2005

Defendants' Answers to Plaintiffs' First Amended Complaint and Affirmative Defenses, Laborers' Pension Welfare Fund v. Cruz Construction Inc., Docket No. 1:04-cv-04653 (Northern District of Illinois Jul 15, 2004)

J. Damian Ortiz
John Marshall Law School, 6Ortiz@jmls.edu

John Marshall Law School Fair Housing Legal Clinic

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LABORERS' PENSION FUND and LABORERS' WELFARE FUND, *et al,*

Plaintiffs,

v.

CRUZ CONSTRUCTION, INC., an Illinois Corporation, and ROBERTO de la CRUZ, individually,

Defendants.

Case No. 04 C 4653
Judge Matthew F. Kennelly

TO: Patrick T. Wallace
Laborers' Pension & Welfare Funds
53 West Jackson, Blvd.
Suite 550
Chicago, IL 60604

NOTICE OF FILING

YOU ARE HEREBY NOTIFIED that on April 15, 2005, we filed with the Clerk of the United States Northern District of Illinois Eastern Division, located at 219 S. Dearborn St., Chicago, IL, *Defendants' Answers to Plaintiffs' First Amended Complaint*, a copy which is served upon you.

CERTIFICATE OF SERVICE

I, J. Damian Ortiz on behalf of the plaintiffs, hereby certify that I caused a copy of this notice and Answers to the above-listed attorney at the address indicated by depositing a copy of the same in the U.S. Mail depository located at 28 E. Jackson, Chicago, Illinois 60604, with the proper postage pre-paid before 5:00 p.m., on April 15, 2005, this statement as set forth is true and correct.

Attorney for Defendants
J. Damian Ortiz
Attorney at Law
28 E. Jackson Blvd.,
Suite 10-A847
Chicago, IL 60604
(312) 786-9844

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LABORERS' PENSION FUND and LABORERS' WELFARE FUND OF THE HEALTH AND WELFARE DEPARTMENT OF THE CONSTRUCTION AND GENERAL LABORERS' DISTRICT COUNCIL OF CHICAGO AND VICINITY, and JAMES S. JORGENSEN, Administrator of the Funds,	)	
Plaintiffs,	)	**Case No. 04 C 4653**
	)	**Judge Matthew F. Kennelly**
v.	)	
CRUZ CONSTRUCTION, INC., an Illinois Corporation, and ROBERTO de la CRUZ, individually,	)	
Defendants.	)	

DEFENDANTS' ANSWERS TO
PLAINTIFFS' FIRST AMENDED COMPLAINT AND AFFIRMATIVE DEFENSES

Defendants Cruz Construction, Inc., an Illinois Corporation (Cruz Construction) and Roberto De La Cruz, individually (Roberto), by their attorney, J. Damian Ortiz, for their Answers to Plaintiffs' First Amended Complaint and Affirmative Defenses state as follows:

COUNT I

(Failure to Pay Employee Benefit Contributions)

1. Jurisdiction is based on Sections 502(e)(1) and (2) and 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§1132(e)(1) and (2) and 1145, Section 301(a) of the Labor Management Relations Act ("LMRA") of 1947 as amended, 29 U.S.C. §§1331.

ANSWER:

Cruz Construction admits jurisdiction, as alleged. Roberto de la Cruz denies jurisdiction.

2. Venue is proper pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. §§1132(e)(2), and 28 U.S.C. §1391 (a) and (b).

ANSWER:

Admit.

3. The Funds are multiemployer benefit plans within the meanings of Sections 3(3) and 3(37) of ERISA. 29 U.S.C. §1002(e) and 37(A). They are established and maintained pursuant to their respective Agreements and Declarations of Trust in accordance with Section 302(c)(5) of the LMRA. 29 U.S.C. § 186(c)(5). The Funds have offices and conduct business within this District.

ANSWER:

Admit.

4. Plaintiff James S. Jorgensen ("Jorgensen") is the Administrator of the Funds, and has been duly authorized by the Funds' Trustees on behalf of the Funds in the collection of employer contributions owed to the Funds and to the Construction and General District Council of Chicago and Vicinity Training Fund, and with respect to the collection by the Funds of amounts which have been or are required to be withheld from the wages of employees in payment of Union Dues for transmittal to the Construction and Laborers' District Council of Chicago and Vicinity (the "Union"). With respect to such matters, Jorgensen is a fiduciary of the Funds within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. §1002(21)(A).

ANSWER:

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 4 and neither admit or denies same and demands strict proof thereof.

5. Defendant Cruz Construction, Inc. (hereinafter "Cruz" of the "Company") is an Illinois corporation. Cruz does business within this District and was at all times relevant herein an employer within the meaning of Section 3(5) of ERISA, 29 U.S.C. §1002(5), and Section 301(a) of the LMRA, 29 U.S.C. §185(c).

ANSWER:

Cruz Construction admits that it is an Illinois corporation which does business within this district and is an employer as alleged. Defendants deny the reaming allegation in paragraph 5 and demands strict proof thereof.

6. Defendant Roberto De La Cruz ("De La Cruz") is and was at all times relevant an officer, director and shareholder of Cruz.

ANSWER:

Defendants admit that De la Cruz is and was a member of Cruz Construction. Defendants deny the allegation of paragraph 6 in other respects and demands strict proof thereof.

7. The Union is a labor organization within the meaning of 29 U.S.C. §185(a). The Union and Cruz are parties to a collective bargaining agreement, which became effective September 24, 2003 ("Agreement"). (A copy of the "short form" Agreement entered into between the Union and Cruz, which Agreement adopts and incorporates Master Agreements between the Union and various employer associations, and also binds Cruz to the Funds' respective Agreements and Declarations of Trust is attached hereto as Exhibit A.)

ANSWER:

Defendants admit that the Union is a labor organization and that Cruz Construction has been parties to the alleged collective bargaining agreement. Cruz Construction denies that a short form Agreement is attached as Exhibit A to the amended complaint and demands strict proof thereof. Defendants deny that any alleged entities, other than Cruz Construction, are a party to the collective bargaining agreement or have obligations under such agreement. Further answering, Defendants deny the remaining allegations of Plaintiffs' paragraph 7 and demands strict proof thereof.

8. The Funds have been duly authorized by the construction and General Laborers' District Council of Chicago and Vicinity Training Fund (the "Training Fund"), the Midwest Construction Industry Advancement Fund ("MCIAF"), the Chicago land Construction Safety Council (the "Safety Fund"), the Laborers' Employers' Cooperation and Education Trust ("LECET"), the Concrete Contractors' Association of Greater Chicago ("CCA"), the CDCNI/CAWCC Contractors' Industry Advancement Fund (the "Wall & Ceiling Fund"), the CISCO Uniform Drug/Alcohol Abuse Program ("CISCO"), and the Laborers' District Council Labor Management Committee Cooperative ("LCDMC") to act as agent in the collection of contributions due to those funds.

ANSWER:

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8, and neither admits or denies same but demands strict proof thereof. To the extend an answer is required Defendants deny this allegation.

9. The Agreement and the Funds' respective Agreements and Declarations of Trust obligate Cruz to make contributions on behalf of its employees covered by the Agreement for pension benefits, health and welfare benefits, for the training fund and to submit monthly

remittance reports in which the Company, *inter alia*, identifies the employees covered under the Agreement and the amount of contributions to be remitted to the Funds on behalf of each covered employee. Pursuant to the terms of the Agreement and the Funds' respective Agreements and Declarations of Trust, contributions which are not submitted in a timely fashion are assessed 10 percent liquidated damages plus interest.

ANSWER:

Defendants deny the allegations contained in paragraph 9 and demands strict proof thereof.

10. The Agreement and the Funds' respective Agreements and Declarations of Trust require Cruz to submit its books and records to the Funds on demand for an audit to determine benefit contribution compliance.

ANSWER:

Defendants have insufficient knowledge to admit or deny that the allegations contained in paragraph 10, neither admits or denies same and demands strict proof thereof. Further answering, paragraph 10 is not a specific and factual allegation, merely a legal conclusion that Defendants have violated contractual provisions and federal law.

11. The Agreement obligates Cruz to obtain and maintain a surety bond to insure future wages, pension and welfare contributions.

ANSWER:

Defendants deny said allegation and demands strict proof thereof. Further answering, Defendants states that the document speaks for itself.

12. Notwithstanding the obligations imposed by the Agreement and the Funds' respective Agreements and Declarations of Trust, Cruz has:

(a) failed to pay $22,706.04 in contributions due to Plaintiff Laborers' Pension Fund for the audit period of September 24, 2003 through August re, 2004 (a true and accurate copy of the audit is attached hereto as Exhibit B), thereby depriving the Laborers' Pension Fund of contributions, income and information needed to administer the Fund and jeopardizing the pension benefits of the participants and beneficiaries;

(b) failed to pay $34,415.53 in contributions due to Laborers' Welfare Fund of the Health and Welfare Department of the Construction and General Laborers' District Council of Chicago and Vicinity for the audit period of September 24, 2003 through August 31, 2004, thereby depriving the Welfare Fund of contributions, income and information needed to administer the Fund and jeopardizing the health and welfare benefits of the participants and beneficiaries;

(c) failed to pay $1,132.67 in contributions to the Laborers' Training Fund for the audit period of September 23, 2003 through August 31, 2004, thereby depriving the Laborers' Training Fund of contributions, income and information needed to administer the Fund and jeopardizing the training fund benefits of the participants and beneficiaries;

(d) failed to pay $799.53 in contributions to the LDCMC Fund for the audit period of September 23, 2003 through August 31, 2004, thereby depriving the LDCMC Fund of contributions, income and information needed to administer the Fund and jeopardizing the training fund benefits of the participants and beneficiaries;

(e) failed to pay $466.39 in contributions to the MCIAF/Safety Fund for the audit period of September 23, 2003 through August 31, 2004, thereby depriving the MCIAF/Safety Fund of contributions, income and information needed to administer the Fund and jeopardizing the training and fund benefits of the participants and beneficiaries;

(f) failed to pay $333.14 in contributions to the LECET Fund for the audit period of September 23, 2003 through August 31, 2004, thereby depriving the LECET Fund of contributions, income and information needed to administer the Fund and jeopardizing the training and fund benefits of the participants and beneficiaries;

(g) failed to pay $66.63 in contributions to the CISCO Fund for the audit period of September 23, 2003 through August 31, 2004, thereby depriving the CISCO Fund of contributions, income and information needed to administer the Fund and jeopardizing the training and fund benefits of the participants and beneficiaries;

(h) failed to obtain and maintain a surety bond in accordance with the terms of the Agreement.

ANSWER:

Cruz Construction denies *a* through *h* and demands strict proof thereof. Defendants deny said allegation as to any other entity named on the complaint.

13. The Company's actions in failing to submit timely contributions and failing to obtain and maintain a surety bond violates Section 515 of ERISA, 29 U.S.C. §1145, and Section 301 of the LMRA, 29 U.S.C. §185.

ANSWER:

Defendants deny the allegation contained Paragraph 13 and demands strict proof thereof. Further answering, Defendants objects to said allegation as it is a legal conclusion.

14. Pursuant to Section 502(g) of ERISA, 29 U.S.C. §1132(g)(2), Section 301 of the LMRA, 29 U.S.C. §185, and the terms of the Agreement and the Funds' respective Trust Agreements, the Company is liable to the Funds for unpaid contributions, as well as interest and liquidated damages on the unpaid contributions, audit costs, reasonable attorneys' fees and costs, and such other legal and equitable relief as the Court deems appropriate.

