



IN THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

FARMERS EXCHANGE BANK,)
)
Plaintiff,)

-vs-)

Case No. CV-11-_____

NATIONAL BANK OF COMMERCE,)
)
F/K/A RED MOUNTAIN BANK, N.A., ERIK)
DICKINSON, QUIKTRAK, INC., TRAVELERS)
INDEMNITY COMPANY, ST. PAUL)
MERCURY INSURANCE COMPANY, ST.)
PAUL FIRE AND MARINE INSURANCE CO.,)
and FICTITIOUS DEFENDANTS A, B and C,)
whether singular or plural, that person, firm or)
corporation that was responsible for)
investigating Allied Health Care Services, Inc.)
and its principals and agents, FICTITIOUS)
DEFENDANTS D, E and F, whether)
singular or plural, that person, firm or)
corporation owning or employing any of the)
Defendants specifically named herein;)
FICTITIOUS DEFENDANTS G, H and I,)
whether singular or plural, that person, firm or)
corporation that was responsible for the)
training of any of the Defendants specifically)
named herein; FICTITIOUS DEFENDANTS J,)
K AND L, whether singular or plural, that entity)
concerning the occasion made the basis of this)
suit, was the principal of any of the named or)
above-described fictitious party Defendants;)
FICTITIOUS DEFENDANTS M, N, and O)
whether singular or plural, the entity which is)
successor-in-interest of any of the named or)
above-described fictitious party Defendants;)
FICTITIOUS DEFENDANTS P and Q, whether)
singular or plural, the entity which is the)
predecessor-in-interest of any of the named)
or above-described fictitious party Defendants;)
FICTITIOUS DEFENDANTS R and S, whether)
singular or plural, the person, corporation,)
association or other entity, whose negligence)
or other wrongful conduct contributed to cause)
the damages described in Plaintiff's Complaint,)

whose names are unknown to the Plaintiff at)
this time but who will be substituted by)
amendment when ascertained)
)
)
Defendants.)

COMPLAINT

JURISDICTION AND VENUE

1. Plaintiff Farmers Exchange Bank (hereinafter referred to “FEB”) is a corporation organized under the laws of the State of Alabama with its principal place of business in Louisville, Alabama.

2. Defendant National Bank of Commerce f/k/a Red Mountain Bank, N.A. (hereinafter referred to “Red Mountain”) is a domestic corporation whose address for service is P. O. Box 381748, Birmingham, AL 35238. At all times pertinent hereto, Defendant Red Mountain was doing business in Barbour County, Alabama.

3. Defendant Erik Dickinson is a resident citizen of the State of Alabama whose address for service is 2700 Rogers Drive, Suite 203, Birmingham, AL 35209. At all times pertinent hereto, Defendant Dickinson was acting individually and as an agent for Defendant Red Mountain within the course and scope of that agency.

4. Defendant Quiktrak, Inc. is a foreign corporation who, at all times pertinent hereto, was doing business in Barbour County, Alabama whose address for service is 9700 SW Nimbus, Beaverton, OR 97008. At all times pertinent hereto, Defendant Quiktrak, Inc. was acting individually and as an agent for Defendant Red Mountain within the course and scope of that agency.

5. Defendant Travelers Indemnity Company is a foreign corporation who, at all times pertinent hereto, was doing business in Barbour County, Alabama and whose agent for service of process is CSC Lawyers, Inc., 150 South Perry Street, Montgomery,

AL 36104. At all times pertinent hereto, Defendant Travelers was acting in a fiduciary relationship with the Plaintiff herein and as an agent or principal for the other named Defendants.

6. Defendant St. Paul Mercury Insurance Company is a foreign corporation who, at all times pertinent hereto, was doing business in Barbour County, Alabama and whose agent for service of process is CSC Lawyers, Inc., 150 South Perry Street, Montgomery, AL 36104. At all times pertinent hereto, Defendant St. Paul was acting in a fiduciary relationship with the Plaintiff herein and as an agent or principal for the other named Defendants.

