UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)

CASE NO. 09-80477-CIV-HURLEY/HOPKINS
(Ancillary Proceeding to U.S.D.C. Case No. 08-81565-CIV-HURLEY/HOPKINS)

JONATHAN E. PERLMAN, Esq., as court appointed Receiver of Creative Capital Consortium, LLC, et al.,

Plaintiff,

v.

MARIO THEODULE, an individual, SMART INVESTMENT MANAGEMENT SERVICES, LLC, a Florida limited liability company, GOT SWAGG, INC., a Florida corporation, DA BEAT HOUSE, INC., a Florida corporation, and CEO of FIVE – 5 BUSINESS SOLUTIONS, INC., a Texas corporation,

Defendants.
_____/

PLAINTIFF RECEIVER'S MOTION TO STRIKE AFFIRMATIVE DEFENSES AND INCORPORATED MEMORANDUM OF LAW

The Plaintiff, JONATHAN E. PERLMAN, Esq., the court-appointed Receiver (the "Receiver") of Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC, United Investment Club, LLC and Reverse Auto Loan, LLC, a Florida limited liability company, pursuant to Fed. R. Civ. P. 12(f), files this motion to strike Defendant's affirmative defenses and incorporated memorandum of law (the "Motion"), and says:

Introduction

1. By this Motion, the Receiver seeks to have Defendants' Second, Third and Fourth Affirmative Defenses stricken, in accordance with Fed. R. Civ. P. 12(f), or alternatively treated as specific denials.

2. The Defendants, Mario Theodule, Got Swagg, Inc. and Da Beat House, Inc., (collectively referred to hereinafter as "Defendants"), insufficiently and redundantly allege their Second, Third and Fourth Affirmative Defenses, thereby forming the basis of this Motion.

Facts Supporting the Relief Requested

3. On August 12, 2009, the Receiver filed his Amended Complaint against the Defendants alleging claims of (i) aiding and abetting and/or conspiracy to breach of fiduciary duty, (ii) aiding and abetting and/or conspiracy to commit conversion, (iii) avoidance and recovery of fraudulent transfers, (iv) unjust enrichment, and (v) imposition of a constructive trust or equitable lien [DE #19].[1] On August 24, 2009, the Defendants filed their Answer and Affirmative Defenses to the Amended Complaint [DE #21] (hereinafter "Defendants' Answer").

4. The Receiver seeks to strike Defendants' Second, Third and Fourth Affirmative Defenses (*see* Defendants' Answer, ¶¶ 8-10), as they are nothing more than insufficient and redundant denials of the allegations made against them in the Amended Complaint, allegations which are also denied earlier in their Answer. (Defendants' Answer, ¶¶ 2-3).

Legal Argument and Citation to Authority

5. Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, a party may move to strike "any insufficient defense or any redundant, immaterial, impertinent, or scandalous

[1] The Receiver filed his Amended Complaint pursuant to this Court's August 11, 2009 Order granting the Receiver leave to amend the initial complaint [DE # 18].

matter" within the pleadings. Fed.R.Civ.P. 12(f). Answers and Affirmative Defenses are, of course, pleadings within the meaning of Fed.R.Civ.P. 12(a) and (b).

6. Affirmative defenses are subject to the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure and will be stricken if they fail to recite more than bare bones conclusory allegations. Home Mgmt. Solutions, Inc. v. Prescient, Inc., 2007 WL 2412834, *2 (S.D.Fla. 2007); Morrison v. Executive Aircraft Refinishing, Inc., 434 F.Supp.2d 1314, 1318 (S.D.Fla. 2005). Although Rule 8 does not obligate a defendant to set forth detailed factual allegations, a defendant must at least give the plaintiff "fair notice" of the nature of the defenses and the grounds upon which they rest. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553 (2007). Thus, an affirmative defense that does not provide "fair notice" of the nature of the defense asserted and the grounds upon which it is based is not sufficient and therefore must be stricken.

7. Although motions of strike tend to be disfavoured by courts, *see* Williams v. Jader Fuel Co., 944 F.2d 1388, 1400 (7th Cir.1991), an affirmative defense may be stricken if the defense is "insufficient as a matter of law." Microsoft Corp. v. Jesse's Computers & Repair, Inc., 211 F.R.D. 681, 683 (M.D. Fla. 2002) *citing* Anchor Hocking Corp. v. Jacksonville Elec. Auth., 419 F. Supp. 992, 1000 (M.D. Fla. 1976). A defense is insufficient as a matter of law if either: (1) on the face of the pleadings, it is patently frivolous, or (2) it is clearly invalid as a matter of law. Id.

8. The U.S. Eleventh Circuit in In re Rawson Food Service, Inc., 846 F.2d 1343, 1349 (11th Cir.1988) held that "[a] defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense." Further, and in conjunction with the Eleventh Circuit decision in Rawson, when a defendant's assertion is actually (i) a denial rather than an

affirmative defense, which was (ii) already denied in the answer to the complaint, the court will strike the alleged affirmative defense for being redundant. Wiemer v. Felberbaum & Associates, P.A. v. ADP Totalsource III, Inc., 2008 WL 299016 (S.D.Fla. 2008).

9. Alternatively, when a defendant's assertion is actually a denial rather than an affirmative defense, wherein the party has incorrectly labeled a "negative averment as an affirmative defense rather than as a specific denial," the proper remedy is to simply treat the claim as a specific denial, rather than to strike the affirmative defense outright. Home Mgmt. Solutions, Inc. v. Prescient, Inc., 2007 U.S. Dist. LEXIS 61608, at *3 (S.D.Fla. 2007); *see also* Premium Leisure, LLC v. Gulf Coast Spa Mfrs., Inc., 2008 WL 3927265, at *3 (M.D.Fla. 2008).

10. Here, Defendants' Second Affirmative Defense states that the Defendants "allege that they ***did not have any involvement whatsoever*** in George Theodule or the Creative Capital Entities' financial transactions, ***and never reviewed or helped to prepare or maintain any of their financial records***." (Defendants' Answer, ¶ 8). (emphasis added).

11. Defendants' Third Affirmative Defense states that the Defendants "allege that they ***never participated in any improper activities*** with George Theodule or the Creative Capital Entities, and they ***never saw anything*** suggesting that George Theodule or the Creative Capital Entities were involved in the alleged Ponzi scheme or defrauding of investors." (Defendants' Answer, ¶ 9). (emphasis added).

12. And finally, Defendants' Fourth Affirmative Defense states that the Defendants "allege that they only conducted business with George Theodule or the Creative Capital Entities from January 2008 through March 2008, and that during this time they provided computer and website design services, but ***never participated in soliciting investors, receiving investments or managing funds***." (Defendants' Answer, ¶ 10). (emphasis added).

13. The Defendants' Second, Third and Fourth Affirmative Defenses are not supported by any facts whatsoever and fail to provide "fair notice" to the Receiver of the actual nature of these defenses and the grounds upon which they rest. Thus, they are insufficient as affirmative defenses and must be stricken. *See* Fed.R.Civ.P. 8; *see also* Twombly, 550 U.S. at 553.

14. Additionally, the Defendants' Second, Third and Fourth Affirmative Defenses do nothing more than broadly deny those allegations already denied earlier in the Answer to the Amended Complaint. (*See* Defendants' Answer, ¶¶ 2-3, denying the allegations in paragraphs 4-8, 13-15, 22-81, and 83-87 of the Amended Complaint, i.e. effectively denying each of the five Count's alleged by the Receiver). Thus, as they are nothing more than redundant denials, they should be stricken as affirmative defenses. *See* Wiemer; 2008 WL 299016. Alternatively, they should be relegated to and treated as specific denials, rather than affirmative defenses. *See* Home Mgmt. Solutions, 2007 U.S. Dist. LEXIS 61608, at *3, and Premium Leisure, LLC, 2008 WL 3927265, at *3.

15. For the reasons stated above, the Receiver respectfully requests the Court strike Defendants' Second, Third and Fourth Affirmative Defenses under Rule 12(f).

16. A proposed Order is attached hereto as Exhibit "A."

WHEREFORE, the Receiver requests the entry of an order granting the relief requested herein and for any other relief the Court deems appropriate.

Dated: September 14, 2009
Miami, Florida

Respectfully submitted,

By: /s/ Harris J. Koroglu

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2009, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the below Service List, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Harris J. Koroglu
Harris J. Koroglu, Esq.
Florida Bar No. 32597

SERVICE LIST

JONATHAN E. PERLMAN, ESQ., as court appointed Receiver of Creative Capital Consortium, LLC, et al. v. Mario Theodule, et al.
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EXHIBIT “A”

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Defendants.
_____/

ORDER GRANTING RECEIVER'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

THIS CAUSE came before the Court upon the Receiver's Motion to Strike Affirmative Defenses and Incorporated Memorandum of Law (the "Motion"). The Court, after reviewing the pleadings and the Motion, and being fully advised in the premises, it is thereupon

ORDERED AND ADJUDGED as follows:

1. The Receiver's Motion is GRANTED.

2. Defendants' Second, Third and Fourth Affirmative Defenses are STRICKEN / shall be treated exclusively as specific denials.

# # #

Submitted By
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Copies Furnished To
Harris J. Koroglu, Esq.
[Attorney Koroglu is directed to serve a copy of this Order upon all parties in interest]