UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Petitioner, v. HELEN T. LOWE and LAUTON R. JOSHUA, Respondents.	HUDALJ 09-M-098-PF-19 January 6, 2010

RULING ON GOVERNMENT'S MOTION TO STRIKE RESPONDENT HELEN T. LOWE'S AFFIRMATIVE DEFENSES

On November 4, 2009, the U.S. Department of Housing and Urban Development (the "Secretary," "HUD," or the "Government") filed a Motion to Strike and Memorandum of Points and Authorities ("Mot. to Strike"), in which the Government moved to strike the affirmative defenses asserted, through counsel, by Helen T. Lowe (the "Respondent") in Respondent Helen T. Lowe's Response to Department of Housing and Urban Development Complaint and Request for Hearing. ("Response and Req. for Hearing"). [1] No response to the Motion to Strike has been received.

I. Regulatory and Procedural Framework

The regulations governing HUD's authority to impose liability for false claims and statements are contained in 24 C.F.R. Part 28, which implement the Program Fraud Civil Remedies Act of 1986 ("PFCRA") (31 U.S.C. §§ 3801-3812). Hearings under Part 28 are conducted in accord with the rules in 24 C.F.R. Part 26, Subpart B. 24 C.F.R. § 28.1(b). Unless specifically incorporated in Part 26, none of the Federal Rules of Civil Procedure govern proceedings at bar, but they may be looked to for guidance where HUD regulations do not specify the procedure to be followed in a given circumstance.

II. Legal Framework

"[A] defense is an affirmative defense if it will defeat the plaintiff's claim even where the plaintiff has stated a prima facie case for recovery under the applicable law." Quintana v. Baca,

[1] By letter, dated September 15, 2009, Respondent Lauton R. Joshua requested an extension of time to answer the Complaint. By reply letter, dated October 6, 2009, the Court granted an extension of time until October 19, 2009, but no response or request for hearing has been received from Ms. Joshua.

233 F.R.D. 562, 564 (C.D. Cal. 2005) (citing Black's Law Dictionary 451 (8th Ed. 2004)). As a matter of pleading, affirmative defenses "must include direct or inferential allegations as to all elements of the defense asserted." LaSalle Bank National Association v. Paramount Properties, 2008 WL 5054713 at *13 (N.D. Ill. 2008) (citing Reis Robotics USA, Inc. v. Concept Indus., Inc., 462 F. Supp. 2d 897, 904 (N.D. Ill. 2006)). Pleadings that are insufficient as a matter of law may be stricken. U.S. v. Cushman & Wakefield, Inc., 275 F. Supp. 2d 763, 767 (N.D. Tex. 2002); Anchor Hocking Corporation v. Jacksonville Electric Authority, 419 F. Supp. 992, 999 (M.D. Fla. 1976). The sufficiency of pleading an affirmative defense turns on whether such pleading gives fair notice of the defense. Wyshack v. City National Bank, 607 F.2d 824, 827 (9th Cir. 1979) (citing Conley v. Gibson, 355 U.S. 41, 47-48 (1957)). "A defense which simply points out a defect or lack of evidence in a plaintiff's case is not an affirmative defense." Morrison v. Executive Aircraft Refinishing, Inc., 434 F. Supp. 2d 1314, 1318 (S.D. Fla. 2005); Boldstar Technical, LLC v. The Home Depot, Inc., 517 F. Supp. 2d 1283, 1291 (S.D. Fla. 2007). Motions to strike affirmative defenses are disfavored, but may be granted if it can be shown that there is no set of circumstances under which the defense could succeed. Heller Financial Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1294 (7th Cir. 1989); Reis Robotics USA, Inc., 462 F. Supp. 2d at 905. Affirmative defenses will not be struck if they are sufficient as a matter of law or if they present a question of law or fact. United States v. 416.81 Acres of Land, 514 F.2d 627, 631 (7th Cir. 1975); FDIC v. Niblo, 821 F. Supp. 441, 449 (N.D. Tex. 1993).

III. Discussion

Through counsel, Respondent Lowe raises the following affirmative defenses:

Fault of Others. Respondent Lowe asserts that she is entitled to indemnification and/or set off, either in whole or in part, from all persons or entities whose negligence or fault proximately contributed to Petitioner's damages, if any. (Response and Req. for Hearing. p. 9.)

