



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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December 11, 2023

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Re: *Mark Fayak, et al. v. Steve Earl, et al.*
Case No. CL-2023-8795

Dear Counsel,

Pending before the Court is the Plaintiffs' Motion to Strike Defendants' "Plea-In-Bar & Demurrer" and Motion for Sanctions ("Motion to Strike"). For the reasons that follow, the Court orders that the Defendants' Plea-In-Bar & (*sic*) Demurrer is stricken. Further, the Court declines to impose sanctions.

Background

Defendants were served with the complaint in this matter on June 26, 2023. By agreement between Counsel, Defendants had 30 days from the date of service to file

OPINION LETTER

responsive pleadings, which would have been July 26, 2023. Defendants filed several responsive pleadings on July 21, 2023, including motions to dismiss for lack of personal jurisdiction on three defendants, a demurrer on behalf of another defendant, and a motion to dismiss for multifariousness and motion craving oyer for another defendant. The demurrer was mooted by the non-suit of that defendant on August 24, 2023. The motions to dismiss for lack of personal jurisdiction were denied on September 8, 2023, and oyer was granted on September 12, 2023. This left unresolved only the motion to dismiss for multifariousness filed by one defendant. On September 20, 2023, Counsel filed a motion to dismiss for multifariousness on behalf of three of the Defendants. The Defendants Plea-In-Bar & Demurrer was filed on November 3, 2023. Plaintiffs' Motion to Strike was filed November 7, 2023.

Plaintiffs move to strike the Defendants' Plea-In-Bar & Demurrer on the ground that it was untimely filed, in violation of Rule 3:8(a) of the Rules of the Supreme Court of Virginia. Defendants deny that the Plea-In-Bar & Demurrer was untimely, arguing that "no Virginia authority precludes Defendants from filing their Plea-in-Bar and Demurrer outside the initial timeframe for responding to the Complaint when they are not in default." Defendants' Opposition to Plaintiffs' Motion to Strike Defendants' Plea-In-Bar And Demurrer And Plaintiffs' Motion for Sanctions at 1.

Analysis

Timeliness of the Defendants' Plea In Bar & Demurrer

Rule 3:8 governs responsive pleadings by a defendant upon service of a summons and complaint, and states in relevant part as follows:

(a) Response Requirement. — A defendant must file pleadings in response within 21 days after service of the summons and complaint upon that defendant Pleadings in response under this Rule – other than an answer – are limited to the following, and are deemed responsive only to the specific count or counts addressed therein: a demurrer, plea, motion to dismiss, motion for a bill of particulars, motion craving oyer, and a written motion asserting any preliminary defense permitted under Code § 8.01-276. If a defendant files no other pleading in response than the answer, it must be filed within the applicable 21- day ... period specified in this Rule.

...

(b) Response After Demurrer, Plea or Motion. — When the court has entered its order overruling all motions, demurrers and other pleas

filed by a defendant as a responsive pleading, such defendant must, unless the defendant has already done so, file an answer within 21 days after the entry of such order, or within such shorter or longer time as the court may prescribe. If the court grants a motion craving oyer, unless the defendant has already filed an answer or another responsive pleading, the defendant must file an answer or another responsive pleading within 21 days after plaintiff files the document(s) for which oyer was granted, or within such shorter or longer time as the court may prescribe.

Thus, a defendant “must file pleadings in response within 21 days” Of note is the use of the plural noun “pleadings.” The rule expressly contemplates the concurrent filing of multiple responsive pleadings. The word “must” in the first sentence of the rule denotes the mandatory nature of the 21-day time limit, as do the two exceptions provided by paragraph (b). The first exception requires the defendant to file an answer with 21 days of the court’s order overruling all motions, demurrers and other pleas filed by a defendant as a responsive pleading. The second exception allows a defendant to file an answer or other responsive pleading within 21 days of when the plaintiff files documents for which oyer was granted. Rule 3:8(b). The mandatory nature of the 21-day time limit is underscored by Rule 1:9¹ and Code § 8.01-276.² Nothing in Rules of the Supreme Court or the Code authorizes a defendant to file responsive pleadings at any time merely because the defendant is not in default and other responsive pleadings remain pending.

