/s/ Jennifer P. Dent
Circuit Court Judge
Ref. Code: 21VUWQNX

E-FILED | 8/16/2021 10:26 AM
CC-41-2019-C-357
Raleigh County Circuit Clerk
Paul H. Flanagan

In the Circuit Court of Raleigh County, West Virginia

GLADE SPRINGS VILLAGE PROPERTY OWNERS, Plaintiff,	)	
vs.)	)	Case No. CC-41-2019-C-357
EMCO GLADE SPRINGS HOSPITALITY, ELMER COPPOOLSE, ELAINE B. BUTLER, GSR, LLC, JAMES TERRY MILLER ET AL, Defendants	)	

ORDER GRANTING GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC.'S MOTION TO STRIKE GSR AND EMCO'S FIRST AFFIRMATIVE DEFENSE TO SECOND AMENDED COMPLAINT

Pending before the Court is Glade Springs Village Property Owners Association, Inc.'s ("GSVPOA") Motion to Strike GSR and EMCO'S First Affirmative Defense to Second Amended Complaint.

RELEVANT PROCEDURAL HISTORY

1. On June 25, 2021, GSVPOA filed the instant Motion requesting that this Court strike Defendants' First Affirmative Defense in their Answer to the Second Amended Complaint.

2. On July 2, 2021, GSR and EMCO filed their Response in Opposition of the Motion.

3. On July 14, 2021, the GSVPOA filed its Reply.

4. The Court finds the issues ripe for adjudication.

STANDARD OF LAW

The Court may strike from the pleadings "any redundant, immaterial, impertinent, or scandalous matter." W. Va. R. Civ. P. 12(f). "The standard on a motion to strike pursuant to Rule

12(f) is the same as the standard on a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6)." Litigation Handbook on West Virginia Rules of Civil Procedure (5th ed. 2017), § 12(f) at 433. Thus, the Court "must view the pleadings, under attack by a motion to strike, in the light most favorable to the pleader." *Id*. Before a motion to strike may be granted, "the movant must demonstrate the material at issue does not bear on the subject matter and will prejudice the movant." *Id*., § 12(f) at 433.

"A Plaintiff may move under Rule 12(f) to strike any insufficient defense." *Id*., § 12(f) at 434. "Affirmative defenses can be challenged as a matter of pleading or as a matter of law. An affirmative defense fails as a matter of law if it lacks merit under any set of fact the defense might allege." *Id.* A motion to strike by the plaintiff under Rule 12(f) goes solely to the sufficiency of defenses as they are presented in the answer and matters outside the pleadings, such as affidavits, may not be used or considered. Syl. pt. 3, *Toler v. Shelton*, 159 W. Va. 476, 223 S.E.2d 429 (1976) ("A motion under Rule 12(f) W. Va. R.C.P., goes solely to the sufficiency of defenses as they are presented in the pleadings and matters outside the pleadings, such as affidavits, may not be used or considered.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

GSVPOA seeks an order striking the First Affirmative Defense from the Answer to the Second Amended Complaint. As set forth in GSVPOA's Motion, the First Affirmative Defense is premised upon information acquired from a complaint recently filed by Cynthia Randolph in an unrelated proceeding in which she alleges that Mr. McClure improperly commingled such assets. ("Cynthia Randolph Complaint").

W. Va. R. Civ. P. 12(f) provides that:

> 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.

W. Va. R. Civ. P. 12(f). "By 'immaterial' it is generally meant that [ ] a matter has no essential or important relationship to the claim for relief or the defenses being pleaded." Litigation Handbook on West Virginia Rules of Civil Procedure (5th ed. 2017), § 12(f) at 432. "Impertinent" means any matters that consist of allegations not responsive or relevant to the issues involved in the action and which could not be put in issue or be given in evidence between the parties." *Id. See also Morse v. Weingarten*, 777 F. Supp. 312, 319 (S.D.N.Y. 1991) (An allegation in a pleading is impertinent or immaterial when it is not relevant to the issues involved in the action.)

