

IN THE COUNTY COURT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

5501 NE 2ND AVENUE, LLC,
a Florida limited liability company,

Plaintiff,

v.

CASE NO.: 2020-018438-CC-05

CIVIL DIVISION

DISTRICT LIVE AGENCY, LLC,
D/B/A CHURCHILL'S PUB,
a Florida limited liability company,
and all others in possession,

Defendant,

_____ /

**PLAINTIFF'S, 5501 NE 2ND AVENUE, LLC, MOTION TO DISMISS,
DEFENDANT'S, DISTRICT LIVE AGENCY, LLC, COUNTERCLAIM**

Plaintiff, 5501 NE 2ND AVENUE, LLC, ("Plaintiff" or "Landlord") by and through its undersigned counsel, hereby files this Motion to Dismiss Defendant's, DISTRICT LIVE AGENCY, LLC, D/B/A CHURCHILL'S PUB, ("Defendant," "District Live Agency" or "Tenant"), Counterclaim and states:

INTRODUCTION

1. On August 25, 2020, the Landlord filed a complaint against the Tenant for possession of the rented commercial premises.

2. Landlord's claims arose out of the Tenant's failure to pay rent and to meet its obligations pursuant to the terms of the commercial Lease Agreement ("Lease") entered into between the parties.

3. On September 22, 2020, the Tenant, DISTRICT LIVE AGENCY, LLC, filed its Answer and Affirmative Defenses.

4. Included within Tenant's Answer and Affirmative Defenses was a three-count counterclaim for Quantum Meruit, Breach of the Implied Covenant of Good Faith and Fair

Dealing, and Accounting, brought by entirely new party The Beverage Group, LLC and by current party defendant, DISTRICT LIVE AGENCY, LLC.

5. As of date of this filing, The Beverage Group, LLC and DISTRICT LIVE AGENCY, LLC, have not paid a filing fee to file their counterclaim.

6. As of date of this filing The Beverage Group, LLC is not a party counter-plaintiff to this action.

7. In addition, DISTRICT LIVE AGENCY, LLC brought its counterclaim against two new parties, Mallory Kauderer and Little Haiti Development Partners, LLC.

8. As of date of this filing, no summons has been issued for Mallory Kauderer.

9. As of date of this filing, no summons has been issued for Little Haiti Development Partners, LLC.

10. The clerk's docket reflects no filing fee payment, no additional parties referenced beyond those referenced on Landlord's original complaint, and finally it reflects that no summons have been issued to any additional parties. See "Clerk Docket, dated October 6, 2020, attached hereto as **Exhibit "A."**

11. As such, the only response due at this juncture is Landlord's response to Tenant's Counterclaims directed at Landlord solely and exclusively, comprised herein.

12. To be clear, the undersigned counsel represents 5501 NE 2ND AVENUE, LLC exclusively at the time of this filing, and no additional related entities or individuals; this instant motion is directed towards DISTRICT LIVE AGENCY, LLC's claims only. No other response is required.

13. DISTRICT LIVE AGENCY, LLC's claims are permissive counterclaims, they are entirely unrelated to the underlining and original commercial rental possession action and the

parties have agreed that under no circumstance shall a counterclaim of any sorts be brought in a summary proceeding regarding the Lease agreement and subject premises. See “Lease Excerpt at Section 6.0,” attached hereto as **Exhibit “B.”**

14. Furthermore, the Tenant has yet to deposit any money into the court’s registry and is seriously delinquent; as a precursor to interjecting a defense they were required to pay money into the court’s registry.

15. Florida Statutes section 82.232 states:

(4) The filing of a counterclaim for money damages does not relieve the tenant from depositing rent due into the registry of the court.

(5) Failure of the tenant to pay the rent into the court registry pursuant to court order shall be deemed an absolute waiver of the tenant’s defenses. In such case, the landlord is entitled to an immediate default for possession without further notice or hearing thereon.

Fla. Stat. § 82.232(4)-(5) emphasis added.

16. As the Tenant has yet to pay any money as required into the Court’s registry no Answer or response is yet due to the Tenant’s counterclaim.

17. In the abundance of caution the Landlord has attached a proposed Answer and Affirmative Defenses which will be filed at the appropriate juncture if necessitated. See Exhibit “C” attached hereto.

18. Finally, the Tenant has failed to state a cause of action for Implied Covenant of Good Faith and Fair Dealing and Accounting, and as such, those claims must be dismissed, and the Landlord granted its attorneys’ fees and costs as entitled pursuant to the terms of the Lease agreement.

19. The Tenant's remaining claim likewise fails as the Lease agreement is fully integrated and Tenant's allegations seek to modify the original written and sealed expression of the parties understanding as it relates to the leased premises.

ARGUMENT

I. The Lease Contains a Provision Barring the Interjection of Counterclaims by the Tenant in an Action Based Solely Upon Tenant's Non-Payment of Rent.

Contracts that are clear and unambiguous require no interpretation. Hill v. Deering Bay Marina Ass'n, Inc., 985 So. 2d 1162, 1166 (Fla. 3d DCA, 2008); Liberty Mutual Insurance Company v. Capeletti Bros., Inc., 699 So. 2d 736 (Fla. 3d DCA, 1997); see Lindheimer v. St. Paul Fire and Marine Insurance Company, 643 So. 2d 636 (Fla. 3d DCA 1994);

The Lease agreement provides:

6.0 Covenant of Rent. Tenant agrees that the provisions for payment of **Base Rent herein are independent covenants of Tenant and Tenant shall not interpose any counterclaim or counterclaims in a summary proceeding or in any action based solely upon non-payment of rent** or any other payment required of Tenant hereunder.

See "Covenant of Rent," supra. The Lease speaks for itself and its language is clear and unequivocal. There shall be no counterclaims in a summary proceeding in any action based solely upon non-payment of rent. Here, the Tenant has done just that, brought a counterclaim, a series of them; and also, the Tenant has improperly interjected a new party counter-plaintiff, two new defendants, and a slew of jumbled allegations, unrelated to the simple possessory action originally filed by the Landlord as a result of Tenant's failure to pay rent. As such, the Tenant's claims are improper; their joinder is barred; and the Landlord is entitled to its attorneys' fees and costs in defending Tenant's impermissible counterclaims.

II. The Lease Contains a Clear, Unambiguous, and Enforceable Merger and Anti-Modification Clause.

“It is well established that [a] court cannot rewrite the clear and unambiguous terms of a voluntary contract.” Pol v. Pol, 705 So.2d 51, 53 (Fla. 3d DCA 1997) see also Wood/Fay Realty Group, Inc. v. New Aquarius Corp., 842 So.2d 914, 917 (Fla. 3d DCA 2003) (concluding that clear and unambiguous contractual terms require no interpretation or rewriting). The Lease agreement expressly provides:

(i) Each provision performable by Tenant shall be deemed both a covenant and a condition. **This Lease contains all agreements of the parties with respect to any matter mentioned herein. No prior agreement or understanding pertaining to any such matter shall be effective. This Lease may be modified in writing only, signed by the parties in interest at the time of modification.**

See “Merger Clause,” attached hereto as **Exhibit “D.”** Here, there is no ambiguity and the language of the Lease is clear; there were to be no modifications unless agreed upon by both Tenant and Landlord in writing. The Tenant has filed a suit based on the flawed underlining premise that the Lease does not represent the understanding of the parties; that multiple, ancillary, or prior agreements modify the understanding of the parties. This is a legal impossibility. The Lease speaks for itself. The Tenant has provided no evidence that represents a modification in writing signed by both the parties; that is because no such writing exists. No such modification is attached to Tenant’s counterclaim and oral modifications are not permitted by the Lease. As such, the Tenant’s Counterclaims all fail; they must be dismissed, and the Landlord granted its attorneys’ fees and costs pursuant to the terms of the Lease agreement.

III. The Tenant has Failed to State a Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing.

There is an implied covenant of good faith and fair dealing in every contract. Meruelo v. Mark Andrews of Palm Beach, Ltd., 12 So.3d 247, 251 (Fla. 4th DCA 2009). “Its purpose is to

protect the reasonable expectations of the contract parties.” Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 896 So.2d 787, 791 (Fla. 2d DCA 2005). “[T]he implied covenant is not an independent term within the parties’ contract. Thus, it cannot override an express contractual provision.” Snow, 896 So.2d at 791 (citing Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d 1285 (11th Cir. 2001)). This is because the implied covenant of good faith and fair dealing attaches to the performance of a contractual provision. Thus, if a contractual provision has not been breached, there has not been a breach of the implied covenant of good faith and fair dealing. Id. The implied covenant of good faith and fair dealing cannot override the express terms the parties agreed to in a contract. Id. The bottom line is that a claim that a party violated the implied covenant of good faith and fair dealing will fail without proving that the party actually violated an express contractual provision. This claim, however, is not a vehicle to rewrite contractual performance obligations and will not be used to supersede what the parties agreed to.

