IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 2018-005132-CA-01 (CA 21)

FREE AND SOVEREIGN STATE OF
VERACRUZ DE IGNACIO DE LA LLAVE,

Plaintiff,

v.

ACE REALTY HOLDINGS, LLC, JAVIER
DUARTE, ANA MARIA VELASQUEZ,
NEXXOS REALTY, LLC, INAKI NEGRETE,
and VULCAN DYNAMIC REALTY FUND, LP,

Defendants.
_____/

DEFENDANT JAVIER DUARTE'S MOTION TO DISMISS COMPLAINT, OR, IN THE ALTERNATIVE, TO STRIKE PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES

Defendant Javier Duarte, through undersigned counsel and pursuant to Florida Rule of Civil Procedure 1.140(b), appearing specially and without waiving any defense arising under Rule 1.140 and/or based on improper forum, moves to dismiss with prejudice the Complaint filed by Plaintiff, the Free and Sovereign State of Veracruz de Ignacio de la Llave, for insufficient service of process, for lack of personal jurisdiction, and for failure to state a claim.

INTRODUCTION

Plaintiff has not properly served Mr. Duarte. Worse yet, the time to serve Mr. Duarte has elapsed and it is too late, under Florida Rule of Civil Procedure 1.070(j), to serve him. Therefore, the Court should dismiss this case as to Mr. Duarte for insufficient service of process.

Plaintiff's Complaint also suffers from a number of other fatal defects. For one, this Court lacks personal jurisdiction over Mr. Duarte. Indeed, Plaintiff has not even made the requisite allegations to invoke Florida's long-arm statute to establish jurisdiction over Mr. Duarte, who is both a foreigner and a non-resident. While Plaintiff's Complaint consists almost entirely of a list of Florida properties, none of those properties are owned by Mr. Duarte. Meanwhile, the few conclusory allegations that remain in the Complaint relate solely to alleged conduct in Mexico, with no ties to Florida.

Finally, the Complaint should be dismissed based on a number of serious pleading deficiencies and for failure to state a claim. For example, it is unclear what conduct Plaintiff seeks to attribute to Mr. Duarte, or to any of the other five Defendants, because Plaintiff simply groups them together throughout the Complaint without any effort to distinguish them. The most elementary of Florida's pleading requirements have not been satisfied, let alone the heightened pleading requirements that apply to Plaintiff's fraud based claims.

There are a number of independent reasons that require dismissal of this Complaint, as such, the Court should not hesitate to do so.

ARGUMENT[1]

I. Plaintiff has failed to effectuate service upon Mr. Duarte and the time to do so has nonetheless elapsed.

Mr. Duarte has not been properly served with a summons and the Complaint in this case. This is so despite Plaintiff's allegation that Mr. Duarte would "be served via the Hague Convention." Complaint at ¶ 6. Further, it appears from the docket that Plaintiff *may* have obtained a summons to *pursue* service upon Mr. Duarte on July 17, 2018. But at that time 148

[1] Mr. Duarte reserves the right to supplement this motion with evidence and further memoranda of law regarding issues related to the insufficiency of service of process and personal jurisdiction prior to any hearing on the motion.

days had already elapsed since Plaintiff filed its Complaint on February 19, 2018. As such, it is not even possible for Plaintiff to have accomplished any manner of service upon Mr. Duarte within the 120-day limit to complete service that is clearly imposed by Florida Rule of Civil Procedure 1.070(j).

There is no record evidence of Plaintiff making any effort to serve Mr. Duarte, nor has the Plaintiff requested any extension of the 120-day limit in this case. Therefore, any purported service must be quashed and the Court should dismiss this action pursuant to Rule 1.070(j) as to Mr. Duarte for failure to effect service and for failure to do so in a timely manner.

II. The Court lacks personal jurisdiction over Mr. Duarte.

Chief amongst the Complaint's numerous deficiencies is this Court's lack of jurisdiction over Mr. Duarte. In fact, the Complaint does not even allege a basis for personal jurisdiction over Mr. Duarte.

