IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES J. KAUFMAN,

Plaintiff,

v.

ORDER

03-C-27-C

GARY R. McCAUGHTRY, SGT. McCARTHY,
JAMES MUENCHOW, RENEE RONZANI,
SANDY HAUTAMAKI, JOHN RAY,
CYNTHIA L. O'DONNELL and JAMYI WITCH,

Defendants.

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Plaintiff has filed two documents: 1) a "Motion to Strike as to Defendants' Answer;" and 2) a letter that he requests be construed as an "addendum to [his] earlier objection" to this court's April 24, 2003 order.

In an order entered in this case on May 19, I construed plaintiff's May 7, 2003 objection to the April 24 order (Dkt. #22) as a motion for reconsideration of the April 24, 2003 order, and I denied the motion. Nothing in plaintiff's addendum convinces me that I erred in dismissing his claim that defendants are failing to identify pornographic material in keeping with the terms of the Aiello settlement agreement and DOC § 309 and IMP 50.

Therefore, although I will accept plaintiff's "addendum" for filing, I will take no further action with respect to it.

Turning to plaintiff's motion to strike, under Fed. R. Civ. P. 12(f), a court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Plaintiff does not contend that defendants' answer contains matter that is redundant, immaterial, impertinent or scandalous. Instead, plaintiff complains that 1) it is improper for defendants to respond to all or portions of paragraphs 2, 3, 7, 9, 10-14, 16 and 17 of plaintiff's 246 paragraph complaint with the statement that a particular allegation "constitutes a conclusion of law to which no response is required, and therefore the defendants DENY the allegations contained therein;" 2) defendants have failed to indicate what attempts they made to obtain information before answering 24 times that they "lack knowledge or information" regarding allegations in the complaint; and 3) defendants have failed to prove their affirmative defenses.

The decision to grant or deny a motion to strike is vested in the district court judge's sound discretion. See Credit General Insurance Company v. Midwest Indemnity Corp.,916 F. Supp. 766, 771 (N.D. Ill 1996). The party moving to strike has the burden of showing that the "challenged allegations are so unrelated to plaintiff's claim as to be devoid of merit, unworthy of consideration, and unduly prejudicial." Carroll v. Chicago Transit Authority, No. 01C8300, 2002 WL 206064 at *1 (N.D. Ill. Feb. 8, 2002). In addition, courts

generally disfavor granting motions to strike affirmative defenses, Wilson v. City of Chicago, 900 F. Supp. 1015, 1023-24 (N.D. Ill. 1995), aff'd 120 F.3d 681 (7th Cir. 1997), because it is often the case that such motions are merely a dilatory tactic on the part of the moving party. See United States v. 416.81 Acres of Land, 514 F.2d 627, 631 (7th Cir. 1975); Van Schouwen v. Connaught Corp., 782 F. Supp. 1240, 1245 (N.D. Ill. 1991). In Van Schouwen, the court described the reasoning behind courts' reluctance to grant such motions:

> [M]otions to strike can be nothing other than distractions. If a defense is clearly irrelevant, then it will likely never be raised again by the defendant and can be safely ignored. If a defense may be relevant, then there are other contexts in which the sufficiency of the defense can be more thoroughly tested with the benefit of a fuller record--such as on a motion for summary judgment.

Id.

In accordance with this reasoning, it has been held that a court should strike a defense as legally insufficient only if "the insufficiency of the defense is 'clearly apparent,"' Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3d Cir. 1986), or if "it appears to a certainty that [the other party] would succeed despite any state of the facts which could be proved in support of the defense and are inferable from the pleadings." Williams v. Jader Fuel Co., Inc., 944 F.2d 1388, 1400 (7th Cir. 1991) (citations omitted).

Plaintiff has not borne his burden of showing that defendants' answers to certain of his allegations in the complaint are devoid of merit, unworthy of consideration, and unduly

prejudicial to him. Moreover, although one or more of defendants' affirmative defenses might fail because the facts ultimately will show that they are meritless, until the facts are developed on a motion for summary judgment, I cannot say as a matter of law that there would be no set of facts that the defendants could prove in support of their defenses. See International Business Machines Corp. v. Comdisco, Inc., 834 F. Supp. 264 (N.D. Ill. 1993) (holding that courts will strike a defense as legally insufficient only if it is impossible for defendant to prove set of facts in support of affirmative defense that would defeat complaint). Therefore, I will exercise my discretion and decline to grant plaintiff's motion to strike the defenses.

ORDER

IT IS ORDERED that

1) plaintiff's addendum to his earlier motion for reconsideration of the April 24, 2003 order is accepted for filing, but no further action will be taken with respect to it; and

2) plaintiff's motion to strike defendants' answer is DENIED.

Entered this 22nd day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge