Muschong et al v. Millennium Physician Group, LLC

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

FORT MYERS DIVISION RONALD J. MUSCHONG, DARLENE J. MUDD, GROVER H. MUDD and RUTH A. ARNOLD, an individual Plaintiffs, v. Case No: 2:13-cv-705-FtM-38CM MILLENNIUM PHYSICIAN GROUP, LLC, Defendant. /

ORDER This matter comes before the Court on the Plaintiffs, Ronald Muschong, Darlene ffirmative Defenses (Doc. #38) filed on April 30, 2014. Group filed its Response is Opposition (Doc. #43) on June 16, 2014. The Motion is now

Affirmative defenses are filed pursuant to Federal Rule of Civil Procedure 8(c). The satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge

in bankruptcy, duress, estoppel, failure of consideration, fraud . . . and any other matter Fed. R. Civ. P. 8(c). Federal Rule of Civil Procedure 12(f) provides that the Harvey v. Home Depot U.S.A., Inc., 2005 WL 1421170, *1 (M.D. Fla. June 17, 2005). In

evaluating a motion to strike, the court must treat all well pleaded facts as admitted and cannot consider matters beyond the pleadings. Repair, Inc., 211 F.R.D. 681, 683 (M.D. Fla. 2002). A motion to strike will usually be

denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties. Harvey, 2005 WL 1421170, at *1 (citing Scelta v. Delicatessen Support Services, Inc., 57 F. Supp. 2d 1327, 1347 (M.D. Fla. 1997)).

An Affirmative defense will only be stricken . . . if the defense is insufficient as a matter of law. Microsoft Corp., 211 F.R.D. at 683. An affirmative defense is insufficient as a matter of law only if: (1) on the face of the pleadings, it is patently frivolous, or (2) it is clearly invalid as a matter of law. Harvey, 2005 WL 1421170, at *1. To the extent that 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. Id. (citing Reyher v. Trans World Airlines, Inc., 881 F. Supp. 574, 576 (M.D. Fla. 1995)).

Affirmative defenses are also subject to the general pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. Hansen v. ABC Liquors, Inc., 2009 WL 3790447 *1 (M.D. Fla. Nov. 9, 2009). Rule 8(b)(1)(A) Fed R. Civ. P. 8(b)(1)(A). Although

Rule 8 does not obligate a defendant to set forth detailed factual allegations, a defendant the nature of the defense and the grounds upon which it rests. Hansen, 2009 WL 3790447 at *1 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

The Plaintiffs move to strike the Defendants Affirmative Defenses 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13. The Court will address each affirmative defense in order.

First Affirmative Defense architectural barriers exist, they are merely technical violations within acceptable

conventional building industry tolerances for field conditions as defined by the ADAAG and the facility, when taken as a whole, is compliant with the ADA and implementing Millennium denies the claim that the alleged barriers are anything more than mere technical violations and therefore, the First Affirmative Defense is a denial. When a party incorrectly labels a negative averment as an affirmative defense rather than as a specific denial, the proper remedy is not to strike the claim but rather to treat it as a specific denial. Ramnarine v. RG Group, Inc., 2012 WL 2735340, *4 (S.D. Fla. July 9, 2012). Thus, the Court will not strike the First Affirmative Defense but treat it as a denial.

Second Affirmative Defense

The second Affirmative Defense, although stated in general terms, gives the Plaintiff sufficient notice of a statute of limitations defense. Smith v Wal-Mart Stores, Inc., 2012 WL 2377840 *5 (N.D. Fla. June 25, 2012). Moreover a statute of limitations defense is specifically enumerated in Fed. R. Civ. P. 8(c). Thus, the Motion to Strike is denied as to the Second Affirmative Defense.

Third Affirmative Defense [u]pon information and belief, Plaintiffs have failed to mitigate their damages, including bringing to the attention of Defendant any The Plaintiff says it should be stricken as the Defendant cannot succeed under any circumstances it can prove. At the pleading stage, the Court will assume the truth of the facts asserted in both Plaintiff's Complaint and Defendant's Affirmative Defenses and not resolve factual disputes. Ramnarine v. RG Group, Inc., 2012 WL 2735340, 3 (S.D. Fla. July 9, 2012) (citing Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L.Ed.2d 59 (1984) Holtzman v. B/E Aerospace,

2008 WL 2225668, at * 1 (S.D. Fla. May 29, 2008) an affirmative defense, the Court must accept as true the allegations in the affirmative

Here, and the Court must accept it as true at this point in the proceedings. Therefore, the Motion

to strike the third affirmative defense is due to be denied.