Because Mr. Duarte is not a resident or citizen of Florida, the Florida long-arm statute applies, which provides for two types of personal jurisdiction: specific, *see* Fla. Stat. § 48.193(1); and general, *see* Fla. Stat. § 48.193(2). Plaintiff has failed to even invoke either type of personal jurisdiction.

A. Florida's long-arm jurisdiction analysis and the burden-shifting framework.

"In Florida, the appropriateness of exercising personal jurisdiction over a nonresident defendant involves a two-part inquiry." *Banco de los Trabajadores v. Cortez Moreno*, 237 So. 3d 1127, 1132 (Fla. 3d DCA 2018). That inquiry requires the Court to "first determine whether sufficient jurisdictional facts exist to bring the action within the ambit of Florida's long-arm statute (section 48.193), and then it must determine whether the foreign [defendant] possesses

sufficient 'minimum contacts' with Florida to satisfy federal constitutional due process requirements." *Id.* (citing *Reynolds Am., Inc. v. Gero*, 56 So. 3d 117, 119 (Fla. 3d DCA 2011)).

Therefore, the Court's first determination looks to "**whether the complaint's allegations are sufficient to bring the action within the ambit of Florida's long-arm statute**." *Id.* (emphasis added). "If the allegations are sufficient, the burden then shifts to the defendant to contest, via affidavit or other sworn proof, the jurisdictional allegations or whether sufficient minimum contacts exist[.]" *Id.* Then, "if properly contested, the burden [] returns to the plaintiff to refute the defendant's evidence with similar sworn proof. *Id.*

Here, the allegations are insufficient and will otherwise be rebutted by the evidence.

B. There is no basis for specific personal jurisdiction.

With respect to specific jurisdiction, Florida Statutes, Section 48.193(1)(a) enumerates the specific acts that may establish a basis for personal jurisdiction. In addition to a defendant having engaged in one of the specified acts under the long-arm statute, the plaintiff must allege that the cause of action arises from one of the specified acts. *See id.* Indeed, "specific jurisdiction expressly require[s] allegations *both*: (i) that the defendant does one of the enumerated acts within Florida, *and* (ii) that the plaintiff's cause of action 'arise from' one of the enumerated acts occurring in Florida. *Banco de los Trabajadores*, 237 So. 3d at 1135 (emphasis in original). These "dual requirements . . . are known as the statute's connexity requirement." *Id.*

Based on Plaintiff's vague allegations, there is no indication as to what, if any, actions Mr. Duarte took in Florida and how Plaintiff's claims arise from any such activity. In fact, Plaintiff alleges the opposite, it only alleges conduct on the part of Mr. Duarte in Mexico. Neither the conclusory claims of theft, fraud, or civil conspiracy point to any conduct in Florida.

Further, Plaintiff does not allege (because it cannot) that Mr. Duarte owns any of the Florida property that it lists in the Complaint.

Thus, Plaintiff's allegations fail to invoke the long-arm statute and also fail to establish the 'connexity' requirement. Even if Mr. Duarte owned property in Florida, "ownership of property is insufficient to subject a nonresident defendant to the jurisdiction of the courts of [] [Florida], unless the cause of action arose out of such ownership." *Kozma Investmentos, LTDA v. Duda*, No. 2:17-CV-306-FTM-99CM, 2018 WL 1535723, at *2 (M.D. Fla. Mar. 29, 2018) (quoting *Nichols v. Paulucci*, 652 So. 2d 389, 393 n.5 (Fla. 5th DCA 1995).

In sum, none of the specific acts under Section 48.193(1)(a) have been alleged, nor have they taken place in fact, as such there is no specific long-arm jurisdiction here.

