IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No. 12012447CI-011

vs.

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.
_____/

PLAINTIFF TERRY BOLLEA'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

Pursuant to Florida Rule of Civil Procedure 1.140(f), Plaintiff Terry Bollea known professionally as Hulk Hogan ("Mr. Bollea"), moves to strike certain legally insufficient affirmative defenses asserted by Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio (together, "Gawker Defendants"), and in support states as follows:

1. In their Amended Answers filed July 17, 2015, Gawker Defendants have pleaded two defenses—"fraud on the court" and a defense based on recent amendments to Florida's Strategic Lawsuits Against Public Participation ("SLAPP") statute—both of which are legally unsupportable, and should be stricken. Gawker Defendants raised these defenses for the same reasons they have done so much else in this case: to inject irrelevant and prejudicial issues and avoid a trial on the merits. The issues presented in this case are whether Gawker Defendants invaded Mr. Bollea's privacy by publishing secretly recorded footage of him naked and having

sex, whether Gawker Defendants' conduct was protected by the First Amendment, and Mr. Bollea's damages. Gawker Defendants' newly raised defenses have no bearing on these issues, and should be stricken.

2. "Fraud on the court" is not an affirmative defense, and should not be presented to the trier of fact at trial. Rather, courts have inherent, but strictly limited, authority to sanction litigants who commit certain kinds of fraud upon the court. This doctrine applies in extremely narrow circumstances (namely, when there has been demonstrably egregious, fraudulent conduct with respect to discovery on the central issues of the case) which are not present in this case. Instead, Gawker Defendants are trying to: (a) use alleged inconsistencies in various discovery materials (something that frequently occurs in contested lawsuits) as an excuse to inject the irrelevant and highly prejudicial issue of Mr. Bollea's alleged use of offensive language into the case; and (b) improperly present a one-sided description of Defendants' discovery disputes with Mr. Bollea to the jury in an effort to try to make him look bad.

3. Likewise, Florida's recent amendments to its SLAPP statute do not create an affirmative defense. Florida's amended SLAPP statute merely provides for an expedited procedure for motions to dismiss and for summary judgment in certain types of cases. However, these recent amendments cannot be applied retroactively to this case and, even if they could be, they do not provide any sort of affirmative defense at trial because Gawker Defendants have already availed themselves of all of the protections the statute affords: the ability to file a Motion to Dismiss and/or Motion for Summary Judgment.

I. STANDARD FOR MOTION TO STRIKE

4. In Florida, "[a] party may move to strike or the court may strike redundant, **immaterial**, **impertinent**, or **scandalous** matter from any pleading at any time." Fla. R. Civ. P.

1.140(f) (emphasis supplied). A motion to strike an affirmative defense for failure to state a legally sufficient defense is authorized by Rule 1.140(b), Florida Rules of Civil Procedure. *See also*, *Chris Craft Indus., Inc. v. Van Valkenburg*, 267 So.2d 642, 645 (Fla. 1972).

5. To state a legally sufficient affirmative defense, a defendant must allege the elements of a defense recognized by law and, in addition, must plead those elements with the same degree of certainty and particularity that applies to the claim for relief to which the defendant is responding. *Am. Nat'l Growers Corp. v. Harris*, 120 So.2d 212, 214 (Fla. 2d DCA 1960); *Zito v. Washington Fed. Savings & Loan Ass'n*, 318 So.2d 175, 176 (Fla. 3d DCA 1975).

6. Further, "the pleader must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be proved in order to provide the latter with a fair opportunity to meet it and prepare his evidence." *Id.*

7. Florida courts have uniformly held that certainty is required when pleading affirmative defenses, and an affirmative defense which pleads conclusions of law unsupported by ultimate facts is legally insufficient and should be stricken. *Cady v. Chevy Chase Savings & Loan, Inc.*, 528 So.2d 136, 138 (Fla. 4th DCA 1988); *Bliss v. Carmona*, 418 So.2d 1017, 1019 (Fla. 3d DCA 1982).

8. Affirmative defenses do not simply deny the facts supporting an opposing party's claim but, rather, they raise some new matter which defeats an otherwise apparently valid claim. *Wiggins v. Portmay Corp.*, 430 So.2d 541, 542 (Fla. 1st DCA 1983).

II. THE "FRAUD ON THE COURT" DEFENSE SHOULD BE STRICKEN.

9. Gawker Defendants each pleaded an affirmative defense of "Fraud on the Court" (twenty-third affirmative defense). Gawker Defendants have not pleaded any facts in support of the defense, and specifically requested "sanctions" as the remedy for the alleged "fraud."

