

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

CASE NO. 09-81085-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.

PAULETTE THEODULE, an individual,

Defendant.

**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 Defendant's First and Second Affirmative Defenses stricken, in accordance with Fed. R. Civ. P. 12(f), or alternatively treated as specific denials.

2. The Defendant, Paulette Theodule (referred to hereinafter as "Defendant"), insufficiently and redundantly alleges her First and Second Affirmative Defenses, thereby forming the basis of this Motion.

Facts Supporting the Relief Requested

3. On July 24, 2009, the Receiver filed his Complaint against the Defendant alleging claims of (i) avoidance and recovery of fraudulent transfers, (ii) unjust enrichment, (iii) imposition of a constructive trust or equitable lien, (iv) aiding and abetting and/or conspiracy to breach of fiduciary duty, and (v) conversion [DE #1]. On September 14, 2009, the Defendant filed her Answer and Affirmative Defenses to the Complaint [DE #9] (hereinafter the “Answer”).

4. The Receiver seeks to strike Defendant’s First and Second Affirmative Defenses (*see* Answer, pp. 17), as they are both insufficient and nothing more than a redundant denial of the allegations made against her in the Complaint, allegations which are also denied earlier in the Answer. (Answer, ¶¶ 49, 53, 63-66, 69-73).

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 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, Defendant's First Affirmative Defense simply states that the "Plaintiff has failed to set forth sufficient material facts to support a cause of action against Defendant." (Answer, p. 17).

11. Defendant's Second Affirmative Defense states that "George Theodule never gave Defendant the purported \$393,000.00." (Answer, p. 17).

12. The Defendant's First and Second 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.

13. Additionally, the Defendant's Second Affirmative Defense does nothing more than broadly deny those allegations already denied earlier in the Answer to the Complaint. (*See* Answer, p. 17, effectively denying the allegations in paragraphs 49, 53, 63-66, 69-73 and 83-86 of the Complaint, i.e. effectively denying Count's 1, 2, 3 and 5 of the Complaint). Thus, as the Second Affirmative Defense is nothing more than a redundant denial, it should be stricken as an affirmative defense. *See* Wiemer; 2008 WL 299016. Alternatively, it should be relegated to and treated as a specific denial, rather than an affirmative defense. *See* Home Mgmt. Solutions, 2007 U.S. Dist. LEXIS 61608, at *3, and Premium Leisure, LLC, 2008 WL 3927265, at *3.

14. For the reasons stated above, the Receiver respectfully requests the Court strike Defendant's First and Second Affirmative Defenses under Rule 12(f).

15. 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 29, 2009
Miami, Florida

Respectfully submitted,

By: /s/ Harris J. Koroglu

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 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

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SERVICE LIST

**JONATHAN E. PERLMAN, ESQ., as court appointed Receiver of Creative Capital
Consortium, LLC, et al. v. Paulette Theodule
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United States District Court, Southern District of Florida**

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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. Defendant's First and Second Affirmative Defenses are STRICKEN / shall be treated exclusively as specific denials.

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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]