

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

SUNWOOD, INC.,
Plaintiff,

Case No.: CACE 21 – 003202 (12)

vs.

POMPANO SENIOR SQUADRON
FLYING CLUB, INC.,

Defendant.

POMPANO SENIOR SQUADRON
FLYING CLUB, INC.

Third-Party Plaintiff,

Vs.

CARL L. KENNEDY, II

Third-Party Defendant.

THIRD-PARTY PLAINTIFF POMPANO SENIOR SQUADRON FLYING CLUB, INC.'S REPLY TO THIRD-PARTY DEFENDANT'S AFFIRMATIVE DEFENSES

Third-Party Plaintiff POMPANO SENIOR SQUADRON FLYING CLUB, INC., (“Club”) by and through its undersigned attorney, files this Reply To Third-Party Defendant’s (“Kennedy”) Affirmative Defenses and says:

1. Defendant Kennedy alleges fifteen (15) affirmative defenses in response Plaintiff Club’s Complaint. Plaintiff Club denies each and every affirmative defense and demands strict proof in support thereof from Defendant Kennedy. To the extent necessary, Plaintiff Club further avoids each and every affirmative defense as they are legally and factually insufficient.

2. An affirmative defense is one that admits the cause of action asserted by the preceding pleading, but avoids liability, wholly or partly, by allegations of excuse, justification or other matter negating liability. *Storchwerke v. Mr. Thiessen's*

Wallpapering Supplies, 538 So.2d 1382 (Fla. 5th DCA 1989); *St. Paul Mercury Ins. Co. v. Coucher*, 837 So. 2d (Fla. 5th DCA 2002); *Jones v Florida Guar. Ass'ii*, 908 So. 2d 435, 452 (Fla. 2005). An affirmative defense that merely denies the allegations of the complaint is not sufficient. *Zito v. Washington Federal Savings & Loan Assoc. of Miami Beach*, 318 So.2d 175 (Fla. 3rd DCA 1975). It is not permissible for a litigant to submit a disorganized assortment of allegations and arguments in hope that a legal premise will materialize on its own. *Barrett v City of Margate*, 743 So. 2d 1160 (Fla. 4th DCA 1999). Plaintiff/Counter-Defendant's affirmative defenses are "conclusory in their content and lacking any real allegations of ultimate fact demonstrating a good defense to the complaint". *Cady v. Chevy Chase Savings and Loan, Inc.*, 528 So.2d. 136 (Fla. 4th DCA 1988). In *Reflex v. Umet Trust*, 336 So.2d 473 (Fla. 3rd DCA 1976), the Court held that where affirmative defenses raise pure paper issues without setting forth any factual support, such affirmative defenses are legally deficient.

3. Defendant Kennedy's affirmative defenses fail to allege any sufficient, ultimate facts in support of the defense, and are merely denials of Plaintiff Club's allegations. These types of bare bones allegations fail to comply with the requirements of Fla.R.Civ.P. 1.110(c) which requires Defendant Kennedy to set forth a short and plain statement of the defenses and fail to comply with Fla. R. Civ. P. 1.130 for failing to attach documents which support the alleged defenses.

4. As to the specific pled affirmative defenses, the first affirmative defense is just outright incorrect. Defendant Kennedy asserts Plaintiff Club failed to state a cause of action. In addition to not detailing why Kennedy makes such assertion, which is a basis to strike and deny the affirmative defense, it is incorrect. Plaintiff Club has asserted each element necessary for an indemnification claim. See *Brickell Biscayne Corp. v. WPL Associates, Inc.*, 671 So.2d 247 (Fla. 3rd DCA 1996).

5. As to Kennedy's Second Affirmative Defense the same argument as in Paragraph 4 above applies.

6. As to the Third Affirmative Defense, Club alleges damages in Paragraphs 22 and 26 of the Complaint as to the indemnification claims. As to the Fraudulent Lien claims, Club alleges damages in Paragraph 40.

7. As to the Fourth Affirmative Defense, Club alleges the fraudulent liens occurred in 2020 which is well within statute of limitations. As for the indemnification claims, Club suffered damages for which it seeks indemnification well within the four (4) year common law and five (5) year contractual statute of limitations from the date it filed its complaint.

8. As to the Fifth Affirmative Defense, Club denies it benefited from Kennedy's time as treasurer and has in fact suffered damages by his work. Kennedy was paid to file the Club's tax returns in 2019 and 2020 which he failed to do causing Club to incur penalty and fines from the IRS. As to procuring a loan from Sunwood, Kennedy was not authorized to procure such loan and breached the By-Laws and his fiduciary duty in doing so but not obtaining a member vote for a financial transaction greater than \$80,000.

9. As to the Sixth Affirmative Defense, a denial is not an affirmative defense and this should be stricken. See *Infra*.

10. As to the Seventh Affirmative Defense, the common law indemnification claim is brought in the alternative to the contractual indemnification claim.

11. As to the Eighth Affirmative Defense, this is not an affirmative defense at all and should be stricken. Additionally, any work Kennedy may have performed which may have benefited the Club is not an affirmative defense to a breach of fiduciary duty. As a director and treasurer of Club, Kennedy was obligated to perform his duties, such obligation is not an excuse to breach a fiduciary duty.

12. As to the Ninth Affirmative Defense, Club denies any accord and satisfaction and

Kennedy failed to allege any ultimate facts to support such an agreement, as such this affirmative defense legally fails.

13. As to the Tenth Affirmative Defense, Club denies any ratification of Kennedy's actions. Furthermore, as no member vote to approve a financial transaction over \$80,000 was taken as required by Club's By-Laws all Kennedy's actions were ultra vires and cannot be ratified by the Board alone.

14. As to the Eleventh Affirmative Defense, Club asserts the same reply as in Paragraph 13 herein.

15. As to the Twelfth Affirmative Defense, the business judgment rule does not apply to an action that is a breach of the Club's By-Laws. As stated above, all financial transactions over \$80,000 must be approved by the Club's members. No member vote was ever taken to approve any loan from Sunwood. As such, Kennedy's actions are ultra vires and cannot fall within the business judgment rule.

16. As to the Thirteenth Affirmative Defense, an alleged claim for a set-off does not bar a claim as such Kennedy asserts in this defense. Additionally, Club owes Kennedy no money and in fact is entitled to a refund and damages for paying him to file the Club's tax returns which he never did causing the Club to incur penalties and interest with the IRS.

17. As to the Fourteenth Affirmative Defense, all claims are timely and well pled.

18. As to the Fifteenth Affirmative Defense, Kennedy has failed to allege any ultimate facts in this defense and therefore same should be stricken.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via eportal this 21st of June 2022 to Dane Stanish, Esq., stanishd@gmail.com and Carl Kennedy, clktax@aol.com.

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