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IN THE COUNTY COURT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 2018-SC-4205
DIVISION: G

JUSTIN LARSEN CONSTRUCTION, INC.,

Plaintiff,

vs.

DARRELL SARGENT,

Defendant.

/

**PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S SECOND AMENDED
AFFIRMATIVE DEFENSES AND COUNTERCLAIMS,
MOTION TO STRIKE DEFENDANT'S SECOND AFFIRMATIVE DEFENSES,
MOTION TO STRIKE, IN PART, DEFENDANT'S SECOND AMENDED
COUNTERCLAIMS,
MOTION TO DISMISS DEFENDANT'S SECOND AMENDED COUNTERCLAIMS,
AND MOTION TO STRIKE DEFENDANT'S DEMAND FOR JURY TRIAL**

Plaintiff, JUSTIN LARSEN CONSTRUCTION, INC., by and through its undersigned counsel, hereby moves this Court, pursuant to Florida Rule of Civil Procedure 1.140, to strike Defendant's latest filing, his "Second Amended Affirmative Defenses and Counterclaims," in its entirety, to strike Defendant's Second Amended Affirmative Defenses, to strike, in part, Defendant's Second Amended Counterclaims, to dismiss Defendant's Second Amended Counterclaims, and to strike Defendant's demand for jury trial, and as grounds therefor Plaintiff states as follows.

To clarify, these motions are filed in response to Defendant's pleading that was filed in this case on October 19, 2019, and listed as entry D60 on this Court's docket. That pleading was titled "Defendant's Second Amended Affirmative Defenses and Counterclaims," but it was only the first purported amendment of Defendant's affirmative defenses and counterclaims. By this Court's order dated July 15, 2019, Defendant was granted leave to file, for the first time, "his compulsory counter claims and affirmative defenses in this action." (D39). Defendant filed his "Affirmative Defenses, Answers, Statement of Facts, and Counterclaims" on July 22, 2019 (D42). On August 5, 2019, Plaintiff filed several motions (D44) directed at that initial pleading from Defendant, and

Plaintiff's motions are still pending. Without first seeking or obtaining leave of this Court, Defendant then filed his "Second Amended Affirmative Defenses and Counterclaims" on October 19, 2019.

I. DEFENDANT'S LATEST PLEADING SHOULD BE STRICKEN IN ITS ENTIRETY BECAUSE IT WAS FILED WITHOUT LEAVE OF COURT

1. Florida Rule of Civil Procedure 1.190(a) provides, in pertinent part: "A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, may so amend it at any time within 20 days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party."

2. Plaintiff was permitted to and did file and serve a pleading in response to Defendant's original affirmative defenses and counterclaim. Therefore, Defendant was required to obtain leave of this Court in order to amend his affirmative defenses and counterclaim.

3. Defendant's "Second Amended Affirmative Defenses and Counterclaims" should be stricken because that pleading was improperly filed without first seeking or obtaining leave of this Court.

II. EACH OF DEFENDANT'S AFFIRMATIVE DEFENSES SHOULD BE STRICKEN

4. "A properly pled affirmative defense includes ultimate facts sufficient to provide notice of the proof the defendant intends to rely upon to defeat the plaintiff's claim." *South Florida Coastal Elec., Inc. v. Treasures on Bay II Condo Ass'n*, 89 So.3d 264, 267 (Fla. 3d DCA 2012).

5. Each of Defendant's eight affirmative defenses is legally insufficient and should be stricken because each contains mere conclusions of law, without any supporting factual allegations to provide notice of the proof Defendant intends to rely upon. *See Zito v. Wash. Fed. Savings & Loan Ass'n of Miami Beach*, 318 So.2d 175, 176-177 (Fla. 3d DCA 1975) (stating "the pleader must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be proved" and affirming order striking affirmative defense that did not meet this standard).

6. Defendant's seventh affirmative defense is particularly deficient in this regard because it contains a conclusory allegation of "fraudulent misrepresentations," without any more factual support or particularity than any of the other defenses. *See Fla. R. Civ. P. 1.120(b)* ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit."); *Cocoves v. Campbell*, 819 So.2d 910, 912-

913 (Fla. 4th DCA 2002) (“When a party asserts fraud as a defense, the pertinent facts and circumstances constituting fraud must be pled with specificity, and all the essential elements of fraudulent conduct must be stated. An affirmative defense of fraud or misrepresentation should specifically identify the misrepresentations or omissions of fact and how those acts or omissions were false or misleading.”) (internal citations omitted).

