

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI**

IHOP IP, LLC et al.,)	
)	
Plaintiffs,)	
)	
vs.)	
)	Case No.: 4:11-cv-00548-NKL
INTERNATIONAL HOUSE OF PRAYER)	
et al.,)	
)	
Defendants.)	

**SUGGESTIONS IN SUPPORT OF MOTION TO AMEND INITIAL SUMMONS
AND STRIKE CERTAIN AFFIRMATIVE DEFENSES**

Plaintiffs IHOP IP, LLC and International House of Pancakes, LLC ("IHOP") provide the following suggestions in support of their motion (1) pursuant to Fed. R. Civ. P. 4(a), to amend the initial summons to reflect that service on International House of Prayer East Bay constituted service on defendant The Prayer Furnace, Inc. ("East Bay"); and (2) pursuant to Fed. R. Civ. P. 12(f) to strike two of East Bay's affirmative defenses asserting improper service and the failure to file a proper return of service.

I. Background Facts

1. After extended settlement negotiations that included the parties in this case and their counsel, IHOP filed a Complaint [Doc. 1] on May 27, 2011. Shortly thereafter, IHOP filed its First Amended Complaint [Doc. 3] on June 14, 2011. The Complaint and First Amended Complaint named "International House of Prayer East Bay" as a defendant. This name was used to identify the defendant throughout the settlement negotiations and is the name prominently displayed on the entity's website located at www.internationalhouseofprayereb.org.

2. On or about June 22, 2011, then counsel for East Bay accepted service and executed a waiver of service on behalf of all defendants. [Doc. 4].

3. IHOP was subsequently informed that East Bay was no longer being represented and that the waiver of service on behalf of East Bay was a mistake.

4. Without waiving any of its rights or conceding any mistake in service, IHOP sent East Bay an additional waiver of service request and a copy of the First Amended Complaint pursuant to Fed. R. Civ. P. 4(d).

5. After East Bay failed to return the second request for waiver of service, IHOP served East Bay with process on September 23, 2011 [Return of Service, Doc. 12].

6. East Bay failed to timely file an answer.

7. On October 21, 2011, East Bay's director, Mr. James Stilwell, who is not an attorney, personally filed an out-of-time Motion for an Extension of Time to File an Answer on behalf of East Bay. [Doc. 14].

8. The Court granted an extension up to and including November 15, 2011 to file an answer through counsel [Doc. 17].

9. East Bay filed its Answer to the First Amended Complaint [Doc. 18] through Diane L. Waters as "Attorney for Defendant International House of Prayer East Bay." East Bay did not raise improper service or filing of an improper return of service as affirmative defenses in its Answer. However, it did assert that "'International House of Prayer East Bay' is not the proper legal entity and not a proper party Defendant in this action." See Doc. 18, paragraph 53.

10. Pursuant to IHOP's requests, counsel for East Bay advised that the name "International House of Prayer East Bay" is a fictitious trade name and the official name of the entity is The Prayer Furnace, Inc.

11. IHOP promptly sought leave to file a Second Amended Complaint identifying the entity sued by its official name, The Prayer Furnace, Inc., and its fictitious name, International House of Prayer East Bay [Doc. 27].

12. The Court granted the requested leave [Doc. 30], and IHOP timely filed the Second Amended Complaint [Doc. 33].

13. East Bay then filed its Answer to the Second Amended Complaint and, for the first time, asserted affirmative defenses denying "proper service of process and suggest[ing] ineffective, defective and insufficient service and process of service" and denying "that a proper return of service has been filed relevant to this Defendant." [Doc. 35, paragraphs 53-54].

II. East Bay Was Properly Served and the Initial Summons May Be Appropriately Amended to Reflect Such Service on The Prayer Furnace, Inc.

The initial summons issued to International House of Prayer East Bay may properly be amended to be directed to The Prayer Furnace, Inc without a requirement of serving process yet again. There is a "well-recognized distinction between a complaint that sues the wrong party, and a complaint that sues the right party by the wrong name." Roberts v. Michaels, 219 F.3d 775, 777-778 (8th Cir. 2000). A "true misnomer situation" occurs where the plaintiff has named and served the right defendant by the wrong name. Id. at 778. "This misnomer principle is most obviously appropriate in cases where the plaintiff has sued a corporation but misnamed it." Id. In a misnomer situation, it is appropriate for the Court to amend the initial summons under Rule 4(a) so that service on the entity under the wrong name is effective on the entity as later identified by the correct name. Id. at 779 (amending the summons under Rule 4(a) in a traditional misnomer situation).

Moreover, there is no obligation to re-serve an amended complaint where the amendments relate back to the date of the original pleading under Federal Rule of Civil

Procedure 15(c)(1)(C). The rule provides that an amendment relates back when:

the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

- (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
- (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Fed. R. Civ. P. 15(c)(1)(C). Rule 15(c)(1)(B) is satisfied when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."

