

Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRADLEY KLOCK,

Plaintiff,

v.

CLEARLY LASIK, INC., a Nevada corporation; MICHAEL MOCKOVAK and HEATHER MOCKOVAK, and the marital community composed thereof; and JOSEPH KING and HOLLY KING, and the marital community composed thereof,

Defendants.

No. 09-CV-00123 RSM

**DEFENDANTS' ANSWER,
ADDITIONAL DEFENSES, AND
COUNTERCLAIMS**

I. ANSWER

Defendants Clearly Lasik, Inc. ("CLI"), Michael Mockovak ("Mockovak"), and Joseph King ("King"), and Holly King (collectively "Defendants"), by way of answer to Plaintiff's Complaint for Breach of Contract, Wages, Defamation, and Malicious Prosecution (the "Complaint"), state as follows:

1. On information and belief, Defendants admit that Plaintiff resides in Vancouver, British Columbia, and is a Canadian citizen. Defendants affirmatively state that (a) CLI had a contractual arrangement with Plaintiff and his Canadian company, Lasik PMG,

1 under which Plaintiff provided certain contractual services to CLI, (b) those services were
2 performed at various locations, including Renton, Washington; and (c) those services
3 included, at times, executive services as President and Chief Executive Officer. Defendants
4 otherwise deny the allegations in paragraph 1.

5 2. Defendants admit the allegations in paragraph 2.

6 3. Defendants admit that Mockovak is an owner and officer of CLI, and that he
7 works and has worked at various CLI clinics in the United States, including its Renton and
8 Vancouver, Washington clinics. Defendants otherwise deny the allegations in paragraph 3.

9 4. Defendants admit that King is an owner and officer of CLI, and that he works
10 and has worked at various CLI clinics in Canada as well as its Renton, Washington clinic.
11 Defendants admit that Holly King is the wife of King. Defendants otherwise deny the
12 allegations in paragraph 4.

13 5. The allegations in paragraph 5 call for legal conclusions for which no response
14 is required, and thus Defendants deny the same.

15 6. Defendants admit that, in approximately December 2004, Mockovak was
16 referred to Plaintiff and contacted him about the possibility of contracting with him to help
17 manage and grow the King & Mockovak Eye Center business in a prudent and profitable
18 manner. After discussions, it was agreed that Plaintiff would be engaged as a consultant and
19 through his Canadian company to provide certain executive services for \$170,000 annually,
20 prorated and paid monthly. Defendants otherwise deny the allegations in paragraph 6.

21 7. Defendants admit CLI's business expanded in 2005 pursuant to a business
22 model prepared by Plaintiff and approved by the Board of Directors. Defendants otherwise
23 deny the allegations in paragraph 7.

1 8. Defendants admit that (a) discussions were held in January and February 2006
2 with Plaintiff and Don Cameron, whose company was providing Chief Financial Officer
3 services to CLI, regarding Plaintiff's 2005 bonus, (b) the parties agreed that Plaintiff's
4 company would be paid an additional \$20,000 in cash and \$110,000 worth of stock options in
5 CLI, and (c) Plaintiff provided instructions to CLI's attorney, Chris Marsh, to draft a
6 document that did not accurately reflect the agreement of the parties and that was never
7 signed by Mockovak and King. Defendants otherwise deny the allegations in paragraph 8.

9 9. Defendants deny the allegations in paragraph 9.

10 10. Defendants admit that (a) the parties disagreed about the appropriateness and
11 amount of any severance agreement for Plaintiff, (b) Plaintiff selected and instructed a
12 Canadian consultant to provide an opinion regarding the severance issue, and (c) the Board
13 agreed to consider information from the consultant. Defendants otherwise deny the
14 allegations in paragraph 10.

15 11. Defendants deny the allegations in paragraph 11.

16 12. Defendants admit that (a) CLI never entered an employment agreement with
17 Plaintiff and (b) on or about November 29, 2006, King and Mockovak informed Plaintiff that
18 the services he and his Canadian company were providing were no longer needed.
19 Defendants otherwise deny the allegations in paragraph 12.

20 13. Defendants admit that Mockovak and King told Plaintiff that, among other
21 things, "they had tried to make things work" and "things had not turned out as planned."
22 Defendants further admit that they provided Plaintiff with a letter, which speaks for itself, at
23 the end of their meeting. Defendants otherwise deny the allegations in paragraph 13.
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1 14. Defendants admit that attorney Russell Perisho communicated on Plaintiff's
2 behalf in early December 2006 with Jeff James, CLI's counsel. Defendants are without
3 knowledge or information sufficient to form a belief as to the truth of the remaining
4 allegations in paragraph 14 and therefore deny the same.