III. PARAGRAPHS 23 THROUGH 34 OF DEFENDANT’S AMENDED COUNTERCLAIM SHOULD BE STRICKEN

7. In paragraph 22 of his amended counterclaim, Defendant alleges that on or about October 4, 2017, he sent Plaintiff a notice of alleged construction defects pursuant to chapter 558, Florida Statutes. Then, in paragraphs 23 through 34 of the amended counterclaim, Defendant purports to set forth the subsequent actions taken and the communications exchanged by the parties in an effort to resolve this case pre-suit pursuant to chapter 558.

8. Chapter 558 prescribes an out-of-court procedure for resolving construction disputes as an alternative to litigation. That procedure is “an opportunity to resolve the claim through *confidential settlement negotiations*.” § 558.001, Fla. Stat. (2015) (emphasis added).

9. The contents of paragraphs 23 through 34 of Defendant’s amended counterclaim are, as a matter of law, confidential settlement negotiations. Therefore, they should be stricken from the counterclaim as immaterial and/or impertinent pursuant to Florida Rule of Civil Procedure 1.140(f).

IV. DEFENDANT’S AMENDED COUNTERCLAIM SHOULD BE DISMISSED

10. Defendant’s amended counterclaim should be dismissed because each of his four claims fails to state a cause of action. Each claim will be addressed in turn below.

A. COUNT I – BREACH OF CONTRACT

11. Count I, Defendant’s claim for breach of contract, fails to state a cause of action because Defendant has failed to allege any actual damages.

12. “To prevail in a breach of contract action, a plaintiff must prove: (1) a valid contract existed; (2) a material breach of the contract; and (3) damages.” *Deauville Hotel Management, LLC v. Ward*, 219 So.3d 949, 953 (Fla. 3d DCA 2017).

13. The counterclaim does not include any factual allegation whatsoever as to any actual damages supposedly suffered by Defendant. Defendant has only included a formulaic, conclusory allegation that he “has suffered injuries and damages, inconveniences, attorney’s fees, costs and

litigation expenses” (Def.’s Second Am. Countercl. ¶ 41), which is insufficient. *See Barrett v. City of Margate*, 743 So.2d 1160, 1162-63 (Fla. 4th DCA 1999) (“It is insufficient to plead opinions, theories, legal conclusions or argument.”); *Maiden v. Carter*, 234 So.2d 168, 170 (Fla. 1st DCA 1970) (“It is a fundamental principle of pleading that the complaint, to be sufficient, must allege ultimate facts as distinguished from legal conclusions which, if proved, would establish a cause of action for which relief may be granted.”).

14. Therefore, Defendant’s breach-of-contract claim fails to state a cause of action and should be dismissed.

15. If Defendant’s reference to “attorney’s fees” in paragraph 41 of the amended counterclaim is a request for an award of his attorney’s fees in connection to his breach-of-contract claim, then it should be stricken because the parties’ contract does not contain any provision for attorney’s fees. *See Bank of New York Mellon Trust Company, N.A. v. Fitzgerald*, 215 So.3d 116, 119 (Fla. 3d DCA 2017) (“It is well-established that attorney’s fees may not be awarded unless authorized by contract or statute.”).

B. COUNT II – VIOLATION OF FDUTPA

16. Count II, Defendant’s claim under the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), fails to state a cause of action for several reasons.

17. “[T]here are basically three elements that are required to be alleged to establish a claim pursuant to the FDUTPA: 1) a deceptive act or unfair practice; 2) causation; and 3) actual damages.” *KC Leisure, Inc. v. Haber*, 972 So.2d 1069, 1073 (Fla. 5th DCA 2008).

