UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SYSTEMATIC HOME STAGING, LLC,

Plaintiff,

v. Case No: 6:17-cv-1327-Orl-41TBS

MHM PROFESSIONAL STAGING, LLC,

Defendant.

ORDER

Pending before the Court is the Motion of Defendant/Counter-Plaintiff, MHM Professional Staging, LLC ("MHM") to Strike Plaintiff/Counter-Defendant, Systematic Home Staging, LLC's ("SHS") Affirmative Defenses to Amended Counterclaim (Doc. 24). SHS has filed its response (Doc. 25). Upon review, the motion is **GRANTED, in part and DENIED, in part.**

SHS initiated this action by filing a complaint seeking a finding of invalidity and/or non-infringement of MHM's alleged intellectual property rights (Doc. 1). A (Corrected) First Amended Complaint for Declaratory Relief was subsequently filed (Doc. 9). MHM answered the amended complaint and filed a counterclaim against SHS alleging counts of trade dress infringement, copyright infringement, and unfair competition (Doc. 20). An amended counterclaim was subsequently filed (Doc. 21). SHS filed its answer and affirmative defenses to MHM's amended counterclaim on September 21, 2017 (Doc. 22). The instant motion seeks to strike the twenty-two affirmative defenses alleged by SHS, contending that each is legally deficient.

General Principles

"An affirmative defense is generally a defense that, if established, requires judgment for the defendant even if the plaintiff can prove his case by a preponderance of the evidence." Wright v. Southland Corp., 187 F.3d 1287, 1303 (11th Cir. 1999). A court has the authority to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Rule 12(f) FED. R. CIV. P. Pursuant to Rule 12(f), courts may strike "insufficient defense[s]" from a pleading, either upon a motion or *sua sponte*. Daley v. Scott, No. 2:15-CV-269-FTM-29DNF, 2016 WL 3517697, at *1 (M.D. Fla. June 28, 2016). Motions to strike are generally disfavored and are often considered "time wasters." Somerset Pharm., Inc., v. Kimball, 168 F.R.D. 69, 71 (M.D. Fla.1996). When it evaluates a motion to strike, the court "must treat all well pleaded facts as admitted and cannot consider matters beyond the pleadings." Florida Software Systems v. Columbia/HCA Healthcare Corp., No. 97-2866-cv-T-17B, 1999 WL 781812 *1 (M.D. Fla. Sept. 16, 1999).

When pleading affirmative defenses, a defendant should "state in short and plain terms its defenses to each claim asserted against it," FED. R.C IV. P. 8(b)(1)(A), and "affirmatively state any avoidance or affirmative defense." FED. R. CIV. P. 8(c). While courts have differed as to whether the pleading standard for complaints articulated by the Supreme Court in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and Ashcroft v. Igbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) applies to affirmative defenses, it is clear that affirmative defenses "must give the plaintiff fair notice of issues that may be raised at trial." Douqan v. Armitage Plumbing, LLC, No. 6:11-cv-1409-Orl-22KRS, 2011 WL 5983352, at *1 (M.D. Fla. Nov.14, 2011) (citing Hassan v. U.S. Postal Serv., 842 F.2d 260, 263 (11th Cir.1988) ("The purpose of

Rule 8(c) is simply to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it.").) As Judge Presnell has observed: "While affirmative defenses may not have to meet the Twombly/Iqbal standard, they must be more than boilerplate." Smith v. City of New Smyrna Beach, No. 6:11-CV-1110-ORL-31, 2011 WL 6099547, at *1 (M.D. Fla. Dec. 7, 2011).

Affirmative defenses that are insufficient as a matter of law can be stricken if they fail to meet the general pleading requirements. Microsoft Corp. v. Jesse's Computers & Repair, Inc., 211 F.R.D. 681, 683 (M.D.Fla.2002). If a defense is patently frivolous, invalid as a matter of law, or if it appears that the defendant cannot succeed under any set of facts which it could prove, the defense will be deemed insufficient and may be stricken. Florida Software Systems, 1999 WL 781812 *1; Microsoft Corp., 211 F.R.D. at 683.

Analysis

MHM argues that SHS' affirmative defenses do not comport with the required pleading standard in that they are either conclusory boilerplate, fail to give enough factual information to constitute sufficient notice, or are in the nature of a general denial. In response, SHS argues that: affirmative defenses do not have to comply with the plausibility pleading standard articulated by the United States Supreme Court in Twombly and Ashcroft; to the extent a denial is mistakenly asserted as an affirmative defense, the remedy is not to strike the claim but to treat it as a specific denial; and the defenses here provide fair notice to MHM so "there is no need for a point-by-point refutation of MHM's ... arguments about their supposed factual deficiencies." (Doc. 25 at 6). I agree that the Twombly/Iqbal standard does not apply here. See Gonzales v. Midland Credit Management, Inc., No. 6:13-cv-1576-Orl-37TBS, 2013 WL 5970721, at *3 (M.D. Fla. Nov.

8, 2013) ("This Court agrees with those courts which hold that the pleading standard explained in Twombly and Iqbal does not apply to affirmative defenses."). I also agree that denials masquerading as affirmative defenses should not be stricken. However, a defense should respond to a specific count or counts and should contain sufficient information to constitute fair notice. I am also of the view that the shotgun pleading of boilerplate defenses clutters the docket and creates unnecessary work for the parties and the Court. For this reason, a "point-by-point" analysis of each defense is, unfortunately, necessary.

> First Affirmative Defense - SHS affirmatively asserts that Counts I, II, and III of MHM's Amended Counterclaim fails to state a claim upon which relief can be granted.

This is a denial, not a defense. Consistent with the above standard, the motion to strike is **denied** as to this defense.

> Second Affirmative Defense -As to Count II, SHS pleads the affirmative defense of unclean hands to the extent MHM has sought to assert rights in common unprotectable elements contained in the allegedly copyrighted work at issue and/or to the extent MHM and/or its assignor made misrepresentations to the U.S. Copyright Office during the registration process.

While a close call, the motion to strike is **denied** as to this defense. This matter can be more fully explored in discovery.

> Third Affirmative Defense - As to Count II, SHS pleads the affirmative defense of fair use as to all elements of the allegedly copyrighted work at issue that copyright law does not protect including but not limited to: ideas, expressions necessarily incident to ideas, expressions already in the public domain, generic expressions, and any other unprotectable or noncopyrightable elements.

The motion to strike is **granted,** as this defense does not sufficiently identify the grounds upon which it is based. As such, it does not constitute fair notice of a fair use defense. SHS may amend to include more specifics, if it can consistent with Rule 11.

> Fourth Affirmative Defense -As to Count II, SHS pleads the affirmative defense of nonoriginality to the extent that the allegedly copyrighted work at issue contains elements of nonoriginal material or material with a quantum of originality that is de minimus and therefore not copyrightable.

This is a denial, not an affirmative defense. As above, the motion to strike is **denied** as to this defense.

> Fifth Affirmative Defense- As to Count II, SHS affirmatively asserts the merger doctrine as an affirmative defense because the idea and expression of the material allegedly covered by a registered copyright in this matter are so closely connected that there is only one or few ways to practically express the idea.

The defense is stated so generally that it does not give fair notice of what is being asserted and provides no nexus between the defense and the claims. Absent an explanation how the merger doctrine applies here, the motion to strike is **granted** as to this defense, with leave to amend, if SHS can do so consistent with Rule 11.

> Sixth Affirmative Defense -As to Count II, SHS affirmatively asserts the independent creation doctrine as an affirmative defense to the extent the work MHM identified as infringing its allegedly copyrighted work was created independently of MHM's work.

I agree with MHM that Plaintiff should possess the facts to know if the independent creation doctrine applies. If it believes it does, it should plead so without qualification, and should provide the reason why. Absent explanation as to how the doctrine applies here, the motion to strike is **granted** as to this defense, with leave to amend, if SHS can do so consistent with Rule 11.

> Seventh Affirmative Defense -As to Count II, SHS affirmatively asserts that any protectable expression in MHM's allegedly copyrighted work is not substantially similar to SHS's displayed work.

This is a denial, not an affirmative defense. As above, the motion to strike is **denied** as to this defense.

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