

2025 WL 3091075

Only the Westlaw citation is currently available.

United States District Court, S.D. Florida.

ARCH INSURANCE COMPANY, Plaintiff,

v.

A3 DEVELOPMENT, LLC, a foreign Limited liability company; A3 NORTH DEVELOPMENT, LLC, a foreign limited A liability company; and A3 AMENITIES, LLC, a foreign limited liability company, Defendants.

Case No. 23-cv-23524-BLOOM/Torres

I

Entered on FLSD Docket 10/21/2025

Editor's Note: This decision contains discussion of citation references that are incorrect or do not actually exist. These invalid citations appeared in the original court opinion and have been preserved as written since they are part of the official record. Any links to these invalid citations have been removed

Attorneys and Law Firms

Guy William Harrison, Jeffrey Scott Geller, Edward Etcheverry, Etcheverry & Harrison LLP, Plantation, FL, for Plaintiff.

Elizabeth K. Coppolecchia, Jessika Arce Graham, Joseph Hyam Serota, Richard Bradlee Rosengarten, Weiss Serota Helfman Cole & Bierman, P.L., Coral Gables, FL, Michael John Kurzman, Weiss Serota Helfman Cole & Bierman, Ft. Lauderdale, FL, for Defendants.

ORDER ON MOTION TO STRIKE

BETH BLOOM UNITED STATES DISTRICT JUDGE

*1 **THIS CAUSE** is before the Court upon Plaintiff Arch Insurance Company's ("Plaintiff") Motion to Strike Affirmative Defenses. ECF No. [101]. Defendants A3 Development, LLC ("A3 Development"), A3 North Development, LLC ("A3 North"), and A3 Amenities, LLC ("A3 Amenities") (collectively "Defendants") filed a Response in Opposition ("Response"), ECF No. [107], to which Plaintiff filed a Reply, ECF No. [114]. The Court has reviewed the Motion, the supporting and opposing

submissions, the record, and is otherwise fully advised. For the reasons that follow, Plaintiff's Motion is granted in part and denied in part.

I. BACKGROUND

This case arises from a construction project for certain luxury residences in Miami Beach. After several rounds of pleadings, Plaintiff filed its Third Amended Complaint on December 20, 2024, alleging eight counts seeking declaratory relief and eight counts for breach of contract. ECF No. [80]. In response, Defendants filed a motion seeking to dismiss all sixteen counts. ECF No. [88]. The Court granted Defendants' Motion in part, dismissing the claims for declaratory relief while preserving Plaintiff's breach of contract claims. ECF No. [98]. Thereafter, Defendants filed their Answer and Amended Affirmative Defenses, asserting eight (8) affirmative defenses directed to Plaintiff's breach of contract claims. ECF No. [99]. Plaintiff's instant Motion now seeks to strike Defendants' First, Third, Fourth, Fifth, Sixth, Seventh, and Eighth affirmative defenses on the basis that each is either a mere denial (the First, Fourth, Fifth, and Sixth Affirmative Defenses) or legally insufficient (the Third, Seventh, and Eighth Affirmative Defenses). *See* ECF No. [101].

II. LEGAL STANDARD

A. Pleading Standard for Affirmative Defenses

An affirmative defense is a defense that "admits to the complaint, but avoids liability, wholly or partly, by new allegations of excuse, justification, or other negating matters." *Adams v. Jumpstart Wireless Corp.*, 294 F.R.D. 668, 671 (S.D. Fla. 2013) (citing *Royal Palm Sav. Ass'n v. Pine Trace Corp.*, 716, F. Supp. 1416, 1420 (M.D. Fla. 1989)). District courts in the Eleventh Circuit have been split as to the pleading standard necessary for affirmative defenses. *See FAST SRL v. Direct Connection Travel LLC*, 330 F.R.D. 315, 317 (S.D. Fla. 2018). While some courts have held that affirmative defenses are subject to the heightened pleading standard of Rule 8(a) required by *Twombly* and *Iqbal*, *see, e.g., Torres v. TPUSA, Inc.*, No. 2:08-cv-618-FtM-29DNF, 2009 WL 764466, at *1 (M.D. Fla. Mar. 19, 2009), other courts have concluded that affirmative defenses need only satisfy the "less stringent standards" of Rules 8(b) and 8(c) and thus "need only 'provide fair notice of the nature of the defense and the grounds upon which it rests.'" *Laferte v. Murphy Painters, Inc.*, No. 17-cv-60376, 2017 WL 2537259, at *2 (S.D. Fla. June 12, 2017) (quoting collecting cases); *see Tsavaris v. Pfizer, Inc.*, 310 F.R.D. 678, 681 (S.D. Fla. 2015). Opinions

