

CAUSE NO. 2014-40964

ERIC TORRES, ADAM SINN,
XS CAPITAL MANAGEMENT, L.P.,
AND ASPIRE COMMODITIES, L.P.,

Plaintiffs,

v.

CRAIG TAYLOR AND
ATLAS COMMODITIES, L.L.C.,

Defendants.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

157TH JUDICIAL DISTRICT

**PLAINTIFF/COUNTER-DEFENDANT ERIC TORRES'S
MOTION FOR TRADITIONAL SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff/Counter-Defendant Eric Torres (“Plaintiff” or “Torres”) in the above-styled and numbered cause of action files his Motion for Traditional Summary Judgment (“Motion”), and requests that the Court enter summary judgment in favor of Torres on all of his claims against Defendants Craig Taylor (“Taylor”) and Atlas Commodities, LLC (“Atlas”), collectively “Defendants” and all of Defendants’ counterclaims against Torres. In support thereof, Torres would respectfully show the Court the following:

I. SUMMARY OF MOTION

Torres seeks traditional summary judgment on his claims against Defendants for \$210,000 in settlement funds plus attorneys’ fees as well as Defendants’ counterclaims against Torres. Defendants have refused to pay Torres, asserting as some kind of defense that Plaintiff Adam Sinn (“Sinn”) sent to Taylor early in the morning on December 22, 2013, after a Christmas party, a picture of several individuals around a Christmas tree holding up their middle fingers at the camera. Taylor admits that the picture message had no text or tag line. Despite the fact that nothing about this communication is disparaging to Defendants or discusses any confidential information and the fact

that Torres did not send it, Taylor and Atlas have used this incident to try to avoid their legal obligation to pay Torres the settlement funds. Torres seeks summary judgment on his claims and Defendants' counterclaims.

II. SUMMARY JUDGMENT EVIDENCE

In support of this Motion, Torres offers the competent summary judgment evidence included in the Appendix hereto, which is incorporated fully herein by reference:

Exhibit A	Affidavit of Eric Torres
A.1	Settlement Agreement dated August 15, 2013

III. STATEMENT OF FACTS

The following facts are supported by the record in this case as well as the Affidavit of Eric Torres attached hereto as Exhibit A.

The Underlying Suit¹

On August 15, 2012, Torres filed a lawsuit in the 157th Judicial District Court of Harris County, Texas, Cause No. 2012-46745, against Taylor and Atlas alleging causes of action for shareholder oppression, violation of the right of inspection, breach of contract, breach of fiduciary duty, fraud in the inducement, negligent misrepresentation, intentional misrepresentation, conversion, statutory theft, and declaratory relief.

On September 19, 2012, Taylor and Atlas filed a counterclaim against Torres alleging causes of action for fraud, fraudulent inducement, negligent misrepresentation, and conspiracy to commit fraud.

On February 25, 2013, Taylor and Atlas filed a third-party petition against Adam Sinn, XS Capital Investments, L.P. ("XS Capital"), and Aspire Commodities, L.P. ("Aspire") alleging causes

¹ Many of these facts are supported by the Court's recording that cause of which this Court can take judicial notice.

of action for conspiracy to commit fraud and aiding and abetting fraud.

On March 7, 2013, Sinn, XS, and Aspire filed a third-party counterclaim against Taylor and Atlas alleging causes of action for groundless pleading.

On July 11, 2013, the Parties attended mediation before Paul D. Clote.

The Settlement Agreement

On August 15, 2013, without admitting or allocating fault or liability, the Parties entered an agreement to permanently resolve and settle any and all claims, issues, matters, or disputes that they had or may have had among them (the “Settlement Agreement”). (Exh. A.1)²

Pursuant to the Settlement Agreement, Torres agreed to assign, transfer, and convey all right, title, and interest in Torres’ ownership interest in Atlas. In exchange, Taylor and Atlas agreed to pay Torres \$500,000 in settlement of all claims.

On August 15, 2013, Atlas paid \$250,000 of the \$500,000 settlement amount according to the terms of the Settlement Agreement.

According to the terms of the Settlement Agreement, Taylor and Atlas agreed that “[t]he remainder of the Settlement Amount shall be paid at a rate of Ten Thousand Dollars (\$10,000) per month for 25 months beginning 30 days after the Effective Date.”

On August 19, 2013, pursuant to the mutual promises, covenants and releases contained in the Settlement Agreement, the parties filed a joint motion to dismiss with prejudice and reported to this Court that “The Parties have settled” and “move for dismissal of all claims with prejudice.”

On September 9, 2013, this Court granted the joint motion to dismiss and “Ordered,

²The Confidentiality provision of the Settlement Agreement provides in pertinent part that “[t]he Parties agree that this Agreement, the negotiations preceding this Agreement, and the amount of consideration paid pursuant to this Agreement are confidential and will not be disclosed by any Party to any other person or entity, *except* ... in the event that a Party must bring or defend a lawsuit filed by or against a Party to protect rights under this Agreement.” Accordingly, this Motion to protect and assert Plaintiffs’ rights under the Settlement Agreement has not been filed under seal.

Adjudged, and Decreed that all claims of each party are dismissed in their entirety with prejudice to all parties' right to re-file any part or aspect of the same, and with each Party to bear his/its own court costs and legal fees.”

Taylor and Atlas only made four (4) of the required monthly payments of \$10,000. Taylor and Atlas failed to pay Torres the payment due January 15, 2014 and have failed to pay and continue to owe twenty-one (21) monthly payments of \$10,000 (i.e., \$210,000).

The Picture Message

On December 21, 2013, Sinn hosted a holiday party at his home. Several of Sinn's friends, employees, and acquaintances attended the holiday party. During the party, Sinn and several friends took a photograph holding up their middle finger to the camera (the "Picture"). (*See Exhibit A to Defendants' Counterclaim filed August 18, 2014*). Later that evening, Sinn sent the Picture via picture message to Craig Taylor. It is undisputed that the picture message that Sinn sent Craig Taylor did not contain any text.

It is further undisputed that Torres never sent the Picture to anyone, and indeed Defendants acknowledge that fact in their pleadings.

Nonetheless, Taylor and Atlas have refused to pay Torres asserting that Sinn violated the following provision in the Settlement Agreement:

Non-Disparagement. The Parties agree that in exchange for the consideration provided under this agreement, the Parties shall not directly or indirectly, disparage, make or publish any false, derogatory, slanderous or libelous comments about any other Party regarding any matter likely to be harmful to the Party's business, business reputation or personal reputation. Further, the Parties agree that they shall not solicit from any third party any comments, statements, or the like that may be considered negative, false, derogatory or detrimental to the business reputation of any other Party. Further, the Parties agree that they will not restrict, limit, or prohibit any third party or employee from socializing, fraternizing, or doing business with any other Party.

(Exh. A.1) As discussed below, nothing Torres (or any other plaintiff) did violated this provision.

IV. ARGUMENTS AND AUTHORITIES

A. Standard of Review

Under Texas Rule of Civil Procedure 166a(c), summary judgment is proper if the movant demonstrates that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Randall's Food Market, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1997); *Wornick v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993); *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1977, no writ). A plaintiff moving for summary judgment must prove that it is entitled to summary judgment as a matter of law on each element of his cause of action. *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986); *Bond v. Crill*, 906 S.W.2d 103, 105 (Tex. App.—Dallas 1995, no writ). A plaintiff need not disprove any affirmative defenses pled by defendant. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *Brown v. Aztec Rig Equipment, Inc.*, 921 S.W.2d 835, 845 (Tex. App.—Houston [14th Dist.] 1996, writ denied). The movant is entitled to summary judgment if “ordinary minds cannot differ as to the conclusion to be drawn from the evidence.” *Zep Mfg. Co. v. Hancock*, 824 S.W.2d 654, 657 (Tex. App.—Dallas 1992, no writ).

There are no genuine issues of material fact in this case and summary judgment is appropriate in favor of Torres and against Defendants based on the summary judgment evidence included in the appendix to this Motion.

B. Summary Judgment is Proper on Torres' Breach of Contract Claim

To recover on a claim for breach of contract the plaintiff must prove (1) the existence of a contract; (2) performance tendered by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff as a result of the defendant's breach. *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1977, no writ).

Torres and Defendants entered into a valid and enforceable contract (i.e. the Settlement Agreement). (Exh. A.1) As part of that Settlement Agreement, Torres tendered his interest in Atlas to Defendants and Defendants became obligated to pay \$500,000, with \$250,000 down and \$10,000 a month. Defendants paid four (4) payments and then refused to pay anymore sums beginning with the payment due January 15, 2014. Thus, Defendants anticipatorily repudiated the Settlement Agreement. *See Taylor Pub. Co. v. Sys. Mktg. Inc.*, 686 S.W.2d 213, 217 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

Plaintiff Torres respectfully requests that the Court enter judgment against Defendants for the damages in the amount of all remaining payments under the Settlement Agreement (i.e. \$210,000), plus prejudgment interest, attorneys' fees discussed below, post-judgment interest, and costs.

C. Summary Judgment is Proper on Defendants' Claims

Defendants have asserted counterclaims for (1) declaratory judgment; and (2) breach of contract.

Defendants' claim for declaratory judgment reads:

43. An actual, existing, and bona fide controversy exists among the parties to the Agreement that should be determined by declaratory judgment. Therefore, pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, Taylor and Atlas seek a declaration that (i) Atlas and Taylor have performed, tendered performance, or attempted to tender performance of all of their obligations under the Agreement; (ii) Sinn and Torres breached the Agreement when they sent the obscene text message described herein to persons associated with Atlas under Atlas's name and/or participated in its creation; and (iii) Atlas and Taylor are excused from further performance of their obligations under the Agreement.

(Counterclaim ¶43). This claim is in essence an alleged defense to Torres's claim for breach of contract. Similarly, Defendants' breach of contract claim asserts that Torres breached the Settlement Agreement because of the Picture and Picture message sent by Sinn.

To recover on a claim for breach of contract the plaintiff must prove (1) the existence of a

contract; (2) performance tendered by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff as a result of the defendant's breach. *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1977, no writ). The interpretation of a contract is a matter of law for the Court. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (“If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law.”).

Furthermore, “[t]o support a claim for business disparagement, the published statements must be, at a minimum, defamatory.” *MKC Energy Investments, Inc. v. Sheldon*, 182 S.W.3d 372, 377 (Tex. App.—Beaumont 2005, no pet.); see also *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 654–55 (Tex. 1987) (“In trying a libel action, the initial question for determination is a question of law to be decided by the trial court: were the words used reasonably capable of a defamatory meaning.”). “The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement.” *Id.*

The evidence shows that, at best, Adam Sinn sent the Picture and the Picture Message, not Torres. Accordingly, Defendants have no claim against Plaintiff Eric Torres. Moreover, for the reasons set forth below and in the motion for traditional summary judgment filed by Adam Sinn (“Sinn Motion”), which is incorporated herein by reference, even if Torres had sent the Picture and Picture Message, such acts are not a violation of the non-disparagement clause. Accordingly all of Defendants’ counterclaims against Torres fail as a matter of law.

The Picture that Sinn sent Taylor does not contain any “false, derogatory, slanderous or libelous comments” about Taylor or Atlas “regarding any matter likely to be harmful” to Taylor’s or Atlas’s “business, business reputation or personal reputation.” Nor does the Picture that Sinn sent Taylor “solicit from any third party any comments, statements, or the like that may be considered

negative, false, derogatory or detrimental to the business reputation” of Taylor or Atlas.

