Rude Music Inc v. Newt 2012, Inc. et al Doc. 24

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

RUDE MUSIC, INC.,	)	
Plaintiffs,	)	Case No. 12 cv 640
v.	)	
	)	Judge Kennelly
NEWT 2012, INC.,NEWT GINGRICH, and AMERICAN CONSERVATIVE UNION,	)	Magistrate Judge Finnegan
Defendants.	)	

PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

Plaintiff Rude Music, Inc., pursuant to Federal Rules of Civil Procedure 8 and 12(f), moves to strike affirmative defenses asserted by defendants Newt 2012, Inc. and Newt Gingrich (collectively, "Gingrich").

Rude Music filed suit against Gingrich and the American Conservative Union ("ACU"), alleging that Gingrich's and the ACU's use of Rude Music's song "Eye of the Tiger" in conjunction with Gingrich's appearances infringed Rude Music's copyright in the song. It is clear that the defendants either have not investigated the incidents that gave rise to Rude Music's infringement claim, or are simply trying to obscure the real issues with a slew of inadequate defenses. Gingrich's answer asserts, as "affirmative defenses":

- "Plaintiff's Complaint fails to state a claim upon which relief may be granted." (First Affirmative Defense)
- "Personal jurisdiction is improper in this Court." (Second Affirmative Defense)

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- “Venue is improper in this Court.” (Third Affirmative Defense)
- “Plaintiff’s Complaint fails to add indispensable parties.” (Fourth Affirmative Defense)
- “Plaintiff lacks standing to assert some or all of the claims they have asserted against these Defendants.” (Fifth Affirmative Defense)
- “Plaintiff’s claims are barred, in whole or in part, by the equitable doctrines of waiver, acquiescence and/or estoppel.” (Sixth Affirmative Defense)
- “Plaintiff’s claims are barred, in whole or in part, because Plaintiff has suffered no damage or irreparable harm.” (Seventh Affirmative Defense)
- “Plaintiff’s claims are barred, in whole or in part, because the alleged actions hereunder were the actions of third parties other than the Defendants.” (Eighth Affirmative Defense)
- “Some or all of Plaintiff’s claims as pled may be barred by the applicable Statute of Limitations.” (Ninth Affirmative Defense)
- “Factors other than Defendants' alleged wrongful conduct caused some or all of Plaintiff’s alleged damages.” (Tenth Affirmative Defense)
- “Some or all of Plaintiff’s claims as pled may be barred by the Doctrines of Laches.” (Eleventh Affirmative Defense)
- “Plaintiff did not exercise due care and did not act reasonably to protect itself or to mitigate any damages that they may have allegedly sustained by reason of Defendants' alleged wrongful conduct.” (Twelfth Affirmative Defense)
- “Plaintiff’s claims are barred, in whole or in part, by the Doctrine of Unclean Hands.” (Thirteenth Affirmative Defense)
- “To the extent any of the acts or omissions alleged in the Complaint occurred, Plaintiff and/or a co-owner/co-author of the alleged copyright authorized, licensed, or consented to it expressly, by implication, or by conduct.” (Fourteenth Affirmative Defense)
- “Plaintiff’s claims are barred, in whole or in part, because Defendants acted in good faith.” (Fifteenth Affirmative Defense)
- “Upon information and belief, Plaintiff has failed to meet and plead the statutory requirements that are conditions precedent to maintaining this action and/or to the recovery of statutory damages of any kind.” (Sixteenth Affirmative Defense)

- "The alleged wrongful conduct of the Defendants constitutes fair use." (Seventeenth Affirmative Defense)

- "The alleged wrongful conduct of Defendants is protected by the First Amendment to the United States Constitution." (Eighteenth Affirmative Defense)

(Answer of Defendants, attached as Exhibit 1, at 7-9). Gingrich's First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth and Eighteenth affirmative defenses are defective and should be stricken.

A. Legal Standards.

Affirmative defenses must comply with all the pleading requirements of the Federal Rules of Civil Procedure. *Renalds v. S.R.G. Rest. Group,* 119 F. Supp. 2d 800, 802 (N.D. Ill. 2000). Although Rule 8(b) requires only that a defendant "state in short and plain terms its defenses to each claim," bare legal conclusions are never sufficient and must be stricken. Fed. R. Civ. P. 8(b); *Heller Financial, Inc. v. Midwhey Powder Co., Inc.,* 883 F.2d 1286, 1295 (7th Cir. 1989). Instead, a properly pleaded defense must include either direct or inferential allegations respecting all material elements of the claim asserted. *MAN Roland Inc. v. Quantum Color Corp.,* 57 F. Supp. 2d 576, 578 (N.D. Ill. 1999); *Ocean Atlantic Woodland Corp. v. DRH Cambridge Homes, Inc.,* No. 02 C 2523, 2003 WL 1720073 *3 (N.D. Ill., Mar. 31, 2003). Accordingly, Rule 12(f) grants courts considerable discretion to strike defenses that do not give fair notice and merely clutter the pleadings. *Riemer v. Chase Bank USA, N.A.*, 274 F.R.D. 637, 639 (N.D. Ill. 2011).

