

**United States Bankruptcy Court  
District of New Mexico**

**Document Verification**

**Case Title:** HomeLoan.com,Inc. v. William Loughborough, et al.  
**Case Number:** 02-01244  
**Nature of Suit:**  
**Judge Code:** S  
**Reference Number:** 02-01244 - S

**Document Information**

**Number:** 42

**Description:** Proposed Findings of Fact and Conclusions of Law by Re: [27-1] Motion To Dismiss Amended and Restated Complaint as to Claim for Breach Contract for Failure to State a Claim Upon which Relief can be Granted by Philip R. Doepfner.

**Size:** 10 pages (22k)

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**Filer Information**

**Submitted By:** James E Burke

**Comments:** Proposed Findings of Fact and Conclusions of Law and Memorandum Opinion on Defendant Phillip R. Doepfner's Motion to Dismiss Debtor's Amended and Restated Complaint as to Claim for Breach of Contract for Failure to State a Claim upon which Relief can be granted

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

In re  
HOMELoAN.COM, INC.<sup>1</sup>  
Debtor.

No. 7-02-12928 MA

HOMELoAN.COM, INC.

Plaintiff,

v.

WILLIAM LOUGHBOROUGH  
and PHILLIP R. DOEPFNER,

Adv. No. 02-1244 S

Defendants.

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND  
MEMORANDUM OPINION ON DEFENDANT PHILLIP R. DOEPFNER'S  
MOTION TO DISMISS DEBTOR'S AMENDED AND RESTATED  
COMPLAINT AS TO CLAIM FOR BREACH OF CONTRACT FOR  
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

This matter is before the Court on Defendant Phillip R. Doepfner's ("Doepfner") Motion to Dismiss Debtor's Amended and Restated Complaint as to Claim for Breach of Contract for Failure to State a Claim upon which Relief can be Granted (doc 27). Doepfner is self-represented. Plaintiff responded through its attorneys Davis & Pierce, P.C. (William F. Davis and Cynthia M. Tessman)(doc 31), and Doepfner replied (doc 33).

**PROCEDURAL POSTURE**

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<sup>1</sup>On May 24, 2004, the Court entered orders converting 4 related Chapter 11 proceedings to Chapter 7 and severing their previous joint administration. The caption is amended to reflect these actions.

Plaintiff filed this adversary proceeding on September 18, 2002, consisting of 4 counts: 1) preferential transfer, 2) breach of fiduciary duty, 3) prima facie tort, and 4) malpractice. Doepfner filed his first motion to dismiss or abstain (doc 5). The Bankruptcy Court issued a Memorandum Opinion containing proposed findings of fact and conclusions of law on that motion (doc 13), which were adopted by the Hon. Bruce D. Black, District Judge (doc 21). This resulted in dismissal of Counts 3 and 4; Doepfner's motion to abstain was also denied. Plaintiff then filed its Amended and Restated Complaint (doc 26) containing a new count 3, "Damages for Breach of Contract." Doepfner then filed this motion to dismiss (doc 27).

Under the analysis of the first Memorandum Opinion, pages 10-11, the new Count 3 is a non-core proceeding. The Bankruptcy Court has jurisdiction over Count 3 as a "related to" proceeding, but must submit proposed findings of fact and conclusions of law to the District Court<sup>2</sup>. Memorandum Opinion, page 7 (citing 28 U.S.C. § 157(c)(2) and Fed.R.Bankr.P. 9033).

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<sup>2</sup> Pursuant to Federal Bankruptcy Rule 9033(b), parties must serve and file written objections to these Proposed Findings of Fact and Conclusions of Law within 10 days after being served with this document.

**PROPOSED FINDINGS OF FACT**

1. Count 3 alleges that Doepfner was Plaintiff's attorney and under his retainer agreement he was required to withdraw from representation if a conflict arose. Doepfner also represented co-defendant Loughborough, who was Plaintiff's director and president. Loughborough was terminated from employment with Plaintiff. Doepfner wished to continue representing both parties, and acknowledged the conflict. Doepfner agreed to not represent either party in any matters involving the other<sup>3</sup>. Due to this agreement, Plaintiff continued to employ Doepfner. Doepfner then did represent Loughborough in an action against Plaintiff<sup>4</sup>, and Plaintiff was damaged therefrom.

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<sup>3</sup> Plaintiff's Exhibit 3 to the Amended complaint is a letter from Doepfner to Plaintiff and Loughborough that informs the parties of the conflict, states that he cannot represent either in any matter involving the other, that he will not take any adverse action to either party, and expresses his desire to continue to represent both.

<sup>4</sup> The Complaint's "Common Allegations" provide more detail. Doepfner acted as Loughborough's attorney in an arbitration hearing regarding Loughborough's termination, in obtaining a default judgment against Plaintiff, in a garnishment against Plaintiff and then in a turnover action against Plaintiff. ¶¶ 8-11, 13.

2. Defendants both live in Texas. Plaintiff did business in Texas. All events alleged in the complaint took place in Texas.

**PROPOSED CONCLUSIONS OF LAW**

1. "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley v. Gibson, 355 U.S. 41 (1957)). For the purposes of a motion to dismiss, a plaintiff's allegations must be taken as true. Id.
2. Federal courts apply the law of the state in which they are sitting, including choice of law rules. Tucker v. R.A. Hanson Co., Inc., 956 F.2d 215, 217 (10<sup>th</sup> Cir. 1992). In contract cases, New Mexico courts look to the place of contracting for the applicable law. Id. See also Eichel v. Goode, Inc., 101 N.M. 246, 250, 680 P.2d 627, 632 (Ct. App. 1984). Therefore, Texas contract law should apply to Count 3.
3. Texas recognizes oral contracts. See, e.g., Critchfield v. Smith, 151 S.W.3d 225, 233 (Tex. App. 2004); Wal-Mart Stores, Inc. v. Lopez, 93 S.W.3d 548, 555 (Tex. App. 2002).

4. In Texas, to establish a breach of contract claim, the plaintiff must prove: 1) a valid contract, 2) that plaintiff performed or tendered performance, 3) that defendant breached, and 4) that plaintiff was damaged. Critchfield, 151 S.W.3d at 233.
5. In Texas, plaintiff need not plead whether a contract sued upon is oral or written. Abraham & Co., Inc. v. Smith, 2004 WL 210570, \*2 (Tex. App. 2004); Dallas Building & Repair v. Butler, 589 S.W.2d 794, 796 (Tex. App. 1979).
6. In Texas, the court can find the existence of an oral contract (i.e., an "implied-in-fact contract") from the acts and conduct of the parties. Critchfield, 151 S.W.3d at 233; Wal-Mart Stores, Inc., 93 S.W.3d at 557. See also Copeland v. Alsobrook, 3 S.W.3d 598, 605 (Tex. App. 1999)(When one party denies existence of an oral contract, the court looks to subsequent conduct. From the conduct, the court can find a "meeting of the minds", offer, acceptance and consideration. Id. at 606).
7. In Texas, the existence of a writing does not preclude a court from finding an oral contract or awarding relief. Dallas Building & Repair, 589 S.W.2d at 796. Cf. Cothron Aviation, Inc. v. Arco Corp., 843 S.W.2d 260, 263-64

(Tex. App. 1993)(Parties may enter oral contract even if contemplating a written contract. The parties' intent is a jury question.)

8. Texas liberally allows notice pleading:

Under Texas law, pleadings must meet a "fair notice" standard, requiring that an opposing party be able to ascertain from the pleading the nature and basic issues of the controversy and the testimony that will be relevant. Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 897 (Tex. 2000). Specifically, a petition is deemed sufficient if it gives fair and adequate notice of the facts upon which the plaintiff bases her claim. Id. The purpose of the rule is to give the opposing party sufficient information to enable him to prepare a defense. Id.

Abraham & Co., Inc., 2004 WL 210570 at \*2. See also Gonzales v. City of Harlingen, 814 S.W.2d 109, 111-12 (Tex. App. 1991)(The purpose of pleadings is to give notice of a party's claims and defenses and notice of the relief sought. Pleadings are to be construed as favorably as possible to the pleader. The Court examines the pleader's "intendment" and upholds a pleading even if some element is not alleged, supplying missing facts that can be inferred from what is specifically stated.)

9. A petition in an action based on a contract must contain a short statement of the cause of action sufficient to give fair notice of the claim involved, including an allegation of a contractual relationship between the parties, and the substance of the contract which supports

the pleader's right to recover. Air & Pump Co. v. Almaquer, 609 S.W.2d 309, 313 (Tex. Civ. App.- Corpus Christi 1980, no writ); 14 TEX.JUR.3D Contracts § 338 (1981). In response, a defendant may file a general denial which puts at issue all matters not required to be denied under oath or affirmatively pleaded. Tex.R.Civ.P. 92; 14 Tex.Jur.3d Contracts § 345 (1981). Many defenses to a breach of contract suit, including lack of capacity, denial of execution, lack of consideration, and usury, must be made by verified denial. Tex.R.Civ.P. 93. Further, the affirmative defenses of accord and satisfaction, duress, failure of consideration, fraud, illegality, statute of frauds, and other matters in avoidance must be affirmatively pleaded. Tex.R.Civ.P. 94.

A party to a breach of contract suit is entitled to pretrial discovery. See generally Tex.R.Civ.P. 166b, 167, 168, 169, 200, 208. A party is entitled to summary judgment in a breach of contract suit when no material fact issues exist and the movant establishes its right to judgment as a matter of law. Tex.R.Civ.P. 166a; Roark v. Stallworth Oil & Gas, Inc., 813 S.W.2d 492, 494-95 (Tex. 1991). If, however, a trial on the merits is necessary, a party to a breach of contract suit is entitled to a jury trial on disputed issues of fact. Trinity Universal Ins. Co. v. Ponsford Bros., 423 S.W.2d 571, 575 (Tex. 1968). To prevail at trial, the plaintiff must prove: (1) a contract existed between the parties; (2) the contract created duties; (3) the defendant breached a material duty under the contract; and (4) the plaintiff sustained damages. Snyder v. Eanes Indep. Sch. Dist., 860 S.W.2d 692, 695 (Tex. App.- Austin 1993, writ denied). Judgment is then entered based on the pleadings, evidence, and findings of the judge or jury. Tex.R.Civ.P. 301.

Cadle Co. v. Castle, 913 S.W.2d 627, 630-31 (Tex. App. 1995). See also Chuck Wagon Feeding Co., Inc. v. Davis,



768 S.W.2d 360, 363 (Tex. App. 1989)(It is sufficient in a contract action for the plaintiff to allege rights or obligations arising out of the contract and a legal conclusion that the defendant contracted to do or refrain from doing a given act.)

10. Count 3 meets the minimum requirements to state a cause of action under Texas law for breach of contract. It provides notice that Plaintiff claims the existence of a contract, that under the contract Doepfner had a duty to refrain from adverse legal actions toward Plaintiff, that Plaintiff provided consideration in the form of continuing to employ Doepfner, that Doepfner breached the contract by representing Loughborough's interests against Plaintiff, and that Plaintiff was damaged.
11. Many of Doepfner's arguments in the Motion to Dismiss focus on his claim that Exhibit 3 is not a contract. But, the complaint does not claim that Exhibit 3 is "the"<sup>5</sup> contract - only that it was a letter from Doepfner agreeing to not represent either party against the other "in order to continue to represent Plaintiff."

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<sup>5</sup> Therefore, Doepfner's cases that stand for the proposition that it is proper to dismiss if a contract attached to a complaint demonstrates no relief is available, are inapplicable.

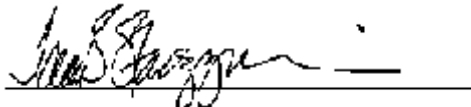
Complaint, ¶44. In a motion to dismiss context, Exhibit 3 can be construed as an offer. The Complaint, ¶45, then states that based upon Exhibit 3 Plaintiff continued to employ Doepfner. In a motion to dismiss context, ¶45 can be construed as an allegation that the offer was accepted, and also suggests consideration.

12. Doepfner's arguments that there was no contract, no consideration, no meeting of the minds and no foreseeable damages go more to the merits of Count 3 than to its failure to state a claim.

**SUMMARY OF RECOMMENDATIONS**

The Bankruptcy Court recommends that the United States District Court:

- 1) Declare that the Bankruptcy Court has jurisdiction over Count 3 of the Amended and Restated Complaint as a non-core "related to" proceeding.
- 2) Deny Defendant Doepfner's Motion to Dismiss Count 3.



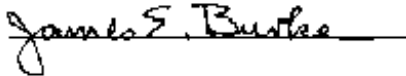
Honorable James S. Starzynski  
United States Bankruptcy Judge

I hereby certify that on April 15, 2005, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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Handwritten signature of James S. Bustee in black ink, written over a horizontal line.