

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

)
SMALL JUSTICE LLC,) Case No.: 1:13-cv-11701-DJC
RICHARD A. GOREN, and)
CHRISTIAN DUPONT dba)
ARABIANNIGHTS-BOSTON)
MASSACHUSETTS,)
)
Plaintiffs,)
)
vs.)
)
XCENTRIC VENTURES LLC,)
)
Defendant.)
)

**RESPONSE TO PLAINTIFFS' CROSS-MOTION
FOR PARTIAL JUDGMENT ON THE PLEADINGS**

Pursuant to Local Rule 7.1(b)(2) and this Court's October 18, 2013 Order (Doc. #23), Defendant Xcentric Ventures LLC ("Defendant") hereby responds to Plaintiffs' Cross Motion for Partial Judgment on the Pleadings (Doc. #20) ("Cross Motion"). The pleadings are not closed, so the Cross Motion is premature and must be denied.

Plaintiffs filed their first amended complaint on September 2, 2013 (Doc. #13). Defendant has not yet filed an answer. Defendant moved to dismiss on September 16, 2013 (Doc. #14). On October 15, 2013, Plaintiffs filed the five-page Cross Motion, along with a 30-page memorandum filed in support, and in opposition to Defendant's motion to dismiss (Doc. #21). Nowhere in those filings do Plaintiffs explain why the Cross Motion should be considered ripe.

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). A pleading is only a complaint or an

answer to the complaint, Fed. R. Civ. P. 7(a)(1)-(6); or, “if the court orders one, a reply to an answer.” Fed. R. Civ. P. 7(a)(7). The pleadings are not closed until all claims by any party have been answered. “Rule 7(a) provides that the pleadings are closed upon the filing of a complaint and an answer (absent a court-ordered reply), unless a counterclaim, cross-claim, or third-party claim is interposed, in which event the filing of a reply to a counterclaim, cross-claim answer, or third-party answer normally will mark the close of the pleadings.” *Sovereign Bank v. Sturgis*, 863 F. Supp. 2d 75, 80 (D. Mass. 2012) (quoting 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1367 (3d ed. 2004)).

Until the pleadings are closed, consideration of the Cross Motion would be premature. “A Rule 12(c) motion, unlike a Rule 12(b)(6) motion, implicates the pleadings as a whole.” *Aponte-Torres v. Univ. of Puerto Rico*, 445 F.3d 50, 54 (1st Cir. 2006) (citing 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1368 (3d ed. 2004)). “‘Rule 12(c) does not allow for any resolution of contested facts; rather, a court may enter judgment on the pleadings only if the uncontested and properly considered facts conclusively establish the movant’s entitlement to a favorable judgment.’” *Patrick v. Rivera-Lopez*, 708 F.3d 15, 18 (1st Cir. 2013) (quoting *Aponte-Torres*, 445 F.3d at 54). Indeed, Plaintiffs seek judgment on “two of the defendant’s affirmative defenses.” Cross Motion p. 1. But the defenses Plaintiffs anticipate, and the counterclaims Defendant may assert if its motion to dismiss is denied, are not yet pleaded.

Converting the Cross Motion to one for summary judgment at this early stage would also be improper. “Conversion of a motion for judgment on the pleadings into one for summary judgment should only occur after the parties have been offered a ‘reasonable opportunity’ to present pertinent summary judgment materials.” *Rubert-Torres v. Hosp. San Pablo, Inc.*, 205 F.

3d 472, 475 (1st Cir. 2000) (quoting Fed. R. Civ. P. 12(c)). Under that standard, Plaintiff's motion for judgment "on the present record" is untimely. Cross Motion p. 1. Plaintiffs also seek to avoid conversion. Doc. #21 p. 5 n.4. Defendant fully expects that the Cross Motion would fail on its merits, if they are ever properly presented to the Court. But that time has not come. Therefore, the Court should deny Plaintiffs' Cross Motion.

Respectfully submitted,

BOOTH SWEET LLP

November 20, 2013

/s/ Dan Booth

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2013, I electronically filed the foregoing Response to Plaintiffs' Cross-Motion for Partial Judgment on the Pleadings by using the Court's ECF system, which will send notification of such filing to, and provide service upon, Plaintiffs' attorney of record.

/s/ Dan Booth