

CGR:sec 3025-163

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

DEBRA K. KEACH and PATRICIA A. SAGE,)
)
Plaintiffs,)
vs.)
)
U.S. TRUST COMPANY, NA., f/k/a U.S. TRUST)
COMPANY OF CALIFORNIA, NA., et al.,)
)
Defendants.)

CASE NO. 01-1168

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO AMEND
ANSWER**

In their Reply Memorandum in Support of Their Motion for Summary Judgment, Plaintiffs Attorneys did not contest the numerous discovery facts and pleading assertions that raise a material issue of fact concerning their claims. Instead, Plaintiffs' entire Reply Brief was based upon their assertion that alleged "judicial admissions" made in paragraph 212 cannot be contradicted by discovery or even by denials set forth elsewhere in the pleadings. Now, in Response to Defendants' Motion to Amend, Plaintiffs contrarily argue that they need reams of new discovery in order to evaluate the amendments that Defendants contend conform to the evidence.

Plaintiffs' inconsistent stance is not an oversight. Plaintiffs explain that the strategy was put in place "as early as December 2001." The crux of Plaintiffs' Response to Defendants' Motion to Amend is not that the proposed Amendment by Defendants fails to conform to the evidence. It does. At the core of Plaintiffs' argument is that having made this early strategy,

they can then ignore the next eight months of discovery. As set forth below, Plaintiffs' arguments are not grounded in fact or law. Defendants request that their Motion to Amend be granted.

I. PLAINTIFFS FALSELY ASSERT THAT THEY RELIED ON DEFENDANTS' SUPPOSED ADMISSIONS BY LIMITING THEIR DISCOVERY.

In their Reply in Support of Their Motion for Summary Judgment Against Foster and Regal, Plaintiffs' Attorneys claimed that Defendants, in their Answer to paragraph 212 of the First Amended Complaint, admitted to failing to adequately disclose sweepstakes issues in connection with the 1995 transaction, and that said admission precludes any factual dispute and trumps any evidence on the disclosure issue. At page 6-8 of Plaintiffs' Response to Defendants' Rule 15 Motion, Plaintiffs lawyers now assert to this Court that they relied on that supposed admission in limiting their discovery. That claim is untrue.

In the Plaintiffs' deposition of Defendant Melvyn Regal, taken February 6, 2002, Plaintiffs' attorneys repeatedly asked Mr. Regal about his involvement in disclosures to U.S. Trust Company and its agents, Houlihan, Lokey and Sonnenschein, Nath & Rosenthal, in connection with the 1995 transaction. On nineteen separate occasions Regal was asked about his participation in due diligence. Plaintiffs' attorneys asked Mr. Regal what his role or responsibilities were, whom he met with in connection with the transaction, and whether certain documents or certain facts were disclosed to any of the three parties just mentioned. For example, Plaintiffs' attorneys asked:

"Was it - - did you personally supervise providing information in response to due diligence requests to Houlihan, Lokey or U.S. Trust, Sonnenschein or Valuemetrics?" Regal deposition at 96.

“Other than maybe some meetings with representatives of U.S. Trust, Houlihan, Valuometrics, or Sonnenschein, did you personally provide any documents to any of those entities in connection with the 1995 transaction?” Regal deposition at 97. “Were you involved in due diligence conducted by an attorney for Sonnenschein in December, 1995?” Regal deposition at 97.

“Well, as we sit here today to the best of your recollection, can you identify for me any specific steps that you took to assure that financial projections provided to U.S. Trust, Houlihan, Lokey, or Valuometrics were reasonable and accurate?” Regal deposition at 105.

The Plaintiffs Attorneys obviously did not assume anything about disclosure, and they did not assume what Mr. Regal’s role was. In addition to inquiring of Mr. Regal regarding his role in the disclosures, Plaintiffs’ attorneys questioned many other deponents, including Defendants Stuber, Norbutas and Bartley, concerning what disclosures were made and who made them, and in so doing, they acquired information regarding disclosures. For example, Regal told Martin Sarafa of U.S. Trust Company that sweepstakes were “key” to Michigan Bulb Company’s business. Sarafa deposition at 29-30. Exhibit 265 at 0004638. Numerous other details of the disclosures in connection with the 1995 transaction are contained in Defendant Foster and Regal’s Response to Plaintiffs’ First Motion for Summary Judgment as to Liability at 25-32.

Plaintiffs Attorneys assert that they elected not to take the deposition of Ellen Foster based upon Defendants’ supposed admissions in their Answer. Plaintiffs neglect to admit they served extensive written discovery on Ellen Foster, including Interrogatories, Requests for Production of Documents, and four sets of Requests for Admission of the Genuineness of Documents. From those discovery responses, it was evident that Ellen Foster had no first hand

knowledge of any relevant and material facts in connection with the 1995 and 1997 transactions. Plaintiffs do not offer any evidence or argument that Ellen Foster has such knowledge.

Plaintiffs Attorneys claim that they relied upon Defendants' admissions in failing to pursue the issue of cartoons presented to the Board of Directors is even weaker. Plaintiffs' Response to Rule 15 Motion at 5. These cartoons are not relevant to any issue in this case, and the effort that the Plaintiffs, and therefore of necessity of the Defendants, have spent on this issue is absurd. The cartoons have nothing to do with the value of F&G stock and nothing to do with the issue of what disclosures were made in connection with any sale of that stock. In the very first deposition taken in this case, taken December 19, 2001, Plaintiffs' attorneys asked Attorney Joseph Sudow about the cartoon, which he included in a legal report to the Board of Directors, dated July 24, 1997. Plaintiffs' attorneys asked Sudow why the cartoon was included, to which he replied, "Taking a crack at lawyers." To the question of whether the question related to Michigan Bulb Sweepstakes, he replied "No." Sudow deposition at 73. If Plaintiffs did not like or believe these answers, they could have followed up with inquiries from other officers and directors, whom they did in fact depose, namely Robert Ostertag, Melvyn Regal, Robert Pellegrino, Lyle Dickes, and Jon Elletson. That they chose not to do so should not be charged to these Defendants.

The facts as developed during discovery not only belie Plaintiffs' assertion that they relied upon supposed judicial admissions; they establish that the amendments sought by Defendants are necessary so that the pleadings conform to the evidence. Significantly, Plaintiffs never deny, here or in their Reply Brief, that the amendments conform to the record that developed over many months. It is well established that motions to amend to conform to the

evidence are routinely granted at trial and after judgment. *Wright, Miller & Kane*, Federal Practice and Procedure: Civil 2d §1491 (1990). Where, as here, Defendants' Motion to Amend comes well before trial, it should be granted as a matter of course.

II. THE REQUESTED AMENDMENTS ARE NECESSARY TO PREVENT PLAINTIFFS FROM DISTORTING THE RECORD.

The amendments requested by these Defendants to paragraphs 119, 121, and 212 are necessary to prevent the deceptive use of these Answers, as exemplified by Plaintiffs Attorneys in their Reply Brief, where they take discreet answers out of context and prevent an accurate picture of Defendants' denial of wrongdoing. In misconstruing the answer to paragraph 212 as an admission of liability, Plaintiffs were fully aware that elsewhere in their Answer, for example paragraphs 4, 11, 14, 231, 237, 256, 257, 259, 271, and 272, Foster and Regal repeatedly denied liability. Likewise with regard to the issue of cartoons, Plaintiffs misrepresent the inclusion of cartoons about lawyers as an admission that the Board of Directors made jokes about having to follow the law. The proposed amendments are necessary to prevent the Plaintiffs Attorneys from further misrepresenting Defendants' answers and taking them out of context.

