



UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI

SAMUEL K. LIPARI)
(Assignee of Dissolved)
Medical Supply Chain, Inc.))
Plaintiff) Case No. 06-1012-CV-W-FJG
) State Court No. 0616-CV32307
)
vs.) (Properly Case No. 05-0210-
) CV-W-ODS)
US BANCORP, NA)
USBANK,NA)
Defendants)

MOTION TO REQUEST MORE DEFINITE
STATEMENT OF DEFENDANTS' ANSWER TO PLAINTIFF'S PETITION

Comes now the plaintiff Samuel K. Lipari, the assignee of the dissolved Missouri corporation Medical Supply Chain, Inc., appearing *pro se* and while reserving his right to remand for lack of jurisdiction, makes the following motion to require a more definite statement from the defendants in answer to his petition for relief. The plaintiff is required under both state and federal rules to raise this request in his first responsive motion and does not voluntarily submit to federal jurisdiction.

STATEMENT OF FACTS

1. In paragraphs 8-27 the defendants claim to lack sufficient knowledge to admit or deny averments within the knowledge of corporate officers and agents of US Bank NA and US Bancorp, even officers specifically identified in the plaintiffs complaint.
2. In paragraph 23 the defendants claim to lack sufficient knowledge to admit or deny averments of specific statements by identified corporate officers of US Bank and US Bancorp.
3. The defendants' purported affirmative defenses numbered 1-21 on pages 7-9 of their answer are devoid of any factual averments.
4. All of the defendants' purported affirmative defenses except # 10 and # 11 on page 8 fail to name any applicable statute entitling the defendants to relief.
5. The defendants' assertion of an affirmative defense in # 10 fails to provide any statutory basis or facts warranting abandoning the American Rule of parties paying their own fees and provides no facts claimed to support sanctions of attorney's fees.

6. The defendants' assertion of an affirmative defense in # 1 I fails to provide any facts or identify what assertions of fraud are insufficiently pled under Rule 9 or what the insufficiencies are.

SUGGESTION IN SUPPORT

It is anticipated that discovery disputes will dominate the resolution of these claims as the plaintiff obtains evidence he is entitled to from the defendants for the resolution of his civil contract, fiduciary and trade secret claims that will have the collateral effect of documenting felonious conduct of the defendants' officers. The need for discovery and its collateral effects could be greatly reduced with a good faith effort to admit or deny each averment of fact contained in the plaintiff's petition within the knowledge of the defendants' corporate officers.

The plaintiff is unable to address the conclusory affirmative defenses raised by the defendants for their lack of specificity.

The plaintiff's right to remand is preserved. "[B]y timely moving for remand, [Plaintiffs] did all that was required to preserve [their] objection to removal." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74, 117 S.Ct. 467, 475, 136 L.Ed.2d 437 (1996).

1. State and Federal Basis For Requiring A More Specific Statement

The Federal Rules of Civil Procedure provide for compelling the defendants to make a more definite answer. Fed. R. Civ. Pro. Rule 12 authorizes a party to move for the following:

"(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just."

The Missouri State Rules of Civil Procedure also provide a procedure for requiring a more specific response by the defendants in their answer to the plaintiff's petition:

"The proper remedy when a party fails to sufficiently plead the facts is a motion for more definite statement pursuant to Rule 55.27(d). Rule 55.27(d) provides:
"A party may move for a more definite statement of any matter contained in a pleading that is not averred with sufficient definiteness or particularity to enable the party properly to prepare responsive pleadings or to prepare generally for trial when a responsive pleading is not required. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just."

Rule 55.27(d) clearly requires entry of an order that the offending pleading be amended within a period of time. While the trial court is allowed discretion regarding the amount of time within which the pleading must be amended, and the appropriate sanction in the event the pleading is not amended, the trial court is not allowed the discretion to ignore the fact pleading requirement of Rule 55.08."

State ex rei. Harvey v. Wells, 955 S.W.2d 546 at 547 (Mo., 1997)

2. The Requirement To More Completely Admit Or Deny The Plaintiff's Averments

The defendants failed to sufficiently plead the affirmative defenses they have asserted, preventing the plaintiff from having enough information to plead or raise affirmative avoidances:

"A pleading must state the theory of the case sufficiently to inform the adversary and the court about the questions presented for decision and establishes the jurisdiction of the trial court to enter judgment. *Bryant v. Price*, 893 S.W.2d 856, 859 (Mo.App.1995). Rule 55.08 requires that an affirmative defense or avoidance be specifically pleaded in order to give notice to the plaintiff. *World*, 713 S.W.2d at 609."

Farm Bureau Town & Country Ins. of Missouri v. Hilderbrand, 926 S.W.2d 944 at 948 (Mo. App.W.D., 1996).

