

IN THE CIRCUIT COURT, OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST. JOHNS COUNTY, FLORIDA

,

Plaintiff,

v.

CASE NO:
DIVISION:

,

Defendant.

/

,

Third-Party Plaintiff,

v.

.

Third-Party Defendants.

/

THIRD-PARTY DEFENDANT'S MOTION TO DISMISS THIRD-PARTY COMPLAINT

Pursuant to Fla. R. Civ. P. 1.140, Third-Party Defendant, (“*”), by and through undersigned counsel, hereby moves to dismiss (“*”)’s Third-Party Complaint, and as grounds therefore states as follows:

I. Procedural History and Background

1. This case arises from various alleged construction defects relating to the construction of a home located in County, Florida (the “Property”).

2. On *, Plaintiff filed his first complaint (“Plaintiff’s Complaint”) against * alleging Count I - Violations of the Florida Building Code, Count II - Breach of Contract, Count III - Negligence, and Count IV - Negligence (Vicarious Liability of Subcontractor’s Negligence).

3. In paragraph 34 under Count IV of Plaintiff’s Complaint, Plaintiff alleges that “*.”

4. On *, Defendant/Third-Party Plaintiff * filed its Third-Party Complaint (“Crossclaim”) against *, as well as numerous other parties.

5. * attempts to allege eight (8) counts against * in its Crossclaim: Count IX - Breach of Contract, Count X - Breach Of Express (Contractual) Warranty, Count XI - Breach of Implied Warranty, Count XII - Express (Contractual) Indemnity, Count XIII - Implied (Common Law) Indemnity, Count XIV - Breach of Contractual Duty To Defend, Count XV - Violation of Florida State Building Code, and Count XVI - Declaratory Relief Regarding Duty to Defend And Indemnify.

6. Attached as the sole exhibit in *’s Crossclaim to implicate *, the scope of work to be provided by * is strictly limited to “*Scope*”.

7. For the reasons set forth below, *, in its Crossclaim, wholly fails to state a cause of action against *, and therefore, the Crossclaim as to * must be dismissed.

II. The Third-Party Complaint Must Be Dismissed for Failure to State a Cause of Action Upon Which Relief May Be Granted.

8. Fla. R. Civ. P. 1.110(b) states, in pertinent part, “a claim for relief . . . must state a cause of action and shall contain . . . *a short and plain statement of the ultimate facts* showing that the pleader is entitled to relief.” (Emphasis added).

9. When ruling on a motion to dismiss, a Court must evaluate the Complaint within its four corners and determine whether the allegations sufficiently state a cause of action. See *Morin v. Fla. Power & Light Co.*, 963 So. 2d 258, 260 (Fla. 2d DCA 2007) (stating “the trial court must ‘treat as true all of the . . . complaint’s well-pleaded allegations, including those that incorporate attachments, and to look no further than the . . . complaint and its attachments.’”) (citing *City of Gainesville v. Fla. Dep’t of Transp.*, 778 So. 2d 519, 522 (Fla. 1st DCA 2001)).

10. * restates here – in a single paragraph – the full extent of the impermissibly vague

allegations by * against * as to work * was to perform and the ways in which * purportedly fell short: “* breached the terms of its Contractor Agreement with * by, among other things, failing to provide workmanship and materials free from defects and that was in compliance with all applicable plans, specifications, codes, and standards as required by the Contractor Agreement for the Property, and/or breached the implied contracts that were created regarding the same” (Crossclaim ¶ #); “ * relied on the representations, skill, and judgment of *” (Id. ¶ #); and “* impliedly warranted to * that their materials would be of merchantable quality and reasonably fit for their intended purpose ...” (Id. ¶ #).

11. “It is a fundamental principal of pleading that the complaint, to be sufficient, must allege ultimate facts as distinguished from legal conclusions which, if proved, would establish a cause of action for which relief may be granted.” *Maiden v. Carter*, 234 So. 2d 168, 170 (Fla. 1st DCA 1970); see *Cutler v. Bd. of Regents of the State of Fla.*, 459 So. 2d 413, 415 (Fla. 1st DCA 1984) (holding that the complaint failed to state a cause of action where “the bare allegations of [the] complaint [were] conclusory in nature, without supporting facts”). In its Crossclaim, * fails to plead the most basic facts regarding the work allegedly performed by *. Accordingly, the Crossclaim must be dismissed. See *Cutler*, 459 So. 2d at 416 (dismissal of claim of failure to maintain common areas was proper where complaint only contained bare conclusory statements as to duty, without alleging ultimate facts.); see also *Barrett v. City of Margate*, 743 So. 2d 1160, 1162-63 (Fla. 4th DCA 1999) (“The complaint must set out the elements and the facts that support them so that the court and the defendant can clearly determine what is being alleged . . . It is insufficient to plead opinions, theories, legal conclusions, or argument.”); *Beckler v. Hoffman*, 550 So. 2d 68, 70 (Fla. 5th DCA 1989) (“It is not necessary to allege *evidentiary* facts . . . but *conclusions* as here alleged are insufficient.”) (Emphasis added).

