

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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DONALD R. FOSHEE, and CAROLYN L.	)	
FOSHEE, MARILYN R. WILLIS, SYLVIA	)	
J. YEWELL, MERVIN D. YEWELL,	)	
MERVIN DWIGHT YEWELL, LOIS I.	)	
YEWELL,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 09-2674-JPM-dkv
	)	
FORETHOUGHT FEDERAL SAVINGS BANK,	)	
FORETHOUGHT LIFE INSURANCE	)	
COMPANY and COMMUNITY TRUST AND	)	
INVESTMENT COMPANY	)	
	)	
Defendant.	)	

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REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION TO STRIKE

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Before the court is the March 23, 2010 motion of the plaintiffs to strike both the Reply filed by defendants Forethought Federal Savings Bank ("Forethought Bank") and Forethought Life Insurance Company ("Forethought Life") (collectively "Forethought defendants") in support of their Motion to Dismiss, (Doc. No. 24), and the Declaration of Max Shelton dated March 1, 2010, (Doc. No. 26). The plaintiffs move to strike the Reply on the basis that it asserts new facts and new evidence which are inappropriate to consider on a motion to dismiss. The plaintiffs move to strike the Shelton Declaration for the same reason and also because it contains statements which are either pure speculation or inadmissible hearsay. The Forethought defendants filed a timely

response in opposition. The motion was referred to the United States Magistrate for report and recommendation.

#### I. FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs are purchasers of pre-need funeral and burial service contracts offered by Forest Hill Funeral Home ("Forest Hill") and Tennessee Cemeteries, Inc. (collectively "Funeral Homes"). Under the terms of these pre-need contracts, the plaintiffs pre-paid for funeral expenses in return for the Funeral Homes' promise to provide funeral or burial services or related merchandise at the time of death. In accordance with Tennessee law, the Funeral Homes then placed the monies which the plaintiffs used to purchase the pre-need contracts in various trust accounts. In or about 1998, the Funeral Homes transferred the various pre-need contract trust accounts to defendant Forethought Federal. Forethought Federal then allegedly used the trust account funds to purchase life insurance policies from Forethought Life upon the lives of the pre-need contract holders. The plaintiffs allege that these purchases were made without the knowledge and consent of the pre-need contract holders in violation of both the trust agreement and Tennessee law.

On or about December 7, 2004, the Funeral Homes substituted defendant Community Trust and Investment Company ("Community Trust") as trustee for the pre-need contracts trusts. All trust monies were then transferred into the possession of Community

Trust. In or about February 2005, Community Trust allegedly caused the life insurances policies issued by Forethought Life to be cash surrendered, and the cash transferred to Community Trust. The plaintiffs allege that incident to this transaction, Forethought Life imposed substantial surrender charges, which depleted the corpus of the pre-need contract trust funds. Thereafter, Community Trust allowed the trust monies to be withdrawn by one or more individuals, further reducing the balance of the trusts.

The plaintiffs filed this class action complaint on October 10, 2009, naming as defendants Forethought Federal, Forethought Life, and Community Trust. (Doc. No. 1.) Based on the facts recited above, the plaintiffs allege a breach of fiduciary duty, negligence or wantonness, conversion, concealment or fraud by suppression, civil conspiracy, unjust enrichment, and violations of the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101, *et seq.*, on the part of the defendants in handling the pre-need contract trust funds. The plaintiffs seek actual and punitive damages, pre and post judgment interest, as well as their costs and attorney fees in pursuing the action.

On January 15, 2010, the Forethought defendants filed a motion to dismiss the plaintiffs' complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. No. 13.) In support of their motion, the defendants attached, among other items, a copy of the Second Supplemental Declaration of Max

Shelton, from a previous action.<sup>1</sup> (Doc. No. 13-3.) The plaintiffs responded in opposition. (Doc. No. 18.) The Forethought defendants then concurrently filed both a reply memorandum in support of their motion to dismiss ("the Reply") and the March 1, 2010 affidavit of Max Shelton, Receiver for Forest Hill (the "Shelton Declaration"). (Doc. Nos. 24, 25.)

The plaintiffs now move to strike both the Reply and the Shelton Declaration. The plaintiffs argue that both the Reply and the Shelton Declaration present new arguments not previously addressed in the motion to dismiss or their response and that the Shelton Declaration is based on hearsay, unsupported speculation, and incomplete and misleading quotations from documents not in the record. In the alternative, the plaintiffs argue that because consideration of the Shelton Declaration would convert the Forethought defendants' motion to dismiss into a motion for summary judgment under Rule 56, the court should allow them to conduct discovery in order to properly respond.

