

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

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

Plaintiff,

vs.

Case No. 05-2013-CA033453

ROSEWARE, LLC, a Florida limited liability
company,

Defendant.

ANSWER AND AFFIRMATIVE DEFENSES

Defendant, ROSEWARE LLC (“Defendant”), by and through its undersigned counsel, hereby submits its Answers, Affirmative Defenses and Counterclaim to that certain Complaint filed by Plaintiff, SCOTT ELLIS, in his official capacity as Brevard County Clerk of the Circuit Court, (“Plaintiff”) and served upon Defendant on or about March 29, 2013. Defendant responds to the Plaintiff’s Complaint as follows:¹

GENERAL ALLEGATIONS

1. Admitted.
2. Admitted.
3. Admitted. However, for the purposes of jurisdiction, the relevant inquiry is the citizenship of the members of the limited liability company.

¹ Unless otherwise specifically stated, each numbered paragraph below corresponds to the similarly numbered paragraph of the Complaint.

4. Admitted.²

5. Denied.

6. Denied.

**COUNT I – BREACH OF CONTRACT
(I.T. Consultancy Contract and the Addendum)**

7. Denied.

8. The Defendant restates and incorporates each of its prior answers to Paragraphs 1 through 6 above, in response to Paragraph 8.

9. Admitted.

10. Denied as stated. The so-called “I.T. Consultancy Contract” speaks for itself and the “various obligations” of the Defendant as set forth therein.

11. Admitted.

12. Admitted.

13. The first sentence of Paragraph 13 is admitted. The second and third sentences of Paragraph 13 is denied as stated, as the “Addendum,” attached as Exhibit C to the Complaint, speaks for itself.

14. Admitted, as the services under the “Addendum” were outside the scope of the original April 6, 2012 “I.T. Consultancy Contract.”

15. Admitted.

16. Admitted.

17. Denied as stated.

18. Denied as stated.

² Defendant intends to timely file a motion to change venue pursuant to §47.101, *Fla.Stat.* at the appropriate time.

19. Admitted.

20. Denied.

21. Denied.

22. Denied.

With respect to Plaintiff's *ad damnum* clause (the prayer for relief), Defendant denies Plaintiff's ability or right to recover the damages alleged.

COUNT II – BREACH OF CONTRACT
(Cost Containment Contract)

23. Denied.

24. The Defendant restates and incorporates each of its prior answers to Paragraphs 1 through 6 above, in response to Paragraph 8.

25. Admitted.

26. Admitted.

27. Admitted.

28. Denied as stated. The "Cost Containment Contract" speaks for itself and sets forth the obligations of Roseware, as well as the obligations of the Plaintiff (the Brevard County Clerk of the Circuit Court).

29. Denied as stated.

30. Paragraph 30 and its subparts, (a) through (e), are all denied.

31. Denied.

32. Denied.

With respect to Plaintiff's *ad damnum* clause (the prayer for relief), Defendant denies Plaintiff's ability or right to recover the damages alleged.

COUNT III – RESCISSION
(Addendum to the I.T. Consultancy Contract)

33. Denied.

34. The Defendant restates and incorporates each of its prior answers to Paragraphs 1 through 6 and 9 through 19 above, in response to Paragraph 34.

35. Denied as stated. The “Addendum” speaks for itself.

36. Denied.

With respect to Plaintiff’s *ad damnum* clause (the prayer for relief), Defendant denies Plaintiff’s ability or right to the relief and recovery sought.

COUNT IV – DECLARATORY JUDGMENT
(I.T. Consultancy Contract, the Addendum and Cost Containment Contract)

37. Denied.

38. The Defendant restates and incorporates each of its prior answers to Paragraphs 1 through 6, 9 through 19, and 25 through 29 above, in response to Paragraph 38.

39. Denied.

40. Denied as stated. The language in the various contracts speak for themselves.

41. Paragraph 41 and all of its subparts, (a) through (d), are denied.

42. Denied as stated. The language in the various contracts speak for themselves.

43. Paragraph 43 and all of its subparts, (a) through (c), are denied.

44. Denied as stated. The language in the various contracts speak for themselves.

45. Denied.

46. Denied as stated. The language in the various contracts speak for themselves.

47. Denied.

48. Denied as stated. The language in the various contracts speak for themselves.

49. Denied.

50. Denied as stated. Schedule "B" of the "I.T. Consultancy Contract" and the "Cost Containment Contract" speaks for itself.

51. Denied.

52. The Defendant is without knowledge of Plaintiff's "information and belief" and therefore denies the same. The Defendant admits that it does, and will, contend that the "Contracts" are valid and enforceable.

53. Denied.

54. Denied.

55. Denied.

56. Denied.

With respect to Plaintiff's *ad damnum* clause (the prayer for relief), Defendant denies Plaintiff's ability or right to the relief and recovery sought.

AFFIRMATIVE DEFENSES

The Defendant hereby asserts and alleges the following Affirmative Defenses to the claims set forth in Plaintiff's Complaint:

First Affirmative Defense

As and for Defendant's First Affirmative Defense, the Defendant states that the 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 Count I for “Breach of Contract” relating to the “I.T. Consultancy Contract”³ and the “Addendum.”⁴

Second Affirmative Defense

As and for Defendant’s Second Affirmative Defense, the Defendant states that the 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 Count II for “Breach of Contract” relating to the “Cost Containment Contract.”⁵

Third Affirmative Defense

As and for Defendant’s Third Affirmative Defense, the Defendant states that the 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 Count III for “Rescission” of the so-called “Addendum.” In addition, the Plaintiff has failed to set forth, and will be unable to show, that no adequate remedy at law exists. Moreover, the Plaintiff has failed to set forth, and will be unable to show, that there exists any fraud, mutual mistake, false representations, impossibility of performance, or other proper ground which would allow for rescission or cancellation of the “Addendum” or the “I.T. Consultancy Contract.”

Fourth Affirmative Defense

As and for Defendant’s Fourth Affirmative Defense, the Defendant states that the 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 Count IV for “Declaratory Judgment.”

³ As this term is defined in the Complaint.

⁴ As this term is defined in the Complaint.

⁵ As this term is defined in the Complaint.

Fifth Affirmative Defense

As and for Defendant's Fifth Affirmative Defense, and with respect to Count IV for "Declaratory Judgment," the Defendant states that the Plaintiff is seeking an improper advisory opinion from the Court, and further that there is no case or controversy at issue over the matters alleged in the Complaint. Plaintiff is not reasonably in doubt as to the rights, status, immunity, powers or privileges of the Brevard County Clerk of Circuit Court with respect to the "I.T. Consultancy Contract," the "Addendum," or the "Cost Containment Contract."

Sixth Affirmative Defense

As and for Defendant's Sixth Affirmative Defense, and with respect to Count III for "Rescission," the Defendant states that the Plaintiff possesses an adequate remedy at law and, thus, the equitable remedy of rescission is wholly unavailable to the Plaintiff.

Seventh Affirmative Defense

As and for Defendant's Seventh Affirmative Defense, and with respect to Count III for "Rescission," the Defendant states that Plaintiff has waived any right, or basis upon which he might rely, to seek rescission.

Eighth Affirmative Defense

As and for Defendant's Eighth Affirmative Defense, with respect to Count III for "Rescission" and Count IV for "Declaratory Judgment," the Defendant states that to the extent any provision of the "I.T. Consultancy Contract" (Exhibit A to the Complaint), the "Addendum" (Exhibit C to the Complaint), and/or the "Cost Containment Contract" (Exhibit F to the Complaint) is declared and proven invalid or unenforceable, said provision(s) does not affect (or otherwise invalidate) any other provision(s) of the I.T. Consultancy Contract, the Addendum, and/or the Cost Containment Contract. In accordance with Paragraph 20 of the "Standard Terms

and Conditions for I.T. Services,” which is attached to and a part of the I.T. Consultancy Contract and the Addendum (by reference), and as set forth in Paragraph 21 of the “Standard Terms and Conditions for I.T. Services,” which is attached to and a part of the Cost Containment Contract:

If any provision of the Agreement shall be found by any court to be invalid or unenforceable to [sic] the invalidity or unenforceability of such provision shall not affect the other provisions of the Agreement and all provisions not affected by such invalidity or unenforceability shall remain in full force and effect. The parties hereby agree to attempt to substitute for any invalid or unenforceable provision a valid or enforceable provision which achieves to the greatest extent possible to [sic] economic legal and commercial objectives of the invalid or unenforceable provision.

Accordingly, even if the Court determines that any provision(s) is invalid or unenforceable, such determination does not render the “I.T. Consultancy Contract,” the “Addendum” or the “Cost Containment Contract” unenforceable in whole. Nor, thereby, does such a determination provide the Plaintiff with a basis for rescission and/or a need for declaratory judgment. Moreover, as agreed to by the parties, any provision that is determined to be invalid or unenforceable is to be substituted with a valid and enforceable provision that achieves, to the greatest extent possible, the economic, legal and commercial objectives of the original provision (that is declared and proven invalid or unenforceable). Stated simply, a determination that any provision(s) is invalid or unenforceable does not provide the Plaintiff with a basis to rescind the “I.T. Consultancy Contract” or the “Addendum.” [Note: the Plaintiff did not request or seek rescission of the “Cost Containment Contract.”]

Ninth Affirmative Defense

As and for Defendant’s Ninth Affirmative Defense, with respect to Counts I and II for “Breach of Contract,” the Defendant states that: (1) it has fully performed its obligations, to date,

under the "I.T. Consultancy Contract," the "Addendum," and the "Cost Containment Contract"; (2) the Defendant is, and has always been, ready, willing and able to perform its obligations under the aforementioned contracts; (3) Plaintiff's actions, and Plaintiff's actions alone, have prevented the Defendant from continuing its performance under the "I.T. Consultancy Contract," the "Addendum" and/or the "Cost Containment Contract."; and, (4) to the extent performance under any of the aforementioned contracts is not complete, the same is the direct and sole result of the actions (or inactions) of the Plaintiff.

Tenth Affirmative Defense

As and for Defendant's Tenth Affirmative Defense, the Defendant states that Plaintiff is estopped from seeking rescission and/or damages for breach of contract. The Defendant contracted with the real party in interest, the Brevard County Clerk of the Circuit Court. It did not contract with a specific individual, as SCOTT ELLIS seemingly desires the Court and the public to believe. SCOTT ELLIS is merely the current head of the legal entity which is the Brevard County Clerk of the Circuit Court. It is the Brevard County Clerk of the Circuit Court who executed the "I.T. Consultancy Contract," the "Addendum," and the "Cost Containment Contract." Accordingly, the Plaintiff, SCOTT ELLIS, as the current head of the Brevard County Clerk of the Circuit Court is estopped from proclaiming that the "I.T. Consultancy Contract" and the "Addendum" are invalid, unenforceable, illegal, void, voidable, and so forth, as he has asserted, or that he is damaged by the Defendant's purported breach of the "I.T. Consultancy Contract," the "Addendum" and/or the "Cost Containment Contract."

Eleventh Affirmative Defense

As and for Defendant's Eleventh Affirmative Defense, the Defendant states that the Plaintiff's claims in equity are barred by the doctrine of unclean hands.

Twelfth Affirmative Defense

As and for Defendant's Twelfth Affirmative Defense, with respect to Counts I and II for "Breach of Contract," the Defendant states that the Plaintiff is estopped from recovering damages for breach of contract on the basis that it is the Plaintiff's conduct and actions which have hindered and/or prevented performance by the Defendant.

Thirteenth Affirmative Defense

As and for Defendant's Thirteenth Affirmative Defense, the Defendants state that the Plaintiff's actions with respect to the filing of the Complaint are an anticipatory repudiation of: (1) the "I.T. Consultancy Contract"; (2) the "Addendum"; and, (3) the Cost Containment Contract. As a result of Plaintiff's anticipatory repudiation, the Defendant is relieved of its duty to further perform under the aforementioned contracts.

Fourteenth Affirmative Defense

As and for Defendant's Fourteenth Affirmative Defense, with respect to Counts I and II for "Breach of Contract," the Defendant states that the Plaintiff has abandoned the "I.T. Consultancy Contract," the "Addendum," and the "Cost Containment Contract."

Fifteenth Affirmative Defense

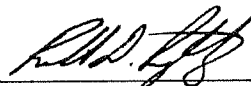
As and for Defendant's Fifteenth Affirmative Defense, with respect to Counts I and II for "Breach of Contract," the Defendant states that the Plaintiff has failed to mitigate its damages, in that it failed to follow the "Dispute Resolution" procedures set forth in the "Standard Terms and Conditions for I.T. Services," which are part of the "I.T. Consultancy Contract," the "Addendum," and the "Cost Containment Contract." The Plaintiff alleges multiple breaches by the Defendants of the aforementioned contracts, however, the Plaintiff failed to timely notify the Defendant of any alleged breaches, and the Plaintiff failed to avail itself of the "Dispute

Resolution” procedures. Accordingly, any damages which Plaintiff has allegedly suffered are the direct and sole result of the Plaintiff’s failure to mitigate his damages through his failure to follow the agreed upon contractual provisions and terms of the aforementioned contracts.

JURY TRIAL DEMAND

ROSEWARE hereby demands a trial by jury as to all issues and matters so triable as a matter of right.

Dated: April 25th, 2013



Michael Gay, Florida Bar No. 0938191
Email: mgay@foley.com
Robert D. Rightmyer, Florida Bar No. 178047
Email: rrightmyer@foley.com
Foley & Lardner LLP
111 North Orange Avenue, Suite 1800
Orlando, FL 32801-2386
P. O. Box 2193
Orlando, FL 32802-2193
Telephone: 407.423.7656
Facsimile: 407.648.1743

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this ^{25th} day of April, 2013 to: Curt Jacobus, Esq. at curt.jacobus@gray-robinson.com; and Alec Russell at alec.russell@gray-robinson.com.



Michael Gay, Florida Bar No. 0938191
Email: mgay@foley.com
Robert D. Rightmyer, Florida Bar No. 178047
Email: rightmyer@foley.com
Foley & Lardner LLP
111 North Orange Avenue, Suite 1800
Orlando, FL 32801-2386
P. O. Box 2193
Orlando, FL 32802-2193
Telephone: 407.423.7656
Facsimile: 407.648.1743