

1998 U.S. Dist. LEXIS 22653 printed in FULL format.

ETHAN TRULL, on behalf of himself and all others similarly situated, Plaintiff, v. MICROSOFT CORP. and ACTIVISION, INC., Defendants.

File No. 97 C 2709

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1998 U.S. Dist. LEXIS 22653

January 12, 1998, Decided  
January 13, 1998, Docketed

DISPOSITION: [\*1] Recommended that this Trull's motion to strike defendants' affirmative defenses and in the alternative for summary judgment be denied.

CORE TERMS: motion to strike, summary judgment, partial, recommended, own initiative, impertinent, scandalous, immaterial, redundant, stricken, notice, manufactured, joystick, game

COUNSEL: For ETHAN E TRULL, plaintiff: James S. Shedden, Lawrence Wiley Schad, David J. Phillips, Steven J. Tomiello, Beeler, Schad & Diamond, P.C., Christopher V. Langone, Langone Law Firm, Chicago, IL.

For MICROSOFT CORP, defendant: William F. Conlon, Richard Francis O'Malley, Theodore R. Scarborough, Jr., Ann Kathryn Adams, Sidley & Austin, Chicago, IL.

For MICROSOFT CORP, defendant: Charles B. Casper, Montgomery, McCracken, Walker and Rhoads, Philadelphia, PA.

For ACTIVISION INC, defendant: Bruce Edward Braverman, Donald A. Tarkington, Novack & Macey, Chicago, IL.

For ACTIVISION INC, counter-claimant: Bruce Edward Braverman, Donald A. Tarkington, Novack & Macey, Chicago, IL.

For ETHAN E TRULL, counter-defendant: Christopher V. Langone, Langone Law Firm, Chicago, IL.

JUDGES: RONALD A. GUZMAN, United States Magistrate Judge. HONORABLE CHARLES R. NORGLER, SR., JUDGE, UNITED STATES DISTRICT COURT.

OPINIONBY: RONALD A. GUZMAN

OPINION:

TO: HONORABLE CHARLES R. NORGLER, SR., JUDGE

UNITED STATES DISTRICT COURT

REPORT AND RECOMMENDATION of [\*2] Magistrate Judge Ronald A. Guzman

Pending is plaintiff, Ethan Trull's ("Trull") motion to strike Microsoft and Activisions' affirmative defenses pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. In the alternative Trull moves for partial summary judgment pursuant to Fed.R.Civ.Pro. 56. For the reasons stated below, it is hereby recommended that Trull's motion to strike and partial motion for summary judgment be denied.

BACKGROUND FACTS

On March 13, 1997, plaintiff Ethan E. Trull ("Trull") filed a putative class action alleging that in early 1996 he purchased a package containing both a computer joystick manufactured by Microsoft Corporation ("Microsoft"), the Sidewinder 3D Pro (the "Sidewinder"), and a computer game manufactured by Activision, MechWarrior 2. Trull alleges that he could not get the joystick and game to work properly together on his personal computer.

On May 19 and May 22, 1997, respectively, Microsoft and Activision answered Trull's complaint. In their answers both defendants included numerous affirmative defenses. It is the timing of Trull's motion as well as the sufficiency of Microsofts' and Activisions' affirmative defenses that are [\*3]at issue in this ruling.

DISCUSSION

The court may strike from any pleading any "insufficient defense or any redundant, immaterial, impertinent,

or scandalous matter." Fed. R. Civ. P. 12(f). Motions to strike are viewed with disfavor because the striking of a portion of a pleading is a drastic measure. 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 1380 (1990). However, when allegations bear no relation to the controversy or may cause undue prejudice to the objecting party, those allegations may be stricken. *Talbot v. Robert Matthews Distrib.*, 961 F.2d 654, 664 (7th Cir. 1989). Rule 12(f) reads, "Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter. Fed. R. Civ. P. 12(f).

At the outset Microsoft and Activision have both requested that Trull's motion be denied based on timeliness. The time[\*4] span between May 19th and July 3, 1997 is well after the June 12, 1997 expiration of the twenty-day limitation period provided by Rule 12(f) and it is undisputed that plaintiffs have never sought an extension or argued that service was incomplete. Further, a review of the asserted defenses, timely pled, reveals that they clearly relate to the allegations in plaintiffs' complaint and they fulfill the notice pleading requirements of Fed. R. Civ. Pro. 8. Likewise, this court finds that plaintiff will not be prejudiced by denial of this motion. Prejudice results where the challenged allegation has the effect of confusing the issues or is so lengthy and complex that it places an undue burden on the responding party. *VPHI, Inc. v. National Educ. Training Group, Inc.*, 1995 U.S. Dist. LEXIS 1365, No. 94 C 5559, 1995 WL 51405, at \*3 (N.D. Ill. June 20 1995). Given that discovery into class issues has just commenced there is no risk of prejudice. It is true that courts have read Rule 12(f) to allow a district court to consider a motion to strike at any point in the case, e.g., *FDIC v. British-American Corp.*, 744 F. Supp. 116, 117 (E.D.N.C. 1990); *National Union Fire Ins. v. Alexander*, 728 F. Supp. 192, 194 (S.D. N.Y. 1989);[\*5]

and *Krauss v. Keibler-Thompson Corp.*, 72 F.R.D. 615, 617 (D. Del. 1976) but this is traditionally upon the court's own initiative. Further, in this district the 20 day limitation set forth in the rule has been followed. *Circuit Systems, Inc. v. Mescalero Sales, Inc.*, 925 F. Supp. 546 (N.D. Ill. 1996) (Judge Norgle). Here, plaintiffs' were simply late with their motion and this in no way triggers an exception to the rule. There is no acceptable reason for plaintiffs' failure to comply with Rule 12 (f)'s 20 day limitation.

Finally, plaintiffs ask this court in the alternative to treat their motion to strike as a motion for partial summary judgment. But plaintiffs have failed to comply with the requirements of Fed. R. Civ. Pro. 56 and Local Rule 12(m). The factual predicate for such a dispositive motion is therefore lacking. Thus, it is recommended that plaintiff's partial motion for summary judgment also be denied.

#### CONCLUSION

For the reasons set forth above it is hereby recommended that Trull's motion to strike defendants' affirmative defenses and in the alternative for summary judgment be denied.

Respectfully submitted,

DATE: JANUARY 12, 1998[\*6]

RONALD A. GUZMAN

United States Magistrate Judge

Any objections to the Report and Recommendation must be filed with Judge Charles R. Norgle, Sr. within ten (10) days of receipt of this notice. See Fed.R.Civ. P. 72(b); 28 U.S.C. § 636(b)(1). Failure to object constitutes a waiver of the right to appeal. *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).