

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
**Judge Wiley Y. Daniel**

Civil Action No. 07-cv-01310-WYD

ROBERT CARDENAS,

Plaintiff,

v.

FINANCIAL INDEMNITY COMPANY, a Colorado corporation, and  
HAPPY DAYS INSURANCE, a Colorado agency,

Defendants

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**ORDER**

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THIS MATTER is before the Court on Defendant Happy Days Insurance's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (filed June 21, 2007). The motion relies on an Affidavit of Nicole Francisco (docket # 6).

Pursuant to the Federal Rules, if a court considers matters outside of the pleadings, a motion to dismiss pursuant to Rule 12(b)(6) should be treated as a motion for summary judgment. Fed. R. Civ. P. 12(b); *Lucero v. Gunter*, 52 F.3d 874, 877 (10th Cir. 1995). While Defendant cites cases which it contends supports consideration of the affidavit in connection with the its argument that it was fraudulently joined to defeat diversity jurisdiction, those cases considered affidavits in connection with a motion to remand, not a motion to dismiss under Rule 12(b)(6). *Estate of Hill v. Allstate Ins. Co.*, 354 F. Supp. 2d 1192, 1196 (D. Colo. 2004); *Blackwood v. Thomas*, 855 F. Supp. 1205, 1207 (D. Colo. 1994).

Accordingly, I find that the affidavit cannot be considered in connection with Defendant's motion without converting the motion to a motion for summary judgment. If the Court treats this motion as a motion for summary judgment, it fails to comply with this Court's Hearing, Conference & Trial Procedures. Accordingly, it is hereby

ORDERED that Defendant Happy Day Insurance's Motion to Dismiss is **STRICKEN** with leave to refile. Defendant Happy Days Insurance may refile the motion within ten (10) days as a motion to dismiss without the accompaniment of affidavits or other outside evidence. In the alternative, Defendant may refile the motion within ten (10) days as a motion for summary judgment in compliance with this Court's Hearing, Conference & Trial Procedures. If Defendant chooses to refile the motion as a motion for summary judgment, it is

FURTHER ORDERED that Defendant Happy Days Insurance shall file an answer to the Complaint within twenty (20) days of receipt of this Order.

Dated: June 22, 2007

BY THE COURT:

s/ Wiley Y. Daniel  
Wiley Y. Daniel  
U. S. District Judge