

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

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|-------------------------------|---------------------------------|
| SAMUEL K. LIPARI |) |
| (Assignee of Dissolved |) |
| Medical Supply Chain, Inc.) |) |
| <i>Plaintiff</i> |) |
| |) Case No. 0816-cv-04217 |
| vs. |) |
| |) |
| Novation, LLC <i>et al.</i> , |) |
| <i>Defendants</i> |) |

MOTION TO STRIKE DEFENDANT LATHROP & GAGE, L.C.’s SECOND THROUGH NINETEENTH AFFIRMATIVE DEFENSES UNDER RULE 55.08

Comes now, the plaintiff Samuel K. Lipari appearing pro se and respectfully requests that the court strike the defendant Lathrop & Gage, L.C.’s second through nineteenth affirmative defenses under Missouri Supreme Court Rule 55.08 for failing to

STATEMENT OF FACTS

1. In their initial but late first responsive pleading, the defendant Lathrop & Gage, L.C. raises nineteen affirmative defenses.
2. The defendant Lathrop & Gage, L.C.’s first affirmative defense “failure to state a claim” is permissible under controlling case law even though it is devoid of supporting facts and fails as a matter of law.
3. The defendant Lathrop & Gage, L.C.’s remaining defenses are devoid of a single supporting fact and are conclusory.

SUGGESTION IN SUPPORT

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).

Lathrop & Gage, L.C.'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 Lathrop & Gage, L.C. in defenses 2 through 19 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)

“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 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).

Lathrop & Gage L.C.'s asserted affirmative defenses 2-11 are fact based or dependent if they could exist, however Lathrop & Gage L.C. has identified no facts or application.

The plaintiff is entirely without information to have notice of Lathrop & Gage, L.C.'s affirmative defenses 7 and 8 regarding settlement. The issue appearing to be raised is indemnification but there is no suggestion as to which defendants are indemnifying Lathrop & Gage L.C. through what if any settlement. Why should any corporate tortfeasor ever settle after Lathrop & Gage L.C. has replaced your state republican form of government with Kansas style corporate syndicalism.

Lathrop & Gage L.C. is mistaken over settlement as a defense. Indemnification is a direct claim against another party, not an affirmative defense. See e.g., *KC. Landsmen, L.L.C. v. Lowe-Guido*, 35 S.W.3d 917, 921 (Mo.App.2001); *Buchanan v. Rentenbach Constructors, Inc.*, 922 S.W.2d 467, 470 (Mo.App.1996); *Cass Bank & Trust Co. v. Mestman*, 888 S.W.2d 400, 403 (Mo.App.1994); *Honey v. Barnes Hosp.*, 708 S.W.2d 686, 696 (Mo.App.1986).

Lathrop & Gage L.C. does however have a substantial core competency in constitutional law. It is poetic justice that the plaintiff acting *pro se* will attempt to defend Missouri's Supreme Court rules and state statutes against this serious and credible challenge to the constitutionality described in Lathrop &

Gage L.C.'s affirmative defenses 12 through 19. The plaintiff has been repeatedly deprived of counsel by the continuing actions of the defendants including Lathrop & Gage Lucy's senior partner Kansas State Senator Vratil in what clearly are crimes and yet the Missouri Board of Bar Governors continues to participate in this unlawfulness as recently as March 2008 in the informal decision to deprive the plaintiff's associate Huffman of an opportunity to sit for the Missouri Bar.

The plaintiff, like the citizens of Missouri and its courts, has been ill served by the policy of the Missouri Board of Bar Governors to support Kansas' racial discrimination, denial of due process, rampant extrinsic fraud for the purposes of rigging the outcomes of Kansas cases and defeating the supremacy of federal law for private profit. A policy incredulously upheld by the Missouri Board of Bar Governors in the name of reciprocal admissions and no doubt to avoid disbarment or other reprisals in Kansas that await any Missouri attorney helping the plaintiff.

Regardless, the plaintiff will hold off Lathrop & Gage L.C.'s meritorious for the time being with the argument that the failure to plead facts related to standing and to injury deprives Lathrop & Gage L.C. from ending Missouri's punitive damage scheme for the time being. However, later these challenges will be ripe and Lathrop & Gage L.C. will be free to raise them to challenge the judgment the plaintiff seeks to deter the monopolization of Missouri's hospital supply market that has so injured the state's citizens. Hopefully, the Missouri Board of Bar Governors may develop some sense of duty and recognize the gravamen of their loyalty to Kansas before the plaintiff has to single handedly hold off Lathrop & Gage L.C. next challenge.

Under the controlling case law applicable to the Missouri Rules, Lathrop & Gage, L.C. has failed to plead affirmative defenses 2 through 19 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 strike the affirmative defenses deficiently asserted by the defendant Lathrop & Gage L.C. except for Lathrop & Gage L.C.'s first affirmative defense which is permitted to be asserted even though it is deficient in supporting facts and fails at law.

Respectively submitted,

S/Samuel K. Lipari

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 13th day of May, 2008, by first class mail postage prepaid to:

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