

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

CASE NO. 05-2013-CA-33457

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

Plaintiff,

vs.

BLUEGEM, LLC, a Florida limited liability  
company,

Defendant.

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BLUEGEM, LLC, a Florida limited liability  
company,

Counter-Plaintiff,

vs.

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

Counter-Defendant.

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**PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES**

Plaintiff/Counter-Defendant, SCOTT ELLIS, in his official capacity as Brevard County Clerk of the Circuit Court (the "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, BLUEGEM, LLC ("BlueGEM"), Affirmative Defenses, and as grounds therefore states:

## BACKGROUND FACTS

1. On or about June 29, 2012, the former Brevard County Clerk of Court, Mitch Needelman (“Former Clerk Needelman”), executed a contract for document scanning services (“Scanning Contract”) with BlueGEM.
2. On or about October 22, 2012, Former Clerk Needelman executed an amendment to the Scanning Contract (“Amendment”) that required the Clerk of Court to borrow \$6.1 million to pay BlueGEM prior to the conclusion of their services.
3. On or about October 29, 2012, BlueGEM was paid in full pursuant to the Scanning Contract and Amendment.
4. On or about March 29, 2013, the Clerk of Court filed a multi-count Complaint against BlueGEM.
5. On or about April 25, 2013, BlueGEM responded to the Complaint by filing an Answer, Affirmative Defenses & Counterclaim.

## MEMORANDUM OF LAW

### **I. DEFENDANTS’ AFFIRMATIVE DEFENSES ARE FACTUALLY UNSUPPORTED AND LEGALLY INSUFFICIENT**

Most of BlueGEM’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 BlueGEM’s Affirmative Defenses addressed below are legally insufficient and

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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 AND SECOND AFFIRMATIVE DEFENSES** – BlueGEM’s First and Second Affirmative Defenses all argue that the Clerk of Court fails to state a cause of action. However, BlueGEM 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 Clerk of Court of necessary ultimate facts to allow the Clerk of Court to formulate a response. As such, these conclusory statements are insufficient and the Affirmative Defenses should be stricken.

**III. NINTH AFFIRMATIVE DEFENSE** – BlueGEM’s Ninth Affirmative Defense is unclear and fails to identify any legally cognizable affirmative defense. It seems to suggest BlueGEM is relying upon “*prior breach*” as the Affirmative Defense, in that BlueGEM states: “(1) it has fully performed it[s] obligations under the Scanning Contract 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) the volume of documents scanned to date is directly the result of Plaintiff’s failure and/or unwillingness to provide the sufficient volume of documents....” These allegations fail to state sufficient facts to support the Affirmative Defense. Further, even if BlueGEM alleged sufficient facts, its allegations would not constitute a valid affirmative defense because BlueGEM mischaracterizes the material terms of the Scanning Contract. BlueGEM has the right to enforce payment from the Clerk of Court, while the Clerk of Court has the right to enforce the services to be performed. BlueGEM has been paid in full, so the Clerk of Court has satisfied its obligation and no prior breach occurred. As such, this Affirmative Defense should be stricken.

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

**V. FOURTEENTH AFFIRMATIVE DEFENSE** - BlueGEM’s Fourteenth Affirmative Defense attempts to assert the defense of “*abandonment of contract*.” BlueGEM states “Plaintiff has abandoned the Scanning Contract and the Amendment.” BlueGEM fails to reasonably inform the Clerk of Court of necessary facts to allow for a proper response. As such, this conclusory statement is insufficient and the Affirmative Defense should be stricken.

**VI. FIFTEENTH AFFIRMATIVE DEFENSE** - BlueGEM’s Fifteenth Affirmative Defense attempts to assert the defense of “*anticipatory repudiation*.” BlueGEM states “Plaintiff’s actions with respect to the filing of the Complaint, and the letter attached ... are an anticipatory repudiation....” This is similar to the BlueGEM’s Ninth Affirmative Defense, *prior breach*. BlueGEM mischaracterizes the material terms of the contract. BlueGEM has the right to enforce payment from the Clerk of Court, while the Clerk of Court has the right to enforce the services to be performed. BlueGEM has been paid in full, so the Clerk of Court has satisfied its obligation and did not breach the contract. As such, this Affirmative Defense should be stricken.

WHEREFORE, 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, Ninth, Eleventh, Fourteen and Fifteenth 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 E-Service to Michael Gay, Esq., Foley & Lardner LLP, Attorneys for Defendant/Counter-Plaintiff: mgay@foley.com and rrightmyer@foley.com this 17 day of May, 2013.



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