IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NORTH AMERICAN SPECIALTY INSURANCE COMPANY,

Plaintiff,

v.

WILLIAM HOWE, MICHELLE HOWE, H&H ENERGY SERVICES, INC., and H&H AUTOMATION, INC.,

Defendants.

OPINION AND ORDER

20-cv-1034-wmc

Plaintiff North American Specialty Insurance Company ("NAS") asserts breach of contract claims against defendants William Howe, Michelle Howe, H&H Energy Services, Inc., and H&H Automation, Inc. (*See* Compl. (dkt. #1).) Before the court is plaintiff's second motion to strike defendants' affirmative defenses under Federal Rule of Civil Procedure 12(f). (Dkt. #23.) Typically, motions to strike prove to be a largely pointless exercise for both the parties and the court. To the extent defendants responded to plaintiff's initial motion by dropping seven of their ten affirmative defenses voluntarily, plaintiff's motions to strike prove both the exception and the rule, in that the court is left to review the remaining three defenses that, unsurprisingly, have more substance and require that the remainder of plaintiff's motion to strike be denied.

BACKGROUND

Plaintiff NAS claims that defendants breached their General Agreement of Indemnity (the "Indemnity Agreement"), which obligated it to act as a surety in connection with various construction projects defendants undertook across the United States,

including in the State of Wisconsin. (*Id.* ¶¶ 8-11, 41-48.) Among other things, as a surety, NAS would issue payments and performance bonds, guaranteeing defendants' performance and payment obligations. (*Id*.) NAS alleges that the Indemnity Agreement also requires that defendants reimburse NAS for "any and all costs and expenses that NAS incurs as a consequence of issuing the bonds." (*Id.* ¶ 11.) NAS further alleges that defendants have neither indemnified nor reimbursed NAS for the costs incurred in issuing the performance bonds. (*Id.* ¶¶ 36-37.)

In response to the complaint, defendants filed an answer denying all of NAS's allegations, along with asserting a laundry list of ten affirmative defenses. (Dkt. #7.) After NAS subsequently moved to strike defendants' affirmative defenses (dkt. #8), defendants filed an amended answer, which left the basic substance of their answer unchanged, but removed seven affirmative defenses and clarified its three, remaining affirmative defenses. (Dkt. #16.) As a result, defendants now only assert that: (1) plaintiff's claims may be barred by the doctrine of accord and satisfaction; (2) plaintiff's claims may be barred by a failure to mitigate its damages; and (3) plaintiff's alleged injuries or damages may have been caused in whole or in part by the acts or omissions of the plaintiff. (Dkt. #16.) With their amended answer having effectively mooted NAS's initial motion to strike, plaintiff promptly filed a second motion, this time to strike the amended answer. For the reasons that follow, that motion will be denied.

OPINION[1]

In its motion, plaintiff seeks an order striking all of defendants' remaining affirmative defenses. The court may strike from a pleading "an insufficient defense or any redundant, immaterial, impertinent, or scandalous material." Fed. R. Civ. P. 12(f). Generally speaking, motions to strike portions of pleadings are disfavored as they often unnecessarily consume scarce judicial resources and may be used for dilatory purposes. *E.g.*, *Eagle Cove Camp & Conference Ctr. v. Town of Woodboro*, No. 10-cv-118-wmc, 2011 U.S. Dist. LEXIS 162624, at *18 (W.D. Wis. Mar. 24, 2011). Nonetheless, such a motion may be granted when they "remove unnecessary clutter from the case," and thereby "serve to expedite, not delay." *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989).

Although captioned as its second motion to strike, plaintiff actually argues that the remaining affirmative defenses should be dismissed because they fail to meet the requirements of Rules 8 and 9, rather than 12(f). Specifically, Rule 8(a)(2) requires a short and plain statement of a claim that shows entitlement to relief by giving fair notice of what the claim is and the grounds upon which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548 (2007). Under 8(a)(2), the pleader need not provide detailed factual allegations, "just enough facts to raise [the claim] above the level of mere speculation." *Riley v. Vilsack*, 665 F. Supp. 2d 994, 997 (W.D. Wis. 2009); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements

[1] The court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a). Plaintiff is a citizen of New Hampshire and Missouri; defendants are all citizens of Wisconsin. (Compl. (dkt. #1) ¶¶ 1-5.) The amount in controversy exceeds $75,000. (*Id.* ¶ 38.)

of a cause of action will not do.'" (quoting *Twombly*, 550 U.S. at 555)). The emerging rule in district courts in the Seventh Circuit is that this same "*Twombly-Iqbal* standard applies to defendants' affirmative defenses." *BCL-Equip. Leasing LLC v. Tom Spensley Trucking, Inc.*, No. 16-CV-007-JDP, 2016 WL 3461603, at *3 (W.D. Wis. June 21, 2016).