Here, the Tenant does not claim that any specific term of the Lease agreement has been breached by the Landlord. Instead, the Tenant introduces allegations of multiple unrelated alleged business dealings and/or quasi agreements or otherwise between non-parties to this action and the Landlord and then claims that the Landlord breached Lease’s implied covenant of good faith and fair dealing. Furthermore, the Tenant then tries to rewrite the Lease agreement stating that rent is not due as a result of ancillary unwritten fantasy agreements. Finally, the record speaks most convincingly to granting dismissal of this claim, as here, the Tenant has failed to bring any action for breach of contract within its counterclaims, instead Tenant brings its claims as quantum meruit. This is because there is no specific link to the Lease. As such, the Tenant’s counterclaim for breach of the implied covenant of good faith and fair dealing fails; it

must be dismissed, and the Landlord granted its attorneys' fees and costs pursuant to the terms of the Lease agreement.

IV. The Tenant has Failed to State a Cause of Action for Accounting.

Under Florida law, an accounting is a cause of action in which a party requests an equitable settlement of claims and liabilities arising out of its relationship with another party. Ho, *The Most Efficient Way to Litigate a Dispute Between Business Partners with Axes to Grind: Partnership Accountings*, FLA. B.J., July 2012, at 1. Discussing the usefulness of an accounting cause of action, the Florida Supreme Court observed, “[t]he variety of its uses and possible applications is practically unlimited; it can be adapted to all circumstances and relations in which an account is necessary for the settlement of claims and liabilities, and for the doing of full justice to the litigant parties.” Scott v. Caldwell, 37 So. 2d 85, 87 (Fla. 1948) (citing Pomeroy, 4 Equity Jurisprudence 1076-1081, par. 1420-22 (5th ed.); 1 Am. Jur. 298; 1 C.J. 613-619; 1 CJS Accounting §§14-188). In short, an accounting allows a court to “balance the equities, adjust the accounts of the parties, and render complete justice between them.” F.A. Chastain Constr., Inc. v. Pratt, 146 So. 2d 910, 913 (Fla. 3d D.C.A. 1962). To be entitled to an equitable accounting, a plaintiff must bring an action that arises out of either 1) a confidential or fiduciary relationship, or 2) extensive or complicated transactions. E.g., Eye Care Intern., Inc. v. Underhill, 92 F. Supp. 2d 1310, 1316 (M.D. Fla. 2000).

In an action for accounting, two triable issues exist: 1) the entitlement to an accounting, and 2) the accounting itself. See Wood v. Brackett, 266 So. 2d 398, 399 (Fla. 1st D.C.A. 1972); A-1 Truck Rentals, Inc. v. Vilberg, 222 So. 2d 442, 444 (Fla. 3d D.C.A. 1969). Before the accounting is addressed a plaintiff's entitlement to an accounting must be determined. Id. In

order to survive a motion to dismiss the plaintiff must allege 1) ultimate facts to show its entitlement to an accounting, and 2) that the remedy at law is inadequate.

Here, the Tenant has failed to plead that its claim for accounting arises out of a confidential or fiduciary relationship; in fact, it entirely ignores this prong and instead reads similar to a request for production of documents. The Tenant states that it has been denied access to its records and asks the Court to grant access. This is not an accounting and it is misplead. The Tenant does not ask that the Court perform an equitable distribution of monies; instead, the Tenant vaguely requests access to “QuickBooks records.” The Tenant states that it has no remedy at law to gain access to its “QuickBooks records,” this is false; if the Tenant requires access to certain records, then the Florida Rules of Civil Procedure provide an appropriate method of obtaining relevant and discoverable documents for use in litigation. An action for accounting is not appropriate, and as such, Tenant’s claim for accounting must be dismissed and Landlord granted its attorneys’ fees and costs pursuant to the terms of the Lease.

CONCLUSION

Based on the foregoing, the Landlord moves this Court to dismiss Tenant’s Counterclaim and request that the Court retaining jurisdiction to award the Landlord its fees and costs pursuant to the Lease and Florida law.

[THIS SPACE IS INTENTIONALLY LEFT BLANK]

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court by using the Florida Courts E-Filing Portal and that the portal has automatically generated an e-mail containing a copy of the foregoing to counsel for the Counter-Plaintiff / Counter-Defendants, Omar K. Bradford, Esq., [obradford@gjb-law.com], on this 6TH day of October 2020.

