

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA**

CASE NUMBER: 502016CA014473XXXMB

JOHN LEOPOLDO FIORILLA,
as trustee f/b/o JOHN LEOPOLDO
FIORILLA TRUST U/A/D 06-25-2003;

Plaintiff,

v.

KLAYMAN & TOSKES, P.A., a Florida
Corporation; LAWRENCE L. KLAYMAN;
and STEVEN D. TOSKES;

Defendants.

_____ /

**PLAINTIFF'S REPLY TO DEFENDANTS' AFFIRMATIVE DEFENSES, AND
ANSWER AND AFFIRMATIVE DEFENSES TO COUNTERCLAIMS**

Plaintiff, John Leopoldo Fiorilla, as trustee f/b/o John Leopoldo Fiorilla Trust U/A/D 06-25-2003 ("Fiorilla"), files this Reply to Defendants' Affirmative Defenses and Answer and Affirmative Defenses to Defendant Klayman & Toskes, P.A.'s ("K&T") Counterclaims, and states:

REPLY

1. All of K&T's affirmative defenses fail as a matter of law for failure to allege ultimate facts supporting each defense.
2. As to K&T's Third, Tenth, Eleventh, Twelfth, and Thirteenth Affirmative Defenses, Defendants raise factual defenses and denials, not legal, affirmative defenses.
3. As to K&T's second affirmative defense, comparative negligence is not a valid legal defense to Count 3 for breach of fiduciary duty.

4. All of K&T's affirmative defenses are denied, and strict proof thereof is demanded.

ANSWER TO COUNTERCLAIMS

1. Admitted that the action purports to seek damages in excess of \$15,000, but denied as to validity of the action and otherwise denied.

2. Admitted for jurisdictional purposes only.

3. Admitted for jurisdictional purposes only.

4. Without knowledge and, therefore, denied.

5. The terms of the Exhibit A speak for themselves; otherwise, denied.

**COUNT I
BREACH OF CONTRACT**

6. Fiorilla's answers to these paragraphs are re-alleged as if fully set forth herein.

7. Admitted.

8. The terms of the Exhibit A speak for themselves; otherwise, denied.

9. The terms of the Exhibit A speak for themselves; otherwise, denied.

10. Denied.

11. Denied.

12. Denied

13. Denied.

**COUNT II
BREACH OF CONTRACT**

14. Fiorilla's answers to these paragraphs are re-alleged as if fully set forth herein.

15. The terms of the Exhibit A speak for themselves; otherwise, denied.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

**COUNT III
UNJUST ENRICHMENT/QUANTUM MERUIT**

20. Fiorilla's answers to these paragraphs are re-alleged as if fully set forth herein.

21. Admitted.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

WHEREFORE, Fiorilla, having responded to K&T's Counterclaims as set forth above, pray that Judgment be entered for Fiorilla for the Counterclaims answered above, that K&T take nothing by virtue of said Counts, and for all other relief deemed equitable and just.

AFFIRMATIVE DEFENSES

Fiorilla will rely on all defenses available at the time of trial. For these reasons, it reserves the right to amend its Affirmative Defenses to include additional defenses as necessary during the course of the lawsuit.

1. Prior Material Breach. K&T's claims for Breach of Contract (Count 1) and (Count 2) are barred by K&T's prior material breach of the Contract, namely the obligation that "Settlement shall be made with your express concurrence." As more fully set forth in the Complaint, K&T did not receive "express concurrence" from Fiorilla to settle the arbitration

case, choosing instead to settle Fiorilla's arbitration matter on terms that he did not consent to or authorize in a blatant attempt to fill its own pockets at the expense of its client. K&T also breached the Contract by failing to perform its obligations in good faith and with the requisite skill, care, knowledge, and judgment.

2. Statute of Limitations. K&T's claim for Unjust Enrichment/Quantum Meruit (Count 3) is subject to a four-year statute of limitation pursuant to Section 95.11(3)(k), Florida Statutes. Specifically, by K&T's own allegations, its claim for Unjust Enrichment/Quantum Meruit arose from services that ceased on May 11, 2012, rendering K&T's claim filed in March, 2017, time-barred as a matter of law. See ¶122 of the Counterclaim.

3. Express Contract. K&T's equitable claim for Unjust Enrichment/Quantum Meruit (Count 3) fails as a matter of law because there is an express contract governing the rights and obligations of the parties.

4. Unclean Hands. K&T's equitable claim for Unjust Enrichment/Quantum Meruit (Count 3) is barred as a matter of law due to its unclean hands, including, but not limited to: (1) its own misconduct, including breach of duties owed as counsel to Fiorilla, the client; (2) failure to abide by the terms of the parties' contract, as more fully set forth in the Complaint; (3) improperly assessing the value of Fiorilla's claims; (4) selfishly advising and, in fact, badgering Fiorilla to settle his claims for an unreasonably low amount; and (5) settling Fiorilla's arbitration matter on terms that he did not authorize in a blatant attempt to fill its own pockets at the expense of its client.

5. Waiver. K&T's claims are barred because K&T has waived any claims stated by: (1) its own misconduct, including breach of duties owed as counsel to Fiorilla, the client; (2) failure to abide by the terms of the parties' contract, as more fully set forth in the Complaint; (3)

improperly assessing the value of Fiorilla's claims; (4) selfishly advising and, in fact, badgering Fiorilla to settle his claims for an unreasonably low amount; and (5) settling Fiorilla's arbitration matter on terms that he did not authorize in a blatant attempt to fill its own pockets at the expense of its client.

6. Equitable Estoppel. K&T is not entitled to any recovery and is equitably estopped from asserting its claims due to its engagement in inequitable (and/or bad faith) conduct in the course of performing its obligations under the parties' contract. Such conduct includes selfishly advising and, in fact, badgering Fiorilla to settle his claims for an unreasonably low amount, and settling Fiorilla's arbitration matter on terms that he did not authorize in a blatant attempt to fill its own pockets at the expense of its client.

7. In Pari Delicto. To the extent that this Court finds that Fiorilla committed any of the purported wrongdoings alleged by K&T - and it did not - by K&T is not entitled to any recovery because by K&T was *in pari delicto*. Indeed, by K&T knew of, actively participated in, and benefitted from the purported wrongdoings alleged by K&T, including its selfish advice to accept a low-ball settlement offer to guarantee a payday.

8. Set-Off. Fiorilla is entitled to a set-off based on the damages he obtains in his Complaint.

9. Failure to Mitigate. K&T's claims fail as a matter of law because it failed to properly mitigate its damages, including failing to undertake reasonable efforts to attempt a resolution with Fiorilla or reduce or minimize the damages alleged to have been suffered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 21, 2017, I electronically filed the foregoing with the Clerk of Court by using the Court's E-Portal system which will generate automatic electronic notifications to all counsel of record.

Dated: April 21, 2017

MORGAN & MORGAN, P.A.
Business Trial Group

/s/ Evan H. Frederick

Evan H. Frederick

Florida Bar No. 064819

William B. Lewis

Florida Bar No. 064936

515 N. Flagler Dr., Suite 2125

West Palm Beach, Florida 33401

Telephone: (561) 227-5858

Facsimile: (561) 227-5859

WLewis@forthepeople.com

EFrederick@forthepeople.com

-and-

BABBITT & JOHNSON, P.A.

/s/ Theodore Babbitt

Theodore Babbitt

Florida Bar No. 091146

1641 Worthington Rd., Suite 100

West Palm Beach, Florida 33409

Telephone: (561) 684-2500

Facsimile: (561) 684-6308

TedBabbitt@Babbitt-Johnson.com

DCodding@Babbitt-Johnson.com

Attorneys for Plaintiff