Perritt et al v. The Cupcakery, et al Doc. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RICKY B. PERRITT, Individually; The Cupcakery, LLC, a Texas Limited Liability Company; Buster Baking, LLC, a Texas Limited Liability Company; and the Woodlands Baking, LLC, a Texas Limited Liability Company	§	
Plaintiffs,	§	
VS.	§	CAUSE NO. 4:11-CV-23
PAMELA F. JENKINS, Individually; and The Cupcakery LLC, a Nevada Limited Liability Company	§	
Defendant.	§	

PLAINTIFFS' ORIGINAL COMPLAINT AND APPLICATION FOR TEMPORARY RESTRAING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, DECLARATORY JUDGMENT AND DAMAGES

RICKY B. PERRITT, individually, THE CUPPCAKERY, LLC, A TEXAS LIMITED LIABILITY COMPANY; BUSTER BAKING, LLC, A TEXAS LIMITED LIABILITY COMPANY; and THE WOODLANDS BAKING, LLC, A TEXAS LIMITED LIABILITY COMPANY, hereinafter called "Plaintiffs", complain of PAMELA F. JENKINS, Individually, and THE CUPCAKERY LLC, A NEVADA LIMITED LIABILITY COMPANY and respectfully show the Court as follows:

I. NATURE OF THE CASE

1.01. This is a suit by RICKY B. PERRITT, an individual resident of the Eastern District of Texas and THE CUPPCAKERY, LLC, A TEXAS LIMITED LIABILITY COMPANY; BUSTER BAKING, LLC, A TEXAS LIMITED LIABILITY COMPANY; and The Woodlands Baking, LLC, a Texas

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Limited Liability Company against PAMELA F. JENKINS, an individual resident of the State of Nevada and THE CUPCAKERY LLC, A NEVADA LIMITED LIABILITY COMPANY.

1.02. In September 2009 PERRITT sued JENKINS concerning disputed ownership and operation OF THE CUPCAKERY LLC, A NEVADA LIMITED LIABILITY COMPANY, THE CUPCAKERY LLC, A TEXAS LIMITED LIABILITY COMPANY and BUSTER BAKING LLC, A TEXAS LIMITED LIABILITY COMPANY. That case was resolved by a written settlement agreement and supporting documents executed pursuant to such settlement agreement, a true copy of the settlement are attached hereto is Exhibit A and made part hereof for all purposes.

1.03. The previous lawsuit had at its core a dispute over the percentage of ownership of each of the limited liability companies in question and the refusal of Jenkins to abide by valid written contractual agreements.

II. PARTIES

2.01. RICKY B. PERRITT is an individual resident and citizen of the State of Texas and resides in Denton County, Texas in the Eastern District of Texas.

2.02. THE CUPCAKERY LLC, , A TEXAS LIMITED LIABILITY COMPANY has its principal place of business in Frisco, Collin County, Texas, within the Eastern District of Texas. Plaintiff BUSTER BAKING LLC, A TEXAS LIMITED LIABILITY COMPANY, has its principal place of business in Dallas County, Texas.

2.03 Plaintiff THE WOODLANDS BAKING, LLC, A TEXAS LIMITED LIABILITY COMPANY has its principal place of business in Montgomery County, Texas.

2.04 All of the Plaintiff entities are owned and controlled by RICKY B. PERRITT.

2.05 Defendant PAMELA F. JENKINS is individual resident of the State of Nevada and may be served with summons at 9680 South Eastern Avenue, Suite 100, Las Vegas, Nevada

89123. Said Defendant is presently residing in Jack County, Texas, on a temporary basis, and may be served with process at Rt 2, Jacksboro, Texas. Said Defendant may further be served with process at her residence, 305 Rosemary Lane, Las Vegas, Nevada 89107.

2.06 Defendant THE CUPCAKERY, LLC, A NEVADA LIMITED LIABILITY COMPANY, is owned and operated by Defendant JENKINS. Said Defendant may be served by serving process on PAMELA F. JENKINS in her capacity as Managing Member of THE CUPCAKERY, LLC, A NEVADA LIMITED LIABILITY COMPANY.

III. JURISDICTION AND VENUE

3.01. This is a suit for injunctive relief, including a temporary restraining order without notice, a preliminary injunction for declaratory judgment, and for damages.

3.02. Jurisdiction is proper in this case under 28 U.S.C. §1332 because this is a civil matter where the amount in controversy exceeds the sum of Seventy-Five Thousand Dollars ($75,000.00), exclusive of interest and costs, and is between citizens of different states.

3.03. Plaintiffs also invoke the courts supplemental jurisdiction under 28 U.S.C. §1367 because certain questions of state law may be involved.

3.04. Venue is proper in this Court under 28 U.S.C. §1391 (a) (2) because the Eastern District of Texas is a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred and in which a substantial part of the property that is the subject of this action is situated. Moreover, this case requires the Court to construe and enforce a written contractual agreement which is performable at least in part in the State of Texas and in the Eastern District of the State of Texas.

3.05. Defendants have substantial and significant contacts within the State of Texas and within the Eastern District of Texas, in that a substantial part of the negotiations and agreements

that the parties reached in settlement of the prior lawsuit, the enforcement of which is now in dispute were negotiated by the individual Defendant while she was present in Texas and the Eastern District, and such negotiations by said Defendant were on behalf of her company, the other Defendant. Moreover, a great volume of telephonic, email and text communication concerning same have been had between the Defendants in Nevada and Plaintiff in Texas. Further, the threatened actions of the Defendant will directly damage these Texas Plaintiffs. The actions threatened to be taken will cause damage directly to said Defendants in the State of Texas and the Eastern District.

IV. FACTS

4.01. The Defendant PAMELA JENKINS is the niece of Plaintiff RICKY PERRITT. In July 2005, PAMELA JENKINS along with LAURA SANTO PIETRO ("PIETRO") and DAWN KALMAN ("KALMAN") formed a Limited Liability Company in the State of Nevada known as THE CUPCAKERY, LLC. JENKINS, PIETRO, and KALMAN each owned a one-third ($^1/_3$) interest in the Business and each was named a Co-Manager of the Business.

4.02. Defendant PAMELA JENKINS did not have sufficient funds to pay any capital contribution when the Business was formed. In 2005 she requested the Plaintiff RICKY PERRITT, brother of her mother, to lend her the money. PERRITT agreed and advanced the sum of Ninety-Five Thousand Dollars ($95,000.00) to JENKINS as a loan to her personally. JENKINS later executed a promissory note acknowledging the debt. The terms and provisions of paying back the note have been renegotiated several times, but at present JENKINS owes approximately Sixty Thousand Dollars ($60,000.00) on the note she executed, payable to PERRITT in Denton County, Texas.

4.03. In 2007, JENKINS became embroiled in a dispute with her partners PIETRO and KALMAN. She confided in PERRITT that she believed KALMAN was attempting to take control of the Business by purchasing PIETRO'S interest.

4.04. JENKINS asked PERRITT to lend her the sum of Two Hundred Thousand Dollars ($200,000.00) to buy out PIETRO and KALMAN. PERRITT refused to lend the money, particularly in light of the fact that the initial loan that he had made to JENKINS had not been paid back and its terms of payment had been renegotiated and extended on several occasions.

4.05. JENKINS implored PERRITT to act in order to save her from the oppressive conduct of KALMAN. PERRITT agreed to advance JENKINS the funds to buy out the partners conditioned upon JENKINS agreement to immediately assign him a two-thirds ($^2/_3$) interest in the Company.

4.06. JENKINS agreed and on the 20th day of April 2007 PERRITT and JENKINS entered into a one (1) page written *Agreement* which provided, among other things, that JENKINS would purchase the membership interest of LAURA SANTO PIETRO and DAWN KALMAN in THE CUPCAKERY, LLC; that PERRITT would pay to JENKINS or directly to KALMAN or PIETRO the sum of that money necessary to purchase the interests of PIETRO and KALMAN; that JENKINS would immediately transfer and assign to PERRITT One Hundred percent (100%) of the interest acquired from PIETRO and KALMAN "including but not limited to all voting, economic and management rights of PIETRO and KALMAN in THE CUPCAKERY, LLC". The *Agreement* provided that JENKINS and PERRITT would execute an *Assignment and Assumption* of Limited Liability Company interest.

4.07. On the same day, April 20th, 2007, PERRITT and JENKINS executed the *Assignment and Assumption* of Limited Liability Company interest. The effect of that *Agreement* was that

PERRITT stepped into the shoes of KALMAN and PIETRO as a two-thirds ($^2/_3$) owner of the Company.