HUD argues that this is an improper affirmative defense because "indemnification and or set off" cannot serve to defeat HUD's stated prima facie case of Respondent Lowe's liability. (Mot. to Strike, p. 4) As support for its position Counsel for HUD cites HUD v. Jimmy Perez Patterson, Debbie Nichols and Old Republic Title Company of Conroe HUDALJ 08-052-PF, and 08-051-PF, at 2 (Feb. 23, 2009),[2] which held that "contribution and indemnity are not affirmative defenses" but rather are "claims for recovery that must be pled and proved." As such Respondent's affirmative defense of fault of others must be stricken.

No Standing. Respondent Lowe asserts that "Petitioner lacks standing to bring the Petition." (Response and Req. for Hearing. p. 9.)

HUD's standing in to bring this action is set forth in the PFCRA and 24 C.F.R. Part 28. (Mot. to Strike, p. 5). Accordingly, Respondent's affirmative defense of no standing must be stricken.

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[2] Citing FDIC v. Niblio, 821 F. Supp. 441, 456-57 ((N.D. Tex. 1993) and FDIC v. Raffa, 935 F. Supp119 (D. Conn. 1995).

Waiver. Respondent Lowe asserts as an affirmative defense that HUD is barred from pursuing its claims by "conduct and activities sufficient to constitute a waiver of any allegation, as set forth in the petition." (Response and Req. for Hearing. p. 9.)

The Government argues that Respondent does not specify any facts or legal basis why the defense of waiver might apply. (Mot. to Strike, p. 5).

Respondent's allegations are not developed and are unsubstantiated. Respondents have failed to affirmatively state a basis for their argument that HUD's conduct and activities sufficient to constitute waiver of any allegation. Fed. R. Civ. P. Rule 8(a) and 8(c) requires a "short and plain statement of the defense," which is intended to ensure that parties receive fair notice of their opponents' defenses and have an opportunity to rebut them. *See,* Heller Financial, Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 198). Merely stating a legal conclusion is an insufficiently pled affirmative defense. As such Respondent's affirmative defense of waiver must be stricken.

Statute of Limitations. Respondent Lowe asserts as an affirmative defense that "each and every cause of action alleged . . . is barred by the applicable statute of limitations." (Response and Req. for Hearing. p. 9.)

The applicable statute of limitations in the PRFCA states: "A hearing...with respect to a claim or statement shall be commenced within 6 years after the date on which such claim or statement is made, presented, or submitted." 31 U.S.C. § 3808(a); 24 C.F.R. § 28.35. A hearing is commenced by the issuance of a notice of hearing and order from the administrative law judge, conforming to the requirements of 31 U.S.C. §§ 3803(g)(2)(A) and (3)(B)(i). 31 U.S.C. § 3803(d)(2)(B); 24 C.F.R. § 26.45(d).

On October 23, 2009, the Court commenced the present hearing when it issued the Notice of Hearing and Order governing this case. The statutes of limitation on the 36 claims at issue stopped running on that date. (Mot. to Strike, p. 6). 24 C.F.R. § 28.35(a) (the statute of limitations "shall be tolled" if a hearing is commenced in accordance with 31 U.S.C. § 3802(d)(2)(B) within 6 years after the date on which the claim or statement is made. In the Matter of Salvadro Alvarez, Rulings on Pre-Hearing Motions, HUDALJ No. 04-025-PF at 7 (September 16, 2004.) (finding that the statute of limitations ceased running upon the issuance of a Notice and Order).

Thus, with respect to the claims alleged, the statute has been tolled by the commencement of the hearing. It is unavailable as an affirmative defense and must be stricken.

Res Judicata. Respondent Lowe asserts as an affirmative defense that "the Petition, and each and every cause of action alleged therein, is barred by the related doctrines of Res Judicata." (Response and Req. for Hearing. p. 10.)

Respondent's allegations are not developed and are unsubstantiated. Respondent has failed to affirmatively state a basis for her argument that HUD is barred from pursuing any

claims by the doctrines of Res Judicata, in contravention of Fed. R. Civ. P. Rule 8(a), which requires a "short and plain statement of the defense," and Rule 8(c), which is intended to ensure

that parties receive fair notice of their opponents' defenses and have an opportunity to rebut them. *See* Heller Financial, Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989). As such, Respondents affirmative defense that HUD is barred from pursuing any claims by the doctrines of Res Judicata must be stricken.

Estoppel. Respondent asserts as an affirmative defense that HUD's claims are barred by the equitable doctrine of estoppel. (Response and Req. for Hearing. p. 10.) Respondent argues that "Petitioner is estopped from seeking relief under the Petition due to his [sic] own wrongful and/or willful acts or omissions with reference to the subject matter of the Petition." (Id.)

Respondent's allegations are not developed and are unsubstantiated. Respondent has failed to affirmatively state a basis for her argument that HUD is barred from pursuing any claims by the doctrines of Res Judicata, in contravention of Fed. R. Civ. P. Rule 8(a), which requires a "short and plain statement of the defense," and Rule 8(c), which is intended to ensure that parties receive fair notice of their opponents' defenses and have an opportunity to rebut them. *See* Heller Financial, Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989).

Further, the Government argues "merely pleading that "wrongful and/or willful acts or omissions" by HUD occurred is inadequate because it does not specify any "affirmative misconduct" by the government. (Mot. to Strike, p. 8). (Citing U.S. v. Marine Shale Processors, 81 F.3d 1329, 1349 (5th Cir. 1996), cert. denied, 519 U.S. 1055 (1997)

Additionally, the United States Supreme Court has held that the government, in enforcing public laws, cannot be estopped on the same terms as any other litigant. See, e.g., OPM v. Richmond, 496 U.S. 414, 422 (1990). In order for the government to be estopped some sort of affirmative act of misrepresentation or concealment of a material fact must take place. Simple negligence, delay or failure to follow agency conduct does not constitute affirmative misconduct. Board of County Commissioners v. Isaac, 18 F. 3d 1492, 1499 (10th Cir. 1994). (Mot. to Strike, p. 8). As such, Respondents affirmative defense that HUD's claims are barred by the equitable doctrine of estoppel must be stricken.

Laches. Respondent Lowe asserts the affirmative defense of laches, which is an "[u]nreasonable delay in pursuing a right or claim . . . in a way that prejudices the party against whom relief is sought." Black's Law Dictionary 726 (8th abr. ed. 2004).

It is well established that the United States, as a party, is not generally subject to the defense of laches. United States v. Summerlin, 310 U.S. 414, 416 (1940). The defense is an equitable one that is generally not available when an action is brought within the statute of limitations expressly stated in a federal statute. See, e.g., Ivani Contracting Corp. v. City of New York, 103 F.3d 257, 260 (2nd Cir. 1997) ("when a plaintiff brings a federal statutory claim seeking legal relief, laches cannot bar that claim, at least where the statute contains an express limitations period within which the action is timely."); see also Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164, 170 (8th Cir. 1995) ("separation of powers principles dictate that federal courts not apply laches to bar a federal statutory claim that is timely filed under an express federal statute of limitations."). The Fifth Circuit has explicitly held that "[t]he

timeliness of government claims is governed by the statute of limitations enacted by Congress," and not the equitable doctrine of laches. Fein v. U.S., 22 F.2d 631, 634 (5th Cir. 1994); see also United States v. Summerlin, 310 U.S. at 416; Chevron, U.S.A., Inc. v. United States, 705 F.2d 1487, 1491 (9th Cir. 1983).

The PFCRA contains an express statute of limitations of six years. 31 U.S.C. § 3808(a). Therefore, the timeliness of this action is governed solely by the statute of limitations, and laches, as a matter of law, is unavailable as an affirmative defense and must be stricken.

Failure to Exhaust Administrative Remedies. Respondent Lowe asserts as an affirmative defense that HUD's claims are barred by its failure to exhaust available administrative remedies. (Response and Req. for Hearing. p. 10.)

Respondent's allegations are not developed and are unsubstantiated. Respondent has failed to affirmatively state a basis for her argument that HUD is barred from pursuing any claims by the doctrines of Res Judicata, in contravention of Fed. R. Civ. P. Rule 8(a), which requires a "short and plain statement of the defense," and Rule 8(c), which is intended to ensure that parties receive fair notice of their opponents' defenses and have an opportunity to rebut them. *See* Heller Financial, Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989).

Further, the Government argues that HUD has not failed to exhaust any required administrative remedies before commencing a PFCRA action because a PFCRA action is the administrative remedy. (Mot. to Strike, p. 9). As such, Respondents affirmative defense that HUD's claims are barred by its failure to exhaust available administrative remedies must be stricken.

Discretionary Acts. Respondent Lowe asserts as an affirmative defense that: "any and all acts or omissions of Respondent were the result of Respondent's exercise of discretion" and "as a result, Respondent is not liable." (Response and Req. for Hearing. p. 10.)