7. Defendant St. Paul Fire and Marine Insurance Company, Inc. is a foreign corporation who, at all times pertinent hereto, was doing business in Barbour County, Alabama and whose agent for service of process is CSC Lawyers, Inc., 150 South Perry Street, Montgomery, AL 36104. At all times pertinent hereto, Defendant St. Paul was acting in a fiduciary relationship with the Plaintiff herein and as an agent or principal for the other named Defendants.

8. Fictitious Defendants A, B, and C, whether singular or plural, that person, firm or corporation that was responsible for investigating Allied Health Care or its related companies.

9. Fictitious Defendants D, E, and F, whether singular or plural, that person, firm or corporation owning or employing any of the Defendants specifically named herein.

10. Fictitious G, H, and I, whether singular or plural, that person, firm or corporation that was responsible for the training of any of the Defendants specifically named herein.

11. Fictitious Defendants J, K, and L, whether singular or plural, that entity concerning the occasion made the basis of this suit, was the principal of any of the named or described fictitious party Defendants.

12. Fictitious M, N and O whether singular or plural, the entity which is successor-in-interest of any of the named or described fictitious party Defendants.

13. Fictitious Defendants P and O, whether singular or plural, the entity which is the predecessor-in-interest of any of the named or above described fictitious party Defendants.

14. Fictitious Defendants R and S, whether singular or plural, the person, corporation, association or other entity, whose negligence or other wrongful conduct contributed to cause the damages described in Plaintiff's Complaint, whose names are unknown the Plaintiff at this time but who are unknown to the Plaintiff at this time but who will be substituted by amendment when ascertained.

15. Defendants have sufficient contacts with the State of Alabama for jurisdiction to be asserted over them here.

16. The claims made in this complaint are based solely on Alabama State Law. Plaintiff makes no claims nor do they assert any rights or remedies under the Constitution or laws of the United States of America.

17. Certain of the Plaintiff's factual and legal claims are made in the alternative as allowed by the Alabama Rules of Civil Procedure.

FACTUAL BACKGROUND

18. In the Summer of 2009, James Esry, an executive vice president at FEB, was approached by Defendant Dickinson about the possibility of assisting Allied Health Care Services, Inc. with financing of some home ventilators. Allied Home Health Care Services, Inc. was a business operating in the State of New Jersey but had an on-going relationship with Defendant Red Mountain.

19. Defendant Dickinson worked at Defendant Red Mountain at all times pertinent hereto.

20. Defendant Dickinson told Mr. Esry that he had investigated Allied Health Care Services, Inc. and that this company was a sound investment. Defendant Dickinson further told Mr. Esry that he would continue to monitor the company for financial soundness.

21. Defendant Dickinson explained to Esry that Allied Health Care Services needed financing for home ventilator machines and that these machines cost \$5,000 per machine. Defendant Dickinson arranged for Defendant Red Mountain to finance the purchase of these machines but then convinced FEB to purchase the leases from Red Mountain.

22. Defendant Dickinson made representations to the Plaintiff that he would continue to monitor Allied Home Health Care to insure that it was a viable, on-going concern. Defendant Dickinson also made representations to the Plaintiff regarding Allied Health and Charles Schwartz, the personal guarantor on the loan, to induce the Plaintiff to make the loan, including, but not limited to, that Mr. Schwartz had a personal net worth of over \$27,000,000 and that Allied Health had a new worth of over \$31,000,000.

23. On three separate occasions, Defendant Red Mountain sold leases from Allied Health Care to the Plaintiff for a profit. On each of these occasions, Dickinson and Red Mountain made similar representations about the financial viability of Allied Health and Schwartz.

24. The Plaintiff relied on these representations in making the decision to purchase the leases from Red Mountain.

25. Defendant Red Mountain hired Defendant Quiktrak, Inc. to inspect the equipment and provide a report.

26. Defendant Quiktrak, Inc. provided a report where it had only observed a fraction of the inventory that had been financed by the Plaintiff.

