UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No. 03-20161 CIV-KING

MARIE JEANNE JEAN, in her individual capacity, and as parent and legal guardian for minors VLADIMY PIERRE and MICHELDA PIERRE, and LEXIUSTE CAJUSTE,

Plaintiffs,

v.

CARL DORÉLIEN, and LUMP SUM CAPITAL, LLC a Maryland limited liability company,

Defendants.

_____/

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT CARL DORÉLIEN'S MOTION TO AMEND INITIAL RESPONSIVE PLEADING (D.E. 41)

Plaintiff Marie Jeanne Jean, in her individual capacity, and as legal guardian for minors Vladimy Pierre and Michelda Pierre, and Lexiuste Cajuste (collectively, "Plaintiffs"), hereby respond in opposition to Defendant Carl Dorélien's Motion to Amend Initial Responsive Pleading (D.E. 41) (the "Motion"). The Motion should be denied for the reasons set forth below:

A. Defendant Dorélien's Motion is an untimely attempt to circumvent the mandatory waiver imposed by Fed. R. Civ. P. 12(h)(1).

In the Motion, Defendant Carl Dorélien ("Dorélien") asks the Court for leave to amend his "initial responsive pleading," that is his Answer and Affirmative Defenses to the original complaint, which he filed on March 14, 2003. (See Answer and Affirmative Defenses (D.E. 11).) Dorélien asks for leave to amend his initial response to include the affirmative defenses of lack of personal jurisdiction, insufficiency of service of process, and improper venue. (See

Motion (D.E. 41), at p. 2, ¶ 7 and prayer for relief.) Insofar as the defense of insufficiency of service of process is concerned, Dorélien's Motion should be denied as an untimely and impermissible attempt to circumvent the mandatory waiver provisions of Rule 12(h)(1), Federal Rules of Civil Procedure.

Rule 12(h)(1), Federal Rules of Civil Procedure, provides:

> A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

See Fed. R. Civ. P. 12(h)(1). Dorélien waived any objections to the sufficiency of service of process when he failed to assert that defense in his Answer and Affirmative Defenses to the original complaint (D.E. 11). See e.g. Lederman v. United States, 131 F. Supp. 2d 46, 57-58 (D.D.C. 2001) (defendants waived service of process defense when they failed to raise it in their response to first complaint).

Moreover, Rules 12(h)(1) and 15(a) preclude Dorélien's attempt to circumvent his waiver by amending his Answer and Affirmative Defenses to add a defense of insufficiency of service of process. Rule 12(h)(1) expressly provides that any amendment to the initial responsive pleading must be an amendment "***permitted by Rule 15(a) to be made as a matter of course***," and Dorélien's proposed amendment is not "as a matter of course." Rule 15(a), Federal Rules of Civil Procedure, defines an amendment "as a matter of course" as follows:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, ***if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served***. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. ...

See Fed. R. Civ. P. 15(a) (emphasis added).

Thus, the time for Dorélien to amend his first Answer and Affirmative Defenses "as a matter of course" expired 20 days after his Answer was served. Here, Dorélien served his first Answer on March 17, 2003, so he had until April 7, 2003 to file an amended Answer "as a matter of course." Because Dorélien failed to comply with the deadline imposed by Rule 15(a), the mandatory waiver provision in Rule 12(h)(1) precludes his assertion of the defense of insufficiency of service of process at this time.

Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974), which Dorélien cites (at p. 3 of Motion) does not support Dorélien's argument that he is entitled to amend his first Answer and Affirmative Defenses to add the defense of insufficiency of service of process. Rowley concerns a different issue: whether the amendment of a complaint revives affirmative defenses that have been waived. In Rowley, the defendant argued that amendments to the complaint revived his right to assert the defense of lack of personal jurisdiction notwithstanding his failure to assert the defense in his motion to dismiss the initial complaint. 502 F.2d at 1332. The court rejected the defendant's argument stating: "An unasserted defense available at the time of response to an initial pleading may not be asserted when the initial pleading is amended." Id., at 1333.

Dorélien has not shown that the defense of insufficiency of service of process was not available at the time he filed his Answer and Affirmative Defenses to the original complaint. In the Motion, Dorélien's current counsel states that he first learned that service was not sufficient in March 2004. (See Motion (D.E. 41) at p. 2, ¶¶ 5-6.) That changes nothing. Dorélien's former counsel filed Dorélien's Answer and Affirmative Defenses to the original complaint, and that initial response did ***not*** assert insufficiency of service of process. Dorélien had the opportunity to tell his former counsel that he did not believe he was properly served and counsel had the

opportunity to raise the issue, but failed to do so. When Dorélien failed to raise any objection to sufficiency of service of process, he waived that defense forever. See Fed. R. Civ. P. 12(h)(1).

B. Dorélien's Answer and Affirmative Defenses to the original complaint has been superceded and is of no further force or authority, so it is not a pleading subject to amendment.

Dorélien's Motion to amend his first Answer and Affirmative Defenses (D.E. 11) is improper because that pleading has been superceded by subsequent answers and is thus *functus officio*, meaning of no further force or authority. See 188 LLC v. Trinity Indus., Inc., 300 F.3d 730, 736 (7th Cir. 2002) ("An amended pleading ordinarily supersedes the prior pleading. The prior pleading is in effect withdrawn as to all matters not restated in the amended pleading and becomes *functus officio*."); Clarke v. Fairbanks Capital Corp., Case No. 00 C 7778, 2003 WL 21277126, at *5 (N.D. Ill. June 2, 2003) (same); and BLACK'S LAW DICTIONARY 606 (5th ed. 1979) (*functus officio* means "of no further force or authority"). Because Dorélien's first Answer is no longer a "pleading" it is no longer subject to amendment.[1]

WHEREFORE, Plaintiffs request that Dorélien's Motion to Amend Initial Responsive Pleading be denied.

Respectfully submitted,

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1 Dorélien's initial Answer and Affirmative Defenses purported to assert the defenses of lack of personal jurisdiction and improper venue. (See Answer and Affirmative Defenses (D.E. 11), at p. 5, ¶ 38, and p. 6, ¶ 39.)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Plaintiffs' Response in Opposition to Defendant Carl Dorélien's Motion to Amend Initial Responsive Pleading was served by fax and U.S. Mail this 2nd day of April, 2004 to: Kurt R. Klaus, Esq., Law Offices of Kurt R. Klaus, Jr., 3191 Coral Way, Suite 402-A, Miami, FL 33145, attorney for Defendant Carl Dorélien; Scott M. Behren, Esq., attorney for Defendant Lump Sum Capital, LLC.

Dwayne E. Williams

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