HUD argues that this defense is defective as a matter of law and that Respondent does not have any discretion that would relieve her of her liability for making or causing false claims to be submitted in violation of PFCRA, 31 U.S.C. § 3802(a)(1), and 24 C.F.R. § 28.10(a). (Mot. to Strike, pp. 9-10). As such, Respondents affirmative defense of discretionary acts must be stricken.

No Duty. Respondent Lowe asserts as an affirmative defense that: "Respondent had no duty to perform the actions which Petitioner seeks to mandate." (Response and Req. for Hearing. p. 10.)

HUD contends that this defense simply points out an alleged defect or lack of evidence and cites Morrison in support of its position. Morrison v. Exec. Aircraft Refinishing, Inc., 434 F. Supp.2d at 1318. (Mot. to Strike, pp. 9-10). As such, Respondents affirmative defense of no duty to perform must be stricken.

Unclean Hands. Respondent Lowe asserts as an affirmative defense that HUD's claims are barred by the doctrine of unclean hands. (Response and Req. for Hearing. pp. 10-11)

HUD argues that Respondent Lowe has merely asserted the name of the defense without furnishing any facts supporting the defense or even referring to the elements of the affirmative defense. (Mot. to Strike, p. 10.)

HUD cites McKennon to prove its argument which states, "the equitable doctrine of unclean hands is intended to deny recovery to a party that has engages in "reprehensible conduct in the course of the transaction at issue." McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360 (1995 Rule 8 and 9 requires a short and plain statement of the facts particularly where the defenses relate to assertions of fraud or mistake.[3] The FRCP requires the pleading of at least ultimate facts to allege the elements of a claim. Mere conclusory assertions are not sufficient. Shechter v. Comptroller of New York, 79 F.3d 265, 270 (2d. Cir. 1996), citing Nat'l Acceptance Co. of Am. V. Regal Prods., Inc., 155 F.R.D. 631, 634 (E.D. Wis. 1994).). Respondent Lowe has failed to furnish any information regarding HUD's alleged misconduct. Further, Respondents' allegations are not developed and are unsubstantiated. Respondent has failed to affirmatively state a basis for her argument that HUD comes to the proceeding with unclean hands, in contravention of Fed. R. Civ. P. Rule 8(a), which requires a "short and plain statement of the defense," and Rule 8(c), which is intended to ensure that parties receive fair notice of their opponents' defenses and have an opportunity to rebut them. See Heller Financial, Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989). As such, Respondent's affirmative defense of unclean hands will be stricken.

Speculative Damages. Respondent Lowe asserts as an affirmative defense that HUD is barred from recovery against Respondent because Petitioner's alleged damages are speculative. (Response and Req. for Hearing. p. 11)

The Government argues "this defense is immaterial because the PFCRA action does not allege or seek "damages" but rather civil penalties, akin to fines, and assessments "in lieu of damages sustained by the United States because of such claim[s]" citing In the Matter of Jacee M. DeMartino, Joan M. Weber, and Carrie R. Ogle, HUDALJ 09-078-PF-17, at 4 (Oct. 8, 2009). Accordingly, Respondent's affirmative defense for speculative damages will be stricken.

Consent. Respondent Lowe assert as an affirmative defense that "Petitioner and/or its agents has at all times given their consent, expressed or implied, to any acts, omissions, representations, and courses of conduct of Respondent." (Response and Req. for Hearing. p. 11)

The Government argues that consent is immaterial in a PFCRA action and according to 31 U.S.C. §§ 3801(a)(5), 3802(a)(1); 24 C.F.R. § 28.10(d) HUD need only prove that Respondent "knew or had reason to know" that the claims submitted were false, fraudulent or supported by materially false statements in order for liability to be imposed. As such, Respondent's affirmative defense of consent will be stricken.

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[3] Fed. R. Civ. P. Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.

Assumption of the Risk. Respondent Lowe asserts as an affirmative defense that Petitioners were aware of and appreciated the risks inherent in the conduct involved in the

transactions but assumed the risk by failing to take necessary precautions and therefore any recovery is diminished by their assumption of the risk. (Response and Req. for Hearing. p. 11.)

HUD argues that this defense is immaterial because "damages are not relevant to liability under the PFCRA ... Thus it is immaterial whether HUD "assumed the risk of potential damages."" (Mot. to Strike, p. 10.) As such, Respondent's affirmative defense of assumption of the risk will be stricken.

Superseding Acts of Third Parties. Respondent Lowe asserts as an affirmative defense that "damages alleged in each cause of action were exclusively caused or contributed to by the negligence or other acts or omissions of other persons, or entities, whether parties to this action or not, and that said negligence or other acts or omissions were an intervening and supervening cause of injuries and damages." (Response and Req. for Hearing. p. 12.) Thus, Respondent believes that because of the superseding acts of third parties HUD is barred from recovering damages from Respondent. (Id.)

