

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
FLAGLER COUNTY, FLORIDA

CASE NO.: 2019-CA-000381

CAPTAIN'S BAIT, TACKLE & BBQ, LLC
a Florida limited liability company,

Plaintiff/Counter-Defendant,
vs.

FLAGLER COUNTY, a political
subdivision of the State of Florida,

Defendant/Counter-Plaintiff.
_____ /

PLAINTIFF/COUNTER-DEFENDANT'S MOTION TO SEVER COUNTERCLAIM

Plaintiff/Counter-Defendant, CAPTAIN'S BAIT, TACKLE & BBQ, LLC ("CAPTAIN'S"), by and through their undersigned counsel and pursuant to Fla.R.Civ.P. 1.270(b), hereby moves to sever the Counterclaim filed by FLAGLER COUNTY ("COUNTY") from the main claim in the above-styled action, and in support thereof states as follows:

RELEVANT FACTS

1. On or about June 7, 2019, Captain's filed the instant lawsuit against the County ("COMPLAINT"). The Complaint alleges four causes of action: Breach of Contract; Breach of Implied Covenant of Good Faith and Fair Dealing; Declaratory Relief; and Specific Performance.
2. All four causes of action arise out of a lease dispute between the parties. The lease dispute involves the Amended Lease executed on November 30, 2018 by Captain's and the County. Additionally, the Complaint also involves significant matters related to actions taken by County staff members regarding the Amended Lease.
3. On or about November 9, 2020 and subsequently amended on or about November

10, 2020, the County filed its Counterclaim for contractual indemnity. The Counterclaim involves litigation from before the Amended Lease was executed, when Captain's and the County were sued in a lawsuit titled *Inad Mansour and Gail Mansour v. Captain's Bait, Tackle & BBQ, LLC, and County of Flagler*, case number 2017-CA-203 (Fla. 7th Jud. Cir., Flagler City) ("MANSOUR LAWSUIT").

4. The Mansour Lawsuit was litigated and subsequently settled in exchange for a dismissal with prejudice as to the claims against the County. The County's insurance carrier paid \$45,000.00 in settlement funds to the Mansour Lawsuit Plaintiffs.

5. The lease at issue in the Counterclaim is from August 23, 2011 ("2011 LEASE"). The County is seeking indemnification of the settlement funds paid to the Mansour Lawsuit Plaintiffs as well as the legal fees incurred in defense of same, which it alleges it is entitled to pursuant to certain provisions of the 2011 Lease.

6. The County asserts the following as a basis for bringing the Counterclaim within the instant lawsuit: "the substance of this counterclaim, namely the property and building at issues, the 2011 Lease, and the parties hereto, are all before the Court in the action filed by Captain's BBQ against the County under case no. 2019-CA-000381, hence the assertion of this counterclaim as part of that pending case." *See Paragraph 4 of Counterclaim.*

7. The substance of the Counterclaim does not arise from the same transaction or occurrence that is the subject matter of the instant lawsuit against the County. The Counterclaim is an indemnification issue and the instant claim by Captain's is a contract/lease dispute that is wholly separate and apart from any alleged indemnification provision of a prior lease between the parties.

LEGAL ARGUMENT

8. Fla.R.Civ.P. 1.170(b) defines a permissive counterclaim as “any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party’s claim.”

9. As set forth above, Flagler County’s Counterclaim in the instant case is not compulsory, it is permissive. The Counterclaim does not arise out of the transaction or occurrence that is the subject matter of the main claim. *See Campbell v. Gordon*, 674 So. 2d 783 (Fla. 1st DCA 1996).

10. The Court, to further convenience or to avoid prejudice, may order a separate trial of any claim. Fla.R.Civ.P. 1.270(b). Permissive counterclaims can be severed from the main claim and do not impair a court’s ability to resolve the main claim in a single suit. *Whigum v. Heilig-Meyers Furniture, Inc.*, 682 So. 2d 643 (Fla. 1st DCA 1996).

11. The trial court has discretion to sever a permissive counterclaim if there is no evidence of prejudice to the claimant. *Strader v. Carpenters Crest Owners Ass’n, Inc.*, 968 So. 2d 621 (Fla. 2d DCA 2007); *Turner Constr. Co. v. E & F Contractors, Inc.*, 939 So. 2d 1108, 1109 (Fla. 3d DCA 2006); *Valliappan v. Cruz*, 917 So. 2d 257 (Fla. 4th DCA 2005).

12. The parties are in dispute over the Amended Lease and actions taken by County staff members regarding the Amended Lease. The main claim does not involve the 2011 Lease to the same extent that the Counterclaim does, and the alleged indemnification provision does not arise out of the issues related to the Amended Lease. In fact, the Lease at issue in the Counterclaim, the 2011 Lease, was executed seven years prior to the Amended Lease. Additionally, the Mansour Lawsuit was filed one year prior to the execution of the Amended Lease.

13. None of the reasons set forth in the Counterclaim as a basis for bringing the

Counterclaim within the instant lawsuit (Paragraph 4 of the Counterclaim) provides for a legitimate basis for the Counterclaim to remain part of the instant lawsuit.

14. Captain's would be unfairly prejudiced if Flagler County would be permitted to pursue an unrelated counterclaim which will undoubtedly confuse any jury that hears the main claim.

15. Additionally, Captain's is placed in a position where the Counterclaim may make it impossible to determine which party is the ultimate prevailing party in terms of recovery of attorneys' fees and costs.

16. Conversely, Flagler County would not be prejudiced by severance of the counterclaim since, to the extent such Counterclaim is viable, Flagler County would be able to prosecute it separately. Captain's has already retained separate counsel to defend the Counterclaim. The parties will be able to effectively continue to litigate this matter under a separate lawsuit.

WHEREFORE, Plaintiff/Counter-Defendant, CAPTAIN'S BAIT, TACKLE & BBQ, LLC hereby respectfully requests the entry of an Order severing the Counterclaim filed by FLAGLER COUNTY from the main claim filed herein, and awarding any further relief deemed just and proper under the circumstances.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served this 9th day of February 2022, via Florida e-filing portal, to the following:

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