

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CASE NO.: 08-28977 CA 30

PALMER TRINITY PRIVATE SCHOOL, INC.,
a Florida not for profit corporation,

Plaintiff,

v.

VILLAGE OF PALMETTO BAY,
FLORIDA, a Florida municipal corporation,
CONCERNED CITIZENS OF OLD CUTLER,
INC., JOAN LINDSAY, individually,
PETTY PEGRAM, individually.

Defendants.

**DEFENDANT, VILLAGE OF PALMETTO BAY'S, MOTION FOR LEAVE
TO AMEND ITS ANSWER AND DEFENSES TO FIFTH AMENDED COMPLAINT**

Defendant, VILLAGE OF PALMETTO BAY ("Village"), by and through its undersigned attorneys and pursuant to Florida Rule of Civil Procedure 1.190(a), requests entry of an Order granting it leave to file an Amended Answer and Defenses to the Fifth Amended Complaint and states as follows:

1. On June 27, 2013, the Village served its Answer and Defenses to the Fifth Amended Complaint. The Plaintiff's Fifth Amended Complaint included a claim for abuse of process (Count IX).

2. On July 17, 2013, the Third District issued its opinion in Wolfe v. Foreman, ___ So. 3d ___, 2013 Fla. App. LEXIS 11230 (Fla. 3d DCA July 17, 2013). There, the Third District confirmed the broad scope of the immunity provided by the litigation privilege for actions that occurred during or before litigation and were related to that litigation. Id.

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3. Based on Wolfe, the Village requests leave of the Court to file an amended Answer and Defenses to the Fifth Amended Complaint to assert the litigation privilege as a defense to the claim for abuse of process. A copy of the proposed Amended Answer and Defenses to the Fifth Amended Complaint is attached hereto as **Exhibit A**.

4. Once a responsive pleading is filed, “a party may amend a pleading only by leave of court or by written consent of the adverse party.” Fla. R. Civ. P. 1.190(a). “Leave of court shall be given freely when justice so requires.” Fla. R. Civ. P. 1.190(a). The denial of a motion to amend is reviewed for abuse of discretion. Hutson v. Plantation Open MRI, LLC, 66 So. 3d 1042, 1044-1045 (Fla. 4th DCA 2011); Noble v. Martin Mem'l Hosp. Ass'n, 710 So. 2d 567, 568 (Fla. 4th DCA 1997). While Rule 1.190(a) provides that leave to amend shall be given freely when justice so requires, courts “should be especially liberal when leave to amend is sought at or before a hearing on a motion for summary judgment.” Quality Roof Servs., Inc. v. Intervest Nat'l Bank, 21 So. 3d 883, 885 (Fla. 4th DCA 2009) (quoting Thompson v. Bank of New York, 862 So. 2d 768, 770 (Fla. 4th DCA 2003)).

5. “[R]efusal to allow amendment of a pleading constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile.” Spradley v. Stick, 622 So. 2d 610, 613 (Fla. 1st DCA 1993), accord Carter v. Ferrell, 666 So. 2d 556 (Fla. 2d DCA 1995). “The primary consideration in determining whether a motion for leave to amend should be granted is a test of prejudice. . . .” Video Indep. Med. Examination, Inc. v. City of Weston, 792 So. 2d 680, 681 (Fla. 4th DCA 2001).

6. All of the relevant factors warrant granting the Village leave to file its Amended Answer and Defenses to the Fifth Amended Complaint. First, there is no prejudice to the Plaintiff or Co-Defendants. The Answer and Defenses to the Fifth Amended Complaint was only recently filed and the case is not yet set for trial. Discovery is ongoing.

7. Second, the City has not abused the privilege to amend. This is the City's first motion requesting leave to amend.

8. Third, amendment would not be futile. In Wolfe, the Third District confirmed the expansive nature of the litigation privilege as to claims for abuse of process. As a result, the Village's requested amendment is not futile as it could still be established that it is entitled to immunity from suit for the claim for abuse of process.

9. For these reasons, the Village requests that its Motion be granted. The relevant factors support granting the Village leave to file its Amended Answer and Defenses to the Fifth Amended Complaint. See Hutson, 66 So. 3d at 1045 (motion for leave to amend answer improperly denied where (1) action below was not set for trial (2) plaintiff would have suffered no prejudice if the trial court granted motion to amend, (3) defendant had not previously requested to amend his answer, and (4) the amendment would not have been futile.).

WHEREFORE, Defendant, VILLAGE OF PALMETTO BAY, requests entry of an Order granting it leave to file the Amended Answer and Defenses to the Fifth Amended Complaint, attached hereto as Exhibit A, together with such further relief the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished to: **Stanley B. Price, Esq.**, (sprice@bilzin.com, mwidom@bilzin.com, eservice@bilzin.com) Bilzin, Sumberg, Baena, Price & Axelrod, LLP, Attorneys for the Plaintiff, 1450 Brickell Avenue, Suite 2300, Miami, FL 33131, **Sean M. Cleary, Esq.**, (sean@clearypa.com, amanda@clearypa.com, kisha@clearypa.com), Law Offices of Sean M. Cleary, P.A., 19 West Flagler Street, Suite 618, Miami, FL 33130, co-counsel for Plaintiff, **Eve Boutsis, Esq.**, (eboutsis@fbm-law.com) Figueredo & Boutsis, P.A., Attorneys for Defendant, 18001 Old Cutler Road, Suite 533, Miami, FL 33157; **Ramy P. Elmasri, Esq.**, (Relmasri@florida-law.com), Vernis & Bowling of Miami, P.A., Attorneys for Defendant Pegram, 1680 N.E. 135th Street, Miami, FL 33181; **Benedict P. Kuehne, Esq.**, (ben.kuehne@kuehnelaw.com, bkuehne@bellsouth.net), Law Office of Benedict P. Kuehne, P.A., Miami Tower, Suite 3550, 100 S.E. 2nd Street, Miami, FL 33131, and **W. Tucker Gibbs, Esq.**, (tucker@wtgibbs.com, wtglawoffice@att.net), W. Tucker Gibbs, P.A., P.O. Box 1050, Coconut Grove, FL 33133 on this 31st day of July, 2013, via E-mail.



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