

**IN THE STATE OF MISSOURI
JACKSON COUNTY SIXTEENTH CIRCUIT COURT
AT INDEPENDENCE**

SAMUEL K. LIPARI,)	
)	
Plaintiff,)	
)	
v.)	Case No. 0916-CV38273
)	Division 15
CHAPEL RIDGE MULTIFAMILY LLC, <i>et al.</i> ,)	
)	
Defendants.)	

**PLAINTIFF’S MOTION
TO REQUIRE DEFENDANT CHAPEL RIDGE MULTIFAMILY LLC
TO MAKE A MORE DEFINITE ANSWER UNDER RULE 55.27(d) AND
TO ADEQUATELY RE-PLEAD AFFIRMATIVE DEFENSES 2 THRU 7 OR FORFEIT THEM**

Comes now, the plaintiff Samuel K. Lipari appearing *pro se* and respectfully requests that the court require defendant CHAPEL RIDGE MULTIFAMILY LLC to make a more definite answer under Rule 55.27(d) and to require CHAPEL RIDGE MULTIFAMILY LLC adequately re-plead affirmative defenses 2 thru 7 or forfeit them.

STATEMENT OF FACTS

1. In their initial but late first responsive pleading, the defendant CHAPEL RIDGE MULTIFAMILY LLC repeatedly denies each material fact related to the chargeable conduct averred by the plaintiff that CHAPEL RIDGE MULTIFAMILY LLC’s employees, Lee’s Summit Police tenants, and CHAPEL RIDGE MULTIFAMILY LLC attorney agents participated in.
2. The defendant CHAPEL RIDGE MULTIFAMILY LLC’s answer does not distinguish between facts known to CHAPEL RIDGE MULTIFAMILY LLC’s co-defendant attorney agents and CHAPEL RIDGE MULTIFAMILY LLC and therefore are imputed to be the knowledge of CHAPEL RIDGE MULTIFAMILY LLC and are therefore improperly denied as unknown in the answer and improperly as facts not known to CHAPEL RIDGE MULTIFAMILY LLC and its employees and agents.
3. CHAPEL RIDGE MULTIFAMILY LLC’s responses lack the requisite detail to adjudicate the claims of the plaintiff without invasive discovery that would otherwise be spared CHAPEL RIDGE MULTIFAMILY LLC, its employees, agents and tenants.

SUGGESTION IN SUPPORT

Rule 55.27(d) motion for more definite statement provides a tool to efficiently resolve claims and

to lessen the burden of discovery on the parties and the court:

“The Missouri rules of civil procedure require fact pleading. Rule 55.08 provides: "A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance." The goal of fact pleading is the quick, efficient, and fair resolution of disputes. Fact pleading identifies, narrows and defines the issues so that the trial court and the parties know what issues are to be tried, what discovery is necessary, and what evidence may be admitted at trial. *Luethans v. Washington University*, 894 S.W.2d 169, 171-172 (Mo. banc 1995); *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d

371, 377 (Mo. banc 1993); *Walker v. Kansas City Star Co.*, 406 S.W.2d 44, 54 (Mo.1966) (quoting *Johnson v. Flex-O-Lite Mfg. Corp.*, 314 S.W.2d 75, 79 (Mo.1958)).

The proper remedy when a party fails to sufficiently plead the facts is a motion for more definite statement pursuant to Rule 55.27(d). Rule 55.27(d) provides:

" A party may move for a more definite statement of any matter contained in a pleading that is not averred with sufficient definiteness or particularity to enable the party properly to prepare responsive pleadings or to prepare generally for trial when a responsive pleading is not required. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just."

State ex rel. Harvey v. Wells, 955 S.W.2d 546 at pg.546 (Mo., 1997).

The lack of details in the defendant’s answer strongly suggests that CHAPEL RIDGE MULTIFAMILY LLC does not understand the gravamen of its answer or the repercussions. There is no reason CHAPEL RIDGE MULTIFAMILY LLC cannot admit or deny the specific conduct of its attorney and law firm agents:

“15. *See generally* LAW GOVERNING LAWYERS § 120(1)(b) ("A lawyer may not knowingly make a false statement of fact to the tribunal."); *id.* cmt. c ("*A lawyer's knowledge. . . . A lawyer's knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false.*"). The Reporter's Note to cmt. c recognizes that some courts have applied a "conscious ignorance" test for knowledge, citing *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 590 (9th Cir. 1983) (in view of other facts known to the law firm, it could not accept at face value client's denial of known fact).”

In re Food Management Group, LLC, Case No. 04-22880 at fn 15 (ASH) (Bankr. S.D.N.Y.

1/23/2008) (Bankr. S.D.N.Y., 2008)

The court has a nondiscretionary duty to order CHAPEL RIDGE MULTIFAMILY LLC to amend its answer and provide more definite responses.

