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IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

DEEPGULF, INC. and
TOKE OIL AND GAS, S.A.,
Plaintiffs,
vs.
MARC M. MOSZKOWSKI,
Defendant.
_____/

Case No.: 2018 CA 000543
Division:

PLAINTIFFS DEEPGULF, INC. AND TOKE OIL AND GAS, S.A., MOTION TO DISMISS COUNTERCLAIM

COMES NOW, Plaintiffs, DeepGulf, Inc. and Toke Oil and Gas, S.A., by and through undersigned counsel, and hereby files this Motion to Dismiss Counterclaim and states as follows:

MEMORANDUM OF LAW

I. Standard of Review

Under Rule 1.140 (b)(6), Florida Rules of Civil Procedure a court must dismiss a complaint whenever the Plaintiff "fails to state a cause of action." To withstand a motion to dismiss, a complaint must "allege sufficient facts to properly state a cause of action." Continental Banking Co. v. Vincent, 634 So.2d 242 (Fla. 1994).

II. Failure to State a Cause of Action (Count I: Accounting)

In Count I, Defendant attempts to state a cause of action for Accounting apparently based upon the sole allegation that Defendant is a stockholder and officer of the Plaintiffs' entities. Rule 1.110(b)(1), Florida Rules of Civil Procedure states that:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, must state a cause of action and must contain:

(1) a short and plain statement of the grounds on which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it;

(2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief; and

(3) a demand for judgment for the relief to which the pleader deems the pleader entitled.

Mere legal conclusions are inserted into a complaint are insufficient to state a cause of action unless substantiated by allegations of ultimate fact. Doyle v. Flex, 210 So.2d 493 (Fla. 1968).

Defendant's allegations do not at all address why it is entitled to an accounting from Plaintiffs. Under Florida law, a party that seeks an equitable accounting must show that: (1) a fiduciary relationship exists between the parties or the transaction at issue is complex; and (2) the remedy at law is inadequate. Zaki Kulaibee Establishment v. McFlicker, 788 F. Supp. 2d 1363 (S.D. Fla. 2011), rev'd and remanded on other grounds, 771 F.3d 1301 (11th Cir. 2014). Element number 2 of the Zaki elements for an accounting, begs the question in this case, what is the wrong that Defendant is seeking a remedy for in Count I? Plaintiffs have no idea because Defendant has not properly alleged any facts to support such a claim. Just because one party is a stockholder and officer of the other party does not automatically entitle such party to a court ordered accounting. In Zaki the court further stated that "accounting is only a remedy attached to an independent cause of action."

Plaintiffs can only presume that this "action" is akin to the antiquated "bill of discovery" where a party improperly seeks to use judicial resources to determine whether a cause of action even exists. See e.g. Vorbeck v. Betancourt, 107 So.3d 1142, 1147 (Fla. 3d DCA 2012) (holding bill of discovery could not be used to "see if causes of action exist" or to determine whether there is sufficient evidence to render a suspected cause of action viable.)

Therefore, Defendant's counterclaim for accounting should be dismissed as it fails to allege a cause of action.

II. Failure to State a Cause of Action (Count II: Breach of Contract)

In Count II, Defendant attempts to state a cause of action for Breach of Contract. Defendant alleges only that the parties "entered into multiple contracts" and that Defendant "agreed to perform certain work for Plaintiffs in exchange for reasonable compensation." Furthermore, Defendant alleges that Plaintiffs have "failed to compensate your Defendant as agreed" and that Defendant "suffered damages." This does not meet the standard required pursuant to Continental Banking. There are not even general allegations as to fact showing what form the alleged contract took (whether it was written or verbal), what time period the alleged contract was entered into, how many "multiple contracts" were entered into[1], and what Defendant was engaged to do.

Therefore, Defendant's counterclaim for breach of contract should be dismissed as it fails to allege a cause of action.

