

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.

**BIENES' RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION TO STRIKE DEFENDANTS'
AFFIRMATIVE DEFENSES AND MEMORANDUM OF LAW**

Defendant, Michael Bienes, files this response in opposition to Plaintiffs' Motion ("Motion") to Strike Defendants' Affirmative Defenses and Memorandum of Law, stating:

ARGUMENT

Plaintiffs' Motion should be denied. 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).

Here, Bienes has properly pled his affirmative defenses. 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 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, Plaintiffs have raised facts which they argue refute and/or negate the affirmative defenses. However, factual disputes are not a basis to strike affirmative defenses. To the contrary, 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’”).

Finally, for their last argument, Plaintiffs assert that Bienes cannot incorporate another defendant's affirmative defenses by reference in his own pleading. This argument is without

¹ The cases cited by Plaintiffs to support this argument involve pleading requirements for a complaint, not for affirmative defenses. *See Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc.*, 915 So.2d 220 (Fla. 4th DCA 2005).

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). Bienes does not raise fraud or misrepresentation in his affirmative defenses.

merit. Plaintiffs have not cited any authority for this position,³ yet there is authority for the opposite conclusion. Under Rule 1.130, Florida Rules of Civil Procedure, “[s]tatements in a pleading may be adopted by reference in a different part of the same pleading, in another pleading, or in any motion.” Certainly this rule contemplates incorporation by reference of arguments or positions raised by another party in the same lawsuit. As such, this argument provides no basis for an order striking Bienes’ affirmative defenses, and the Motion should be denied.

CONCLUSION

For the reasons stated above, the Motion should be denied.

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).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of July, 2015, the foregoing document was served to the parties identified on the attached Service List via electronic mail.

Respectfully submitted,

/s/ Shane P. Martin

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