within this district have reinforced that affirmative defenses need not “satisfy the strictures of *Twombly* and *Iqbal*.” *Mad Room, LLC v. City of Miami*, No. 21-cv-23485, 2024 WL 2776173, at *1 (S.D. Fla. May 30, 2024). The Court agrees with the “growing number of courts” that the lower pleading standard for affirmative defenses “is faithful both to the letter and the spirit of Rules 8(b) and (c), as revealed through the plain language of Rule 8 and Eleventh Circuit precedent.” *Tsavaris*, 310 F.R.D. at 682.

*2 Because this Court follows the lower pleading standard requirement set forth in Rules 8(b) and 8(c), an affirmative defense need only provide the opposing party “fair notice of the nature of the defense and the grounds upon which it rests.” *Forsythe v. Starboard Yacht Group, LLC*, 345 F.R.D. 544, 548 (S.D. Fla. 2023) (quoting *Dionisio v. Ultimate Images & Designs, Inc.*, 391 F. Supp. 3d 1187, 1192 (S.D. Fla. 2019)). In other words, an affirmative defense is sufficiently pled if “a plaintiff has notice that an affirmative defense will be raised at trial.” *Hewitt v. Mobile Research Tech., Inc.*, 285 F. App'x. 694, 696 (11th Cir. 2008) (citing *Hassan v. U.S. Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988)).

B. Motion to Strike

Rule 12(f) of the Federal Rules of Civil Procedure provides that a court “may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). However, “[a] motion to strike will ‘usually be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties.’ ” *Harty v. SRA/Palm Trails Plaza, LLC*, 755 F. Supp. 2d 1215, 1218 (S.D. Fla. 2010) (citing *Story v. Sunshine Foliage World, Inc.*, 120 F. Supp. 2d 1027, 1030 (M.D. Fla. 2000)); see *Home Mgmt. Solutions, Inc. v. Prescient, Inc.*, No. 07-20608-CIV, 2007 WL 2412834, at *1 (S.D. Fla. Aug. 21, 2007); *U.S. Commodity Futures Trading Comm'n v. Minto, LLC*, Case No. 15-cv-61960, 2016 WL 3944101, at *2 (S.D. Fla. May 17, 2016).

While courts have “broad discretion when considering a motion to strike, [] striking defenses from a pleading remains a drastic remedy to be resorted to only when required for the purposes of justice and only when the stricken material has no possible relation to the controversy.” *Lalusis v. NCL (Bah.) Ltd.*, Case No. 24-cv-21354, 2024 WL 3183238, *1 (S.D. Fla. June 26, 2024) (quoting *FAST SRL v. Direct Connection Travel, LLC*, 330 F.R.D. 315, 317 (S.D. Fla. 2018)). That being said, “affirmative defenses may be stricken if the defense is ‘insufficient as a matter of law.’ ” *Forsythe*, 345

F.R.D. at 546 (quoting *Microsoft Corp. v. Jesse's Computers & Repair, Inc.*, 211 F.R.D. 681, 683 (M.D. Fla. 2002)). “A defense is insufficient as a matter of law only if: (1) on the face of the pleadings, it is patently frivolous, or (2) it is clearly invalid as a matter of law.” *Id.*

III. DISCUSSION

A. First, Fourth, Fifth, and Sixth Affirmative Defenses

Plaintiff argues that Defendants’ First, Fourth, Fifth, and Sixth Affirmative Defenses should be stricken because they are mere denials and not true affirmative defenses. See ECF No. [101]. Plaintiff contends the First Affirmative Defense merely asserts that the breach of contract claims are barred because Defendants satisfied all of their contractual obligations. See *id.* at 4. The Fourth Affirmative Defense alleges that the claims are also barred because Defendants provided proper notice under the bonds. *Id.* at 6. As for the Fifth and Sixth Affirmative Defenses, Plaintiff argues they are duplicative of the Second Affirmative Defense and are mere denials because they simply allege that Plaintiff cannot recover on its breach of contract claims because Defendants’ conduct was not the proximate or at least sole proximate cause of Plaintiff’s injuries. See *id.* at 7-8.