18. First, Count II is deficient because Defendant has not alleged any deceptive or unfair practice. Defendant alleges that Plaintiff violated FDUTPA by “failing to obtain the proper construction permits before performing the construction work on Sargent’s house” (Def.’s Second Am. Countercl. ¶ 49), but even if permits were required, a failure to obtain permits is neither deceptive nor unfair. Defendant also alleges that Plaintiff violated FDUTPA by “luring Sargent into contracting for a defective handicap bathroom” (Def.’s Second Am. Countercl. ¶ 50), but the counterclaim lacks any factual allegations to indicate how Defendant was supposedly “lured” or what alleged conduct on Plaintiff’s part was objectively likely to mislead Defendant to his detriment. *See Angelo v. Parker*, 275 So.3d 752 (Fla. 1st DCA 2019) (finding no allegation of deceptive acts, defined as those likely to mislead consumers acting reasonably in the circumstances to the consumers’ detriment, and no allegation of unfair acts, defined as those causing substantial

injury to a consumer which the consumer could not have reasonably avoided and which is not outweighed by countervailing benefits to the consumer or to competition).

19. Second, Count II is deficient because Defendant has not alleged any actual damages. *See General Motors Acceptance Corp. v. Laesser*, 718 So.2d 276, 277 (Fla. 4th DCA 1998) (“to be actionable an unfair or deceptive trade practice must be the cause of loss or damage to a consumer”). Like Count I, Count II lacks any factual allegation whatsoever as to any recoverable damages supposedly suffered by Defendant. It appears from Defendant’s Second Motion to Transfer Based on Lack of Subject Matter Jurisdiction (D59) and the report attached thereto as Exhibit A that Defendant is alleging he will incur costs to re-do the bathroom that Plaintiff remodeled for him, but even if they had been alleged in the amended counterclaim, the supposed costs to re-do Defendant’s bathroom would be consequential damages, not actual damages recoverable under FDUTPA. *See Smith v. 2001 South Dixie Highway, Inc.*, 872 So.2d 992, 994 (Fla. 4th DCA 2004) (reciting the definition of “actual damages” under FDUTPA as the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties, which does not include consequential damages, and affirming dismissal of complaint); *Orkin Exterminating Co. v. Petsch*, 872 So.2d 259, 263 (Fla. 2d DCA 2004) (holding FDUTPA permits a consumer to recover only the diminished value of the services received, not special, consequential or incidental damages).

20. Third, Defendant’s FDUTPA claim is deficient and subject to dismissal because it is nothing more than a reiteration of his breach-of-contract claim. *See Rebman v. Follett Higher Education Group, Inc.*, 575 F.Supp.2d 1272, 1279-1280 (M.D.Fla. 2008) (granting summary judgment for defendant on FDUTPA claim because plaintiffs did not show any unfair or deceptive acts separate and apart from the breach of contract).

21. For these reasons, Defendant’s FDUTPA claim fails to state a cause of action and should be dismissed.

22. Upon prevailing in this action, Plaintiff will be entitled to an award of its attorney’s fees and costs pursuant to section 501.2105, Florida Statutes.

C. COUNT III – FRAUDULENT MISREPRESENTATION

23. Count III, Defendant’s claim of fraudulent misrepresentation, also fails to state a cause of action.

24. “As the Florida Supreme Court has stated, a party seeking to establish fraudulent misrepresentation is required to prove the following elements: ‘(1) a false statement concerning a material fact; (2) the representor’s knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation.’” *Arlington Pebble Creek, LLC v. Campus Edge Condo Ass’n, Inc.*, 232 So.3d 502, 505 (Fla. 1st DCA 2017) (quoting *Butler v. Yusem*, 44 So.3d 102, 105 (Fla. 2010)).

25. With regard to the first element, Defendant’s fraudulent-misrepresentation claim is deficient because the alleged fraud is not pled with particularity as required by Florida Rule of Civil Procedure 1.120(b). *See Robertson v. PHF Life Ins. Co.*, 702 So.2d 555, 556 (Fla. 1st DCA 1997) (affirming dismissal of complaint that “fail[ed] to specifically identify misrepresentations or omissions of fact, the time, place or manner in which they were made, and how the representations were false or misleading”).

