

No. 2014-40964

ERIC TORRES, ADAM SINN,	§	IN THE DISTRICT COURT
XS CAPITAL INVESTMENTS, L.P.,	§	
AND ASPIRE COMMODITIES, L.P.	§	
	§	OF HARRIS COUNTY, TEXAS
VS.	§	
	§	
CRAIG TAYLOR, AND ATLAS	§	
COMMODITIES, L.L.C.	§	157 TH JUDICIAL DISTRICT

Eric Torres’ Special Exceptions to Defendants’ Counterclaim

Plaintiff Eric Torres (“Torres”) files the following special exceptions to Defendants’ Plea in Abatement and Counterclaim, and would respectfully show as follows:

1. Counterclaim for Breach of Contract – No Breach: Torres specially excepts to ¶¶ 45-49 of Defendants’ Counterclaim. To prove an action for breach of contract, Defendants must establish that Torres breached the contract. *Southwell v. University of the Incarnate Word*, 974 S.W.2d 351, 354-55 (Tex. App.—San Antonio 1998, pet. denied). In this case, Defendants assert in ¶ 30 that an “unsolicited contact by Sinn was a breach of the Settlement Agreement.” However, Defendants fail to allege that **Torres** ever sent a text message, sent a photograph, or made any unsolicited contact to Defendants. Nor have plaintiffs alleged that Torres made 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,” as is required by the non-disparagement clause of the Settlement Agreement. Moreover, Defendants have failed to allege that Torres “solicit[ed] 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, as is required by the non-disparagement clause of the Settlement Agreement. This is important because the Settlement Agreement provides that “Taylor, Marshall, and Atlas, jointly and severally, agree to pay **Torres**

Five-Hundred Thousand Dollars (\$500,000.00) in settlement of all claims.”¹ Defendants have failed to allege that Torres took any action in violation of the Settlement Agreement, and cannot establish breach. Defendants should therefore be required to replead; if they fail to do so, Defendants’ tortious interference claim should be stricken. *See Cruz v. Morris*, 877 S.W.2d 45, 47 (Tex. App.—Houston [14th Dist.] 1994, no writ) (if party refuses to amend, court can strike).

2. Counterclaim for Breach of Contract – No Injury: Torres specially excepts to ¶¶ 45-49 of Defendants’ Counterclaim. To prove an action for breach of contract, Defendants must establish that the alleged breach caused injury. *Prudential Sec. Inc. v. Haugland*, 973 S.W.2d 394, 397 (Tex. App.—El Paso 1998, pet. denied). Defendants say in ¶ 48 that “Defendants have suffered damages as a result of the breaches of contract alleged herein.” However, Defendants fail to allege any facts to support this conclusory statement. Namely, Defendants have failed to allege that Defendant Craig Taylor or Atlas Commodities, LLC have suffered any damage to their business, business reputation, or personal reputation as a result of Taylor’s receipt of the text message. Defendants have failed to allege that a single employee, associate, or affiliate of Atlas, other than Craig Taylor and those pictured in the photo, received the disputed text message. Defendants have failed to allege that they have lost any business or suffered some monetary loss as a result of the disputed text message. Because Defendants have failed to allege that they suffered any injury or damages as a result of the alleged text message, Defendants cannot establish their breach of contract claim. Defendants should therefore be required to replead; if they fail to do so, Defendants’ breach of contract claim should be stricken.

¹ The settlement agreement does not say that settlement payments are to go to Adam Sinn. To the contrary, the Settlement Agreement at Paragraph 16 provides that “Sinn, XS, and Aspire on one hand, and Torres on the other hand shall separately document between themselves any agreement relating to the release of any note obligations related to the Disputes, the Lawsuit or the Claims. Such release is not a part of this Agreement.”

See Cruz v. Morris, 877 S.W.2d 45, 47 (Tex. App.—Houston [14th Dist.] 1994, no writ) (if party refuses to amend, court can strike).

3. Failure to Specify Maximum Amount Claimed: Torres specially excepts to Defendants' Counterclaim because Defendants do not state the maximum amount of their alleged damages. Texas Rule of Civil Procedure 47 provides that "upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed." Tex. R. Civ. P. 47. Torres invokes this provision to trigger Defendants' obligation for such specificity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this the 24th day of September, 2014, a true and correct copy of the above and foregoing instrument was properly forwarded to the following counsel of record in accordance with Rule 21 of the Texas Rules of Civil Procedure as indicated below:

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