

IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI

FILED
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OWNER-OPERATOR INDEPENDENT)
DRIVERS ASSOCIATION, INC., et al.,)
)
Plaintiffs,)
)
v.)
)
NEW PRIME, INC., d/b/a PRIME, INC.,)
et al.,)
)
Defendants.)

Case No. 103CC0015

**DEFENDANTS' ANSWER TO CLASS ACTION PETITION
FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF
AND DEFENDANT NEW PRIME, INC.'S COUNTERCLAIMS
AGAINST PLAINTIFF WARTA**

Defendants New Prime, Inc., d/b/a Prime, Inc. ("Prime"), Robert Lowe, Lawana Lowe and Vera Lowe (together "the Individual defendants"), for their Answer and Affirmative Defenses to plaintiffs' Class Action Petition for Damages, Injunctive Relief and Declaratory Relief, state as follows:

1. Defendants admit that this Court has personal jurisdiction over them and that venue is proper in this judicial district. Defendants deny each and every other allegation contained in paragraph 1.
2. Defendants admit that this Court has personal jurisdiction over them and that venue is proper in this judicial district. Defendants deny each and every other allegation contained in paragraph 2.
3. Defendants are without sufficient knowledge or information to form a belief as to the statements, claims and allegations in paragraph 3, and therefore, defendants deny all allegations contained in paragraph 3.



4. Defendants admit that "owner-operators" are individuals that "own or lease and operate motor carrier equipment." Defendants are without sufficient knowledge or information to form a belief as to the other statements, claims and allegations in paragraph 4, and therefore, defendants deny all other allegations contained in paragraph 4.

5. Defendants admit the allegations contained in paragraph 5.

6. Defendants admit the allegations contained in paragraph 6.

7. Defendants admit the allegations contained in paragraph 7.

8. Defendants admit the allegations contained in paragraph 8.

9. Defendants deny all allegations contained in paragraph 9.

10. Defendants deny all allegations contained in paragraph 10.

11. Defendants deny all allegations contained in paragraph 11.

12. Defendants deny all allegations contained in paragraph 12.

13. Defendants deny all allegations contained in paragraph 13.

14. Defendants deny all allegations contained in paragraph 14.

15. Defendants admit that plaintiff Warta was an owner-operator, independent contractor driver for Prime from 1996 to 2000. Defendants admit that, during that period, plaintiff Warta provided equipment to Prime under the terms of a contract with Prime. Defendants deny each and every other allegation in paragraph 15.

16. Defendants admit that plaintiff Warta leased a vehicle or vehicles from Success Leasing, Inc. ("Success") and that the Lease Purchase Agreement between Warta and Success had an option to purchase. Defendants admit that Warta then leased the

vehicle or vehicles to Prime. Defendants deny each and every other allegation contained in paragraph 16.

17. Defendants deny all allegations contained in paragraph 17.

18. Defendants deny all allegations contained in paragraph 18.

19. Defendants admit that plaintiff Warta could elect to purchase either workers' compensation or occupational accident insurance through Prime, and if he did, payments for such premiums would be made through plaintiff Warta's settlements. Defendants deny all other allegations in paragraph 19.

20. Defendants deny all allegations contained in paragraph 20.

21. Defendants admit that plaintiff Warta made a workers' compensation claim.

22. Defendants deny all allegations contained in paragraph 22.

23. Defendants deny all allegations contained in paragraph 23.

24. The claims and allegations contained within paragraph 24 are allegations of law, not fact, and plaintiffs improperly attempt to summarize Missouri law. To the extent required, defendants deny all allegations in paragraph 24.

25. Defendants admit that R.S.Mo. § 287.020.1 defines employees and that the statute speaks for itself. Defendants deny each and every other allegation in paragraph 25.

26. The claims and allegations contained within paragraph 26 are allegations of law, not fact, and plaintiffs improperly attempt to summarize Missouri law. To the extent required, defendants deny all allegations in paragraph 26.

27. The claims and allegations contained within paragraph 27 are allegations of law, not fact, and plaintiffs improperly attempt to summarize Missouri law. To the extent required, defendants denied all allegations in paragraph 27.