C. There is no basis for general personal jurisdiction.

Finally, apart from specific personal jurisdiction, Plaintiff has not alleged general personal jurisdiction and Mr. Duarte is otherwise not "engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise." *See* Fla. Stat. § 48.193(2). To establish general jurisdiction, section 48.193(2) requires:

> a defendant to have engaged in 'substantial and not isolated' activity in this state. Florida courts have defined 'substantial and not isolated' to mean 'continuous and systematic general business contact with Florida.' Continuous and systematic contacts occur where a nonresident defendant's activities are 'extensive and pervasive, in that a significant portion of the defendant's business operations or revenue [are] derived from established commercial relationships in the state' or where 'the defendant continuously solicits and procures substantial sales in Florida.'

E.g., *Aegis Def. Services, LLC v. Gilbert*, 222 So. 3d 656, 659 (Fla. 5th DCA 2017). Again, in this inquiry, "the court must [first] determine whether the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of section 48.193, Florida's long-arm

statute." *Id.* Plaintiff fails to make any allegations that could support general personal jurisdiction, again, because it cannot.

In light of the above, because neither specific or general long-arm jurisdiction have been established by the allegations or evidence in this case the Court should dismiss this lawsuit for lack of personal jurisdiction.

III. The Complaint should be dismissed for failure to state a cause of action.

A. Plaintiff's Complaint fails to distinguish the Defendants from each other whatsoever.

Where, as here, a plaintiff groups multiple defendants together without sufficiently differentiating the allegations against each, the complaint is subject to dismissal for failure to comply with the requirements of Florida Rule of Civil Procedure 1.110(b). *See K.R. Exchange Svcs., Inc. v. Fuerst, Humphrey, Ittleman, PL*, 48 So. 3d 889, 893-94 (Fla. 3d DCA 2010) (affirming dismissal of plaintiff's case for "failure to comply with minimum pleading requirement" when numerous paragraphs referred collectively to "defendants" and failed to differentiate between the multiple defendants' actions); *Aspsoft, Inc. v. WebClay*, 983 So. 2d 761, 768 (Fla. 5th DCA 2008) (affirming dismissal of plaintiff's complaint which "impermissibly commingled separate and distinct claims against the separate defendants"); *Simon v. Celebration Co.*, 883 So. 2d 826, 833 (Fla. 5th DCA 2004) (noting that "the lack of specificity is particularly troublesome here where nine separate defendants are lumped together in each count in a complaint that often fails to particularize which of the nine defendants made which statements").

Here, Plaintiff has sued six unique Defendants, comprised of both individuals and companies. However, Plaintiff makes no effort to distinguish between the six different individuals and entities, simply referring to them collectively as "Defendants." This fatal

ambiguity pervades Plaintiff's allegations, rendering it impossible for each Defendant to know precisely how to respond to the allegations. To prepare his defenses, Mr. Duarte should not have to speculate about something as basic as which accusation, statement, or averment is actually meant to pertain to him. Rather, the Complaint should "clearly determine what is being alleged." *Barrett v. City of Margate,* 743 So. 2d 1160, 1162-63 (Fla. 4th DCA 1999). The Court should dismiss the Complaint on this basis alone.

B. The Plaintiff's allegations are too vague to sustain its claims, particularly under the applicable heightened pleading standard.

The Complaint, largely consisting of a mere list of properties that Mr. Duarte does not own, fails to state any cognizable causes of action nor does it contain anything more than a handful of conclusory statements posing as factual allegations.

It bears reiterating the classic analysis on a motion to dismiss: although the Court must accept well-pled facts as true, the Court is not required to accept a plaintiff's internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party. *See R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999). A complaint must plead sufficient ultimate facts to support each element of the cause of action. The mere pleading of conclusory allegations is insufficient to meet this requirement. *Nodal-Tarafa v. ARDC Corp.*, 579 So. 2d 414 (Fla. 3d DCA 1991).