Here, the Second Amended Complaint clearly relates back to the First Amended Complaint. It did not add a new party; it merely corrected a misnomer by using East Bay's official name, "The Prayer Furnace" instead of the fictitious name, "International House of Prayer East Bay," under which it does business. It also asserts the exact same claims. The amendments merely identify East Bay by its official name and seek an additional remedy for the same "conduct, transaction, or occurrence" set out in the First Amended Complaint. See Maegdlin v. Int'l Ass'n of Machinists & Aerospace Workers, 309 F.3d 1051, 1053 (8th Cir. 2002) (in the relation-back context, "[i]t is the facts well pleaded, not the theory of recovery or legal conclusions, that state a cause of action and put a party on notice.") (citation omitted).

East Bay also received adequate notice of this action. Its former counsel waived service of the First Amended Complaint, and East Bay was later served with the initial summons and a copy of the First Amended Complaint within the time frame set forth under Rule 4(m). See Exhibit A, Declaration of Jeanne Kosta. After being served, East Bay's Director, Mr. Stilwell,

personally contacted the Court seeking an extension of time to answer the First Amended Complaint, and its current counsel answered the First Amended Complaint under its trade name without contesting service or the return of service. Given these actions, there is no doubt that East Bay knew or should have known that it was the intended defendant when IHOP served it at its place of business under the name by which it holds itself out to the public. See Roberts, 219 F.3d at 777-779 (8th Cir. 2000) (an amended complaint relates back where the president and general manager of the real party in interest was mistakenly named as the defendant under an incorrect d/b/a, the president was served with the complaint within the time frame provided under Rule 4(m), and the amended complaint restated the same claims).

Given that this is a traditional misnomer situation that has already been corrected by the Second Amended Complaint, and the Second Amended Complaint relates back to the First Amended Complaint, IHOP respectfully asks the Court to amend the initial summons under Rule 4(a) to reflect that service of the First Amended Complaint on International House of Prayer East Bay constituted service on The Prayer Furnace, Inc.

III. East Bay's Affirmative Defenses Relating to Improper Service Should Be Stricken as Insufficient and Inapplicable.

Although motions to strike are viewed with disfavor, the Court enjoys liberal discretion under Federal Rule of Civil Procedure 12(f) to strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. See Fed. R. Civ. P. 12(f); Lucas v. Jerusalem Café, LLC, No. 4:10-cv-00582-DGK, 2011 WL 1364075, at *2 (W.D. Mo. Apr. 11, 2011) (striking affirmative defenses as insufficient or inapplicable).

For all the reasons stated above, there is no basis for East Bay's defenses relating to service of process or the return of service. First, this is a true misnomer situation where the right corporate defendant was properly served under its fictitious rather than official name. The

misnomer has been corrected in the Second Amended Complaint, which relates back to the First Amended Complaint. Second, East Bay waived service of the First Amended Complaint and should not be heard now to complain otherwise. IHOP merely served process afterward out of an abundance of caution when East Bay elected to change counsel and advised that the waiver of service was a mistake. Third, service was effected on East Bay within the time frame set forth under Rule 4(m) as the summons and First Amended Complaint were personally served on East Bay's Treasurer and Assistant Director, Amy Knight, at its place of business on September 23, 2011. See Exhibit A, Declaration of Jeanne M. Kosta and Return of Service [Doc. 12] attached thereto.¹ Because IHOP properly served the First Amended Complaint and the Second Amended Complaint relates back to the First Amended Complaint, IHOP has no obligation to re-serve the Second Amended Complaint (which East Bay has answered in any event). Accordingly, there is no sufficient factual basis that would make these defenses plausible on their face. See Lucas, 2011 WL 1364075 at *2 (holding the Iqbal pleading standard applicable to affirmative defenses).

Finally, IHOP would be prejudiced if the two asserted defenses were allowed to remain in the pleading. The parties are now in the discovery phase of the litigation and IHOP is daily expending resources in the case. It would prejudice IHOP during this or later phases of the litigation if East Bay attempted to avoid this action by asserting that service was improper or that an improper return of service had been filed. Such attempts by East Bay would distract from and potentially obviate the work presently being done to move this case forward as efficiently as possible. IHOP respectfully requests that the Court strike the insufficient and inapplicable

¹ To the extent that East Bay is complaining about the return of service because the box showing service on East Bay's Treasurer/Assistant Director was not checked, the attached Declaration of Jeanne M. Kosta and her amended proof of service make clear that service was accomplished both by delivering the summons to the Treasurer/Assistant Director and by mail.

affirmative defenses relating to service in paragraphs 53 and 54 of East Bay's Answer to the Second Amended Complaint to eliminate this prejudice.

IV. Conclusion

For all the reasons given above, IHOP respectfully requests that the Court amend the initial summons under Rule 4(a) such that service on International House of Prayer East Bay is effective as to The Prayer Furnace, Inc. and strike the insufficient and inapplicable affirmative defenses in paragraphs 53 and 54 of East Bay's answer asserting improper service of process and an improper return of service.

Respectfully submitted,

/s/ Mark M. Iba

Mark D. Hinderks (MO Bar No. 58124)

Mark M. Iba (MO Bar No. 45452)

Elizabeth A. Tassi (MO Bar No. 59621)

STINSON MORRISON HECKER LLP

1201 Walnut Street, Suite 2900

Kansas City, Missouri 64106

(816) 842-8600 (telephone)

(816) 691-3495 (facsimile)

Attorneys for Plaintiffs

IHOP IP, LLC and INTERNATIONAL HOUSE
OF PANCAKES, LLC

