

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN
AND FOR BREVARD COUNTY, FLORIDA

CASE NO. 05-2013-CA-33453-XXXX-XX

SCOTT ELLIS, in his official capacity as
Brevard County Clerk of the Circuit Court,

Plaintiff,

vs.

ROSEWARE, LLC, a Florida limited liability
company,

Defendant.

PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES

Plaintiff, SCOTT ELLIS, in his official capacity as Brevard County Clerk of the Circuit Court ("Clerk of Court") by and through undersigned counsel and pursuant to Rule 1.140(b), Florida Rules of Civil Procedure, hereby files its Motion to Strike Defendant's, ROSEWARE, LLC ("RoseWare"), Affirmative Defenses, and as grounds therefor states:

BACKGROUND FACTS

1. On or about April 6, 2012, former Brevard County Clerk of the Circuit Court, Mitch Needelman ("Former Clerk Needelman"), executed a contract for information technology ("I.T.") consulting services (the "I.T. Consulting Contract") with RoseWare.
2. On or about April 6, 2012, the Clerk of Court tendered payment to RoseWare in the amount of \$100,000.00 prior to any services being performed.
3. On or about May 1, 2012, less than one (1) month later, Former Clerk Needelman executed an addendum to the I.T. Consulting Contract (the "Addendum").

4. On or about May 3, 2012, the Clerk of Court tendered payment to RoseWare in the amount of \$150,350.00 prior to any services being performed.

5. The Clerk of Court fully performed its obligations under both the I.T. Consulting Contract and the Addendum including, without limitation, paying RoseWare the full contract sum of \$250,350.00.

6. Further, on or about April 6, 2012, Former Clerk Needelman executed a contract for cost containment services (the "Cost Containment Contract") with RoseWare.

7. The Clerk of Court fully performed its obligations under the Cost Containment Contract.

8. On or about March 29, 2013, the Clerk of Court filed a multi-count Complaint against RoseWare.

9. On or about April 25, 2013, RoseWare responded to the Complaint by filing an Answer and Affirmative Defenses.

MEMORANDUM OF LAW

I. DEFENDANTS' AFFIRMATIVE DEFENSES ARE FACTUALLY UNSUPPORTED AND LEGALLY INSUFFICIENT

Most of RoseWare's Affirmative Defenses consist of nothing more than conclusory allegations, unsupported by ultimate facts to support the defenses. In that Florida is a fact pleading jurisdiction, Florida law requires specificity and certainty in pleadings whether they be claims or defenses. *Continental Banking Co. v. Vincent*, 634 So.2d 242, 244 (Fla. 5th DCA 1994). A defendant must allege each element of the defense and must state the factual basis for the same. *L.B. McLeod Const. Co. v. Cooper*, 134 So. 224, 225 (Fla. 1931). This is to reasonably inform the adversary and provide them with a fair opportunity to prepare a response. *Zito v. Washington Federal Sav. & Loan Assoc. of Miami Beach*, 318 So.2d 175, 176 (Fla. 3d

DCA 1975). As RoseWare's Affirmative Defenses addressed below are legally insufficient and fail as a matter of law, they should be stricken. *Valdes v. Lambert*, 568 So.2d 117, 118 (Fla. 5th DCA 1990); *Zito*, 318 So.2d at 176-77 (certainty is required when pleading defenses, and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient).

II. FIRST, SECOND AND FOURTH AFFIRMATIVE DEFENSES – RoseWare's First, Second and Fourth affirmative defenses all argue that fails to state a cause of action. However, RoseWare limits its allegations in each by stating "Plaintiff has failed to state a claim upon which relief may be granted (i.e., failed to state a cause of action) with respect to" These Affirmative Defenses fail to reasonably inform the of necessary ultimate facts to allow to formulate a response. As such, these conclusory statements are insufficient and the Affirmative Defenses should be stricken.

III. SEVENTH AFFIRMATIVE DEFENSE - RoseWare's Seventh Affirmative Defense attempts to assert the defense of "waiver," stating: "Plaintiff has waived any right, or basis upon which he might reply, to seek rescission." The essential elements of waiver are "(1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right." *Woodlands Civic Ass'n, Inc. v. David W. Darrow, D.C., P.A.* 765 So. 2d 874, 877 (Fla. 5th DCA 2000). Here, RoseWare fails to provide any ultimate facts establishing the elements of waiver, so does not have enough information to properly respond. As such, the conclusory statement is insufficient and the Affirmative Defense should be stricken.

IV. NINTH AFFIRMATIVE DEFENSE – RoseWare's Ninth Affirmative Defense is unclear and fails to identify any legally cognizable Affirmative Defense. It seems to suggest RoseWare is relying upon "*prior breach*" as the affirmative defense, in that RoseWare states:

“(1) it has fully performed it[s] obligations, to date, ...; (2) it is, and has always been, ready, willing and able to perform ...; (3) the Plaintiff’s actions ... have fully prevented Defendant from continuing its performance ...; and, (4) to the extent performance under any of the ... contracts is incomplete, the same is the direct and sole result ... of the Plaintiff.” These allegations fail to state sufficient facts to support the Affirmative Defense. Further, even if RoseWare alleged sufficient facts, its allegations would not constitute a valid Affirmative Defense because RoseWare mischaracterizes the material terms of the contract. RoseWare has the right to enforce payment from the Clerk of Court, while has the right to enforce the services to be performed. RoseWare has been paid in full, so has satisfied its obligation and no prior breach occurred. As such, this Affirmative Defense should be stricken.

V. TENTH AFFIRMATIVE DEFENSE – RoseWare attempts in its Tenth Affirmative Defense to assert the defense of “*equitable estoppel*.” RoseWare states “Plaintiff, Scott Ellis, as the current head of the Brevard County Clerk of the Circuit Court is estopped....” without providing addition facts to support their Affirmative Defense. In the beginning of the Affirmative Defense, RoseWare suggests Scott Ellis, individually, is not the “real party” in interest. While these allegations may be true, it is insufficient to suggest the Clerk of Court is estopped from prosecuting its claims. The essential elements of estoppel are “(1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.” *State of Florida v. Harris*, 881 So. 2d 1079, 1084 (Fla. 2004). This Affirmative Defense fails to establish the necessary elements of an estoppel defense and, fails to reasonably inform the of necessary ultimate facts to allow them to properly respond. As such, the conclusory statement is insufficient and the Affirmative Defense should be stricken.

VI. ELEVENTH AFFIRMATIVE DEFENSE – RoseWare’s Eleventh Affirmative Defense attempts to assert the doctrine of “*unclean hands*.” RoseWare states “Plaintiff’s claims in equity are barred by the doctrine of unclean hands.” However, RoseWare fails to reasonably inform the of necessary facts to afford any opportunity for a meaningful response. As such, this conclusory statement is insufficient and the Affirmative Defense should be stricken.

VII. THIRTEENTH AFFIRMATIVE DEFENSE - RoseWare’s Thirteenth Affirmative Defense purportedly invokes the defense of “*anticipatory repudiation*.” RoseWare states “Plaintiff’s actions with respect to the filing of the Complaint are an anticipatory repudiation....” Similarly, the Ninth Affirmative Defense, *prior breach*, RoseWare again mischaracterizes the material terms of the contracts. RoseWare has the right to enforce payment from the Clerk of Court, while has the right to enforce the services to be performed. RoseWare has been paid in full, therefore has satisfied its obligation and did not breach the contract. As such, this Affirmative Defense should be stricken.

VIII. FOURTEENTH AFFIRMATIVE DEFENSE - RoseWare’s Fourteenth Affirmative Defense attempts to assert the defense of “*abandonment of contract*.” RoseWare states “Plaintiff has abandoned the I.T. Consultancy Contract, the Addendum, and the Cost Containment Contract.” RoseWare fails to reasonably inform the of necessary facts to allow for a proper response. As such, this conclusory statement is insufficient and the Affirmative Defense should be stricken.

WHEREFORE, Plaintiff, SCOTT ELLIS, in his official capacity as Brevard County Clerk of the Circuit Court, respectfully requests the entry of an order striking the First, Second, Fourth, Seventh, Ninth, Eleventh and Fourteen Affirmative Defenses asserted, an award of attorneys’ fees and costs and such other and further relief as this Court deems just and proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email this 17 day of May 2013 to: Michael Gay, Esq.: mgay@foley.com; Robert D. Rightmyer, Esq.: rightmyer@foley.com

GRAYROBINSON, P.A.

By:



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