

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS,
AUSTIN DIVISION

FILED
2010 SEP -7 PM 2:01
CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
DEPUTY

Deliverance Poker, LLC,
Plaintiff,

§
§
§
§
§
§
§

v.

Civil Action No. 1:10-CV-00664-LY

Tiltware, LLC and
Michael Mizrachi,
Defendants.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiff asks the court to grant a motion for a temporary restraining order against Defendant Michael Mizrachi.

A. Introduction

1. Plaintiff is Deliverance Poker, LLC; Defendants are Tiltware, LLC and Michael Mizrachi.
2. Plaintiff sued Defendants for breach of contract and tortious interference with existing contract. A copy of the original complaint is attached as Exhibit A.
3. Plaintiff alleges that Plaintiff and Defendant Mizrachi executed a written contract on or about July 12, 2009 ["Deliverance Contract"]. Said contract provided that Plaintiff would 1) pay Defendant Mizrachi \$150,000, 2) provide a membership interest of 1.75% in Plaintiff's corporation, and 3) advance expenses related to poker tournaments in which Defendant Mizrachi would participate. Said contract further provided that Defendant Mizrachi would compete in tournaments, make personal appearances to promote Plaintiff's website, exclusively wear memorabilia promoting Plaintiff's website, and give interviews.
4. Defendant Mizrachi honored the Deliverance Contract until approximately July 2010. During this time, he played in numerous tournaments on behalf of Plaintiff. During these tournaments, he wore hats and other items that prominently featured Plaintiff's name and logo.
5. Defendant Mizrachi subsequently entered into a separate contract with Defendant Tiltware ["Tiltware Contract"]. This second contract essentially replaced Plaintiff as Defendant Mizrachi's official sponsor, thereby resulting in damages to Plaintiff.

B. Argument

6. Plaintiff will suffer imminent and irreparable injury if Defendant Mizrachi is not immediately restrained from promoting Plaintiff's competitor. Plaintiff requires an injunction preventing Defendant Mizrachi from promoting Plaintiff's competitor so that Plaintiff may 1) receive the benefit of its bargain and 2) receive televised exposure via Defendant Mizrachi's advancement within the World Series of Poker tournament. Fed. R. Civ. P. 65(b)(1); *see Sampson v. Murray*, 415 U.S. 61, 88-89 & n.59 (1974). Plaintiff's injury will result from Defendant Mizrachi's promotion of Defendant Tiltware, a competing company in the same (or in a materially similar) industry. This injury is imminent insofar as Defendant Mizrachi has already begun publicly participating in tournaments in which he has sponsored Defendant Tiltware. This sponsorship is irreparable insofar as Plaintiff is not receiving the benefit of its bargain, to wit: the televised advertisement of Deliverance Poker by Defendant Mizrachi. Additionally and/or alternatively, it is irreparable because the benefit that is being accrued by Defendant Tiltware to Plaintiff's detriment cannot be recouped by Plaintiff. Additionally and/or alternatively, the damages incurred as a result of Defendant Mizrachi's conduct cannot be accurately measured and/or the Plaintiff cannot be adequately compensated in damages for Defendant Mizrachi's conduct.
7. There is no adequate remedy at law if Defendant Mizrachi is not enjoined from continuing to promote a competing company in violation of his contractual obligations. In other words, Plaintiff cannot acquire additional advertisements from Defendant Mizrachi that will reach an international audience in the event that he is not enjoined from promoting a competing company. Further, Plaintiff cannot undo the harm inflicted by Defendant Mizrachi's advertisement of a competing company.
8. There is a substantial likelihood that Plaintiff will prevail on the merits. *Schiavo v. Schiavo*, 403 F.3d 1223, 1225 (11th Cir. 2005). This is because Plaintiff and Defendant Mizrachi entered into a binding and unambiguous contract. Said contract provided that Defendant Mizrachi would exclusively promote Plaintiff. Defendant Mizrachi has breached this contract and is presently promoting Defendant Tiltware.
9. The threatened harm to Plaintiff outweighs the harm that a temporary restraining order would inflict on Defendant. *Id.* at 1225-26.
10. Issuance of a temporary restraining order would not adversely affect the public interest and/or public policy because this is a private dispute between Plaintiff and Defendant Mizrachi. Given the fact that the public has no discernible interest in this matter, the issuance of a preliminary injunction would not adversely affect the public interest. *Id.*
11. Plaintiff is willing to post a bond in the amount the court deems appropriate.
12. The court should enter this temporary restraining order without notice to Defendant because Plaintiff will suffer immediate and irreparable injury, loss, or damage if the order is not granted before Defendant can be heard, and notice would be impractical

because the harm is already being suffered. See Fed. R. Civ. P. 65(b)(1); *First Tech. Safety Sys. v. Depinet*, 11 F.3d 641, 650 (6th Cir. 1993).

