

IN THE TWELFTH JUDICIAL CIRCUIT COURT
IN AND FOR MANATEE COUNTY, FLORIDA

MARY LOU SMITH, et al.,

Plaintiffs,

v.

Case No. 2008-CA-11315

TRAILER ESTATES PARK AND
RECREATION DISTRICT, et al.,

Defendants.

**DEFENDANT JANET JONES' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION TO STRIKE AFFIRMATIVE DEFENSES OF DEFENDANTS**

Defendant Janet Jones opposes Plaintiffs' Motion to Strike Affirmative Defenses of Defendants. Plaintiffs seek to strike eight of Ms. Jones' nine affirmative defenses. "The striking of pleadings is not favored and all doubts are to be resolved in favor of the pleadings." Costa Bella Dev'p Corp. v. Costa Dev'p Corp., 445 So. 2d 1090 (Fla. 3d DCA 1984); Burns v. Equilease Corp., 357 So. 2d 786, 787 (Fla. 3d DCA 1978) (reversible error for court to strike a defense where evidence may be presented to support it); Bay Colony Office Building Joint Venture v. Wachovia Mortgage Co., 342 So. 2d 1005, 1006 (Fla. 4th DCA 1977) (all doubts resolved in favor of the attacked pleadings; affirmative defenses must be without any possible relation to the controversy to be stricken). Plaintiffs' motion should be denied.

Ms. Jones' Sixth Affirmative Defense – Unclean hands/estoppel

Plaintiffs in paragraph 7 of their motion seek to strike Ms. Jones' sixth affirmative defense of unclean hands, contending that equitable defenses are improper in a Sunshine case.

Plaintiffs' argument is directly contrary to their jury trial argument. Previously, Plaintiffs argued that this case was a case in equity in an effort to avoid a jury trial. See Plaintiffs' Motion to Strike Defendants . . . Jury Demand, bearing July 20, 2009 certificate of service. Specifically, Plaintiffs wrote in their original motion to strike jury trial demands that Defendants were not entitled to a jury trial "due to the equitable nature of the relief sought by the Plaintiffs." At p.4, ¶8. Plaintiffs also cited cases in that motion for the proposition that there is no jury trial right in equity cases. See id., pg. 3, ¶5. The Court accepted Plaintiffs' argument and ruled that "all remedies sought are equitable in nature."¹

Now that Plaintiffs have staked out their position that this is a case in equity, they should not be heard to complain when Defendants, including Ms. Jones, raise equitable defenses to a lawsuit filed in equity. Plaintiffs are barred under the doctrine of estoppel against inconsistent positions from now claiming that equity does not apply here. See Dubois v. Osborne, 745 So. 2d 479, 480-81 (Fla. 1st DCA 1999). "The doctrine of estoppel against inconsistent positions serves to prevent a party who has gained something from the assertion of its first position to, by the assertion of the second, inconsistent position, gain something more, to which it would not have been entitled under the first position. Id. at 481 (internal citations omitted). That is exactly what Plaintiffs seek to do here. The Court should not permit this inconsistency. Accordingly, the Court must deny Plaintiffs' motion to strike this defense and all defenses raising equity matters.

Even if the Court reaches the merits of Plaintiffs' argument, Plaintiffs failed to provide any authority to support their argument that equity is irrelevant in a *Sunshine case*, vis a vis a

¹Ms. Jones does not waive her position that she is entitled to a jury trial.

Public Record case. The decision cited by Plaintiffs, Silver Express Co. v. District Bd. Of Lower Tribunal Trustees of Miami-Dade Community College, 691 So. 2d 1099, 1101 (Fla. 3d DCA 1997), neither states nor implies that motive is irrelevant in a Sunshine case. Silver Express addresses the issue of whether the plaintiffs could pursue a Sunshine case after unsuccessfully pursuing an administrative hearing on other grounds. The other two cases cited by the Plaintiffs were ***Public Record cases***, not Sunshine cases.

Plaintiffs baldly state without any explanation that Ms. Jones' assertion of an equitable affirmative defense to Plaintiffs' claims against her is immaterial, impertinent and scandalous. See Motion at p.4, ¶7. Plaintiffs' contention simply is wrong. Unclean hands is a permissible defense in a case in equity. See Quality Roof Svcs. Inc. v. Intervest Nat. Bank, 2009 WL 3446476 (Fla. 4th DCA Oct. 28, 2009).