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<sup>1</sup> The previous action involved four separate claims which were consolidated into one action, *Parent, et al v. Tennessee Cemeteries, Inc., et al*, No. 2:06-cv-02612-JPM-tmp (W.D. Tenn.), and involved substantially similar claims to the case at bar. On August 20, 2009, the district court dismissed, without prejudice, the claims of two of the plaintiffs in the current action, Donald R. Foshee and Carolyn L. Foshee. (See *Parent*, No. 2:06-cv-02612-JPM-tmp, Doc. No. 157, Order Granting in Part and Denying in Part Defs. Mot. to Dismiss, Order Denying Pls. Mot. to Remand.) The plaintiffs do not challenge the court's consideration of this document in ruling on the Forethought defendants' Motion to Dismiss.

## II. ANALYSIS

### A. Procedural Impropriety of a Motion to Strike

As a general rule, a motion to strike is not an authorized or proper way to defeat supporting documents which one party finds objectionable. 5A Wright and Miller, *Federal Practice and Procedure*: Civil 2d § 1380 (West 1990). The only provision within the Federal Rules which provides for striking an item is Rule 12(f). That rule authorizes the court to "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). Affidavits and/or attached exhibits accompanying memoranda in support of motions for summary judgment, or the memoranda themselves for that matter, however, are not among the documents identified as "pleadings" by the Federal Rules. See FED. R. CIV. P. 7(a). Accordingly, courts in this district have consistently held that a motion to strike is not the proper procedural device for countering exhibits or affidavits attached to memoranda in support of motions. See, e.g., *Porter v. Hamilton Beach/Proctor-Silex, Inc.*, No. 01-2970 MaV, 2003 WL 21946595, 2003 U.S. Dist. LEXIS 14089, \*5-6 (W.D. Tenn. July 28, 2003) (finding that a motion to strike was "not the proper procedural device" by which to object to exhibits offered to support a motion). See also *Moore v. Baptist Mem. Coll. of Health Scis.*, No. 08-2311 MaP, 2010 WL 100551, 2010 U.S. Dist. LEXIS 1219, \*8, n.2 (W.D. Tenn. Jan. 7, 2010) (finding

that a deposition transcript is not a pleading that is subject to a motion to strike as contemplated by Rule 12(f) of the Federal Rules of Civil Procedure); *Scott v. Dress Barn*, No. 04-1298, 2006 WL 870684, 2006 U.S. Dist. LEXIS 19501, \*2 (W.D. Tenn. Mar. 31, 2006) (citations omitted) (refusing to strike an affidavit because it is not a pleading).

Courts presented with inadmissible evidence should disregard the evidence rather than striking it from the record. *Lombard v. MCI Telecom. Corp.*, 13 F. Supp. 2d 621, 625 (N.D. Ohio 1998) (citing *State Mut. Life Assur. Co. of Am. v. Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979)). In order for a party to preserve its objection to a court's consideration of material which it believes to be inadmissible, "it is enough for the movant to make its objections known in a reply memorandum if one is permitted, in open court if a hearing is held, or otherwise." *Porter*, 2003 U.S. Dist. LEXIS at \*6 (citing *Lombard*, 13 F. Supp. 2d at 625). The court therefore recommends that the plaintiffs' motions to strike be denied, and that the plaintiffs' objections to the documents be noted on the record.

B. The Shelton Declaration

Because there are no specific procedures or rules governing evidentiary rulings in connection with a motion to dismiss, courts consistently look to Rule 56 for guidance. *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 327 (6th Cir. 1990); *Crawford*

*v. United States*, 796 F.2d 924, 928 (7th Cir. 1986); *Mclaughlin v. Copeland*, 435 F. Supp. 513, 521 n.1 (D. Md. 1977). Rule 56(e) delineates the requirements for affidavits submitted in support of or in opposition to summary judgment. The rule provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." FED. R. CIV. P. 56(e). It further provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." *Id.* Whenever the court receives accompanying affidavits with a memorandum either in support of or in opposition to a motion for summary judgment, it is required to evaluate the contents and determine whether the affidavits meet the relevant criteria under the Federal Rules of Civil Procedure.

