

Cause No. 2009-550,359

MIKE LEACH

Plaintiff,

v.

TEXAS TECH UNIVERSITY

Defendant.

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IN THE DISTRICT COURT

OF LUBBOCK COUNTY, TEXAS

99TH JUDICIAL DISTRICT

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2010 JAN -8 AM 8:30
DEPUTY

PLAINTIFF MIKE LEACH'S SECOND AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Mike Leach ("Leach"), Plaintiff and files this Second Amended Petition complaining of Texas Tech University, Defendant, and would show as follows:

I. DISCOVERY CONTROL PLAN

1. Mike Leach intends to conduct discovery under Level 2 of Texas Rule of Civil Procedure 190.

II. PARTIES

- 2. Plaintiff is Mike Leach, the head football coach at Texas Tech University.
- 3. Defendant is Texas Tech University, which has already appeared in this case.

III. VENUE

4. Venue is proper in Lubbock County, Texas. Specifically, venue is allowed in this county because all or a substantial part of the events or omissions occurred in this county. Tex. Civ. Prac. & Rem. Code § 15.002(a)(1). Venue is mandatory in this county because of Texas Civil Practice & Remedies Code Section 15.017 provides that venue is mandatory in the county in which the plaintiff resided at the time of the accrual of the cause of action.

IV. FACTS

5. For the last ten years Leach has made his livelihood as head football coach at Texas Tech University, a Division 1 school that has appeared in NCAA College Bowl games the last eight years. Leach has a strong winning percentage while the head coach at Texas Tech.

6. Leach is a member of a very small pool of qualified applicants for head coaching positions at major colleges and universities in the United States. The number of head coaches at Division 1 schools number 120 in the NCAA Bowl Eligible Subdivision. Even fewer openings exist for such positions in any given year. These Division 1 schools recruit during the year and practice in the spring and summer for the upcoming year. If a coach is not hired in the early part of the year, his opportunity to find a position is effectively gone. Moreover, a coach's good reputation among recruits – high school seniors and their families – is paramount.

7. This case involves a dispute between Texas Tech University and its head football coach, Mike Leach. The University executed a contract with Leach effective January 1, 2009 (the "Agreement") providing that Leach will perform as Head Football Coach of the University's Division 1 football program for a term of five years. The Agreement has certain provisions relating to termination, including a termination-at-will provision, and a termination for cause provision, and a notice and cure provision. See Exh. 1, Employment Contract dated February 19, 2009, already on file with this Court.¹

8. On December 28, 2009, Mike Leach received the following letter from Defendant:

"Dear Coach Leach:

We recently received a complaint from a player and his parents regarding your treatment of him after an injury, and we have undertaken an investigation of that complaint. We

¹ All Exhibits referenced are attached to Plaintiff's Motion for Expedited Discovery which is on file with this Court and are incorporated by reference.

consider this a serious matter. Until the investigation is complete, you are suspended from all duties as Head Football Coach effective immediately.

Sincerely,
Gerald Myers
Athletics Director

Guy Bailey
President”

9. On or about December 30, 2009, the University wrongfully terminated Leach without cause. In so doing, the University contends that it does not owe Leach any additional salary or compensation, including bonuses to which Leach was or would have been entitled and certain guaranteed income.

10. Defendant, its agents and representatives have given conflicting statements about the basis for terminating Leach, casting doubt as to Defendant’s reasons for terminating Plaintiff’s employment. On or about December 30, 2009, the day the University terminated Leach, University Chancellor Kent Hance stated that he “wanted to solve the problem, so did the Athletic Director and the President.” Hance pronounced that, “[w]e can’t believe this has happened. But the only person responsible for Mike getting fired is Mike.” See Exh. 2. “TTU Chancellor Kent Hance speaks on ESPN about Leach’s termination.” Hance also claimed that Leach’s contractual bonuses due under the contract were “never a consideration” when Leach was fired. See Ex. 3 “Tech Fires Leach for ‘cause’; attorney plans to fight back.” However, the Wall Street Journal reported on January 1, 2010 that “three prominent current and former members of the school’s board of regents said the firing was largely the result of ill will left over from heated contract negotiations early last year.” See Exh. 4 “Heard on The Field: Why Mike Leach and Texas Tech Broke Up.” That report is supported by emails obtained by the Dallas Morning News in 2009 which illustrate hostility on the part of the University in the contract

negotiations with Leach and demonstrating that bonuses and contract buy-out issues were at the very heart of the hostility by the University. See Exh. 5.