In Plaintiffs' Response to Motion to Amend at 3-4, Plaintiffs make the absurd suggestion that they thought that these Defendants were resting their defense solely on the claim that Regal and Foster were not fiduciaries. Regal and Foster have, of course, asserted that they were not fiduciaries, but they have also asserted in their pleadings and elsewhere that to the extent that they were fiduciaries they did not breach their duty, that Plaintiffs did not suffer any harm from any supposed breach of fiduciary duty by anyone, and that the transactions at issue were for no

more than adequate consideration. There is nothing remotely inconsistent about defending on numerous and/or alternative grounds and this is precisely what defendants here have done.

Likewise the proposed "General Answer" was made necessary by the Plaintiffs' proven propensity to distort Defendants' individual answers. Contrary to Plaintiffs' assertions, the General Answer does not make the rest of Defendants' Answer "very difficult to understand." It merely precludes the Plaintiffs from distorting that Answer.

III. PLAINTIFFS WILL NOT BE PREJUDICED BY THE AMENDMENTS.

The proposed amendments will bring no unfair surprise to the Plaintiffs, since they are based upon facts and conclusions abundantly documented during discovery that Defendants set out in their Response to Plaintiffs' Motion for Summary Judgment. Plaintiffs did not claim any surprise at the facts asserted by Defendants as indeed they could not, since they participated in the discovery that produced the facts that Defendants rely upon, and they should not be heard to claim surprise now. The case law is clear that amendments should be freely granted as long as they do not unfairly surprise or prejudice the defendant." Umar v. Johnson, 173 F.R.D. 494, 503 (N.D. Ill. 1997).

Plaintiffs' only claim of prejudice is that the proposed amendments would disrupt their discovery strategy as it was set in December 2001. This is not the type of surprise or prejudice recognized by the Courts. If Plaintiffs' strategy turns out to be a mistake, or harmful to the Plaintiffs' case, the responsibility for that circumstance lies with Plaintiffs' attorneys. This is not the strategy of a party dealing fairly with the facts of a case and trying to show why no genuine dispute as to the facts exists. It is the strategy of a party seeking to gain a technical advantage, contrary to the well-established principal that a decision should be based upon the merits. In re

Prescott, 805 F.2d 719, 725 (7th Cir. 1986)(intent of Rule 15(b) is to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties).

In contrast, Defendants will suffer substantial prejudice if the amendments are not permitted. Although Defendants will be able to assert all of the facts and positions set forth in their requested amendments at the trial of this action even if this Motion is denied, it will be distracting and prejudicial to Defendants if Plaintiffs continue to bellow about supposed “judicial admissions.” Until viewing Plaintiffs’ Reply Brief, Defendants could not have anticipated or predicted Plaintiffs’ contorted reading of Defendants’ Answer. Plaintiffs’ Attorneys’ conduct through discovery could infer only the opposite. Accordingly, it is necessary to permit the requested amendments to foster the goal that each claim be decided on the merits. Foman v. Davis, 371 U.S. 178, 182 (1962)(parties “ought to be afforded an opportunity to test [their] claim on the merits”).

IV. DEFENDANTS’ MOTION TO ASSERT AFFIRMATIVE DEFENSES SHOULD BE GRANTED.

Defendants seek leave to add seven Affirmative Defenses. Although half of the Affirmative Defenses could fairly be said to be included within Defendants’ overall denial of liability and assertion that Plaintiffs cannot prove the essential elements of their claim (i.e. Defenses First, Fourth, and Sixth), it will be helpful to the Court and parties to specifically assert these defenses. Of course the First, Second, Fourth and Sixth affirmative defenses, which Plaintiffs readily admit were already asserted by US Trust as their affirmative defenses, have been actively litigated throughout discovery and will not impact in any manner the progression to a trial on the merits of this case. Moreover, during discovery, as the facts developed, the validity

of these Affirmative Defenses has become increasingly apparent, making it necessary to conform the pleadings to the evidence.

