UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER MORTGAGE CORPORATION,

Case No.: 3:09-bk-7047-JAF

Debtor.
_____/

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON AND LONDON MARKET INSURANCE COMPANIES, etc.

Plaintiffs,

v.

Adv. Pro. No. 3:10-ap-243-JAF

TAYLOR BEAN & WHITAKER MORTGAGE CORPORATION, FEDERAL HOME LOAN MORTGAGE CORPORATION, GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, and SOVEREIGN BANK,

Defendants.
_____/

ORDER GRANTING IN PART MOTION TO STRIKE DEFENDANT SOVEREIGN BANK'S AFFIRMATIVE DEFENSES

This proceeding is before the Court upon the Motion to Strike Defendant Sovereign Bank's Affirmative Defenses (Doc. 220, Motion to Strike; *see also* Doc. 206, Answer and Affirmative Defenses), filed by Plaintiffs Certain Underwriters of Lloyd's, London and London Market Insurance Companies (collectively, the "Underwriters"). Defendant Sovereign Bank ("Sovereign") filed a response in opposition (Doc. 250)—to which, the Underwriters filed a Reply brief (Doc. 253). For the reasons that follow, the Motion to Strike (Doc. 220) will be granted in part.

Background

On August 24, 2009, TBW filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, thereby commencing Case No. 3:09-bk-7047-JAF. Included in the assets of

TBW's bankruptcy estate are certain fidelity bonds and insurance policies that cover TBW for various types of losses attributable to employee dishonesty (collectively, the "Bonds").[1] The Underwriters' Bonds provided base level, or primary, coverage and also the first level of excess coverage (Doc. 184, Exs. 1-17). By way of the Second Amended Complaint (Doc. 184), the Underwriters contend, *inter alia*, that TBW, in its initial applications for coverage under the Bonds, failed to disclose to the Underwriters the conduct upon which it relies to establish coverage (Doc. 184 at 2-3, 30).

Consequently, the Underwriters filed the instant Adversary Proceeding seeking, *inter alia*, a declaration that TBW's material misrepresentations and omissions void the Bonds and/or preclude coverage (Doc. 184 at 28-33). Because Sovereign is a named loss payee under the Bonds, and therefore has a potential interest in TBW's recovery, the Underwriters included Sovereign as a defendant in this Adversary Proceeding to ensure that any judgment rescinding the Bonds applies equally to Sovereign (Doc. 220 at 2).

Discussion

Rule 12(f) of the Federal Rules of Civil Procedure (made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure) states: "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Consequently, a defense will be stricken if it is insufficient as a matter of law. *Anchor Hocking Corp. v. Jacksonville Elec. Auth.*, 419 F. Supp. 992, 1000 (M.D. Fla. 1976). In addition, affirmative defenses are subject to the general pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure

[1] The Bonds are more particularly described in the Second Amended Complaint (Doc. 184 at 2-3). The Underwriters subscribe to the Bonds.

and will be stricken if they recite "no more than bare-bones conclusory allegations." *Microsoft Corp. v. Jesse's Computers & Repair, Inc.*, 211 F.R.D. 681, 684 (M.D. Fla. 2002) (*internal quotations and citations omitted*). While defendants are not required to set forth detailed facts, defendants must provide fair notice of the defense and the ground(s) upon which it rests. *Id*.

An affirmative defense is established when a defendant admits to the essential facts of the complaint, "but sets forth other facts in justification or avoidance." *Boldstar Technical, L.L.C. v. Home Depot, Inc.*, 517 F. Supp. 2d 1283, 1291 (S.D. Fla. 2007). A defense that simply points out defects or flaws in the complaint is not an affirmative defense. *Flav-O-Rich, Inc. v. Rawson Food Serv., Inc. (In re Rawson Food Serv., Inc.)*, 846 F.2d 1343, 1349 (11th Cir. 1988).