By: /s/ Hilary R. Zalman
HILARY R. ZALMAN, ESQ.
F.B.N.: 31182

ZALMAN LAW, P.A.
7050 Montrico Drive
Boca Raton, FL 33433
Phone: 561.716.3327
Fax: 888.628.2038
Email: eService@ZalmanLawFirm.com

Exhibit “A”



MIAMI-DADE COUNTY CLERK OF THE COURTS

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CIVIL, FAMILY AND PROBATE COURTS ONLINE SYSTEM

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5501 NE 2ND AVENUE, LLC VS DISTRICT LIVE, LLC			
Local Case Number:	2020-018438-CC-05	Filing Date:	08/25/2020
State Case Number:	132020CC018438000005	Judicial Section:	CC01
Consolidated Case No.:	N/A	Case Type:	Evictions (Non-Monetary)
Case Status:	OPEN		

Parties Total Of Parties: 3			
Party Description	Party Name	Attorney Information	Other Attorney(S)
Plaintiff	5501 NE 2ND AVENUE, LLC	B#: (Bar Number)31182 N: (Attorney Name)Zalman, Hilary R, ESQ	
Defendant	DISTRICT LIVE, LLC	B#: (Bar Number)90444 N: (Attorney Name)Bradford, Omar K, ESQ	
Eviction Property Address	DISTRICT LIVE, LLC		

Hearing Details Total Of Hearings: 1				
Hearing Date	Hearing Time	Hearing Code	Description	Hearing Location
10/26/2020	1:30PM	MOTCAL	Motion Calendar	

Dockets							Total Of Dockets: 12
Number	Date	Book/Page	Docket Entry	Event Type	Comments		
	10/26/2020		Motion Calendar	Hearing	DEFENDANTS MOTION TO DETERMINE RENT ANDOR IN THE ALTERNATIVE MOTION TO DISMISS UNDERLYING EVICTION COMPLAINT		
 10	09/24/2020		Notice of Hearing-	Event	VIA ZOOM OCTOBER 26, 2020 AT 1:26AM		
 9	09/22/2020		Motion:	Event	TO DETERMINE RENT		
 8	09/22/2020		Answer and Affirmative Defense	Event	Parties: Bradford Omar K ESQ; DISTRICT LIVE LLC		
 7	09/11/2020		Amended Notice	Event			
6	09/04/2020		Receipt:	Event	RECEIPT#:2060099 AMT PAID:\$10.00 COMMENT: ALLOCATION CODE QUANTITY UNIT AMOUNT 2139-SUMMONS ISSUE FEE 1 \$10.00 \$10.00 TENDER TYPE:CHECK TENDER AMT:\$10.00 RECEIPT DATE:09/04/2020 REGISTER#:206 CASHIER:TCOBB		
	09/04/2020		5 Day Summons Issued	Service			
5	09/04/2020		5 Day Summons Issued	Event	Parties: DISTRICT LIVE LLC		
4	08/28/2020		Receipt:	Event	RECEIPT#:2710056 AMT PAID:\$185.00 NAME:ZALMAN, HILARY R, ESQ 7050 MONTRICO DR BOCA RATON FL 33433-6924 COMMENT: ALLOCATION CODE QUANTITY UNIT AMOUNT 2100-COUNTY FILING FEE 1 \$185.00 \$185.00 TENDER TYPE:E-FILING ACH TENDER AMT:\$185.0		
 3	08/25/2020		Motion:	Event			
 2	08/25/2020		Complaint	Event			
 1	08/25/2020		Civil Cover Sheet - Claim Amount	Event			

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Please be advised:

Exhibit “B”

below) payable in monthly installments, in advance, without notice, due on the first day of each calendar month during the term of this Lease, free from all claims, demands or setoffs against Landlord of any kind or character whatsoever. If the Term of this Lease shall begin or terminate on other than the first or last day respectively of a calendar month, all Base Rent and other charges accruing under this Lease for such portion of the partial calendar month shall be apportioned and paid on the basis of a thirty (30) day month. In addition to any other sums due under this Lease, simultaneously with Tenant's execution of this Lease, Tenant shall pay Landlord the first month's rent. The period between the Delivery Date and the Rent Commencement Date shall be deemed the 'Rent Free Period', provided that during the Rent Free Period, Tenant shall pay all utility charges and other expenses due in connection with Tenant's use and operation of the Premises.

5.2 The Base Rent set forth in Section 5.1 above shall be adjusted at the beginning of each Lease Year (as hereinafter defined) during the term of this Lease (and any renewal hereof) by the amount set forth in the BLI Rider. A "Lease Year" shall be the twelve (12) month period commencing with the Commencement Date of this Lease and ending one (1) year later, except for the last Lease year of the term, which may be less than twelve (12) months. Each subsequent Lease Year is the twelve (12) full calendar months immediately following the preceding Lease Year. The first adjustment of Base Rent shall be made at the beginning of the second Lease Year, and at the beginning of each new Lease Year thereafter.

5.3 **Additional Rent.** The term "Additional Rent" is sometimes used herein to refer to any and all other sums payable by Tenant hereunder. Tenant agrees to pay Additional Rent upon demand by Landlord. Additional Rent is to be treated in the same manner as Rent hereunder, both in terms of the lien for Rent herein provided and in terms of the default provisions herein contained.

6.0 **Covenant of Rent.** Tenant agrees that the provisions for payment of Base Rent herein are independent covenants of Tenant and Tenant shall not interpose any counterclaim or counterclaims in a summary proceeding or in any action based solely upon non-payment of rent or any other payment required of Tenant hereunder.

7.0 **Operating Cost Pass Through and Gross Sales Percentage Rent**

7.1 **Operating Cost Pass Through.** For purposes of this Lease, the following terms shall have the following meanings: "Parcel" means the land owned by Landlord on which the Building is located. "Tenant's Share" means and is conclusively agreed to be **100%**. Landlord and Tenant acknowledge that the stipulated Tenant's Share has been obtained by taking the approximate net rentable area of the Premises, and dividing such number by the approximate total net rentable area of the Building. In the event Tenant's Share is changed during a calendar year by reason of a change in the net rentable area of the Premises or the Building, Tenant's Share shall thereafter mean the result obtained by dividing the new net rentable area of the Premises by the net rentable square feet of the Building and multiplying such quotient by 100.

In addition to Base Rent and adjustments thereto, Tenant shall pay to Landlord as additional rent Tenant's Share of all Operating Costs. **This shall be deemed a triple net Lease and Tenant shall pay Tenant's Share of all Operating Costs without regard to a base year.** Operating Costs shall include all "Taxes" (including, without limitation, all impositions, taxes, ad valorem real property taxes, municipal, county and federal assessments (special or otherwise), water and sewer assessments, local improvement rates, and assessments and other governmental liens or charges of any and every kind, nature and sort whatsoever, ordinary and extraordinary, and substitutes therefor), assessments, insurance costs, governmental liens and any other charges, costs and expenses of Landlord of any nature and sort whatsoever, ordinary, foreseen, or unforeseen, computed on the accrual basis, which arise from Landlord's ownership, operation or use of the Parcel or Building, or any part thereof ("Operating Costs"). Operating Costs shall also be deemed to include (i) any and all costs of ownership, management, operation, repair, refurbishing, redecorating, replacement, and administration and maintenance of the Building, common areas and parking areas including, without limitation, wages, salaries, taxes, insurance, benefits and other payroll burdens of all employees, janitorial, maintenance, security, and other services, building management office rent or rental value, power, fuel, water, waste disposal, landscaping care, garbage removal, window cleaning, system maintenance, advertising, and any and all other utilities (including, but not limited to electricity for the Building), materials, supplies, maintenance, repairs, casualty and liability insurance applicable to the Building and Landlord's personal property and depreciation on personal property, (ii) the cost (amortized over such reasonable period as Landlord shall determine together with interest at the rate of three (3) points over Citibank's prime rate per annum on the unamortized balance) of any capital improvements made to the Building by Landlord after the date of this Lease that are required under any governmental law or regulation; provided, however, that Operating Expenses shall not include depreciation on the Building other than depreciation on carpeting in public corridors and common areas, costs of tenant improvements, real estate brokers' commissions, interest and capital items other than those referred to in this subsection



Exhibit “C”

IN THE COUNTY COURT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

5501 NE 2ND AVENUE, LLC,
a Florida limited liability company,

Plaintiff,

v.

CASE NO.: 2020-018438-CC-05

CIVIL DIVISION

DISTRICT LIVE AGENCY, LLC,
D/B/A CHURCHILL'S PUB,
a Florida limited liability company,
and all others in possession,

Defendant,

_____ /

DISTRICT LIVE AGENCY, LLC,
a Florida limited liability company; and
THE BEVERAGE GROUP, LLC,
a Florida limited liability company

Counter-Plaintiffs,

v.

5501 NE 2ND AVENUE, LLC,
a Florida limited liability company; and
LITTLE HAITI DEVELOPMENT
PARTNERS, LP,
a Florida limited partnership,
MALLORY KAUDERER,
individually,

Counter-Defendants.

_____ /

**COUNTER-DEFENDANT'S, 5501 NE 2ND AVENUE, LLC
ANSWER AND AFFIRMATIVE DEFENSES TO COUNTERCLAIM**

Counter-Defendant, 5501 NE 2ND AVENUE, LLC, ("Counter-Defendant" or "Landlord")
by and through its undersigned counsel, hereby files its Answer and Affirmative Defenses to
Counter-Plaintiff's, DISTRICT LIVE AGENCY, LLC, D/B/A CHURCHILL'S PUB, ("Counter-
Plaintiff" or "Tenant"), Amended Counterclaim and states:

PARTIES

1. Landlord is without knowledge as to the allegations in Tenant’s Counterclaim and demands strict proof thereof.

2. Landlord is without knowledge as to the allegations in Tenant’s Counterclaim and demands strict proof thereof.

3. Landlord is without knowledge as to the allegations in Tenant’s Counterclaim and demands strict proof thereof.

4. Admitted for jurisdictional purposes only; any non-jurisdictional allegation is otherwise denied.

5. Admitted for jurisdictional purposes only; any non-jurisdictional allegation is otherwise denied.

JURISDICTION AND VENUE

6. Landlord is without knowledge as to the allegations in Tenant’s Counterclaim and demands strict proof thereof.

7. Admitted.

FACTUAL BACKGROUND

8. Denied.

9. Denied.

10. Denied.

11. Admitted.

12. Denied.

13. Denied.

14. Landlord is without knowledge as to the allegations in Tenant’s Counterclaim and demands strict proof thereof.

15. Denied.
16. Landlord is without knowledge as to the allegations in Tenant's Counterclaim and demands strict proof thereof.
17. Landlord is without knowledge as to the allegations in Tenant's Counterclaim and demands strict proof thereof.
18. Landlord is without knowledge as to the allegations in Tenant's Counterclaim and demands strict proof thereof.
19. Landlord is without knowledge as to the allegations in Tenant's Counterclaim and demands strict proof thereof.
20. Denied.
21. Landlord is without knowledge as to the allegations in Tenant's Counterclaim and demands strict proof thereof.
22. Landlord is without knowledge as to the allegations in Tenant's Counterclaim and demands strict proof thereof.
23. Denied.
24. Denied.
25. Denied.
26. Denied.
27. Denied.
28. Denied.
29. Denied.
30. Denied.
31. Denied.
32. Denied.

33. Denied.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

49. Landlord is without knowledge as to the allegations in Tenant's Counterclaim and demands strict proof thereof.

50. Denied.

51. Denied.

52. Denied.

53. Denied.

54. Denied.

55. Denied.

56. Landlord is without knowledge as to the allegations in Tenant's Counterclaim and demands strict proof thereof.

57. Landlord is without knowledge as to the allegations in Tenant's Counterclaim and demands strict proof thereof.

COUNT I
QUANTUM MERUIT

58. This paragraph requires no response.

59. Denied.

60. Denied.

61. Denied.

62. Denied.

63. Denied.

64. Denied.

65. Denied.

66. Denied.

COUNT II
BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

67. This paragraph requires no response.

68. Denied.

69. Landlord is without knowledge as to the allegations in Tenant's Counterclaim and demands strict proof thereof.

70. Landlord is without knowledge as to the allegations in Tenant's Counterclaim and demands strict proof thereof.

71. Denied.

72. Denied.

73. Denied.

74. Denied.

COUNT III
ACCOUNTING

75. This paragraph requires no response.

76. Denied.

77. Denied.

78. Denied.

79. Denied.

TENANT'S WHEREFORE CLAUSES

Landlord denies in their entirety, any implicit or express allegation made within the Tenant's Wherefore clauses herein and demands strict proof thereof.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE: MERGER AND/OR FAILURE TO STATE A CAUSE OF ACTION FOR BREACH OF IMPLIED CONTRACT OR OTHERWISE

In Florida, even without the existence of a written merger clause, it is well established that negotiations and conversations preceding and/or accompanying the making of contract are presumed to have merged into the contract itself. Carlton, Inc. v. Southland Diversified Co., 381 So. 2d 291, 293 (Fla 4th DCA 1980). Florida law also holds that: Although the existence of a merger clause in a contract does not conclusively establish that the integration of the agreement is total, it is a highly persuasive statement that the parties intended the agreement to be totally integrated and generally works to prevent a party from introducing parol evidence to vary or contradict written terms. Envtl. Servs, Inc. v. Carter, 9 So. 3d 1258, 1265 (Fla. 5th DCA 2009).

The concept of an integrated agreement is based on a presumption that the parties to a written contract intended that writing “to be the sole expositor of their agreement.” Jenkins v. Eckerd Corp., 913 So. 2d 43, 53 (Fla 1st DCA 2005); Everglade Lumber Co. v. Nettleton Lumber Co., 149 So. 736, 738 (Fla. 1933). The Lease at issue contains contain a merger clause, which explicitly states that the agreement itself embodies the entire understanding and agreement between the parties and further supersedes any and all prior agreements, promises, negotiations, representations, understandings, or inducements, whether express or implied, oral or written, regarding the terms of the agreement between the parties. Therefore, by the express contractual terms of the parties, the integrated agreement itself, embodies the entire agreement between the parties. The effect of this clause is to bar parties from reaching outside the confines of the written agreement to impose additional contractual duties upon the other party. Here, the Tenant attempts to do just that, extend random fictional obligations upon the Landlord to suit itself.

SECOND AFFIRMATIVE DEFENSE: FAILURE TO STATE A CAUSE OF ACTION FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

There is an implied covenant of good faith and fair dealing in every contract. Meruelo v. Mark Andrews of Palm Beach, Ltd., 12 So.3d 247, 251 (Fla. 4th DCA 2009). “Its purpose is to protect the reasonable expectations of the contract parties.” Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 896 So.2d 787, 791 (Fla. 2d DCA 2005). A breach of this implied covenant of good faith and fair dealing is not really an independent cause of action. This is because the implied covenant of good faith and fair dealing attaches to the performance of a contractual provision. Snow, 896 So.2d at 791. Thus, if a contractual provision has not been breached, there has not been a breach of the implied covenant of good faith and fair dealing. Id. The implied covenant of good faith and fair dealing cannot override the express terms the parties agreed to in a contract. Id. Here, the Tenant has not claimed that the Landlord breached the Lease agreement

in question, instead the Tenant has concocted a laundry list of ancillary facts and claims that it alleges arise under the same set of operative facts brought within Landlord's original complaint; aside from the fact that these claims are independent of the Landlord's original claims,

THIRD AFFIRMATIVE DEFENSE: FAILURE TO STATE A CAUSE OF ACTION FOR ACCOUNTING

Under Florida law, an accounting is a cause of action in which a party requests an equitable settlement of claims and liabilities arising out of its relationship with another party. To be entitled to an equitable accounting, a plaintiff must bring an action that arises out of either 1) a confidential or fiduciary relationship, or 2) extensive or complicated transactions. Here, the Tenant's claim for "Accounting" claim boils down to nothing more than a glorified request for production of documents. The Tenant is not asking that the court equitably adjust the accounts of the parties; instead, the Tenant is asking for the books and records of the Landlord, and this can be accomplished through ordinary pre-trial discovery procedures. This claim must be dismissed.

FOURTH AFFIRMATIVE DEFENSE: ESTOPPEL OR CONDUCT AND CONSENT

Any damages suffered by the Tenant were suffered as a direct result of its own conduct in entering into the Lease in bad faith, by failing to pay rent and by failing to comply with the terms of the Lease.

FIFTH AFFIRMATIVE DEFENSE: OFFSET

Any claim for damages by Tenant has been fully offset and is exceeded by the damages suffered by the Landlord as a result of the Tenant's actions and conduct in breaching the Lease agreement and failing to pay rent.

SIXTH AFFIRMATIVE DEFENSE: FAILURE OF CONDITION PRECEDENT OR IMPROPER NOTICE

Tenant has failed to provide written notice, in compliance with the terms of the Lease, of any alleged breach by Landlord of the Lease terms.

SEVENTH AFFIRMATIVE DEFENSE: UNCLEAN HANDS

The allegations of the Tenant are false. The fiction created by the Tenant is detrimental and damaging to the image of the Landlord and its principals. It is the belief of the Landlord that the Tenant's attempt to concoct these claims is a misguided attempt to derail this litigation from its simple purpose, that is to collect damages owed to a landlord as a result of a tenant's failure to pay rent due under a commercial lease agreement.

EIGHT AFFIRMATIVE DEFENSE: PRIOR BREACH

The Tenant committed a prior breach of the Lease agreement at issue, thus negating any requirement of performance by Landlord under the Lease or any alleged agreement.

RIGHT TO AMEND

Plaintiff / Counter-Defendant reserves the right to amend or add to these affirmative defenses stated.

