

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

TUFF CAR COMPANY, INC., an Illinois Corporation,

Plaintiff/Counter-Defendant,
v.

TOWN OF CICERO, Illinois, an Illinois municipal corporation,

Defendant/Counter/Cross-Plaintiff,
v.

EUGENE POTEMPA, PATRICK POTEMPA, and TIMOTHY POTEMPA,

Cross-Defendants.

Case No. 2015 CH 13833

6783987

**REPLY IN SUPPORT OF TOWN OF CICERO’S SECTION
2-615 MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION
TO STRIKE COUNTER-DEFENDANTS’ AFFIRMATIVE DEFENSES**

All of Counter-Defendants’ affirmative defenses are insufficient as a matter of law and should be stricken. In Counter-Defendants’ Response, Counter-Defendants do not address any of the arguments that are the premise of Cicero’s Motion to Dismiss. For example, Counter-Defendants readily admit that Affirmative Defenses I and II (promissory and equitable estoppel) are both based on the Town attorney’s alleged oral “promise” that the Counter-Defendants were not responsible for paying rent or tow fees for “years.” (Response, ¶¶ 9-12). However, Counter-Defendants simply continue to assert their allegations as pled, and completely ignore that both defenses fail because any such oral promise that Counter-Defendants claim to have relied upon to justify their failure to pay rent and tow fees for several years is barred by the Statute of Frauds. *Id.* Counter-Defendants also continue to assert that the Town attorney “lied” to them in making an oral promise and fail to address that both defenses fail because the parties’ Commercial Lease

specifically provides in its Entire Agreement clause that it may *only* be modified by a writing signed by both parties. *Id.* Based on the language of the Commercial Lease it is unreasonable for Counter-Defendants to claim they relied on the Town Attorney's supposed oral representations that they did not have to pay rent, which directly contradicts the express terms of the written Commercial Lease.

In support of Affirmative Defense III (the *laches* doctrine), Counter-Defendants argue that they will suffer material prejudice in having to pay back unpaid rent and tow fees because Counter-Defendants claim that they did political favors for Cicero in exchange for its agreement not to collect rent for a period of years. *Id.*, ¶ 8. However, Counter-Defendants ignore the fact that Cicero acted promptly as soon as it discovered Counter-Defendants' fraudulent conduct in submitting false and fraudulent leases with a forged Town signature on it to the Illinois Commerce Commission ("ICC") to secure a Relocator's License then stored cars towed through its private towing business on Cicero's government lot, without authorization. *Id.*, ¶¶ 5-8. Counter-Defendants also do not address Cicero's arguments that Affirmative Defense III should be stricken because Counter-Defendants fail to assert any extraordinary circumstances, unreasonable delay, or material prejudice that would give rise to a *laches* defense against Cicero, a government body and do not address their failure to come into a court of equity with clean hands. *Id.*

Accordingly, Defendant/Counter/Cross-Plaintiff Town of Cicero, Illinois, an Illinois Municipal Corporation's ("Cicero" or "Town"), respectfully requests that the Court strike Plaintiff/Counter-Defendants, Tuff Car Company, Inc, an Illinois corporation ("Tuff Car") and Cross-Defendants, Eugene F. Potempa, Patrick Potempa, and Timothy Potempa's ("Potempas") (collectively "Counter-Defendants") Affirmative Defenses in their entirety.

REPLY

A. Any Oral Addendum “For Years” to The Commercial Lease And Towing Contract is Barred by The Statute of Frauds.

In Counter-Defendants Response, Counter-Defendants simply reallege the substance of Affirmative Defenses I and II (promissory and equitable estoppel): that the Town’s Attorney made an oral promise to Counter-Defendants that they “would never have to pay rents if they granted the Town of Cicero certain political favors.” (Response, ¶¶ 10, 12; Affirmative Defenses, ¶¶ 6-9; 15-25). Counter-Defendants make no response whatsoever to the argument that the Statute of Frauds prevents Counter-Defendants from establishing these defenses because both are based on a supposed oral addendum to the Commercial Lease and Towing Agreement that Counter-Defendants did not have to pay rent or tow fees “for years.” Counter-Defendants thus had the opportunity to address Cicero’s arguments regarding the applicability of the Statute of Frauds to the Town Attorney’s alleged oral promise, but Counter-Defendants failed to do so, thereby forfeiting any counterargument and conceding the issue. *Crossroads Ford Truck Sales v. Sterling Truck Corp.*, 355 Ill. Dec. 400, 417 (2011) (finding forfeiture of argument by plaintiff for failure to respond in plaintiff’s reply brief to the substance of an argument raised by the defendant in its brief).

As stated in the Town’s Opening Brief, is well established that the Statute of Frauds applies to a lease for a term of more than one year. *Winnetka Bank v. Mandas*, 202 Ill. App. 3d 373, 389 (1st Dist. 1990) (citing *Fischer v. Mann*, 161 Ill. App. 3d 424, 428 (2nd Dist. 1987); *Daehler v. Oggoian*, 72 Ill. App. 3d 360, 366 (1st Dist. 1979)). Counter-Defendants concede that Affirmative Defenses I and II are wholly dependent upon supposed oral representations by the Town attorney. (Response, ¶¶ 10, 12; Affirmative Defenses, ¶¶ 6-9; 15-25). The Statute of Frauds bars these defenses because the signed writings (the parties’ Commercial Lease and Towing Contract) do not

refer to any supposed addendum, which was not reduced to writing at all. *Mandas*, 202 Ill. App. 3d at 389; *Fischer*, 161 Ill. App. 3d at 428; *Daehler*, 72 Ill. App. 3d at 366. The Statute of Frauds also bars these defenses because although it is clear that Counter-Defendants claim the oral agreement was for a period of “years,” there is no specific claim as to the term of this alleged lease addendum. *Id.* The Court should strike Affirmative Defenses I and II.

B. The Court Should Strike Affirmative Defenses I and II Because The Entire Agreement Clause Bars All Amendments That Are Not in Writing.

Likewise, Counter-Defendants also completely fail to make and thus forfeit any counterargument to the Town’s argument that the Entire Agreement clause bars their First and Second Affirmative Defenses. *Crossroads Ford Truck Sales*, 355 Ill. Dec. at 417. As explained in the Town’s Opening Brief, the “Entire Agreement” clause in the parties’ Commercial Lease expressly bars all oral amendments to the contract.

Under *Benson v. Stafford*, 407 Ill. App. 3d 905, 921-22 (1st Dist. 2010), Counter-Defendants cannot raise an affirmative fraud claim against the Town as a matter of law for supposedly fraudulent oral misrepresentations that they allegedly justifiably relied on to their detriment because of the non-reliance terms present in the Entire Agreement clause. *Id.* at 921-22 (citing *Tirapelli v. Advanced Equities, Inc.*, 351 Ill. App. 3d 450, 457 (1st Dist. 2004); *Adler v. William Blair & Co.*, 271 Ill. App. 3d 117, 126-27 (1st Dist. 1995) (affirming the dismissal of a lawsuit based in fraud when the plaintiffs argued that they relied on oral misrepresentations that differed from the written representations provided to them)). It is unreasonable for the Counter-Defendants to claim that they relied on supposed oral representations that they did not have to pay rent or towing fees for many years that ***directly contradict*** the express terms of the parties’ Commercial Lease and the Towing Contract. *See Adler*, 271 Ill. App. 3d at 126-27. The Court should strike Counter-Defendants’ Affirmative Defenses I and II in their entirety.

C. The Court Should Strike Counter-Defendants' *Laches* Defense Because They Have Not Asserted Extraordinary Circumstances Necessary to Bring The Defense Against a Government Body, Unreasonable Delay, Or Material Prejudice.

Counter-Defendants also fail to respond and thus waive any opposition to the legal principle that in order to assert a *laches* defense against a government body like the Town, Counter-Defendants must allege extraordinary circumstances. *Crossroads Ford Truck Sales*, 355 Ill. Dec. at 417; *Schivarelli v. Chi Transit Auth.*, 355 Ill. App. 3d 93, 103 (1st Dist. 2005); *Madigan ex rel. Dep't of Healthcare & Family Servs. V. Yballe*, 397 Ill. App. 3d 481, 493 (1st Dist. 2009); *In re Sharena H.*, 366 Ill. App. 3d 405, 413 (1st Dist. 2006). Counter-Defendants also do not acknowledge the "clean hands" doctrine, which provides that one seeking equitable relief cannot take advantage of his own wrong and does not have standing to successfully assert an equitable defense like *laches* if he does not come to the court with clean hands. *Monahan v. Hinsdale*, 210 Ill. App. 3d 985, 995 (2nd Dist. 1991); *Davies v. Atkinson*, 25 Ill. App. 260, 270 (1st Dist. 1887) (citing Bigelow on Fraud). Not only do Counter-Defendants fail to assert any extraordinary circumstances that would give rise to a defense of *laches* against Cicero, a government body, Counter-Defendants have also engaged in fraudulent conduct, including submitted fake leases to the ICC with a forged signature on behalf of Cicero. (Counter-Claims, ¶¶ 75, 78-83; Ex C, D, E, F to Ex 1).

In their Response, Counter-Defendants focus on the Town's failure to act against them sooner. (Response, ¶ 8). The fact is that Counter-Defendants lulled the Town into relying upon them by paying the fees due to the Town for four years, without any evidence of prompting by the Town. However, as soon as Cicero learned of Counter-Defendants' fraudulent activity in creating fraudulent and false leases and submitting them to the ICC, the Town immediately sought to terminate the relationship in August 2015 and then promptly filed its Counter-Claims in October

2015. (Counter-Claims, ¶¶14-16). Cicero's Counter-Claims are well within the relevant statutory periods for its asserted causes of action. *See e.g.*, 735 ILCS 5/13-206 and 13-205. Moreover, Counter-Defendants do not allege material prejudice. Although Counter-Defendants' claim that they "incur[red] risk" and "went broke" waiving tow fees for political favors, (Response, ¶ 8), Counter-Defendants are being asked to pay Cicero rent and towing fees pursuant to the terms they agreed to under the Commercial Lease and Towing Contract. Moreover, these arguments completely belie the facts – when the Town sought to terminate the Towing Contract, it was Tuff Car that filed this action seeking a determination that the contract could not be terminated. That is not the action of a party that was "went broke" as a result of inequitable terms.

Next, the Counter-Defendants' delay argument is simply incredible. They contend that it is unfair for the Town to have delayed bringing an action for monies owed to the Town when they allegedly relied on representations about waiving tow fees in exchange for not paying rent. Wholly aside from the fact that they cannot maintain that claim (for the reasons discussed above), this argument is based upon revisionist history. Tuff Car initiated this dispute, and it was Tuff Car that claimed to be owed monies for the waived fees. While parties are allowed to plead in the alternative, they cannot be allowed to plead alternative facts. They cannot claim that there was an "agreement" to waive fees in exchange for their services while at the same time claim that they are entitled to monies for all of the waived fees. *Laches* is an equitable action, and one who is seeking equity must do equity. It is hard to imagine something less equitable than allowing the Counter-Defendants to complain about the delay in seeking rent when Tuff Car (and the Counter-Defendants who controlled it) started this dispute by complaining about payments they claim were due from the same periods.

CONCLUSION

For the reasons stated above, Defendant/Counter/Cross-Plaintiff Town of Cicero, Illinois, an Illinois Municipal Corporation respectfully requests that this Court grant its Motion to Strike Counter-Defendants' Affirmative Defenses in their entirety and for any other relief this Court deems just and proper.

Dated: October 1, 2019.

TOWN OF CICERO, ILLINOIS, an Illinois
Municipal Corporation

Defendant/Counter/Cross-Plaintiff

By: /s/Christina Jaremus
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CERTIFICATE OF SERVICE

Christina Jaremus, an attorney, hereby certifies that she caused the Town of Cicero's **Reply Memorandum in Support of its Motion to Strike Counter-Defendant's Affirmative Defenses** in the above-captioned matter to be served on all counsel of record listed below, via e-mail before the hour of 5:00 p.m. on October 1, 2019:

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