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

THE JOCKEY CLUB CONDOMINIUM APARTMENTS, INC., on behalf of themselves of all persons similarly situated,

Plaintiff,

v.

THE CITY OF NORTH MIAMI, a municipal corporation

Defendant.

CASE NO.: 20-27233 CA 43

Answer and Affirmative Defenses to Amended Complaint

The City of North Miami (the "City"), hereby responds and asserts defenses to the *Amended Complaint* (Filing # 122895395) including with numbered responses below that accord with the like-numbered allegations of Plaintiff's pleading except as otherwise noted, and states:

Answer

Response to "Introduction"

1. Admitted that Plaintiff presents and styles this action as a putative class action. Denied that the City has engaged in any wrong-doing or that Plaintiff is entitled to relief.

2. Admitted that customers of the City's water utility received water utility bills from the City that were accurate, correct, and in accordance with applicable law. The City is without knowledge sufficient to determine the truth or falsity of the balance of these allegations and therefore denies same.

Response to "Parties, Jurisdiction, and Venue"

3. Admitted.

4. Admitted.

5. Denied that Plaintiff has alleged or otherwise presented a valid cause of action, otherwise admitted for venue purposes only.

6. Admitted.

7. Admitted that Plaintiff seeks the referenced relief but specifically denied that Plaintiff is entitled to the relief sought.

Response to "Class Representation Allegations"

8. Admitted that Plaintiff purports to seek relief on behalf of a putative class, but denied that Plaintiff or the putative class members are entitled to the relief sought.

9. Admitted joinder of all putative class members would exceed 100 in number, but denied that Plaintiff or the putative class members are entitled to the relief sought.

10. Denied.

11. Denied.

12. The City is without knowledge sufficient to admit or deny this allegation and therefore denies the allegation and demands strict proof thereof.

13. Denied.

14. Denied.

15. Denied.

Response to "Fact Common to All Counts"

16. Specifically denied that Ordinance 19-96 applies or governs. The City is without knowledge sufficient to admit or deny the balance of this allegations and therefore denies the allegations and demands strict proof thereof.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. Denied.

22. Denied.

Response to Count I – Declaratory Relief

23. The City incorporates its responses to paragraph 1 through 22 as if fully set forth herein.

24. Admitted that Plaintiff professes doubt or confusion, but denied that under the circumstances, including with respect to Ordinance 19-96, as to information made available by the City, and the 2012 Resolution, that any such professed doubt is actionable under the law or facts of this case.

25. Admitted that Plaintiff professes doubt or confusion, but denied that under the circumstances, including with respect to Ordinance 19-96, as to information made available by the City, and the 2012 Resolution, that any such professed doubt is actionable under the law or facts of this case. Specifically denied that Ordinance 19-96 applies and governs or that Plaintiff has been subject to collection procedures or penalties pertaining to the City's water utility. As to the balance of any allegations, the City is without knowledge sufficient to admit or deny the allegations and therefore denies same and demands strict proof thereof.

26. Admitted that this Court has equitable powers including under section 86.011, Florida Statutes, to enter decrees and declaratory judgment, but denied any such relief is warranted or appropriate here. The City specifically denies all allegations of wrongdoing, specifically denies that Ordinance 19-96 governs, and specifically denies that the City has violated any law.

27. Denied.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

33. Denied.

Response to Count II – Money Had and Received

[Responding to Amended Complaint's second paragraph 32] The City incorporates its responses to paragraph 1 through 22 as if fully set forth herein.

[Responding to Amended Complaint's second paragraph 33] Denied.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

Response to Count III – Unjust Enrichment

[Responding to Amended Complaint's second paragraph 34] The City incorporates its responses to paragraph 1 through 22 as if fully set forth herein.

[Responding to Amended Complaint's second paragraph 35] Admitted that Plaintiff purports to bring this claim on behalf of itself and a putative class, but denied Plaintiff or the putative class are entitled to any or such relief.

[Responding to Amended Complaint's second paragraph 36] Denied.

