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IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2020-CA-2133
DIVISION: CV-E

TANISHA ANDERSON,
As Mother and next friend of I.L., a minor,

Plaintiff,

vs.

DUVAL COUNTY SCHOOL BOARD,

Defendant.

_____ /

MOTION TO STRIKE AFFIRMATIVE DEFENSES

COMES NOW, the Plaintiff, TANISHA ANDERSON (hereinafter "Ms. Anderson"), by and through undersigned counsel and pursuant to Florida Rule of Civil Procedure 1.140, hereby moves this Honorable Court for an Order Striking the Affirmative Defenses pled in Defendant's, DUVAL COUNTY SCHOOL BOARD (hereinafter "DCSB") "Answer and Defenses" (hereinafter referred to as "Answer") filed by the Defendant, and in support thereof states::

INTRODUCTION

This action was initiated to recover damages for personal property damages and injuries to Ms. Anderson, which was caused by the negligence of DCSB. Specifically, DCSB carelessly and/or negligently operated and oversaw a school and this caused damage to Ms. Anderson.

On or about May 4, 2020, DCSB filed their Answer to Ms. Anderson's Complaint. Defendant pled nine (9) affirmative defenses in its Answer. Ms. Anderson moves to strike these Affirmative Defenses for the reasons stated herein.

MEMORANDUM OF LAW

Florida has been and continues to be a notice-pleading state. Florida Rule of Civil Procedure 1.110(b) only requires that a pleading contain a "short and plain statement of ultimate facts." Ultimate facts are the final resulting facts, reached by the process of logical reasoning from detailed probative facts. Ultimate issuable facts only, as distinguished from evidentiary facts and conclusions of law, are what must be plead. This has long been and continues to be the law of Florida. *Ingram-Dekle Lbr. Co., v. Geiger*, 71 So. 552 (Fla. 1916); *Barton v. Moline Properties*, 164 So. 551 (Fla. 1935); *Meadary v. Dalman*, 69 So.2d 888 (Fla. 1954); *Williams v. Guyton*, 167 So.2d 7 (Fla. 3rd DCA 1964) *cert. Den.* 168 So.2d 751 (Fla. 1964).

However, the allegations of the affirmative defenses in this case do not meet the requirement of ultimate facts. There is nothing in the affirmative defenses that would permit Ms. Anderson to know what facts, as opposed to theory and conjecture, the defense relies upon. The notice-pleading rule does not mean that DCSB may merely allege affirmative defenses simply by naming the affirmative defense and alleging no facts specific to this case. Ms. Anderson is entitled to have ultimate facts pled before framing any reply to the affirmative defenses. Without the ultimate facts, Ms. Anderson will be unable to frame any reply that may be required under the facts as alleged by the defense.

Even if the Court does not find that the affirmative defenses should be stricken or dismissed, Ms. Anderson is, at a minimum, entitled to have DCSB clarify its Affirmative Defenses pursuant to Rule 1.1.40(e). When pleadings are sufficient to state a cause of action a party may nevertheless be entitled to seek clarification by way of a motion for more definite statement under Rule 1.140(e). *Feller v. Eau Gallie Yatch*, 397 So.2d 1155 (Fla. 5th DCA 1981). This is also true even if the allegations contain sufficient particularity to overcome a motion to

dismiss under Rule 1.120(b). *Manka v. Defranco's Inc.*, 575 So.2d 1357 (Fla. 1st DCA 1991).

Thus, Ms. Anderson is entitled to have the basis of the affirmative defenses clarified.

Finally, Ms. Anderson moves to strike the Affirmative Defenses filed by DCSB in this matter. Many of these affirmative defenses, if not all, are completely inapplicable to the facts alleged in Ms. Anderson's Complaint and cannot constitute affirmative defenses of any kind. These are matters of avoidance. It is procedurally incorrect to add motions to dismiss or attach the Ms. Anderson's allegations under the guise of affirmative defenses.

MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES

I. First Affirmative Defense

DCSB's First Affirmative Defense states: "At the time and place alleged in the Complaint, I.L. was himself negligent and such negligence was the sole proximate cause of the injury complained of and serves to bar or comparatively reduce the damages which may be claimed."

Ms. Anderson moves to strike DCSB's Third Affirmative Defense on the grounds that that Florida follows the law of comparative negligence, which reduces Plaintiff's recovery by his or her own negligence, but does not bar recovery on the claims. Florida Statute section §768.81 states, "In a negligence action, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery." Fla. Stat. § 768.81(2) (2012). DCSB's Affirmative Defense incorrectly applies the law in this case. As such, it should be stricken.

