

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

NBIS CONSTRUCTION & TRANSPORT
INSURANCE SERVICES, INC., a/s/o Sims
Crane & Equipment Company,
Plaintiff,

CASE NO.: 8:19-cv-02777-VMC-AAS

vs.

Lower Court Case No.: 19-CA-010166

LIEBHERR-AMERICA, INC.,
Defendant.

**LIEBHERR-AMERICA, INC.'s ANSWER
AND AFFIRMATIVE DEFENSES**

NOW COMES the defendant, LIEBHERR-AMERICA, INC., d/b/a LIEBHERR USA, CO., a Virginia corporation, through its attorneys and for its Answer and Affirmative Defenses to plaintiff's Complaint, hereby states as follows:

1. Defendant has insufficient knowledge upon which to base either an admission or denial of the allegations in paragraph 1 and therefore denies same and demands strict proof thereof.
2. Defendant has insufficient knowledge upon which to base either an admission or denial of the allegations in paragraph 2 and therefore denies same and demands strict proof thereof.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted
7. Admitted

8. Defendant has insufficient knowledge upon which to base either an admission or denial of the allegations in paragraph 8 and, therefore, denies same and demands strict proof thereof.

9. Defendant admits only that a German company, Liebherr-Werk Ehingen GmbH, manufactured the model of the crane identified in this paragraph and that defendant sold a used model of this crane to Schuch HeavyLift Corp., a company located in New York. Defendant had no sales contract with plaintiff. Defendant has insufficient information upon which to base either an admission or denial of the remaining allegations in paragraph 9 and, therefore, denies same and demands strict proof thereof.

10. Defendant admits only that it sold a used model of the referenced crane to Schuch HeavyLift Corp., a company based in New York, with components and features requested by the customer and, per Schuch's instructions, delivery was made to Jacksonville, Florida. Defendant had no sales contract with plaintiff. Defendant has insufficient information upon which to base either an admission or denial of the remaining allegations in paragraph 10 and, therefore, denies same and demands strict proof thereof.

11. Defendant admits only that Schuch HeavyLift Corp., a company based in New York, requested crane training and that defendant provided crane training that was attended by personnel from Sims Crane. Defendant has insufficient information upon which to base either an admission or denial of the remaining allegations in paragraph 11 and, therefore, denies same and demands strict proof thereof.

12. Defendant has insufficient knowledge upon which to base either an admission or denial of the allegation in paragraph 12 and, therefore, denies same and demands strict proof thereof.

13. Defendant has insufficient knowledge upon which to base either an admission or denial of the allegation in paragraph 13 and, therefore, denies same and demands strict proof thereof.

14. Defendant has insufficient knowledge upon which to base either an admission or denial of the allegation in paragraph 14 and, therefore, denies same and demands strict proof thereof.

15. Admitted.

16. Admitted.

17. Defendant has insufficient knowledge upon which to base either an admission or denial of the allegation in paragraph 17 and, therefore, denies same and demands strict proof thereof.

18. Admitted.

19. Defendant admits only that Liebherr-Werk Ehingen issued a Product Bulletin that contained the language quoted in this allegation but has insufficient information upon which to base either an admission or denial of the remaining allegations in paragraph 19 and, therefore, denies same and demands strict proof thereof.

20. Denied.

21. Defendant denies that Sims Crane was not aware of the proper methods of operation of its crane and boom extensions, as all such information was provided to and acknowledged by Sims Crane during its training sessions. Defendant has insufficient knowledge upon which to base either an admission or denial of the remaining allegations in paragraph 21 and, therefore, denies same and demands strict proof thereof.

22. Admitted.

23. Denied.

COUNT ONE

24. Defendant repeats and re-alleges its answers to paragraphs 1-23 as and for its answer to this paragraph 24, as though fully set for herein.

25. Defendant denies this allegation as a legal conclusion.

26. Defendant denies this allegation as a legal conclusion.

27. Defendant denies this allegation as a legal conclusion.

28. Defendant denies this allegation as a legal conclusion.

29. Denied, including subparagraphs (a) – (e).

30. Denied.

31. Denied.

32. Denied.

WHEREFORE, the defendant, LIEBHERR-AMERICA, INC., d/b/a LIEBHERR USA, CO., denies that it owes plaintiff any amounts whatsoever and demands that judgment be entered in its favor and against the plaintiff, plus its costs of defense and such other and further relief as the Court deems just.

COUNT TWO

33. Defendant repeats and re-alleges its answers to paragraphs 1-32 as and for its answer to this paragraph 33, as though fully set for herein.

34. Defendant denies this allegation as a legal conclusion.

35. Defendant denies this allegation as a legal conclusion.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Denied

41. Denied.

WHEREFORE, the defendant, LIEBHERR-AMERICA, INC., d/b/a LIEBHERR USA, CO., denies that it owes plaintiff any amounts whatsoever and demands that judgment be entered in its favor and against the plaintiff, plus its costs of defense and such other and further relief as the Court deems just.

COUNT THREE

42. Defendant repeats and re-alleges its answers to paragraphs 1-41 as and for its answer to this paragraph 42, as though fully set for herein.

43. Denied.

44. Denied.

45. Denied.

46. Denied, including subparagraphs (a) – (f).

47. Denied.

48. Denied.

49. Denied.

WHEREFORE, the defendant, LIEBHERR-AMERICA, INC., d/b/a LIEBHERR USA, CO., denies that it owes plaintiff any amounts whatsoever and demands that judgment

be entered in its favor and against the plaintiff, plus its attorneys' fees, costs of defense and such other and further relied as the Court deems just.

FIRST AFFIRMATIVE DEFENSE

[Failure to State a Cause of Action]

Defendant is informed, believes and alleges that the Complaint and each cause of action therein fails to state facts sufficient to state a cause of action against Defendant.

SECOND AFFIRMATIVE DEFENSE

[Negligence]

Defendant is informed, believes and alleges that if Plaintiff suffered or incurred any obligation or liability for any loss, damage, or injury as alleged in the Complaint, such liability and/or obligation for such loss, damage, or injury was proximately caused or contributed to by Plaintiff's insured and its employees and agents in failing to conduct themselves in the manner ordinarily expected of a reasonably prudent person or entity in the conduct of its own affairs. Plaintiff's pursuit of recovery is diminished to the extent Plaintiffs liability is attributable to its own negligence.

THIRD AFFIRMATIVE DEFENSE

[Third Party Negligence]

Defendant is informed, believes and alleges that if Plaintiff suffered or sustained any obligation or liability for any loss, damage, or injury as alleged in the Complaint, such loss, damage, or injury was proximately caused or contributed to by the wrongful and negligent acts and conduct of parties, persons, or entities other than Defendant, and that such wrongful and negligent acts or conduct were an intervening or superseding cause of the loss, damage, or injury of which Plaintiff alleges in its Complaint.

FOURTH AFFIRMATIVE DEFENSE

[Apportionment of Fault]

Defendant is informed, believes and alleges that if Plaintiff suffered or sustained any obligation or liability for any loss, damage, or injury as alleged in the Complaint, such liability or obligation for such matter was proximately caused or contributed to by persons or entities other than Defendant. The liability of all of the defendants and responsible parties, named or unnamed, should be apportioned according to the relative degrees of fault, and the liability of Defendant should be reduced accordingly or barred.

FIFTH AFFIRMATIVE DEFENSE

[Statute of Limitations]

Defendant is informed, believes and alleges that Plaintiffs Complaint is uncertain as to the date on which the purported obligation or liability for the loss, damage, or injury of which Plaintiff complains was incurred or sustained.

SIXTH AFFIRMATIVE DEFENSE

[Failure to Mitigate]

Defendant is informed, believes and alleges that if Plaintiff suffered or sustained any loss, damage, or injury as alleged in the Complaint, Plaintiff has failed to mitigate such damage, and Plaintiffs recovery is barred or limited to the extent of any such failure to mitigate damages.

SEVENTH AFFIRMATIVE DEFENSE

[Laches]

Defendant is informed, believes and alleges that the Complaint and each cause of action therein is barred by the doctrine of laches, as Plaintiff unreasonably delayed in the bringing of this action and thereby prejudiced the rights of Defendant.

EIGHTH AFFIRMATIVE DEFENSE

[Waiver]

Defendant is informed, believes and alleges that the Complaint and each cause of action therein is barred by the doctrine of waiver.

NINTH AFFIRMATIVE DEFENSE

[Estoppel]

Defendant is informed, believes and alleges that the Complaint and each cause of action therein is barred by the doctrine of estoppel.

TENTH AFFIRMATIVE DEFENSE

[Release]

Defendant is informed, believes and alleges that the Complaint and each cause of action therein is barred by the doctrine of release.

ELEVENTH AFFIRMATIVE DEFENSE

[Unclean Hands]

Defendant is informed, believes and alleges that the Complaint and each cause of action therein is barred by the doctrine of unclean hands.

TWELFTH AFFIRMATIVE DEFENSE

[Wrongful Acts of Plaintiff]

Defendant is informed, believes and alleges that the agreement, if any, between the parties is invalid by virtue of the initial and other wrongful acts by Plaintiff. Further, Defendant's breach, if any, was caused or excused by the acts of Plaintiff.

THIRTEENTH AFFIRMATIVE DEFENSE

[Spoliation of Evidence]

Defendant is informed, believes and alleges Plaintiff was involved in an intentional and/or negligent spoliation of evidence and, therefore, the Complaint is barred.

FOURTEENTH AFFIRMATIVE DEFENSE

[Standing]

Defendant is informed, believes and alleges Plaintiff lacks the standing to assert against Defendant any cause of action set forth in the Complaint.

FIFTEENTH AFFIRMATIVE DEFENSE

[Lack of Capacity]

Defendant is informed, believes and alleges Plaintiff herein lacks the legal capacity and standing to sue, is not a real party in interest or entity with superior right to make the claims contained in the Complaint and is thereby precluded from any recovery whatsoever. In addition, to the extent Plaintiff lacks standing or proper appointment to bring the claims it is asserting, any action taken in this matter with regard to Plaintiffs claim(s) is voidable.

SIXTEENTH AFFIRMATIVE DEFENSE

[Misuse]

Defendant is informed, believes and alleges the damages sustained by Plaintiff, if any, were proximately caused and/or contributed to by misuse of products by Plaintiff and/or by other parties to this action and/or other persons not presently parties to this action. Defendant further alleges that if Plaintiff sustained damages attributable to the use of any products manufactured, distributed or supplied by Defendant, which allegations are expressly denied, then the damages, if any, were solely caused by and attributable to the unreasonable, unforeseeable, and improper use of the component by Plaintiff and/or by parties to this action other than Defendant and/or by other persons not presently parties to this action.

SEVENTEENTH AFFIRMATIVE DEFENSE

[Modification and/or Alteration]

Defendant is informed, believes and alleges Plaintiff and/or others modified, altered, and changed any products manufactured, distributed or supplied by Defendant, so that such changes in said products proximately caused the loss and damages complained of, if any.

EIGHTEENTH AFFIRMATIVE DEFENSE

[No Defective Condition]

Defendant is informed, believes and alleges if Plaintiff was injured and/or damaged by any component manufactured, distributed and/or supplied by Defendant, such product was not in a defective condition when it left Defendant's possession, custody and/or control.

NINETEENTH AFFIRMATIVE DEFENSE

[Failure To Exercise Ordinary Care]

The alleged potential liability of Defendant resulted from the failure of Plaintiff or the failure of other to exercise reasonable and ordinary care, caution and/or vigilance for which Defendant is not legally liable or responsible.

TWENTIETH AFFIRMATIVE DEFENSE

[Causes Beyond Defendant's Control]

Any foreseeable and unreasonable risk of injury or damages that are the subject of this litigation were a risk which Defendant did not create or could not reduce or eliminate.

TWENTY-FIRST AFFIRMATIVE DEFENSE

[Industry Standards]

Defendant is informed, believes and alleges any product or service manufactured, supplied and/or sold by Defendant conformed to all applicable industry standards and met the state of the art existing at the time of manufacture and sale.

TWENTY-SECOND AFFIRMATIVE DEFENSE

[Benefits Exceed Risk]

Defendant is informed, believes and alleges the benefits of the product(s) referred to in Plaintiffs Complaint outweighed the risk of danger, if any, inherent in said product(s).

TWENTY-THIRD AFFIRMATIVE DEFENSE

[Reasonable and Adequate Labeling]

Defendant is informed, believes and alleges any and all products manufactured, labeled or sold by Defendant were accompanied by good and sufficient labeling when such products left the custody, possession and control of Defendant which gave conspicuous, reasonable and

adequate warnings and directions to the users of such products concerning the purpose, manner and precautions with which such products were to be used and concerning the risks and dangers, if any, attendant to said use. Defendant thereby fulfilled its duty, if any, to Plaintiff. If Plaintiff sustained injuries or damages attributable to the use of any products manufactured by Defendant, which allegations are expressly denied, then the injuries and damages, if any, were solely caused by and attributable to the unreasonable, unforeseeable and improper use of the product by Plaintiff and by parties to this action other than Defendant and by other parties not presently parties to this action. The injuries and damages sustained by Plaintiff, if any, were proximately caused and/or contributed to by the use of the alleged products in disregard of warnings and directions, which use was not reasonably foreseeable to Defendant.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

[Failure to Inspect]

Defendant is informed, believes and alleges Plaintiff, persons and/or entities other than Defendant failed to inspect the products identified in the Complaint prior to their use.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

[Speculative Damages]

Any losses or damages allegedly caused by Defendant and sustained by Plaintiff are *de minimis*, remote, speculative and/or transient and, hence, not cognizable by law.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

[Comparative Fault]

Defendant alleges the damages claimed were proximately caused by Plaintiff and/or others affiliated in any manner with Plaintiff, in that at all times relevant herein, Plaintiff failed to use and exercise for its own protection the proper care and precautions which a prudent person under

the same and similar circumstances would have exercised and if Defendant committed any wrongful act at all (which supposition is made for the purpose of this defense without admitting such to be a fact), the aforesaid conduct of Plaintiff and/or entities or persons associated in any manner with Plaintiff contributed to the happenings of Plaintiff's alleged damages.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

[Not a Substantial Factor]

Defendant is informed and believes and thereon alleges Plaintiff is barred from recovery as against Defendant as the tortious misconduct alleged in the Complaint as against Defendant, if any, was not a substantial factor in bringing about the alleged injuries and/or damages claimed by Plaintiff, nor a substantial factor in bringing about any alleged injuries and/or damages for which indemnification has been alleged and/or sought, as against Defendant.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

[Allocation of Damages]

Plaintiff is barred and precluded from recovery against Defendant for any non-economic damages, except those allocated to this Defendant in direct proportion to its percentage of fault, if any such fault or damages there be.

TWENTY-NINTH AFFIRMATIVE DEFENSE

[Lack of Maintenance]

Defendant is informed and believes and thereon alleges Plaintiff failed to perform that degree of maintenance on the work of improvement necessary to protect such work of improvement from deterioration from the elements, wear and tear, and/or other factors, thus barring or otherwise diminishing the recovery of Plaintiff as against Defendant.

THIRTIETH AFFIRMATIVE DEFENSE

[Lack of Good Cause]

Defendant is informed and believes and thereon alleges Plaintiffs Complaint was brought without reasonable cause and without a good cause belief that there was a justifiable controversy under the facts or law which would warrant the bringing of said action against Defendant, therefore barring and/or diminishing Plaintiffs recovery as against Defendant.

THIRTY-FIRST AFFIRMATIVE DEFENSE

[Indispensable Parties]

Defendant is informed and believes and thereon alleges that the purported claims and causes of action contained in the Complaint require for their full, final and complete resolution and adjudication the presence of additional necessary and/or indispensable parties that are not participating in this action, so prejudicing Defendant that any recovery by Plaintiff against Defendant should be barred or diminished.

THIRTY-SECOND AFFIRMATIVE DEFENSE

[Statute of Repose]

Defendant alleges the causes of action, if any, attempted to be stated and set forth in the Complaint are barred by applicable statutes of repose, including statutes of repose in other states that are applicable to this action.

THIRTY-THIRD AFFIRMATIVE DEFENSE

[Economic Loss Rule/Contractual Defenses]

Defendant alleges that the economic loss rule and/or contractual defenses prevent or limit plaintiff's recovery of damages in this case

THIRTY-FOURTH AFFIRMATIVE DEFENSE

[Additional Defenses]

Defendant alleges that it cannot fully anticipate all affirmative defenses that may be applicable to the within action. Accordingly, the right to assert additional affirmative defenses, if and to the extent that such affirmative defenses are applicable, is hereby reserved.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

[Additional Defenses]

Incidental and consequential damages are not recoverable under the Florida Deceptive and Unfair Trade Practices Act, and Plaintiff's claim for such should be struck.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

[Additional Defenses]

Defendant is entitled to attorneys' fees pursuant to the Florida Deceptive and Unfair Trade Practices Act, and seeks the same from Plaintiff.

DEMAND FOR JURY TRIAL

Defendant Liebherr-America, Inc. demands a trial by jury of all issues so triable as a matter of right.

WHEREFORE, Defendant LIEBHERR-AMERICA, INC., d/b/a LIEBHERR USA, CO. hereby prays for judgment consistent with these affirmative defenses, for its attorneys' fees and for such other and further relief as this Court may deem just and proper.

Dated: November 14, 2019.

Respectfully submitted,

/s/ Michael L. Forte

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November 2019, I electronically filed the foregoing Liebherr-America, Inc.'s Answer and Affirmative Defenses with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to Joshua R. Goodman, Esq., Cozen O'Connor, 200 South Biscayne Blvd., Suite 3000, Miami, FL 33131 (attorney for Plaintiff).

/s/ Michael L. Forte

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