26. It is not clear, but Count III appears to be based upon two representations allegedly made by Plaintiff: (1) some representation(s) “regarding [Plaintiff’s] installation of a fully functioning handicap accessible bathroom in Sargent’s home” (Def.’s Second Am. Countercl. ¶ 55), and (2) a representation that “[Plaintiff] would visit Sargent’s home and cure the construction defects on January 4, 2018” (Def.’s Second Am. Countercl. ¶ 56). The problems with each will be addressed in turn.

27. As for the first alleged representation, the amended counterclaim simply does not contain any factual allegations to indicate what statement(s) Plaintiff supposedly made to Defendant “regarding [Plaintiff’s] installation of a fully functioning handicap accessible bathroom in Sargent’s home.” In any event, “[a]s a general rule, a false statement of fact, to be a ground for fraud, must be of a past or existing fact, not a promise to do something in the future.” *Wadlington v. Continental Medical Services, Inc.*, 907 So.2d 631, 632 (Fla. 4th DCA 2005) (internal quotation and citation omitted); *see also Biscayne Inv. Group, Ltd. v. Guarantee Management Services, Inc.*, 903 So.2d 251, 255 (Fla. 3d DCA 2005) (“a mere promise not performed... cannot form the predicate for actionable fraud”).

28. The second alleged representation refers to the parties’ pre-suit attempts to resolve their dispute pursuant to chapter 558, Florida Statutes. Representations allegedly made during that process are not actionable. Instead, they are confidential settlement negotiations according to

section 558.001, Florida Statutes. As stated above, the references to that process in Defendant's counterclaim are improper and should be stricken.

29. Furthermore, Defendant has not alleged the fourth element of a fraudulent-misrepresentation claim. Other than formulaic, conclusory allegations of reliance and damages (see Def.'s Second Am. Countercl. ¶¶ 58-59), Defendant has not alleged any actual reliance on Plaintiff's alleged misrepresentations nor any damages resulting from reliance. *See Arlington Pebble Creek, LLC*, 232 So.3d at 506-507 (reversing judgment on fraudulent-misrepresentation claim because there was no evidence of actual reliance or damages resulting from reliance); *see also Barrett v. City of Margate*, 743 So.2d 1160, 1162-63 (Fla. 4th DCA 1999) ("It is insufficient to plead opinions, theories, legal conclusions or argument."); *Maiden v. Carter*, 234 So.2d 168, 170 (Fla. 1st DCA 1970) ("It is a fundamental principle of pleading that the complaint, to be sufficient, must allege ultimate facts as distinguished from legal conclusions which, if proved, would establish a cause of action for which relief may be granted.").

30. Therefore, Defendant's fraudulent-misrepresentation claim fails to state a cause of action and should be dismissed.

D. COUNT IV – ABUSE OF PROCESS

31. Count IV, Defendant's claim of "abuse of the legal process," also fails to state a cause of action.

32. "A cause of action for abuse of process contains three elements: (1) that the defendant made an illegal, improper, or perverted use of process; (2) that the defendant had ulterior motives or purposes in exercising such illegal, improper, or perverted use of process; and (3) that, as a result of such action on the part of the defendant, the plaintiff suffered damage." *S&I Investments v. Payless Flea Market, Inc.*, 36 So.3d 909, 917 (Fla. 4th DCA 2010).

33. Defendant has not alleged and cannot allege either of the first two elements.

34. Defendant merely alleges that Plaintiff filed a "frivolous lawsuit against Sargent... with a malicious motive and lacking probable cause." (Def.'s Second Am. Countercl. ¶¶ 63). Even if that allegation were true, which Plaintiff emphatically denies, it would not support a claim for abuse of process.

35. "[T]he tort of abuse of process is concerned with the improper use of process after it issues." *Marty v. Gresh*, 501 So.2d 87, 89 (Fla. 1st DCA 1987) (quoting *Yoder v. Adriatico*, 459 So.2d 449, 450 (Fla. 5th DCA 1984)). "[T]he usual case of abuse of process involves some form

of extortion.” *Bothmann v. Harrington*, 458 So.2d 1163, 1169 (Fla. 3d DCA 1984). “[A]buse of process requires an act constituting the misuse of process after it issues. The maliciousness or lack of foundation of the asserted cause of action itself is actually irrelevant to the tort of abuse of process.” *Cazares v. Church of Scientology of Cal., Inc.*, 444 So.2d 442, 444 (Fla. 5th DCA 1983). “The plaintiff must prove that the process was used for an immediate purpose other than that for which it was designed. Where the process was used to accomplish the result for which it was intended, *regardless of an incidental or concurrent motive of spite or ulterior purpose*, there is no abuse of process.” *S&I Investments v. Payless Flea Market, Inc.*, 36 So.3d 909, 917 (Fla. 4th DCA 2010) (internal citations omitted) (emphasis in original).

