

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

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

CASE NO.: 2023 CC 000091

Plaintiff,

v.

PEN AND PILOT, INC., a Florida profit
corporation,

Defendant.

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ANSWER TO COUNTERCLAIM AND MOTION TO STRIKE

Plaintiff/Counter Defendant, FLAGLER COUNTY (hereinafter “County”), by and through its undersigned counsel, files this Answer to the Counterclaim filed by the Defendant/Counter Plaintiff, PEN AND PILOT, INC. (hereinafter “Pilot”), and states in response to each numbered paragraph of the Counterclaim as follows:

1. Admitted.
2. The County admits that Pilot is a Florida corporation and that its principal, Mr. Les Abend, is a pilot and writer. County is without knowledge as to the other assertions.
3. The County admits that Pilot leased a T-hangar at the Flagler Executive Airport, the lease at issue in this case (hereinafter, the “Lease”). The County also admits that Pilot’s principal, Mr. Abend, served for a time on the County’s Airport Advisory Board. The County denies that the Airport Director took steps to disband the Advisory Board as he has no authority to do so—the creation, composition, and elimination of County advisory boards being completely within the purview of the Board of County Commissioners. The County Commission voted

unanimously to disband the Airport Advisory Board on September 9, 2020, following several public discussions at County Commission meetings concerning the ineffectiveness of the board. The Airport Director never advocated that the Airport Advisory Board should be disbanded. The County also denies that the Airport Director resented recommendations of the Airport Advisory Board or other stakeholders regarding noise abatement or otherwise—having steadfastly served in his role as the County Commission’s liaison to that board until it was disbanded by the County Commission. Even after the elimination of the Airport Advisory Board, the Airport Director participated on a committee formed by the prior County Administrator, which included community stakeholders, to investigate Airport noise. The committee’s work resulted in the County’s voluntary Airport noise abatement policy.

4. The County categorically denies the vague assertion that the Airport Director took any action whatsoever toward Mr. Abend that could be deemed hostile or retaliatory in any way. On the contrary, the Airport Director has at all times comported himself in a courteous and professional manner toward all T-Hangar tenants. The County admits that the Airport Director stated to third parties that it was reported to the Airport Director that Mr. Abend sought to have the Airport Director’s employment terminated.

5. The County admits that it has only terminated T-hangar leases for cause. The County denies that it terminated Pilot’s Lease for no cause. The Lease does not require that a cause for termination be provided in the notice of termination.

6. The County admits that one tenant exercised the tenant’s right to express concerns to the Airplane Owners and Pilots Association (AOPA) over the staging of disaster recovery workers at the Airport. The AOPA representative at the Airport found the County’s handling of the situation to be superb.

7. The County admits that it did not meet to discuss the Lease termination with Pilot as Pilot's Lease does not provide for an appeal or contestation of the termination. Nevertheless, the County Administrator spoke to Mr. Abend on the phone about the matter and responded in writing to Mr. Abend's request for reconsideration to the entire County Commission, thus providing Due Process beyond what the Lease required. The other statements in paragraph 7 are denied and are not relevant as the Lease provides for termination without cause.

8. The County admits Pilot is entitled to and has invoiced Pilot for double rent in accordance with Florida law. The County denies that the Lease never expired. In accordance with the provisions of the month-to-month Lease, the Lease term expired on January 13, 2023, upon the expiration of the thirty-day notice of termination period. See Exhibit C to County's Complaint. Thus, Pilot is a holdover tenant wrongfully in possession of public property after the termination of Pilot's Lease and is required to pay double rent in accordance with Section 83.06, Florida Statutes.

COUNT I – BREACH OF OBLIGATION OF DUTY OF GOOD FAITH AND FAIR DEALING

9. The County admits to the general statement of the law that good faith and fair dealing govern the law of contracts in Florida, and the County agrees that these obligations extend to the termination provision of the Lease at issue. However, “[T]he doctrine of implied covenant of good faith cannot be used to vary the terms of an express contract.” *Flagship Resort Development Corp. v. Interval Intl., Inc.*, 28 So.3d 915, 924 (Fla. 3rd DCA 2010). The termination provision of the Lease is mutual and unambiguous, and the County followed it in terminating the Lease. The implied covenant of good faith applies equally to Pilot with regard to the termination provision as well as the covenant to vacate the premises upon termination of the Lease.

10. The County denies it acted in bad faith. The County again denies that the termination of Pilot's Lease was without cause. The County categorically denies the vague assertion that the Airport Director treated Pilot's principal with ill will. The County acted in good faith by providing written notice of termination in accordance with the Lease. In fact, despite Pilot having received the notice of termination via regular U.S. Post, the County re-sent the notice of termination via certified mail as required by the Lease, resulting in three additional weeks of tenancy—all in good faith adherence to the requirements of the Lease. As further evidence of good faith, it should be noted the County did not avail itself of the self-help provisions allowed by the Lease. Rather, the County filed suit to evict when Pilot made clear that Pilot would not vacate the premises.

