IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DARYL STRENKE,

OPINION and ORDER

Plaintiff,

09-cv-473-bbc

v.

ROBERT ALAN GLICKMAN,

Defendant.

- -

Plaintiff Daryl Strenke is proceeding pro se on claims that defendant Robert Glickman's legal representation of him in a Wisconsin state criminal matter "led to a substantial breach of contract and fraud." Defendant has filed a motion to dismiss and a motion for summary judgment, arguing in part that plaintiff has failed to show that this court has subject matter jurisdiction in this case. Defendant has filed an additional motion, requesting a status conference. For his part, plaintiff has filed a motion for judgment on the pleadings, a motion to strike portions of defendant's response to this motion, two motions to extend the time to file his reply and a motion for leave to amend the complaint. I will address these motions below.

OPINION

I. Diversity Jurisdiction

In a September 9, 2011 order, I denied defendant's motion for summary judgment to the extent he argued that the amount in controversy does not exceed $75,000, but noted that plaintiff had failed to show diversity of citizenship of the parties and gave plaintiff a chance to verify defendant's citizenship.

Plaintiff has responded by submitting an affidavit in which he states that defendant is domiciled in Georgia. Because plaintiff has previously shown that he is a Wisconsin citizen, I conclude that this court may exercise diversity jurisdiction over the case.

II. Plaintiff's Motion for Judgment on the Pleadings

Plaintiff has also filed a motion for judgment on the pleadings and proposed findings of fact in support of the motion, to which defendant has responded with his own proposed findings. Because the parties have submitted documents outside the pleadings, I will convert the motion for judgment on the pleadings to a motion for summary judgment under Fed. R. Civ. P. 56. R.J. Corman Derailment Services, LLC v. International Union of Operating Engineers, Local Union 150, 335 F.3d 643, 647 (7th Cir. 2003) ("[I]f, on a motion under [12(c)], matters outside the pleadings are presented to and not excluded by the court, then the motion must be converted to one for summary judgment under Fed. R. Civ. P. 56, and

all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."); Tierney v. Vahle, 304 F.3d 734, 738 (7th Cir. 2002).

Plaintiff asks the court to strike defendant's brief and proposed findings, raising two arguments: (1) by responding to plaintiff's submissions, defendant has unfairly been given the opportunity to "expand" briefing on his own previously briefed summary judgment motion; and (2) defendant attempts to raise facts and argument contrary to plaintiff's third request for admissions, to which defendant failed to respond and thus must be deemed admitted. In the alternative, plaintiff asks for a stay of the briefing on his motion for judgment on the pleadings so that he can submit additional findings and a response to defendant's proposed findings.

There is no merit to plaintiff's argument that defendant should be barred from submitting his own proposed findings. Plaintiff opened the door to these submissions by submitting his own "supplemental" proposed findings of fact along with his motion. Plaintiff cannot argue persuasively that defendant is getting an unfair second chance at briefing summary judgment because plaintiff is getting his own second chance at filing a dispositive motion by filing this motion for judgment on the pleadings well after the court's May 23, 2011 deadline for doing so.

Turning to plaintiff's argument that everything in his third request for admissions should be deemed admitted because defendant failed to respond to the request, I note that

Federal Rule of Civil Procedure 36(a)(3) states that "[a] matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter . . . ." Rule 36 admissions are limited to matters relating to "facts, the application of law to fact, or opinions about either; and the genuineness of any described documents." Rule 36 (a)(1)(A)&(B). Defendant objects to the court's assuming that plaintiff's third request for admissions must be deemed admitted, arguing that "nearly all of plaintiff's requests for admission are pure legal conclusions," and are therefore improper.