“ 55.27(d) clearly requires entry of an order that the offending pleading be amended within a period of time. While the trial court is allowed discretion regarding the amount of time within which the pleading must be amended, and the appropriate sanction in the event the pleading is not amended, the trial court is not allowed the discretion to ignore the fact pleading requirement of Rule

55.08.”

State ex rel. Harvey v. Wells, 955 S.W.2d 546 at pg.546 (Mo., 1997).

The lack of details in the defendant’s asserted affirmative defenses 1 thru 7 prevent the plaintiff from being able to address or respond to their relevancy. Affirmative defense 8 has not yet been asserted. As such, CHAPEL RIDGE MULTIFAMILY LLC’s. affirmative defenses 2 thru 7 violate the plaintiff’s constitutional right to notice under the Due Process clause. The plaintiff requests that the defendant adequately plead its affirmative defenses 2 thru 7 or forfeit them.

Rule 55.07 requires that "[a] party shall state in short and plain terms his defenses to each claim." Rule 55.08 requires that a party "plead ... 'matter constituting an avoidance or affirmative defense.'" *Gee v. Gee*, 605 S.W.2d 815, 817 (Mo.App.1980). Finally, Rule 55.11 requires that "[a]ll averments of claim or defense ... shall be limited as far as practicable to a statement of a single set of circumstances." Such rules contemplate that in pleading affirmative defenses, their factual basis must be set out in the same manner as is required for pleading claims. *ITT Commercial Finance v. Mid-Am Marine*, 854 S.W.2d 371, 384 (Mo. banc 1993). The purpose of such rules is to give notice to the opposing parties in order to be prepared on the issues. *Schimmel Fur Co. v. American Indemnity Co.*, 440 S.W.2d 932, 939 (Mo.1969).

“Rule 55.08 requires that all affirmative defenses be pled in responsive pleadings or be abandoned. *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002). Failure to plead affirmative defenses will result in their waiver. *Holdener v. Fieser*, 971 S.W.2d 946, 950 (Mo. App. E.D. 1998); *Leo’s Enters., Inc.*, 805 S.W.2d at 740.”

City of Peculiar v. Effertz Bros. Inc., No. WD 67554 at pg. 1 (Mo. App. 1/22/2008) (Mo. App., 2008).

Rule 55.08 (2004) provides in pertinent part:

“A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court may treat the pleadings as if there had been a proper designation.”

The purpose of Rule 55.08 is to require a defendant raising an affirmative defense to plead the defense so as to give the plaintiff notice of it. *Bailey v. Cameron Mutual Ins. Co.*, 122 S.W.3d 599, 604 (Mo.App. E.D.2003).

CHAPEL RIDGE MULTIFAMILY LLC’s affirmative defenses are deficient at law:

“An affirmative defense is asserted by the pleading of additional facts not necessary to support a

plaintiff's case which serve to avoid the defendants' legal responsibility even though plaintiffs' [sic] allegations are sustained by the evidence." *Reinecke v. Kleinheider*, 804 S.W.2d 838, 841 (Mo.App.1991). [Emphasis added.] Bare legal conclusions, ..., fail to inform the plaintiff of the facts relied on and, therefore, fail to further the purposes protected by Rule 55.08. *Schimmel Fur Co. v. American Indemnity Co.*, 440 S.W.2d 932, 939 (Mo.1969) (rule requires notice of facts relied on so that opposing parties may be prepared on those issues).

ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 383 (Mo. banc 1993). Mr. and Mrs. Brekke failed to plead any facts in support of their "affirmative defenses." The affirmative defenses were deficient as a matter of law. They amount only to legal conclusions without any factual basis. A motion for judgment on the pleadings does not admit the truth of facts not well pleaded by an opponent nor conclusions of law contained in an opponent's pleading. *Holt v. Story*, 642 S.W.2d 394, 396 (Mo.App.1982); *Helmkamp v. American Family Mut. Ins. Co.*, 407 S.W.2d 559, 565-66 (Mo.App.1966). Mr. and Mrs. Brekke's "affirmative defenses" raised no issue of material fact."

Stephens v. Brekke, 977 S.W.2d 87 at pg. 93-94 (Mo. App. S.D., 1998).