Further, because Plaintiff has made claims alleging fraud, the heightened pleading standard of Rule 1.120 applies to the Complaint. Rule 1.120 provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit." Fla. R. Civ. P. 1.120(b). Pursuant to this Rule, "[t]he factual basis for a claim of fraud must be pled with particularity and must specifically

identify misrepresentations or omissions of fact, as well as time, place or manner in which they were made." *Cedars Healthcare Grp., Ltd. v. Mehta*, 16 So. 3d 914, 917 (Fla. 3d DCA 2009) (citing *Blue Supply Corp. v. Novos Electro Mech. Inc.*, 990 So. 2d 1157, 1159-60 (Fla. 3d DCA 2008). In fact, the "elements of fraud are required to be alleged with sufficient particularity so that the trial judge, in reviewing the ultimate facts alleged, may rule as a matter of law whether or not the facts alleged are sufficient as the factual basis for the inferences the pleader seeks to draw." (*Id.*).

For example, Plaintiff simply alleges the conclusions that its funds "were stolen by Javier Duarte and his network to invest into the above referenced assets," and that "Mr. Duarte and his associates conspired together and looted government coffers and engaged in other graft that stole money" from Plaintiff. Complaint, ¶¶ 55, 57. These conclusory allegations among other totally vague statements in the Complaint fail to meet basic pleading requirements and utterly fail to satisfy the heightened pleading standard under Rule 1.120.

Based on the vagueness and conclusory nature of Plaintiff's claims, all of Plaintiff's claims should be dismissed.

C. Plaintiff's "constructive trust" claim must be dismissed because that is a remedy, not a cause of action.

Plaintiff appears to assert "constructive trust" as a cause of action. *See* Complaint, ¶ 57. However, "[a] constructive trust . . . is not a traditional cause of action; it is more accurately defined as an equitable remedy . . . [t]herefore, because a constructive trust is a remedy, it must be imposed based upon an established cause of action." *Swope Rodante, P.A. v. Harmon*, 85 So. 3d 508, 511 (Fla. 2d DCA 2012) (internal citations and quotations omitted). Thus, this claim must be dismissed "because a constructive trust is a remedy, not a cause of action." *Id.* (affirming dismissal of constructive trust claim because it is a remedy).

D. Plaintiff's civil conspiracy claim must be dismissed.

Plaintiff's bare legal conclusions in paragraph 58 of the Complaint fail to satisfy the threshold elements of a claim for civil conspiracy: "(a) an agreement between two or more parties, (b) to do an unlawful act or do a lawful act by unlawful means. . . ." *Rey v. Philip Morris, Inc.*, 75 So. 3d 378, 381 (Fla. 3d DCA 2011) (citing *Charles v. Florida Foreclosure Placement Center, LLC,* 988 So. 2d 1157, 1159-60 (Fla. 3d DCA 2008)). Allegations of conspiracy must always be "clear, positive, and specific." *Eagletech Communications, Inc. v. Bryn Mawr Inv. Group, Inc.*, 79 So. 3d 855, 863 (Fla. 4th DCA 2012) (citing *World Class Yachts, Inc. v. Murphy,* 731 So. 2d 798, 799 (Fla. 4th DCA 1999)). As a result, Plaintiff's conclusory allegation of an agreement is insufficient to support its conspiracy claim. *Russo v. Fink*, 87 So. 3d 815, 819 (Fla. 4th DCA 2012).

But even if the Court were to disregard these pleading deficiencies, a conspiracy claim cannot be sustained unless it is based on a properly pled, underlying wrong. *See Raimi v. Furlong*, 702 So. 2d 1273, 1286 (Fla. 3d DCA 1997); *see also Marriott Intern., Inc. v. Am. Bridge Bahamas, Ltd.*, 193 So. 3d 902, 909 (Fla. 3d DCA 2015). Here, Plaintiff simply does not state what the underlying wrong for the alleged conspiracy actually is, nor does it tie the claim to any of its other vaguely alleged/titled torts. In any event, because Plaintiff's other claims must be dismissed the conspiracy claim necessarily fails as well.

