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

In the Matter of: JACEE M. DEMARTINO, JOAN M. WEBER, and, CARRIE R. OGLE, Respondents.	HUDALJ 09-M-078-PF-17 October 8, 2009

RULING ON GOVERNMENT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES ASSERTED BY RESPONDENT DEMARTINO

On September 2, 2009, the U.S. Department of Housing and Urban Development (the "Secretary," "HUD," or the "Government") filed a Motion to Strike ("Mot. to Strike"), in which the Government moved to strike the affirmative defenses of Jacee M. DeMartino ("Respondent DeMartino") in her Answer and Request for Hearing ("Answer") received by the Court on August 13, 2009. On September 14, 2009, Respondent Jacee M. DeMartino, by and through her counsel, Christopher Reade, Esq., filed her Opposition to Government's Motion to Strike Affirmative Defenses ("DeMartino Answer to Mot. to Strike").

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, 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 DeMartino raises the following affirmative defenses:

Failure to State a Claim. First Respondent DeMartino asserts as an affirmative defense that HUD failed to state a claim upon which relief may be granted. (DeMartino Answer, p. 33.) Respondent DeMartino's allegations are not developed and are unsubstantiated. Respondent DeMartino has failed to affirmatively state any bases for her argument that HUD failed to state a claim for relief. 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). As such, Respondent's affirmative defense of failure to state a claim will be stricken.

Statute of Limitations. Respondent DeMartino asserts has that the present matter is barred by the Statute of Limitations prescribed by 31 U.S.C. § 3808(a), Title 24 C.F.R. § 28.35 and Title 24 C.F.R. § 26.44. Respondent DeMartino argues that HUD did not commence the present action within the six years prescribed by 31 U.S.C. § 3808(a), Title 24 C.F.R. § 28.35 and Title 24 C.F.R. § 26.44. (DeMartino Answer. to Mot. to Strike, pp. 33-38.)

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. The language of the statute indicates that the statute of limitations can begin running at either the time of a false statement of a false claim. In the present case, HUD alleges liability based on the occurrence of false claims supported by false certifications. (Mot. to Strike, p. 9.)

The Government seeks to hold the Respondent liable under 31 U.S.C. § 3802(a (1)(B) for causing a claim to be made to HUD that is supported by a statement she knew to be false. Therefore, because the Government is seeking liability on the claims, not the statements, the

statute of limitations began to run from the date on which the claims, not the statements, were made.

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 August 20, 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 claims at issue in this case stopped running on that date. 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).

HUD concedes that the statute of limitation for the claim in Count 2 expired before commencement of the hearing in this case. The remaining claims at issue were received by HUD on March 10, 2004 (Counts 1 and 3), February 9, 2004 (Count 4), August 31, 2004 (Count 5), and July 22, 2004 (Count 6). (Mot. to Strike, p. 9.) Thus—except for the claim alleged in Count 2—none of the statutes of limitation was due to expire until 2010. With respect to the claims alleged in the remaining counts, the statute has apparently been tolled by the commencement of the hearing. It is unavailable as an affirmative defense and must be stricken.

Lack of Causation. Respondent DeMartino asserts as an affirmative defense that HUD: caused its own damages to some extent, that third parties caused HUD's damages to some extent, and/or that HUD contributed more than Respondent did to those damages. (Mot. to Strike, p. 4.) The issue of cause and/or proximate cause is addressed in each of these defenses. (Id .)

"As asserted by the Government, causation is an element of HUD's *prima facie* case. (Mot. to Strike, p. 4.) Pursuant to 24 C.F.R. § 26.45(e), the Government has the burden of production and persuasion concerning Respondent's causation of the false claims at issue in the present proceeding. A denial of causation is not an affirmative defense because causation is an element of the Government's case. True affirmative defenses raise matters outside of the scope of plaintiff's *prima facie* case. Instituto Nacional de Comercializacion Agricola, supra, at 991, quoting 2A Moore's Federal Practice at 8.27[3]. Lack of causation is not an affirmative defense, and it will be stricken.

