

IN THE COUNTY COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT IN
AND FOR BROWARD COUNTY,
FLORIDA

BURKETT-SCHOLL PROPERTIES, II

CASE NO: COCE-20-022051

Plaintiff,

v.

ULIANA BOGASH,

Defendant.

/

DEFENDANT'S MOTION TO DISMISS COMPLAINT

Defendant, ULIANA BOGASH ("Ms. Bogash"), by and through the undersigned counsel, and pursuant to Florida Rule of Civil Procedure 1.140, hereby moves to dismiss Plaintiff BURKETT-SCHOLL PROPERTIES, II's ("BSP") August 30, 2020 Complaint:

INTRODUCTION

The unfortunate reality of this matter is that it involves a predator landlord engaging in an illegal scheme to defraud and take advantage of an immigrant businesswoman who only speaks English as a second language and who is attempting to make a living in the United States. Acting with fraudulent intent, BSP, an unregistered fictitious entity unlawfully conducting business in Florida, induced Ms. Bogash to enter into an Office Lease Agreement (the "Contract") in June 2015 under the belief that the Contract would be renewable from year to year. However, unbeknownst to Ms. Bogash and contrary to statements of material fact made to Ms. Bogash by BSP, the Contract instead provided for an initial 1-year term followed by automatic successive 3-year terms. Notwithstanding the language in the Contract, the parties performed the Contract on a year to year basis through 2018, with BSP contacting Ms. Bogash each year and Ms. Bogash agreeing to renew her lease for the following year. However, once Ms. Bogash decided to move her business out of Florida to Puerto Rico, Ms. Bogash timely advised BSP that she would no longer be renewing her lease for the following year, and BSP

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thereafter attempted to improperly charge Ms. Bogash with utility fees unattributable to her and told Ms. Bogash that she could no longer continue to rent the premises.

Now, after years of performing the Contract on a year to year basis pursuant to the meeting of the minds between the parties, BSP has filed their Complaint erroneously claiming damages based upon allegations that Ms. Bogash abandoned the premises after the automatic successive 3-year renewal period was in effect.¹ As an initial matter, BSP cannot even maintain the instant lawsuit because it is an unregistered fictitious entity and is therefore illegally purporting to conduct business in Florida. Furthermore, BSP has failed to attach adequate portions of the Contract to its Complaint, in which BSP seeks “interest” and “penalty fees” that were not agreed upon and could render the Contract unenforceable. Based on the foregoing and because BSP cannot be permitted to gain from its unlawful and predatory scheme, BSP’s Complaint against Ms. Bogash must be dismissed.

MEMORANDUM OF LAW

I. Legal Standard

The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. *Provence v. Palm Beach Taverns, Inc.*, 676 So. 3d 1022 (Fla. 4th DCA 1996). However, justice need not be blind at any stage of litigation. Although a court is to draw all inferences in favor of the nonmoving party, this Court is not required to abandon its common sense and draw inferences that are either unreasonable, illogical, or that do not accord with human experience. *See Voelker v. Combined Ins. Co. Of America*, 73 So. 3d 403, 406 (Fla. 1954).

¹ As an initial matter, BSP’s Complaint raises a question of whether this Court has subject matter jurisdiction over this matter. Specifically, paragraph 1 states that “this is an action for breach of contract...claiming an amount that exceeds \$15,000.00.” As such, this jurisdictional allegation as stated does not preclude the possibility that the amount in controversy could exceed \$30,000.00, thereby removing this matter for the jurisdiction of the County Courts pursuant to Fla. Stat. § 34.01.

For purposes of a motion to dismiss, determining whether a *prima facie* case has been pled depends upon the sufficiency of the factual allegations, excluding any bare conclusory allegations. *Alvarez v. E&A Produce Corp.*, 708 So. 2d 997, 999 (Fla. 3d DCA 1998); *American Seafood, Inc. v. Claumson*, 598 So. 2d 273 (Fla. 3d DCA 1992) (mere general conclusory allegations are insufficient to state a cause of action and thus should be dismissed); *see also* Rule 1.110(b)(2). While the allegations of the Complaint are taken as true, when considering a motion to dismiss, this Court need not accept any factual claims that are internally inconsistent, deductions which are unwarranted, or mere legal conclusions asserted by a party. *See Ellison v. City of Fort Lauderdale*, 175 So. 2d 198 (Fla. 1965); *Bliss v. Carmona*, 418 So. 2d 1017, 1019 (Fla. 3d DCA 1982). Any exhibit attached to a pleading is considered part of the pleading for all purposes. *Len Hazen Painters, Inc. v. Wood Hopkins Const. Co.*, 396 So.2d 1233 (Fla. 1st DCA 1981).