NO DEMAND FOR JURY TRIAL

Plaintiff / Counter-Defendant requests a bench trial on all issues deemed triable.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court by using the Florida Courts E-Filing Portal and that the portal has automatically generated an e-mail containing a copy of the foregoing to counsel for the Counter-Plaintiff / Counter-Defendants, Omar K. Bradford, Esq., [obradford@gjb-law.com], on this __ day of October 2020.

By: /s/ Hilary Zalman
HILARY R. ZALMAN, ESQ.
F.B.N.: 31182
ZALMAN LAW, P.A.
7050 Montrico Drive
Boca Raton, FL 33433
Phone: 561.716.3327
Fax: 888.628.2038
Email: eService@ZalmanLawFirm.com

Exhibit “D”

(c) The words "Landlord" and "Tenant" shall also extend to and mean the successors in interest of the respective parties hereto and their permitted assigns, although this shall not be construed as conferring upon the Tenant the right to assign this Lease or sublet the Premises or confer rights of occupancy upon anyone other than Tenant.

(d) All charges due from Tenant to Landlord hereunder, including, without limitation, any charges against Tenant by Landlord for services or work done on the Premises by order of Tenant, except sales tax, shall be deemed additional rent, shall be included in any lien for rent, and shall be paid (including sales tax) without setoff or defense of any kind.

(e) This Lease has been fully negotiated and reviewed by the parties and their counsel and is the work product of both Landlord and Tenant; it shall not be more strictly construed against either party. Provisions inserted herein or affixed hereto shall not be valid unless appearing in the duplicate original hereof held by the Landlord and initialed by the Parties hereto. In the event of variation or discrepancy, the Landlord's duplicate shall control.

(f) This Lease and the exhibits, schedules, addenda, riders, and guaranty, if any, attached hereto are incorporated herein and set forth the entire agreement between the Landlord and Tenant concerning the Premises and Building and there are no other agreements or understandings between them. Nothing in this Lease creates any relationship between the parties other than that of lessor and lessee and nothing in this Lease constitutes the Landlord a partner of the Tenant or a joint venturer or member of a common enterprise with the Tenant.

(g) Nothing herein contained shall be deemed or construed by the parties hereto, nor by any third party, as creating a relationship of principal and agent or of partnership or of joint venture between the parties hereto. Neither the method of computation of rent, nor any other provisions contained herein, nor any acts of the parties hereto, shall be deemed to create any relationship between the parties hereto other than the relationship of landlord and tenant.

(h) The invalidity of any provision of this Lease as determined by a court of competent jurisdiction shall in no way affect the validity of any other provision hereof. Landlord and Tenant acknowledge that they were each represented by counsel in connection with this Lease and that each of them or their respective counsel reviewed and revised this Lease and that any rule of construction to the effect that ambiguities are to be resolved against the drafting party or Landlord shall not be employed in the interpretation of this Lease.

(i) Each provision performable by Tenant shall be deemed both a covenant and a condition. This Lease contains all agreements of the parties with respect to any matter mentioned herein. No prior agreement or understanding pertaining to any such matter shall be effective. This Lease may be modified in writing only, signed by the parties in interest at the time of modification.

(j) Subject to the provisions hereof restricting assignment or subletting by Tenant and regarding Landlord's liability, this Lease shall bind the parties, their heirs, personal representatives, successors and assigns. This Lease shall be governed by the laws of the State of Florida.

(k) The "Effective Date" of this Lease shall be the date last executed by the last of the parties to execute this Lease without amendment or deletion to this Lease and its Exhibits.

(l) The submission of this Lease for examination by Tenant does not constitute an offer or an option to lease the Demised Premises, nor is it intended as a reservation of the Demised Premises for the benefit of Tenant, nor shall this Lease have any force or validity until and unless a copy of it is returned to Tenant duly executed by Landlord.

53. STATUTORY NOTICE REQUIREMENT. Tenant hereby acknowledges receipt of the following notice as required by Chapter 88-285, Laws of Florida:

RADON GAS: RADON IS A NATURALLY OCCURRING RADIOACTIVE GAS THAT, WHEN IT HAS ACCUMULATED IN A BUILDING IN SUFFICIENT QUANTITIES, MAY PRESENT HEALTH RISKS TO PERSONS WHO ARE EXPOSED TO IT OVER TIME. LEVELS OF RADON THAT EXCEED FEDERAL AND STATE GUIDELINES HAVE BEEN FOUND IN BUILDINGS IN FLORIDA. ADDITIONAL INFORMATION REGARDING RADON AND RADON TESTING MAY BE OBTAINED FROM YOUR COUNTY PUBLIC

