IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

COMPLEX BUSINESS LITIGATION DIVISION

CASE NO: 2021-015089-CA-01
SECTION: CA43
JUDGE: MICHAEL HANZMAN

In re:

Champlain Towers South Collapse Litigation
_____/

PLAINTIFFS' REPLY TO DEFENDANT NV5 INC.'S AFFIRMATIVE DEFENSES TO PLAINTIFFS' CONSOLIDATED THIRD AMENDED CLASS ACTION COMPLAINT

Plaintiffs, Raquel Azevedo de Oliveira, as personal representative of the Estates of Alfredo Leone and Lorenzo de Oliveira Leone; Kevin Spiegel, as personal representative of the Estate of Judith Spiegel; Kevin Fang, as personal representative of the Estate of Stacie Fang; Raysa Rodriguez; and Steve Rosenthal, by and through their undersigned counsel, hereby file this Reply to Defendant NV5 INC.'s Affirmative Defenses to Plaintiffs' Consolidated Third Amended Class Action Complaint dated March 29, 2022, and state:

1. Defendant's Eleventh Affirmative Defense accuses Plaintiffs of spoliation – "destroying evidence and precluding NV5 from exercising its right to investigate and obtain evidence to prepare its defense in this matter." This is nonsensical. Defendant NV5 has the same right of access as Plaintiffs to whatever evidence remains of the collapse. This defense is specifically denied.

2. Defendant's Thirteenth Affirmative Defense is a claim that apportionment of fault is appropriate pursuant to section 768.81, Florida Statutes, and is not a plea of avoidance. *See Gatt v. Keyes Corp.,* 446 So. 2d 211 (Fla. 3d DCA 1984). But whether any apportionment of fault is

appropriate will be determined by a jury. Moreover, to assert a *Fabre v. Marin*, 597 So. 2d 883 (Fla. 1992) defense, assigning liability to third-parties, Defendant must not only plead the identity of those third parties and defendants, but also "has the burden of presenting at trial that the nonparty's fault contributed to the accident in order to include the nonparty's name on the jury verdict." *Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262, 1264 (Fla. 1996) (citing *W.R. Grace & Co.—Conn. v. Dougherty,* 636 So.2d 746, 748 (Fla. 2d DCA)). In addition, Plaintiffs deny Defendant's allegations set forth in this Affirmative Defense as to the non-parties identified, and specifically assert as to the individual unit owners named that the defense is lacking in specificity as to their alleged negligent conduct. Moreover, as in *Engle v. Liggett Group, Inc.,* all individual defenses of this nature must be left to the individual damages phase of this consolidated action and are not appropriate for adjudication during the liability phase. Lastly, apportionment of fault under section 768.81 does not apply when liability is vicarious or derivative in nature, or as to the activities for which Defendant owed a nondelegable duty to Plaintiffs or are strictly liable. *See Grobman v. Posey*, 863 So. 2d 1230, 1236 (Fla. 4th DCA 2003); *Continental Florida Materials v. Kusherman,* 91 So. 3d 159 (Fla. 4th DCA 2012).

3. Defendant's Fourteenth Affirmative Defense fails to state a legal defense for failure to set forth sufficient ultimate facts to support the Defendants' assertion that the "Plaintiffs' claims are barred" by "intervening and/or superseding causes." The Defendant fails to identify such superseding or intervening cause. Additionally, Defendant's conduct may be the legal cause of Plaintiff's damages, even if it operates in combination with some other cause which was itself a reasonably foreseeable consequence. Without waiving the foregoing, Plaintiff specifically denies this defense.

4. Defendant's Eighteenth Affirmative Defense is legally insufficient and is denied. Victims of a tortious conduct causing personal injury and their survivors have no legal duty to

mitigate damages, which duty is exclusively a tenant of contract law. *See Sys. Components Corp. v. Florida Dep't of Transp.*, 14 So. 3d 967, 982 (Fla. 2009) (explaining that in tort cases, "[t]here is no actual 'duty to mitigate,' because the injured party is not compelled to undertake any ameliorative efforts"). To the extent that Defendant seeks again to blame Plaintiffs for the collapse, this defense is duplicative of Defendant's Thirteenth Affirmative Defense and, accordingly, Plaintiffs incorporate and reasserts the response to that defense herein.

5. Defendant's Nineteenth Affirmative Defense is duplicative of its Thirteenth Affirmative Defense in that it seeks to ascribe blame to Plaintiffs. Accordingly, Plaintiffs incorporate and reasserts the response to that defense herein.

6. Defendant's Twentieth Affirmative Defense fails to state a legal defense for failure to set forth sufficient ultimate facts supporting the Defendant's claim that it is entitled to a set-off for all "reimbursements and payments" received by Plaintiffs and is denied. The Florida Legislature has abolished joint and several liability for economic and noneconomic damages in negligence actions. *See Port Charlotte HMA, LLC v. Suarez*, 210 So. 3d 187, 190 (Fla. 2d DCA 2016) (reversing order granting setoff). Any apportionment of fault will be determined by Fla. Stat. 768.81, if applicable. Furthermore, Defendant is not entitled to a set-off from benefits payable by collateral sources to the extent such collateral sources have a subrogation right, and even if some collateral source payments are appropriate for a setoff they may not be admitted into evidence at trial. *Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1253 (Fla. 2015); *Gormley v. GTE Products Corp.,* 587 So.2d 455 (1991).

7. Defendant's Twenty-Second Affirmative Defense is specifically denied and is legally insufficient. Again, the Florida Legislature has abolished joint and several liability for damages in negligence actions, which operated to defeat third party causes of action for contribution. Defendant's fault will be apportioned, if appropriate, pursuant to section 768.81.

See T*&S Enterprises Handicap Accessibility, Inc. v. Wink Indus. Maintenance & Repair, Inc*., 11 So. 3d 411 (Fla. 2d DCA 2009).

8. Defendant's Twenty-Third Affirmative Defense is legally indistinguishable from the defense of contributory negligence, and thus is duplicative of other of Defendant's affirmative defenses. *See Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977) (holding that "the affirmative defense of implied assumption of risk is merged into the defense of contributory negligence and the principles of comparative negligence"). Without waiving the foregoing, Plaintiffs specifically deny this defense.

9. In addition to the foregoing, all other of Defendant's affirmative defenses are denied by operation of Florida Rule of Civil Procedure 1.110(e).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 18th day of April, 2022, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using the Florida Court's e-Filing portal which will send a notice of electronic filing to all attorneys of record.

Dated: April 18, 2022 */s/ Harley S. Tropin* Harley S. Tropin (FBN 241253) Javier A. Lopez (FBN 16727) Jorge L. Piedra (FBN 88315) Tal J. Lifshitz (FBN 99519) Eric S. Kay (FBN 1011803) KOZYAK TROPIN & THROCKMORTON LLP 2525 Ponce de Leon Boulevard, 9th Floor Coral Gables, FL 33134 Tel: (305) 372-1800 hst@kttlaw.com ***Plaintiffs' Co-Chair Lead Counsel***	Respectfully submitted, */s/ Rachel W. Furst* Rachel W. Furst (FBN 45155) GROSSMAN ROTH YAFFA COHEN, P.A. 2525 Ponce de Leon Boulevard, Suite 1150 Coral Gables, FL 33134 Tel: (305) 442-8666 rwf@grossmanroth.com ***Plaintiffs' Co-Chair Lead Counsel***

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