The Second Affirmative Defense asserts that Plaintiffs' claims in the Amended Complaint are barred by the statute of limitations. This defense, of course, includes Mrs. Foster's probate claim. Unaccountably Plaintiffs Attorneys argued in their Reply Brief that Defendants "waived" this defense because they did not include it in their answer and because the time for amendments under the Scheduling Order has passed. Plaintiffs are wrong. Defendants first made this claim in their Motion to Dismiss, have been handling this matter in probate since the outset of this litigation (at this court's suggestion to the Plaintiffs' Attorneys), and therefore have not waived the statute of limitations defense.¹ Justice requires that this Court permit it to Amend its Answer to assert this critical defense.

The Seventh Circuit Court of Appeals has made it abundantly clear that defendants are permitted to amend their answer to assert the statute of limitations defense when "plaintiff had adequate notice that a statute of limitations defense was available, and had an adequate opportunity to respond to it despite the defendant's tardy assertion." Jackson v. Rockford Housing Authority, 213 F.3d 389 (7th Cir. 2000)(citing cases). The general rule that "amendment is allowed absent undue surprise or prejudice to the plaintiff is widely adhered to by our sister courts of appeals." Id. Thus, in *Jackson*, the defendant was permitted to amend its complaint and assert the statute of limitations defense after first bringing it up in a motion for summary judgment.

¹ See transcript of hearing on November 8, 2001, page 53.

In the case at Bar, the statute of limitations defense was raised in a Motion to Dismiss before Defendants answered Plaintiffs' Amended Complaint. The entire issue has been the subject of discovery requests and state court litigation by both parties. Plaintiffs' own discovery requests and depositions sought and developed detailed information concerning this important defense. As stated above, the statute of limitations as it relates to Mrs. Foster has been actively litigated by Plaintiffs in the probate court, at this court's instruction. There is no question that Plaintiffs "had an adequate opportunity to respond." There is no undue surprise or prejudice to Plaintiffs and pursuant to the clear directives of the Seventh Circuit Court of Appeals, Defendants must be permitted to amend their Answer to assert this affirmative defense.

The Fifth Affirmative Defense alleges that transactions alleged in the Complaint satisfy the exemption requirements of ERISA Section 408(e) and, therefore, did not violate ERISA. This Court recently granted, almost as a matter of course, a motion to assert affirmative defenses based upon statutory exemptions from the Fair Labor Standards Act. Barron v. Lee Enterprises, Inc., 183 F.Supp.2d 1077 (C.D.Ill. 2002). The same result is appropriate here.

Defendants' proposed seventh Affirmative Defense, lack of standing, is based on the likely claims of F&G and its lenders to the proceeds of the present suit.² These Defendants' attorneys raised this issue in their depositions of both Plaintiffs. Keach deposition at 337-339. Sage deposition at 209-210. Plaintiffs assert that granting leave to file this Affirmative Defense would require them to depose the lenders, pursue the discovery requests in the F&G bankruptcy, and otherwise expend great effort and time in new discovery. But the creditors' loans to F&G,

² Paragraph 1 of the Amended Complaint alleges the debt to others by both the ESOP and F&G and the bankruptcy of F&G.

and F&G's loans to its ESOP, are abundantly documented in this case and the bankruptcy proceedings for anyone who cares to check. Whether these well documented circumstances constitute lack of standing on the part of these Plaintiffs is a legal issue that will not require any further discovery.

Finally, with respect to the above and also to the Third (waiver and laches) and Affirmative Defense, the reasoning of the Federal District Court of Illinois in Hall v. Operative Plasterers' and Cement Masons International Association Local Union 143, 188 F. Supp. 2d 1013 (S.D. Ill. 2001), is compelling. Hall argued that the Union had waived the defense of exhaustion of administrative remedies. The Federal District Court said that although it was possible to waive a defense, "a defendant's failure to raise the defense in his initial answer or in a motion to dismiss is not necessarily fatal to the defense. Under liberal federal pleading amendment standards, a court may allow a defendant to amend its answer to add with the requisite specificity the failure to exhaust affirmative defense and thereby to properly bring the defense before the court." *Id.* at 1018. The Court held that the Union had not waived the failure to exhaust affirmative defense by failing to plead it in its initial answer or in a motion to dismiss. "It raised the issue prior to trial and may still properly put the question in issue by amending its answer." *Id.* at 1018.