12. In its Crossclaim, * has wholly failed to plead sufficient ultimate facts in support

of its claims, as required by Fla. R. Civ. P. 1.110(b). For example, * fails to allege sufficient ultimate facts to show (1) whether any duty, and what duty arose from the purported subcontract; (2) what alleged defects are present in *’s work at the Property; (3) how *’s work was allegedly performed improperly; (4) what sections of the Florida Building Code * allegedly violated; and (5) what specific damages allegedly resulted from *’s work. Instead, * simply makes conclusory allegations as to *’s purported duty of care and breach thereof.

13. Nowhere in the Plaintiff’s Complaint, the Plaintiff’s Expert Report attached to that Complaint, or the Third-Party Complaint are there any allegations that *scope* was incorrectly installed or is otherwise causing any damages to any portion of the subject property.

14. “If an exhibit facially negates the cause of action asserted, the document attached as an exhibit controls and must be considered in determining a motion to dismiss.” *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240, 1242 (Fla. 2000). “Where a document on which the pleader relies in the complaint directly conflicts with the allegations of the complaint, the variance is fatal and the complaint is subject to dismissal for failure to state a cause of action.” *Thomas v. Hickory Foods, Inc.*, 145 So. 3d 203, 205 (Fla. 1st DCA 2014) (quoting *Appel v. Lexington Ins. Co.*, 29 So. 3d 377, 379 (Fla. 5th DCA 2010)).

15. As a result of *’s failure to plead ultimate facts supporting the elements of duty and breach, the Crossclaim as pertaining to * should be dismissed for failure to state a cause of action. See *Cutler*, 459 So. 2d at 416 (dismissal of claim of failure to maintain common areas was proper where complaint only contained bare conclusory statements as to duty, without alleging ultimate facts); see also *Barrett v. City of Margate*, 743 So. 2d 1160, 1162-63 (Fla. 4th DCA 1999) (“[t]he complaint must set out the elements and the facts that support them so that the court and the defendant can clearly determine what is being alleged . . . It is insufficient to plead opinions, theories, legal conclusions, or argument”); *Beckler v. Hoffman*, 550 So. 2d 68, 70 (Fla. 5th DCA

1989) (“[i]t is not necessary to allege *evidentiary* facts . . . but *conclusions* as here alleged are insufficient”) (emphasis added).

III. **Counts Relating to Indemnity/Duty to Defend Must be Dismissed for Failure to State a Cause of Action, In That * Has Failed to Attach a Copy of the Purported Contract as Relative to *’s Scope of Work in Plaintiff’s Complaint.**

16. Rule 1.130(a) of the Florida Rules of Civil Procedure provides, in pertinent part, “[a]ll...contracts...on which action may be brought...must be incorporated in or attached to the pleading.”

17. A pleading based on a written contract fails to state a cause of action until the contract, or an adequate portion of the contract, is attached to or incorporated in that pleading. See *Safeco Ins. Co. v. Ware*, 401 So. 2d 1129, 130 (Fla. 4th DCA 1981).

18. In the instant case, * attempts to skirt the requirements of Rule 1.130(a) by attaching a copy of a contractor agreement between * and * signed [years prior], specifically relating to “*scope*” as the scope of work. (Crossclaim, Exhibit “3”).

19. * expressly bases each of its causes of action against * on the Plaintiff’s allegations (Crossclaim ¶ 82, 88, 94, 101, 108, 112, 116, & 127).

20. A review of the Plaintiffs’ Complaint that was incorporated by reference into *’s Third-Party Complaint reveals a complete omission of any allegations regarding any issue with *’s scope of work.

21. There are no allegations of building code violations with “*scope*” in Plaintiff’s Complaint, which is the scope of work provided in *’s attached Contract. (Crossclaim, Exhibit “3”).

22. For the reasons stated above, unless and until * is able to attach a copy of any alleged subcontract between * and * stating a scope of work as relative to this action, Counts 12, 13, 14 and 16 must be dismissed.

IV. **In The Alternative, * Requests A More Definite Statement As To The Pleading Deficiencies Noted Above.**

23. As demonstrated above, Counts 9 through 16 of *’s Third-Party Complaint should be dismissed for failure to state a cause of action. However, should this Court decide otherwise, * respectfully requests that this Court direct * to provide a more definite statement, curing the pleading deficiencies described above.

WHEREFORE, Third-Party Defendant, *, respectfully requests that this Court enter an Order dismissing Counts 9 through 16 of *’s Third-Party Complaint for failure to state a cause of action, and such other relief as the Court may find necessary and just. In the alternative, * requests that this Court enter an Order directing * to provide a more definite statement as to the pleading deficiencies outlined above.

SIGNATURE BLOCK

CERTIFICATE OF SERVICE