Fourth Affirmative Defense The or all of the Plaintiffs have no standing to bring these cla The Plaintiff argues the

Fourth Affirmative Defense is invalid as a matter of law. The Plaintiffs further claim the Amended Complaint provides a sufficient factual basis to support the Plaintiffs claims. The Court rejects Plaintiff's argument that the Court should strike this affirmative defense because he has pled sufficient facts to demonstrate standing. At the pleading stage, the Court will assume the truth of the facts asserted in both Plaintiff's Complaint and Defendant's Affirmative Defenses and not resolve factual disputes. RG Group, Inc., 2012 WL 2735340 at * 3 (citing Hishon, 467 U.S. at 73 all of the plaintiff's allegations as true in determining whether a plaintiff has stated a claim Holtzman, 2008 WL 2225668, at *1 considering a motion to strike an affirmative defense, the Court must accept as true the

Although standing is not listed among the eighteen defenses, nothing in the language of Rule 8(c) purports to limit what may be pled as affirmative defenses. Ramnarine v. CP RE Holdco 2009-1, LLC, 2013 WL 1788503, *4 (S.D. Fla. Apr. 26, 2013) (citing Gwin v. Curry, 161 F.R.D. 70, 71 (N.D. Ill. 1995) (describing Rule 8(c) out a nonexclusive) (emphasis added). Moreover,

numerous courts have allowed standing to be pled as an affirmative defense. See, e.g., Achievement & Rehabilitation Ctrs., Inc. v. City of Lauderhill, 2012 WL 6061762, *1 (S.D. Fla. Dec. 6, 2012) Th[is] substantial questions of law better decided after factual Guididas v. Cmty.

Nat'l Bank Corp., 2013 WL 230243, *2 (M.D. Fla. Jan. 22, 2013)

Nevertheless, it is true that some courts that have specifically analyzed whether standing qualifies as an affirmative defense have concluded that it does not for reasons other than the fact that standing does not appear on the Rule 8(c) list. See Native American Arts, Inc., 253 F.Supp.2d at 1045. In Native American Arts, Inc., for example, the court, in determining that the defendant had not waived the defense of standing by failing to plead it as an affirmative defense, first held that standing is not an affirmative defense because the plaintiff bears the burden of pleading and proving standing, whereas the defendant must shoulder the burden of pleading and proof on affirmative defenses. Id.

The Native American Arts Court is, of course, correct that the party invoking federal jurisdiction shoulders the burden of proving standing. Bischoff v. Osceola Cnty., 222 F.3d 874, 878 (11th Cir.2000) asserting an affirmative defense usually has the burden of proving In re Rawson Food

Serv., Inc., 846 F.2d 1343, 1349 (11th Cir.1988) (citation and internal quotation marks omitted). But even assuming that standing does not technically meet the definition of an affirmative defense, it may still be viewed as a type of denial. The proper remedy when a party mistakenly labels a denial as

an affirmative defense is not to strike the claim but instead to treat it as a specific denial. Lugo v. Cocozella, LLC, 2012 WL 5986775, *1 (S.D. Fla. Nov. 29, 2012) (citation omitted). Whether regarded as a specific denial or an affirmative defense, Defendants' invocation of standi purpose of placing Plaintiff and the Court on notice of certain issues Defendant intends

Inlet Harbor Receivers, Inc. v. Fid. Nat'l Prop. & Cas. Ins. Co., 2008 WL 3200691, *1 (M.D. Fla. Aug.6, 2008). Nor, at this point, does whether Defendants' standing theory is regarded as a denial or an affirmative defense affect how the parties will proceed, as a practical matter. Therefore, the Court denies Plaintiff's and will treat the Fourth Affirmative Defense as a denial.

Fifth Affirmative Defense accessibility existed, Defendant provided legally sufficient alternative access and equivalent facilitation. The Plaintiff states the Defense is blatantly false. Contrary to the must accept as true the allegations in the affirmative defense. RG Group, Inc., 2012 WL

2735340, at *3 (citing Holtzman, 2008 WL 2225668, at * 1). Thus, the Motion to Strike the Fifth Affirmative Defense is denied.

Sixth Affirmative Defense faith belief it complied with all applicable statutes and regulations at all times relevant to

the allegations within the Complai complied is not relevant. Millennium denies the claim that the alleged barriers are

anything more than mere technical violations and therefore, the Sixth Affirmative Defense is a denial. When a party incorrectly labels a negative averment as an affirmative defense rather than as a specific denial, the proper remedy is not to strike the claim but rather to treat it as a specific denial. Ramnarine v. RG Group, Inc., 2012 WL 2735340, *4 (S.D. Fla. July 9, 2012). Thus, the Court will not strike the Sixth Affirmative Defense but treat it as a denial.

Seventh Affirmative Defense [s]ubsequent remedial actions th Affirmative Defense should be stricken because it is factually inaccurate and invalid as a matter of law. As noted above when considering a motion to strike an affirmative defense, the Court must accept as true the allegations in the affirmative defense. RG Group, Inc., 2012 WL 2735340, at 3 (citing Holtzman, 2008 WL 2225668, at *1). Thus, the Motion to Strike the Seventh Affirmative Defense is due to be denied.

Eighth Affirmative Defense barriers to accessibility do exist, removal of the same is not readily achievable. With

Eighth Affirmative Defense, Plaintiffs state it should be stricken because it is insufficient as a matter of law.

The Eighth Affirmative Defense is not an affirmative defense but a denial of the Plaintiffs claim found in the Complaint that the barrier removal at the specified Millennium clinics are readily achievable. Millennium denies the claim that the barriers are readily removable and therefore, the Eighth Affirmative Defense is a denial. When a party incorrectly labels a negative averment as an affirmative defense rather than as a specific denial, the proper remedy is not to strike the claim but rather to treat it as a specific denial. RG Group, Inc., 2012 WL 2735340, at *4. Thus, the Court will not strike the Eighth Affirmative Defense but treat it as a denial.

Ninth Affirmative Defense existing facilities under the terms of the ADA and its regulations. The Plaintiff states the

Ninth Affirmative Defense should be stricken because it is not an affirmative defense but

modification standards depending on when the properties were constructed. RG Group,

Inc., 2012 WL 2735340, at *4. While newly constructed facilities must comply with the ADA's Accessibility Guidelines, 28 C.F.R., Part 36 42 U.S.C. § 12182(b)(2)(A)(iv) RG Group, Inc., 2012 WL

2735340, at *4 (citing 28 C.F.R. § 36.304(a) (preexisting facilities must remedy accessi i.e., easily facility is not required to comply with the ADAAG, the ADAAG are still relevant for the

purpose of evaluating whether architectural barriers are present in existing construction. RG Group, Inc., 2012 WL 2735340, at *4 (citing Parr v. L & L Drive Inn Restaurant, 96 F.Supp.2d 1065, 1086 (D. Haw. 2000)). That stated, there is nothing improper about Defendant asserting an affirmative defense that it need not comply with the ADAAG for new construction if its structures were already in existence at the time the ADA took effect. Thus, the Motion to Strike the Ninth Affirmative Defense is denied.

Tenth Affirmative Defense The Tenth Affirmative Defense states that the requested alterations are structurally impractical. Plaintiffs argue the Tenth Affirmative Defense should be stricken because it is insufficient as a matter of law as it fails to provide fair notice as required by the Federal Rules of Civil Procedure. The term structurally impractical refers to the new construction standard and not the readily achievable or technically infeasible standard found for structures built prior to the ADA. Lugo v. Cocozella, LLC., 2012 WL 5986775, *1 (S.D. Fla. Nov. 29, 2012). However, as noted above, when a party incorrectly labels a negative averment as an affirmative defense rather than as a specific denial, the proper remedy is not to strike the claim but rather to treat it as a specific denial. RG Group, Inc., 2012 WL 2735340, at *4. Thus, the Court will not strike the Tenth Affirmative Defense but treat it as denial.

Eleventh Affirmative Defense modifications in policies, practices and procedures to the extent necessary to afford

goods, services, facilities, privileges, advantages or accommodations to disabled as demonstrated by the fact that the Plaintiff was unable to use the restroom, in order to provide

Again, as noted above when considering a motion to strike an affirmative defense, the Court must accept as true the allegations in the affirmative defense. RG Group, Inc., 2012 WL 2735340, at 3 (citing Holtzman, 2008 WL 2225668, at * 1). Thus, the Motion to Strike the Eleventh Affirmative Defense is due to be denied.

Twelfth Affirmative Defense whole or in part, by the applicable statute of limitations, to the extent the Complaint does

A statute of limitations defense is specifically enumerated in Fed. R. Civ. P. 8(c). Thus, the Motion to Strike is denied as to the Twelfth Affirmative Defense.

Thirteenth Affirmative Defense recipient or a program or activity receiving federal financial aid for purposes of applying false because Defendant obtains Medicare payments for treatment of patients.

individual with a disability ... shall, solely by reason of his or her disability, be excluded

from participation in, be denied the benefits of, or be subject to discrimination under any 29 U.S.C. § 794(a). The but the United States Supreme Court has made clear that mere beneficiaries or incidental

beneficiaries of federal aid are not subject to statutory coverage. B.M. ex rel. M.F. v. Thompson, 2013 WL 4547344, *10 -11 (M.D. Fla. Aug. 27, 2013). Thus the Motion to strike the Thirteenth Affirmative Defense is denied.

Accordingly, it is now ORDERED: is DENIED. Affirmative

Defenses numbers One, Four, Six, Eight, and Ten will be treated as denials rather than affirmative defenses. However, they will not be stricken from the Answer and Affirmative defenses.

DONE and ORDERED in Fort Myers, Florida this 8th day of July, 2014.

Copies: All Parties of Record