5 15. Defendants admit that (a) on December 19, 2006, Mr. James had a discussion
6 with Mr. Perisho, (b) Mr. Perisho admitted that Plaintiff and CLI had never agreed on a
7 severance amount, and (c) Mr. James explained that the services provided by Plaintiff and his
8 company had been terminated for cause for reasons including: Plaintiff telling CLI
9 employees that they were not allowed to communicate with Mockovak and King; Plaintiff
10 using a corporate credit card to charge CLI for improper expenses; and the failure to meet
11 business targets that Plaintiff had helped establish. Defendants otherwise deny the allegations
12 in paragraph 15.

13 14 16. Defendants admit that Plaintiff (a) incurred some regular and necessary
15 business expenses, (b) after being confronted, reimbursed CLI for some improper personal
16 expenses, and (c) failed to reimburse CLI for other improper personal expenses. Defendants
17 otherwise deny the allegations in paragraph 16.

18 19 17. Defendants admit that CLI and its counsel retained an investigator named Rose
20 Winquist. Defendants otherwise deny the allegations of paragraph 17.

21 22 18. Defendants deny the allegations in paragraph 18.

23 19. Defendants admit that (a) Defendants CLI and Mockovak reported information
24 about and filed charges in relation to Plaintiff's actions to the Renton police department, (b)
25 an officer came to CLI's office to discuss the report, and (c) Defendants CLI, Mockovak, and
26 King provided further and additional information to the Renton police department and/or the

1 King County Prosecutor's Office when requested to do so. Defendants otherwise deny the
2 allegations in paragraph 19.

3 20. Defendants are without knowledge or information sufficient to form a belief as
4 to the truth of the allegations that Klock "was arrested, arraigned, handcuffed, fingerprinted,
5 photographed, and placed in jail for seven hours" and therefore deny the same. Defendants
6 otherwise deny the allegations in paragraph 20.

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8 21. Defendants admit that Plaintiff procured counsel. Defendants otherwise deny
9 the allegations in paragraph 21.

10 22. Defendants admit the King County Prosecutor has dismissed the charges
11 against Plaintiff. Defendants otherwise deny the allegations in paragraph 22.

12 23. In response to paragraph 23, Defendants reallege and incorporate their
13 responses to the foregoing paragraph numbers 1 through 22 as though fully set forth herein.

14 24. Defendants deny the allegations in paragraph 24.

15 25. Defendants deny the allegations in paragraph 25.

16 26. Defendants deny the allegations in paragraph 26.

17 27. Defendants deny the allegations in paragraph 27.

18 28. Defendants deny the allegations in paragraph 28.

19 29. Defendants deny the allegations in paragraph 29.

20 30. Defendants deny the allegations in paragraph 30.

21 31. Defendants deny the allegations in paragraph 31.

22 32. Defendants deny the allegations in paragraph 32.

23 33. Defendants deny the allegations in paragraph 33.

1 34. Defendants deny each and every allegation not expressly admitted in the
2 foregoing Answer.

3 **II. ADDITIONAL DEFENSES**

4 By way of further answer and defense, Defendants state:

- 5 1. Lack of process and service of process.
- 6 2. Failure to state a claim upon which relief may be granted.
- 7 3. Some or all of Plaintiff's claims are barred by the relevant statutes of
8 limitations and limitations periods.
- 9 4. Failure to join an indispensable party under Fed. R. Civ. P. 19.
- 10 5. Plaintiff lacks standing to pursue some of the stated claims.
- 11 6. Plaintiff's claims are barred because Defendants have fully paid, performed,
12 and discharged any and all contractual obligations that Defendants have with Plaintiff and his
13 Canadian company.
- 14 7. Plaintiff's claims are barred by the Statute of Frauds, lack of consideration,
15 lack of mutual assent, lack of authority, lack of reliance, fraud, mistake of fact or law, mutual
16 mistake, ambiguity, failure of consideration, breach, failure to perform a condition precedent,
17 hindrance, illegality, and justification.
- 18 8. Some or all of the Plaintiff's claims are barred under the doctrines of laches,
19 estoppel, and unclean hands.
- 20 9. Defendants acted in good faith and any alleged violations were not willful.
- 21 10. Plaintiff's claims are barred, in whole or in part, because any alleged wrongful
22 acts were outside the course and scope of the actor's employment and cannot be imputed or
23 attributed to CLI or any other Defendants.
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1 11. Plaintiff's claims are barred, in whole or in part, because Defendants' actions
2 were taken for legitimate business reasons.

3 12. Plaintiff's claims are barred, in whole or in part, because Defendants' actions
4 were privileged under RCW 4.24.510 and as otherwise provided by law.

5 13. Any alleged statements made by Defendants were opinion, truthful, made in
6 good faith upon a reasonable belief that the statements were true, and/or protected or
7 privileged communications.
8

9 14. Plaintiff has failed to mitigate his damages.

10 15. Relief pursuant to RCW 49.52.070 is not justified because the amounts sought
11 are not wages; Plaintiff was not an employee; Defendants were not employers, officers, vice
12 principals, or agents under that provision; Defendants did not willfully and intentionally
13 deprive any employee of wages; and any arguably improper withholding was the result of
14 inadvertence, good faith dispute, or knowing submission.
15

16 16. Relief pursuant to RCW 49.48.030 is not justified because the amounts sought
17 are not wages, and Defendants are not employers under that provision.

18 17. To the extent Defendants are found liable to Plaintiff for any unpaid wages or
19 other amounts, Defendants claim a credit or offset for all amounts actually paid to Plaintiff
20 and his Canadian company, all amounts advanced or paid to Plaintiff and his Canadian
21 company in excess of that to which Plaintiff and his company were legally entitled, all other
22 amounts that Plaintiff and his Canadian company took to which they were not entitled, and all
23 other CLI assets that Plaintiff and his Canadian company took and/or wasted.
24

25 18. Defendants intend to rely upon the after-acquired evidence doctrine.
26

1 19. Defendants specifically reserve the right to raise additional defenses as they
2 may become known through the course of further investigation and discovery.

3 **III. COUNTERCLAIMS**

4 Defendants CLI, Mockovak, and King, by and through their attorneys K&L Gates
5 LLP, complain and allege as follows in accordance with RCW 49.48.010 and other relevant
6 law:
7

8 **Claims and Jurisdiction**

9 1. Defendants CLI, Mockovak, and King assert counterclaims against Plaintiff for
10 breach of the duty of loyalty and care; breach of fiduciary duty; violation of the Computer
11 Fraud and Abuse Act, 18 U.S.C. § 1030; conversion; unjust enrichment; breach of contract;
12 and trespass to chattels.

13 2. If brought as a separate matter, this Court would have original jurisdiction over
14 this action pursuant to 28 U.S.C. § 1332(a) because complete diversity of citizenship exists
15 and the matter in controversy exceeds the sum of \$75,000.

16 3. In addition, if brought as a separate matter, this Court would have original
17 jurisdiction over this case pursuant to 28 U.S.C. § 1331 because CLI's counterclaim under the
18 Computer Fraud and Abuse Act, 18 U.S.C. § 1030, arises under federal law.

19 4. Moreover, this Court has supplemental jurisdiction over Defendants'
20 counterclaims pursuant to 18 U.S.C. § 1367. Such claims are so related to Plaintiff's and
21 Defendants' claims within the original jurisdiction of this Court that they form part of the
22 same case or controversy under Article III of the United States Constitution.
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Background and Facts

1
2 5. Prior to 2005, King and Mockovak owned and operated CLI's predecessor, the
3 King & Mockovak Eye Centers. At that time, the business had little debt and earnings of
4 approximately \$2.5 million per year.

5
6 6. At approximately the start of 2005, the King & Mockovak Eye Centers agreed
7 to engage Plaintiff with and through his Canadian company to provide certain executive
8 services for \$170,000 annually, prorated and paid monthly. Plaintiff and his company were
9 expected to help manage and grow the business in a prudent and profitable manner.

10 7. Shortly after Plaintiff and his Canadian company were retained, Plaintiff
11 presented a plan to aggressively grow the business, obtain private equity investments, and
12 make the business more profitable. Plaintiff represented that the business's growth would be
13 funded by equity investments of at least \$10 million, which would allow Mockovak and King
14 to receive substantial cash payouts in exchange for a share of the business.

15
16 8. Plaintiff failed to raise the promised private equity investments.

17 9. In Spring 2005, Plaintiff helped establish and incorporate CLI, which acquired
18 the interests of the King & Mockovak Eye Centers.

19 10. While filling a role as President and then CEO of CLI, Plaintiff oversaw the
20 expansion of CLI's operations, but failed to assure that funding was in place for such
21 expansion. Moreover, in 2005 and 2006, Plaintiff engaged in a pattern of mis-, mal-, and non-
22 feasance that severely injured CLI and its business prospects. For example:

23
24 11. Plaintiff arranged for CLI to hire additional personnel, some of whom were
25 hired because of their relationships with Plaintiff and were not suited for the jobs they filled.
26

1 These employees were a drain on CLI's resources, were subsequently terminated, and
2 provided little benefit to CLI.

3 12. Plaintiff instructed CLI employees and its vendors that they were not permitted
4 to speak to King or Mockovak directly. At the same time, Plaintiff was difficult to reach and
5 did not return telephone calls in a timely manner. CLI employees report that Plaintiff's
6 demand for control, coupled with his unresponsiveness, often hindered their ability to do their
7 jobs in an effective manner.
8

9 13. Plaintiff spent \$48,000 in 12 months developing a new website that was never
10 completed. Under Plaintiff's watch, Internet marketing fell behind that of CLI's competitors
11 and the effectiveness of its print and radio advertising plummeted.
12

13 14. Plaintiff was responsible for renewing CLI's business license. After Plaintiff's
14 relationship with CLI ended, CLI learned that its license expired in May 2006 and that it was
15 considered an "inactive business" by the Secretary of the State of Washington.
16

17 15. Plaintiff was responsible for overseeing trademark applications to the U.S.
18 Patent and Trademark office ("USPTO") for "Clearly Lasik" and "The Best in Sight." The
19 USPTO deemed these applications abandoned because requests for clarification sent to
20 Plaintiff went unanswered for months. CLI was only able to revive the application for
21 "Clearly Lasik".
22

23 16. When the Edmonton center was opened, Plaintiff failed to register the domain
24 name "www.clearlylasik.ca." A competitor then registered the domain name and launched a
25 website with that URL. Plaintiff learned of the registration by the competitor but failed to
26 immediately inform King, Mockovak, or CLI. CLI lost substantial business that was diverted

1 to this competitor and ultimately had to spend substantial amounts to obtain the transfer and
2 ownership of this URL.

3 17. Over the span of the two years that Plaintiff and his company were charged
4 with providing executive services to CLI, CLI was transformed from a debt-free and
5 profitable company into a debt-laden company with an operating loss of \$1.9 million.

6 18. During this time, Plaintiff wasted the resources of CLI, often for his personal
7 pleasure or gain. Plaintiff used a company-issued credit card to pay for personal meals,
8 personal travel, and personal activities. These include substantial expenditures on activities
9 for or with female friends of Plaintiff. Plaintiff did not reimburse CLI for any such expenses
10 until the issue of misuse was raised by Mockovak and King. Subsequently, Plaintiff only
11 repaid CLI for a fraction of the personal expenses that he incurred. Those expenses are
12 estimated to be in excess of \$65,000.

13 19. Plaintiff also misdirected and/or misappropriated company funds. For
14 instance, after CLI paid for a car repair that was subsequently reimbursed, Plaintiff deposited
15 the reimbursement check into his personal account.

16 20. In addition, Plaintiff engaged in deception and self-dealing in an attempt to
17 assure himself of a huge payday regardless of his performance or the performance of CLI.
18 For example, Plaintiff included a compensation methodology in an extensive powerpoint
19 presentation addressing proposed additional investment and growth plans and asked for
20 approval of these proposals without disclosing to King and Mockovak that he intended (as he
21 now argues) that the compensation methodology would be a binding contract in favor of
22 himself. Moreover, when CLI agreed to consider the recommendations of a consultant,
23 Plaintiff retained a consultant for the purpose of justifying his proposed severance amount
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1 rather than for the purpose of honestly evaluating the appropriate level of compensation for
2 someone in his role in a company like CLI.

3 **Count I: Breach of Duty of Loyalty and Care**

4 21. Defendants reallege paragraphs 1 through 20 above.

5 22. While providing executive services for CLI (including, at times, services as its
6 President and CEO) and acting as its agent, Plaintiff owed CLI and its owners, King and
7 Mockovak, a duty of loyalty and care.
8

9 23. Plaintiff failed to fulfill and, in fact, breached his duty of loyalty and care.

10 24. CLI has suffered damages caused by Plaintiff's breach of duty of loyalty and
11 care in an amount to be proven at trial.

12 **Count II: Breach of Fiduciary Duty**

13 25. Defendants reallege paragraphs 1 through 24 above.

14 26. While performing executive services for CLI and acting as its agent, Plaintiff
15 owed a duty of trust and loyalty to not take actions that would benefit himself at the expense
16 or detriment of CLI.
17

18 27. Plaintiff failed to fulfill and, in fact, breached his fiduciary duties.

19 28. CLI has suffered damages caused by Plaintiff's breach of fiduciary duty in an
20 amount to be proven at trial.
21

22 **Count III: Computer Fraud and Abuse Act**

23 29. Defendants reallege paragraphs 1 through 28 above.

24 30. While performing executive services for CLI and acting as its agent, Plaintiff
25 was allowed to use a Sony Vaio VGN-T350P laptop ("Sony laptop").
26

1 31. After he was no longer performing services for CLI, by letter dated January 25,
2 2007, CLI instructed Plaintiff to return the Sony laptop without alteration. Plaintiff was
3 warned that, "If it has been altered, CLI will consider it spoliation."

4 32. Nevertheless, on March 30, 2007, Plaintiff ran or had someone run a program
5 called Ace Utilities on the Sony laptop from 3:45 p.m. until approximately 9:30 p.m. The
6 program was used to eliminate normal information that would be maintained on the Sony
7 laptop or found by a forensic analysis in relation to 32,137 empty files.

8 33. Plaintiff then returned the Sony laptop to CLI. At the time of its return, the
9 Sony laptop had no recoverable deleted office-type documents (*e.g.*, documents in Word and
10 Excel).

11 34. By his actions as alleged herein, Plaintiff knowingly caused the transmission of
12 code, program, information, or command, thereby intentionally causing damage to a protected
13 computer, as that term is defined for purposes of the Computer Fraud and Abuse Act, 18
14 U.S.C. § 1030, without authorization, which caused a loss to CLI aggregating at least \$5,000
15 in value during a one-year period, the full amount of which shall be determined at trial.

16 35. Alternatively, by his actions as alleged herein, Plaintiff intentionally accessed a
17 protected computer without authorization, and as a result of such conduct, caused or
18 recklessly caused damage and loss to CLI aggregating at least \$5,000 in value during a one-
19 year period, the full amount of which shall be determined at trial.

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23 **Count IV: Conversion**

24 36. Defendants reallege paragraphs 1 through 35 above.

25 37. Plaintiff intentionally exercised dominion and control over CLI's money and
26 property without authorization.

1 38. CLI has suffered damages caused by Plaintiff's conversion in an amount to be
2 proven at trial.

3 **Count V: Unjust Enrichment**

4 39. Defendants reallege paragraphs 1 through 38 above.

5 40. Plaintiff profited or inequitably enriched himself as a result of his exercise of
6 dominion and control over CLI's money and property without authorization.
7

8 41. CLI has suffered damages caused because of Plaintiff's actions in an amount to
9 be proven at trial.

10 **Count VI: Breach of Contract**

11 42. Defendants reallege paragraphs 1 through 41 above.

12 43. In 2006, Plaintiff agreed to occupy and pay rent for a condominium owned by
13 Mockovak and King.

14 44. Plaintiff continued to occupy the condominium until January 2007.

15 45. Plaintiff breached the agreement by failing to pay rents due.

16 46. Mockovak and King have suffered damages caused by Plaintiff's breach of
17 contract in an amount to be proven at trial.
18

19 **Count VII: Trespass to Chattel**

20 47. Defendants reallege paragraphs 1 through 46 above.

21 48. Plaintiff dispossessed, used, or intermeddled with CLI's property.

22 49. CLI has suffered damages caused by Plaintiff's trespass to chattels in an
23 amount to be proven at trial.
24

25 **DEFENDANTS' PRAYER FOR RELIEF**

26 WHEREFORE, having fully answered all allegations contained in the Complaint and

1 having further asserted their counterclaims, Defendants pray that:

- 2 1. Plaintiff take nothing by his Complaint;
- 3 2. Plaintiff's claims be dismissed with prejudice and without cost to Defendants;
- 4 3. Defendants be awarded their costs, attorneys' fees, and statutory damages

5 incurred in defense of this action pursuant to RCW Chapters 4.24 and 4.84, Rule 11, and as
6 otherwise provided by law;

- 7
- 8 4. Defendants be awarded damages on their counterclaims as established at trial;

9 and

- 10 5. Defendants be granted such other and further relief as the Court may deem just

11 and equitable.

12 DATED this 3rd day of February, 2009.

13

14 K&L GATES LLP

15

16 By /s/Patrick M. Madden _____

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22 Attorneys for Defendants

Clearly Lasik, Inc., Michael Mockovak,

23 Joseph King, and Holly King

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

- Stephen P Connor steve@cslawfirm.net
- Anne-Marie E Sargent aes@cslawfirm.net,dawn@cslawfirm.net

K&L GATES LLP

By /s/Patrick M. Madden _____
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