The claims asserted by GSVPOA against EMCO and GSR in the Second Amended Complaint include:

- Count I – Accounting Against EMCO and GSR;
- Count II – Breach of Contract Against EMCO;
- Count IV – Breach of Contract against GSR on Real Property Rights of GSVPOA;
- Count V – Breach of Contract Against GSR;
- Count VI - Unjust Enrichment against GSR;
- Count VII – Punitive Damages.

See Second Amended Complaint. In their First Affirmative Defense to the claims raised in the Second Amended Complaint, GSR and EMCO assert that:

> Since the current POA Board was elected, the POA has failed to manage Glade Springs Village in a manner that is as economical and beneficial as when Mr. Coppoolse, Mr. Miller and Ms. Butler were on the POA Board. Moreover, under the current POA Board, the POA has purchased or contracted for service from companies owned and/or operated by David McClure despite alleging that it was a conflict of interest and therefore improper for the prior Board to contract with Defendants EMCO and/or GSR.
>
> Upon information and belief, Mr. McClure's improper comingling of POA assets with those of his business have

> contributed to the POA's seeking of damages from Defendants despite the POA not having a legitimate basis for claiming such damages. This defense is made upon information and belief because it is based upon the Complaint recently filed by Cynthis Randolph, in which she alleges that Mr. McClure improperly commingled such assets. The Complaint is attached as Exhibit A.

The allegations in the First Affirmative Defense include unrelated accusations of Mr. McClure commingling POA assets with his business assets based upon nothing more than "information and belief" of a nonparty to these proceedings. These allegations are immaterial, impertinent, prejudicial, and completely unrelated to Plaintiff's claims. *See Lipsky v. Commonwealth United Corp*. *See* 51 F.2d 887 (2d Cir. 1976) (holding that the "complaint which preceded the ... judgment is also immaterial"); *See alsoIn re Merrill Lynch & Co., Inc. Research Reports Sec. Litig*., 218 F.R.D. 76, 78 (S.D.N.Y. 2003) (striking references to ongoing related litigations, stating that "Second Circuit case law makes it clear that references to preliminary steps in litigations ... that did not result in an adjudication on the merits ... are, as a matter of law, immaterial under Rule 12(f) ...").

Rule 12(f) permits this Court to strike from a pleading any immaterial matter. *Lipsky,* 51 F.2d. at 893. Because the First Affirmative Defense clearly and explicitly relies on allegations based upon the Cynthia Randolph Complaint filed in June of 2021 that have not been adjudicated, or even answered, the First Affirmative Defense must be stricken as immaterial and impertinent under Rule 12(f) of the West Virginia Rules of Civil Procedure. As stated above, references to complaints filed in other actions that had not been resolved on the merits are immaterial.

As a matter of law in West Virginia, a motion to strike an affirmative defense in an answer by the plaintiff under Rule 12(f) goes solely to the sufficiency of defenses as they are presented in the answer and matters outside the pleadings, such as affidavits, may not be used or considered. Syl. pt. 3, *Toler v. Shelton*, 159 W. Va. 476, 223 S.E.2d 429 (1976) ("A motion under Rule 12(f) W. Va. R.C.P., goes solely to the sufficiency of defenses as they are presented in the

pleadings and matters outside the pleadings, such as affidavits, may not be used or considered."). Therefore, outside matters, such as the Cynthia Randolph Complaint cannot be used, referenced, or considered. *Id.*

The allegations set forth in the Cynthia Randolph Complaint are also scandalous and highly prejudicial. Scandalous allegations reflect unnecessarily on a defendant's moral character. *See*, *e.g.*, Litigation Handbook on West Virginia Rules of Civil Procedure (5th ed. 2017), § 12(f) at 432 ("Scandalous" generally refers to any allegations that "improperly casts a derogatory light on someone, usually a party to the action"). GSR and EMCO's allegations that Mr. McClure improperly commingled assets without any support for these accusations, other than the Cynthia Randolph Complaint in an unrelated civil action, improperly cast a derogatory light on Mr. McClure's moral character in the case at hand. Courts routinely strike allegations of even analogous misconduct in unrelated situations. *See Schnell v. Schnall*, No. 80 Civ. 2442, 1981 WL 1618, at *4 (S.D.N.Y. Mar. 30, 1981) (striking allegations regarding [defendant's] prior securities violations ... "[d]ue to the highly prejudicial nature of the offending language"); *Toto v. McMahan*, No. 93 CIV. 5894 (JFK), 1995 WL 46691, at *48 (S.D.N.Y. Feb. 7, 1995) (striking immaterial and prejudicial allegations of criminal tax fraud and references to the criminal indictment of defendant's former employee, and the naming of a defendant as an unindicted co-conspirator) (implied overruling on other grounds recognized by *Moy v. Terranova*, No. 87 CV 1578 (SJ), 1999 WL 118773 (E.D.N.Y. Mar. 2, 1999)).

Finally, an affirmative defense "will defeat the plaintiff's . . . claim, even if all the allegations in the complaint are true." *Gomez v. A.C.R. Promotions, Inc*., 2019 W. Va. LEXIS 379, *9 (2019) citing Black's Law Dictionary 509 (10th ed. 2014) (emphasis added.). Defendants failed to articulate how GSVPOA's allegations against them would fail, in their entirety, if they were able to prove falsified accounting. Notably, the vast majority of GSVPOA claims arose during the period of Declarant control of GSVPOA – October 10, 2010 through

May 1, 2019, the date the Elected Board (including David McClure) assumed office. Not striking the First Affirmative Defense would be highly prejudicial toward GSVPOA and cause additional, burdensome, discovery in the instant proceedings. *See Commerce & Indus. Ins. Co. v. Newhall Contr., Inc*., 2014 U.S. Dist. LEXIS 114772, *7, (S.D.W. Va. 2014) ("the moving party must show prejudice: for instance, where an 'irrelevant affirmative defense . . . result[s] in increased time and expense of trial, including the possibility of extensive and burdensome discovery"'); s*ee also, Clark v. Milam,* 152 F.R.D. 66, 70, 1993 U.S. Dist. LEXIS 17207, *9 (S.D.W. Va. 1993) ("when a party succeeds in establishing a defense's insufficiency, the court should grant a motion to strike 'to avoid unnecessary time and money in litigating invalid, spurious issues.')(internal citations omitted); *Villa v. Ally Fin., Inc.,* 1:13CV953, 2014 U.S. Dist. LEXIS 25624, 2014 WL 800450, at *1 (M.D.N.C. Feb. 28, 2014) ("In addition, the moving party must show prejudice: for instance, where an 'irrelevant affirmative defense . . . result[s] in increased time and expense of trial, including the possibility of extensive and burdensome discovery.'").

WHEREFORE, GSVPOA's Motion to Strike the First Affirmative Defense is GRANTED. The Clerk of this Court shall enter the foregoing and forward attested copies hereof to all counsel and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia 25401.

ENTERED this 16th day of August, 2021.

/s/ Jennifer P. Dent
Circuit Court Judge
10th Judicial Circuit

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Paul H. Flanagan

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC., a West Virginia non-profit corporation,

Plaintiff,

vs.

Civil Action No.: 19-C-357
Presiding: Judge Dent
Resolution: Judge Lorensen

EMCO GLADE SPRINGS HOSPITALITY, LLC, a West Virginia limited liability company; ELMER COPPOOLSE, an individual; JAMES TERRY MILLER, an individual; R. ELAINE BUTLER, an individual; and GSR, LLC, a West Virginia limited liability company,

Defendants,

and

GSR, LLC,

Counterclaim/Third-Party Plaintiff,

vs.

Civil Action No.: 19-C-357
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GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC., a West Virginia non-profit corporation, DAVID MCCLURE, CINDI FERNALD, ALLEN TEINERT, RICK LAY, RENNIE HILL, and An unknown number of John or Jane Does,

Counterclaim Third-Party Defendants.

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ENTERED this ____ day of July, 2021.

_____
The Honorable Jennifer P. Dent
Judge of the West Virginia
Business Court Division

Prepared and presented by:

/s/ Ramonda C. Marling
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