The defendants cannot escape their duty to respond to each averment of the plaintiff by claiming the complaint is "prolix". Missouri state law pleadings are fact based and differ from Federal Rule 8:

"The Missouri rules of civil procedure require fact pleading. Rule 55.08 provides: "A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance." The goal of fact pleading is the quick, efficient, and fair resolution of disputes. Fact pleading identifies, narrows and defines the issues so that the trial court and the parties know what issues are to be tried, what discovery is necessary, and what evidence may be admitted at trial. *Luethans v. Washington University*, 894 S.W.2d 169, 171-172 (Mo. bane 1995); *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371,377 (Mo. bane 1993); *Walker v. Kansas City Star Co.*, 406 S.W.2d 44,54 (Mo.1966) (quoting *Johnson v. Flex-O-Lite Mfg. Corp.*, 314 S.W.2d 75, 79 (Mo.1958)).

State ex rei. Harvey v. Wells, 955 S.W.2d 546 at 547 (Mo., 1997). The plaintiffs avoidance pleading requirements are equally rigorous:

"A pleading must state the theory of the case sufficiently to inform the adversary and the court about the questions presented for decision and establishes the jurisdiction of the trial court to enter judgment. *Bryant v. Price*, 893 S.W.2d 856, 859 (Mo.App.1995). Rule 55.08 requires that an affirmative defense or avoidance be specifically pleaded in order to give notice to the plaintiff. *World*, 713 S.W.2d at 609."

Farm Bureau Town & Country Ins. of Missouri v. Hilderbrand, 926 S.W.2d 944 at 948 (Mo. App.W.D., 1996).

In addition to failing to provide the plaintiff enough information to plead affirmative avoidances, the defendants affirmative defenses lack any facts or applied statutes to give constitutionally sufficient notice to the plaintiff:

"Rule 55.08 (2004) provides in pertinent part:

A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court may treat the pleadings as if there had been a proper designation.

The purpose of Rule 55.08 is to require a defendant raising an affirmative defense to plead the defense so as to give the plaintiff notice of it. *Bailey v. Cameron Mutual Ins. Co.*, 122 S.W.3d 599, 604 (Mo.App. E.D.2003). When determining the sufficiency of the allegations setting forth a defendant's affirmative defense, we may look to the responsive pleadings as a whole. *Mobley*, 72 S.W.3d at 258."

Roth v. Roth, 176 S.W.3d 735 at 738 (Mo, 2005).

3. Appropriate Relief From Insufficient Pleading Of Affirmative Defenses

The appropriate relief is for the court to strike the affirmative defenses which are too conclusory in nature and too irrelevant to the facts of the circumstances to be applicable, rendering amendment futile:

Defendant has asked the Court to overlook its failure to plead an affirmative defense and allow it to amend its pleadings. Even though delay alone is not a sufficient reason for denying Defendant's leave to amend, Hickman Mill's defense lacks merit. See *Buder v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 644 F.2d 690, 695 (8th Cir.1981). A motion to amend should be denied if the party's amendment clearly will not succeed on the merits. *Id.*

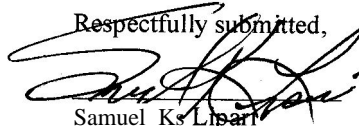
EEOC v. Hickman Mills Canso I. School Dist. No.1, 99 F.Supp.2d 1070 at 1079-80 (W.D. Mo., 2000).

However, the defendants' fraudulent removal through Shughart Thomson & Kilroy, P.C. and Mark A. Olthoff(MO lie. #38572) which withheld from the Clerk of the Court and the Judges of The Western District of Missouri that the material information that federal jurisdiction over the plaintiff's state claims already exists in *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-2299-CM (formerly W.D. Mo. Case No. 05-0210- CV-W-ODS) has deprived the plaintiff of making a motion to strike affirmative defenses which a federal court could construe as voluntarily invoking the jurisdiction of the forum forfeiting the plaintiffs right to remand. The court was materially deceived by the fraud of Shughart Thomson & Kilroy, P.C. and Mark A. Olthoff(MO lie. #38572) and docketed the refiled state claims as a new action styled as case no. 06-1012-CV-W-FJG. Completing the elements of the act of Fraud on The Court by Shughart Thomson & Kilroy, P.C. and Mark A. Olthoff(MO lie, #38572).

Conclusion

The plaintiff respectfully requests that this action be remanded to Missouri state court from whence it was removed.

Respectfully submitted,



Samuel K. Lisari

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Prose

Certificate of Service

I certify that on January 4th, 2007 I have served the opposing counsel with a copy of the foregoing notice using the *CMIECF* system via the office of the clerk which will send a notice of electronic filing to the following:

Mark A. Olthoff

MARK A. OLTHOFF MO lie. #38572

ANDREW M. DEMAREA MO lie. #45217

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ATTORNEY FOR DEFENDANTS
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION



Samuel K. Lisari



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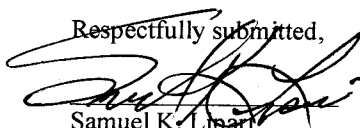
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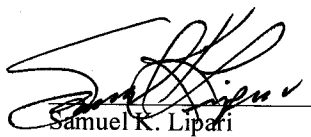
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Pro se

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I certify that on January 4th, 2007 I have served the opposing counsel with a copy of the foregoing notice using the CM/ECF system via the office of the clerk which will send a notice of electronic filing to the following:

Mark A. Olthoff
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