IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

CLARK L. DURPO, JR., and
CLARK L. DURPO,

Plaintiffs,

v. Case No. 13-CA-001057
(consolidated with Case No. 14-CA-000083)

BELLA LAGO CONDOMINIUM AT BAY BEACH CONDOMINIUM ASSOCIATION, INC., et al,

Defendants.
_____/

PLAINTIFFS' MOTION TO STRIKE DURPOS' AFFIRMATIVE DEFENSES TO AMENDED COMPLAINT

Plaintiffs, ESTERO BAY IMPROVEMENT ASSOCIATION, INC., BAYSIDE MASTER ASSOCIATION, INC., and WATERSIDE DOCK ASSOCIATION, INC. (collectively the "**Plaintiffs**"), by and through their undersigned attorneys and pursuant to Rule 1.140(b) & (f) of the Florida Rules of Civil Procedure, hereby move to strike certain affirmative defenses in the Answer and Affirmative Defenses filed on November 20, 2014, by Defendants, CLARK L. DURPO, JR. and CLARK L. DURPO, (collectively the "**Defendants**"), and as grounds therefor state:

INTRODUCTION

1. Plaintiffs' Amended Complaint was deemed filed as of October 31, 2014 (the "**Amended Complaint**").

2. Counts I-IX of the Amended Complaint relate to the legal and equitable bases which give rise to the Plaintiffs' entitlement to drain across land owned by the Defendants

(defined in the Amended Complaint as the "**Golf Course Property**"[1]), to wit: (1) the reasonable use doctrine; (2) express easements by grant contained in the Stardial Deed; (3) express easements by grant contained in the Cost Share Agreement; (4) easements by implication contained in the Stardial Deed; (5) easements by implication contained in the Cost Share Agreement; (6) equitable servitudes arising from the Cost Share Agreement; (7) irrevocable licenses; (8) mutual drain; and (9) restrictive covenants. Count X requests a declaration as to the binding effect of the EBIA Declaration

3. The Defendants filed their Answer and Affirmative Defenses to the Amended Complaint on November 20, 2014 (the "**Answer**"), asserting thirty-one (31) affirmative defenses to Counts I-X of the Amended Complaint (referred to collectively as the "**Defenses**" and specifically by number, e.g., the "**First Defense**").

4. As described below, many of the Defenses should be stricken because the allegations pled in support thereof are insufficient to establish legal defenses to Counts I-X of the Amended Complaint.

LEGAL STANDARD

5. Rule 1.140(f) of the Florida Rules of Civil Procedure provides in relevant part: "[a] party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time."

6. Florida Rule of Civil Procedure 1.140(b) requires that "the objection of failure to state a legal defense in an answer or reply shall be asserted by motion to strike the defense within 20 days after service of the answer or reply."

7. A motion to strike an affirmative defense tests the legal sufficiency of the defense pled. Burns v. Equilease Corp., 357 So. 2d 786, 787 (Fla. 3d DCA 1978). "An affirmative

[1] Unless defined herein, capitalized terms shall have the same meaning as provided in the Amended Complaint.

defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability." St. Paul Mercury Ins. Co. v. Coucher, 837 So. 2d 483, 487 (Fla. 5th DCA 2002); see also Burnette v. State, 901 So. 2d 925, 927 (Fla. 2d DCA 2005); King ex rel. Murray v. Rojas, 767 So. 2d 510, 511 n. 1 (Fla. 4th DCA 2000).

8. Under Florida law, "certainty is required when pleading claims and defenses alike, and an affirmative defense that merely sets forth a legal theory without supporting facts is insufficient and is subject to be stricken." Cady v. Chevy Chase Savings and Loan, Inc., 528 So. 2d 136, 138 (Fla. 4th DCA 1988); White v. Crandall, 137 So. 2d 272 (Fla. 1931). "As in plaintiff's statement of claim, the requirement of certainty will be insisted upon in the pleading of a defense; and the certainty required is that the pleader must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be proved in order to provide the latter with a fair opportunity to meet it and prepare his evidence." Zito v. Washington Federal Sav. and Loan Ass'n of Miami Beach, 318 So. 2d 175, 176 (Fla. 3d DCA 1975).

9. As for defenses rooted in allegations of fraud, "the pertinent facts and circumstances constituting fraud must be pled with specificity, and all the essential elements of fraudulent conduct must be stated. . . . An affirmative defense of fraud or misrepresentation should specifically identify the misrepresentations or omissions of fact and how those acts or omissions were false or misleading." Cocoves v. Campbell, 819 So. 2d 910, 912-913 (Fla. 4th DCA 2002) (citations omitted); Para del Ray v. Rey, 114 So. 3d 371, 386 (Fla. 3d DCA 2013); see also Fla. R. Civ. P. 1.120(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit.").