Paragraph 12 of the Shelton Declaration contains Shelton's claim that the Funeral Homes "intend[] to honor all pre-need agreements as written" and assuring the court that "Plaintiffs will receive the goods and services for which they contracted pursuant to their pre-need contracts with [the Funeral Homes]." The plaintiffs object to these statements arguing that they are based on "rank speculation." The plaintiffs contend that Shelton has no analysis or facts to support these statements and has produced no

documents showing that the trust accounts will have sufficient assets to meet the Funeral Homes' obligations when they come due. In response, the Forethought defendants contend that Shelton, in his capacity as Receiver, has sufficient personal knowledge of the trusts on which to base his statements. Moreover, they argue that during his time as Receiver, Shelton has caused the Funeral Homes to honor these contracts and has stated on several occasions that the Funeral Homes will continue to honor these contracts as they come due.

It appears to the court that the Receiver's statements in question are based on personal knowledge as required by Rule 56(e). The Shelton Declaration sets forth that Shelton has served as the Receiver of the Funeral Homes since his appointment to that position on February 27, 2007. As Receiver, Shelton has the responsibility to take charge of, control, and manage the Funeral Homes for the purpose of bringing them into compliance with Tennessee law. Shelton also has personal knowledge of whether he has caused the Funeral Homes to fulfill their obligations under pre-need contracts during his time as Receiver. Due to his position as receiver, Shelton may also testify to Funeral Homes' financial condition and their abilities to meet future financial obligations. Such opinion testimony is within Shelton's knowledge of the financial affairs of the Funeral Homes gained in his capacity as receiver and is helpful to the court's determination of

the issue at hand. See, e.g., *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3rd Cir. 1993). Accordingly, the court recommends that the plaintiffs' objection to paragraph 12 of the Shelton Declaration be overruled.

The plaintiffs also object to paragraph 9 of the Shelton Declaration arguing that the statement is based on hearsay. In that paragraph, Shelton states:

Prior to Forethought Federal Savings Bank (sic) appointment as trustee in 1998, the pre-need contract holders received yearly Form 1099s reflecting the earnings on the trust funds. It is my understanding that after the insurance policies were purchased, Form 1099s were no longer issued. According to the information provided to me in my capacity as Receiver, numerous contract holders made inquiry with Forest Hill regarding the 1099s and were advised of the purchase of insurance to the point that it was commonly known among the pre-need contract holders.

(Doc. No. 26 ¶ 9.) In response, the Forethought defendants argue that the information is admissible as Shelton has learned of the inquiries that the Funeral Homes have received from contract holders while serving as Receiver over the past three years.

Hearsay is a statement made by an out-of-court declarant, which is "offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). The statements offered in paragraph 9 of the Shelton Declaration clearly fall within this definition. The recitation that in response to the contract owners' inquiries about the 1099s someone advised them of the purchase of insurance is clearly a statement offered for no other

purpose than to prove the truth of the matter asserted. None of the hearsay exceptions found in Rules 803, 804 or 807 are applicable, and the Forethought defendants have not cited any authority to the contrary. Therefore, the court recommends that the plaintiffs' objection to paragraph 9 of the Shelton Declaration be sustained.

C. New Evidence

The plaintiffs object to both the Reply and the Shelton Declaration in their entirety on the grounds that they raise "new arguments and new 'facts'" not contained within the motion to dismiss or the plaintiffs' response to the motion to dismiss. Courts may properly consider a reply brief or affidavit which does not present new evidence, but "'merely responds to matters placed in issue by the opposition . . . and does not spring upon the opposing party new reasons for the entry of [judgment].'" *Memphis Publishing Company v. Newspaper Guild, Local 33091*, No. 04-2620 BP, 2005 WL 3263878, 2005 U.S. Dist. LEXIS 31958, \* 5-6 (W.D. Tenn. Dec. 1, 2005) (quoting *Baugh v. City of Milwaukee*, 823 F. Supp. 1452, 1456-57 (E.D. Wis. 1993)). The question before the court is therefore whether these documents present new evidence, which was not placed at issue by the plaintiffs' response to the motion to dismiss or the motion to dismiss itself.

In their response to the Forethought defendants' allegations that the plaintiffs lacked standing, the plaintiffs set forth facts

and arguments attempting to show that the defendants' actions caused them to suffer a concrete and justiciable harm. The plaintiffs centered their arguments around their contention that the defendants' illegal acts had depleted the trust funds to the point that the Funeral Homes could not possibly fulfill their obligations under pre-need contracts. The plaintiffs also contend that at least some of the named plaintiffs' contracts contain clauses entitling them or their estate to receive any overage left in their trust account after payment is rendered for funeral services and merchandise and that any sum they may have otherwise received has been lost due to the depletion of the trust fund assets by the Forethought defendants.