III. Failure to State a Cause of Action (Count III: Work and Labor Done)

In Count III, Defendant attempts to state a cause of action for Work and Labor Done. Plaintiffs are unaware of the basis for such a cause of action. If there is such a cause of action, Defendants have merely alleged in one paragraph that "Defendant/Counter-Claimant claims, of the Plaintiffs/ Counter-Defendants, sums due for work and labor done." This Count is again woefully inadequate under Continental Banking. Again, Plaintiffs are left to wonder what work and labor Defendant performed, what is the basis in contract or tort or otherwise that Defendant can assert a cause of action for said work and labor against Plaintiffs, and the time frame that the work and labor was performed.

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[1] If there were truly multiple contracts entered into, then it is possible that those contracts and the breaches thereof should be alleged in separate counts.

Therefore, Defendant's counterclaim for work and labor done should be dismissed as it fails to allege a cause of action

IV. Failure to State a Cause of Action (Count IV: Breach of Contract)

In Count IV, Defendant attempts to state a cause of action for Breach of Contract. This Count alleges that Plaintiffs had an agreement to take all necessary and reasonable steps to obtain a permanent visa for Defendant.

A central tenant of contract law is that in order for a contract or promise to be enforceable, there must be consideration. Solnes v. Wallis & Wallis, P.A., 15 F. Supp. 3d 1258 (S.D. Fla. 2014), aff'd, 606 Fed. Appx. 557 (11th Cir. 2015) (applying Florida law); In re Bayshore Yacht & Tennis Club Condominium Ass'n., Inc., 336 B.R. 866 (Bankr. S.D. Fla. 2006) (applying Florida law). The law aptly terms an agreement to do an act or to pay money or another thing where there is no consideration for it a nudum pactum, a naked agreement, or a promise without legal support, which the law will not enforce no matter whether it is verbal or written or however earnestly and solemnly it is made. Kaufman v. Harder, 354 So.2d 109 (Fla. 3d DCA 1978). Defendant makes no legal or factual allegations of consideration flowing from Defendant to Plaintiffs with regards to this claim.

Therefore, Defendant's counterclaim for breach of contract should be dismissed as it fails to allege a cause of action

V. Failure to State a Cause of Action (Count V: Fraud Based on Promise to Pay)

In Count V, Defendant attempts to state a cause of action for Fraud Based on Promise to Pay. In pleading fraud, a party must state ultimate facts, not conclusions. St. Clair v. City Bank & Trust Co. of St. Petersburg, 175 So.2d 791 (Fla. 2d DCA 1965). Defendant merely states in this Count that Plaintiffs made "certain assurances...concerning compensation" and that those

representations were false for a "series of occasions between 2008 and 2017." These are not ultimate facts as are required by St. Clair. Defendant's allegations do not "allege facts as to time, place and substance of the...alleged fraud, specifically the details of the...allegedly fraudulent acts, when they occurred, and who engaged in them." *See* United States ex rel. Silva v. VICI Marketing, LLC, 361 F. Supp.3d (M.D. Fla 2019). Furthermore, these allegations do not state with particularity the circumstances constituting fraud or mistake pursuant to Rule 1.120(b), Florida Rules of Civil Procedure.

Therefore, Defendant's counterclaim for fraud based upon promise to pay should be dismissed as it fails to allege a cause of action

VI. Failure to State a Cause of Action (Count VI: Fraudulent Misrepresentation)

In Count VI, Defendant attempts to state a cause of action for Fraud Based on Fraudulent Misrepresentation. Once again, Defendant fails to allege facts as to "time, place and substance of the...alleged fraud, specifically the details of the...allegedly fraudulent acts, when they occurred, and who engaged in them." See VICI Marketing, supra.

WHEREFORE, Plaintiffs move this Court to dismiss the Counter-Claims and for such other and further relief as the Court deems just and proper.

CERTIFICATE OF CONFERRAL

I certify that conferral prior to filing is not required under Rule 1.202.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 11th day of March, 2025, a copy of the foregoing has been furnished to the Defendant, Marc M. Moszkowski, Le Verdos, 83300 Chateaudouble, France (m.moszkowski@deepgulf.net) via the Court's E-filing system.

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