Defendants respond that the First Affirmative Defense is more than a mere denial because it “provides a complete defense to liability—that all conditions precedent to [Plaintiff’s] liability were indeed satisfied.” ECF No. [107] at 4. Defendants also maintain that “[u]nder Rule 9(c) a defendant may allege compliance with conditions precedent as an affirmative defense.” *Id.* at 4-5. Defendants argue that the allegations in the Fourth Affirmative Defense establish a valid defense because the contract expressly allowed Defendants to correct defective work. Defendants contend the allegations amount to more than a denial because “courts recognize contractual provisions that waive a plaintiff’s rights under the contractual documents as a valid affirmative defense.” *Id.* at 6. As for the Fifth and Sixth Affirmative Defenses, Defendants contend that both defenses “directly speak to causation and damages” and therefore are not mere denials. *Id.* at 6. Defendants also argue that the defenses are not duplicative of the Second Affirmative Defense because, unlike the Second, the Fifth and Sixth Affirmative Defenses “address [Plaintiff’s] self-infliction of damages under theories of avoidance.” *Id.* at 6. Because avoidance is a valid defense and because “redundant defenses are not valid reasons for striking an affirmative defense,” Defendants insist that Plaintiff’s request to strike the Fifth and Sixth Affirmative Defenses should be denied. *Id.*

*3 The Court finds the First Affirmative Defense is a mere denial. Although Defendants are correct that a failure to satisfy a condition precedent is a valid affirmative defense, see *MSPA Claims I, LLC v. Infinity Auto Ins. Co.*, No. 15-21504-CIV, 2017 WL 10402992, at *4 (S.D. Fla. Aug. 9, 2017), merely alleging that a defendant satisfied all the obligations of a contract is not. Here, Defendants allege that they satisfied the conditions necessary to make a demand under the bonds and therefore did not breach the related contracts. See ECF No. [99] at 35-36. Defendants do not contend that a condition precedent was not satisfied and, therefore, the First Affirmative Defense is not an affirmative defense but rather a denial. Nevertheless, the Court will not strike the defense because “[w]hen a defendant mislabels a specific denial as a defense, the proper remedy is to treat the claim as a denial, not to strike it.” *Tsavaris v. Pfizer*, 310 F.R.D. 678, 682 (S.D. Fla. 2015) (citing *FDIC v. Bristol Home Mortgage Lending, LLC*, No. 08-81536-CIV, 2009 WL 2488302, at *3 (S.D. Fla. Aug. 13, 2009)). As such, Plaintiff’s request to strike the First Affirmative Defense is denied.

In the Fourth Affirmative Defense, Defendants simply contend that they had no obligation under the contract to provide notice to Plaintiff and, therefore, failure to provide such notice was not a breach of the contract. “[A] defense which points out a defect in the Plaintiff’s prima facie case is not an affirmative defense.” *Pujals ex rel. El Rey De Los Habanos, Inc. v. Garcia*, 777 F. Supp. 2d 1322, 1328 (S.D. Fla. 2011) (quoting *In re Rawson Food Serv. Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1989)). Rather than admitting the elements of a breach of contract as is required to assert an affirmative defense, Defendants contend the breach element was not satisfied because there was no obligation under the contract to provide Plaintiff notice. Accordingly, the Fourth Affirmative Defense is a specific denial.¹ However, as previously explained, because mislabeled defenses should not be stricken, the Court denies Plaintiff’s request to strike Defendants’ Fourth Affirmative Defense at this juncture.

The Fifth Affirmative Defense is not a valid defense either. In essence, the Fifth Affirmative Defense alleges that Plaintiff’s own actions contributed to the damages alleged in the Third Amended Complaint. See ECF No. [99] at 38. However, “comparative fault is not a defense to a breach of contract claim.” *Kobi Karp Architecture & Interior Design, Inc. v. RG Michigan 2014 LLC*, No. 18-21079-CIV, 2021 WL 4819903, at *7 (S.D. Fla. Oct. 15, 2021) (quoting *Fed.*

Deposit Ins. Corp. v. Kunzmann Appraisals, Inc., No. 12-CV-80525, 2014 WL 12531543, at *3 (S.D. Fla. Feb. 11, 2014)). While Plaintiff’s comparative fault may be introduced as evidence of damages, “it has no bearing on whether Defendants breached the contract at issue.” *Fed. Deposit Ins. Corp.*, 2014 WL 12531543, at *3 (citing *Tampa Elec. Co. v. Stone & Webster Eng’g Corp.*, 367 F. Supp. 27, 38 (M.D. Fla. 1973)). Accordingly, the Court finds that the Fifth Affirmative Defense must be stricken.