28. Defendants deny all allegations contained in paragraph 28.

29. Defendants deny all allegations contained in paragraph 29.

30. Defendants deny all allegations contained in paragraph 30.

31. Defendants deny all allegations contained in paragraph 31.

COUNT I

32. Defendants reallege and incorporate by reference their answers and allegations to paragraphs 1 through 31 hereof.

33. Defendants deny all allegations contained in paragraph 33.

34. Defendants deny all allegations contained in paragraph 34.

35. Defendants deny all allegations contained in paragraph 35.

COUNT II

36. Defendants reallege and incorporate by reference their answers and allegations to paragraphs 1 through 35 hereof.

37. Defendants deny all allegations contained in paragraph 37.

38. Defendants deny all allegations contained in paragraph 38.

39. Defendants deny all allegations contained in paragraph 39.

40. Defendants deny all allegations contained in paragraph 40.

41. Defendants deny all allegations contained in paragraph 41.

42. Defendants deny all allegations contained in paragraph 42.

COUNT III

43. Defendants reallege and incorporate by reference their answers and allegations to paragraphs 1 through 42 hereof.

44. Defendants deny all allegations contained in paragraph 44.

45. Defendants deny all allegations contained in paragraph 45.

46. Defendants deny all allegations contained in paragraph 46.

47. Defendants deny all allegations contained in paragraph 47.

48. Defendants deny all allegations contained in paragraph 48.

49. Defendants admit the allegations of paragraphs 49 through 52.

50. Defendants deny all allegations of paragraphs 53 through 55.

COUNT IV

51. In response to paragraph 56, defendants reallege and incorporate by reference their answers and allegations to paragraphs 1 through 31 and 49 through 55 hereof.

52. Defendants deny all allegations of paragraphs 57 through 59.

AFFIRMATIVE DEFENSES

1. Each count of plaintiffs' Petition fails to state a claim for which relief can be granted.

2. Plaintiffs' claims for class action treatment and class relief should be dismissed because plaintiffs have not made allegations that, if true, would support the certification of a class.

3. Plaintiffs' claims, and the claims of the individual members of the putative class, are barred, in whole or in part, by the doctrines of set off or recoupment, and any amounts that defendants may be found to owe to the plaintiffs, or the individual members of the putative class, must be reduced or offset by whatever amounts that plaintiffs, or the individual members of the putative class, may be found to owe defendants.

4. To the extent that plaintiffs, or any class members, were injured by reason of the negligence of any party, such injury resulted from the acts or omissions of plaintiffs and/or persons other than defendants. Alternatively, to the extent that defendants are determined to be liable for any negligent acts or omissions, plaintiffs and other third parties were at fault for such negligent acts or omissions and defendants' fault therefore should be compared or reduced in proportion to the fault of plaintiffs and any other persons.

5. Plaintiffs did not rely or should not have relied on any alleged misstatements and/or omissions claimed to have been made by defendants, which defendants specifically deny, because plaintiffs did not avail themselves of means to information which was accessible to them through their own independent investigation and which is now the subject matter of this action. Further, plaintiffs failed in their duty to adequately investigate and exercise reasonable care to acquire knowledge of facts or matters available to them.

6. Any alleged misstatements and/or omissions claimed to have been made by defendants, which defendants specifically deny, were known or should have been known

to plaintiffs through their own independent investigation, or plaintiffs were on inquiry notice of such facts as to equate such notice with actual knowledge.

7. Plaintiffs' claims are barred because plaintiffs have failed to exhaust their administrative remedies.

8. Plaintiffs' claims are barred by the doctrine of judicial estoppel because plaintiffs have admitted that they are "owners and operators" under R.S.Mo. § 287.020.1 and because plaintiffs have admitted that they are self-employed or are independent contractors.

9. Plaintiffs have waived any claim or should be estopped from asserting claims that they may have against defendants by continuing to do business with defendants.

10. Plaintiffs' claims are barred by the doctrine of voluntary payment.

11. Plaintiffs' claims are barred by the doctrine of laches.

12. Plaintiffs' claims are barred by the doctrine of estoppel.

13. All or part of plaintiffs' claims or the claims of members of the putative class are barred by the applicable statutes of limitations.

14. Defendant Prime is entitled to attorneys' fees as specifically provided in its agreements with its drivers.

15. This Court lacks personal jurisdiction over all purported class members that do not reside in Missouri.

16. Plaintiffs' claims for damages are barred, in whole or in part, by plaintiffs' failure to mitigate such damages.

17. Defendants reserve the right to assert any additional defenses and counterclaims against plaintiffs or individual members of the putative class that may become appropriate as this action progresses, including counterclaims similar to those raised against plaintiff Warta.

WHEREFORE, having fully answered Plaintiffs' Petition, defendants New Prime, Inc., Robert Low, Lawana Low and Vera Low respectfully request that this Court dismiss Plaintiffs' Petition with prejudice, enter judgment thereon in favor of defendants and against plaintiffs, award defendants their costs and attorneys' fees, as specifically provided in the contracts or by law, and such other relief as the Court deems just and proper.

**NEW PRIME, INC.'S COUNTERCLAIM AGAINST
PLAINTIFF JEFFREY WARTA**

New Prime, Inc. ("Prime"), for its counterclaims against plaintiff Jeffrey Warta, states as follows:

1. On or about December 31, 1996, plaintiff Jeffrey Warta ("Warta") entered into a Independent Contractor Operating Agreement with Prime whereby Warta leased certain motor vehicle equipment to Prime to which he had a legal right to possession.

2. On or about November 4, 1999, plaintiff Warta entered into another Independent Contractor Operating Agreement with Prime whereby Warta leased certain motor vehicle equipment to Prime to which he had a legal right to possession.

3. Pursuant to the terms of the Independent Contractor Operating Agreements, plaintiff Warta made his motor vehicle equipment available to Prime with qualified drivers to pick up loads and transport them to destinations designated by various shippers

who were customers of Prime. In exchange for plaintiff Warta's agreement to lease his equipment to Prime, Prime agreed to pay plaintiff Warta a percent of the revenue received on the shipments or a set amount per mile.

4. Under these Independent Contractor Operating Agreements, plaintiff Warta also agreed that he would pay all operating expenses and maintenance expenses incurred in connection with the operation of his equipment, including but not limited to all expenses for bonds, insurance, fines, penalties, tolls, ferries, detention, accessorial expenses and taxes.

5. Pursuant to the terms of the Independent Contractor Operating Agreement, if plaintiff Warta was unable to pay expenses in performing his duties under the Agreement, Prime would advance those expenses to plaintiff on the expressed condition that plaintiff repay all amounts advanced to him. When plaintiff Warta was unable to pay expenses, it was customary for Prime to advance money to plaintiff Warta in order for plaintiff Warta to cover his expenses, claims and losses.

6. During the time that plaintiff Warta leased his equipment to Prime, he took numerous advances from Prime for such things as repairs and other operating expenses. In addition, plaintiff Johnson took cash advances from Prime. All of the advances to plaintiff whether for cash or expenses were provided by Prime based on the agreement with plaintiff Warta that he would repay those expenses.

7. On or about June 20, 2000, plaintiff Warta prematurely terminated his relationship with Prime. At the time that plaintiff Warta left, he still owed Prime in

excess of \$6,000.00 in advances. Plaintiff Warta has not paid these advances back to Prime.

Count I
Breach of Contract Against Plaintiff Jeffrey Warta

8. Defendant Prime hereby incorporates each and every allegation contained in paragraphs 1 through 7.

9. Defendant Prime and plaintiff Warta entered into an Independent Contractor Operating Agreement whereby plaintiff Warta would provide services to Prime and Prime would pay plaintiff Warta for his services. In addition, Prime and plaintiff Warta agreed that as part of this relationship, Prime would from time to time make advances to plaintiff Warta, or would other pay amounts on his behalf, in order for him to perform the services provided under the Independent Contractor Operating Agreement, and plaintiff Warta agreed to pay those advances back.

10. Prime has fully performed its obligations under the Independent Contractor Operating Agreement.

11. Plaintiff Warta has failed to perform his obligations under the Independent Contractor Operating Agreement and as otherwise agreed by the parties in that plaintiff Warta has failed to repay the advances made to him or amounts otherwise paid on his behalf. Therefore, plaintiff Warta has breached the parties' agreement.

WHEREFORE, defendant Prime prays for judgment against plaintiff Warta, for damages in a fair and reasonable amount to be proven at trial, together with interest as allowed by law and contract, reasonable attorneys' fees and costs, and such other relief as the Court deems just and equitable under the circumstances.

Count II
Action for Money Had and Received and/or Unjust Enrichment
Against Plaintiff Jeffrey Warta

12. Defendant Prime hereby incorporates each and every allegation contained in paragraphs 1 through 11.

13. At the request of plaintiff Warta, Prime paid money by way of advances to plaintiff Warta based on the parties' agreement and/or understanding that plaintiff Warta would repay the money to Prime. Prime also paid amounts on behalf of plaintiff Warta for which plaintiff Warta was personally responsible.

14. Plaintiff Warta used the advances for personal expenses or expenses for which Warta was otherwise personally responsible.

15. Plaintiff Warta has not repaid Prime for advances made by Prime or for amounts otherwise paid by Prime on behalf of plaintiff Warta.

WHEREFORE, defendant Prime prays for judgment against plaintiff Warta, for damages in a fair and reasonable amount to be proven at trial, together with interest, reasonable attorneys' fees and costs, and such other relief as the Court deems just and equitable under the circumstances.