

**IN THE STATE OF MISSOURI
JACKSON COUNTY DISTRICT COURT
AT INDEPENDENCE, MISSOURI**

SAMUEL K. LIPARI)	
(Assignee of Dissolved)	
Medical Supply Chain, Inc.))	
<i>Plaintiff</i>)	
)	
vs.)	
)	
GENERAL ELECTRIC COMPANY,)	Case No. 0616-cv07421
GENERAL ELECTRIC CAPITAL)	
BUSINESS ASSET FUNDING CORP.,)	
GE TRANSPORTATION SYSTEMS)	
GLOBAL SIGNALING, L.L.C.)	
<i>Defendants</i>)	

**REPLY TO DEFENDANTS' SUGGESTION IN
OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS
THE SECOND SET OF AFFIRMATIVE DEFENSES UNDER RULE 55.08**

Comes now the petitioner, Samuel K. Lipari ("plaintiff") appearing *pro se* and respectfully submits the following reply to the defendants' suggestion opposing dismissal of both sets of affirmative defenses.

STATEMENT OF FACTS

1. The defendants raised affirmative defenses in their first responsive pleading on 5-4-06.
2. The defendants' first set of affirmative defenses were raised in a pleading addressing the preceding petition to dismiss the petitioner's claims contained in the petition which was overruled on 5-25-06.

3. The plaintiff filed a motion on 6-01-06 to dismiss the defendants' first set of affirmative defenses, which has not yet been ruled on.

4. The defendants' untimely suggestion in opposition asserts at pg. 2 that their motion to dismiss was not their first responsive pleading for affirmative defense purposes.

5. The defendants answered the petition on 7-17-06 on the same day the defendants removed the action to federal court.

6. The defendants' answer on 7-17-06 listed a second set of affirmative defenses addressing the plaintiff's petition, not the preceding pleading.

7. The defendants' answer on affirmative defenses contained in ¶¶ 113-117 of the 7-17-06 answer are conclusory, lacking a short and plain statement of facts showing GE is entitled to any defense or avoidance.

8. The plaintiff timely replied to defendants' answer by seeking to dismiss the second set of affirmative defenses for being in violation of Missouri Rule 55.08.

9. The plaintiff's motion was filed contemporaneously to when the state court has jurisdiction returned to it through receipt of a certified letter containing the US District Court order remanding the action.

10. On February 9, 2007, the defendants orally sought an extension without a showing of good cause and obtained an extension of ten days to reply to the plaintiff's motions to dismiss the defendants affirmative defenses.

11. The defendants failed to file a responsive pleading opposing dismissal of their affirmative defenses as of February 22, 2007.

12. The plaintiff prepared a proposed order striking the defendants' affirmative defenses. See Attachment 1.

13. On February 23, 2007 the defendants filed their suggestion opposing dismissal of their affirmative defenses.

14. The defendants' response does not oppose dismissal of the first set of affirmative defenses raised in their motion to dismiss on 5-4-06.

15. The defendants' response falsely asserts on page 3 that "there has been no fact discovery regarding the GE defendants' affirmative defenses" when the plaintiff has produced thousands of documents in discovery to the defendants who have themselves not produced a single document.

**SUGGESTION IN SUPPORT OF PROPOSED ORDER DISMISSING
AFFIRMATIVE DEFENSES**

The defendants suggestion in opposition argues that their 5-4-06 motion to dismiss was not the first responsive pleading to the plaintiff's petition filed 3-22-06. The defendants on page 2 of their suggestion instead argue that their 7-17-06 answer to the petition was their first responsive pleading to the 3-22-06 petition and that the Missouri Supreme Court case *Detling v. Edelbrock*, 671 S.W.2d 265 is not controlling on the issue of whether a motion to dismiss is counted as a first responsive pleading for affirmative defense purposes.

The defendants raised two affirmative defenses that were defective at law in their motion to dismiss. Raising defenses in a motion to dismiss is proper when that motion is the first responsive pleading:

"In that regard, Rule 55.083 requires, inter alia, that "[i]n pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses[.]" Hence, the failure to plead the running of the applicable statute of limitations as a defense in a responsive pleading, waives the defense. *Patel v. Pate*, 128 S.W.3d 873, 877 (Mo.App.2004). Here, there is no dispute that the respondents properly pled the affirmative defense of the running of the applicable statute of limitations in their answer to the appellant's petition.