*4 As for the Sixth Affirmative Defense, Defendants allege that Plaintiff’s “claims are barred because to the extent that [Plaintiff] has suffered any damages, [Defendants’] actions were not the proximate legal cause.” ECF No. [99] at 38. The Court finds that these allegations constitute a specific denial of the proximate cause element of Plaintiff’s breach of contract claims and, therefore, cannot be considered a valid affirmative defense. See *Inversiones YV3343, C.A. v. Lynx FBO Fort Lauderdale, LLC*, No. 21-CV-60197, 2024 WL 2938805, at *11 (S.D. Fla. June 11, 2024) (explaining that allegations that defendant was not the proximate cause was not a valid affirmative defense). While Defendants’ Response explains why the Sixth Affirmative Defense is not duplicative of the Second, Defendants fail to explain why the allegations are not merely a specific denial of Plaintiff’s prima facie case. Accordingly, since Defendants failed to establish that the Sixth Affirmative Defense is a valid defense, the Court will treat it as a specific denial of proximate cause.

B. Third Affirmative Defense

The Third Affirmative Defense claims that the Plaintiff’s “claims are barred in whole or in part due to [Plaintiff’s] frustration of the purpose of the bonds.” ECF No. [99] at 36-37. Plaintiff argues that this affirmative defense is legally insufficient “as it is nothing more than the Defendants’ basis for [Plaintiff’s] breach of contract.” ECF No. [101] at 5. *Id.* Defendant does not allege an “unforeseeable event” that would destroy the purpose of the bonds and, therefore, because the challenges Defendants faced were reasonably foreseeable, the affirmative defense must be stricken.

Defendants contend that Plaintiff’s interpretation of the frustration of purpose defense “is a narrow interpretation not supported by case law.” ECF No. [107] at 5. According to Defendants, they “provided a viable and fact-based defense” by alleging that Plaintiff’s “delayed response defeated the core protective purpose of the performance bonds.” *Id.*

Defendants' frustration of purpose defense is indeed sufficient. Defendants simply need to provide "fair notice of the nature of the defense and the grounds upon which it rests." *Forsythe*, 345 F.R.D. at 548. Here, Defendants have provided notice of the defense and have explained that the basis for asserting the defense is because of Plaintiff's delay in electing a preferred remedy. See ECF No. [99] at 36. Whether those grounds are sufficient to ultimately support a frustration of purpose defense is not for the Court to decide at this juncture. As such, the request to strike the Third Affirmative Defense is denied.

C. Seventh Affirmative Defense

Defendants' Seventh Affirmative Defense alleges that Plaintiff's "claims are barred by the doctrine of unclean hands because, among other things, [Plaintiff] acted wrongfully by failing to promptly make an election of remedies under the bonds. ECF No. [99] at 39. Plaintiff argues that the invocation of the unclean hands defense is improper under the circumstances because the defense requires "a showing of unscrupulous practices and conduct, concealment of important facts, trickery, or taking unfair advantage of one's position." ECF No. [101] at 8. Because a failure to promptly make an election of remedies does not rise to the level of egregious conduct, Plaintiff contends Defendants have failed to establish the affirmative defense. Plaintiff also points out that the doctrine of unclean hands is an equitable defense, not a legal one. Given that the remaining claims in this case are all breach of contract claims and, therefore, legal in nature, Plaintiff argues that Defendants cannot rely on this equitable defense.

Defendants respond that the unclean hands defense is appropriate where a "plaintiff attempts to benefit from its own actions or inaction," including where the plaintiff breaches the contract by failing to act under performance bonds. ECF No. [107] at 7.