Some of plaintiff's requests are clearly proper, such as request no. 2, which asks for an admission of the amount of the original retainer he paid the law firm Crime Attorneys remaining after the firm paid defendant for his work on the case. Other requests are less clear. "The line between a request to admit a pure legal conclusion and the application of law to fact can be murky because the application of law to fact necessarily incorporates an admission as to what the law is." Aventure Communications Technology, L.L.C. v. MCI Communications Services, Inc., 2008 WL 4280371, *1 (N.D. Iowa Sept. 16, 2008); see also In re Rail Freight Fuel Surcharge Antitrust Litigation, 2011 WL 5603995 *11 (D. D.C. Nov. 17, 2011) ("the line between demanding the application of a law to a fact and demanding a party admit the validity of a proposition of law can admittedly waiver").

It seems likely that some of plaintiff's requested admissions are improper. For

instance, plaintiff submitted the following requests:

> (3) Pursuant to ¶¶ 1 + 2, supra, Robert Alan Glickman is responsible for the return of $19,250.00 to Daryl Strenke as unearned funds that continued retention of would be considered unreasonable under S.C.R. 20:1.5(E).
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> (7) Robert Alan Glickman failed to perform to the contracted level of representation by failing to represent Daryl Strenke in the Wisconsin Court of Appeals.
>
> (43) Robert Alan Glickman owes Strenke $25,000.00 compensatory damages for denial of the right set forth in ¶¶ 37, supra.

Naxon Telesign Corp. v. GTE Information Systems, Inc., 1980 WL 57937, *1 (N.D. Ill. Oct. 3, 1980), suggests that requests for "an admission of the "ultimate legal conclusion" in a case are improper. The propriety of other requests is more murky. For instance, plaintiff submitted the following requests:

> (1) Because Daryl Strenke retained "Crime Attorneys" on August 19, 2003 in the amount of $25,000.00 and Staff Attorney Edward Lerner referred the matter to Robert Alan Glickman; Robert Alan Glickman assumed the same ethical responsibility for the representative of Daryl Strenke as if Robert Alan Glickman and the referring attorney were partners in the same firm, "Crime Attorneys" (See S.C.R. 20:1.5(E)(3)).
>
> (12) Daryl Strenke had reasonable grounds to pursue an appeal in the Wisconsin Court of Appeals and Wisconsin Supreme Court as set forth in Plaintiff's Proposed Findings of Facts ¶ 39(A).
>
> (37) Daryl Strenke had a statutory and constitutional right to a direct appeal under § 809.30, Wis. Stats., and Robert Alan Glickman deprived him of that right even though Daryl Strenke had reasonable grounds therefore as set forth in ¶¶ 12-36, Supra.

It is less clear whether these and other similar other admissions ask for a legal conclusion or the application of law to fact. However, even if all of plaintiff's requests were proper, I conclude that it would be inappropriate to deem them admitted at this point. The court may "permit withdrawal or amendment [of the admission] if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." Fed. R. Civ. P. 36(b). The court may treat defendant's summary judgment response objecting to plaintiff's argument concerning admissions as an implicit motion to withdraw admissions under Rule 36(b). Bergemann v. United States, 820 F.2d 1117, 1120-21 (10th Cir. 1987); Paymaster Corp. v. California Checkwriter Co., 1996 WL 543322, *2 (N.D. Ill. Sept. 23, 1996) ("Although a separate motion under Rule 36(b) would have been preferable, defendants' failure to comply with the technical nuances of Rule 36 will not preclude withdrawal of the default admissions.").

The first half of the test in Rule 36(b) is satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case. Raiser v. Utah County, 409 F.3d 1243, 1246 (10th Cir. 2005); Perez v. Miami-Dade County, 297 F.3d 1255, 1266 (11th Cir. 2002); Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995). If defendant's admissions were allowed to stand, defendant would have little hope of prevailing in this case, because he will have admitted to breaching a contract with plaintiff

and that plaintiff was damaged by having to forgo meritorious claims on appeal. It is clear from the parties' summary judgment materials that the parties vigorously dispute many issues present in the admissions, so this prong is met.

The prejudice contemplated by Rule 36(b) is "not simply that the party who obtained the admission will now have to convince the factfinder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence" with respect to the questions previously deemed admitted. Hadley, 45 F.3d at 1348 (internal quotations omitted); see also Raiser, 409 F.3d at 1246. There is no reason to believe plaintiff would be prejudiced by allowing withdrawal of the admissions because he has been able to present his own independent evidence in support of the facts set forth in the admissions. Plaintiff will not be prejudiced by allowing defendant to file a late response to plaintiff's request for admissions; plaintiff did not raise the issue until he filed his own late dispositive motion. Accordingly, I will grant defendant's motion to withdraw his admissions, and allow him a short period of time to provide a formal response to the requests. A decision on plaintiff's motion to strike defendant's summary judgment responses will be stayed pending receipt of defendant's response.

In addition, I will grant plaintiff's request to toll briefing on his motion for judgment on the pleadings (now converted to a motion for summary judgment). I will give plaintiff

a short time to submit his reply materials. In doing so, plaintiff should respond to defendant's proposed findings of fact even if plaintiff believes that they should ultimately be stricken as contrary to his request for admissions. Once plaintiff has submitted his reply, I will consider his motion together with defendant's dispositive motions.

III. Motion for Status Conference

Defendant has submitted a letter indicating that he has obtained counsel, and that "it is likely that [he] will voluntarily withdraw his pending dispositive motions if he is permitted to renew them pursuant to a new scheduling order." I will deny this motion because there is no need to reset briefing now that defendant has had the opportunity to submit a brief and proposed findings of fact opposing plaintiff's dispositive motion. The materials submitted by the parties concerning both defendant's earlier motions and plaintiff's later motion should be more than enough to determine whether either party should be granted summary judgment. Should neither party be awarded summary judgment, a new schedule will be set for resolving plaintiff's claims at trial.

IV. Motion to Amend Complaint

Under Fed. R. Civ. P. 15(a)(2), a court "should freely give leave [to amend the complaint] when justice so requires." In determining whether a plaintiff satisfies this

standard, courts consider a number of factors, including whether the amendment would be futile or cause unfair prejudice or whether the party waited too long to ask for amendment. Foman v. Davis, 371 U. S. 178, 182 (1962); Sound of Music v. Minnesota Mining & Manufacturing Co., 477 F.3d 910, 922-23 (7th Cir. 2007).

Except in unusual circumstances, once a case as been fully briefed on a motion for summary judgment, it is too late for a plaintiff to seek to amend his complaint. Granting leave to amend at that point prejudices the defendant. E.g., Bethany Pharmacal Co. v. QVC, Inc., 241 F.3d 854, 861-62 (7th Cir. 2001) (court did not err in denying motion to amend complaint when defendant had already filed motion for summary judgment). At this late date, after both sides have filed dispositive motions, it would inappropriate to allow plaintiff to amend his complaint. Accordingly, his motion to amend his complaint will be denied.

ORDER

IT IS ORDERED that

1. Defendant Robert Glickman's motion to dismiss, dkt. #71, is DENIED to the extent he argues that the court does not have diversity jurisdiction over the case.

2. Defendant Robert Glickman's motion to withdraw admissions, dkt. #108, is GRANTED. Defendant will have until February 21, 2012 to submit responses to plaintiff's third request for admissions.

3. Plaintiff's motion to strike defendant Robert Glickman's response to plaintiff's motion for judgment on the pleadings, dkt. #113, is STAYED pending receipt of defendant's responses to plaintiff's third request for admissions.

4. Plaintiff's motions for an extension of time to file a reply to his motion for summary judgment (converted from his motion for judgment on the pleadings), dkt. ##113 & 118, are GRANTED. Plaintiff will have until February 14, 2012 to file his reply.

5. Defendant's motion for a status conference, dkt. #102, is DENIED.

6. Plaintiff's motion for leave to amend his complaint, dkt. #119, is DENIED.

Entered this 1st day of February, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge