

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 19-22831-Civ-WILLIAMS/TORRES

WESTCHESTER GENERAL HOSPITAL, INC.,

Plaintiff,

v.

EVANSTON INSURANCE COMPANY,

Defendants.

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ORDER ON PLAINTIFF’S MOTION TO STRIKE

This matter is before the Court on Westchester General Hospital, Inc.’s (“Plaintiff”) motion to strike Evanston Insurance Company’s (“Defendant”) affirmative defenses. [D.E. 24]. Defendant responded to Plaintiff’s motion on September 23, 2019 [D.E. 26] to which Plaintiff replied on September 27, 2019. [D.E. 27]. Therefore, Plaintiff’s motion is now ripe for disposition. After careful consideration of the motion, response, reply, relevant authorities, and for the reasons discussed below, Plaintiff’s motion to strike is **GRANTED**.

I. BACKGROUND

Plaintiff filed this action in Florida state court and Defendant removed it on July 10, 2019. [D.E. 1]. This action relates to an incident that occurred in 2018 where Jane Doe was a mental health patient at Plaintiff's facility. Jane Doe alleges that one of Plaintiff's employees injured her and that that Plaintiff was negligent for failing to investigate, train, supervise, and/or adequately staff its mental health department.

Defendant issued Plaintiff an insurance policy with effective dates of May 23, 2018 to May 23, 2019. The policy contains several coverage parts, including general liability insurance coverage and professional liability insurance coverage. Defendant also issued an umbrella liability policy to Plaintiff, providing excess indemnity. When Jane Doe filed suit in state court, Plaintiff notified Defendant of the underlying litigation. On April 2, 2019, Defendant issued a reservation of rights letter to Plaintiff, stating that Defendant would provide a defense to Plaintiff under one of the insurance policies. Defendant clarified, however, that it would not indemnify Plaintiff for any damages that may be awarded. Plaintiff then filed this declaratory action pursuant to the insurance policies and demands that Defendant indemnify Plaintiff for any damages incurred in the underlying litigation.

II. APPLICABLE PRINCIPLES AND LAW

A party may move to strike pursuant to Rule 12(f) of the Federal Rules "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "An affirmative defense is one that admits to the

complaint, but avoids liability, wholly or partly, by new allegations of excuse, justification or other negating matter.” *Royal Palm Sav. Ass’n v. Pine Trace Corp.*, 716 F. Supp. 1416, 1420 (M.D. Fla. 1989) (quoting *Fla. East Coast Railway Co. v. Peters*, 72 Fla. 311, 73 So. 151 (Fla. 1916)). Thus, affirmative defenses are pleadings, and as a result, must comply with all the same pleading requirements applicable to complaints. *See Home Management Solutions, Inc. v. Prescient, Inc.*, 2007 WL 2412834, at *1 (S.D. Fla. Aug. 27, 2007). Affirmative defenses must also follow the general pleading standard of Fed. R. Civ. P. 8(a), which requires a “short and plain statement” of the asserted defense. *See Morrison v. Executive Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1318 (S.D. Fla. 2005). A defendant must admit the essential facts of the complaint and bring forth other facts in justification or avoidance to establish an affirmative defense. *See id.*

“The striking of an affirmative defense is a ‘drastic remedy’ generally disfavored by courts.” *Katz v. Chevaldina*, 2013 WL 2147156, at *2 (S.D. Fla. May 15, 2013) (citations omitted); *see also Blount v. Blue Cross & Blue Shield of Florida, Inc.*, 2011 WL 672450, at *1 (M.D. Fla. Feb. 17, 2011) (“Striking a defense . . . is disfavored by the courts.”); *Pandora Jewelers 1995, Inc. v. Pandora Jewelry, LLC*, 2010 WL 5393265, at *1 (S.D. Fla. Dec. 21, 2010) (“Motions to strike are generally disfavored and are usually denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties”) (internal quotations omitted) (quoting another source).

But, a “defendant must allege some additional facts supporting the affirmative defense.” *Cano v. South Florida Donuts, Inc.*, 2010 WL 326052, at *1 (S.D. Fla. Jan. 21, 2010). Affirmative defenses will be stricken if they fail to recite more than bare-bones conclusory allegations. *See Merrill Lynch Bus. Fin. Serv. v. Performance Mach. Sys.*, 2005 WL 975773, at *11 (S.D. Fla. March 4, 2005) (citing *Microsoft Corp. v. Jesse’s Computers & Repair, Inc.*, 211 F.R.D. 681, 684 (M.D. Fla. 2002)). “An affirmative defense may also be stricken as insufficient if: ‘(1) on the face of the pleadings, it is patently frivolous, or (2) it is clearly invalid as a matter of law.’” *Katz*, 2013 WL 2147156, at *1 (citing *Blount v. Blue Cross and Blue Shield of Fla., Inc.*, 2011 WL 672450 (M.D. Fla. Feb.17, 2011)).

“Furthermore, a court must not tolerate shotgun pleading of affirmative defenses, and should strike vague and ambiguous defenses which do not respond to any particular count, allegation or legal basis of a complaint.” *Morrison v. Exec. Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1318 (S.D. Fla. 2005). An affirmative defense should only be stricken with prejudice when it is insufficient as a matter of law. *See Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057 (5th Cir. 1982) (citing *Anchor Hocking Corp. v. Jacksonville Elec. Auth.*, 419 F. Supp. 992, 1000 (M.D. Fla. 1976)). Otherwise, district courts may strike the technically deficient affirmative defense without prejudice and grant the defendant leave to amend the defense. *Microsoft Corp.*, 211 F.R.D. at 684.

III. ANALYSIS

Plaintiff's motion seeks to strike all six of Defendant's affirmative defenses because they are mere denials. Plaintiff claims that an affirmative defense – by definition – is a defense that admits the facts of a complaint and sets forth other facts in justification or avoidance. Plaintiff argues that the affirmative defenses in this case fail to meet that threshold and that they should be stricken as a result. Plaintiff also contends that the affirmative defenses fail for an entirely separate reason because they lack any factual support to meet the requirements of Rule 8. Plaintiff suggests, for example, that each defense sets forth nothing more than legal conclusions or generic references to legal doctrines such as waiver, laches, and estoppel. While some of the defenses reference the underlying insurance policies, Plaintiff maintains that they are defective because Defendant fails to specify what terms, limitations, conditions, or exclusions apply in this case. Because Defendant's single-sentence defenses are conclusory and lack any factual support, Plaintiff concludes that the motion to strike must be granted.

Plaintiff's motion is well taken because the affirmative defenses in this case fail to comply with Fed. R. Civ. P. 8. “Courts have developed two schools of thought regarding the pleading standard required for affirmative defenses, and the Eleventh Circuit has not yet resolved the split in opinion.” *Ramnarine v. CP RE Holdco 2009-1, LLC*, 2013 WL 1788503, at *1 (S.D. Fla. Apr. 26, 2013). In fact, no United States Court of Appeals has decided the question on whether the plausibility standard enunciated in *Twombly* and *Iqbal* applies to affirmative defenses “and the

district courts that have considered it do not agree on an answer.” *Owen v. Am. Shipyard Co., LLC*, 2016 WL 1465348, at *1 (D.R.I. Apr. 14, 2016) (citing Stephen Mayer, Note, *An Implausible Standard for Affirmative Defenses*, 112 Mich. L. Rev. 275, 276 (2013) (“More than one hundred federal cases have contemplated whether the plausibility standard outlined in [Twombly and Iqbal] applies to affirmative defenses, yet the districts remain divided, and no court of appeals has yet addressed the issue.”); Justin Rand, *Tightening Twiqbal: Why Plausibility Must Be Confined to the Complaint*, 9 Fed. Cts. L. Rev. 79 (2016)).

On one hand, many courts have held that affirmative defenses are subject to the heightened pleading standard set forth in the Supreme Court cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See also Home Mgmt. Sols., Inc.*, 2007 WL 2412834, at *2 (“Affirmative defenses, however, are subject to the general pleading requirements of Rule 8(a) and will be stricken if they fail to recite more than bare-bones conclusory allegations.”) (citing *Merrill Lynch Bus. Fin. Serv.*, 2005 WL 975773, at *11) (citing *Microsoft Corp.*, 211 F.R.D. at 684); *see also Torres v. TPUSA, Inc.*, 2009 WL 764466 (M.D. Fla. Mar. 19, 2009) (affirmative defense stating that plaintiff fails to state a claim upon which relief can be granted provides no basis on which the court can determine a plausible basis for this defense); *see also Holtzman v. B/E Aerospace, Inc.*, 2008 U.S. Dist. LEXIS 42630, at *6 (S.D. Fla. May 28, 2008) (“While Defendants need not provide detailed factual allegations, they must provide more than bare-bones conclusions. Plaintiff should not be left to discover the bare

minimum facts constituting a defense until discovery”); *see also Home Mgmt. Solutions, Inc.* 2007 WL 2412834, at *3 (S.D. Fla. Aug. 21, 2007) (“Without some factual allegation in the affirmative defense, it is hard to see how a defendant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the defense, but also ‘grounds’ on which the defense rests.”) (brackets omitted) (quoting *Twombly*, 550 U.S. at 556 n.3).