The Defendants rely upon decisions made by other circuit courts holding that Rule 3:8 authorizes a defendant not in default to file additional responsive pleadings more than 21 days after service of the complaint. In *Carter v. Mazin Alayssami, D.M.D., P.C.*, 82 Va. Cir. 148, 149 (2011), the Stafford County Circuit Court found that Rule 3:8 has “no requirement, implicit or otherwise, that all responsive pleadings be filed within that time frame.” The Chesapeake County Circuit Court, relying on *Carter*, adopted the same position. See *City of Chesapeake v. Thrasher*, 109 Va. Cir. 149, 150 (2021). This Court respectfully disagrees with those opinions.

When a rule of the Supreme Court of Virginia sets forth a time in which some act must or is permitted to be done, that necessarily excludes the

¹ Rule 1:9 provides that “[t]he time allowed for filing pleadings may be extended by the court in its discretion and such extension may be granted although the time fixed already has expired....”

² Code § 8.01-276 allows a motion challenging subject matter jurisdiction or personal jurisdiction over an indispensable party to be filed at any time.

authorization under that same rule to act outside of the stated time. The contrary position taken by the Defendants, and by the circuit courts in *Carter* and *Thrasher*, undermines the prompt administration of justice by allowing a defendant to submit multiple responsive pleadings successively until the last of them have been resolved. This would allow a defendant to delay a case merely for strategic reasons and without good cause. When a defendant is aware of grounds for any of the enumerated responsive pleadings at the outset of the case, that pleading must be filed within the 21-day time period stated in Rule 3:8. If a defendant subsequently becomes aware of grounds supporting an additional responsive pleading, that defendant must obtain leave of court pursuant to Rule 1:9, unless an exception provided by Rule 3:8(b) or 8.01-276 applies.

The Court finds that the Defendants' Plea-In-Bar & Demurrer was filed after the time for filing pursuant to Rule 3:8 had expired, and it was filed without leave of court. Therefore, the Court orders that the Defendants' Plea-In-Bar & Demurrer is stricken.

Sanctions

Plaintiffs seek the imposition of sanctions on the Defendants pursuant to Code § 8.01-271.1 claiming that "[t]here are no facts or existing laws which would cause the Defendants ... to believe that it was appropriate to file a responsive pleading 100 days after the filing deadline for responsive pleadings has passed." Motion to Strike at 3. The Court notes that the Virginia Supreme Court has not addressed this issue. There is, therefore, no controlling legal authority that resolves the issue against the Defendants. There is non-binding authority from two Virginia circuit courts that supports the Defendants' position. While this Court ultimately finds that the Defendants' interpretation of Rule 3:8 is incorrect, Defendants' position is not without some support in the decisional authority of the Commonwealth. The Court is not persuaded that the Defendants' pleading was submitted for an improper purpose. Therefore, the Court declines to award sanctions.

Conclusion

The Court finds that the Defendants' Plea-In-Bar & Demurrer was filed after the time for filing pursuant to Rule 3:8 had expired, and the pleading was filed without leave of court to file a late pleading. The Plaintiffs' Motion to Strike the Plea-In-Bar and Demurrer is granted. The Plaintiffs' request for sanctions is denied. An order to this effect is enclosed.

Sincerely yours,

A solid black rectangular redaction box covering the signature of the judge.

Michael F. Devine
Circuit Court Judge

VIRGINIA :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

| | |
|---------------------|---|
| MARK FAYAK, et al., |) |
| |) |
| Plaintiffs, |) |
| v. |) |
| |) |
| STEVE EARL, et al. |) |
| |) |
| Defendants. |) |

CL-2023-8795


ORDER

THIS MATTER came before the Court on the Plaintiffs' Motion to Strike Defendants' "Plea-In-Bar & Demurrer" and Motion for Sanctions. For the reasons stated in the letter opinion issued this day, it is hereby

ORDERED that the Defendants' "Plea-In-Bar & Demurrer" filed on November 3, 2023 is stricken because it was filed outside of the time provided by Rule 3:8 of the Rules of the Supreme Court of Virginia. It is further

ORDERED that the Court declines to award sanctions against the Defendants for filing the untimely pleading.

Entered: December 11, 2023



Michael F. Devine
Circuit Court Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL IS WAIVED PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA.