

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

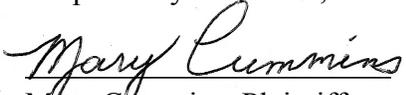
MARY CUMMINS)	CIVIL ACTION
Plaintiff,)	
)	
vs.)	
)	
AMANDA LOLLAR, DENISE)	Civil Action No.: 4:12-CV-00560-Y
TOMLINSON, DOROTHY HYATT,)	
MICHELLE MCCAULLEY, KATE)	
RUGRODEN, LESLIE STURGES, BAT)	
WORLD SANCTUARY, JOHN DOES 1-10)	
)	
Defendants.)	JURY

PLAINTIFF’S RESPONSE TO DEFENDANTS’ MOTION TO DISMISS

Plaintiff Mary Cummins files this Response to Defendants’ Motion to Dismiss, and respectfully shows the Court as follows:

1. Plaintiff has stated a claim for negligence upon which relief may be granted.
2. In support of this response Plaintiff files a Supporting Brief.

DATED: February 7, 2013

Respectfully submitted,

 Mary Cummins, Plaintiff
 645 W. 9th St. #110-140
 Los Angeles, CA 90015-1640
 In Pro Per
 Direct: (310) 877-4770
 Direct Fax: (310) 494-9395
 Email: mmmaryinla@aol.com

CERTIFICATE OF CONFERENCE

On February 7, 2013 Plaintiff Mary Cummins conferred, via email, with Defendants' Amanda Lollar and Bat World Sanctuary's attorney Randy Turner concerning the foregoing response to motion and was informed through non response that Defendants oppose the relief sought herein.

By: 
Mary Cummins, Plaintiff Pro Se
February 7, 2013

CERTIFICATE OF SERVICE

I, Mary Cummins, hereby certify that a copy of **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS** was served on the Defendants' Attorneys of record by CM/ECF, FAX and EMAIL at,

RANDALL E. TURNER
DANIEL P. SULLIVAN
Bailey & Galyen
1901 West Airport Freeway
Bedford, Texas 76021

Also sent by Email: rturner@galyen.com

By: 
Mary Cummins, Plaintiff Pro Se
February 7, 2013

negligent interference with prospective economic advantage and negligent infliction of emotional distress. See Doc. No. 1.

On July 2, 2012 Defendants Amanda Lollar, Bat World Sanctuary filed a Motion to Dismiss for improper venue, or Transfer the case to the Northern District of Texas. See Doc. No. 5.

On July 9, 2012 Plaintiff filed a First Amended Complaint which included the original causes of action, added new causes and new defendants, i.e. the members of the Board of Directors of Bat World Sanctuary.

On July 30, 2012 the Court ordered Plaintiff to show cause why the case should not be dismissed for improper venue or transferred to the Northern District of Texas. See Doc. No. 16. Plaintiff filed a motion showing cause stating that Plaintiff and her medical experts and witnesses are in California. The economic and emotional damages were suffered in California where Plaintiff lives and works. Plaintiff pro se believed these were legitimate claims for California venue. See Doc. No. 10.

On August 8, 2012 the Court entered an order stating the claims had been “added in bad faith to circumvent venue requirements.” See Doc. No. 18, p.2. Plaintiff Cummins did not add the new claims in “bad faith.” Cummins added the new claims because they are legitimate claims. They were not added in “bad faith” but as a pro se without help of legal counsel. The Court transferred the case to the Northern District of Texas due to improper venue.

August 29, 2012 Plaintiff filed her Second Amended Complaint which was later unfiled because leave to file had not been granted. See Doc. No. 28. Again, Cummins is not an attorney and did not realize she had to request leave to file an amended complaint.

September 21, 2012 Plaintiff filed a Motion for Leave to File Second Amended Complaint which was granted by the Court on September 28, 2012. See Doc. No. 42, 45.

November 11, 2012 Plaintiff finally filed her Second Amended complaint. In that complaint she removed all claims except those related directly to the personal injury she suffered in Texas in 2010. She added the board members of Bat World Sanctuary.

January 30, 2013 Defendants filed a motion to dismiss. Defendants did not confer with Plaintiff before filing this motion. They included no certificate of conference with their motion.

B. Factual Background

Plaintiff worked as an intern June 19 to June 28, 2010 at Bat World Sanctuary in Mineral Wells, Texas. See Doc. No. 46. Plaintiff was supposed to receive training, room and board in exchange for working in the sanctuary. While at Bat World Sanctuary the President of the sanctuary Amanda Lollar instructed her to don a hair net/hat, booties and a head lamp to enter the “wild sanctuary building” which had no lights on to clean guano and check for ill, injured and orphaned bats. Plaintiff stated she was “instructed to climb up a step stool and go through a window to go out onto the roof of the building to look for bats outside.” Plaintiff stated that she “attempted to climb through the window...she hit her head on a piece of wood” and fell backwards, injuring her head and back.

Plaintiff sued Defendants for \$500,000, claiming that their negligence was a “substantial factor in bringing about Cummins’ injury.” In support of this allegation she claims Defendant Lollar instructed her to don a hair net/hat and head lamp to enter the “wild sanctuary.” The building was dark because Defendant covered the windows with wood and did not turn on the lights. The hair net/hat and head lamp made it impossible to see anything directly above her head

which is why she hit the beam and fell. Another intern also hit her head on the same beam the next day. Defendant Lollar was negligent in instructing Plaintiff to wear the items which obstructed her view then telling her to climb through a window to trespass onto the roof of her neighbor's building next door. This claim is a claim under negligent activity theory and premise defect theory.

Plaintiff claims that these facts gave rise to a cause of action for “negligence,” “negligent interference with prospective economic advantage,” and “negligent infliction of emotional distress.”

STANDARD OF REVIEW

A. Standard for Motion to Dismiss Pursuant to Rule 12(b)(6)

Defendants state that Plaintiff as per FRCP 12(b)(6) “failure to state a claim upon which relief can be granted.” Plaintiff has indeed stated a claim upon which relief can be granted. Plaintiff stated the claim of negligence.

ARGUMENT AND AUTHORITIES

A. Negligent Interference with Prospective Economic Advantage as a Cause of Action

Plaintiff claims the cause of action of Negligent Interference with Prospective Economic Advantage, See Doc 28,pg 5.

1. Plaintiff had to state her profession on her application for internship. Defendants knew she was a working real estate appraiser. Plaintiff even did appraisal work via computer while at Bat World.
2. Defendant knew that Cummins had work booked for her return to California following her internship at Bat World Sanctuary.

3. Defendants owed a duty of care to Cummins based on the existence of a special relationship between the parties.

4. Defendants wrongfully interfered with the relationship between Cummins and her clients.

Cummins was not able to work as a result of her injury. Cummins lost clients and employment.

5. As an actual and foreseeable result of Defendants' negligent interference, Cummins has suffered damages. Defendants' negligence caused Plaintiff Cummins to lose work and income.

B. Negligent Infliction of Emotional Distress as an Independent Cause of Action

Plaintiff has pleaded a physical injury. A claim for mental anguish damages must be supported through the proper pleading of a recognized duty, the breach of which will support mental anguish damages. Defendants breached a recognized duty.

In Plaintiff's complaint she stated the claim of negligence, See Doc 28, pg 4.

Under Texas law, the Defendants owed the Plaintiff the following non- delegable duties:

1. The duty to provide rules and regulations for the safety of servants, and to warn them, under certain conditions, as to the hazards of their positions or work;
2. The duty to furnish reasonably safe instrumentalities with which its servants are to work;
3. The duty to furnish its servants with a reasonably safe place to work;
4. The duty to exercise ordinary care to select careful competent fellow servants.

Defendant Bat World Sanctuary, through its agents, servants, and/or employees, breached these duties by:

- a. Appointing careless and incompetent Amanda Lollar who has not gone past the ninth grade as President and in charge of interns who directed Plaintiff to climb a step stool to crawl through

a window to get onto the roof while wearing a hair net/hat and head lamp knowing that it posed an unnecessary risk to Plaintiff, and without warning Plaintiff of those risks;

- b. Failing to turn on adequate light so Plaintiff could see the beam and window;
- c. Failing to implement policies and procedures regarding workplace safety; and
- d. Failing to provide proper work equipment, i.e. proper lighting equipment which would not obstruct vision.

Defendants' breach of these duties proximately caused the damages.

C. Plaintiff has Stated a Negligence Claim Upon Which Relief May Be Granted

For all of the reasons stated above in item "B," Defendants were negligent and breached a duty to Plaintiff. The aforesaid negligent acts and omissions, when viewed objectively, involved an extreme degree of risk considering the probability and magnitude of potential harm to Plaintiff.

1. Defendants were subjectively aware of such risk.
2. Defendants proceeded with conscious disregard for the rights, safety and/or welfare of Plaintiff.
3. For these reasons, Plaintiff contends that Defendants' acts of negligence rise to the level of gross negligence as defined by Chapter 41 of the Texas Civil Practices and Remedies Code.
4. Defendants are liable for punitive or exemplary damages resulting from its grossly negligent conduct because it:
 - a. Authorized the doing and the manner of the acts and omissions in question;
 - b. Recklessly employed personnel who were unfit, incompetent, and/or unqualified to perform the duties and tasks assigned to them;

c. Employed personnel in managerial positions who were acting within the course and scope of their employment at the time the negligent acts and/or omissions occurred and failed to stop or prevent such acts and/or omissions; and/or

d. Through its officers, managers, supervisors, or higher-level employees, ratified or approved the negligent acts and/or omissions in question.

E. Plaintiff Should Be Permitted To Amend her Pleadings

Plaintiff filed the original case in CA. Plaintiff amended her complaint once to add claims which she thought and still believes are legitimate. Plaintiff is a pro se. The case was transferred to Texas. Because it was transferred to Texas Plaintiff had to amend the complaint to get rid of the California Defendant and the California claims. If Plaintiff is allowed to amend her complaint, it would only be the second amendment since being transferred to Texas. The first complaint was amended to remove claims which was necessary because of change of venue.

Plaintiff does not make this request in bad faith or to delay. It is Defendants who have delayed this case by not answering the complaint and then substituting attorneys three times. Plaintiff has legitimate claims against Defendants. FED. R. CIV. P. 15(a) provides that leave should be freely given when justice so requires. Justice requires it in this case.

F. Plaintiff Should Be Permitted A Stay Of One Month To Hire An Attorney

Plaintiff is not an attorney. She is not even a citizen of the state of Texas. She suffered a serious back injury which has left her legally, permanently, physically disabled. She can't stand over five minutes at a time without great pain and has been instructed not to sit longer than 20 minutes at a time. If Plaintiff is to have due process of law, she should be allowed the time to

have an attorney represent her and time for him to get up to speed on the facts and evidence of the case.

PRAYER

WHEREFORE, PLAINTIFF MARY CUMMINS respectfully requests that the court deny Defendants' Amanda Lollar and Bat World Sanctuary's request for dismissal. Plaintiff further requests leave to hire an attorney and amend her pleadings.

Respectfully submitted,



Mary Cummins, Plaintiff

645 W. 9th St. #110-140

Los Angeles, CA 90015-1640

In Pro Per

Direct: (310) 877-4770

Direct Fax: (310) 494-9395

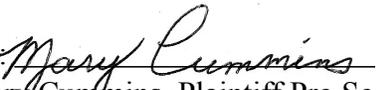
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CERTIFICATE OF SERVICE

I, Mary Cummins, hereby certify that a copy of **PLAINTIFF'S BRIEF SUPPORTING PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS** was served on the Defendants' Attorneys of record by CM/ECF, FAX and EMAIL at,

**RANDALL E. TURNER
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By: 
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