On the other hand, some courts have held that the heightened pleading standard described in *Twombly* and *Iqbal* only applies to the allegations in complaints – not affirmative defenses. *See, e.g., Gonzalez v. Midland Credit Mgmt., Inc.*, 2013 WL 5970721, at *3 (M.D. Fla. Nov. 8, 2013); *Floyd v. SunTrust Banks, Inc.*, 2011 WL 2441744 (N.D. Ga. June 13, 2011); *Jackson v. City of Centreville*, 269 F.R.D. 661 (N.D. Ala. 2010); *Romero v. S. Waste Sys., LLC*, 619 F. Supp. 2d 1356, 1358 (S.D. Fla. 2009); *Sparta Ins. Co. v. Colareta*, 2013 WL 5588140, at *3 (S.D. Fla. Oct. 10, 2013); *Blanc v. Safetouch, Inc.*, 2008 WL 4059786, at *1 (M.D. Fla. Aug. 27, 2008). The basis for these decisions stem from the differences between Rule 8(a) – which apply to the pleading of claims – and Rules 8(b) and (c) which apply to affirmative defenses.

In debating whether *Twombly* and *Iqbal* apply to affirmative defenses, many parties rely on the language in Rules 8(a) and 8(b). Rule 8(a) requires “a short and plain statement of the claim *showing* that the pleader is entitled to relief,” whereas Rule 8(b) requires that a party “*state* in short and plain terms its defenses to each claim asserted against it.” Fed. R. Civ. P. 8(a) and (b) (emphasis added). Some

parties have speculated that Rule 8(a) requires a party to “show” an entitlement to relief whereas Rule 8(b) merely requires a party to “state” an affirmative defense. *See Moore v. R. Craig Hemphill & Assocs.*, 2014 WL 2527162 (M.D. Fla. May 6, 2014) (“Whereas [Rule 8’s] pleading provision uses, ‘showing,’ its response and affirmative-defense provisions use, ‘state,’ and *Iqbal*’s and *Twombly*’s analyses relied on ‘showing’”); *see also Laferte*, 2017 WL 2537259, at *2 (S.D. Fla. June 12, 2017) (“The difference in language between Rules 8(a) and Rule 8(b) is subtle but significant.”); *Owen*, 2016 WL 1465348, at *2 (“Applying different pleading standards recognizes the differences between these words; ‘showing’ requires some factual underpinnings to plead a plausible claim, while ‘stating’ contemplates that defendants can plead their defenses in a more cursory fashion.”); *Ramnarine*, 2013 WL 1788503 at *3 (explaining that “the difference in the language between Rule 8(a) and Rules 8(b) and (c) requires a different pleading standard for claims and defenses”); *Smith v. Wal-Mart Stores, Inc.*, 2012 WL 2377840, at *2 (N.D. Fla. June 25, 2012) (noting that the Supreme Court in *Twombly* and *Iqbal* relied on the specific language of Rule 8(a), and finding that the plausibility requirement contained therein was inapplicable); *Floyd*, 2011 WL 2441744 at *7 (“In adopting the plausibility standard, the Supreme Court relied heavily on the rule language purporting to require a ‘showing’ of entitlement to relief.”) (citation omitted).

The Court is persuaded – by three considerations – that *both* complaints and affirmative defenses are subject to *Twombly* and *Iqbal*. First, *Iqbal*’s extension of the *Twombly* pleading standard was premised on *Twombly*’s holding that the

purpose of Rule 8 – in general – was to give parties notice of the basis for the claims being sought. Importantly, the Supreme Court discussed Rule 8 at large and never limited its holding solely to complaints. Plaintiff’s reliance on a subtle difference in wording (i.e. “show” and “state”) between Rule 8(a) and 8(b) is unpersuasive because the purpose of pleading sufficient facts is to give fair notice to the opposing party that there is a plausible and factual basis for the assertion and not to suggest that it might simply apply to the case. This was the foundation for the decisions in *Twombly* and *Iqbal* and it applies equally to complaints and affirmative defenses.

Second, “it neither makes sense nor is it fair to require a plaintiff to provide defendant with enough notice that there is a plausible, factual basis for . . . [his] claim under one pleading standard and then permit the defendant [or counter-defendant] under another pleading standard simply to suggest that some defense may possibly apply in the case.” *Castillo v. Roche Labs. Inc.*, 2010 WL 3027726, at *2 (S.D. Fla. Aug. 2, 2010) (quoting *Palmer v. Oakland Farms, Inc.*, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010)). And third, “when defendants are permitted to make “[b]oilerplate defenses,” they “clutter [the] docket; they create unnecessary work, and in an abundance of caution require significant unnecessary discovery.” *Castillo*, 2010 WL 3027726, at *3 (citation and internal quotation marks omitted).