While it is not uncommon for a defendant's answer to assert a slew of affirmative defenses, most, if not all, are never developed and eventually withdrawn. Thus, plaintiffs can often force a defendant to elaborate on or withdraw such defenses through requests for admission or interrogatories, and even if dodged by conference, as a last resort, may bring a motion to compel. In contrast, seldom does a motion to dismiss an affirmative defense right out of the gate prove an effective strategy, which plaintiff largely proves by filing its second motion to dismiss here. Still, if an affirmative defense, even when coupled with the allegations in the complaint as context, does not satisfy Rule 8 or is otherwise clearly frivolous, then the court will strike it.

Viewing the pleadings alone, defendants' remaining three affirmative defenses are wholly sufficient to satisfy the Rule 8(a)(2) standard. As detailed above, defendants allege in their affirmative defenses that: (1) plaintiff's claims may be barred by the doctrine of accord and satisfaction; (2) plaintiff's claims may be barred by a failure to mitigate its damages; and (3) plaintiff's alleged injuries or damages may have been caused in whole or in part by the acts or omissions of the plaintiff itself. (Dkt. #16.) In their brief, plaintiffs address the second and the third defense together, and the court agrees that these defenses are essentially the same -- asserting that plaintiff's claims may be barred, in whole or in part, because NAS could have avoided at least some of the claimed damages. Accordingly,

the court will take up those two defenses together before addressing their first defense.

A. Defendants' "Failure to Mitigate" and "Acts or Omission to Act" Defenses

In its motion to strike, plaintiff relies on the language of the indemnity agreement to argue that defendants' "failure to mitigate" and "acts or omission to act" defenses fail as a matter of law. Specifically, plaintiff argues that both affirmative defenses are rendered irrelevant by the indemnity clause granting to plaintiff

> the right to decide and determine in its sole discretion whether any claim, liability, suit or judgment made or brought against [plaintiff] or any of the Indemnitors on any bond shall or shall not be paid, compromised, resisted, defended, tried or appealed and the [plaintiff's] decision shall be final, binding and conclusive upon the indemnitors.

(*See* Compl. (dkt. #1-1) ¶ 11.)

However, at least at the pleading stage, the court disagrees that this language alone forecloses defendants' affirmative defenses for failure to mitigate, to act or not to act, for three reasons. First, plaintiff cites no binding authority granting a motion to strike similar defenses at the pleading stage based solely on the court's interpretation of arguably ambiguous contract language. Instead, plaintiff merely cites to cases where the court rejected a mitigation defense to a claim for indemnity at the dispositive motion stage or on appeal. (Pl.'s Br. (dkt. #24) 8-9.) At minimum, plaintiff's motion would also require the court to interpret the language of other provisions in the indemnity agreement to determine whether plaintiff NAS was required to ensure all payments were due (that the work was not completed, for example) before proceeding with any payments.

Second, and related to the first reason, plaintiff contends that "failure to mitigate" and "act/omission to act" defenses always fail under an indemnity agreement so long as the

surety's performance is in *good faith*. (*Id*.) Even if true, the defendants assert that others "completed additional and unnecessary work on these projects," and that plaintiff NAS "failed to complete its due diligence before incurring [those] costs to complete projects." (Defs.' Br. (dkt. #25) 6-7.) Since both arguments appear to implicate NAS's "good faith," any decision as to the merits of the defendant' affirmative is premature at best.

Third, because plaintiff asserts a claim for compensatory damages, defendants are free to assert a failure to mitigate defense. *See Reilly v. Badger Coaches, Inc.*, No. 18-CV-198-WMC, 2019 WL 1435913, at *4 (W.D. Wis. Apr. 1, 2019). While plaintiff has alleged facts that could defeat both of these defenses, defendants are *not* required to prove the actual merit of these defenses at the pleading stage, nor is the court expected to interpret the contract's language at this early stage.

B. Defendants' "Accord and Satisfaction" Defense

Finally, defendants' pleading of their first affirmative defense -- that plaintiff's claims may be barred because of an accord and satisfaction provision -- is also sufficient at this stage. Plaintiff contends that this allegation fails due to the "lack of facts demonstrating (1) the existence of good faith dispute about a debt, and (2) notice that an alleged payment is intended to be . . . offered in full satisfaction of the debt Defendants owe NAS." (Pl.'s Br. (dkt. #24) 11-12.)

Similarly, this defense is just another dispute as to NAS's "good faith" and the total amount owed to NAS. Here, too, the court finds that defendants' allegations satisfy Rule 8, and plaintiff has failed to develop any argument legally foreclosing this defense. Specifically, defendants satisfied the notice requirement by pointing to a possible payment

through the pending receivership action in *Michael S. Polsky et al v. H&H Group Holdings, Inc, et al.*, Case No. 20CV178 (Dane Cnty. Cir. Ct.) (Defs.' Br. (dkt. #25) 7.)

ORDER

IT IS ORDERED that plaintiff North American Specialty Insurance Company's second motion to strike inadequately pleaded and otherwise legally insufficient affirmative defenses (dkt. #23) is DENIED.

Entered this 29th day of November, 2021.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge