

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re: ) Case No. 96-12660 (consolidated with  
) 96-12909 and jointly administered with  
JAMES E. LUNDEEN, SR., M.D., INC., ) 96-12918)  
et al., )  
) Chapter 11  
Debtors. )  
) Judge Pat E. Morgenstern-Clarren  
\_\_\_\_\_)  
) Adversary Proceeding No. 07-1084  
PARSHOTAM GUPTA, M.D., et al., )  
)  
Plaintiffs, )  
)  
v. ) **ORDER STRIKING JURY DEMAND**  
)  
)  
JAMES E. LUNDEEN, SR., M.D., et al., )  
)  
Defendants. )

After giving the parties an opportunity to brief the issue, the court issues this order to address the jury demand filed by defendants James and Cynthia Lundeen in this proceeding. (Docket 121, 126, 139).

The procedure for demanding a jury trial is governed by federal civil rule 38. FED. R. CIV. P. 38 (made applicable by FED. R. BANKR. P. 9015). Rule 38(b) provides that:

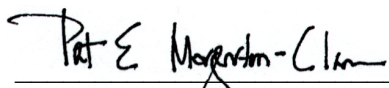
Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be endorsed upon a pleading of the party.

Under this rule, where parties have a right to jury trial, they must make their demand for one within ten days of the “last pleading directed to such issue.” The failure to do so constitutes a

waiver of a trial by jury. FED. R. CIV. P. 38(d). Under federal civil rule 7, the term “pleading” includes “a complaint and an answer; a reply to a counterclaim . . . ; an answer to a cross-claim . . . ; a third-party complaint . . . ; and a third-party answer . . . [.]” FED. R. CIV. P. 7(a) (made applicable by FED. R. BANKR. P. 7007). “Cases interpreting the time constraints for jury trial demands have consistently held that these six documents are the only ones which may qualify as the ‘last pleading’ under Rule 38(b).” *Webb v. White (In re White)*, 222 B.R. 831, 833 (Bankr. W.D. Tenn. 1998) (citations omitted).

The pleadings in this proceeding are the complaint, the amended complaint, and the Lundeens’ answer to the amended complaint (including a motion to dismiss). The Lundeens did not endorse a jury demand on their answer which was filed on August 7, 2007, but instead made a jury demand 104 days later on November 19, 2007. As the Lundeens’ answer was the last pleading filed in this matter, their demand was filed outside the 10-day time frame established by rule 38. Consequently, they have waived a jury trial.<sup>1</sup> The Lundeens’ argument that their demand was timely because it was filed within 10 days of the court’s ruling on their motion to dismiss is rejected because judicial decisions clearly do not constitute pleadings for purposes of rule 38 jury demands. *United States Leather, Inc. v. Mitchell Mfg. Group, Inc.*, 276 F.3d 782, 790 (6th Cir. 2002).

IT IS SO ORDERED.

  
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Pat E. Morgenstem-Clarren  
United States Bankruptcy Judge

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<sup>1</sup> The court, therefore, need not decide whether there is a right to a jury trial with respect to any of the issues raised in this proceeding.