

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**PETROFF TRUCKING COMPANY,)
INC.,)**

Plaintiff,)

v.)

ENVIROCON, INC. and BRIAN BELL,)

Defendants.)

CAUSE NO. 05-CV-414-WDS

MEMORANDUM & ORDER

STIEHL, District Judge:

Before the Court is plaintiff's motion for summary judgment (Doc. 41), to which defendants have responded (Doc. 42).

BACKGROUND

Plaintiff originally filed its complaint in state court. Defendants removed the matter to federal court. Plaintiff is an Illinois Corporation involved in trucking and hauling. Plaintiff executed a contract with defendant Envirocon, Inc. relating to a job in Granite City, Illinois. (Doc. 2, Ex. A). In its complaint, plaintiff alleges that Envirocon breached this contract by failing to remit to plaintiff funds owed for work done, failing to purchase various loads called for in the contract, and/or failing to use plaintiff's personnel and equipment as required by the contract. (Doc. 2, ¶ 5). Plaintiff's complaint further alleges that defendant Brian Bell was the project director for Envirocon. Count II of the complaint alleges that Bell interfered with plaintiff's business expectancy and caused Envirocon to breach its contract with plaintiff.

In his answer, Bell claims that the relief sought by plaintiff is barred by the following affirmative defenses: one, that the complaint fails to state a claim upon which relief can be

granted; two, because plaintiff has failed to mitigate its damages, if any; three, defendants did not legally or proximately cause plaintiff's alleged injury; four, the doctrine of accord and satisfaction; five, "the Subcontract Agreement expressly provides that final payment to Plaintiff would be based on a determination of final topographically surveyed quantities of actual materials placed, less progress payments made by Envirocon;" six, Bell is not a "third party" as required in a successful claim of tortious interference; seven, Bell is entitled to immunity as an employee of Envirocon; and eight, waiver and/or estoppel. Envirocon also asserted several affirmative defenses in its Answer.

Plaintiff now moves for summary judgment against defendant Envirocon on all counts, and against both defendants on their First, Second and Fourth Affirmative Defenses.¹

A. The case in chief against Envirocon.

Plaintiff seeks summary judgment in its favor on all Counts relating to defendant Envirocon.

STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party initially bears the burden to demonstrate an absence of genuine issues of material fact, indicating judgment should be granted as a matter of law. *See, Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 294 (7th Cir. 1998) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once a motion for summary judgment has been made and

¹Though defendants filed their answers separately, their stated First, Second, and Fourth Affirmative Defenses are identical. (Docs. 5 & 27).

properly supported, however, the nonmovant has the burden of setting forth specific facts showing the existence of a genuine issue for trial. *See, id.* In determining whether a genuine issue of material fact exists, the Court construes all facts in the light most favorable to the nonmoving party and draws all reasonable and justifiable inferences in that party's favor. *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995).

ANALYSIS

Plaintiff seeks summary judgment against Envirocon "on all counts;" however, only Count 1 of plaintiff's complaint is against Envirocon. In Count 1, plaintiff alleges that defendant Envirocon breached its contract with defendant by failing to remit to plaintiff funds owed for work done, failing to purchase various loads called for in the contract, and/or failing to use plaintiff's personnel and equipment, which were contracted for use. (Doc. 2, ¶ 5). In support of its motion, plaintiff asserts many "uncontroverted" facts that it purports show that Envirocon breached its duty. In its response, Envirocon also asserts many "uncontroverted" facts in its defense. The Court finds neither argument to be persuasive. When viewing the facts in the light most favorable to the nonmoving party, summary judgment is not appropriate on this Count. Genuine issues of material fact remain as to whether Envirocon breached the contract or plaintiff released Envirocon from its obligations. Plaintiff's motion for summary judgment as to Count 1 against Envirocon is, therefore, **DENIED**.