[Responding to Amended Complaint's second paragraph 37] Denied.

38. Denied.

39. Denied.

40. Denied.

Residual Denial

To the extent, if any, that the City is deemed to have not responded to some portion of an allegation in the Amended Complaint, the City denies same and demands strict proof thereof.

WHEREFORE, the City of North Miami prays for judgment dismissing all claims with prejudice, and granting such other and further relief as the Court deems just and proper.

Affirmative Defenses

On April 10, 2012, the City of North Miami passed Resolution No. R-2012-52 (the "2012 Resolution"). Among other impacts, the 2012 Resolution imposed a new rate structure plan. Prior to doing so, the City informed all customers of the Water and Sewer Collection and Transmission System concerning the application of the new rate plan pursuant to section 180.136, Florida Statutes. The City sent this statutory notice to customers including Plaintiff. The 2012 Resolution further authorized the City Manager to do all things necessary to implement the new rate structure plan.

Since 2012, the City has carried out billing for the Water and Sewer Collection and Transmission System in a consistent manner effective with the changes implemented by the City in 2012 via its City Manager. For nearly nine years, the City's utility has issued invoices to customers, like Plaintiff, under the 2012-forward rate structure without complaint or suggestion of error. Upon information and belief, Plaintiff never complained upon receiving the section 180.136, Florida Statutes, notice, nor did Plaintiff complain after any invoice for the water utility. The first time the

City learned of a complaint regarding the rate structure was upon learning of this lawsuit.

The City has not deemed Ordinance 19-96 as the governing law for nearly a decade. Ordinance 19-96 is not the governing law. The 2012 Resolution either directly or indirectly repealed Ordinance 19-96.

Affirmative Defense No. 1. Repeal. The 2012 Resolution necessarily repeals Ordinance 19-96. The 2012 Resolution goes to the heart of that ordinance. The intention of the Mayor and City Counsel is clear. Ordinance 19-96 cannot stand alongside the 2012 Resolution, which renders Ordinance 19-96 void.

Affirmative Defense No. 2. Mistake of Law. The City reiterates its stated position and assurance that it acted properly and lawfully. In any case, however, the City avoids liability under the doctrine of mistake of law. To the extent Ordinance 19-96 is deemed or held to be an enforceable ordinance, the City misapprehended the law and acted in good faith, leading to a mistake.

Affirmative Defense No. 3. Mistake of Fact. The City reiterates its stated position and assurance that it acted properly and lawfully. In any case, however, the City avoids liability under the doctrine of mistake of fact. To the extent that that the 2012 Resolution is deemed to have not repealed Ordinance 19-96, the parties were mistaken about the validity of Ordinance 19-96 and the 2012 Resolution.

Affirmative Defense No. 4. Waiver (2012 Resolution and Statutory Notice). Plaintiff claims a right, privilege or advantage in the former rate structure of Ordinance 19-96. But the City furnished Plaintiff and other utility customers with the section 180.136, Florida Statutes, notice regarding a rate-change in 2012. Thereafter, in a public meeting, the City passed the 2012 Resolution. Then, for a period of years, the City issued bills and collected fees for the water utility and Plaintiff paid for same, by and by. The City made its rates public. Consequently, Plaintiff had

actual or constructive knowledge of the new rate structure and the 2012 Resolution. Over the span of nearly a decade, Plaintiff failed to act or raise a concern about the parties' course of conduct. Plaintiff's inaction evidences an intention to relinquish its purported right, privilege or advantage pertaining to Ordinance 19-96.

Affirmative Defense No. 5. Waiver (Contract). Plaintiff is not a resident of the City. As such, Plaintiff and the City are linked through privity of contract. The contract is a contract implied in fact or, as Plaintiff contends, a contract implied in law (via its unjust enrichment claim). In either case, the City's water utility makes rates accessible through bills to customers like Plaintiff, on its website, and in other publicly-available sources. Over a period of nearly a decade, Plaintiff and the City performed this agreement including through their course of dealing or usage of trade or course of performance. To the extent Plaintiff contends that the City breached this agreement, the City denies same, and submits that Plaintiff waived any claim of breach by continuing to perform the same contract implied in fact since 2012. Plaintiff has had actual or constructive knowledge of the City's rate structure change since 2012 through the performance of the agreement. Plaintiff's inaction for nearly a decade established an intention to relinquish Plaintiff's claimed right, privilege or advantage.

