

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRUSTEES OF THE UNIVERSITY : CIVIL ACTION
OF PENNSYLVANIA, *et al.* :
 : NO. 97-1111
v. :
 :
MAYFLOWER TRANSIT, INC., :
et al. :

MEMORANDUM AND ORDER

Presently before the court are Defendants' Motion to Dismiss Counts II through VII of Plaintiffs' Complaint, Plaintiffs' Motion to Strike Defendants' Motion to Dismiss Counts Two through Seven of Plaintiffs' Complaint, defendants' answer thereto, and plaintiffs' reply memorandum.

For the reasons set forth below, I will deny plaintiffs' motion to strike. Although defendants' motion to dismiss was filed as an untimely post-answer motion under Federal Rule of Civil Procedure 12(b)(6), I will consider it as a motion for partial judgment on the pleadings under Rule 12(c). Plaintiffs will be given ten days to file a substantive response.

BACKGROUND

This action arises from the alleged damage and loss of personal property, including household items and business goods, owned by plaintiffs Richard Tannen, Vivian Baraban Tannen, and Vivian Baraban Interior Design, Inc., during the moving and storage of that property by defendant Mayflower Transit, Inc. Count I of plaintiffs' amended complaint asserts a claim under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11707 *et seq.* In

Counts II through VII, plaintiffs assert claims for breaches of two contracts, violation of 13 Pa. C.S.A. § 7204, negligence, fraud, and negligent misrepresentation.

Defendants filed their answer to the complaint on April 30, 1997. Subsequently, on June 25, 1997, defendants filed a motion to dismiss Counts II through VII of plaintiffs' complaint, asserting that the Carmack Amendment preempts claims under all other law. Because Rule 12(b) requires that a motion to dismiss shall be made before pleading, plaintiffs have moved to strike the motion to dismiss from the record.

DISCUSSION

1. Timeliness of Motion to Dismiss

Plaintiffs are correct in noting that defendants' motion to dismiss should properly have been filed prior to the filing of an answer to the complaint. "A motion under Rule 12(b)(6) raising the defense of failure to state a claim upon which relief may be granted must be made before the service of a responsive pleading." Wright & Miller, *Federal Practice & Procedure: Civil 2d* § 1357, at 299-300 (1990). In their answer to plaintiffs' motion to strike, defendants have not advanced any argument that their motion was in fact timely under Rule 12(b)(6).¹

Although "a post-answer Rule 12(b) motion is untimely," Wright & Miller, *supra*, § 1367, at 300-01, this timing requirement has customarily been treated as a mere technicality. *See*

1. Where the defense offered under Rule 12(b) previously had been included in the answer, a number of courts have treated a post-answer motion under Rule 12(b)(6) as timely. *E.g.*, *Gerakaris v. Champagne*, 913 F.Supp. 646, 650-51 (D. Mass. 1996) (defendants preserved Rule 12(b) motion by stating it in answer as an affirmative defense); *Doolittle v. Ruffo*, 882 F.Supp. 1247, 1257 n.9 (N.D.N.Y. 1994). Here, the defendants included the foundation of their subsequent Rule 12(b)(6) motion in their answer. As the "Tenth Affirmative Defense," defendants assert that "Plaintiff's complaint and in each count thereof fails to state a cause of action upon which relief can be granted." Defs.' Answer Pls.' Compl. at 28. As the "Fifteen [sic] Affirmative Defense," defendants assert that "[s]ome or all of plaintiffs' claims are preempted by the Carmack Amendment to the Interstate Commerce Act." *Id.* at 28-29.

id. § 1367 (Supp. 1997), at 129 n.2.1. This court has previously held that a motion to dismiss under Rule 12(b)(6) made after an answer has been filed may be treated, in the court's discretion, as a Rule 12(c) motion for judgment on the pleadings. *Scheetz v. Morning Call, Inc.*, 130 F.R.D. 34, 36 (E.D. Pa. 1990). Many courts have endorsed the practice. *E.g., Lanigan v. Village of E. Hazel Crest*, 110 F.3d 467, 470 n.2 (7th Cir. 1997); *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 n.1 (6th Cir. 1988); *National Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs.*, 850 F.2d 904, 909 n.2 (2d Cir. 1988); *see Wright & Miller, supra*, § 1367 at 515 nn. 17, 19 (citing cases treating untimely motion to dismiss as motion for judgment on the pleadings). Accordingly, defendants have urged this court to treat their motion to dismiss as a motion for judgment on the pleadings pursuant to Rule 12(c).

In this situation, the court looks beyond technical deficiencies, to the substance of the motion. *Stoltzfus v. Ulrich*, 587 F.Supp. 1226, 1228 (E.D. Pa. 1984). This court has pointed out that "later motions raising essentially the same objections would be permissible." *Scheetz*, 130 F.R.D. at 36. A defense of failure to state a claim upon which relief can be granted may be made after the answer is filed, "by motion for judgment on the pleadings, or at the trial on the merits." Fed.R.Civ.P. Rule 12(h)(2). Since the Rule 12(c) motion serves the same function as the untimely motion under Rule 12(b)(6), numerous courts faced with "a misnamed motion to dismiss have chosen to overlook the semantic faux pas and restyled the motion as a Rule 12(c) motion," reaching the same "judicially efficient answer." *Delta Truck & Tractor, Inc. v. Navistar Int'l Transp. Corp.*, 833 F.Supp. 587, 588 (W.D. La. 1993).

I will therefore treat defendants' motion to dismiss as a motion for partial judgment on the pleadings under Rule 12(c). The motion will be evaluated using the same standards for

dismissal that apply under Rule 12(b)(6). *Turbe v. Government of Virgin Islands*, 938 F.2d 427, 428 (3d Cir. 1991); *Scheetz*, 130 F.R.D. at 36.

2. Plaintiffs' Motion to Strike

Either on motion or on its own initiative, “the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”

Fed.R.Civ.P. 12(f). In general, motions to strike are disfavored and infrequently granted. *King v. M.R. Brown, Inc.*, 911 F.Supp. 161, 169 (E.D. Pa. 1995); Wright & Miller, *supra*, § 1380, at 647-49. Motions to strike are often denied in the absence of a showing of prejudice to the moving party. *Great West Life Assurance Co. v. Levithan*, 834 F.Supp. 858, 864 (E.D. Pa. 1993).

Plaintiffs have not argued that they would be prejudiced by the court's consideration of defendants' motion, and have not attacked the legal sufficiency of the defenses made therein. The sole basis of plaintiffs' motion to strike is that defendants' motion is untimely under Rule 12(b)(6), having been filed subsequent to the defendants' answer to the complaint. Because defendants' motion to dismiss may properly be characterized as a timely motion for judgment on the pleadings, and because plaintiffs have made no showing of a legitimate cause to strike the motion, I will deny the motion to strike.

Plaintiffs have also requested, without filing a motion under Rule 11, that this court “exercise its inherent authority” to impose sanctions on defendants for “filing of such a clearly untimely and unauthorized motion,” and award those sanctions to plaintiffs in the form of attorneys' fees. Pls.' Mot. to Strike at ¶ 4. That request will be denied.²

2. Fee shifting, as an exercise of the court's inherent power, is prohibited in most cases. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45, 111 S.Ct. 2123, 2133 (1991). A district court ordering sanctions under its inherent power must justify an order that shifts attorneys' fees to an

(continued...)

3. Timing of Rule 12(c) Motion

Plaintiffs contend that consideration of a motion under Rule 12(c) is “premature at this time” because there is “an imminent possibility” that additional parties may be brought into this case. Pls.’ Reply Mem. at ¶¶ 3, 5. Plaintiffs’ argument is without merit.

In support of their argument, plaintiffs note that courts interpreting Rule 12(c) have held that “pleadings are closed upon the filing of a complaint and answer, unless a counterclaim, cross-claim or third-party claim is interposed.” *Progressive Cas. Ins. Co. v. Estate of Crone*, 894 F.Supp. 383, 385 (D. Kan. 1995) (citing Wright and Miller, *supra*, § 1367, at 512). In *Progressive*, a motion under Rule 12(c) was held premature where two defendants had not answered the complaint, two other defendants had not yet filed answers to cross-claims, and motions were pending for extensions of time to respond. *Id.* No similar situation exists in the instant case. Defendants’ counterclaim was withdrawn with prejudice on June 12, and no other claim was interposed before the filing of defendants’ motion to dismiss.

Plaintiffs allege that defendants have represented that they “may . . . bring a third-party claim against the crating company” as a third-party defendant, and that “a new Louderback entity could potentially be brought into the case by either defendants or plaintiffs.” Pls.’ Reply Mem. at ¶¶ 3-4. However, even where an additional defendant had been named but not yet served, it has been held that “the pleadings may be treated as closed for purposes of this [Rule 12(c)] motion; as [defendant] is not yet a party, the disposition of this motion can have no effect on them. A

2. (...continued)

opposing party with a determination that the sanctioned party willfully disobeyed a court order, or “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Id.* at 45-46, 111 S.Ct. at 2133; *Rogal v. American Broadcasting Cos.*, 74 F.3d 40, 46 (3d Cir. 1996). I find nothing to support plaintiffs’ request. Plaintiffs have simply mischaracterized defendants’ technical error as an “inexcusable violation.” Pls.’ Mot. to Strike at ¶ 4.

contrary reading of Rule 12(c) would mean that a plaintiff could forever preclude a 12(c) motion simply by naming and then not serving an additional defendant.” *Moran v. Peralta Community College Dist.*, 825 F.Supp. 891, 894 (N.D. Cal. 1993). Even where a complaint seeking indemnity from a third party had in fact been served, and had not yet been answered, the contention that a Rule 12(c) motion was premature because the pleadings were not closed was held to be without merit. *Starmakers Publ’g Corp. v. Acme Fast Freight, Inc.*, 615 F.Supp. 787, 790 (S.D.N.Y. 1985).

Therefore, the mere possibility of a future claim against an additional party is not convincing as a reason to preclude defendant’s motion from proceeding as a Rule 12(c) motion. The pleadings in this case are closed for the purpose of evaluating defendant’s motion to dismiss as a motion under Rule 12(c).

CONCLUSION

Defendants’ Motion to Dismiss Counts II through VII of Plaintiffs’ Complaint will be considered by this court as a timely motion for partial judgment on the pleadings under Rule 12(c). Plaintiffs will be given leave to file a response thereto within ten (10) days. An appropriate order follows.

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ORDER

AND NOW, this day of September, 1997, upon consideration of Defendants' Motion to Dismiss Counts II through VII of Plaintiffs' Complaint, Plaintiffs' Motion to Strike Defendants' Motion to Dismiss Counts Two through Seven of Plaintiffs' Complaint, defendants' answer thereto, and plaintiffs' reply memorandum:

IT IS HEREBY ORDERED that Plaintiffs' Motion to Strike Defendants' Motion to Dismiss Counts Two through Seven of Plaintiffs' Complaint is DENIED.

IT IS FURTHER ORDERED that plaintiffs are given leave to file a response to Defendants' Motion to Dismiss Counts II through VII of Plaintiffs' Complaint within ten (10) days of the date of this order.

William H. Yohn, Jr., Judge