4.08. Under the terms of that document the Parties granted each other a preferential right to purchase each other's interest. Effectively, each party got a right of first refusal where they had the right but not the obligation to purchase the interest of the other under the same terms and conditions as a good faith purchaser of said interest.

4.09. After PERRITT approximately paid Two Hundred Twenty-Five Thousand Dollars ($225,000.00) to PIETRO and KALMAN to became the majority owner of the Company, the Parties discussed and agreed that expanding the Company based upon the trademark, trade name, intellectual property and goodwill attached to that name and the excellent product produced by the Company would be a desirable and prudent thing to do.

4.10. JENKINS proposed that LAS VEGAS open a second (2nd) store in that city. PERRITT agreed to advance the funds to open that store and did so by advancing the sum of One Hundred Eighty-Seven Thousand Five Hundred Dollars ($187,500.00) as a loan to LAS VEGAS. LAS VEGAS is repaying that loan, which is set up on a promissory note bearing interest at ten percent (10%) per annum. The note has a present unpaid balance of approximately Sixty Thousand Dollars (~$60,000.00). The note is payable to PERRITT in Denton County, Texas. That store opened January 2008.

4.11. Thereafter, PERRITT, with the full knowledge and approval of JENKINS, and using his own funds, opened a store in Frisco, Collin County, Texas called "THE CUPCAKERY." The store used the same recipes, name, marks, and other intellectual property that had been developed by the Nevada Limited Liability Company. JENKINS contributed no capital to the Frisco, Texas store but did appear at the grand opening. The FRISCO location is organized as a

separate Texas Limited Liability Company, "THE CUPCAKERY. A TEXAS LLC" is the name of that company. That company is in good standing with the State of Texas and operated by PERRITT as the sole member.

4.12. Subsequently, PERRITT, using his own funds, opened another store in Texas in the City and County of Dallas. PERRITT has formed a separate Texas Limited Liability Company known as BUSTER BAKAKING, LLC to own and operate the store in question and has entered into a *Lease Agreement* in which he has personally guaranteed the sum of Three Hundred Thousand Dollars ($300,000.00) future rentals.

4.13 In September 2009 the Parties had a dispute over who owned what. In order to resolve this PERRITT filed suit against Jenkins in this Court seeking declaratory judgment and other relief. Defendant Jenkins never answered that suit. However, she was represented by an attorney named Kirk Kaplan in Las Vegas, Nevada. Mr. Kaplan prevailed on counsel for Plaintiff to attempt to resolve the matter and after negotiations a settlement agreement was reached. A true and correct copy of that settlement agreement and certain documents executed pursuant thereto is attached hereto as Exhibit A, incorporated by reference and made part hereof for all purposes. The essence of the settlement agreement was that PERRITT received an assignment from Jenkins and THE CUPCAKERY, LLC, a Nevada Limited Liability Company, Defendants, herein, of an undivided 50% interest in all trademarks, tradenames, and intellectual property owned by them with respect to the cupcake business.

4.14 The Parties further agreed as to a portion of the intellectual property a website "TheCupcakery.com" that the landing page of the website would direct all developmental and media inquires outside Nevada to PERRITT and all such inside Nevada to JENKINS. PERRITT obtained the right to hire any national media firm and to design the web's landing page.

4.15 Jenkins received 100% of the stores in Nevada and PERRITT received 100% of the stores in Texas. The agreement provided that PERRITT and Jenkins individually would each own an undivided 50% interest in all THE CUPCAKERY™ trademarks, tradenames and intellectual property. Each Party had an obligation to conduct their respective businesses in such a manner as to protect the names and marks. All inquiries about development opportunities were required to be directed by JENKINS to PERRITT The Parties were to maintain a joint Cupcakery website, the format to be agreed upon by the Parties and the website was required fairly and prominently to direct all inquires about development opportunities outside Nevada to PERRITT. The agreement further provided that the Parties agreed not to disparage each other in any way or to take any action which might damage the trademarks, tradenames or intellectual property of THE CUPCAKERY™.

4.16 The Parties executed the settlement agreement and all supporting documents. The parties agreed on the format for the website and the same was set up.

4.17 The website "TheCupcakery.com" is the first website that appears when one does an internet search of the term "cupcakery". Although there are other "Cupcakery's" such as "Sift, a cupcakery" no other person may use the tradename owned by these parties, to: "THE CUPCAKERY™".

4.18 The Plaintiffs incorporate herein by reference as if copied fully at length verbatim herein the AFFIDAVIT OF RICKY B. PERRITT in support of their Motion for Temporary Restraining Order.

4.19 Jenkins has apparently become dissatisfied with the Agreement that she made and has acted to breach same in several respects. Although she has an obligation to protect the intellectual property, including the trademark and tradenames she has refused to pay her share of

legal and other expenses to protect said tradenames and trademarks. Plaintiff PERRITT has had to finance a lawsuit in California against a third party which was settled on favorable terms and reserved THE CUPCAKERY™ for the parties to this case. PERRITT advanced considerable sum of his own money. Jenkins has failed and refused and continues to fail and refuse to pay her share of these legal expenses in the sum of approximately Eight Thousand Dollars ($8,000.00). JENKINS has further stated that she will not pay any monies or take any measures necessary to protect THE CUPCAKERY™ intellectual property. She has further stated that she will give the right to use the name to third parties without consideration of any sort.

4.20 PERRITT has attempted to discuss these differences in a rationale manner but has been unable to persuade Jenkins of her responsibilities under the agreement they reached.

4.21 The website "TheCupcakery.com" is hosted by a company called BannerView.com located in Las Vegas, Nevada. Because the THE CUPCAKERY, LLC, a Nevada Limited Liability Company had a previous 5 year contract with the company who hosted the website, the Parties continued to have that company host the website. The Parties agreed on the landing page and the format of the website and BannerView.com has hosted the same since the Parties reached their settlement.

4.22 Jenkins has recently said that she is going to "take down" the website "TheCupcakery.com" because it is "hers", and use it as a separate website and has told the Plaintiff PERRITT that he needs to create another website. PERRITT owns a 50% undivided interest in all the intellectual property including the website and to switch websites from the one website that gets the most hits when "Cupcakery" is entered on any search engine would cause substantial and irreparable harm.

4.23 On or about January 12, 2011 Jenkins sent PERRITT an email stating that she was going to "pull down" of the website. PERRITT attempted to discuss this with her and although she cursed and refused to discuss the matter rationally, it is PERRITT's belief that she intends to take the website "TheCupcakery.com" and use it has her own website, leaving PERRITT without a website and causing irreparable harm.

4.24 Plaintiff PERRITT's Affidavit states in detail the reasons that such conduct by JENKINS would cause immediate and irreparable harm to him and to his restaurants. PERRITT has three restaurants in Texas and is on the verge of opening another. This website gets many hits each day from people inquiring about location, catering, and placing pick up orders. Moreover, the website directs all inquiries about investments, development, franchising and licensing in any location outside the State of Nevada to him. PERRITT frequently receives inquiries and is seriously considering business propositions to open stores in Massachusetts and Florida. Having the website down for any length of time will cause PERRITT to be unable to communicate with potential investors, franchisees, or licensees.

4.25 Jenkins' threat concerning the website was specific as to time. She said she intends to take action on Monday, January 17, 2011. There is insufficient time to notify Jenkins or her attorney and hold a hearing prior to the time of her threatened action. As of the time of filing this suit, as stated in the Certificate of the undersigned attorney, JENKINS' Nevada attorney, Kirk Kaplan has been unable to confirm that his client will enter into an Agreed Temporary Restraining Order or otherwise agree to conform to the terms and provisions of the agreement.

4.26 Unless this Court grants appropriate relief in terms of a temporary restraining order without notice, PERRITT and the Plaintiff companies will be reparably harmed and injured without any adequate legal remedy.

V. FIRST CAUSE OF ACTION
APPLICATION FOR RESTRAINING ORDER AND PRELIMINARY INJUCTION

5.01 Plaintiffs move this Court to grant a Temporary Restraining Order restraining and enjoining the Defendants, their agents, servants, employees, contractors and attorneys and those persons in active concert and participation with them from interfering in any manner with the current operation of the website "TheCupcakery.com" or from pulling down, modifying, amending, or otherwise changing any of the content of said website or from committing any act or omission calculated to cause any harm or damage to the intellectual property owned by PERRITT in THE CUPCAKERY™ pending the hearing and disposition of the Plaintiffs' Motion for Preliminary Injunction filed on January 14, 2011 on the ground that immediate and irreparable loss, damage and injury will result to Plaintiffs as more fully appears from this verified Complaint and the attached AFFIDAVIT OF RICKY B. PERRITT.

5.02 Plaintiffs further move that this Court, after proper notice and hearing, grant a preliminary injunction granting the injunctive relief specified in the application for temporary restraining order, such injunctive relief to be effective until the conclusion of this lawsuit, or until further ORDER of this Court.

VI. SECOND CAUSE OF ACTION—DECLARATORY JUDGMENT

6.01. PLAINTIFFS sue for declaratory judgment and request the Court after construing all the documentation in this case, along with the sworn testimony, to enter a *Declaratory Judgment* determining the following:

a. That PERRITT owns an undivided 50% interest in the intellectual property of THE CUPCAKERY™, including but not limited to the trademarks and trade names.

b. That JENKINS is obligated to pay 50% of the attorneys fees and costs associated with protecting said intellectual property rights.

c. That JENKINS is not entitled to change or alter content or operation of the website "The Cupcakery.com" or its Landing Page without the express consent and permission of PERRITT.

d. That JENKINS owes a duty of loyalty to the brand name THE CUPCAKERY™.

e. That JENKINS may not act to harm the other, or to damage good will, trademarks, trade names or business associated with THE CUPCAKERY™.

f. That the Defendant JENKINS' conduct as heretofore alleged constitutes a breach of the duty of loyalty to the Brand Name and to Plaintiff.

g. That the Defendant JENKINS' conduct as heretofore alleged constitutes a breach of her fiduciary duties to the Brand Name and to Plaintiff.

h. That JENKINS is obligated to give PERRITT information about all inquiries made, past or future, by third (3rd) parties seeking to do business with the Company.

i. That JENKINS has breached the settlement agreement.

6.02. That Plaintiff is entitled to recover his reasonable and necessary attorney fees is this declaratory judgment matter.

VII. THIRD CAUSE OF ACTION—BREACH OF THE DUTY OF LOYALTY

7.01. Defendant JENKINS' conduct as heretofore alleged constitutes a breach of the duty of loyalty imposed by common law and specifically incorporated in the governing documents pertaining to the Settlement.

7.02. As a result Plaintiff has been damaged in an amount in excess of Seventy-Five Thousand Dollars ($75,000.00).

VIII. FOURTH CAUSE OF ACTION—BREACH OF FIDUCIARY DUTY

8.01. Plaintiff alleges that Defendant owes him a fiduciary duty to act in a manner of utmost good faith and trust. Her conduct aforesaid constitutes a breach of that duty.

8.02. As a result Plaintiff has been damaged in an amount in excess of Seventy-Five Thousand Dollars ($75,000.00).

IX. FIFTH CAUSE OF ACTION—BREACH OF CONTRACT

9.01. As alleged previously, Defendant has repeatedly made threats to harm the name, mark, website and intellectual property of THE CUPCAKERY™. She has refused and continues to refuse to pay her share of the expenses of protecting same.

9.02. Such acts are a breach of the Settlement documents and have damaged Plaintiffs in excess of Seventy Five Thousand Dollars ($75,000.00).

9.03. Plaintiff is entitled to recover this reasonable attorneys fees for such breach.

X. PRAYER FOR RELIEF

10.01. Plaintiff requests that summons issue requiring Defendant PAMELA JENKINS to appear and answer this *Complaint*.

10.02. Plaintiff prays that the court issue a Temporary Restraining Order without notice and asks that after appropriate notice a hearing be held on his request for *Preliminary Injunction* and that the Court enter a preliminary injunction restraining and enjoining Defendant as heretofore specified. Plaintiff prays that such injunction be made permanent.

10.03. Plaintiff prays that the Court enter a *Declaratory Judgment* granting the relief heretofore requested.

10.04. Plaintiff requests that he have and recover damages on account of Defendant's breach of the duty of loyalty and breach of fiduciary duty and breach of contract in an amount in excess of Seventy-Five Thousand Dollars ($75,000.00) for each violation.

.05. Plaintiff prays that he recover his reasonable attorney fees, expenses of litigation, costs of court, and that he have such other and further relief, general and special, in law or in equity to which he may justly be entitled.

Respectfully submitted,

MICHAEL J. WHITTEN & ASSOCIATES, PC
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MICHAEL J. WHITTEN
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VERIFICATION

I have read the above and foregoing Complaint. I have personal knowledge of the facts alleged therein and they are true and correct.

RICKY B. PERRITT