In its Answer, Sovereign asserts eight (8) affirmative defenses (Doc. 206 at 18-19). Sovereign's First Affirmative Defense provides that the Underwriters have "failed to comply with all conditions of the 2008 Bonds" (Doc. 206 at 18). While Sovereign has not provided any detailed facts in support of this defense, it does provide the Underwriters with fair notice and it apprises them of the grounds upon which the defense rests. The Court recognizes additional information regarding this defense may come to light during the discovery process. Therefore, this defense will not be stricken.

Sovereign's Second Affirmative Defense provides the Underwriters' claims "are barred by the doctrines of latches, waiver and/or estoppel" (Doc. 206 at 18). This defense is a bare-bones conclusory statement made without reference to any facts; thus, it is insufficient. Consequently, the Second Affirmative Defense will be stricken without prejudice to amend. Sovereign's Third Affirmative Defense states the Underwriters' claims are barred because the complaint "fails to state a cause of action" (Doc. 206 at 18). This defense simply points out defects, or flaws, in the Second

Amended Complaint; therefore, it is not an affirmative defense. "An affirmative defense raises matters extraneous to the plaintiff's *prima facie* case . . . . [Other] defenses negate an element of the plaintiff's prima *facie case*; these defenses are excluded from the definition of affirmative defense in Fed. R. Civ. P. 8(c)." *In re Rawson Food Serv., Inc.*, 846 F.2d at 1349. The Court will, therefore, strike Sovereign's Third Affirmative Defense as impertinent. The Court, however, will accept Sovereign's statement in this regard as a specific denial of the allegations contained in the Second Amended Complaint.

Sovereign's Fourth Affirmative Defense provides simply that the Underwriters' claims are "barred by the doctrine of unclean hands" (Doc. 206 at 18). To assert a defense of unclean hands, however, a defendant must demonstrate that the plaintiff's wrongdoing is directly related to the claim against which it is asserted. *Calloway v. Partners Nat'l Hlth. Plans*, 986 F.2d 446, 451 (11th Cir. 1993). Here, Sovereign has asserted no facts in support of this defense. Thus, Sovereign's Fourth Affirmative Defense will be stricken without prejudice to amend.

With respect to Sovereign's Fifth, Sixth, and Eighth affirmative defenses, the Court would note that Sovereign does not even argue in support of sustaining these defenses in its response in opposition to the Motion to Strike (*see* Doc. 250). These defenses are boilerplate defenses, which were made without any factual support. Accordingly, the Court will strike Sovereign's Fifth, Sixth, and Eighth affirmative defenses with leave to amend. Sovereign's Seventh Affirmative Defense, that it "expressly reserves all other applicable affirmative defenses," will be stricken as redundant. Should discovery reveal Sovereign is entitled to any additional defense(s), it may, of course, file an appropriate motion with the Court.

Conclusion

For the reasons stated herein, it is **ORDERED**:

1. The Motion to Strike Defendant Sovereign Bank's Affirmative Defenses (Doc. 220) is granted in part.

2. Defendant Sovereign Bank's First Affirmative Defense is sustained.

3. Defendant Sovereign Bank's Second Affirmative Defense is stricken without prejudice to amend.

4. Defendant Sovereign Bank's Third Affirmative Defense is stricken. The Court, however, accepts Sovereign Bank's statement that the complaint fails to state a cause of action as a specific denial of the allegations contained in the Second Amended Complaint.

5. Defendant Sovereign Bank's Fourth Affirmative Defense is stricken without prejudice to amend.

6. Defendant Sovereign Bank's Fifth, Sixth, and Eighth affirmative defenses are stricken without prejudice to amend.

7. Defendant Sovereign Bank's Seventh Affirmative Defense is stricken as redundant.

8. Defendant Sovereign Bank has until **October 14, 2011** within which to amend its affirmative defenses.

DATED this 30th day of September 2011 in Jacksonville, Florida.

/s/ Jerry A. Funk

JERRY A. FUNK
United States Bankruptcy Judge

Copies to:

Denise D. Dell-Powell, Counsel for Plaintiffs, and
Danielle S. Kemp, Counsel for Defendant