in determining the severity of the injury." Saint Rogers v. Louisville Land Co., 367 S.W.3d 196, 208 (Tenn. 2012).

Furthermore:

To summarize the preceding review of the law in Tennessee regarding the "severe mental injury" element of the torts of intentional infliction of emotional distress and negligent infliction of emotional distress, the following nonexclusive factors inform the analysis and are pertinent to support a plaintiff's claim that he or she has suffered a serious mental injury:

(1) Evidence of physiological manifestations of emotional distress, including but not limited to nausea, vomiting, headaches, severe weight loss or gain, and the like;

(2) Evidence of psychological manifestations of emotional distress, including but not limited to sleeplessness, depression, anxiety, crying spells or emotional outbursts, nightmares, drug and/or

alcohol abuse, and unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, and worry;

(3) Evidence that the plaintiff sought medical treatment, was diagnosed with a medical or psychiatric disorder such as post-traumatic stress disorder, clinical depression, traumatically induced neurosis or psychosis, or phobia, and/or was prescribed medication;

(4) Evidence regarding the duration and intensity of the claimant's physiological symptoms, psychological symptoms, and medical treatment;

(5) Other evidence that the defendant's conduct caused the plaintiff to suffer significant impairment in his or her daily functioning; and

(6) In certain instances, the extreme and outrageous character of the defendant's conduct is itself important evidence of serious mental injury.

The plaintiff may present this evidence by his or her own testimony, the testimony of lay witnesses acquainted with the plaintiff such as family, friends, and colleagues, or by the testimony of medical experts.

Saint Rogers v. Louisville Land Co., 367 S.W.3d 196, 209-10 (Tenn. 2012).

Plaintiff, in numbered paragraph 55 of the Complaint, asserted that he experienced severe emotional distress in the form of frustrations, anxiety, stress, and humiliation. This language is sufficient to support his cause of action.

For Negligent Infliction of emotional distress, Plaintiff agrees with Defendant that Plaintiff would have to show negligence, in addition to a severe emotional injury. As previously stated, Plaintiff has already supported his claim for a severe emotional injury.

Furthermore, Defendant was negligent, as supported in the Complaint in its entirety, and specifically in numbered paragraphs 7, 24, 25, 34, 37, 38, 39, 40, and 41. The parties entered into a binding contract. (see Complaint numbered paragraph 7). Plaintiff informed Defendant of its misconduct regarding the taking of his work, and Defendant asked Plaintiff not to repeat what he knew to anyone. (see Complaint numbered paragraph 25). Defendant then failed to follow the proper steps necessary to investigate the matter. (see Complaint numbered paragraph 34).

Defendant had a duty to keep Plaintiff from being exploited, and to protect his work. (see Complaint numbered paragraph 37). Defendant then breached its duty, which caused Plaintiff to be victimized. (see Complaint numbered paragraphs 37-41).

Therefore, the Complaint sufficiently supports Plaintiff's claims of emotional distress. Also, to the extent that Defendant asserts that Plaintiff has not met any federal pleading standards, not only is this disputed, but in addition, it should be noted that the Complaint was filed in Tennessee's Circuit Court, under state law, and therefore, any federal pleading standards would not apply.

II. The Claim of Fraud Is Sufficiently Pled.

Plaintiff has also sufficiently pled the claim of Fraud.

"Constructive Fraud is a breach of a legal or equitable duty which is deemed fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." Kincaid v. South Trust Bank, 221 S.W. 3d 32, 39 (Tenn. 2006).

This cause of action is supported in the Complaint in its entirety, and specifically under numbered paragraphs 7, 10, 11, 17, 22, 25, 28, 29, 30, 31, 32, 33, 34 and 35. Plaintiff entered into a contract with Defendant in order to be taught and educated. (see Complaint numbered paragraph 7). Plaintiff, however, became aware that his work was being improperly stolen for personal use by Defendant employee, and once made aware, Defendant requested that Plaintiff not tell anyone about what was occurring. (see Complaint numbered paragraph 10, 11, 17). Defendant then tried to characterize the improper conduct as a "mishandling" of the student papers and documents, and Defendant asked Plaintiff not to repeat what he knew about the situation. (see Complaint numbered paragraph 22, 25). Plaintiff was then expelled from the school and Defendant prevented him from

being able to properly appeal the decision, or to protect his rights, as outlined in their contract. (see Complaint numbered paragraph 28-30). Defendant also instructed Plaintiff not to pursue the matter, because it would not help. (see Complaint numbered paragraph 31, 32, 33). Defendant: took Plaintiff's money; refused to properly teach or educate him; and then stole work from him to be used for Defendant's own personal benefit, violating their agreement. (see Complaint numbered paragraph 35). Plaintiff believed that he was going to a school to educate him. Defendant represented itself to be a music school that would educate him. However, in reality, Defendant took Plaintiff's money, refused to educate him, and when Plaintiff tried to have the matter investigated, Defendant removed favorable evidence to Plaintiff, from out of the investigative file. (see Complaint numbered paragraph 34). Plaintiff was deceived into believing that he was going to Defendant to receive an education in music, and that if he had any concerns, a process was in place to protect his rights. Plaintiff was led to believe that this process included an appellate process. Instead, after Defendant took Plaintiff's money, no such process was used, and Plaintiff was punished for trying to report that he was victimized. This is clearly a violation by Defendant of a legal or equitable duty. In addition, Defendant represented itself to be a school in music education. However, Defendant was using Plaintiff's work, as a student, not to educate him, but for its own potential financial gain. Furthermore, it is specifically alleged that although it represented itself to be a school of music education, it refused to properly teach Plaintiff, a student. (see Complaint numbered paragraph 35). This conduct by Defendant would qualify as conduct that has a tendency to deceive others, to violate public or private confidence, or to injure public interests. Therefore, Plaintiff's cause of action is properly supported.

If fraud is not constructive, then fraud can also be established if: 1.) there is an intentional misrepresentation; 2.) knowledge of the falsity of the misrepresentation; 3.) an injury caused by

reasonable reliance on the representation; and 4.) the misrepresentation involved a past of existing fact. Kincaid v. South Trust Bank, 221 S.W. 3d 32, 39 (Tenn. 2006).

As previously pointed out, Defendant intentionally misrepresented that it would teach and educate Plaintiff. (see Complaint numbered paragraph 7). Defendant also represented that there was an appeal process to handle disputes. (see Complaint numbered paragraph 32, 33). Defendant knew that the representations were false, and Defendant intentionally never educated Plaintiff, nor followed any appeal process. (see Complaint numbered paragraph 32, 35). Plaintiff was clearly injured by suffering a loss of money, and emotional damages. (see Complaint numbered paragraph 54-57). The misrepresentations by Defendant involved past and existing facts, as laid out in the Complaint and repeatedly stated in this response.

Therefore, Plaintiff has sufficiently supported his claim of Fraud.

III. Plaintiff Has Sufficiently Pled A Claim For Unjust Enrichment.

Plaintiff has sufficiently pled a claim for Unjust Enrichment. This is articulated in the Complaint in its entirety, but specifically in paragraphs 10, 11, 12, 13, 35, 42, 51, and 52. Defendant's employee was taking information from Plaintiff, in order to assist him with a book that Defendant employee was writing, without Plaintiff's permission. (see Complaint numbered paragraph 10, 11, 12, 13). This conduct was known to Defendant, and Defendant was going to benefit from the conduct, whether directly or indirectly. (see Complaint numbered paragraph 51, 52). Defendant also took Plaintiff's tuition money in exchange for educating and teaching Plaintiff. (see Complaint numbered paragraph 35, 42). However, Defendant, after receiving the money, refused to properly educate or teach Plaintiff. (see Complaint numbered paragraph 35, 42).

Therefore, to the extent that a jury were to conclude that there was no binding contract, or

that all of Plaintiff's claims are not covered by a binding contract, then Plaintiff would still be able to recover under the theory of unjust enrichment.

Quantum meruit actions are equitable substitutes for contract claims. They enable parties who have provided goods and services to another to recover the reasonable value thereof when the following five circumstances exist:

1. No existing enforceable contract covering the same subject matter.
2. The party seeking recovery must prove that valuable goods and/or services were provided.
3. Other party must have received the goods or services.
4. The parties involved should have reasonably understood that the person providing the goods or services expected to be compensated.
5. The circumstances must show that it would be unjust for the party benefitting from the goods or services to retain them without paying for them.

Castelli v. Lien, 910 S.W.2d 420 (Tenn. App. 1995); In re Estate of Marks, 187 S.W.3d 21 (Tenn. Ct. App. 2005).

In this case, if a jury were to conclude that there was no enforceable contract, Plaintiff would still be able to recover by showing that: he provided Defendant with valuable goods, such as tuition fees and his writings; that Defendant received his tuition fees and writings; that Defendant understood that Plaintiff expected to be educated based on his tuition fees paid; that Defendant understood that it had no right to use Plaintiff's work without his permission; that Defendant understood that it was not allowed to use his work to assist in the creation of a book which would make money for Defendant and its employee; that Plaintiff would expect to be compensated for any use of his work that Defendant relied on directly, or indirectly, for any purpose outside of what was

agreed on by the parties, if that use was to Defendant's benefit; that it would be unjust for Defendant to benefit from Plaintiff's work, and tuition fees, when it failed to provide Plaintiff with an education, and when it used his work for its own financial gain.

IV. Plaintiff Has Made A Valid Claim For Defamation And Slander.

Plaintiff has sufficiently pled a claim for Defamation and Slander. This claim is supported by the Complaint in its entirety, and specifically in numbered paragraphs 26, 27,28, 40, 41, 44, 45, 46, and 53. Plaintiff alleged that students were discussing what had occurred regarding the taking of student work by Defendant employee. (see Complaint numbered paragraph 26). When Defendant discovered that Plaintiff was being asked about his work being stolen, he was expelled. (see Complaint numbered paragraph 27, 28, 40, 41,44). Defendant falsely alleged that Plaintiff acted improperly and made false misrepresentations, in order to protect the image of its staff. (see Complaint numbered paragraph 45-46). Defendant verbally, and in writing, has, and continues to represent to this day, that Plaintiff is, and was expelled based on Plaintiff's improper conduct, and that Plaintiff has behavioral and ethical flaws that has been detrimental to Defendant. (see Complaint numbered paragraph 53).

"Publication is a term of art meaning the communication of defamatory matter to a third person." Quality Auto Parts Co. v. Bluff City Buick, 876 S.W.2d 818, 821 (Tenn.1994).

Only where it "appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief," should a defendant's motion to dismiss be granted. Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 857 (Tenn. 2002).

In this case, it is clear that Plaintiff has asserted that multiple third parties were aware of the situation which forms the basis of this Complaint. (see Complaint numbered paragraph 10-18, 34).

Plaintiff has also asserted that after students became aware of what was occurring, Defendant made false representations to protect its image, and the image of its staff, and that it continues to make these representations verbally and in writing. (see Complaint numbered paragraph 26-28, 45-46, 53). Due to its continuing nature, as well as what was previously pled, Plaintiff has made a sufficient claim for Defamation and Slander, even if the exact word “published” is not used. Furthermore, Plaintiff has also sufficiently asserted grounds to support that his character and reputation has been damaged, as he has been represented, and continues to be represented, as someone with ethical flaws, who has acted improperly. (see Complaint numbered paragraph 53).

Conclusion

Wherefore, Premises Considered, Plaintiff requests that Defendant’s Motion be denied in its entirety.

Respectfully Submitted,

____s/Terrell Tooten____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent on March 27, 2020, to Defendant, through the electronic filing system.

____s/Terrell Tooten____

Terrell Tooten