When coupling the three considerations discussed above with the fact that a majority of courts have agreed with this position, we hold that there is no separate standard for complaints and affirmative defenses in connection with Rule 8. *See*,

e.g., *Barnes v. AT & T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1171–72 (N.D. Cal. 2010) (“While neither the Ninth Circuit nor any other Circuit Courts of Appeals has ruled on this issue, the vast majority of courts presented with the issue have extended *Twombly*’s heightened pleading standard to affirmative defenses.”) (citing *CTF Dev., *1172 Inc. v. Penta Hospitality, LLC*, 2009 WL 3517617, at *7–8 (N.D. Cal. Oct. 26, 2009) (“Under the *Iqbal* standard, the burden is on the defendant to proffer sufficient facts and law to support an affirmative defense”); *see also Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 n.15 (D. Kan. 2009) (citing nine cases applying *Twombly* and *Iqbal* to the pleading of affirmative defenses)).

Having established that *Twombly* applies to affirmative defenses, the defenses in this case are inadequate to meet the requirements of Rule 8. The first and second affirmative defenses assert, for instance, that Plaintiff’s claims are barred under the “terms, limitations, conditions, and exclusions,” of insurance policies. [D.E. 20]. But, Defendant fails to articulate with any specificity how the insurance policies bar Plaintiff’s recovery. And even if the necessary factual support was included, Defendant fails to explain how the first and second defenses are affirmative defenses.

By definition, “an affirmative defense is something that, if proven, will reduce or eliminate a plaintiff’s recovery even if the plaintiff established a prima facie case.” *F.D.I.C. v. Stovall*, 2014 WL 8251465, at *2 (N.D. Ga. Oct. 2, 2014). “For example, responding that plaintiff’s complaint fails to state a claim upon which

relief may be granted—the standard for dismissal under Rule 12(b)(6)—or that defendants did not owe plaintiff a duty does not raise an affirmative defense.” *F.D.I.C. v. Stovall*, 2014 WL 8251465, at *2 (N.D. Ga. Oct. 2, 2014) (citing *In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 2010) (“A defense which points out a defect in the plaintiff’s prima facie case is not an affirmative defense.”)). As the Sixth Circuit explained in *Ford Motor Co. v. Transport Indemnity Co.*, an affirmative defense presents an extraneous reason that helps a defendant avoid liability:

An affirmative defense raises matters extraneous to the plaintiff’s prima facie case; as such, they are derived from the common law plea of ‘confession and avoidance.’ On the other hand, some defenses negate an element of the plaintiff’s prima facie case; these defenses are excluded from the definition of affirmative defense in Fed. R. Civ. P. 8(c).

795 F.2d 538, 546 (6th Cir. 1986) (internal citations omitted).

Here, the first and second affirmative defenses fail to negate any portion of Plaintiff’s allegations. Defendant merely claims that the insurance policies bar any possible recovery. This means that the defenses do not admit the allegations set forth in the complaint nor do they follow that admission with a reason for a reduction or elimination of damages. Therefore, the first and second affirmative defenses fail because they violate Rule 8 and fail to meet the definition of an affirmative defense.

As for the remaining affirmative defenses, they are equally defective for failing to comply with Rule 8. The defenses state that Plaintiff’s claims are barred under the doctrines of laches, waiver, and estoppel. But, each defense is only one

sentence long and fails to describe how any of the doctrines apply to the facts of this case. Indeed, the defenses lack any factual support and fail to explain or give notice to Plaintiff as to how any of them might apply. This alone renders them defective as a matter of law. *See Perlman v. Wells Fargo Bank, N.A.*, 2014 WL 4449602, at *2 (S.D. Fla. Sept. 10, 2014) (striking affirmative defense that “state legal doctrines or terms, but neither state how or why such defenses might apply to Plaintiff’s claims, nor state facts in support of their application.”); *Certain Interested Underwriters at Lloyd’s, London v. AXA Equitable Life Ins. Co.*, 2013 WL 3892956, at *4 (S.D. Fla. July 26, 2013) (striking an affirmative defense because “it is inappropriate for [the defendant] to place the burden on [the plaintiffs] and on the Court to sift through ‘pages of allegations to determine which [the defendant] might have intended to form the basis of each of its defenses.’”). Accordingly, Plaintiff’s motion to strike is **GRANTED**.

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that Plaintiff’s motion to strike [D.E. 24] is **GRANTED**. Any amended answer shall be filed within fourteen (14) days from the date of this Order.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th day of October, 2019.

/s/ Edwin G. Torres

EDWIN G. TORRES
United States Magistrate Judge