*5 The Court agrees with Plaintiff. The doctrine of unclean hands is an equitable defense that is not applicable to an action exclusively for legal damages. See *Regions Bank v. Old Jupiter, LLC*, No. 10-80188-CIV, 2010 WL 5148467, at *6 (S.D. Fla. Dec. 13, 2010) ("The unclean hands doctrine traditionally applies only to claims for equitable relief or in opposition to equitable defenses... Where, as here, a plaintiff seeks to recover only damages, the unclean hands doctrine is not applicable"); *21st Mortg. Corp. v. TSE Plantation, LLC*, 301 So. 3d 1120, 1122 (Fla. 1st DCA 2020) ("The unclean hands defense applies to bar an equitable claim"); *Nat'l Loan*

Acquisitions Co. v. Tabernacle Christian Ctr. Ministries, Inc., 402 So. 3d 1028, 1037 (Fla. 4th DCA 2024) ("Unclean hands is an equitable defense[.]") (quoting *McMichael v. Deutsche Bank Nat'l Tr. Co.*, 241 So. 3d 179, 181 (Fla. 4th DCA 2018)). The only claims asserted by Plaintiff are breach of contract claims, which are actions at law, not actions in equity. *AcryliCon USA, LLC v. Silikal GmbH*, 985 F.3d 1350, 1374 (11th Cir. 2021) (noting that "breach of contract is a traditional action at law"). Therefore, the unclean hands doctrine does not apply, and Plaintiff's Motion to Strike Defendants' Seventh Affirmative Defense is granted.

D. Eighth Affirmative Defense

The Eighth Affirmative Defense alleges that Plaintiff "failed to mitigate its damages, and in fact caused its own alleged losses by failing to promptly make an election of remedies pursuant to Section 5 of the Bonds." ECF No. [99] at 39. Plaintiff argues that Defendants' Eighth Affirmative Defense should be stricken because Defendants have failed to plead the basic elements for a failure to mitigate damages defense. Plaintiff contends that such boilerplate allegations are insufficient, as they fail to establish the essential facts to sustain a mitigation defense. Defendants respond that "[c]ourts recognize, particularly in surety cases, the duty to mitigate one's damages, and as such, Plaintiff's motion to strike their Eighth Affirmative Defense should be denied.

The Court finds that the allegations are sufficient to sustain the Eighth Affirmative Defense. Failure to mitigate is indeed a valid affirmative defense in a breach of contract action, and although the facts supporting the defense are somewhat sparse, Defendants do point to sufficiently specific conduct that Plaintiff should have engaged in to mitigate damages. See *Noveshen v. Bridgewater Assocs., LP*, No. 13-CV-61535-KAM, 2016 WL 3902580, at *2 (S.D. Fla. Feb. 25, 2016); *Bakshi v. Carnival Corp.*, CASE NO. 23-cv-21839, 2023 WL 6376730, *7 (S.D. Fla. Aug. 23, 2023) (finding that failure to mitigate damages defense does not require significant additional facts). Accordingly, Plaintiff's motion to dismiss the Eighth Affirmative Defense is denied.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that

1. Plaintiff's Motion to Strike, **ECF No. [101]**, is **GRANTED in part and DENIED in part**.

2. The **Fifth and Seventh Affirmative Defenses** are **STRICKEN**. providing the Court with non-existent cases as part of Defendants' response brief.
3. The First, Fourth, and Sixth Affirmative Defenses shall be treated as specific denials. **DONE AND ORDERED** in Chambers at Miami, Florida, on October 20, 2025.
4. It is further **ORDERED** that no later than **October 28, 2025**, defense counsel shall **SHOW CAUSE** as to why the Court should not impose Rule 11 sanctions on Michael Kurzman and Elizabeth Coppolecchia for **All Citations**
Slip Copy, 2025 WL 3091075

Footnotes

- 1 The only case law that Defendants seem to offer to the contrary is *Solis v. Zenith Cap. LLC*, a case that appears not to exist. See ECF No. [107] at 5 (citing *Solis v. Zenith Cap., LLC*, No. 19-80730-CIV, 2019 WL 7376782, at *2 (S.D. Fla. Sept. 26, 2019)). The Court also notes that later in Defendants' Response, there is another citation to what appears to be a non-existent case. See *id.* at 7 (citing *PGA Nat'l Resort, LLC v. Liberty Mut. Fire Ins. Co.*, 2016 WL 8716673, at *3 (S.D. Fla. Oct. 24, 2016)). Defense counsel not only has a duty of candor to the Court but a duty to ensure the brief filed is accurate. See *ByoPlanet Int'l, LLC v. Johansson*, No. 0:25-CV-60630, 2025 WL 2091025, at *7 (S.D. Fla. July 17, 2025) ("The filing of papers without taking the necessary care in their preparation is an abuse of the judicial system that is subject to Rule 11 sanction.") (quoting *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 460 (S.D.N.Y. 2023) (additional level of citation and quotations omitted)). Defense counsel's inclusion of non-existent cases appears to have disregarded those obligations.