Affirmative Defense No. 6. Laches. The City furnished Plaintiff with the section 180.136, Florida Statutes, notice regarding a rate-change. Thereafter, in a public meeting, the City passed Resolution 2012. Then, for a period of years, the City issued bills and collected fees for the water utility and Plaintiff paid for same, by and by. Over the span of nearly a decade the City and Plaintiff performed the agreement for the water utility. It is the City's rate-change regarding multi-unit structures on a single or master meter that gives rise to Plaintiff's claims in this action. But Plaintiff knew of this conduct and did not assert its right to restrict the City's activities as Plaintiff has sought

to do in this action. The City would be injured and prejudiced if Plaintiff is afforded the relief sought in this lawsuit.

Affirmative Defense No. 7. Voluntary Payment (2012 Resolution). Regardless of whether the 2012 Resolution repealed Ordinance 19-96 or not – and it did – the City carried out a water utility calculation regimen based on the City Manager's interpretation of the 2012 Resolution. In so doing, the City issued bills to customers including Plaintiff, and customers like Plaintiff paid the bills. Upon information and belief, Plaintiff never complained of its payments for the grounds raised in this action. All facts pertaining to the 2012 Resolution, the statutory notice (§ 180.136, Fla. Stat.), and the April 2012 city council meeting were open, publicly available events and documents. As such, Plaintiff had knowledge sufficient to raise its contentions at any time since April 2012 or thereabouts. Plaintiff did not do so. For nearly a decade, Plaintiff acceded, agreed, and acquiesced to the City's interpretation of the 2012 Resolution. In short, Plaintiff never resisted payment at the time of payment. As such, Plaintiff made voluntary payments with full knowledge of the facts.

Affirmative Defense No. 8. Voluntary Payment (Contract). Independently, Plaintiff voluntarily paid under a contract. Plaintiff is not a resident of the City. As such, Plaintiff and the City are linked through privity of contract. The contract is a contract implied in fact or, as Plaintiff contends, a contract implied in law (via its unjust enrichment claim). The City's water utility makes rates accessible through bills to customers like Plaintiff, on its website, and in other publicly-available sources. Over a period of nearly a decade, Plaintiff and the City performed a contract including through their course of dealing or usage of trade or course of performance. To the extent Plaintiff contends that the City breached this contract, the City denies same, and submits that Plaintiff voluntarily paid on the parties' contract implied in fact with full knowledge of the facts.

Affirmative Defense No. 9. Statute of Limitations (Declaratory Relief as to Municipal

Legislation). Florida courts have recognized that cities have a need for certainty in their economic affairs and that their policy decisions should not be subject to perennial review. Here, Plaintiff's claims are governed by statutes of limitation. Count I for declaratory relief is time-barred for reasons including Plaintiff's failure to assert its claim within the applicable limitations period of five years, or within four years if this Court agrees that the four-year catchall statute of limitations applies (§ 95.11(3)(p), Fla. Stat.). This claim accrued either when Plaintiff received the City's section 180.136, Florida Statutes, notice or – at the latest – when the City passed the 2012 Resolution. Section 95.11(2)(b), Florida Statutes, bars this tardy claim (Count 1).

Affirmative Defense No. 10. Statute of Limitations (Contract). All three counts regard an agreement between the City and Plaintiff. The crux of Plaintiff's claim is that the City breached that agreement. Even if that were the case, the City's breach would have occurred in 2012. Any breach-related claim at this juncture is therefore time-barred. Even to the extent Plaintiff cloaks its contract-based claim as a claim for declaratory relief, that claim seeks damages and is otherwise a contract-based claim. As such, all three claims are time-barred.