Courts apply a three-part test to determine whether to strike an affirmative defense: (1) The matter must be properly pleaded as an affirmative defense; (2) the matter must comply with Rules 8 and 9; and (3) the matter must meet the requirements of Rule 12(b)(6), *i.e.*, if the defendant can prove no set of facts in support of the affirmative defense that would defeat the complaint, the defense must be stricken as legally inadequate. *Renalds*, 119 F. Supp. 2d at 802–03.

B. Gingrich's 1st, 5th, 7th, 8th and 10th Affirmative Defenses Are Not Proper Affirmative Defenses.

A court may strike affirmative defenses that are not actually affirmative defenses. An affirmative defense under Rule 8(c) requires a defendant to admit the complaint's allegations but then assert that for some legal reason it is excused from liability. *Sloan Valve Co. v. Zurn Industries, Inc.*, 712 F.Supp.2d 743, 756 (N.D. Ill. 2010).

Gingrich's First Affirmative Defense is legally inadequate, because it alleges only that Rude Music has failed to state a claim. This "is not an affirmative defense which adds substance to the litigation; it is clutter." *Surface Shields, Inc. v. Poly-Tak Protection Systems, Inc.*, 213 F.R.D. 307, 308 (N.D. Ill. 2003). That is particularly true where the defense is simply listed without any explanation of the basis for the defense. *See Anicom, Inc. v. Netwolves Corp.,* No. 00 C 2088, 2000 WL 1644543 *3 (N.D. Ill., Oct. 27, 2000); *Builders Bank v. First Bank & Trust Co.,* No. 03 C 4959, 2004 WL 626827, *3-4 (N.D. Ill., Mar. 24, 2004). Gingrich's First Affirmative Defense should be stricken.

Gingrich's Fifth Affirmative Defense, lack of standing, is not an affirmative defense under federal law. The plaintiff bears the burden of pleading and

proving standing. *Native American Arts, Inc. v. The Waldron Corp.*, 253 F.Supp.2d 1041, 1045 (N.D. Ill. 2003); *Ocean Atlantic Woodland Corp.*, 2003 WL 1720073 *4. Gingrich's Fifth Affirmative Defense should be stricken.

Gingrich's Seventh, Eighth and Tenth defenses do not qualify as affirmative defenses, because they purport to deny, rather than admit, the truth of the complaint's allegations. For example, Gingrich's Seventh Affirmative Defense asserts that Rude Music has suffered no damages or harm. Gingrich's Eighth Affirmative Defense accuses unnamed third parties of infringing Rude Music's copyright. Gingrich's Tenth Affirmative Defense alleges that someone else or something else caused the damages to Rude Music that the Seventh Affirmative Defense alleges did not occur. These "affirmative defenses" do not admit, and instead merely reiterate Gingrich's denials of, Rude Music's allegations. They are the "clutter" that the Seventh Circuit recommends be stricken.

C. Gingrich's 4th, 6th, 8th, 9th, 10th 11th, 12th, 13th, 14th and 16th Affirmative Defenses Fail to Meet the Requirements of Rules 8 and 9.

Gingrich's Fourth, Sixth, Eighth, Ninth, Tenth, Eleventh, Twelfth, Fourteenth and Sixteenth Affirmative Defenses consist solely of the "bare bones conclusory allegations" condemned by *Heller*. In *Surface Shields, Inc.*, the court dismissed similar naked allegations of unclean hands, laches, intervening acts of other parties, plaintiff's failure to mitigate its losses, comparative negligence and statute of limitations as insufficient, stating:

> But in no instance does it attempt to explain why these doctrines or actions would provide it with a defense. In no instance does it

> allege any specific facts which might support its conclusions. [Defendant] argues in its brief that it has no duty to allege facts that will show how the affirmative defenses will be applicable, but it is incorrect. Rule 8(a) and the Seventh Circuit agree that a defendant does have a duty to allege "the necessary elements" of its defenses in order to conform with the Federal Rules. *Heller*, 883 F.2d at 1295. The defendant must provide enough facts so that, at a minimum, plaintiff is put on notice as to which of its actions are complained of.

