

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-60995-CIV-DIMITROULEAS

FLEXITEEK AMERICAS, INC.,
a Florida corporation; FLEXITEEK
INTERNATIONAL AS, a foreign corporation,

Magistrate Judge Snow

Plaintiffs,

vs.

NUTEAK DECKING, INC.,
a Florida corporation, and
TEK-DEK, LTD., a foreign corporation,

Defendants.

_____ /

ORDER DENYING PLAINTIFFS’ MOTION TO STRIKE

THIS CAUSE is before the Court upon Plaintiffs’ Motion to Strike Defendant’s Affirmative Defenses and Counterclaims. [DE-55]. The Court has carefully considered the Motion, Defendant’s Response [DE-59], Plaintiffs’ Reply [DE-60], and is otherwise fully advised in the premises.

Federal Rule of Civil Procedure 12(f) provides that “the court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). However, this is a drastic remedy that is generally disfavored and motions to strike affirmative defenses should be denied unless it is clear that the defenses could not succeed under any circumstances. Williams v. Jader Fuel Co., Inc., 944 F.2d 1388, 1400 (7th Cir. 1991); Augustus v. The Bd. of Pub. Instruction of Escambia County, Florida, 306 F.2d 862, 868 (5th Cir. 1962)¹; Thompson v. Kindred Nursing Ctrs. East, LLC, 211 F. Supp. 2d 1345, 1348 (M.D.

¹ The Eleventh Circuit, Bonner v. Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), adopted as binding precedent all decisions of the United States Court of Appeals for the Fifth Circuit handed down by that court prior to the close of business on September 30, 1981.

Fla. 2002); In re Tampa Checkmate Food Serv., Inc., 221 B.R. 541, 544 (Bankr. M.D. Fla. 1998) (citing State of New York v. Almy Bros, Inc., 971 F. Supp. 69, 72 (N.D.N.Y. 1997)).

There are no hard and fast rules for determining what constitutes an insufficient defense; an affirmative defense will be held insufficient as a matter of law only if it appears that the defendant cannot succeed under any set of facts which it could prove. Equal Employment Opportunity Comm'n v. First Nat'l Bank, 614 F.2d 1004, 1008 (5th Cir. 1980); Openshaw v. Cohen, Klingenstein, & Marks, Inc., 320 F. Supp. 2d 357, 364 (D. Md. 2004). An affirmative defense must be stricken when the defense compromises no more than bare-bones, conclusory allegations. Microsoft Corp. v. Jesse's Computers & Repair, Inc., 211 F.R.D. 681, 684 (M.D. Fla. 2002); Meridian of Palm Beach Condominium Ass'n, Inc. v. QBE Ins., 2007 WL 1364334 (S.D. Fla. May 7, 2007). However, where a defense puts into issue relevant and substantial legal and factual questions, it is sufficient and may survive a motion to strike, particularly when there is no showing of prejudice to the movant. Augustus, 306 F.2d at 868.

The Court finds that the Affirmative Defenses are sufficient. Though brief, each of the defenses raise relevant and substantial questions. In addition, there has been no showing of prejudice to Plaintiffs. The Affirmative Defenses and Counterclaims, along with the Answer, put Plaintiffs on sufficient notice as to the issues raised by Tek-Dek. Furthermore, it has not been established by Plaintiffs that at a later stage in this case the defenses clearly could not succeed under any circumstances. In light of the drastic nature of a motion to strike, the Court finds that the defenses are sufficient.


Moreover, the Counterclaims are sufficient. Plaintiffs had argued that they were redundant as the subject matter was the same as certain affirmative defenses. However, as Defendant points out, an affirmative defense provides a reason to deny Plaintiffs' requested

relief, whereas the counterclaims seek relief on behalf of the Defendant. Notably, in their Reply, Plaintiffs only address the affirmative defenses and do not further address the counterclaims. The Court finds that the counterclaims as pled are sufficient.

In addition, Defendant points out that Plaintiffs' counsel have failed to confer with opposing counsel prior to filing the instant motion. The Court directs the parties to Local Rule 7.1(A)(3), which requires a moving party to confer with opposing counsel prior to filing a motion to strike. At the time of filing the motion, a certification must be filed indicating that counsel conferred or that reasonable efforts were made to confer. There is no such certification filed with this motion. See also, Fed. R. Civ. P. 4(d). The Court points the parties to this rule so that future issues may be discussed between the parties, thus possibly avoiding the necessity of filing a motion before the Court.

Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion to Strike [DE-55] is hereby **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 9th day of July, 2009.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record