

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

James Greiff and T.I.C.)
Enterprises, Inc.,)
)
Plaintiffs,)
)
v.) Civ. No. 03-882-SLR
)
T.I.C. Enterprises, L.L.C.,)
NUI Capital Corp., NUI Sales)
Management, Inc., and NUI)
Corporation,)
)
Defendants.)

MEMORANDUM ORDER

At Wilmington, this 9th day of January, 2004, having reviewed defendants' motion to strike plaintiffs' affirmative defenses and the papers submitted by the parties in connection therewith;

IT IS ORDERED that defendants' motion to strike plaintiffs' sixteen affirmative defenses (D.I. 69) is granted in part as to plaintiffs' seventh, eighth, ninth, tenth, twelfth, and sixteenth affirmative defenses and denied in part as to plaintiffs' first, second, third, fourth, fifth, sixth, eleventh, thirteenth, fourteenth, and fifteenth affirmative defenses.

1. On May 8, 2001, defendants agreed to purchase plaintiffs' fifty-one percent remaining interest¹ in T.I.C. Enterprises, LLC for a total sum of eight million dollars to be

¹Plaintiffs previously sold their forty-nine percent interest in T.I.C. Enterprises, LLC to defendants.

financed in two parts: (1) five million dollars to be paid in cash upon closing the sale transaction in May 2001; and (2) three million dollars in promissory notes to be paid on a maturity date of January 2, 2001. (D.I. 6 at ¶7; see id., exh. A) On April 4, 2002, plaintiffs filed suit against defendants in state court for failure to pay the promissory notes as required under the purchase agreement. (D.I. 36 at 2) Defendants removed the case to the United States District Court for the Northern District of Georgia on May 15, 2002. Plaintiffs filed their first amended complaint on June 17, 2002 alleging breach of contract, fraud, and tortious interference with contractual relations. (See D.I. 6) Defendants answered this first amended complaint on July 15, 2002 denying the allegations and contending that plaintiffs failed to state a claim upon which relief may be granted for select counts. (See D.I. 11) Defendants later amended their answer on November 14, 2002 to raise affirmative defenses. (See D.I. 26) On March 5, 2003, defendants also raised counterclaims against plaintiffs alleging breach of contract, unjust enrichment, and fraud. (See D.I. 59) Plaintiffs filed a second amended complaint on May 29, 2003 to refine their fraud claims against defendants to include a charge that defendants defrauded their creditors. (D.I. 60 at ¶34) Plaintiffs answered defendants' counterclaims on June 2, 2003 denying the allegations and, alternatively, pleading affirmative defenses. (See D.I. 63)

Defendants moved to transfer the case to the District of Delaware on July 2, 2003 (D.I. 66; 02-CV-1323), and the Northern District of Georgia granted this motion on September 10, 2003. (D.I. 86)

2. Plaintiff James Greiff is a resident of the State of Georgia. (D.I. 6 at ¶1) Plaintiff T.I.C. Enterprises, Inc. is a Georgia corporation with its principal place of business in Georgia. (Id. at ¶2) Defendant T.I.C. Enterprises, L.L.C. is a limited liability company organized under the laws of the State of Delaware with its principal place of business in Georgia. (Id. at ¶3) Defendant NUI Capital Corporation is incorporated under the laws of the State of Florida with its principal place of business in Florida. (Id. at ¶4) Defendant NUI Sales Management is incorporated under the laws of the State of Delaware with its principal place of business in New Jersey. (Id. at ¶5) Defendant NUI Corporation is incorporated under the laws of the State of New Jersey with its principal place of business in New Jersey. (Id. at ¶6) The court has jurisdiction over the instant suit pursuant to 28 U.S.C. § 1332.

3. Federal Rule of Civil Procedure 8 requires a party to set forth affirmative defenses in a responsive pleading with a "short and plain statement." Fed. R. Civ. P. 8(a) (2003). Rule 8(c) specifically enumerates a non-exhaustive list of nineteen

affirmative defenses.² Federal Rule of Civil Procedure 12(f), in turn, states:

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Fed. R. Civ. P. 12(f) (2003). Motions to strike affirmative defenses, however, are disfavored. Proctor & Gamble Co. v. Nabisco Brands, Inc., 697 F. Supp. 1360, 1362 (D. Del. 1988).

When ruling on such a motion, "the court must construe all facts in favor of the nonmoving party ... and deny the motion if the defense is sufficient under the law." Id. Furthermore, courts prefer not to grant a motion to strike "unless it appears to a certainty that . . . [the movant] would succeed despite any state of the facts which could be proved in support of the defense." Salcer v. Envicon Equities, Corp., 744 F.2d 935, 939 (2d Cir. 1984).

4. Plaintiffs' first affirmative defense asserts that the defendants' complaint fails to state a claim upon which relief

²The affirmative defenses recognized in the rule include: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. See Fed. R. Civ. P. 9(c) (2003).

can be granted. The court notes that the Federal Rules of Civil Procedure specifically permit this averment to be raised as either an affirmative defense or in a motion to dismiss. Rule 12(b) states, in pertinent part, that: "A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a)." Fed. R. Civ. P. 12(b) (2003). Rule 12(h) also states, in pertinent part, that: "Every defense, in law or fact, to a claim for relief in any pleading . . . may at the option of the pleader be made by motion [including]: . . . failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(h) (2003). Additionally, it is well settled that the concept of failure to state a claim may be included in an answer as an affirmative defense. See S.E.C. v. Toomey, 866 F. Supp. 719, 723 (S.D. N.Y. 1992). Accordingly, the court denies defendants' motion to strike plaintiffs' first affirmative defense.

5. Plaintiffs' second through sixth affirmative defenses plead, respectively, an arbitration clause, estoppel, failure of consideration, release, and waiver. These averments are proper affirmative defenses under Rule 8(c) and likewise comply with the "short and plain statement" requirement of Rule 8(a). Additionally, the court finds that plaintiffs' pleadings adequately place defendants on sufficient notice of the nature of the defenses to be litigated against them. Defendants may

ascertain the context of these averments through the discovery process, possibly via contention interrogatories. Furthermore, the court concludes that defendants will not be unnecessarily prejudiced if these affirmative defenses remain in the pleadings. The court, consequently, denies defendants' motion to strike the second through sixth affirmative defenses.

6. Plaintiffs' seventh affirmative defense alleges that any excessive punitive damages sought by defendants are barred by the Due Process Clause of the Fourteenth Amendment and the Due Process Clause of the Georgia Constitution. Plaintiffs' eighth and ninth affirmative defenses plead, respectively, that defendants' counterclaims must fail because defendants have not incurred any damages and that defendants' damages are contractually limited by the purchase agreement. The court finds that these averments do not constitute affirmative defenses because they will not defeat defendants' counterclaims if proven. In other words, these averments entirely overlook liability and focus solely on potential relief. In contrast, "[a]ffirmative defenses, if accepted by the court, will defeat an otherwise legitimate claim for relief." FDIC v. Haines, 3 F. Supp.2d 155, 166 (D. Conn. 1997) (quoting 2 James Wm. Moore et al., Moore's Federal Practice § 8.07[1] (3d ed. 1997)). Moreover, it is clear that the concept of damages serves a purpose far different from an affirmative defense -- damages are intended to redress

injuries incurred by a plaintiff after liability has been established, not as a means to shield liability in the first instance. The court, therefore, grants defendants' motion to strike plaintiffs' seventh, eighth, and ninth affirmative defenses.

7. Plaintiffs' tenth affirmative defense asserts that any damages incurred by defendants are due to their own actions. The court construes this averment as an attempt to plead contributory negligence. Defendants, however, do not plead negligence as one of their counterclaims. The court, consequently, grants defendants' motion to strike this defense.

8. Plaintiffs' eleventh affirmative defense pleads that defendants' breach of the purchase agreement and unjust enrichment counterclaims must fail because defendants breached the contract at issue.³ The court construes this averment to argue that plaintiffs could not have breached the purchase agreement because defendants breached it first, thereby rendering the purchase agreement invalid. In other words, plaintiffs appear to argue that they could not have breached the purchase agreement because it was invalid. Plaintiffs' thirteen, fourteen, and fifteen affirmative defenses plead, respectively, that defendants' fraud in the inducement

³An action for breach of contract requires proof of: (1) a valid contract; (2) breach of a duty imposed by the contract; and (3) damages resulting from the breach.

counterclaim⁴ must fail because (1) plaintiffs did not knowingly make any false representations or material omissions; (2) plaintiffs did not knowingly make any false representations or material omissions with intent to induce defendants to act or to refrain from acting; and (3) defendants did not justifiably rely on any alleged misrepresentation or material omission made by plaintiffs. The court interprets these averments as denying particular elements of defendants' breach of contract and fraud in the inducement counterclaims. The court finds that these specific denials give defendants notice of the particular issues to be litigated, despite plaintiffs' choice of nomenclature. Such is one of the main purposes for the affirmative pleadings requirement of Rule 8. Additionally, "as long as the pleading clearly indicates the allegations in the complaint that are intended to be placed in issue, the improper designation should not prejudice the pleader." 5 Wright & Miller, Federal Practice and Procedure: Civil 2d § 1269 (1990). Accordingly, the court denies defendants' motion to strike plaintiffs' eleventh,

⁴An action for a fraud in the inducement under Delaware law, requires proof of: (1) a false representation, usually one of fact, made by the defendant; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction [was] taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance. See Lord v. Souder, 748 A.2d 393, 402 (Del. 2000).

thirteen, fourteenth, and fifteenth affirmative defenses.

9. Plaintiffs' twelfth affirmative defense alleges that defendants' fraud in the inducement counterclaim must fail because defendants breached the contract at issue. Plaintiffs have agreed to withdraw this affirmative defense. (See D.I. 73 at 15) "[I]f a defense has been withdrawn, a motion to strike it from the pleadings is proper." 5A Wright & Miller, Federal Practice and Procedure: Civil 2d 1381 (1990). Therefore, the court grants defendants' motion to strike plaintiffs' twelfth affirmative defense.

10. Plaintiffs' sixteenth affirmative defense alleges that "plaintiffs respond to the individually-numbered paragraphs in defendants' counterclaim as follows." (D.I. 63 at 4) The court construes this averment as attempt to offer plaintiffs' entire answer as an affirmative defense. The court finds this attempt illogical and grants defendants' motion to strike plaintiffs' sixteenth affirmative defense.

Sue L. Robinson
United States District Judge