11. Denied. Although a request for attorney's fees are not included in Pilot's prayer for relief, to the extent the Counterclaim could be construed to request attorney's fees, the County notes that Florida law does not require the County to pay Pilot's costs much less Pilot's attorney's fees when Pilot forced the County to commence an eviction action, needlessly expending public resources, by refusing to vacate the T-hangar upon termination of the Lease.

COUNT II – RETALIATORY TERMINATION OF CONTRACT

12. County re-alleges its statements regarding paragraphs 1-11 of Pilot's Counterclaim.

13. The County admits it terminated the Lease for cause and that the Lease may be terminated for cause or for no cause, but either way, the Lease does not require that cause be included in the notice of termination.

14. County denies that it terminated Pilot's lease with discriminatory intent, nor is there any evidence of such unlawful conduct in the Counterclaim aside from bare, conclusory assertions.

15. The County admits it terminated the Lease based on Pilot's interference with disaster recovery operations at the Airport in the wake of Hurricane Ian. The County denies that the Airport Director ignored Mr. Abend's text message during the hurricane recovery efforts as the text was sent to the Airport Director's personal phone, which was not on the Airport Director's person at the time it was sent. In the text as in the Counterclaim, Pilot admits to requesting disaster recovery workers to move equipment to accommodate his aircraft.

16. The County admits the Airport runways remained open during the disaster recovery operations as the County has no authority, absent physical damage, to shut down runways. However, the County closed both aircraft ramps and three taxiways for the storage of trucks and equipment of disaster recovery workers. The County admits it did not terminate any other T-hangar leases based on events in the aftermath of Hurricane Ian, but this is because no other pilot or tenant attempted to interfere with the hurricane recovery operations at the Airport.

17. The County denies it breached the Lease by staging hurricane recovery workers at the Airport. The Airport Director emailed tenants on October 1, 2022, which states in part:

“We have a lot going on here at the airport and would prefer that you not fly at this time, but if you absolutely need to fly, please call the FBO and we will make sure the path is clear for you to get out. Do not attempt to taxi your aircraft without assistance from airport personnel and do not interfere with the emergency response crews working on the field.”

This correspondence demonstrates the County made reasonable efforts to keep areas adjacent to rented T-Hangars clear of hazards. But more importantly, the Airport's Rules and Regulations, which are binding on Pilot pursuant to Section 6.e of the Lease, authorize the Airport Director to take whatever actions are prudent and necessary to protect life and safety during emergencies. Moreover, at the time in question, Flagler County was under a declared Local State of Emergency as well as a broader state of emergency declared by the Governor pursuant to Chapter 252, Florida

Statutes. The states of emergency further authorized the County to respond to the emergency situation, including the rapid establishment of a mini-city of recovery workers at the Airport after their original staging area, the Daytona International Speedway, flooded.

18. The County denies it terminated Pilot's Lease after Hurricane Ian in late 2022 based on Mr. Abend's speech prior to September 2020. It is noteworthy that the Airport Director never treated Pilot differently than any other tenant during those intervening years. The County admits the Airport Director stated that another individual advised him that Mr. Abend wished to have the Airport Director's employment terminated. The County denies that the Airport Director suggested or advocated for the County Commission to eliminate the Airport Advisory Board, which only the County Commission has the authority to do, and which the County Commission did at a public meeting based on discussions of the Commissioners and the prior County Administrator in public meetings.

19. The County denies that Florida law allows for damages, injunctive relief, or fee shifting in the circumstances of this case, nor have the elements for such relief been pled. The County denies Pilot suffered any actionable damages due to actions of the County. Nor does any part of the Lease provide that the County must pay to relocate Pilot's equipment upon termination of the Lease. Section 83.251, Florida Statutes, only entitles the prevailing party in this case to judgment for costs. Neither the Lease nor Florida Statutes provide for an attorney fee shifting or for consequential damages.

MOTION TO STRIKE

To the extent that the Counterclaim may be construed to request attorney's fees, the County, a political subdivision of the State of Florida, by and through its undersigned counsel, pursuant to Fla. R. Civ. P. 1.150(a), moves this Court to strike Pilot's demands for attorney's fees.

As grounds therefor, the County would show that there exists no contractual or statutory basis for the award of attorney's fees to Pilot, and Pilot has failed to allege any legal basis therefor. *Dade County v. Pena*, 664 So.2d 959 (Fla. 1995).

EXPRESS CONTRACT

20. The Lease at issue is not a long-term lease in which the tenant constructs capital improvements that upon expiration of the tenancy become property of the County. Rather, it is a month-to-month Lease for storage of an aircraft with a stand-alone section that reads in its entirety:

“13. Thirty (30) Day Termination:

Either party to this Agreement shall have the right, with or without cause, to terminate the Agreement by giving thirty (30) days prior written notice.” (emphasis original)

While the required notice of termination is consideration enough, termination is not a unilateral right of the County under the Lease, but a mutual covenant equally binding on Pilot and the County. It is of considerable benefit to T-hangar tenants to have the right to end their leases and the obligations thereunder rather than be locked into a long-term lease. The termination provision is a bargained for covenant in an arm's length transaction between sophisticated parties, and the Counterclaim improperly seeks to have the Court delete it from the Lease.