11. On or about December 30, 2009, Defendant released a “Statement from Texas Tech on Termination of Football Coach Mike Leach.” See Exh. 6. In that statement, Defendant claimed that Leach’s termination was precipitated by his treatment of an injured player (widely rumored to be Adam James, son of ESPN analyst Craig James) that put Mr. James at risk of additional injury. *Id.* However, Defendant has produced no evidence of any “risk of injury” and later said in the statement that Leach “refused to obey a suspension order and instead sued Texas Tech.” *Id.* That statement suggests Defendant terminated Leach because he sought to apprise himself of legal protections and to enforce his legal rights under his contract.

12. All of these statements have been made by Defendant despite school officials telling the Los Angeles Times on January 4, 2010 that “the investigation into Adam James’ allegations is on-going.” See Exh. 7 “Texas Tech starts search to replace fired Leach, AD says McNeill to get ‘strong consideration’.” These conflicting statements demonstrate that Plaintiff Leach was not at fault in this situation and establish the impropriety of Defendant’s actions.

13. Having terminated Leach, the University is not intending to pay him the compensation (salary, bonuses, etc.) it owes under the Agreement. In addition, in reasonable probability, Leach will not be able to obtain another head coaching position in the near term due to the very public, wrongful acts and statements of Texas Tech University, its agents and representatives. The University has publically accused Leach of mistreating a student athlete who allegedly suffered a mild concussion and being insubordinate and uncooperative in the investigation. The University even alleges that Leach is responsible for his contract being terminated. Leach denies those allegations but the news reports continue unabated. The mere

allegation that a head football coach would mistreat a student athlete threatens that coach's reputation and prospects for future employment and exposes him to ridicule and contempt.

14. In the present case, Defendant's representatives' communications with one another during contract negotiations with Leach and their actions surrounding his wrongful termination support the conclusion that Texas Tech, through its Board of Regents, negotiated Leach's contract in bad faith and without any intent to perform it. By way of example, internal emails among the Chancellor and a booster at the time negotiations between Leach and the Chancellor were on-going strongly imply an intent not to perform this contract at the time of its execution. Moreover, actions by Defendant in failing to abide by the terms of the contract, such as notice and cure provisions material to this dispute, demonstrate that Defendant did not abide by the contract terms. Specifically, Defendant terminated Leach without providing him with a contractually imposed notice of conduct Defendant claimed violated the contract terms and at least 10 days to cure any alleged breach, which is also specifically set forth in the contract. See Exh. 1.

V. CAUSES OF ACTION

A. Breach of Contract

15. Defendant has breached its contract with Mike Leach by, among other things, suspending him without any process or contractual basis, failing to give Plaintiff notice as required under his contract and a reasonable opportunity to cure, and allegedly terminating him for cause when no good cause exists.

16. Plaintiff has suffered damages in excess of the minimum jurisdictional limits of this Court for which he now sues.

B. Fraud in the Inducement

17. Additionally, Plaintiff would not have entered into the contract but for the reasonable expectations from representations exhibited in the terms of the contract that he would not be deprived of process in the face allegations of misconduct. In addition Defendant represented and assured Leach that Defendant would honor all contract terms. Defendant knew or should have known these representations were false or made recklessly. These representations and/or omissions were material and were made or omitted with the intent that Plaintiff rely upon them. Defendant had an obligation to fully disclose information to Plaintiff but failed to do so. Plaintiff relied upon such representations and/or omissions to his detriment and has suffered damages in excess of the minimum jurisdictional limits of this Court for which he now sues.

C. Defamation

18. Defendant has made both slanderous and libelous statements including but not limited to:

- a) that Mike Leach was terminated for cause;
- b) that Leach was insubordinate and refused to cooperate and was responsible for his contract being terminated for cause;
- c) that Plaintiff Leach's termination was precipitated by his treatment of a player diagnosed with a concussion and he placed that player at risk of additional injury.

These false statements were made intentionally and designed to injure Mike Leach's reputation as a coach, injure him in his occupation, and expose him to financial harm. Plaintiff has suffered damages in excess of the jurisdictional limits of this Court for which he now sues.

D. Constitutional Due Course of Law Violation

19. Plaintiff Mike Leach alleges that Defendant violated his due process rights under the Texas Constitution. On the date that Defendant terminated him, Plaintiff Leach was an employee of Defendant, a public institution of higher education in the State of Texas. Plaintiff Leach had a written contract for a specified term with Defendant. That contract provided for continued employment for a specific term. In addition, the University's ability to terminate that contract was expressly limited by terms requiring substantial monetary payment in the event it were terminated without cause and provided for specific procedures and an opportunity to cure, in the event the University contemplated termination with cause. Specifically, the contract's "for cause" provision required at least 10 days notice of the alleged violation and a reasonable opportunity to cure before being terminated. The limitations on termination for cause were additionally regulated by specific procedures under the employment policies and regulations of Texas Tech University.

20. The specific term of Plaintiff Leach's contract and the limitations on the University's ability to terminate that contract created a vested property interest protected the Article I, Section 19 of the Texas Constitution. Defendants violated Plaintiff Leach's rights under the Texas Constitution by failing to afford the mandatory due process, and by unilaterally and wrongfully terminating Plaintiff Leach's employment contract, thereby depriving him of a vested property right.

21. Plaintiff Leach seeks redress from this Court for Defendant's actions in depriving him of his rights without due course of law. In light of this Constitutional due course of law violation, Plaintiff Leach seeks a declaratory judgment that he did not violate a material provision of the contract, that Defendant did not have cause to terminate Leach as head football

coach and that Defendant violated Leach's rights under the contract and Texas Constitution in terminating the contract.

E. Constitutional Taking

22. Because Plaintiff Leach had a vested property interest in his employment contract, Defendant was required to observe due course of law before depriving Leach of that interest. Defendant failed and refused to afford Leach his rights to due course of law before unilaterally and wrongfully terminating the contract and thereby depriving Leach of his property rights. Under the Texas Constitution, no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made...." TEX.CONST.ART.I,§17. The takings clause prohibits the State from taking a person's property under its sovereign powers without adequate compensation. In this case, Defendant has taken or invaded Plaintiff Leach's property and/or unreasonably interfered with Leach's right to the use and enjoyment of the contract terms and benefits without compensation. As such, Plaintiff Leach is entitled to compensation for the loss he has suffered as a result of Defendant's actions.

F. Waiver of Sovereign Immunity

23. Plaintiff Mike Leach denies that Defendant is entitled to immunity from suit because Defendant has waived such immunity based on its conduct. Texas Tech waived any immunity claim by its egregious conduct which was in violation of Mike Leach's contractual rights and rights to due process. See *Texas Southern University v. State Bank and Trust Co.* 212 S.W.3d 893 (Tex.App.—1st Dist. 2007, pet. Denied); *Catalina Development Inc. v. County of El Paso*, 121 S.W.3d 704 (Tex.2003).

24. Defendant fraudulently represented that it would honor the parties' agreement. Then, only days before it was to pay Leach a bonus of \$800,000 under the contract, Defendant

falsely accused Leach of violations of the contract's "Performance" provisions without any or adequate investigation. Defendant acted wrongfully in order to claim that Leach was terminated "for cause." In manufacturing a false basis to terminate Leach allegedly for cause, Defendant failed to abide by the notice and cure provisions available to Leach in the contract. When Leach attempted to enforce the contract in a court of law, Defendant alleged termination for cause based upon Leach's resort to the courts for protection. These extraordinary factual circumstances put Leach to the proverbial Hobbesian's Choice – accept Defendant's defamatory public accusations and allegations of improper conduct and get fired for cause based on those allegations, or defend himself and seek to enforce his contractual rights and get fired for cause. This conduct, along with other acts by Defendant constitute a waiver of any claim of, or right to, sovereign immunity to which Defendant might be entitled.

VI. ATTORNEY'S FEES

25. Pursuant to Texas Civil Practice & Remedies Code Section 37.001 *et seq.* and 38.001 *et seq.*, Plaintiff seeks recovery of his reasonable attorney's fees.

VII. PUNITIVE DAMAGES

26. Due to the intentional, abusive and reckless conduct of Defendant, Plaintiff seeks recovery of punitive damages as allowed by law.

VIII. DEMAND FOR JURY

27. Mike Leach demands a jury trial and has paid the appropriate fee.

IX. PRAYER

28. For these reasons, Mike Leach asks that Defendant be cited to appear and answer and, on final trial, that Mike Leach have judgment against Defendant for:

- a. Actual damages.
- b. Consequential, special and incidental damages.

- c. Punitive damages.
- d. Reasonable attorney fees.
- e. A declaration as requested above.
- f. Prejudgment and post-judgment interest as allowed by law.
- g. Costs of suit.
- h. All other relief, in law and in equity, to which Mike Leach may be entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served upon the following on the 7th day of January, 2010, as follows:

Daniel C. Perkins
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/s/ Frederick T. Johnson