

2015 WL 1011438 (Mass.Super.) (Trial Pleading)
Superior Court of Massachusetts.
Middlesex County

Lee a. BAUER, Individually and on behalf of Class Members, Plaintiff,

v.

HOMEAWAY, INC., Defendant.

No. MICV2015-00846.
February 27, 2015.

Complaint, Jury Claim and Request for Class Certification

Evans J. Carter, Esq. (BBO# 076560), Evans J. Carter, P.C., 860 Worcester Road, Second Floor, Post Office Box 812, Framingham, MA 01701, (508) 875-1669, for plaintiff, Lee A. Bauer.

I. Introduction and Overview of Action

1. The plaintiff brings this action on behalf of herself and on behalf of all others similarly situated who reside within the Commonwealth of Massachusetts and are consumers who lost funds due to fraud, The defendant has committed all or some of the following unfair trade practices:

a. Falsely advertised on the Internet that:

At HomeAway, our mission is to make every vacation rental in the world available to every traveler in the world through our online marketplace. With over **one million live vacation rental listings** in 190 countries, we're committed to helping families and friends find the perfect vacation rental to create unforgettable travel experiences together.

b. However, the defendant failed to state that, although consumers reasonably relied on them, they failed to perform any significant due diligence to protect consumers and that they aided and abetted fraud.

c. The defendant was a facilitator of a fraud and did nothing to stop it even though it was foreseeable due to lack of due diligence and insufficient oversight and facilitated indirect assistance to permit a client to be defrauded. The definition of facilitator is "to make easy" or "ease a process."

II. Parties

2. The plaintiff, Lee A. Bauer, resides at 14 Bent Hill Drive in Framingham, Middlesex County, Massachusetts.

3. The defendant, Homeaway, Inc., is a corporation with its executive offices located at 1011 W. Fifth Street, Suite 300, Austin, State of Texas. It conducts trade or commerce on the Internet and in the Commonwealth of Massachusetts.

III. Factual Allegations

4. On or about December 8, 2014, the defendant "put together" the plaintiff Bauer with the alleged owner of 108 Spring Hill Road, Killington, Vermont, and the plaintiff executed a vacation rental agreement and paid \$3,500 to or for the benefit of one

Marchanta Williams, who the defendant put together with the plaintiff. A copy of the agreement is agreement is annexed hereto and marked as Exhibit A.

5. Said Marchanta Williams did not own the property and the house turned out to be non-existent. The defendant, at a minimum, should have determined that there was actually a house located at 108 Spring Hill Road, Killington, Vermont, and what authority Ms. Williams had.

6. Ms. Williams, if that is her name, could have been Bin Laden and the funds sent to her could have been used by terrorists but the defendant would not have known this since no anti-money laundering or theft deterrent policies or any due diligence were in effect or were promulgated.

7. The facts presented here constitute **elder financial exploitation** that the defendant could have and should have stopped. The Consumer **Financial** Protection Bureau, along with the FDIC, published a free booklet entitled “Money Smart for Older Adults.” This booklet states that:

With over 50 million Americans aged 62 and older, Older Adults are prime targets for **financial exploitation** both by persons they know and trust and by strangers. **Financial exploitation** has been called “the crime of the 21st century” with one study suggesting that older Americans lost at least \$2.9 billion to **financial exploitation** by a broad spectrum of perpetrators in 2010.

What is **elder Financial exploitation**?

As defined by Older Americans Act:

Financial exploitation is the fraudulent or otherwise illegal, unauthorized or improper actions by a caregiver, fiduciary, or other individual in which the resources of an older person are used by another for personal profit or gain; or actions that result in depriving an older person of the benefits, resources, belongings, or assets to which they are entitled.

Elder financial exploitation is the theft of money, property or belongings.

8. The defendant owed a duty of reasonable care/foreseeable risk/harm to the plaintiff. In the applicable principles that guide the determination of the existence of a duty, stating: “No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.” Also, as a general principal of tort law, every actor has a duty to exercise reasonable care to avoid harm to others. A precondition to this duty is, of course, that the risk of harm to another be recognizable or foreseeable to the actor. In this case “... an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another....”

9. The defendant also had a duty to warn, to investigate and to deter fraud. Commercial bad faith, which it failed to comply with.

10. The defendant also owed a duty of care to the plaintiff, which it breached. Although the duty arises out of their contractual relationship and the breach of that duty as well as being negligent, also subjects the defendant to liability in tort for the damages resulting from it.

11. The defendant owed a duty to the plaintiff and it breached that duty, The plaintiff was damages as a result of the causal relation (proximate cause) between the breach of duty and the damages she incurred.

COUNT I reach of Contract and/or the Covenant of Good Faith and Fair Dealing)

The plaintiff incorporates by reference and realleges paragraphs 1 through 11 inclusive, as if fully set forth herein.

12. The defendant owed to the plaintiff and the class members a contractual obligation and a covenant of good faith and fair dealing and by the above-stated actions, it breached the same.

13. By the above-stated actions, the defendant has also breached the agreement with the plaintiff and other class members, which has caused the plaintiff and the other class members monetary damages.

COUNT II (Negligence)

The plaintiff incorporates by reference and realleges paragraphs 1 through 13 inclusive, as if fully set forth herein.

14. By the above-stated actions, the defendant owed a duty of due care to the plaintiff, which it breached, which proximately caused monetary damages to the plaintiff.

COUNT III (Unfair Trade Practices, [G.L. Chapter 93A, Sections 2 and 9](#))

The plaintiff incorporates by reference and realleges paragraphs 1 through 14 inclusive, as if fully set forth herein.

15. By the above-stated actions, the defendant has committed unfair trade practices in violation of [General Laws, Chapter 93A, Sections 2 and 9](#), as well as violating rules and regulations and statutes.

16. The above-stated actions were done knowingly, willfully, intentionally and/or recklessly by the defendant.

17. The defendant conducts trade or commerce in Massachusetts so as to come within the purview of G.L. Chapter 93A.

18. The plaintiff sent two (2) demand letters to the defendant and copies are annexed hereto and collectively marked as Exhibit A.

19. As a direct result of the defendants' unfair trade practices, as above-stated, the plaintiff and other class members have incurred monetary damages plus interest, costs and reasonable attorneys' fees.

COUNT IV (Class Action Certification)

The plaintiff incorporates by reference and realleges paragraphs 1 through 19 inclusive, as if fully set forth herein.

20. The plaintiff brings this action as a class action pursuant to [Rule 23 of the Massachusetts Rules of Civil Procedure](#) on behalf of all Massachusetts consumers who have arranged to rent properties through the defendant and have lost monies.

21. Based on information, it is estimated that there are probably in excess of 100 Class Members.

22. The plaintiff's claims are typical of the claims of the Members of the Class. The plaintiff and all members of the Class sustained damages as a result of the wrongful conduct for which the defendant is responsible as described in this complaint.

23. The plaintiff will fairly and adequately protect the interests of the Members of the Class and it has retained counsel competent and experienced in class action litigation.

24. A class action is superior to other available methods for the fair and effect adjudication of this controversy. The damages suffered by many individual Class Members are relatively small, albeit significant. The expense and burden of individual litigation makes it impractical for many Class members individually to seek redress for the wrongful conduct alleged in this action.

25. Common questions of law and fact exist as to all Members of the Class and predominate over any questions solely affecting individual Members of the Class. Among the questions of law and fact common to the Class whether the defendants engaged in unfair trade practices by failing to conduct any due diligence and to prevent consumers from fraud by third-parties who the defendants introduced to the consumers.

26. The plaintiff knows of no difficulty which will be encountered in the management of this litigation which would preclude its maintenance as a Class Action.

27. Certifying this as a class action would resolve these issues for all potential plaintiffs without the necessity of filing individual lawsuits. Additionally, class certification in this matter would not impose any significant burden upon the Court.

28. In this case, the certification of the class is appropriate where the it would not complicate or delay disposition of the case and the defendant would suffer no prejudice as a result of certification and where certification would assure the class members that the defendants would not evade its responsibility in implementing any Court orders.

29. The names and addresses of all Class Members are available from the defendant and notice will be provided to Class Members via first-class mail, using techniques and a notice approved by this court.

PRAYERS FOR RELIEF

WHEREFORE, plaintiff, on her own behalf and on the behalf of others similarly situated (Class Members) prays for judgment as follows:

1. Determine that the defendant has committed breaches of contract and unfair trade practices in the servicing of consumers' credit card transactions.
2. Declare this action to be a Class Action.
3. Award to the plaintiff and to all Class Members compensatory damages in an amount which may be proven at trial and actual and statutory damages, together with prejudgment interest at the maximum rate allowed by law.
4. Award to the plaintiff and to all Class Members treble damages.
5. Award to the plaintiff its costs and expenses incurred in this action, including reasonable attorney, accountant and expert fees.
5. Award to plaintiffs and to all Class Members such other and further relief as this court may deem meet, just and proper.

THE PLAINTIFF CLAIMS A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

Dated: February 26, 2015

LEE A. BAUER, Plaintiff

By her Attorney,

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