

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR BROWARD COUNTY

CASE NO.: 12-034123 (07)

P&S ASSOCIATES, GENERAL
PARTNERSHIP, etc., et al.,

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**DEFENDANT'S AMENDED RESPONSE TO PLAINTIFFS' MOTION TO STRIKE
DEFENDANTS' AFFIRMATIVE DEFENSES AND MEMORANDUM OF LAW**

Defendant, Frank Avellino, by and through his undersigned counsel, hereby files his Amended Response to Plaintiffs' Motion to Strike Defendants' Affirmative Defenses and Memorandum of Law and as grounds therefore states as follows:

ARGUMENT

A motion to strike an affirmative defense only tests the legal sufficiency of the defense. *Gonzalez v. NAFH National Bank*, 93 So.3d 1054, 1057 (Fla. 3rd DCA 2012). Where a defense is legally sufficient on its face and presents a bona fide issue of fact, it is improper to grant a motion to strike. *Gonzalez*, 93 So.3d at 1057. Striking of pleadings is not favored and all doubts are to be resolved in favor of the pleadings. *Costa Bella Development Corporation v. Costa Development Corp*, 445 So.2d 1090, 1090 (Fla. 3rd DCA 1984).

In the instant case, Defendant has properly pled his affirmative defenses. Contrary to Plaintiffs' argument, there is no requirement to plead facts to support affirmative defenses.¹ Pursuant to Florida Rules of Civil Procedure 1.110(d) and 1.140(b), affirmative defenses must be affirmatively asserted either by motion or a pleading, and the grounds on which the affirmative defenses are based and the substantial matters of law intended to be argued are to be stated specifically and with particularity. The affirmative defenses raised by Defendant of statute of limitations, statute of repose, doctrine of *in pari delicto*, standing, laches, comparative negligence, reduction of damages pursuant to Florida's Tort Reform Act, equitable estoppel, waiver and doctrine of unclean hands, are all legally sufficient defenses, and thus, should not be stricken.² In addition, these affirmative defenses apply to all the causes of action raised by Plaintiffs so it was not necessary to delineate the particular counts for each affirmative defense.

Furthermore, as a basis for striking the affirmative defenses of estoppel, waiver and unclean hands (8th and 11th affirmative defenses), Plaintiffs have raised facts which they argue refute and/or negate the affirmative defenses. However, factual disputes are not a basis to strike the affirmative defenses. They are more properly raised as a reply to the affirmative defenses. *See Gonzalez*, 93 So.2d at 1057 ("an affirmative defense may not be stricken 'merely because it appears to a judge that the defendant may be unable to produce evidence at trial to sustain such a defense'").

¹ The cases cited by Plaintiffs to support this argument involve pleading requirements for a complaint, not affirmative defenses. *See Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc.*, 915 So.2d 220 (Fla. 4th DCA 2005). The pleading requirements for a complaint are set forth in Florida Rule of Civil Procedure 1.110(b), and require, *inter alia*, in (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief.

² Plaintiffs' reliance on *Cady v. Chevy Chase Savings and Loan, Inc.*, 528 So.2d 136 (Fla. 4th DCA 1988) is also misplaced, because it involves affirmative defenses raising fraud and misrepresentations, which do require pleading with specificity under Florida Rule of Civil Procedure 1.120(b). Defendant in the instant case does not raise fraud or misrepresentation in his affirmative defenses.

Finally, Plaintiffs' final argument that Defendant cannot incorporate other Defendant's affirmative defenses is without merit. Plaintiffs have not cited any authority for such argument, and the undersigned has found no case law or rule which prohibits such incorporation.³

Based on the foregoing Defendant Frank Avellino respectfully submits that Plaintiffs' Motion to Strike Defendants' Affirmative Defenses should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of July, 2015, the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin Order No. 13-49.

HAILE, SHAW & PFAFFENBERGER, P.A.

Attorneys for Defendant Avellino
660 U.S. Highway One, Third Floor
North Palm Beach, FL 33408
Phone: (561) 627-8100
Fax: (561) 622-7603
gwoodfield@haileshaw.com
bpetroni@haileshaw.com
eservices@haileshaw.com
syoffee@haileshaw.com
cmario@haileshaw.com

By: /s/ Gary A. Woodfield
Gary A. Woodfield, Esq.
Florida Bar No. 563102
Susan Yoffee, Esq.
Florida Bar No. 511919

³ The cases cited by Plaintiffs involve incorporating by reference all the allegations of a preceding count of a complaint in the following counts of the complaint. *See Gerentine v. Coastal Security Systems*, 529 So.2d 1191 (Fla. 5th DCA 1988).

SERVICE LIST

THOMAS M. MESSANA, ESQ.
MESSANA, P.A.
SUITE 1400, 401 EAST LAS OLAS BOULEVARD
FORT LAUDERDALE, FL 33301
tmessana@messana-law.com
Attorneys for P & S Associates General Partnership

LEONARD K. SAMUELS, ESQ.
ETHAN MARK, ESQ.
STEVEN D. WEBER, ESQ.
BERGER SIGNERMAN
350 EAST LAS OLAS BOULEVARD, STE 1000
FORT LAUDERDALE, FL 33301
emark@bergersingerman.com
lsamuels@bergersingerman.com
sweber@bergersingerman.com
DRT@bergersingerman.com
Attorneys for Plaintiff

PETER G. HERMAN, ESQ.
TRIPP SCOTT, P.A.
15TH FLOOR
110 SE 6TH STREET
FORT LAUDERDALE, FL 33301
pgh@trippscott.com
ele@trippscott.com
*Attorneys for Defendants Steven F. Jacob
and Steven F. Jacob CPA & Associates, Inc.*

JONATHAN ETRA, ESQ.
MARK F. RAYMOND, ESQ.
SHANE MARTIN, ESQ.
CHRISTOPHER CAVALLO, ESQ.
BROAD AND CASSEL
One Biscayne Tower, 21st Floor
2 South Biscayne Blvd.
Miami, FL 33131
mraymond@broadandcassel.com
ssmith@broadandcassel.com
ccavallo@broadandcassel.com
jetra@broadandcassel.com
msoza@broadandcassel.com
smartin@broadandcassel.com
msanchez@broadandcassel.com
Attorneys for Michael Bienes