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Olmsted County, MN

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF OLMSTED | THIRD JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

Judge: Joseph F. Chase
Court File #55-CV-15-6531

Wilmar Investments, LLC,

Plaintiff,

vs.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS AFFIRMATIVE DEFENSE

Cascade Township,

Defendant.

INTRODUCTION

Wilmar moves to strike one of the affirmative defenses stated in Defendant's Answer. In particular, Wilmar moves to strike Cascade Township's sixth affirmative defense:

> 6. Defendant alleges the use of the land that Plaintiff proposes—which includes blasting and gravel crushing in proximity to nearby residences—constitutes a nuisance, so that the activity is not permitted.

Answer, Affirmative Defense No. 6.

Wilmar's motion to dismiss must be denied on several grounds. Because it is a "defense" that is at issue, and not a "claim," the proper mechanism for avoiding the defense is stated in Rule 12.06 and Wilmar's motion is untimely because it was not brought within twenty days of the time the defense was asserted in Cascade Township's Answer. The motion must also be denied because only claims—and not defenses—are subject to dismissal under Rule 12.02(e). Finally, reference to the effect of Wilmar's proposed project on adjoining residences was proper because it put Wilmar on notice that Cascade Township would rely on theses effects in opposing the declarations Wilmar seeks.

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STATEMENT OF THE DOCUMENTS RELIED UPON

1. Complaint

2. Answer

3. All filings previously submitted by Cascade Township in connection with its Motion for Summary Judgment, Documents 19-50.

STATEMENT OF FACTS

Wilmar's tenant Mathy proposes a hard rock mining operation that would last up to 100 years, extract 30 to 60 million tons of bedrock from section 11, and use blasting and rock crushing on parcels with property lines that are less than 30 feet from neighboring residential structures. Bayliss Aff., Ex. 19; Declaration of Conzemius, Doc. 43. Wilmar admits that its tenant Mathy is seeking to open a hard rock mine and extract tens of millions of tons of bedrock materials from that mine. Cascade Township contends that the proposed project will constitute a nuisance and has asserted this as a defense to the requested declaratory relief that Wilmar seeks.

STATEMENT OF ISSUES

1. Is Wilmar's Motion Timely?

2. Is a "Defense" in an Answer a "Claim" Susceptible to a Rule 12.02 (e) Motion to Dismiss?

3. Where Issues Related to Whether Plaintiff's Proposed Activities Would Constitute a Nuisance Are Relevant to Plaintiff's Claims, Does the Court Properly Strike Reference to Nuisance Contained in Defendant's Answer?

ARGUMENT

I. WILMAR'S RULE 12 MOTION IS UNTIMELY.

A review of the language of Rule 12 shows that Wilmar is using the wrong rule to obtain the relief it seeks. The specified response to an affirmative defense that is asserted improperly is

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not a motion to dismiss pursuant to Rule 12.02(e), but instead a motion to strike pursuant to Rule 12.06.

Rule 12.06 provides:

> Upon motion made by a party before responding to a pleading or, if no response of pleading is permitted by these rules upon a motion made by a party within 20 days after the service of pleading upon the party, or upon its own initiative at any time, the court may order any pleading not in compliance with Rule 11 stricken in sham or false, or may order stricken from any pleading any insufficient defense or any redundant material, impertinent or scandalous data.

(Emphasis added.) Rule 12 thus contains a mechanism for contesting a defense claimed to be insufficient and it is a Rule 12.06 motion to strike. See, e.g., Swelbar v. Lahti, 473 N.W.2d. 77 (Minn. Ct. App. 1991) (reversing trial court's refusal to grant Rule 12.06 motion to strike affirmative defense). With respect to the nearly identical federal rule, courts have noted that a Rule 12 motion to strike an affirmative defense is generally considered "a drastic remedy which is disfavored by the courts and is infrequently granted." Federal Deposit Ins. Corp. v. R-C Mktg. & Leasing, Inc., 714 F. Supp. 1535, 1541 (D. Minn. 1989) (quoting H.J., Inc. v. Northwestern Bell Telephone Co., 648 F.Supp. 419, 422 (D.Minn.1986).