The Government asserts that this defense is immaterial because "damages are not relevant to liability under the PFCRA...Thus it is immaterial whether "damages" were caused by others, as Respondent Lowe alleges."As such, Respondent's affirmative defense of superseding acts of third parties will be stricken.

Apportionment of Fault. Respondent Lowe asserts as an affirmative defense apportionment of fault. Respondent asserts that all of the facts and/or omissions alleged in the Complaint were solely those of other Respondents and/or parties and that Respondent Lowe is entitled to indemnification from those parties. (Response and Req. for Hearing. p. 12.)

The Government argues that this is an improper defense because it will not serve to defeat HUD's prima facie case of Respondent's liability under PFCRA. (Mot. to Strike, p. 14.) In support of its argument the Government cites Nichols, which held that contribution and indemnity are not affirmative defenses but rather are claims for recovery that must be pled and proved. HUD v. Jimmy Perez Patterson, Debbie Nichols and Old Republic Title Company of Conroe HUDALJ 08-052-PF, and 08-051-PF, at 2 (Feb. 23, 2009). As such, Respondent's affirmative defense of apportionment of fault will be stricken.

Failure to Mitigate Damages. Respondent Lowe asserts as an affirmative defense that HUD failed to mitigate its damages. (Response and Req. for Hearing. pp. 12-13.) However, HUD has no statutory duty to mitigate damages under PFCRA. Thus, whether or not damages were not mitigated by HUD is immaterial. Accordingly, the assertion that the Government failed to mitigate its alleged damages is insufficient to state an affirmative defense, and will be stricken.

Reservation of Right s. Respondent Lowe asserts a catch-all provision claiming to preserve a right to amend her response to include affirmative defenses not yet discovered. (Response and Req. for Hearing. p. 13.)

Pursuant to FRCP 15, Respondents must seek leave of court to amend a pleading. (Citing Ill. Wholesale Cash Register, Inc. v. PCG Trading, LLC, 2009 U.S. Dist. LEXIS 44509 (N.D. Ill. May 27, 2009)(finding that a defendant "cannot simply abrogate the Rules of Federal Procedure and hold the Court hostage to [its] inclination to later amend" its pleading).)

What Respondents seek to preserve—the right to amend their pleading as evolving circumstances warrant—cannot be granted, and must be denied. However any party may seek permission from the Court to amend a pleading for adequate cause.

IV. Conclusion

Consistent with the foregoing, it is **ORDERED**:

1. The Respondent's claim of the ***fault of others*** as an affirmative defense is **STRICKEN**;
2. The Respondent's claim of ***no standing*** as an affirmative defense is **STRICKEN**;
3. The Respondents claim of ***waiver*** as an affirmative defense is **STRICKEN**;
4. The Respondent's claim of ***statute of limitations*** as an affirmative defense is **STRICKEN**;
5. The Respondent's claim of ***res judicata*** as an affirmative defense is **STRICKEN**;
6. The Respondent's claim of ***estoppel*** as an affirmative defense is **STRICKEN**;
7. The Respondent's claim of ***laches*** as an affirmative defense is **STRICKEN**;
8. The Respondents' claim of ***failure to exhaust administrative*** remedies is **STRICKEN**;
9. The Respondents' claim of ***discretionary acts*** as an affirmative defense is **STRICKEN**;
10. The Respondents' claim that they have ***no duty to perform*** as an affirmative defense is **STRICKEN**;
11. The Respondents' claim of ***unclean hands*** as an affirmative defense is **STRICKEN**;
12. The Respondents' claim of ***speculative damages*** as an affirmative defense is **STRICKEN**;
13. The Respondents' claim of ***consent*** as an affirmative defense is **STRICKEN**;
14. The Respondents' claim of ***assumption of the risk*** as an affirmative defense is **STRICKEN**;

15. The Respondents' claim of ***superseding acts of third parties*** as an affirmative defense is **STRICKEN**;

16. The Respondents' claim of ***apportionment of fault*** as an affirmative defense is **STRICKEN**;

17. The Respondents' claim of ***failure to mitigate damages*** as an affirmative defense is **STRICKEN**;

18. The Respondents' purported reservation of ***a right to amend*** their pleading of affirmative defenses is **STRICKEN**.

J. Jeremiah Mahoney
Administrative Law Judge