The following factors were important to the *Hall* Court: (1) the affirmative defense would not cause any undue delay; (2) it would not prejudice any party; (3) there was no need for additional discovery on the issue; (4) no evidence of any bad faith or dilatory motive on the part of the Union in waiting until the summary judgment stage to raise the issue; (5) no delay in trial date ; (6) no history of a failure to cure pleadings by prior amendments.

All of those factors are present here, and even more, since Plaintiffs have been aware of Defendants' claims since their Motion to Dismiss. Moreover, only the Third Affirmative Defense (laches and waiver) comes within the ambit of Federal Rule of Civil Procedure 8(a), requiring that certain affirmative defenses be set forth specifically. Accordingly, Defendant will be permitted to assert all of these affirmative defenses except for waiver and laches if the Amendment is denied. However, that is not a reason for denying the amendment. Plaintiffs' Response does not argue that they will be prejudiced in any way by the inclusion of these two specific affirmative defenses. As a result, Justice requires that the proposed Affirmative Defenses be permitted.

V. THERE IS NO NEED FOR FURTHER DISCOVERY.

Contrary to the Plaintiffs' assertions, there is no need for further discovery or for delay of the trial. Plaintiffs present to this court a list of the horrors that will ensue if the Motion to Amend is granted. More specifically, Plaintiffs' claim that the entire discovery process will have to be reopened. This is a completely unjustified demand, since every issue that the Defendants assert in their proposed Amended Answer and Affirmative Defenses has been heavily litigated or concerns facts peculiarly within the knowledge of plaintiffs (i.e. laches and waiver). Because Plaintiffs do not dispute that the amendments, as well as the proposed Affirmative Defenses, conform to the evidence, Plaintiffs do not have a legitimate claim that additional discovery is needed.

If Plaintiffs chose to pursue certain issues more than others, they have simply made a choice of strategy that all litigants must make. If that strategy was mistaken, the responsibility lies with the Plaintiffs' attorneys. Moreover, Plaintiffs should not be heard to complain that their

failed strategy will result in additional cost and expense to them in reviewing the “sixty shelf-feet of documents” and the “extensive filings in the F & G bankruptcy.” Plaintiffs have caused untold legal hours to be spent on their Motion for Summary Judgment, which has no chance of success, based not only on their need to rely on contortions of the admissions but also on the fact that no prior ESOP plaintiffs have ever been granted such a motion. No law or logic protects litigants that put on blinders to serve their own needs. Plaintiffs request for additional discovery should be rejected by this Court.

CONCLUSION

Defendants’ requested amendments do not merit additional discovery, will not prejudice Plaintiffs and will not delay any schedule of this Court. Moreover, Defendants have good cause and have acted with due diligence in seeking this relief. Substantial injustice will result if Defendants are not permitted to amend their answer and assert these affirmative defenses. It is important that the claims in this case be tried on the merits and, accordingly, Defendants request that their Motion be granted.

ELLEN D. FOSTER, as Executrix of the Estate of Thomas S. Foster, Deceased and MELVYN R. REGAL, STEPHEN P. BARTLEY, MICHAEL F. NORBUTAS, FREDERICK J. STUBER, and ASHLEY ANNE FOSTER, Defendants by their attorneys, KAVANAGH, SCULLY, SUDOW, WHITE & FREDERICK, P.C.



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon the following by placing the same in an envelope, postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Peoria, Illinois, or by hand delivery, on the 1st day of **October, 2002**, addressed as follows:

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