The Picture and Picture Message that Sinn sent the persons pictured in the Picture similarly contains no “false, derogatory, slanderous or libelous comments” about Taylor or Atlas “regarding any matter likely to be harmful” to Taylor’s or Atlas’s “business, business reputation or personal reputation.” Nor does the Picture or Picture Message that Sinn sent the persons pictured in the Picture “solicit from any third party any comments, statements, or the like that may be considered negative, false, derogatory or detrimental to the business reputation” of Taylor or Atlas.

Furthermore, Sinn’s actions did not and could not have harmed Taylor or Atlas’s business or personal reputation. *See Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 358 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (“To prevail on a business disparagement claim, a plaintiff must establish that (1)the defendant published false and disparaging information, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff.”); *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 767 (Tex. 1987) (“Proof of special damages is an essential part of the plaintiffs' cause of action for business disparagement. The requirement goes to the cause of action itself and requires that plaintiff ‘establish pecuniary loss that has been realized or liquidated as in the case of specific lost sales.’”).

Moreover, Torres never sent the Picture to anybody—not Taylor, not Atlas, nor any clients or affiliates of Taylor or Atlas. Neither did Torres make any “false, derogatory, slanderous or libelous comments” about Taylor or Atlas “regarding any matter likely to be harmful” to Taylor’s or Atlas’s “business, business reputation or personal reputation.” This is important because Torres assigned, transferred, and conveyed all of his right, title, and ownership interest to Atlas, in exchange for payment of the full \$500,000 settlement amount.

Unfortunately and inexplicably, Taylor and Atlas have used this incident involving Sinn as a

pretext to avoid their monthly payment obligations to Torres. Taylor and Atlas unilaterally ceased making settlement payments without first complying with the dispute resolution provisions of the Settlement Agreement. Taylor and Atlas are now delinquent and continue to owe over \$210,000 in settlement funds.

Summary judgment is proper on Defendants' counterclaims as a matter of law.

D. Attorneys' Fees and Interest

Torres is entitled to recover his reasonable and necessary, equitable and just attorneys' fees under Texas Civil Practice & Remedies Code Chapters 37 and 38, because this is a suit on a written contract and a suit for debt and on a contract, and because Defendants have asserted a counterclaim for declaratory judgment. Torres has presented his claims to Defendants, and Defendants have refused to pay the claims. Torres has retained the undersigned counsel to pursue this claim and is entitled to an award of reasonable and necessary, equitable and just attorneys' fees through judgment and on appeal. Given that there are several issues and matters in this lawsuit which are ongoing and thus will likely increase the attorneys' fees after this motion is filed, Torres seeks here a judgment that he is entitled to his reasonable and necessary, equitable and just attorneys' fees and requests that the Court set a hearing or trial on the issue of the amount of such fees.

Prejudgment interest is calculated on the amount of actual damages, \$210,000, from July 17, 2014, the date the Petition was filed, and ending on the day preceding the date the judgment is rendered and final, at the statutory rate of 6%. *See Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998); *see also* Tex. Fin. Code. Ann. § 304.022. Defendants will owe Torres prejudgment interest at the rate of 6% per annum in the amount of \$6,558.90 ((((\$210,000 x 6%)/365 days per year) x 190 days)). Such prejudgment interest is accruing and will continue to accrue at \$34.52 per day from July 17, 2014 to the date before the Summary

Judgment is signed.

Post-judgment interest is calculated at the rate of 5% per annum on all of the above amounts accruing on the date of judgment and continuing until the judgment is fully satisfied.

PRAYER

WHEREFORE, Torres respectfully requests that the Court grant this Motion and enter summary judgment against Defendants for damages, pre-judgment interest, post judgment interest, attorneys' fees (setting a hearing or trial on the amount), and costs of suit, and against Defendants on their counterclaims (as set forth above and in the proposed order being filed herewith), and for all other relief in law or in equity to which Torres is entitled.

Respectfully submitted,

RAPP & KROCK, PC

s/ Kenneth M. Krock

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CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of January 2015, a true and correct copy of this document was served on counsel of record in accordance with the Texas Rules of Civil Procedure.

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