A. Fraud on the Court is Not an Affirmative Defense

10. The doctrine of fraud on the court is a **sanction**, not an affirmative defense. *Rocka Fuerta Construction, Inc. v. Southwick, Inc.*, 103 So.3d 1022, 1024 (Fla. 5tth DCA 2012) (describing doctrine as an "extreme sanction"); *Gilbert v. Eckerd Corp.*, 34 So.3d 773, 775 ("Such sanction may be imposed only on a clear showing of fraud, pretense, collusion, or similar wrongdoing.") (internal quotation omitted). It derives from the Court's inherent powers, and is not a matter to be presented at trial to a jury. *Bologna v. Schlanger*, 995 So.2d 526, 528 (Fla. 5th DCA 2008) ("[A] trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court."); *Arzuman v. Saud*, 843 So.2d 950, 952 (Fla. 4th DCA 2003). *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So.2d 701, 703 (Fla. 4th DCA 1995) (citing *Emerson Electric Co. v. Garcia*, 623 So.2d 523 (Fla. 3d DCA 1993) (evidence related to history of pre-trial discovery should normally not be a matter submitted for the jury's consideration).

11. As a matter of law, because fraud on the court is not an affirmative defense, it should be stricken from Gawker Defendants' Amended Answers. *Cherubino v. Fenstersheib & Fox, P.A.* 925 So.2d 1066, 1068 (Fla. 4th DCA 2006) (holding that fraud on the court is raised in a motion to dismiss).

B. Independently, Fraud on the Court Does Not Apply to Collateral Issues

12. A "fraud on the court" occurs where it can be demonstrated clearly and convincingly, that a party has deliberately set in motion an unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense. *Laschke v. R.J. Reynolds Tobacco Co.*, 872 So.2d 344, 346 (Fla. 2d DCA 2004).

13. Moreover, this "unconscionable scheme" must be "directly related to the central issue in the case." *Ramey v. Haverty Furniture Cos.*, 993 So.2d 1014, 1019 (Fla. 2d DCA 2008); *accord Gilbert*, 34 So.2d at 775 ("The scheme must go to the very core issue at trial.").

14. Here, Gawker Defendants' fraud on the court defense appears to be based on alleged inconsistent statements relating to the offensive language issue. This Court has repeatedly ruled that Mr. Bollea's alleged use of offensive language is not a central issue in the case, and is not relevant to the case at all, and, on that basis, has restricted discovery on the issue and excluded the evidence from the trial in this action. Thus, Gawker Defendants cannot establish fraud on the court with this collateral issue.

15. Further, cases involving circumstances that are ambiguous and do not demonstrate clearly that a fraud has occurred do not warrant sanctions. *Laschke*, 872 So.2d at 346; *Gehrmann v. City of Orlando*, 962 So.2d 1059, 1060-61 (Fla. 5th DCA 2007); *Amato v. Intindola*, 854 So.2d 812 (Fla. 4th DCA 2003). At worst, it appears that Gawker Defendants intend to raise inconsistent statements as the basis for their assertion of fraud upon the Court which would only amount to impeachment.

III. THE "ANTI-SLAPP STATUTE" DEFENSE SHOULD BE STRICKEN.

16. Gawker Defendants improperly seek to avail themselves of July 2015 amendments to Fla. Stat. § 768.295, which provide for an expedited motion to dismiss and summary judgment procedure for meritless lawsuits filed for the purpose of chilling First Amendment rights ("SLAPP suits"), and further provides that a prevailing party with respect to such a motion may recover attorney's fees in connection with the dispositive motion.

17. Section 768.295 is not an affirmative defense. Instead, it is a mechanism that provides for expedited review and disposition of SLAPP suits. "A person or entity sued by a

governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. A person or entity may move the court for an order dismissing the action or granting final judgment in favor of that person or entity. The person or entity may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant's or governmental entity's lawsuit has been brought in violation of this section." Fla. Stat. § 768.295(4). There is no provision for an affirmative defense, or an award of attorney's fees after trial.

18. Regardless, Gawker Defendants have already availed themselves of all the protections this statute affords. Their motion to dismiss was heard and denied. Their motions for summary judgment were heard and denied.

19. Mr. Bollea's claims undeniably have merit. He was even granted leave to amend to assert claims for punitive damages against Gawker Defendants based on a record showing of evidence which substantiates his claims.

20. Independently, Gawker Defendants cannot take advantage of the July 2015 amendments to Section 768.295. Statutes are applied retroactively **only** where there is an expressed legislative intent in the plain language of the statute. *Florida Insurance Guaranty Ass'n v. Devon Neighborhood Ass'n*, 67 So.3d 187, 194 (Fla. 2011) (amendment to insurance statutes that contained no language indicating retroactivity was given prospective effect only). "In the absence of clear legislative intent to the contrary, statutes are presumed to apply prospectively only." Fla. Jur. § 394.

21. The July 2015 amendments to Section 768.295 extending the anti-SLAPP law to private lawsuits, were enacted long after this case was filed and after Gawker Defendants' summary judgment motions were already denied. They do not contain any language whatsoever

indicating that the legislature intended a retroactive effect. Accordingly, the amendments do not apply to this action, and Gawker Defendants' defense should be stricken.

IV. CONCLUSION

For the foregoing reasons, Mr. Bollea respectfully requests that the Court strike Gawker Defendants' "Fraud on the Court" and "anti-SLAPP statute" defenses under Florida Rule of Civil Procedure 1.140(f).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 30th day of October, 2015 to the following:

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