Ms. Jones' Seventh Affirmative Defense – Excuse on account of Plaintiffs' actions

Similarly, Plaintiffs contend in paragraph 23 of the instant motion that Ms. Jones' seventh affirmative defense of excuse is improper and must be stricken. In that defense, Ms. Jones asserts that her conduct is excused because Plaintiffs affirmatively advised Defendants that two or more trustees could be present at non-board meetings, and now Plaintiffs functionally claim in this lawsuit this conduct is improper. Again, Ms. Jones points out that Plaintiffs are precluded about complaining about Ms. Jones' equitable affirmative defenses pursuant to the doctrine of estoppel against inconsistent positions as discussed above.

On the merits, this is an appropriate equitable affirmative defense, as it seeks to excuse Ms. Jones' conduct. Plaintiffs concede that an avoidance of liability by excuse is properly an affirmative defense. See Motion p.2, ¶3. Moreover, Plaintiffs assert on page 15 that Ms. Jones

should be not able to shift the blame to plaintiffs because of training received by District counsel. This, of course, is really a reply to the affirmative defense and not a proper basis for a motion to strike. The Court should deny Plaintiffs motion and order them to file a reply.

Ms. Jones' First Affirmative Defense – Administrative Conversations

In paragraph 11, Plaintiffs contend that Ms. Jones cannot raise as an affirmative defense that certain conversations were administrative in nature. Plaintiffs thus seek to strike Ms. Jones' first defense, in which she raised this matter. Specifically, Plaintiffs state that “[t]his affirmative defense does not properly assert an avoidance of liability by alleging excuse or justification[.]” Motion p.17, ¶14.

Contrary to Plaintiffs' contention, this defense puts forth justification for conversations between two or more trustees outside a noticed meeting. This defense injects the issue that, even if there were conversations between Ms. Jones and one or more then-trustees on the referenced matters, she was justified in doing so because those discussions addressed administrative matters.

Accordingly, this affirmative defense is proper in a Sunshine Law case. The Plaintiffs' motion on this issue must be denied.

Ms. Jones' Eighth Affirmative Defense – Cure

In paragraph 21 of the instant motion, Plaintiffs appear to raise two concerns about Ms. Jones' eighth affirmative defense on cure. It appears that Plaintiffs do not challenge the balance of Ms. Jones' eighth affirmative defense.

Plaintiffs' first concern relates to paragraph 37(s) of the Third Amended Complaint, which provides that in October 2006, the Board interviewed and hired legal counsel outside of the Sunshine. As cure, Ms. Jones raised each meeting at which Kirk Pinkerton PA.'s attorney fee

bills were subsequently discussed and approved. Plaintiffs' simply states this is "unresponsive" to allegation 37(s). Ms. Jones disagrees.

If Plaintiffs establish that the Trustees violated the Sunshine law in hiring Kirk Pinkerton, any possible violation that may have occurred was cured by each an every subsequent Trustee meeting held within the Sunshine Law where the Trustees approved the payment of Kirk Pinkerton's legal fees. Votes to approve attorney fees, at the very least, serve as an implicit ratification of the work done to date as well as an endorsement of continuation of such work.

Plaintiffs' second concern is that in some of Ms. Jones' cure allegations, the cure occurred after Plaintiffs filed the lawsuit. Even if true, that fact is not relevant to whether there is a cure; instead, that fact is relevant, if it is relevant at all, to the imposition of attorney fees. Plaintiffs' argument to strike Ms. Jones' defense of cure must be denied.

Ms. Jones' Second, Third, and Fourth Affirmative Defenses – Excuse & Justification

Plaintiffs in paragraph 22 of their instant motion seek to strike Ms. Jones' second, third, and fourth defenses, claiming that they are simply denials of the allegations. These defenses were properly pled as they involve excuse or justification and Ms. Jones should have the opportunity to present evidence at trial to support them. "It is reversible error for a trial court to strike a defense where evidence may be presented to support it." Burns, 357 So. at 787.

Ms. Jones' Ninth Affirmative Defense – Continuation of Previous Policy

Finally, Plaintiffs seek to strike Ms. Jones' ninth defense, which is directed to allegation 37(x) of the Third Amended Complaint. In that allegation, Plaintiffs allege that on February 12, 2007, Ms. Jones, acting as a committee of one, decided that all public comments at public meetings should be restricted to three minutes. Although not alleged, this allegation involves a

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail and First Class this 7th day of December, 2009, to:

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