Furthermore, this defense lack sufficient particularity and should be drafted to more definitely state the facts upon which said affirmative defense is predicated. See *Tropical*

Exterminators v. Murray, 171 So.2d 432 (Fla. 2d. DCA 1965) *cert. denied* 177 So.2d 435 (Fla. 1965).

II. Second Affirmative Defense

DCSB's Second Affirmative Defense states: "Plaintiff received, or is entitled to receive, or may in the future receive, compensation for injuries and damages sustained from collateral sources and Defendant claims a setoff for said compensation."

Ms. Anderson moves to strike DCSB's Second Affirmative Defense on the grounds that this is not a properly stated affirmative defense for a collateral source set-off. DCSB does not receive a reduction in award by the total amount of which has been paid, only those amounts which are paid as defined by the collateral source statute, § 786.76 Fla. Stat. Here, DCSB is attempting to broaden the scope of the collateral source statute. Thus, this affirmative defense should be stricken.

Furthermore, this defense lack sufficient particularity and should be drafted to more definitely state the facts upon which said affirmative defense is predicated. See *Tropical Exterminators v. Murray*, 171 So.2d 432 (Fla. 2d. DCA 1965) *cert. denied* 177 So.2d 435 (Fla. 1965).

III. Third Affirmative Defense

DCSB's Third Affirmative Defense states: "Plaintiff and/or I.L. failed to mitigate their damages and by their failure contributed to the extent of the injuries claimed and, accordingly, the damages should be barred or reduced in proportion to said failure."

Ms. Anderson moves to strike DCSB's Third Affirmative Defense on the grounds that not only is the Failure to Mitigate Damages Affirmative Defense an insufficient legal conclusion, it is also no longer a separate affirmative defense. The doctrine of comparative negligence

subsumes the concept of mitigation of damages. Thus, the Fourth Affirmative Defense is legally insufficient and must be stricken.

IV. Fourth Affirmative Defense

DCSB's Fourth Affirmative Defense states: "Defendant is immune from tort liability except to the extent waived in Section 768.28(a), Florida Statutes."

Ms. Anderson moves to strike DCSB's Fourth Affirmative Defense on the grounds that although this is tort claims brought against a governmental entity, this is precisely the liability that is permitted by the statute. Furthermore, Ms. Anderson has satisfied each condition precedent for the relief sought in the Complaint. Accordingly, this affirmative defense is immaterial and impertinent, and must be stricken.

V. Fifth Affirmative Defense

DCSB's Fifth Affirmative Defense states: "Plaintiff has failed to satisfy the requirements of Section 768.28(7), Florida Statutes; therefore, DCSB is immune from suit and this action is barred."

Ms. Anderson moves to strike DCSB's Fifth Affirmative Defense on the grounds that Ms. Anderson has satisfied each condition precedent for the relief sought in the Complaint. DCSB alleges that the Plaintiffs failed to present the claim in writing to DCSB citing Section 768.28(7), Florida Statutes. Section 768.28(7), Florida Statutes, applicable to tort claims brought against governmental entities, but Ms. Anderson provided this notice. This is the same for Sections 112.201 through 112.206 Jacksonville Municipal Code. Accordingly, this affirmative defense fails to account facts of this case, and must be stricken. A copy of the statutory notice is attached to Ms. Anderson's Complaint as Exhibit N.

Moreover, compliance with said statutory provisions does not constitute an element of the claim asserted. Fla. Stat. 768.28(6)(b)("For purposes of this section, the requirements of notice to the agency and denial of the claim pursuant to paragraph (a) are conditions precedent to maintaining an action but shall not be deemed to be elements of the cause of action and shall not affect the date on which the cause of action accrues.").

VI. Sixth Affirmative Defense

DCSB's Sixth Affirmative Defense states: " Plaintiff is not entitled to recover economic damages for those past medical expenses, if any, written off by his medical care providers or reduced by agreement between the medical care providers and insurers, regardless of whether such write-offs constitute collateral sources as defined in Section 768.76, Florida Statutes, or by common law."

Ms. Anderson moves to strike DCSB's Sixth on the grounds that this affirmative defense is the same as the DCSB's Second Affirmative Defense and these defenses are simply a statement of Florida law which would apply to any post-judgment proceedings. A trial court is proper in striking affirmative defenses when the defenses do not raise any new matters to defeat the Complaint. *Gatt v. Keyes Corp.*, 446 So.2d 211, 212 (Fla. 3rd DCA 1984).

VII. Seventh Affirmative Defense

DCSB's Seventh Affirmative Defense states: "The Plaintiff has failed to comply with the requirements of Section 768.28(6), Florida Statutes and Sections 112.201 through 112.206 Jacksonville Municipal Code."

Ms. Anderson moves to strike DCSB's Fifth Affirmative Defense on the grounds that Ms. Anderson has satisfied each condition precedent for the relief sought in the Complaint. DCSB alleges that the Plaintiffs failed to present the claim in writing to DCSB citing Section 768.28(6),

Florida Statutes. Section 768.28(6), Florida Statutes, applicable to tort claims brought against governmental entities, but Ms. Anderson provided this notice. This is the same for Sections 112.201 through 112.206 Jacksonville Municipal Code. Accordingly, this affirmative defense fails to account facts of this case, and must be stricken. A copy of the statutory notice is attached to Ms. Anderson's Complaint as Exhibit N.

Moreover, compliance with said statutory provisions does not constitute an element of the claim asserted. Fla. Stat. 768.28(6)(b) ("For purposes of this section, the requirements of notice to the agency and denial of the claim pursuant to paragraph (a) are conditions precedent to maintaining an action but shall not be deemed to be elements of the cause of action and shall not affect the date on which the cause of action accrues.").

VIII. Eighth Affirmative Defense

DCSB's Eighth Affirmative Defense states: " The Defendant alleges that Plaintiff has failed to state a cause of action against the Plaintiff upon which relief can be granted."

Ms. Anderson moves to strike DCSB's Eighth Affirmative Defense on the grounds that this affirmative defense does nothing more than deny Plaintiff's allegations. A denial should not be pleaded as an affirmative defense. *Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432 (Fla. 2d DCA 1965). Properly asserted affirmative defenses raise new matters which must be pled.

Pursuant to Florida Rule of Civil Procedure 1.140(b) the defense of failure to state a cause of action must be made by motion before pleading if a further pleading is permitted. DCSB had an opportunity to file a motion to dismiss and raise this exact issue. DCSB choose to instead answer the Complaint. Only affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion to dismiss.

VII. Nineth Affirmative Defense

DCSB's Nineth Affirmative Defense states: "Any claim by Plaintiff for attorney's fees should be stricken and are prohibited by Section 768.28, Florida Statutes."

Ms. Anderson moves to strike DCSB's Nineth Affirmative Defense on the grounds that this affirmative defense is an incorrect statement of law. There is nothing in Fla. Stat. §768.28 that prohibits the recovery of attorney's fees.

Taken Arguendo that this is additional grounds to strike a claim for attorney's fees, Ms. Anderson moves to strike this affirmative defense on the grounds that DCSB has failed to plead this affirmative defense with the requisite specificity and particularity required by Florida Rules of Civil Procedure 1.140; *Cady v. Chevy Chase S & L, Inc.*, 528 So 2d 136 (Fla 4th DCA 1988).

CONCLUSION

Rule 2.515(a), Florida Rule of Judicial Administration, states that a matter should not be pled unless there is good ground to support it and that it is not interposed for delay. In the instant matter, there is no good ground to support DCSB's Affirmative Defense and therefore, it should be stricken.

Affirmative defenses that are conclusory in their content, lacking certainty, or lacking any real allegations of ultimate facts are legally insufficient. See *Caddy v. Chevy Chase Savings and Loan, Inc.*, 528 So.2d 136 (Fla. 4th DCA 1988); *Zito v. Washington Federal Savings and Loan Association of Miami Beach*, 318 So.2d 175 (Fla. 3rd DCA 1975), *cert. denied* 330 So.2d 23 (Fla. 1976). Each element of a defense recognized by law must be pled. *L.B. McLeod Construction Co. v. Cooper*, 134 So. 224 (Fla. 1931).

True affirmative defenses "don't deny the facts of the opposing party's claim, but they raise some new matter which defeats the opposite party's otherwise apparently valid claim."

Tropical Exterminators v. Murray, 171 So.2d 432 (Fla. 2d. DCA 1965). Florida Rule of Civil Procedure 1.140(b), which governs the procedure for asserting defenses, states in pertinent part, "Every defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading..."

DCSB failed to state "specifically and with particularity in the responsive pleading" the "grounds" for either of these purported defenses and the "substantial matters of law intended to be argued."

DCSB has the burden of proof with regards to these affirmative defenses. See *Boymer v. Birmelin*, 227 So.2d 358 (Fla. 3rd DCA 1969). As such, DCSB should be required to plead them properly.

WHEREFORE, Ms. Anderson respectfully requests that this Honorable Court strike DCSB's Affirmative Defenses and all other relief this Court deems just and proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was via the Florida Courts E-Filing Portal and a copy will be served via electronic mail to counsel for the Defendant, DCSB, Gaby C. Young, Esq., at GCYoung@coj.net this 27th day of May 2020.

Respectfully Submitted,

POSTILLION LAW GROUP, LLC

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