ANALYSIS

10. An analysis of each of the affirmative defenses asserted by the Defendants reveals that many are conclusory in their content and lacking in sufficient allegations of ultimate fact demonstrating a good defense to the Amended Complaint. See Cady, 528 So. 2d at 138. The absence of factual allegations in support of the Defenses causes prejudice to Plaintiffs with respect to discovery and the preparation of its case at large. The Defenses which do not meet the pleading standards described above or which are otherwise legally insufficient should be stricken, with prejudice where appropriate.

11. The First Defense alleges that Counts I-X of the Complaint fail to state a cause of action, however, the First Defense is conclusory in nature and does not specify which factual allegations are un-provable or which legal elements are absent for the various claims. The Defendants cannot properly assert a defense for failure to state a cause of action without also identifying the specific deficiencies giving rise to the defense.

12. The Second Defense is legally insufficient because it fails to allege facts giving rise to a defense of equitable estoppel. Instead, the Second Defense should be stricken with prejudice because the defense of equitable estoppel cannot be founded upon representations by a third party as alleged by Defendants. See Major League Baseball v. Morsani, 790 So. 2d 1071, 1076 (Fla. 2001) (explaining doctrine of equitable estoppel).

13. The Fifth Defense alleges the "doctrine of balancing of relative conveniences of the parties bars the relief sought by Plaintiffs" but the doctrine is inapplicable here because the Plaintiffs do not seek injunctive relief against the Defendants. See Liza Danielle, Inc. v. Jamko, Inc., 408 So. 2d 735, 740 (Fla. 3d DCA 1982).

14. The Sixth Defense alleges "the Plaintiffs have ratified, waived claims against, acquiesced in, and accepted the [Defendants'] right to refuse further drainage of the surface and stormwaters under the current system and are barred from contending they have any claim to or interest in the [Golf Course Property]." The Sixth Defense is legally insufficient because the facts alleged therein do not demonstrate the applicability of the various legal theories offered to justify refusal of further drainage through the System.

15. The Ninth Defense is legally insufficient as an affirmative defense because it is founded upon a denial of the allegations in the Amended Complaint.

16. The Twelfth Defense alleges that Plaintiffs "have been unjustly enriched and are entitled to no relief as a matter of equity and good conscious [sic]." The doctrine of unjust enrichment does not function as an affirmative defense and has already been asserted as a claim in the Amended Complaint by Defendants against Plaintiffs.

17. The entirety of the Fourteenth Defense is as follows:

> The allegations in the Plaintiffs Complaint (sic) are repugnant to, negated and contradicted by the documents attached to the Complaint (sic), which render the Complaint (sic) a nullity and subject to dismissal.

The Fourteenth Defense is vague and lacking in any allegation of fact to support the conclusions stated therein.

18. The Fifteenth Defense is legally insufficient insofar as the purported negligence of Plaintiffs is irrelevant to the existence of the legal and equitable rights described in Counts I-X of the Amended Complaint.

19. The Sixteenth Defense alleges that all claims of Plaintiffs are barred due to their "refusal to pay or contribute to the costs for use and services provided by the Golf Course Property and the Durpos." The Sixteenth Defense is leally insufficient because the alleged

refusal to pay does not implicate the validity of the rights held by Plaintiffs. Moreover, certain bases for Plaintiffs' entitlement to drain through the System are free of any legal obligation to contribute for same.

20. The Seventeenth Defense alleges that the claims of Plaintiffs are barred for failing "to obtain and perfect the required land use rights required for their water dumping activities," which allegations fail to establish a legal defense recognized under Florida law. The Seventeenth Defense is founded upon a denial of the allegations of the Amended Complaint and otherwise fails for lack of specificity insofar as it does not identify the land use rights which are required (and purportedly absent), the applicable manner of perfection for same, and how the Plaintiffs failed to meet this standard.

21. The Eighteenth Defense alleges that "Plaintiffs' claims are barred by their lack of good faith and fair dealing in their silence, failure to disclose material facts and information, and attempts to take advantage of the Durpos' ignorance of their activities." These allegations do not constitute a legal defense recognized under Florida law. Defendants fail to identify the facts giving rise to an obligation of good faith and fair dealing as between the Plaintiffs and Defendants, the facts which should have been disclosed but were not, or any other grounds which support the allegation that Plaintiffs sought to capitalize on the alleged ignorance of the Defendants.

22. The Nineteenth Defense alleges that the Plaintiffs have not provided Defendants with consideration in exchange for use of the Golf Course Property or the services provided by them for the operation of the System. The Nineteenth Defense is not a legal defense to Counts I-X of the Amended Complaint because Defendants have failed to identify any legal theory

whereby the alleged lack of consideration paid to the Defendants would affect the validity of the rights claimed to exist by Plaintiffs in their Amended Complaint.

23. The Twentieth Defense is legally insufficient because it does not allege any legal theory or facts which function as a defense to Counts I-X of the Amended Complaint.

24. The Twenty-First Defense is duplicative of many of the earlier Defenses and is similarly insufficient for purposes of establishing a legal or equitable defense to the claims asserted by Plaintiffs.

25. The Twenty-Second Defense asserts and incorporates the entirety of the Amended Complaint as "affirmative defenses" to the Amended Complaint. The Twenty-Second Defense is facially deficient because it purports to contain multiple defenses, moreover, the manner of pleading does not adequately identify or establish the elements of any defense to the Amended Complaint.

26. The Twenty-Third Defense is legally insufficient because it fails to allege any facts that demonstrate a failure to perform the Cost Share Agreement by the Plaintiffs that would excuse further performance by the Defendants. See e.g., Savage v. Horne, 31 So. 2d 477, 482 (Fla. 1947); see also Bryan and Sons Corp. v. Klefstad, 237 So. 2d 236, 238 (Fla. 4th DCA 1970). It is instead a denial of performance and a bare legal conclusion as to the effect of same.

27. The Twenty-Fifth Defense is legally insufficient because it fails to tie the Defendants' various allegations of noncompliance with respect to the SFWMD Permit to any legal theory that acts as a defense to Counts I-X of the Amended Complaint.

28. The Twenty-Sixth Defense is redundant to the Twenty-Fourth Defense.

29. The Twenty-Seventh Defense is redundant to the Nineteenth Defense.

30. The Twenty-Eighth Defense is legally insufficient because the bare allegation regarding perpetual drainage by the Plaintiffs does not demonstrate how the doctrine of unconscionability would apply or act as a defense to the claims pending in this case. See e.g., Southworth & McGill v. S. Bell Tel. and Telegraph Co., 580 So. 2d 628, 630-31 (Fla. 1st DCA 1991); Kohl v. Bay Colony Club Condominium, Inc., 398 So. 2d 865, 868 (Fla. 4th DCA 1981).

31. The Twenty-Ninth Defense is an irrelevant allegation of fact and legally insufficient to act as a defense to the claims pending in this case.

32. The Thirtieth Defense is redundant to the Twelfth Defense.

33. The Thirty-First Defense is legally insufficient because assumption of risk is not a legal defense to any of Counts I-X of the Amended Complaint. See e.g., Kuehner v. Green, 436 So. 2d 78 (Fla. 1983) (explaining nature of claims to which defense of assumption of risk may apply).

CONCLUSION

34. Nearly every one of Defenses contained in the Answer is not stated with the requisite degree of particularity under Florida Law. Certain other Defenses, even if proven, would be legally insufficient to preclude the relief sought by Plaintiffs. The First, Second, Fifth, Sixth, Ninth, Twelfth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-First, Twenty-Second, Twenty-Third, Twenty-Fifth, Twenty-Sixth, Twenty-Seventh, Twenty-Eighth, Twenty-Ninth, Thirtieth and Thirty-First Defenses should be stricken from the Defendants' Answer to the Amended Complaint, with prejudice as to those Defenses found to be adequately pled yet legally insufficient to the claims at issue.

WHEREFORE, Plaintiffs, ESTERO BAY IMPROVEMENT ASSOCIATION, INC., BAYSIDE MASTER ASSOCIATION, INC., and WATERSIDE DOCK ASSOCIATION, INC.,

pursuant to Rule 1.140(b) & (f) of the Florida Rules of Civil Procedure and the authorities cited herein, move the Court to strike the First, Second, Fifth, Sixth, Ninth, Twelfth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-First, Twenty-Second, Twenty-Third, Twenty-Fifth, Twenty-Sixth, Twenty-Seventh, Twenty-Eighth, Twenty-Ninth, Thirtieth and Thirty-First Defenses contained in the Answer and Affirmative Defenses filed on November 20, 2014, by Defendants, CLARK L. DURPO, JR. and CLARK L. DURPO, with prejudice and awarding fees and costs where appropriate, and for entry of an Order granting this and all other relief which the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of December, 2014, a true and accurate copy of the above and foregoing has been furnished by electronic mail to the individuals who have registered with the Court's electronic filing system with respect to the above-captioned action.

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