

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

CASE NO. 12-034123 (07)

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

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.

Defendants.

DEFENDANT FRANK AVELLINO'S RESPONSE TO PLAINTIFFS'
MOTION TO STRIKE SIXTH AFFIRMATIVE DEFENSE

Defendant, Frank Avellino, by and through his undersigned counsel, hereby files his Response to Plaintiffs' Motion to Strike Affirmative Defense and as grounds therefore states as follows:

1. Defendant has properly pled his Sixth Affirmative Defense, as he has provided the grounds on which the defense is based and the substantial matters of law intended to be argued, pursuant to Florida Rule of Civil Procedure 1.140(b). *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).

2. In his Sixth Affirmative Defense, Defendant has sufficiently alleged that other persons may have caused or contributed to Plaintiffs' alleged damages, and that Defendant is entitled to a reduction of those damages assessed, either in whole or in part, based on Chapter 768, Fla. Stat. Until recently, Defendant would not have known the particular individuals to name, because Plaintiffs have continued to object to discovery and have either refused to

produce documents or answer interrogatories, or have limited production or only partially responded to interrogatories. Defendant has named those persons who he has been able to identify through Plaintiffs' ever changing complaints or through the limited production they have provided to date.

3. It is disingenuous for Plaintiffs to argue that they cannot respond to this defense because Defendant failed to mention what conduct these individuals were engaged in or how it results in the reduction of damages, because it is Plaintiffs who have brought their claims against these named individuals alleging that the named individuals caused damages to Plaintiffs. Defendant has been seeking, since the commencement of this action, for Plaintiffs to provide the facts, documents and relevant information as to how Defendant Avellino and these other named individuals have caused damages to Plaintiffs. Until such facts, documents and information are produced to Defendant through discovery, he cannot provide any further facts to support this affirmative defense.

4. Striking of pleadings is not favored and all doubts are to be resolved in favor of the pleadings. *Cost Bella Development Corporation v. Costa Development Corp.*, 445 So.2d 1090, 1090 (Fla. 3rd DCA 1984). In the instant case, Defendant has sufficiently pled a legal affirmative defense and any further specific facts relating to this defense will be revealed through the discovery process.

WHEREFORE, Defendant respectfully requests this Court to deny Plaintiffs' Motion to Strike Sixth Affirmative Defense and for such other relief as this Court deems just and equitable.

I HEREBY CERTIFY that on this 8th day of October, 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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