21. Hypothetically, if the Court were to grant Pilot the relief Pilot requests, would the County be enjoined from simply invoking the termination clause again? The Counterclaim does not plead or seek an injunction, and the termination clause cannot be ignored and must mean something. Florida law does not permit the Court to rewrite the termination provision out of the Lease between the County and Pilot simply because Pilot feels after the fact that it entered into an unwise contractual arrangement. An implied covenant of good faith cannot be used to vary the

unambiguous terms of a written contract, and courts are not at liberty to change such bargains. *Indian Harbor Citrus, Inc. v. Poppell*, 658 So. 2d 605, 607 (Fla. 4th DCA 1995).

LACK OF CAUSATION

22. The County Commission disbanded the Airport Advisory Board in September 2020, and the Airport Director did not advocate for the Commission to disband it. The termination of Pilot's Lease occurred over two years later in November 2022. Pilot's Counterclaim makes the bare, conclusory assertion without supporting evidence that the termination of the Lease was based on Mr. Abend's participation on the Airport Advisory Board over two years earlier. There is a dearth of evidence in the Counterclaim showing the causal connection between Mr. Abend's membership on the Airport Advisory Board and the County's termination of Pilot's Lease. Moreover, given the temporal distance between the two events, a causal connection cannot be inferred.

23. To show bad faith, Pilot has a high burden to present clear and convincing evidence that the County's termination was made with the intent to injure Pilot. *Handi-Van, Inc. v. Broward County*, 116 So.3d 530, 540 (Fla. 4th 2013) quoting *Krygoski Constr. Co. v. United States*, 94 F.3d 1537, 1441 (Fed. Cir. 1996). Pilot would have the Court believe that the Airport Director harbored bad feelings toward Mr. Abend and waited over two years to terminate Pilot's Lease when the County could have terminated the Lease at any time by simply providing thirty days' notice. The element of causation is lacking, and the Counterclaim should fail.

FIRST AFFIRMATIVE DEFENSE: SEPARATION OF POWERS

24. Pilot would also have the Court second guess the County's discretionary, proprietary acts in administering its T-hangar leases in violation of the constitutional principle of separation of powers. Art. II, Sec. 3, Fla. Const. In essence, Pilot seeks to have the Court

superintend the administration of T-Hanger leases at the Flagler Executive Airport and to substitute the Court's discretion for the County's discretion in administering the leases. Pilot asserts that its actions during the emergency recovery efforts at the Airport were not sufficiently severe to warrant termination of the Lease. Setting aside for the moment the irrelevance of this argument, i.e., the fact that the Lease at issue may be terminated for convenience, to grant the relief requested by Pilot, the Court would have to transgress the separation of powers and take on the executive role of deciding when to invoke bargaining for contractual rights of the County, specifically the contractual right to terminate the Lease. The Florida Supreme Court has stated, "[T]he judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights." *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So.2d 912 (Fla. 1985).

25. The County's decision to terminate the Lease is an executive function of county government and is not subject to judicial review. *See De Groot v. Sheffield*, 95 So. 2d 912, 914-915 (Fla. 1957)(finding that executive decisions of agencies done without notice or the opportunity to be heard are beyond the reach of the courts); *accord Fisher Island Holdings, LLC v. Miami-Dade County Commission on Ethics & Public Trust*, 748 So. 2d 381 (Fla. 3rd DCA 2000); *see also Lee County v. Harsh*, 44 So. 3d 239 (Fla. 2nd DCA 2010)(finding that decisions entirely within the sole discretion of a public official are executive, not quasi-judicial, in nature and therefore not subject to judicial review).

26. The doctrine of separation of powers applies in myriad situations, not merely within fact specific contexts in which the doctrine has been addressed in appellate opinions. In a code enforcement context, the Third District Court of Appeal stated:

"While the cases we rely on arose in torts, mandamus and criminal law, the governing principles apply equally well to injunctions and declaratory actions.

Separation of powers is a constitutional doctrine that extends across all procedural vehicles that might be used to challenge executive action. It would be a hollow idea if it applied only to some procedures and not others.” *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3rd DCA 2013).

The verboten procedural vehicle in the present case is Pilot’s Counterclaim and demand for relief. The Court should look to the substance of Pilot’s request and apply the principle of separation of powers to deny it.

SECOND AFFIRMATIVE DEFENSE: QUALIFIED IMMUNITY

27. Although the Counterclaim does not expressly seek civil damages against the Airport Director, to the extent the Counterclaim may be construed now or as the case progresses, and in order to avoid any claim that such defense is waived, the County hereby asserts the affirmative defense of qualified immunity. Qualified immunity shields the Airport Director when acting in a discretionary capacity from civil damages insofar as the director’s conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 730 (U.S. 1982).

28. All of the alleged actions of the Airport Director in the Counterclaim were within the director’s scope of employment and were discretionary acts.

Respectfully submitted,

Sean S. Moylan

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by service through the e-portal to Dennis K. Bayer to the designated email addresses dennis@bayerlegal.com and pleadings@bayerlegal.com on this 11th day of May 2023.

Unofficial Copy

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