

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

IHOP IP, LLC and INTERNATIONAL)
HOUSE OF PANCAKES, LLC)

Plaintiffs,)

vs.)

INTERNATIONAL HOUSE OF)
PRAYER; et. al.)

Defendants.)

Case No: 11-CV-00548-NKL

**THE PRAYER FURNACE INC.'S RESPONSE
TO PLAINTIFF'S MOTION TO AMEND THE INITIAL
SUMMONS AND STRIKE CERTAIN AFFIRMATIVE DEFENSES**

COMES NOW the Defendant The Prayer Furnace, Inc., by and through its counsel of record, and hereby respectfully responds and objects to Plaintiff's Motion to Amend the Initial Summons and Strike Certain Affirmative Defenses.

Plaintiff's Motion suggests that the initial summons should be amended due to a misnomer and that defenses should be stricken as insufficient and inapplicable. Neither of these proposals are appropriate under the circumstances, however, as explained subsequently herein, Defendant does not object to Motion to Amend the Summons but suggests it does not cure the service or Proof of Service defenses. Defendant does object to the Motion to Strike Certain Affirmative Defenses.

I. Striking Defenses

Plaintiff seeks to strike defenses related to improper service of process. The supporting argument is essentially an argument that the defenses are not winning defenses. The defendant, The Prayer Furnace, Inc., contends it was not properly

served and the Proof of Service [Doc. 12] was not proper and does not reflect proper service. The Prayer Furnace, Inc., was not even arguably a party to this lawsuit until the Petition was recently amended [Doc. 33] and The Prayer Furnace, Inc. was added as a Defendant. The first time The Prayer Furnace, Inc., filed any pleadings in this matter, it immediately asserted improper service and correlating defenses [Doc. 35, paragraphs 53 – 55]. Additionally, to the extent the Second Amended Complaint dates back to the original filing, so does the Answer to the Second Amended Complaint – thus making it a timely Answer. With all of that stated, the success of those potential defenses is not properly argued in a Motion to Strike.

“Although Court’s enjoy ‘broad discretion’ in determining whether to strike a party’s pleadings, such an action is ‘an extreme measure’ and motions to strike are ‘viewed with disfavor and infrequently granted.” *Morgan v. Midwest Neurosurgeons, L.L.C.*, No. 1:11-CV-37 (CEJ), slip op. at 1 (E.D.Mo. 2011)(2011 WL 2731534), *citing*, *Stanbury Law Firm v. IRS*, 221 F.#d 1059, 1063 (8th Cir. 2000). “Motions to strike are generally disfavored ‘because they are often interposed to create a delay.’” *Morgan*, No. 1:11-CV-37 (CEJ), slip op. at 1 (E.D.Mo. 2011)(2011 WL 2731534), *citing*, *Van Schouwen v. Connaught Corp.*, 782 F.Supp. 1240, 1245 (N.D.Ill. 1991).

Indeed, motions to strike can be nothing other than distractions. If a defense is clearly irrelevant, then it will likely never be raised again by the defendant and can be safely ignored. If a defense may be relevant, then there are other contexts in which the sufficiency of the defense can be more thoroughly tested with the benefit of a fuller record – such as on a motion for summary judgment

Id.

Striking an affirmative defense is not appropriate “unless, as a matter of law, the defense cannot succeed under any circumstances[.]” *Federal Deposit Ins. Corp. v. Cable*, 720 F.Supp. 748, 750 (E.D.Mo. 1989).

Plaintiffs properly note the rare exceptions when a motion to strike is an appropriate remedy such as redundancy, immateriality, impertinent or scandalous defenses [Doc. 45, p. 5]. None of these requirements have been satisfied in this case.

Upon being named as a defendant to this action, The Prayer Furnace, Inc., properly alleged that it was not properly served. It continues to contend improper service and an improper Proof of Service. The question of whether that defense is a successful defense cannot be judged at this stage of the proceedings as there has been no discovery on the question. Defendant respectfully contends that the evidence will show a lack of proper service and a lack of a proper Proof of Service.

II. Amending the Summons

With regard to the question of amending the summons, Defendant has no objection to amending the summons but respectfully suggests that such amendment does not cure the service and Proof of Service defenses asserted in the Answer filed by The Prayer Furnace, Inc.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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