27. Defendant Quiktrak, Inc. did not properly assess the equipment to determine whether the equipment that was ultimately to be financed by the Plaintiff was present at Allied Home Health.

28. Unknown to the Plaintiff, Allied Home Health had falsified records, including invoices, for the equipment that the Plaintiff was to be financing. Allied Home Health did not actually use the money from the Plaintiff to purchase the equipment but, instead, converted the money to its own use.

29. At the time it sold the leases to the Plaintiff, the Defendants knew or should have known that Allied Home Health was not purchasing equipment with the monies paid by the Plaintiff.

30. This malicious fraud, negligence, and wantonness on the part of Red Mountain ultimately resulted in Plaintiff losing over \$1,600,000. Defendants Red Mountain, Dickinson, and Quiktrak failed to conduct proper due diligence in connection with these transactions. In particular they failed to take appropriate actions to verify the accuracy of documents relating to these transactions as it was their duty to do. The action or inaction of these defendants constituted negligence or wantonness.

31. The defendant Red Mountain entered into a fiduciary relationship with the Plaintiff. In connection with these transactions, Red Mountain was acting as an agent, or correspondent bank for the Plaintiff under circumstances where It was clear to Red Mountain that the Plaintiff was relying on Red Mountain's superior knowledge of Allied Health Care and its principals. By failing to properly verify the accuracy of title

documents relating to these transactions, Red Mountain violated its fiduciary responsibilities to the Plaintiff.

32. As a result of the acts and omissions of the defendants, the Plaintiff has suffered loss resulting directly from, in good faith, giving value on the faith of written documents, including documents of title, such as bills of lading, which were a counterfeit or an imitation intended to deceive.

33. The Defendants Travelers and the St. Paul Defendants issued a policy of insurance to the Plaintiff that provided coverage, in part, for fraud on the part of the Plaintiff's creditors.

34. The Plaintiff timely made all premium payments on the Travelers/St. Paul's insurance policy.

35. The Plaintiff timely and promptly notified Travelers/St. Paul's of the fraudulent acts set forth above that gave rise to the loan default in an amount over \$1,300,000.

36. Upon receipt of the claim, Travelers and St. Paul's failed to pay the claim in a timely manner.

37. All of the Defendants failed to conduct proper due diligence in connection with these transactions. In particular they failed to take appropriate actions to verify the accuracy of documents relating to these transactions as it was their duty to do. The action or inaction of these defendants constituted negligence or wantonness.

COUNT ONE: CONSTRUCTIVE FRAUD

38. Plaintiff hereby adopts and realleges Paragraph Numbers 1 through 37 of this complaint as if fully set forth.

39. Defendants made many false representations concerning material facts to the Plaintiff.

40. Defendants intended the Plaintiff to rely and act on such representations.

41. Plaintiff did, in fact, rely and act upon said representations.

42. Plaintiff's reliance on said representations was reasonable.

43. Plaintiff has suffered severe and substantial damage proximately resulting from these representations.

COUNT TWO: RECKLESS FRAUD

44. Plaintiff hereby adopts and realleges Paragraph Numbers 1 through 43 of this complaint as if fully set forth.

45. Defendants, recklessly and without regard to truth or falsity, made many false representations concerning material facts to the Plaintiff regarding the principals of Allied Health Care Services, Inc. and their financials.

46. Defendants intended the Plaintiff to rely and act on such representations.

47. Plaintiff did, in fact, rely and act upon said representations.

48. Plaintiff's reliance on said representations was reasonable.

49. Plaintiff has suffered severe and substantial damage proximately resulting from these representations.

COUNT THREE: INTENTIONAL FRAUD AND DECEIT

50. Plaintiff hereby adopts and realleges Paragraph Numbers 1 through 49 of this complaint as if fully set forth.

51. Defendants intentionally made many false representations concerning existing material facts to the Plaintiff.

52. Defendants intended to deceive and injure the Plaintiff.

53. Defendants intended the Plaintiff to rely and act on such representations.

54. Plaintiff did, in fact, rely and act upon said representations.

55. Plaintiff's reliance on said representations was reasonable.

56. Plaintiff has suffered severe and substantial damage proximately resulting from these representations.

COUNT FOUR: PROMISSORY FRAUD

57. Plaintiff hereby adopts and realleges Paragraph Numbers 1 through 56 of this complaint as if fully set forth.

58. Defendants intentionally, maliciously, negligently, and/or wantonly, made many false representations and promises concerning events to occur in the future to the Plaintiffs.

59. Defendants never intended for the events to occur.

60. Defendants never intended to perform the acts promised.

61. Defendants intended the Plaintiff to rely and act on such representations and promises.

62. Plaintiff did, in fact, rely and act upon said representations and promises.

63. Plaintiff's reliance on said representations and promises was reasonable.

64. Plaintiff has suffered severe and substantial damage proximately resulting from these representations and promises.

COUNT FIVE: FRAUDULENT SUPPRESSION

65. Plaintiff hereby adopts and realleges Paragraph Numbers 1 through 64 of this complaint as if fully set forth.

66. Defendants failed to disclose and/or intentionally concealed material facts that they had a duty to disclose to the Plaintiff.

67. The duty to disclose the material facts arose from the confidential and/or fiduciary relationship between the parties and/or the particular circumstances, or otherwise, which imposed such duty upon the Defendants.

68. Defendants, by this suppression, fraudulently induced the Plaintiff to act to its detriment.

69. Plaintiff's reliance was reasonable.

70. Plaintiff has suffered severe damage proximately resulting from Defendants' suppression.

COUNT SIX: CONSPIRACY

71. Plaintiff hereby adopts and realleges Paragraph Numbers 1 through 70 of this complaint as if fully set forth.

72. Defendants conspired among themselves and with others to take actions, to make misrepresentations, and/or to suppress material facts and/or otherwise act illegally.

73. The purpose of the conspiracy was to accomplish something unlawful or oppressive and/or to accomplish a permissible purpose by unlawful or oppressive means.

74. Plaintiffs have suffered severe and substantial damage proximately resulting from such illegal actions and conspiracy.

COUNT SEVEN: NEGLIGENCE AND/OR WANTON SUPERVISION

75. Plaintiff hereby adopts and realleges Paragraph Numbers 1 through 74 of this complaint as if fully set forth.

76. Defendant Red Mountain negligently, wantonly and/or maliciously failed to adequately supervise and/or control its agents and employees, including Defendant Erik Dickinson

77. Plaintiff has suffered severe and substantial damage proximately resulting from such failure to properly supervise.

COUNT EIGHT: RESPONDEAT SUPERIOR

78. Plaintiff hereby adopts and realleges Paragraph Numbers 1 through 77 of this complaint as if fully set forth.

79. Defendant Red Mountain authorized or actually or impliedly ratified the actions of its agents, including Erik Dickinson and Quiktrak, Inc., and is therefore

vicariously liable for any tort, alleged above, committed by them within the line and scope of their duties.

80. Plaintiffs have suffered severe and substantial damage proximately resulting from such torts, and Defendant Red Mountain is thereby liable to Plaintiffs.

COUNT NINE: NEGLIGENCE/WANTONNESS

81. Plaintiff hereby adopts and realleges Paragraph Numbers 1 through 80 of this complaint as if fully set forth.

82. Defendants acted negligently recklessly, and/or wantonly with regard to their business and contractual relations, negotiations and dealings with Plaintiff.

83. Defendants, under Alabama common law, owed a duty of care to the Plaintiffs and breached that duty through their actions as described above.

84. Plaintiff has suffered severe and substantial damage proximately resulting from such negligence and/or wantonness.

COUNT TEN: BREACH OF CONTRACT

85. The Plaintiff hereby adopts and realleges paragraph numbers 1 through 84 of this complaint as if fully set forth.

86. Defendants St. Paul's and Travelers entered into a contract with the Plaintiff whereby the Plaintiff agreed to purchase general liability insurance and pay premiums thereon and the Defendant agreed to provide coverage for the same.

87. The Plaintiff made each and every premium payment for the liability insurance coverage in a timely fashion.

88. The Defendant breached the obligations and promises made in the policy.

89. Plaintiff has suffered severe and substantial damage as a result of this breach.

COUNT ELEVEN: BAD FAITH REFUSAL TO PAY A JUST CLAIM

90. The Plaintiff hereby adopts and realleges paragraph numbers 1 through 89 of this complaint as if fully set forth.

91. Plaintiff properly made a claim for benefits under the insurance contract issued by Defendants St. Paul's and Travelers.

92. Plaintiff fully complied with all the terms and provisions of the policy.

93. Defendant St. Paul's and Travelers constructively denied the Plaintiff's claim by failing to timely process it and by failing to pay it.

94. There was no reasonable basis or justification for the Defendant's denial of Plaintiff's claims. This denial was in bad faith.

95. As a result of the Defendant's bad faith failure to pay insurance benefits, the Plaintiff was injured and damaged as alleged above.

96. To the extent that the Defendant's conduct was intentional and/or wanton, punitive damages are allowed to punish this Defendant and to deter others similarly situated from such conduct in the future.

COUNT TWELVE: BAD FAITH REFUSAL TO INVESTIGATE A CLAIM

97. The Plaintiff hereby adopts and realleges paragraph numbers 1 through 96 of this complaint as if fully set forth.

98. Defendants Travelers and St. Paul's failed or refused to adequately investigate Plaintiffs' just claim. There was no justifiable basis for this failure or refusal to investigate.

99. Defendant Travelers and St. Paul's committed bad faith in their failure or refusal to adequately investigate Plaintiff's claims.

100. As a result of the Defendant's bad faith failure to investigate, the Plaintiff was injured and damaged as alleged above.

101. To the extent that the Defendant's conduct was intentional and/or wanton, punitive damages are allowed to punish this Defendant and to deter others similarly situated from such conduct in the future.

COUNT THIRTEEN: BREACH OF CONTRACT

102. The Plaintiff hereby adopts and realleges paragraph numbers 1 through 101 of this complaint as if fully set forth.

103. Defendants Red Mountain entered into a contract with the Plaintiff whereby the Plaintiff agreed to purchase leases from the Defendant and pay the Defendant for the leases thereon and the Defendant agreed to provide leases to the Plaintiff.

104. The Plaintiff paid the Defendant for the leases.

105. The Defendant breached the obligations and promises made in the policy by failing to transfer legitimate and existing leases to the Plaintiff.

106. Plaintiff has suffered severe and substantial damage as a result of this breach.

COUNT FOURTEEN: BREACH OF FIDUCIARY DUTY

107. The Plaintiff hereby adopts and realleges paragraph numbers 1 through 106 of this complaint as if fully set forth.

108. Defendants Red Mountain and Dickinson owed fiduciary duties to the Plaintiff as a result of their relationship with Allied and the Plaintiff.

109. The Defendants breached those fiduciary responsibilities as set forth above.

110. As a result of the Defendants' breach of fiduciary duty, the Plaintiff has been injured and damaged as set forth above.

WHEREFORE, Plaintiff demands judgment against Defendants as follows:

- A. In such an amount of compensatory damages as will reasonably and adequately compensate it for its injuries and damages;
- B. In such an amount of punitive damages as will reflect the enormity of the wrongs committed by the Defendants and will deter the Defendants and others from committing similar wrongful acts in the future;
- C. Its costs in this action; and,
- D. Such other relief as this Court finds is appropriate.

/s/ L. Shane Seaborn
L. SHANE SEABORN (SEA027)
Attorney for Plaintiff

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JURY DEMAND

Plaintiff hereby demands a trial by jury of all issues in this case.

/s/ Christina D. Crow

OF COUNSEL