B. The Affirmative Defenses.

Plaintiff seeks summary judgment in its favor on defendants' First, Second, and Fourth Affirmative Defenses. In its argument, plaintiff refers to no facts outside the pleadings when attacking defendants' First and Second Affirmative Defenses. Of course, this is really an attack

on the pleadings, and not an attack on the merits of defendant's claims; therefore, the Court could not possibly grant summary judgment on the affirmative defenses. The Court will, however, consider plaintiff's motion for summary judgment on these affirmative defenses as a motion to strike pursuant to Federal Rules of Civil Procedure Rule 12(f).

Federal Rule of Civil Procedure 12(f) permits a district court to strike portions of a pleading "[u]pon 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." The Federal Rules do not permit a response to an answer that does not contain a counterclaim. *See* Fed. R. Civ. P. 7(a). Accordingly, plaintiff's motion should have been made within 20 days after service of Envirocon's Answer upon plaintiff, as it did not contain a counterclaim. Envirocon's Answer was served on June 16, 2005. (Doc. 5). The motion before the Court was filed on May 22, 2006, nearly a year later and, accordingly, well beyond the 20 day window. Therefore, plaintiff's motion for summary judgment as to defendants' First and Second Affirmative Defenses, which the Court construes as a motion to strike said defenses, is **DENIED** as untimely.²

When arguing it is entitled to summary judgment on defendants' Fourth Affirmative Defense, plaintiff does refer the Court to matters outside the pleadings; thus, this argument is correctly classified as a motion for summary judgment. District Courts within the Seventh Circuit "routinely entertain motions for partial summary judgment seeking the dismissal of

²The Court notes that motions to strike affirmative defenses are generally disfavored and should be granted only when the affirmative defense is insufficient on the face of the pleading. *See, e.g., Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1400 (7th Cir. 1991). "Ordinarily, defenses will not be struck if they are sufficient as a matter of law or if they present questions of law or fact." *Heller Fin., Inc. v. Midwhay Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989) (internal citations omitted).

affirmative defenses.” *Wildey v. Springs*, 1993 WL 350195 (N.D. Ill. 1993) (internal citations omitted). As the *Wildey* court explained:

Although there is reasonable debate on the propriety of granting partial summary judgment on a motion that seeks to dispose of less than an entire claim, the court finds that Rule 56(d) permits the disposition of a motion for partial summary judgment on an affirmative defense. In *Lovejoy Electronics, Inc. v. O'Berto*, 616 F. Supp. 1464 (N.D. Ill. 1985), the court explained Rule 56(d) as follows:

Although . . . commonly referred to as a "partial summary judgment," it is really no more than a pretrial adjudication, interlocutory in character, specifying certain issues to be "deemed established" for trial. 6 J. Moore & J. Wicker, *Moore's Federal Practice* ¶ 56.20 (2d ed. 1948). Its purpose is to "salvage some results from the judicial effort involved in the denial of a motion for summary judgment," and to "frame and narrow the triable issues if the court finds that such an order would be helpful to the progress of the litigation."

Id. at *1-2. This Court agrees. Because the motion presently before the Court does not attempt to partition a single claim and because the motion promotes judicial economy (at least in theory) the Court will rule on the merits of the motion.

In their Fourth Affirmative Defense, defendants plead accord and satisfaction. In its motion for summary judgment, plaintiff claims it is entitled to summary judgment on this Affirmative Defense because defendants have only one document to support this defense and it is, so plaintiff claims, inadmissible. However, plaintiff fails to argue why said document is inadmissible. Plaintiff's argument is scant, at best. As stated above, it is plaintiff's burden to support its motion and it has failed to do so. Accordingly, plaintiff's motion for summary judgment as to defendants' Fourth Affirmative Defense is **DENIED**.

CONCLUSION

Plaintiff's motion for summary judgment (Doc. 41) is **DENIED** on all grounds raised.

IT IS SO ORDERED.

DATED: October 13, 2006.

s/ WILLIAM D. STIEHL
DISTRICT JUDGE