36. In this case, Plaintiff sued Defendant to recover the unpaid balance that remains owed by Defendant to Plaintiff under the parties’ construction contract. Defendant has not alleged and cannot allege that Plaintiff has used this litigation for any immediate purpose other than that for which it was designed – that is, to seek collection of the remaining balance on the parties’ contract.

37. Therefore, Defendant’s abuse-of-process claim fails to state a cause of action and should be dismissed.

V. DEFENDANT’S DEMAND FOR JURY TRIAL SHOULD BE STRICKEN

38. Florida Small Claims Rule 7.150 provides: “Jury trials may be had upon written demand of the plaintiff at the time of the commencement of the suit, or by the defendant within 5 days after service of notice of suit or at the pretrial conference, if any. Otherwise jury trial shall be deemed waived.”

39. Pursuant to Rule 7.150, Defendant waived his right to demand a jury trial long ago by not asserting it at the pretrial conference in this case.

40. Neither Defendant’s original counterclaim nor his “second amended” counterclaim revived the time for demanding a jury trial because neither injected new issues into this case. *See Dr. Phillips, Inc. v. L&W Supply Corp.*, 790 So.2d 539, 545 (Fla. 5th DCA 2001) (affirming the striking of a demand for jury trial first made in an amended pleading that did not inject new issues into the case). “Whether there is a ‘new issue’ depends on whether the amended pleadings contain new issues of fact, rather than new theories of recovery.” *Id.* (quoting *Adler v. Seligman of Florida, Inc.*, 492 So.2d 730, 733 (Fla. 4th DCA 1986)).

41. Defendant’s counterclaim in this case is a compulsory one. Therefore, by definition, it did not and could not inject new factual scenarios into the case, but depended on and arose from the

very same transaction alleged in Plaintiff's statement of claim in this case – that is, the performance of the parties' contract for the remodeling of a bathroom in Defendant's home.

42. Even if Defendant had injected new issues into this case, he would not be able to overcome his initial waiver of the right to demand a jury trial because, at this point, a jury trial would impose an injustice upon Plaintiff and an unreasonable inconvenience on this Court. *See Dr. Phillips, Inc. v. L&W Supply Corp.*, 790 So.2d at 545 (affirming the striking of a demand for jury trial because the appellant did not establish that the late-demanded jury trial would impose neither an injustice nor an inconvenience). Florida Small Claims Rule 7.010(a) requires this Court to construe the rules so as "to implement the simple, speedy, and inexpensive trial of actions at law in county courts." Defendant has already made this case anything but simple, speedy and inexpensive. Defendant has delayed this case for a year and a half without leaving the pleading stage, causing inordinate expense to Plaintiff (and presumably to Defendant as well). A jury trial would cause further, unreasonable increases in the costs of this case and further, unreasonable delay of the trial of this case.

WHEREFORE, Plaintiff respectfully requests this Court to enter an order:

- a. striking Defendant's latest pleading, his "Second Amended Affirmative Defenses and Counterclaims," in its entirety;
- b. striking each of Defendant's amended affirmative defenses;
- c. striking paragraphs 23 through 34 of Defendant's amended counterclaim;
- d. dismissing Defendant's amended counterclaim;
- e. awarding Plaintiff's attorney's fees pursuant to section 501.2105, Florida Statutes;
- f. awarding Plaintiff's costs pursuant to sections 57.041 and 501.2105, Florida Statutes; and
- g. granting to Plaintiff any other relief this Court deems just, equitable, or proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion was filed through the Florida Courts E-filing Portal, which will furnish a copy to Defendant's counsel, Eric Jones, via email to wereallycareaboutu@gmail.com, on this 28th day of October 2019.

/s/ Jeffrey G. Haynie
Jeffrey G. Haynie

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