Missouri courts have consistently held that deficient affirmative defenses such as those raised by CHAPEL RIDGE MULTIFAMILY LLC in defenses 2 through 7 are without effect and a nullity:

"Appellants also pled the affirmative defenses of accord and satisfaction, estoppel, waiver, failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction in their respective answers to respondent's petition. These defenses were listed as conclusory statements and appellants pled no specific facts to serve as the basis for each defense. Rule 55.08 requires 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. The factual basis for an affirmative defense must be set out in the same manner as is required for the pleading of claims under the Missouri Rules of Civil Procedure. *Ashland Oil, Inc. v. Warmann*, 869 S.W.2d 910, 912 (Mo.App.1994). Because appellants have not sufficiently pled the alleged affirmative defenses, they fail as a matter of law. See *Id.*"

Curnutt v. Scott Melvin Transport, Inc., 903 S.W.2d 184 (Mo. App.W.D., 1995). See also *Lumbermens*

Mutual.:

"Here, Thornton alleged no facts showing that the adverse interest exception did not apply in this matter. Nor did it allege facts that established that Western Container was otherwise aware of the misrepresentations until after Horton's defalcation was discovered. Thus, even if Horton knowingly made knowing misrepresentations to Thornton, Thornton's motion fails because it neglects to present undisputed facts showing that those misrepresentations are legally attributable to Western Container or that Western Container had actual knowledge of the misrepresentations at the time they were made. Having failed to allege sufficient facts to establish that it is entitled to the affirmative defense as a matter of law, Thornton cannot prevail on its motion for summary judgment upon that basis."

Lumbermens Mut. Cas. Co. v. Thornton, 92 S.W.3d 259 at pg. 270 (Mo. App., 2002).

Missouri has long held as a clearly established rule deficient affirmative defenses coupled with an answer that uniformly refutes every material fact as CHAPEL RIDGE MULTIFAMILY LLC has done is a mere general denial making recognition of alleged affirmative defenses reversible:

"For the error, then, which permeates all these instructions, and which was present throughout the whole trial, in admitting what are held to be affirmative defenses under a general denial, and in

instructing the jury on affirmative defenses, none of which have been pleaded, we are compelled to reverse this case.”

People's Bank v. Stewart, 117 S.W. 99 at pg. 103, 136 Mo. App. 24 (Mo. App., 1909).

CHAPEL RIDGE MULTIFAMILY LLC’s asserted affirmative defenses 2 thru 7 are fact based or fact dependent if they could exist, however CHAPEL RIDGE MULTIFAMILY LLC has identified no facts or application.

Under the controlling case law applicable to the Missouri Rules, CHAPEL RIDGE MULTIFAMILY LLC has failed to plead affirmative defenses 2 through 7 and they are now lost:

“After specifically listing certain affirmative defenses, Rule 55.08 provides that a party must plead “any other matter constituting an avoidance or affirmative defense.” “If a defendant intends to raise a defense based on facts not included in the allegations necessary to support the plaintiff’s case, they must be pled under Rule 55.08.” *Shaw v. Burlington Northern, Inc.*, 617 S.W.2d 455, 457 (Mo.App.1981). A defense, which contends that even if the petition is true, a plaintiff cannot receive the relief sought because there are additional facts which place defendant in a position to avoid legal responsibility, must be set forth in a defendant’s answer. Id. Such is the defense at issue here and Plaintiff was obliged to plead it affirmatively. Rule 55.08. This she has failed to do. “Generally, failure to plead an affirmative defense results in waiver of that defense.” *Detling v. Edelbrock*, 671 S.W.2d 265, 271 (Mo. banc 1984); *Lucas v. Enkvetchakul*, 812 S.W.2d 256, 263 (Mo.App.1991). Clearly, Plaintiff recognized the need to plead additional facts which would have allowed her to avoid legal liability as to Karlyn because she pled the matter affirmatively in her answer to Larry’s pleading. Based on long standing rules of pleading, Plaintiff waived her “inequitable conduct” defense as to Karlyn unless (1) Karlyn either implied or expressly consented to trying the case on that defense, or (2) the trial court permitted the pleadings to be amended to include the defense. Rule 55.33(b). 5 See *Lucas*, 812 S.W.2d at 263. Consent to the trial of nonpleaded affirmative defenses should not be inferred unless it clearly appears that the party against whom the defense is asserted tacitly agreed to join issues on such defenses. *Lucas*, 812 S.W.2d at 263. Moreover, “[w]hen evidence is relevant to an issue already in the case, and there is no indication at trial that the party who introduced the evidence was seeking to raise a new issue, the pleadings will not be amended by implication or consent.” *Gee*, 605 S.W.2d at 817.”

Tindall v. Holder, 892 S.W.2d 314 at 328 (Mo. App. S.D., 1994).

CONCLUSION

For the above stated reasons this court should order CHAPEL RIDGE MULTIFAMILY LLC to make a more definite answer fully including knowledge of its employees, agents, attorneys and law firm described and identified in the plaintiff’s Amended Petition.

For the above stated reasons this court should order CHAPEL RIDGE MULTIFAMILY LLC’s affirmative defenses 2 thru 7 to be stricken if the more definite answer fails to adequately inform the plaintiff of the facts and applicable law CHAPEL RIDGE MULTIFAMILY LLC’s affirmative defenses are asserted upon.