II. The Complaint must be dismissed because BSP is partnership illegally doing business under an unregistered fictitious name and therefore BSP cannot maintain the instant lawsuit.

A “fictitious name” is defined in Florida as “any name under which a person transacts business in this state, other than the person’s legal name.” Fla. Stat. § 865.09(2)(c). Under Florida law, **it is illegal** for any person, including a purported general partnership such as BSP, to conduct business in the state under an unregistered fictitious name. *See Aronovitz v. Stein Properties*, 322 So. 2d 74, 75 (Fla. 3d DCA 1975) (holding that trial court erred in denying defendant’s motion to dismiss a complaint filed by a partnership conducting business under an unregistered fictitious name); Fla. Stat. § 865.09(3)(a); *see also Florida Op. Atty. Gen.*, 057-283, Sept. 17, 1957 (stating that where a business name is such as not reasonably to reveal the names of the operators of the business, then registration is necessary under the Fictitious Name Statute). In *Aronovitz*, Florida’s Third District Court of Appeal stated that:

Section 865.09(3), Fla.Stat., F.S.A., provides that **it shall be unlawful** for any partnership to engage in business in this state under a fictitious name unless such name is properly registered with the clerk of the circuit court of the county in which its principal place of business is located. Section 865.09(5), Fla.Stat., F.S.A., provides that **the penalty for the failure to comply with this law shall be that neither the business nor the members nor those interested in doing such business may maintain suit in any court of this state as a plaintiff...**

322 So. 2d at 75 (emphasis added).

Virtually identical to the case at bench, *Arnovitz* involved a partnership doing business under the unregistered fictitious name “Stein Properties” bringing an action for damages under a contract. *Id.* at 74 - 75. Because the record revealed that Stein Properties was not registered under Fla.Stat. § 865.09, the Court found that Stein Properties “could not maintain a suit in any court of this state as plaintiff” and held that the trial court should have granted the defendant’s motion to dismiss. *Id.* at 75. Because BSP, like Stein Properties, is not registered as a fictitious name in the State of Florida, BSP cannot maintain the instant lawsuit against Ms. Bogash. Accordingly, this Court should apply the Third District’s holding in *Arnovitz* and dismiss the instant lawsuit.

III. The Complaint must be dismissed for failure to comply with Fla.R.Civ.P. 1.130(a).

In *Safeco Ins. Co. of Am. v. Ware*, the Florida’s Fourth District Court of Appeal stated:

Florida Rule of Civil Procedure 1.130 provides that contracts ‘upon which action may be brought or defense made’ or copies thereof ‘shall be incorporated in or attached to the pleading.’ **One of the ways to reach a failure to attach a necessary exhibit is by motion to dismiss...** In the case of a complaint based on a written instrument it does not state a cause of action until the instrument or an adequate portion thereof is attached to or incorporated in the pleading in question.

401 So. 2d 1129, 1130 (Fla. 4th DCA 1981) (emphasis added).

Here, the Complaint fails to attach the entirety of the document being sued upon, and instead only attaches select portions of the Contract, *i.e.* the first 12 of 17 pages. BSP is admittedly seeking “interest” and “penalty fees” under the Contract (*See* Complaint at ¶¶ 7, 8), which interest and penalties are not defined in the attached portion of the Contract and could possibly render the entire contract

illegal and/or unenforceable. *See Crosby Forrest Products, Inc. v. Byers*, 623 So. 2d 565, 567 (Fla. 5th DCA 1993) (“A contract term which provides that a party must pay a penalty for breaching a contract is unenforceable”); *Humana Med. Plan, Inc. v. Jacobson*, 614 So. 2d 520, 523 (Fla. 3d DCA 1992) (holding that penalty provision is void as a matter of law and unenforceable). Accordingly, because BSP has failed to attach adequate portions of the Contract to determine *inter alia* whether the interest or penalties could render the Contract unenforceable, the Complaint must be dismissed.

WHEREFORE, based on the foregoing, Defendant ULIANA BOGASH, respectfully requests this Court to enter an Order (i) granting the instant motion; (ii) dismissing Plaintiff BSP’s Complaint; (iii) awarding Bogash her reasonable attorneys’ fees and costs pursuant to the Contract and Fla. Stat. § 865.09; and (iv) granting any other and further relief this Court deems just and proper.

[CERTIFICATE OF SERVICE ON FOLLOWING PAGE]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed and served via the Florida Courts E-Filing Portal this 8th day of October, 2021, to Claudio R. Cedrez Pellegrino, Esq., counsel for the Plaintiff, 11098 Biscayne Blvd., Suite 100A, Miami, Florida 33161, ccedrez@cedrezlaw.com.

Respectfully submitted,

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