If properly pled, as here, the affirmative defense of the running of the statute of limitations may be asserted in a motion to dismiss. *Id.*"

Doyle v. Crane, 200 S.W.3d 581 at 585 (Mo. App., 2006).

In *Detling v. Edelbrock*, 671 S.W.2d 265 (Mo. banc 1984), the landlord filed a motion to dismiss tenants' petition that sought, inter alia, specific performance of covenants of a rental agreement. Landlord contended that pursuant to provisions of the Property Maintenance Code and the Fire Prevention Code, the lease was illegal from its inception. Landlord did not, however, affirmatively plead the illegality. The Missouri Supreme Court found the defense of illegality waived, invoking the general rule requiring affirmative pleading in the answer:

"Illegality of contract is an affirmative defense which, under Rule 55.08, respondent was obliged to plead responsively. *Parker v. Pine*, 617 S.W.2d 536, 542 (Mo.App.1981); *McDowell v. Schuette*, 610 S.W.2d 29, 36 (Mo.App.1980). Generally, failure to plead an affirmative defense results in waiver of that defense. *Williams v. Irwin-Willert Co.*, 604 S.W.2d 640, 642 (Mo.App.1980). See also C. Wright & A. Miller, 5 Federal Practice and Procedure § 1278 (1969) (construing Rule 8(c) of the Federal Rules of Civil Procedure which is identical to our Rule 55.08). **Respondent answered appellants' amended petition with a motion to dismiss in which the defense was neither raised nor intimated."**

Id. at 271.

The defendants inspired effort to have this court overrule the Missouri Supreme Court express determination of this issue because an answer was not filed in *Detling* (Defendants' Suggestion pg. 2) fails because of the pervasive lack of diligence exhibited by the defense in their failure

to meet deadlines, attend case management conferences, comply with discovery. The second set of affirmative defenses contained in the 7-17-06 answer gives the Plaintiff no notice.

The defendants' second set of affirmative defenses fail to give the constitutionally required notice incorporated in Missouri Rule 55.08. The purpose of Rule 55.08 is to provide notice to the plaintiff, *Lucas v. Enkvetchakul*, 812 S.W.2d 256, 263 (Mo.App.1991), the facts supporting a defense must be pled in the same manner as they would be with claims. *Ashland Oil, Inc. v. Warmann*, 869 S.W.2d 910, 912 (Mo.App.1994). Mere conclusory allegations constitute inadequate pleadings. *Id.*

The defendants second responsive pleading contained a only a list of defenses with no facts or averments making them relevant to the plaintiff's petition or conduct. The defendants at page 3 seek to excuse the conclusory nature of their second set of affirmative defenses by misrepresenting to the court that facts had not been discovered. The complaint itself contains transcripts and the subject contract. Amendment of affirmative defenses would be futile. The defendants did not attempt to comply with the pleading standard for affirmative defenses in

Missouri Rule 55.8. Even the liberal federal Rule 8 or notice pleading standard was not complied with.

"The remaining alleged affirmative defenses fail for several reasons. First, guarantors listed these defenses as conclusory statements, and did not plead any specific facts to support each defense. Rule 55.08 mandates that "a pleading setting forth an affirmative defense shall contain a plain statement of the facts showing that the pleader is entitled to the defense." *Curnutt v. Scott Melvin Transport, Inc.*, 903 S.W.2d 184, 192 (Mo.App.1995). Because the guarantors did not adequately plead these alleged affirmative defenses, they fail as a matter of law. *Id.*"

Stewart Title Guar. Co. v. WKC Restaurants Venture Co., 961 S.W.2d 874 at 884 (Mo. App.W.D., 1998). The defendants' request for leave to amend is untimely should be denied.

CONCLUSION

The plaintiff respectfully requests that the court grant the plaintiff's motions to dismiss the defendants' affirmative defenses.

Respectively submitted,

Samuel K. Lipari
Pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 27th day of February, 2007, by first class mail postage prepaid to:

Leonard L. Wagner and John K. Power, Esq., Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

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