Of course, Rule 12.06 requires that a party bring a motion to strike "within 20 days after service of the pleading by the party." Rule 12.06; see also Sazenski v. Comm'r of Revenue, No. 4460 (Minn. Tax Ct. June 6, 1986) (holding that Rule 12.06 motion brought more than 20 days after an answer is served is untimely). Defendant's answer asserting the defense was served and filed on September 21, 2015. The motion seeking to strike the defense is obviously untimely, having been filed on July 19, 2016. The motion is untimely and should be denied on that ground.

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II. A "DEFENSE" IS NOT A "CLAIM," SO RULE 12.02(e) CANNOT BE USED TO SEEK DISMISSAL OF A DEFENSE.

Perhaps recognizing that a Rule 12.06 motion would be untimely and that Rule 12.06 is therefore unavailable, Wilmar relies on Rule 12.02(e). But this rule is one that is used to dismiss claims and not defenses. Rule 12.02 states in relevant part:

> Every defense. . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses made at the option of the pleader be made by motion:
>
> (a) lack of jurisdiction of the subject matter;
> (b) lack of jurisdiction over the person;
> (c) insufficiency of process;
> (d) insufficiency of service of process;
> (e) failure to state a claim upon which relief can be granted; and
> (f) failure to join a party pursuant to Rule 19.

Rule 12.02.

The text of the rule makes it clear that Rule 12.02 is reserved for the dismissal of claims, which is in contradistinction to Rule 12.06 and its provisions related to the striking of affirmative defenses. The fundamental error contained in Wilmar's motion is confusing the concepts of "claim" and "defense." Every case cited by Wilmar in support of its motion involved the proposed dismissal of claims; none involve the dismissal of defenses.

III. BECAUSE ISSUES RELATED TO NUISANCE BEAR ON THE CLAIMS RAISED BY WILMAR, IT WAS PROPER FOR CASCADE TOWNSHIP TO ALERT WILMAR TO ITS INTENTION TO ARGUE THAT FUTURE ACTIVITY THAT WILMAR INTENDS TO TAKE, INCLUDING BLASTING, ROCK CRUSHING, AND RELATED ACTIVITIES WILL CONSTITUTE A NUISANCE.

Beyond the procedural failures of the motion, the substantive argument is deficient as well. It is an example of a "straw man" argument. The first step in a straw man argument is asserting that another is making an argument that they are not. Wilmar does this by pretending that the Township is affirmatively bringing some type of enforcement action. Of course, the Township is doing no such thing. To be clear, Cascade Township is not now bringing an

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enforcement action under either the public or private nuisance statute. Wilmar spends its entire memorandum refuting claims that were never brought and arguments that were never made.

The second step in a straw man argument is to then take issue with the opponent's misstated position. Wilmar does this by taking issue with the manner in which the mythical enforcement action is being prosecuted, first by contesting the Township's ability to maintain an action for private nuisance, and then by asserting statutory limitations on nuisance actions, including those contained in the private nuisance statute, Minnesota Statutes sections 561.01617.80-.97 (2015), and the public nuisance statute, Minnesota Statutes sections 617.80-.97 (2015). See Memorandum in Support of Motion to Dismiss, p. 9-12.

The defense as asserted lies at the heart of this dispute. Wilmar is seeking an order that will permit it to move forward with the hard rock mining project that it has proposed. The Township is simply pointing out that the blasting, rock crushing, millions of truck trips associated with the project, and other related activities would have negative consequences for adjoining properties. These types of concerns are routinely and necessarily raised in cases involving the expansion of mining activities to adjoining parcels and have been raised in nearly all the cases addressing application of the three-prong test. It was appropriate for the Township to put Wilmar on notice that it would be arguing that its proposed activities bear on its entitlement to relief. The assertion of the defense was wholly appropriate.

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CONCLUSION

For the reasons stated above, Wilmar's motion to dismiss for failure to state a claim should be denied.

QUINLIVAN & HUGHES, P.A.

Dated: August 5, 2016

s/ Kenneth H. Bayliss

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