213 F.R.D. at 308. *See also Riemer*, 274 F.R.D. at 639-40 (condemning similar affirmative defenses as "exceedingly sketchy and conclusory" and failing to give the plaintiff fair notice of what was alleged).

Gingrich alleges no facts whatsoever to support these defenses. Gingrich does not identify the indispensable party of the Fourth Affirmative Defense. Gingrich does not describe any conduct giving rise to "waiver, acquiescence and/or estoppel." Gingrich does not identify the "third parties" responsible for the infringement. Gingrich does not explain why infringement from 2009 to present is subject to the statute of limitations or laches. Gingrich suggests that the damage to the plaintiff from Gingrich's infringing use of the copyrighted work was due to mysterious "other factors." Gingrich does not explain how Rude Music might have mitigated the damage caused by Gingrich's willful infringement of its copyright. Gingrich pleads no facts to support its allegation that Rude Music is guilty of "unclean hands" in connection with Gingrich's unauthorized use of the copyrighted song. Gingrich identifies no "co-owner/co-author" of the song that "authorized, licensed, or consented to it expressly, by implication, or by conduct," or what the expression, implication or conduct was.

Gingrich's Sixteenth Affirmative Defense alleges that Rude Music failed to meet conditions precedent to maintaining this action. In *American Top English v.*

Lexicon Marketing (USA), Inc., No. 03 C 7021, 2004 WL 2271838 *11 (N.D. Ill., Oct. 4, 2004), the court struck a virtually identical affirmative defense for failure to allege any specific facts to support the claim, as required by Rule 9(c). *See also* Fed. R. Civ. P. 9(c)("when denying that a condition precedent has occurred or been performed, a party must do so with particularity). Gingrich's Sixteenth Affirmative Defense must be stricken as well.

Gingrich has merely named affirmative defenses; he has not pleaded them. None of these defenses give Rude Music fair notice of Gingrich's allegations, and they must be stricken.

D. Gingrich's 7th, 9th, 15th and 18th Affirmative Defenses Are Defective as a Matter of Law.

Gingrich's Seventh, Ninth, Fifteenth and Eighteenth affirmative defenses fail as a matter of law, and therefore do not meet the third criterion of this Circuit's test.

Gingrich suggests that he is not liable for copyright infringement because Rude Music has "suffered no damage or irreparable harm." (Seventh Affirmative Defense) Lack of injury to the plaintiff is not an affirmative defense to a charge of copyright infringement. In the absence of actual damages, the copyright owner may recover the defendant's profits or elect to receive statutory damages. 17 U.S.C. § 504; *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984). Gingrich's Seventh Affirmative Defense should be stricken.

Gingrich next alludes to the statute of limitations. (Ninth Affirmative Defense) The statute of limitations for a copyright infringement claim is three years. 17 U.S.C. § 507. Each of Gingrich's infringements alleged in the

complaint occurred within three years preceding the filing of the complaint. (See Exhibit 1, ¶¶ 10-12) Gingrich's Ninth Affirmative Defense should be stricken.

Gingrich's Fifteenth Affirmative Defense alleges that the "Defendants acted in good faith." Good faith is not a defense to copyright infringement; though it may bear on damages, an innocent infringer is just as liable as a willful infringer. *Ocean Atlantic Woodland Corp.*, 2003 WL 1720073 * 4. The Fifteenth Affirmative Defense should be stricken.

Finally, Gingrich contends that his wrongful conduct is protected by the First Amendment. (Eighteenth Affirmative Defense) Concepts within the Copyright Act, such as the idea/expression dichotomy and the fair use defense, adequately protect free speech rights. *Eldred v. Ashcroft*, 537 U.S. 186, 219-21 (2003). The Seventh Circuit has put it more directly: "The First Amendment adds nothing to the fair use defense." *Chicago Bd. Of Education v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003); *see also In re Aimster Copyright Litigation*, 334 F.3d 643, 656 (7th Cir. 2003). Gingrich's First Amendment defense is redundant and should be stricken.

CONCLUSION

For the foregoing reasons, Rude Music asks that the Court strike the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth and Eighteenth affirmative defenses asserted by Newt 2012, Inc. and Newt Gingrich.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2012, the foregoing Plaintiff's Motion to Strike Affirmative Defenses was electronically filed using the CM/ECF system and served upon:

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