

IN THE CIRCUIT COURT OF THE 17<sup>TH</sup> 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.

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**DEFENDANT'S 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 Response to Plaintiffs' Motion to Strike Defendants' Affirmative Defenses and Memorandum of Law and as grounds therefore states as follows:

**ARGUMENT**

Pursuant to Florida Rule of Civil Procedure 1.140(b) any objections of failure to state a legal defense in an answer or reply shall be asserted by a motion to strike the defense within 20 days after service of the answer or reply. In the instant case, Defendant served his affirmative defenses on May 18, 2015. Plaintiff's Motion to Strike Affirmative Defenses was served 34 days later, on June 22, 2015. Plaintiff's Motion is untimely and should be denied.

Even assuming *arguendo* the court allows the untimely motion to strike to be heard, it should be denied because it is without merit. 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.

3<sup>rd</sup> 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. 3<sup>rd</sup> 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.<sup>1</sup> 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.<sup>2</sup> 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 (8<sup>th</sup> and 11<sup>th</sup> 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.

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<sup>1</sup> 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. 4<sup>th</sup> 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.

<sup>2</sup> Plaintiffs' reliance on *Cady v. Chevy Chase Savings and Loan, Inc.*, 528 So.2d 136 (Fla. 4<sup>th</sup> 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.

*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’”).

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.<sup>3</sup>

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.

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<sup>3</sup> 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. 5<sup>th</sup> DCA 1988).

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