Affirmative Defense No. 11. Election of Remedies. In certain circumstances, declaratory relief might run alongside a claim for damages. Here, however, the declaratory relief claim is redundant of the damages claims. By seeking damages in all three counts, Plaintiff has elected its remedy.

Affirmative Defense No. 12. Ratification (2012 Resolution). For a period nearly reaching a decade, the City in good faith carried out the 2012 Resolution in the operation of its water utility. Throughout that period of time, Plaintiff had full knowledge it could reject the City's determination of, and execution of the 2012 Resolution. But Plaintiff did not act and instead accepted the City's political and executive actions arising from or relating to the 2012 Resolution. In so doing, Plaintiff

ratified the City's actions and the course of dealing that arose from the 2012 Resolution.

Affirmative Defense No. 13. Ratification (Contract). Plaintiff ratified the parties' agreement based on the 2012 Resolution and abandonment and/or repeal of Ordinance 19-96. Plaintiff is not a resident of the City. Plaintiff and the City are linked through privity of contract. The contract is a contract implied in fact or, as Plaintiff contends, a contract implied in law (via its unjust enrichment claim). In either case, the City's water utility makes rates accessible through bills to customers like Plaintiff, on its website, and in other publicly-available sources. Over a period of nearly a decade, Plaintiff and the City performed their agreement, including through their course of dealing or usage of trade or course of performance. To the extent Plaintiff contends that the City breached this agreement, the City denies same, and submits that Plaintiff ratified the agreement by continuing to perform the same agreement since 2012.

Affirmative Defense No. 14. Novation. Alongside the 2012 Resolution are contract principles that inform and guide this dispute. Plaintiff, as a non-resident, stands in contractual privity with the City. The 2012 Resolution heralded a novation of the agreement evident in the since-repealed or negated Ordinance 19-96. Following the 2012 Resolution, the City Manager used the executive power to impose a new rate structure for utility customers, including with regard to multiple-unit structures on a single (master) meter. Over nearly a decade of custom and usage, the parties evidenced a substitute agreement over water utility rates in this aspect, and performed the replacement agreement rather than the former agreement that preceded the 2012 Resolution.

Affirmative Defense No. 15. Preemption. The City furnished a statutory notice under section 180.136, Florida Statutes. As applied here, that state statute preempts any claim based upon a third-party publication of municipal code. Thus, whatever was set forth in section 180.136 notice governs and controls over the ordinance.

Affirmative Defense No. 16. Set-Off. The City does not seek to recover from any utility customers in making this defense. But to the extent Plaintiff or the putative class were to realize some recovery in this action, that recovery should off-set by the benefits enjoyed by the Plaintiff and putative class for rate increases that the City did *not* impose consistent with the Black & Veatch report's suggested schedule of rate increases. The City did not impose all scheduled rate increases it had the discretion and authority to impose from the 2012 Resolution. Had the City done so, however, those increases would have off-set the claimed benefit Plaintiff contends the City received here. Equity demands that Plaintiff and the putative class not benefit from the City's restraint in imposing further, lawful rate increases.

Affirmative Defense No. 17. Recoupment. The City does not seek to recover from any utility customers in making this defense, except for recoupment as to the named, putative class representatives, including Plaintiff. To the extent Plaintiff might realize some recovery in this action, the City seeks to recoup the benefits enjoyed by the Plaintiff for rate increases that the City did *not* impose consistent with the Black & Veatch report's suggested schedule of rate increases. The City did not impose all scheduled rate increases it had the discretion and authority to impose from the 2012 Resolution. Equity demands that Plaintiff should not benefit from the City's restraint in imposing further, lawful rate increases.

Affirmative Defense No. 18. Unjust Enrichment. The City does not seek to recover from any utility customers in making this defense. But Plaintiff and the putative class members have been unjustly enriched in the calculations of rates by the water utility. To the extent Plaintiff might prevail in showing some entitlement to recovery or error or mistake by the City, Plaintiff's claims sounding equity must be tempered by the fact that Plaintiff has been unjustly enriched by and through the City's restraint in imposing the full set of rate increases contemplated by the 2012 Resolution. In

short, the City did *not* impose all rate increases consistent with the Black & Veatch report's suggested schedule of rate increases. The City did not impose all scheduled rate increases it had the discretion and authority to impose from the 2012 Resolution. In so doing, the City permitted Plaintiff and other members of the putative class to avoid higher water utility bills. Put in other terms, the City conferred a direct benefit on every customer of the water utility by not proceeding with scheduled rate-increases. But it would be unjust to permit Plaintiff and the putative class to retain that benefit under the circumstances of Plaintiff's claims. Equity demands that Plaintiff should not benefit from the City's restraint in imposing further, lawful rate increases.

Affirmative Defense No. 19. Existence of Contract Precludes Unjust Enrichment. Plaintiff is a non-resident of the City. The parties' relationship arises from privity of contract for water services. The City concedes the existence of a contract. The existence of a contract precludes recovery through unjust enrichment.

Affirmative Defense No. 20. Legal Remedy Precludes Declaratory Relief. The City incorporates its arguments against Count 1 from the previously filed motion to dismiss the Amended Complaint here, as if fully stated. Plaintiff's Count 1 for declaratory relief fails, as Plaintiff has an adequate remedy at law in the form of damages.

Affirmative Defense No. 21. Declaratory Relief Can Serve No Useful Purpose with These Concurrent Legal Claims. For the claims at bar, the declaratory relief claim can serve no useful purpose given the concurrent, damages claims. There is no need for guidance or an advisory opinion on the parties' rights. Plaintiff has asserted an action on its rights for damages, undermining the applicability of the Declaratory Judgments Act, as applied here. *See Ready v. Safeway Rock Co.*, 24 So. 2d 808, 809 (Fla. 1946) ("Viewed in its proper perspective, the Declaratory Judgments Act is nothing more than a legislative attempt to extend procedural remedies to comprehend relief in cases

where technical or social advances have tended to obscure or place in doubt one's rights, immunities, status or privileges. It should be construed with this objective in view, but it should not be permitted to foster frivolous or useless litigation to answer abstract questions, to satisfy idle curiosity, go on a fishing expedition **or to give judgments that serve no useful purpose**. It should be construed to aid those who have a meritorious cause rather than to provide a way of escape for those who would be adversely affected. There is no reason whatever why the highway to justice should be strewn with hurdles and pitfalls that make one who secures it wonder if the 'game is worth the candle.'") (emphasis added).

Affirmative Defense No. 22. Separation of Powers Doctrine. Beyond adopting the Black & Veatch study and its rates, the 2012 Resolution separately and further delegated executive power to the City Manager "to do all things necessary to implement the stated rate structure plan." The City thus delegated authority and discretion to the City Manager to carry out the rate change, and the City Manager did so. This political action, delegating power to the executive rather than reserve same in the ordinance, further negated Ordinance 19-96.

Affirmative Defense No. 23. Failure to exhaust administrative remedies. Upon information and belief, Plaintiff never appealed or protested its water utility rates or bills over a period of nearly nine years. Administrative remedies were at hand for Plaintiff, who chose instead to move immediately in favor of a class action lawsuit.

Affirmative Defense No. 24. Privilege. The City has both constitutional authority under its Home Rule powers and statutory authority under section 180.13, Florida Statutes, to set its utility rates and charges. The City's privilege to exercise this power avoids liability under the theories of recovery purportedly alleged here by Plaintiff.

Certificate of Service

I certify that, on the date provided below, a true and correct copy of the foregoing document is being served, pursuant to Rule 2.516(b), Fla. R. Jud. Admin., *via* Florida Courts e-Filing Portal to the names and e-mail addresses provided by all parties, counsel of record and *pro se* parties.

Dated: June 21, 2021

Respectfully submitted,

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