E. Plaintiff's civil theft claim must be dismissed.

In paragraph 61, Plaintiff purports to allege a violation of Florida Statutes, Section 812.014. Without stating civil theft or mentioning the appropriate statute, evidently Plaintiff may seek to allege a civil theft claim under Florida Statutes, Section 772.11, which provides a

civil remedy for violations of the penal statute, section 812.014. Again, this lack of clarity highlights the problems generated by Plaintiff's vague allegations.

Assuming that Plaintiff is asserting a civil theft claim, it is barred because Plaintiff has not, and has not even alleged that it complied with the conditions precedent for asserting a civil theft claim under Florida law. That is because the civil theft statute requires a written, pre-suit demand and also provides for a 30-day notice period before a civil theft claim may be filed:

> Before filing an action for damages under this section, the person claiming injury **must make a written demand** for $200 or the treble damage amount of the person liable for damages under this section. If the person to whom a written demand is made complies with such demand within 30 days after receipt of the demand, that person shall be given a written release from further civil liability for the specific act of theft or exploitation by the person making the written demand.

Fla. Stat. § 772.11(1) (emphasis added).

"Hence, under Florida law, before an action for civil theft is filed, the plaintiff must first make a written demand for payment on the defendant. In the event no payment is made, the plaintiff may, after waiting 30 days, file suit alleging his or her civil theft claim." *Hamilton v. Blum*, No. 08-61336-CIV, 2009 WL 10666972, at *8 (S.D. Fla. Dec. 4, 2009), *report and recommendation adopted,* No. 08-61336-CIV, 2010 WL 11504343 (S.D. Fla. Jan. 20, 2010). It is no surprise then that Plaintiff failed to comply, or even allege compliance with this requirement in light of the fact that it did not even cite the appropriate statute for its civil theft claim. Plaintiff's failure to at a minimum, allege compliance, is ground for dismissal of this claim. *See id.*

Further, Plaintiff has failed to plead the requisite elements of a civil theft claim. "In order to establish an action for civil theft, the claimant must prove the statutory elements of theft, as well as criminal intent." *Gersh v. Cofman*, 769 So. 2d 407, 409 (Fla. 4th DCA 2000). The elements of theft are established in Florida Statutes, Section 812.014(1):

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
>
> > (a) Deprive the other person of a right to the property or a benefit from the property.
> >
> > (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

Plaintiff's conclusory allegations fail to allege these elements. In sum, Plaintiff's civil theft claim should be dismissed for failure to comply with the pre-suit requirements and also as a matter of deficient pleading.

IV. Plaintiff's premature request for exemplary or punitive damages must be stricken.

Plaintiff seeks "punitive" or "exemplary" damages without any basis or entitlement to do so. Complaint, ¶¶ 58, 63. First, prior to pleading a claim for punitive damages a plaintiff must seek leave to amend to add such a claim and must make a proffer that would demonstrate a reasonable basis for the recovery of punitive damages:

> In any civil action, **no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages**. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure.

Fla. Stat. 768.72(1) (emphasis added). Of course, at this stage, Plaintiff has failed to meet the statutory requirement to assert a claim for punitive damages.

Second, Plaintiff's claim that it seeks exemplary damages based on Defendants' "criminal conduct" and for violations of "the Penal Code, including 812.014" is without support. *See* Complaint, ¶ 63. Again, to the extent Plaintiff is alleging a civil theft claim, neither the civil theft statute nor section 812.014 permit an award of punitive damages in connection with such a claim. Fla. Stat. 772.11(1) ("Punitive damages may not be awarded under this section.").

In light of the above, and in the unlikely event that the Court does not dismiss this case, Plaintiff's request for punitive damages must be stricken.

CONCLUSION

WHEREFORE, for the foregoing reasons, Mr. Duarte respectfully requests that this Court enter an order dismissing the Complaint with prejudice and for such further relief as the Court deems just and proper. In the alternative, if the Court declines to dismiss the Complaint, Mr. Duarte respectfully requests that the Court issue an order striking Plaintiff's claim for punitive or exemplary damages.

Respectfully submitted,

Dated: November 27, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the electronic filing portal's generated e-mail on this 27th day of November, 2018, on the following:

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