CHAPEL RIDGE MULTIFAMILY LLC's first affirmative is privileged under Missouri precedent and permitted to be asserted even though it is deficient in supporting facts and fails at law.

Respectfully submitted,

S/ Samuel K. Lipari

SAMUEL K. LIPARI
PLAINTIFF *PRO SE*.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 22nd day of February 2010 by hand delivery, by first class mail postage prepaid, or by email to:

Marrow, Willnauer & Klosterman, LLC
James C. Morrow #32658
Abagil L. Pierpoint #59997
Executive Hills East, Bldg. A
10401 Holmes Suite 300
Kansas City, MO 64131; (816) 382-1382
jmorrow@mwklaw.com
apierpoint@mwklaw.com

ATTORNEY FOR DEFENDANT
SWANSON & MIDGLEY LLC,
CHRISTOPHER BARHORST
HOLLY L FISHER
4600 MADISON STE 1100
KANSAS CITY, MO 64112; (816) 842-6100
cbarhorst@swansonmidgley.com
hfisher@swansonmidgley.com

Horn Aylward & Bandy, LLC
Danne W. Webb #39384
2600 Grand Blvd. Suite 1100
Kansas City, MO 64108; (816) 421-0700
dwebb@hab-law.com

ATTORNEY FOR DEFENDANT
CHAPEL RIDGE MULTIFAMILY LLC; 3460 NE
AKIN BOULEVARD LEES SUMMIT, MO 64064

Bryan Cave, LLP
Keitha M. Wright #58646
1200 Main Street Suite 3500
Kansas City, MO 64105
816-374-3370 (direct)
keitha.wright@bryancave.com

ATTORNEY FOR DEFENDANT'S LEANNE
ZELLMER 2300 MAIN ST. STE 900 KANSAS
CITY, MO 64108; (816) 448-3100
lianne.zellmer@regus.com

REGUS PLC; 26 BOULEVARD ROYAL L-2449
LUXEMBOURG; +44 (0) 1932 895059 C/O REGUS
PLC REGISTERED OFFICE 22 GRENVILLE
STREET; ST. HELIER; JERSEY, JE4 8PX

REGUS MANGEMENT GROUP LLC; 15305
DALLAS PARKWAY STE 1400 ADDISON, TX
75001 C/O REGISTERED AGENT CSC
LAWYERS INCORPORATING SERVICE, INC.;
150 S PERRY ST. MONTGOMERY, AL 36104

Deacy & Deacy, LLP
Spencer J. Brown #18616
920 Main Street, Suite 1900
Kansas City, MO 64105 (816) 421-4000
cld@deacylaw.com

ATTORNEY FOR DEFENDANT'S
TROPBITO & MILLER LLC
508 WALNUT STREET
KANSAS CITY, MO 64106 (816) 221-6006

Troppito & Miller, LLC
508 Walnut Street
Kansas City, MO 64106 (816) 221-6006

ATTORNEY FOR DEFENDANT
NICHOLAS L. ACKERMAN #54761
CHRIS L TROPBITO
TONY R MILLER
508 WALNUT STREET
KANSAS CITY, MO 64106 (816) 221-6006
nla@troppitomiller.com
trm@troppitomiller.com
cmt@troppitomiller.com

South & Associates, P.C.
Phillip R. Anderson #48543
6363 College Blvd. Suite 100
Overland Park, KS 66211 (913) 663-7600
Phillip.Anderson@southlaw.com

ATTORNEY FOR WACHOVIA DEALER
SERVICES INC.; 8575 W 110TH ST, STE 100
OVERLAND PARK, KS 66210 WELLS FARGO;
420 MONTGOMERY STREET, SAN FRANCISCO,
CALIFORNIA 94163; (866) 249-3302

Husch Blackwell Sanders LLP
John K. Power #35312
Michael Thompson #22153
Sean Tassi #59718
1200 Main Street Suite 2300
Kansas City, MO 64105 (816) 283-4651
john.power@huschblackwell.com
michael.thompson@huschblackwell.com
sean.tassi@huschblackwell.com

ATTORNEYS FOR GENERAL ELECTRIC
COMPANY, GENERAL ELECTRIC CAPITAL
BUSINESS ASSET FUNDING CORPORATION
AND GE TRANSPORTATION SYSTEMS
GLOBAL SIGNALING, LLC

Arnold & Porter LLC
Jonathan I. Gleklen
555 12th Street, N.W.
Washington, D.C. 20004
jonathan.gleklen@aporter.com

ATTORNEY FOR JEFFREY R. IMMELT
3135 EASTON TURNPIKE
FAIRFIELD, CT 06828-0001 (203) 373-2211

S/ Samuel K. Lipari

SAMUEL K. LIPARI
803 S. Lake Drive
Independence, MO 64064
816.507.1328
saml@medicalsupplychain.com
Plaintiff, *Pro Se*