UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

BEN H. WILLINGHAM,

Debtor.
_____/

Case No.: 3:11-bk-1002-JAF
Chapter 7

ABDULLAH M. AL-RAYES;
ENTERPRISE PROPERTIES, INC.;
RANGER INVESTMENTS, INC.;
RANGER-KENMAR, INC.;
ESSEX INVESTMENTS, INC.; and
ESSEX-TRIANGLE, INC.,

Creditors/Plaintiffs,

Adv. Pro. No. 3:11-ap-269-JAF

v.

BEN H. WILLINGHAM,

Debtor/Defendant.

_____/

ORDER GRANTING MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES

This proceeding is before the Court upon Plaintiffs' Motion to Strike Defendant's Affirmative Defenses (Doc. 22, Motion to Strike; *see also* Doc. 14, Amended Complaint; Doc. 17, Answer and Affirmative Defenses), and Defendant's response in opposition thereto (Doc. 23). For the reasons stated herein, the Motion to Strike (Doc. 22) will be granted.

Discussion

Rule 12(f) of the Federal Rules of Civil Procedure (made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure) states: "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Consequently, a defense will be stricken if it is insufficient as a matter of law. *Anchor Hocking Corp. v. Jacksonville Elec. Auth.*, 419 F. Supp. 992, 1000 (M.D. Fla. 1976).

Affirmative defenses are defined by Rule (8)(c) of the Federal Rules of Civil Procedure, as adopted by Federal Rule of Bankruptcy Procedure 7008. Rule (8)(c) provides in relevant part:

> In responding to a pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and other matters constituting an avoidance or affirmative defense.

Fed. R. Civ. P. 8(c).

An affirmative defense is established when a defendant admits to the essential facts of the complaint, "but sets forth other facts in justification or avoidance." *Boldstar Technical, L.L.C. v. Home Depot, Inc.*, 517 F. Supp. 2d 1283, 1291 (S.D. Fla. 2007). A defense that simply points out defects, or flaws, in the complaint is not an affirmative defense. *Flav-O-Rich, Inc. v. Rawson Food Serv., Inc. (In re Rawson Food Serv., Inc.)*, 846 F.2d 1343, 1349 (11th Cir. 1988).

When, however, the sufficiency of the defense depends upon disputed issues of fact or questions of law, a motion to strike an affirmative defense should not be granted. *Mark v. Labar*, No. 08-80646-CIV, 2009 WL 909478, at *1 (S.D. Fla. April 1, 2009).[1] Nevertheless,

[1] Unpublished opinions are not considered binding authority; however, they may be cited as persuasive authority pursuant to the Eleventh Circuit Rules. 11th Cir. R. 36-2.

"weeding out legally insufficient defenses at an early stage of a complicated lawsuit may be extremely valuable to all concerned in order to avoid the needless expenditures of time and money in litigating issues which can be seen to have no bearing on the outcome." *Id*. (*internal quotations and citations omitted*).

In his Answer and Affirmative Defenses, Defendant asserts five (5) affirmative defenses (Doc. 17 at 12-14). Defendant's First Affirmative Defense provides that the Amended Complaint "fails to state a cause of action" (Doc. 17 at 12). This defense simply points out purported defects in the Amended Complaint and is, therefore, not an affirmative defense. "An affirmative defense raises matters extraneous to the plaintiff's *prima facie* case . . . . [Other] defenses negate an element of the plaintiff's prima *facie case*; these defenses are excluded from the definition of affirmative defense in Fed. R. Civ. P. 8(c)." *In re Rawson Food Serv., Inc.*, 846 F.2d at 1349. Consequently, Defendant's First Affirmative Defense will be stricken as impertinent. The Court, however, will accept Defendant's assertion in this regard as a specific denial of the allegations contained in the Amended Complaint.

Defendant's Second and Third affirmative defenses raise judicial estoppel, equitable estoppel, and laches—claiming essentially that Plaintiffs should be estopped from relitigating a claim that was reduced to a final judgment in state court (Doc. 17 at 12-14; *see also* Doc. 23 at 3-5). As an initial matter, the issue regarding judicial estoppel was previously raised by Defendant in his initial Motion to Dismiss, but was later expressly abandoned in his Reply Brief (Doc. 10 at 1). Accordingly, this issue has been waived.

Equitable estoppel "arises where the parties recognize the basis for suit, but the wrongdoer prevails upon the other to forego enforcing his right until the statutory time has lapsed." *Cook v. Deltona Corp.*, 753 F.2d 1552, 1563 (11th Cir. 1985). In bankruptcy, the right

to challenge dischargeability is reserved to creditors. *Fed. Trade Comm'n v. Black (In re Black)*, 95 B.R. 819, 821 (Bankr. M.D. Fla. 1989). More particularly,

> [w]hen a debtor seeks discharge in bankruptcy his [or her] claim to that remedy is the claim at issue and fraud by the debtor is one of several potential defenses or objections to the bankruptcy court's grant of relief to the debtor. The claim is the debtor's right to discharge, not the creditor's objection, based on fraud, to discharge.

Graham v. I.R.S. (In re Graham), 973 F.2d 1089, 1096 (3d Cir. 1992).

The facts asserted by Defendant in support of his equitable estoppel defense are not germane in the context of the instant non-dischargeability (Count I) and objection to discharge (Count II) action (*see* Doc. 17 at 12; *see also* Doc. 23 at 3-4). Therefore, this defense will be stricken as impertinent. The Court, however, will permit Defendant leave to amend this affirmative defense. Any amendment to Defendant's equitable estoppel defense should be in the context of an objection to discharge under 11 U.S.C. § 727 and determination of dischargeability pursuant to 11 U.S.C. § 523.

Defendant's Third Affirmative Defense provides for the defense of laches (Doc. 17 at 12-13). The Eleventh Circuit Court of Appeals has held that to establish laches, a defendant must demonstrate: (1) a delay in asserting a right or a claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted. *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1545 (11th Cir. 1986).

Rule 4007 of the Federal Rules of Bankruptcy Procedure provides that a complaint to determine the dischargeability of a debt under § 523(a) (*i.e.*, Count I) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). Fed. R. Bankr. P. 4007(c); *see also* 11 U.S.C. § 523(c)(1). Here, the first date set for the meeting of creditors in the underlying bankruptcy case was March 25, 2011 (3:11-bk-1002-JAF [Doc. 11]). The

complaint that initiated the instant adversary proceeding was filed on May 23, 2011 (Doc. 1). As the complaint was filed 59 days subsequent to March 25, 2011, Count I is timely.[2] Therefore, the affirmative defense of laches, as to Count I, will be stricken as legally insufficient.

Regarding Count II (objection to discharge under §§ 727(a) (2), (3), (4) and (5)), while the equitable defense of laches is available under § 727 under certain circumstances, such as a plaintiff's dilatory conduct during the pendency of the bankruptcy case *(see The Peoples Bank, Inc. v. Herron (In re Herron),* 49 B.R. 32, 35 (Bankr. W.D. Ky. 1985)), Defendant has not asserted any such factual circumstances here (*see* Doc. 17 at 12-13; Doc. 23 at 4-5). Affirmative defenses are subject to the general pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure, and will be stricken if they recite "no more than bare-bones conclusory allegations." *Microsoft Corp. v. Jesse's Computers & Repair, Inc.*, 211 F.R.D. 681, 684 (M.D. Fla. 2002) (*internal quotations and citations omitted*). While a defendant is not required to set forth detailed facts, he or she must provide fair notice of the defense and the ground(s) upon which it rests. *Id*.

With the foregoing principals in mind, the Court finds Defendant's Third Affirmative Defense of laches, as to Count II, asserts no more than impertinent, conclusory allegations and will, therefore, be stricken. Nevertheless, Defendant will be permitted leave to amend this affirmative defense. Any amended affirmative defense of laches, however, should be in the appropriate context.

Defendant's Fourth Affirmative defense pertains to waiver (Doc. 17 at 13-14). Waiver is the voluntary and intentional relinquishment of a known right. *Hale v. Dep't of Revenue,* 973

[2] In granting in part Defendant's motion to dismiss the initial complaint, the Court permitted Plaintiffs to file the Amended Complaint (Doc. 12).

So. 2d 518, 522 (Fla. 1st DCA 2007). In order for a waiver to be effective, a party is required to have full knowledge of his or her legal rights and the intent to surrender those rights. *Id.* The party waiving a known right must do so clearly, unequivocally, and decisively. *See id.* In this instance, nothing in the pleadings suggests Plaintiffs have intentionally elected to forego their right to seek an objection to Defendant's discharge or a determination of non-dischargeability. Consequently, Defendant's Fourth Affirmative Defense will be stricken with leave to amend.

Defendant's Fifth Affirmative Defense provides: "Plaintiffs are pursuing frivolous litigation and should their conduct be exposed, Debtor [*i.e.*, Defendant] should be able to recoup sanctions against Plaintiffs, including attorneys' fees and costs" (Doc. 17 at 14). This is not an affirmative defense (*see* Rule 8 of the Federal Rules of Civil Procedure, as adopted by Rule 7008 of the Federal Rules of Bankruptcy Procedure), but rather an issue that should be raised by motion practice. Therefore, this defense will be stricken.

Conclusion

For the reasons stated herein, it is **ORDERED**:

1. Plaintiffs' Motion to Strike Defendant's Affirmative Defenses (Doc. 22) is granted.

2. Defendant's First, Second, Third, Fourth, and Fifth affirmative defenses are stricken.

3. Defendant shall have until **February 10, 2012** within which to amend his affirmative defenses.

DATED this 26th day of January, 2012 in Jacksonville, Florida.

/s/ Jerry A. Funk
JERRY A. FUNK
United States Bankruptcy Judge

Copies to:

Kenneth B. Jacobs, Counsel for Plaintiffs, and
Mike E. Jorgensen, Counsel for Defendant