Both the Forethought defendants' reply and the Shelton Declaration filed in support thereof contain facts and arguments which directly rebut the plaintiffs' allegations in their response. Specifically, the Shelton Declaration contains the Receiver's contentions that: (1) under the Receivership, the Funeral Homes have continued to honor pre-need contracts according to their terms; (2) the Receivership now controlling the trust assets has been fulfilling its responsibility to trace, recover, and marshal trust fund assets; (3) the Receivership bears the economic risk associated with the Funeral Homes' obligations under the pre-need contracts; and, (4) the trust assets sought by the plaintiffs actually belong to the Receivership. The Reply relies on these

facts to reassert its previous argument that the plaintiffs lack standing. Because the facts and arguments contained in the Reply and the Shelton Declaration are merely responses to matters placed in issue by the plaintiffs' response, both documents may be considered by the district court.

The plaintiffs further argue, however, that it would be improper for the court to consider the Reply and the Shelton Declaration in connection with the Forethought Defendants' motion to dismiss without allowing them discovery. The plaintiffs concede that the court may look beyond the complaint and consider other evidence in ruling on a motion to dismiss. *See Gentek Bldg. Prods. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007); *Humphrey v. United States Atty. Gen.'s Office*, 279 F. App'x 328, 331 (6th Cir. 2008). They insist, however, that the volume of material that comprises the Shelton Declaration requires the court to allow them to conduct discovery before requiring them to answer.

The Forethought defendants' motion to dismiss cites as its basis both Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. Courts consider each rule to be both procedurally and substantively distinct. *See Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). Indeed, because the determination that the court lacks subject matter jurisdiction moots all other pending issues, courts are required to rule on Rule 12(b)(1) motions before addressing motions brought pursuant to Rule

12(b)(6). *Bell v. Hood*, 327 U.S. 678, 682 (1946); *Moir v. Greater Cleveland Reg. Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

A Rule 12(b)(1) motion can make two separate challenges: (1) a facial challenge concerning only the complaint itself, and (2) a factual challenge which calls into question a plaintiff's alleged basis for subject matter jurisdiction. *Id.*; *Wright v. United States*, No. 95-5175, 1996 WL 172119, 1996 U.S. Dist. LEXIS 12438, \*9-10 (6th Cir. April 11, 1996). "In reviewing a facial attack, a trial court takes the allegations in the complaint as true." *Ohio Nat'l*, 922 F.2d at 325. In contrast, under a factual attack, as in this case, no presumption of truthfulness attaches to the complaint, and the district court is required to weigh the evidence presented to determine whether the factual basis for subject matter jurisdiction is present. *Id.*; *Ogle v. Church of God*, 153 F. App'x 371, 375 (6th Cir. 2005). To resolve any factual disputes, the court may consider other evidence submitted by the parties in the form of affidavits or exhibits. *Id.*; *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 916 (6th Cir. 1986). The consideration of such evidence in connection with a Rule 12(b)(1) motion does not convert the motion into one for summary judgment, even where the court holds a limited evidentiary hearing, as is within its discretion to do so. *Ohio Nat'l*, 922 F.2d at 925; *Rogers*, 798 F.2d at 916; *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981); *Mortenson v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir.

1977).

Here, the Forethought defendants' motion to dismiss attacks the factual basis for the court's subject matter jurisdiction over the plaintiff's claims pursuant to Rule 12(b)(1) as well as calls into question whether the plaintiffs' class action complaint states a claim upon which relief may be granted under Rule 12(b)(6). As noted above, the district court is obligated to determine the issue of subject matter jurisdiction before turning to the defendants' Rule 12(b)(6) motion. In so doing, the district court may consider outside evidence submitted by either party. The court therefore recommends that the district court overrule the plaintiffs' objections to both the Reply and the Shelton Declaration and consider both documents for the limited purpose of ruling on the Forethought defendants' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

### III. RECOMMENDATION

Based on the foregoing, the court recommends that the plaintiffs' motion to strike be denied and their objections to the Reply and the Shelton Declaration be noted on the record. The court further recommends that with the exception of paragraph 9 of the Shelton Declaration, the district court consider both documents in ruling on the Forethought Defendants' motion to dismiss for lack of subject matter jurisdiction. In order to properly segregate the issues presented, the court recommends further that the district

court hold a limited evidentiary hearing on the issue of subject matter jurisdiction alone, as consideration of the Shelton Declaration and its exhibits in connection with a Rule 12(b)(6) motion would convert the motion into motion under Rule 56, which may then necessitate that the court first give the parties sufficient notice and opportunity to conduct discovery. See *Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2003).

Respectfully submitted this 7th day of May, 2010.

s/ Diane K. Vescovo  
DIANE K. VESCOVO  
UNITED STATES MAGISTRATE Judge

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.