

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

SEP 26 2007

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
~~SECURITY CLERK~~

BARBARA MONTEMAYOR, Individually §
and as Representative of the Estate of §
CARLOS MONTEMAYOR, deceased §

CIVIL NO:
SA: 06-CV-00763-WRF

VS. §

DON COLEMAN, DON COLEMAN §
ADVERTISING, INC., GAYE L. MILLER, §
MONTEMAYOR Y ASOCIADOS, INC. §

PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES **BARBARA MONTEMAYOR**, Individually and as Representative fo The Estate of **CARLOS MONTEMAYOR**, Deceased, and files this their First Amended Original Complaint, pursuant to the Federal Rules of Civil Procedure and would respectfully show unto the Court as follows:

PARTIES

1. Petitioner, **BARBARA MONTEMAYOR**, is an individual who resides in San Antonio, Bexar County, Texas.
2. Defendant, **DON COLEMAN ADVERTISING, INC.**, d/b/a **GLOBALHUE**, has been served with process and has filed an answer herein.
3. Defendant, **DON COLEMAN ADVERTISING, INC.**, d/b/a **GLOBALHUE** is a corporation and has been served with process and has filed an answer herein.
4. Defendant, **DON COLEMAN** is an individual who has been served with process and has filed an answer herein.

5. Defendant, **GAYEL MILLER** is an individual who has been served with process and has filed an answer herein.

6. Defendant, **MONTEMAYOR Y ASOCIADOS, INC.** is a corporation and has been served with process and has filed an answer herein.

JURISDICTION & VENUE

7. Venue is proper in the United States District Court for the Western District of Texas pursuant to 18 U.S.C. §1391(B)(C) in that substantial part of the event giving rise to the claim occurred in Bexar County, Texas.

**FACTUAL ALLEGATIONS RELATING TO BREACH OF CONTRACT
ACTION**

8. On or about December 15, 2000, Mr. and Mrs. Montemayor entered into that certain Stock purchase Agreement with Don Coleman Advertising, Inc. The Stock purchase Agreement provided that a portion of the purchase price was to be paid at the time of the sale of the shares, and that the remainder of the purchase price, defined as the "Earnout Payment," was to be calculated according to a complex and variable formula, paid 95 days after December 31, 2003. Accordingly, the Earnout Payment was to have been paid on or before April 4, 2004. On or about the 30th day of March 2004, Mr. and Mrs. Montemayor were notified that there would be no Earnout Payment paid. By failing to pay Mr. and Mrs. Montemayor according to the terms of the Stock Purchase Agreement, such agreement has been breached. Mr. and Mrs. Montemayor are entitled to payment for the full value of the shares transferred to Defendant in the corporation, Montemayor y Asociados, Inc.

9. In order to induce Mr. and Mrs. Montemayor to enter into the Stock purchase Agreement, numerous misrepresentations were made by Defendant Don Coleman and Don Coleman

Advertising, Inc. which were material and which were made with the intent that Mr. and Mrs. Montemayor rely upon them in entering into the Agreement, thereby selling all of their stock in Montemayor y Asociados, Inc. The purpose for inducing the Plaintiffs to enter into the Agreement was to obtain a lower price for the shares on the promise of future payments, which payments it now appears were never intended to be made.

10. In an effort to ensure that full value for Mr. and Mrs. Montemayor's stock in Montemayor Y Asociados, Inc. would never be paid, Don Coleman Advertising, Inc., Mr. Don Coleman, Ms. Gaye L. Miller and Montemayor y Asociados, Inc engaged in conspiracy to cause Montemayor y Asociados, Inc. (the "agency") to show a loss or, at least, no profit by denying Mr. and Mrs. Montemayor financial reports and by concealing assets and revenue and misstating expenses. The Defendants took profitable divisions and moved the work, including production and print ads to a third-party contractor, thereby causing the clients to be billed more for the total advertising services and reducing revenue. The Defendants credited client billings to other divisions or companies to reduce the revenue of the agency. The Defendants had the agency's employees perform work for other divisions or companies and their clients without apportioning the cost of such work to the other divisions or companies and without apportioning the revenue generated by such work to the agency.

11. The Defendants caused the agency to terminate many of its long-standing and profitable local clients in order to "pitch" several national companies. When the national accounts were obtained for the agency, however, the accounting procedures were such that the agency would not obtain credit for a large percentage of the billings that were actually generated out by the agency.

12. Prior to the sale of the shares, and during negotiations for the determination of the price of the shares and how the purchase price was to be paid, numerous misrepresentations were

made regarding the management of the agency after the sale of stock. Mr. and Mrs. Montemayor reasonably relied upon such misrepresentations and performed acts necessary to fulfill the conditions of the Stock Purchase Agreement, including transferring the shares and continuing to attempt to manage the business of the agency. Additionally, representations were made to Mr. and Mrs. Montemayor by Defendants subsequent to the sale of the stock assuring them that they would receive just compensation for the stock. It is now clear that such representations were false and were made in order to induce Mr. and Mrs. Montemayor to refrain from pursuing further legal remedies to enforce their rights.

BREACH OF CONTRACT

13. By failing to pay the Plaintiffs according to the terms of the Stock Purchase Agreement, in spite of Plaintiffs having performed all actions necessary and required pursuant to the Stock purchase Agreement, Defendants have therefore breached the Stock Purchase Agreement. The Plaintiffs are entitled to payment in full for the value the shares transferred to Defendant in the corporation, Montemayor y Asociados, Inc.

FRAUDULENT MISREPRESENTATION

14. In order to induce the Plaintiffs to enter into the Stock Purchase Agreement, Defendants made numerous misrepresentations which were material and made with the intent that Plaintiffs enter into the Agreement, thereby selling all of the stock owned by Plaintiffs in Montemayor y Asociados, Inc. The purpose for inducing the Plaintiffs to enter into the Agreement was to attempt to obtain a lower price for the shares on the promise of future payments, which payments it now appears Defendants never intended to make. The Defendants conducted the agency in such a manner as to cause the agency to appear to lose money. The Defendants took profitable divisions of the company and moved the work, including production and print ads to a

third-party contractor, thereby causing the clients of the agency to be billed more for the total advertising services. In spite of repeated requests by Plaintiffs to Defendants, acting by and through its agents and representatives, Defendants refused to allow competitive bidding.

15. One of the requirements that Defendants had was that Montemayor y Asociados, Inc. fire many of its long standing and profitable local clients in order to "pitch" several national companies. When the national accounts were obtained for the agency, however, the Defendants changed the accounting procedures so that Montemayor y Asociados, Inc. would not obtain credit for a large percentage of the billings that were actually generated out of the San Antonio office.

16. During the negotiations of the sale of the stock of Montemayor y Asociados, Inc., Defendant made numerous misrepresentations regarding the ability of the Plaintiffs to continue running the agency as they had in the past. One of the motivations to sell the stock to DON COLEMAN ADVERTISING, INC. was that the Montemayors would continue to have executive decisions regarding clients and all of the business of the agency. Prior to the sale of the shares, and during negotiations for the determination of the price of the shares and how the purchase price was to be paid, the Plaintiffs reasonably relied on the misrepresentations of the Defendants and performed acts necessary to fulfill its conditions of the Stock Purchase Agreement, including transferring the shares and continuing to attempt to manage the business of Montemayor y Asociados, Inc.

DAMAGES

17. As a result of Defendants' breaches of contract, fraud and conspiracy Plaintiffs have suffered damages. In addition to the damages the Plaintiffs have retained counsel, who presented Plaintiffs' claim to Defendants. The Defendants have not tendered the performance due under the contract. Thus, Plaintiffs seek recovery of reasonable attorneys' fees as allowed by Texas Civil Practice and Remedies Code 38.001, et seq.

18. In addition to monetary damages, Plaintiffs seek the following remedies:

Specific performance of the contract;

Pleading in the alternative, and without waiving the foregoing, quantum merit as an alternative to the contract claim.

CONDITIONS PRECEDENT

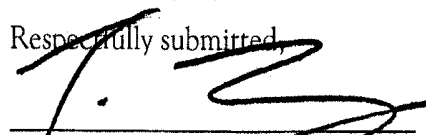
19. Plaintiffs have performed all conditions precedent as required by law and contract. Plaintiffs have performed and are willing to continue to perform pursuant to any agreements they had with Defendants. Alternatively, Plaintiffs would show that prior material breaches of the agreement(s) between the parties by Defendants excuse the failure, if any, of Plaintiffs to perform.

PRAYER

20. For these reasons, Plaintiffs ask that Defendants be cited to appear and answer, and that Plaintiffs have judgment against Defendants for:

1. The damages within the jurisdictional limits of this court;
2. Specific performance and quantum merit;
3. Exemplary Damages;
4. Reasonable attorneys' fees;
5. Pre-judgment and post-judgment interest as allowed by law;
6. Cost of suit; and
7. All other relief to which the Plaintiffs show themselves to be entitled, both at law and in equity.

Respectfully submitted,


TIM MALONEY
State Bar No. 12887380
PAUL E. CAMPOLO
State Bar No. 03730150

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Attorneys for Plaintiffs,
CARLOS MONTEMAYOR
and **BARBARA MONTEMAYOR**

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing instrument has been forwarded, via certified mail, return receipt requested, hand delivery, facsimile, regular mail and/or electronically by CM/ECF to:

Robert W. Wachsmuth
GLAST, PHILLIPS, & MURRAY, PC
The Court Building
219 E. Houston St., Suite 400
San Antonio, Texas 78205

**ATTORNEYS FOR DON COLEMAN, DON COLEMAN
ADVERTISING, INC., GAYE L. MILLER,
MONTEMAYOR Y ASOCIADOS, INC.**

on this the 14 day of September, 2007.



TIM MALONEY