ANSWER:

Defendants deny the allegation contained Paragraph 14 and demands strict proof thereof. Further answering, Defendants objects to said allegation as it is a legal conclusion.

15. Defendant De La Cruz knowingly and intentionally submitted false benefit contribution reports to the Funds. Specifically, De La Cruz intentionally omitted reporting and submitting contributions on behalf of individuals whom De La Cruz knew had performed covered work during the relevant time period. Thus, De La Cruz committed fraud on the Funds and is personally liable for all amounts due to the Funds.

ANSWER:

Defendants deny the allegation and demand strict proof thereof.

WHEREFORE, Defendants respectfully request that this Court dismiss the complaint, enter an order denying Plaintiffs the requested relief and for any other relief this Court deems just and proper.

COUNT II

(Failure to Pay Union Dues)

16. Plaintiff re-alleges paragraphs 1 through 11 of Count I.

ANSWER:

Defendants re-state their answer to paragraphs 1 thorough 11 as and for their answers to paragraph 16.

17. Pursuant to the Agreement the Funds have been duly designated to serve as a collection agent for the Union in that the Funds have been given the authority to collect from employers' union dues, which should have been or have been deducted from the wages of covered employees.

ANSWER:

Defendants deny the allegation and demand strict proof thereof.

18. Notwithstanding the obligations imposed by the Agreement, Cruz failed to withhold and/or report to and forward union $2,506.86 in dues that were deducted or should have been deducted from the wages of its employees for the audit period of September 24, 2003 through August 31, 2004, thereby depriving the Union of income and information.

ANSWER:

Defendants deny the allegation and demand strict proof thereof.

19. Pursuant to the Agreement, Cruz is liable to the Fund for the unpaid union dues, as well as liquidated damages, audit costs, reasonable attorneys' fees and costs as the Union's collection agent, and such other legal and equitable relief as the Court deems appropriate.

ANSWER:

Defendants deny the allegation and demands strict proof thereof.

20. Defendant De La Cruz knowingly and intentionally submitted false dues reports to the Union. Specifically, De La Cruz intentionally omitted reporting and submitting dues on behalf of individuals whom De La Cruz knew had performed covered work during the relevant time period. Thus, De La Cruz committed fraud on the Union and is personally liable for all amounts due to the Union.

ANSWER:

Defendants deny the allegation and demands strict proof thereof.

WHEREFORE, Defendants respectfully request that this Court dismiss the complaint, enter an Order denying Plaintiffs the requested relief, be awarded their costs, attorneys fess and for any other relief this Court deems just and proper.

AFFIRMATIVE DEFENSES

Defendants by and through their attorney, state affirmative defenses against Plaintiffs' as follows:

1. Affirmative defense I: Unenforceable Contract:
The effective date of the contract is September 24, 2009, and thus at the present is unenforceable, see Exhibit "A" of the Complaint. The complaint is pre-mature and should be dismissed with prejudice.

2. Affirmative defense II: Duress:
The defendants on different occasions were harassed, intimidated and coerced into entering into the alleged contract. On different occasion, Plaintiffs agents stopped and prevented the Defendants from completing their work and complying with their contractual obligations with the City of Riverside. The Plaintiffs continued harassment, threats and work stoppage, overcame the defendants free will.

3. Affirmative defense III: Lack of Capacity:
The Defendants lack the capacity to understand the contract. The contract was not explained or translated to the Defendants in his native language, Spanish. Plaintiffs knew of the Defendants lack of capacity, understanding and content of the contract.

CRUZ CONSTRUCTION, *et al.*

By:_____
J. Damián Ortiz, their attorney

J. Damián Ortiz
Attorney at Law
28 East Jackson Boulevard
Suite 10-A847
Chicago, IL 60604
(312) 786-9844