Failure to Mitigate Damages. Respondent DeMartino argues as an affirmative defense that HUD "failed to mitigate its damages." (DeMartino Answer. to Mot. to Strike, p. 38.)

Respondents' allegations are not developed and are unsubstantiated. Respondent has failed to affirmatively offer facts supporting her argument that HUD failed to mitigate damages, or had a duty to do so. 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. 1989). As Respondent has not done so, the affirmative defense of failure to mitigate damages will be stricken.

Laches. Respondent DeMartino asserts the affirmative defenses 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.

Ratification, Confirmation and Acceptance. Respondent DeMartino asserts that the Government voluntarily relinquished any rights in this case either by waiver, ratification, confirmation or acceptance of the acts and positions of the Respondent. HUD argues that this defense must be stricken because "[a] violation of the rights of the Government cannot be waived or ratified by unauthorized acts of its agents." United States ex rel. Dye v. ATK Launch Sys., 2008 U.S. Dist. LEXIS 85331 (D. Utah 2008); United States v. Cushman & Wakefield, Inc., 275 F. Supp. 2.d 763, 771 (N.D. Tex. 2002).

HUD further argues that the law does not sanction or permit the government to waive its rights under the PFCRA and that a party asserting the defense of ratification or conformation must show that the complainant's agent: "(1) fully knew the material facts surrounding the unauthorized agreement; and (2) knowingly confirmed, adopted, or acquiesced to the unauthorized agreement." (Quoting Strickland v. United States, 382 F. Supp. 2d 1334, 1346 (M.D. Fla. 2005), citing Schism v. United States, 316 F.3d 1259, 1289 (Fed. Cir. 2002). The doctrine of waiver or acceptance requires an intentional relinquishment of a known right with knowledge of its existence and the intent to relinquish it. CBS, Inc. v. Merrick, 716 F.2d 1292, 1295 (9th Cir. 1983); Novato Fire Protection Dist. V. United States, 181 F.3d 1135, 1141 (9th Cir. 1999).

Respondent DeMartino has not presented a legal theory which, if proven at trial, will negate some essential fact of the Government's case. As such, Respondent DeMartino's affirmative defense that HUD voluntarily relinquished any known right in this case either by waiver, ratification, or acceptance must be stricken.

Estoppel to Pursue Claims. Respondent DeMartino asserts as an affirmative defense that "HUD is estopped from pursuing any claims against this Answering Defendant." (DeMartino Answer, p. 39.)

Respondents' allegation is not developed and is unsubstantiated. Respondent has failed to affirmatively state a basis for her assertion that HUD is estopped from pursuing any claims against her. 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. 1989). As such, Respondent's affirmative defense of estoppel to pursue any claims will be stricken.

Valid Excuses. Respondent DeMartino asserts that "Answering Defendant has valid legal and/or equitable excuses for any alleged non-performance or other claims raised by Plaintiff." (DeMartino Answer, p. 39.)

HUD argues that this is not an affirmative defense but merely a statement that Respondent believes she has excuses. (Mot. to Strike, p. 6.) This Court agrees that Respondent DeMartino's twelfth affirmative defense is merely a conclusory allegation. Morrison held that, "where affirmative defenses are no more than bare bones conclusory allegations, [they] must be stricken." Morrison v. Executive, Aircraft Refinishing, Inc., 4343 F. Sup.2d. 1314, 1318 (S.D. Fla. 2005). Also Merrill Lynch Business Financial Services, Inc. "held that affirmative defenses are subject to the general pleading requirements of Rule 8(a) "and will be stricken if they fail to recite more than bare-bones conclusory allegations."' Merrill Lynch Business Financial Services, Inc. v. Performance Machine Systems USA, 2005 WL 975773, * 11(S.D. Fla. 2005).

Respondents' allegations are not developed and are unsubstantiated. Respondent has failed to affirmatively state a basis for her argument that she has valid legal and/or equitable excuses for any alleged non-performance or other claims raised by the Government. Fed. R. Civ. P. Rule 8(a) and 8(c) require 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. 1989). As such, Respondent's affirmative defense will be stricken.

Unclean Hands. Respondent DeMartino asserts that "HUD is not entitled to any monies or relief since HUD comes to this Proceeding with unclean hands." (DeMartino Answer, p. 39.) HUD argues that Respondent DeMartino 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. 18.)

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.[1] The FRCP requires the pleading of at least

[1] 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.

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 DeMartino 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.

Invalid Claim. Respondent DeMartino asserts as an affirmative defense that HUD's claims are non-perfected, invalid and unenforceable.

Respondent's allegations are not developed and are unsubstantiated. Respondent has failed to affirmatively state a basis for her argument that HUD's claims are non-perfected, invalid and unenforceable, 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 that HUD's claims are non-perfected, invalid and unenforceable will be stricken.

Reservation of Right to Amend. Respondent DeMartino asserts a catch-all provision claiming to preserve a right to amend their answer to include affirmative defenses not yet discovered. Pursuant to Fed. R. Civ. P. Rule 15, a respondent must seek leave of the court to amend a pleading. Respondent cannot unilaterally decide when she will amend her pleading. Ill. Wholesale Cash Register v. PCG Trading, LLC, 2209 U.S. Dist. LEXIS 44509, at *4 (N.D. Ill. 2009).

What Respondents seek to establish and preserve—a 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.

Fines are Excessive and Disproportionate. Respondent DeMartino asserts as an affirmative defense that Pursuant to 24 C.F.R. § 28.40(b), the fines and assessments requested by HUD are excessive, disproportionate and not reflective of the true facts in this matter. However, this is not a defense, much less an affirmative defense. Again, Respondent DeMartino has failed to sufficiently assert an affirmative defense in this instance. As asserted by the Government, a true affirmative defense raise matters outside of the scope of the Government's *prima facie* case. Instituto Nacional de Comercializacion Agricola, supra, at 991, quoting 2A Moore's Federal Practice at 8.27[3]. The Government further argues that this is a defense concerning elements of their case and that they have the burden of production and persuasion concerning their entitlement to recover penalties (Mot. to Strike, p. 8.), and the amount of any such penalties. This asserted affirmative defense will be stricken.

IV. Conclusion

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

1. The Respondent's claim of ***failure to state a claim*** as an affirmative defense is **STRICKEN**;

2. The Respondent's claim of ***statute of limitations*** as an affirmative defense is **STRICKEN**; [2]

3. The Respondent's claim of ***lack of causation*** as an affirmative defense is **STRICKEN**;

4. The Respondent's claim of ***failure to mitigate damages*** as an affirmative defense is **STRICKEN**;

5. The Respondent's claim of ***laches*** as an affirmative defense is **STRICKEN;**

6. The Respondent's claim of ***ratification, confirmation and acceptance*** as an affirmative defense is **STRICKEN**
7. The Respondent's claim that ***HUD is estopped from pursuing any claims*** as an affirmative defense is **STRICKEN**;

8. The Respondent's claim that she has ***valid legal and/or equitable excuses*** as an affirmative defense is **STRICKEN**;

9. The Respondent's claim that HUD had ***unclean hands*** as an affirmative defense is **STRICKEN**;

10. The Respondent's claim that HUD's claims are ***non-perfected, invalid and unenforceable*** as an affirmative defense is **STRICKEN;**

11. The Respondent's ***reservation of right to add additional affirmative defenses*** is **STRICKEN**; and

12. The Respondent's claim that ***fines are excessive and disproportionate*** as an affirmative defense is **STRICKEN**.

[signed]

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J. Jeremiah Mahoney
Administrative Law Judge

[2] The parties are in agreement that the statute of limitation for the claim alleged in Count 2 of the Complaint passed prior to commencement of the hearing in this matter. HUD has withdrawn Count 2 (HUD Mot to Strike DeMartino Aff. Def., note 3), and it is dismissed, with prejudice.