13. Plaintiff asks the court to set its request for a preliminary injunction for hearing at the earliest possible time.

C. Conclusion

14. Plaintiff will suffer imminent and irreparable injury if Defendant Mizrachi is not immediately restrained from promoting Plaintiff's competitor.
15. There is no adequate remedy at law if Defendant Mizrachi is not enjoined from continuing to promote a competing company in violation of his contractual obligations, and there is a substantial likelihood that Plaintiff will prevail on the merits. The threatened harm to Plaintiff outweighs the harm that a temporary restraining order would inflict on Defendant. Issuance of a temporary restraining order would not adversely affect the public interest and public policy because this is a private dispute between Plaintiff and Defendant Mizrachi. The harm is already being suffered, and thus the court should grant this motion *ex-parte* to prevent additional imminent harm to Plaintiff.
16. For these reasons, Plaintiff asks the court to issue a temporary restraining order preventing Defendant Mizrachi from promoting Plaintiff's competitor so that Plaintiff may 1) receive the benefit of its bargain and 2) receive televised exposure via Defendant Mizrachi's advancement within (*inter alia*) the World Series of Poker tournament.

Respectfully submitted,

By:



William Pieratt Demond
Texas State Bar No. 24058931
701 Brazos Street, Suite 500
Austin, Texas 78701
Email: william.demond@connordemond.com
Tel: 512.917.2111
Fax: 512.519.2495

OF COUNSEL
Connor & Demond, PLLC

ATTORNEY IN CHARGE FOR
PLAINTIFF, Deliverance Poker, LLC

STATE OF TEXAS
TRAVIS COUNTY

§
§

VERIFICATION


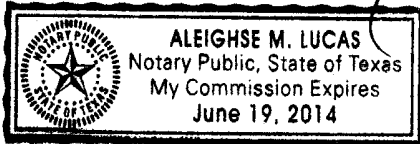
Before me, the undersigned notary, on this day personally appeared William Pieratt Demond, the affiant, a person whose identity is known to me. After I administered an oath to affiant, affiant testified:

“My name is William Pieratt Demond. I have read the Plaintiff’s Memorandum in Support of Motion for Temporary Restraining Order. The facts stated in it are within my personal knowledge and are true and correct.”



William Pieratt Demond

SWORN TO and SUBSCRIBED before me by William Pieratt Demond on Sept. 7th,
2010.



Notary Public in and for
the State of Texas

Exhibit A

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS,
AUSTIN DIVISION

2010 SEP -7 AM 9:53

CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY (Signature)
DEPUTY

Deliverance Poker, LLC,
Plaintiff,

v.

Tiltware, LLC and
Michael Mizrachi
Defendants.

§
§
§
§
§
§
§
§
§

Civil Action No. _____

A10CA664 LY

PLAINTIFF'S ORIGINAL COMPLAINT

A. Parties

1. Plaintiff, Deliverance Poker, LLC ["Deliverance"], is a corporation that is organized under the laws of (and has its principal place of business in) the State of Texas.
2. Defendant, Michael Mizrachi ["Mizrachi"], is an individual and a citizen of the State of Florida. He can be served with process at 12879 SW 51sr Street, Miramar, Florida 33027-5807.
3. Defendant, Tiltware, LLC ["Tiltware"] is a corporation that is incorporated under the laws of the State of California. Defendant has its principal place of business in the State of California. Defendant does not have a registered agent for service of process in the State of Texas. Service of process on Defendant Tiltware may be made according to the laws of the State of Texas by serving Raymond Bitar at 10866 Wilshire Blvd., 4th Floor, Los Angeles, California, 90024.

B. Jurisdiction

4. The court has jurisdiction over this lawsuit under 28 U.S.C. §1332(a)(1) because the Plaintiff and the Defendants are citizens of different states and the amount in controversy exceeds \$75,000, excluding interest and costs.
5. The court has supplemental jurisdiction over Plaintiff's requests for both a temporary injunction and a permanent injunction against Defendant Mizrachi under 28 U.S.C. §1367 because Plaintiff's claims are so related to the claims within the court's original jurisdiction that they form part of the same case or controversy under Article 3 of the U.S. Constitution. More specifically, Plaintiff's request for a temporary injunction

against Defendant Mizrachi is directly and inextricably related to the other causes of action (breach of contract and tortious interference with existing contract) over which this Court has original jurisdiction.

C. Venue

6. Venue is proper in the Western District of Texas, Austin Division, pursuant to 28 U.S.C. Section 1391.
7. Additionally and/or alternatively, venue is proper in the Western District of Texas under Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 590-596 (1991) insofar as the contract in question provides that

“the parties irrevocably agree, consent and otherwise submit to the exclusive jurisdiction of a court of appropriate jurisdiction in Travis County, Texas for the adjudication of any dispute, controversy or claim arising from or in connection with this Agreement.”

8. This forum-selection clause is presumed to be valid under Kevlin Servs. v. Lexington State Bank, 46 F.3d 13, 15 (5th Cir. 1995).

D. Conditions Precedent

9. All conditions precedent have been performed or have occurred.

E. Facts

10. Plaintiff and Defendant Mizrachi executed a written contract on or about July 12, 2009 [“Deliverance Contract”]. Said contract provided that Plaintiff would 1) pay Defendant Mizrachi \$150,000, 2) provide a membership interest of 1.75% in Plaintiff’s corporation, and 3) advance expenses related to poker tournaments in which Defendant Mizrachi would participate. Said contract further provided that Defendant Mizrachi would compete in tournaments, make personal appearances to promote Plaintiff’s website, exclusively wear memorabilia promoting Plaintiff’s website, and give interviews.
11. Defendant Mizrachi honored the Deliverance Contract until approximately July 2010. During this time, he played in over 20 tournaments on behalf of Plaintiff. During these tournaments, he wore hats and other items that prominently featured Plaintiff’s name and logo.

12. Defendant Mizrachi subsequently entered into a separate contract with Defendant Tiltware ["Tiltware Contract"]. This second contract essentially replaced Plaintiff as Defendant Mizrachi's official sponsor, thereby resulting in damages to Plaintiff.

F. Count 1
BREACH OF CONTRACT

13. The foregoing paragraphs are incorporated herein as if quoted verbatim.
14. The Deliverance Contract provided specific obligations that would be performed by both Plaintiff and Defendant Mizrachi (*see supra*). Plaintiff has performed its obligations under the contract. Defendant, however, has not performed his contractual obligations.
15. Specifically, Defendant has failed to honor the provision that he would "[e]xclusively wear site logoed shirts and caps during all Tournaments and Public Appearances." Defendant's nonperformance is a breach of the parties' contract. Plaintiff has incurred damages as a result of Defendant Mizrachi's nonperformance and/or breach.
16. Additionally and/or alternatively, Defendant Mizrachi has breached the provision granting Plaintiff the exclusive right to Defendant's name, voice, and likeness. This breach has resulted in damages to Plaintiff.

G. Count 2
TORTIOUS INTERFERENCE WITH EXISTING CONTRACT

17. The foregoing paragraphs are incorporated herein as if quoted verbatim.
18. Plaintiff had a valid contract with Defendant Mizrachi.
19. Defendant Tiltware knew or had reason to know of 1) Plaintiff's contract with Defendant Mizrachi and 2) Plaintiff's interest in said contract. These reasons include (but are in no way limited to) the fact that Defendant Mizrachi participated in numerous tournaments while wearing memorabilia prominently featuring Plaintiff's logo.
20. Defendant Tiltware willfully and intentionally interfered with the Deliverance Contract.
21. Defendant Tiltware's interference proximately caused injury to Plaintiff.
22. Plaintiff seeks unliquidated damages within the jurisdictional limits of this court.
23. Exemplary damages. Plaintiff's injury resulted from Defendants' malice or actual fraud, which entitles Plaintiff to exemplary damages from both Defendants under Texas Civil Practice & Remedies Code section 41.003(a).

H. Participatory Liability – Conspiracy

24. Defendant Mizrachi, in combination with Defendant Tiltware, agreed to enter into the Tiltware Contract. Both Defendants had knowledge that Defendant Mizrachi had an existing contract with Plaintiff.
25. Defendants knew that the agreed acts would result in harm to Plaintiff.
26. To accomplish the object of their agreement, Defendants executed a contract that intentionally interfered with the Deliverance Contract.
27. The agreement to intentionally interfere with the Deliverance Contract proximately caused injury to Plaintiff.

I. Damages

28. As a direct and proximate result of Defendants' conduct, Plaintiff suffered the following injuries and damages:
 - a. Lost earnings;
 - b. Lost profits; and
 - c. Loss of earning capacity.

J. Attorney Fees & Costs

29. Plaintiff is entitled to an award of attorney fees and costs under Texas Civil Practice and Remedies Code § 38.001.

K. Prayer

30. For these reasons, Plaintiff asks for judgment against Defendants for the following:
 - a. Actual damages;
 - b. Prejudgment and postjudgment interest;
 - c. Reasonable attorney fees;

- d. Costs of suit; and
- e. All other relief the court deems appropriate.

Respectfully submitted,

By: 

William Pieratt Demond
Texas State Bar No. 24058931
701 Brazos Street, Suite 500
Austin, Texas 78701
Email: william.demond@connordemond.com
Tel: 512.917.2111
Fax: 512.519.2495

OF COUNSEL
Connor & Demond, PLLC

ATTORNEY IN CHARGE FOR
PLAINTIFF, Deliverance Poker, LLC