

**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>)	

**MOTION TO DISMISS THE GE
DEFENDANTS' SECOND SET OF AFFIRMATIVE
DEFENSES UNDER RULE 55.08 AND SUGGESTION IN SUPPORT**

Comes now the petitioner, Samuel K. Lipari ("plaintiff") appearing *pro se* and makes the following motion to dismiss the General Electric Company, General Electric Capital Business Asset Funding Corporation and GE Transportation Systems Global Signaling, LLC ("defendants") second attempt to raise affirmative defenses in violation of Missouri Rule 55.08.

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

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

6. 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.

7. The plaintiff opposed removal with a timely motion raising the right to remand the action from U S District Court for the absence of federal jurisdiction which ultimately was vindicated in a US District court order dated 11-29-06.

8. The plaintiff could not introduce motions addressing the substantive matters related to his claims during the period of time in federal court due to the failure of jurisdiction.

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

10. The plaintiff's motion is 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.

SUGGESTION IN SUPPORT OF DISMISSING AFFIRMATIVE DEFENSES

The plaintiff in this pleading seeks that the defendants' second set of affirmative defenses be dismissed or struck. Pleadings are "of the greatest utility in defining issues of a case." *Young v. Hall*, 280 S.W.2d 679, 681 (Mo.App.1955), citing *Gerber v. Schutte Inv. Co.*, 354 Mo. 1246, 194 S.W.2d 25, 28 (Mo.1946). This pleading addresses the requirements of Missouri's rules of civil procedure:

"The rules establish an organized procedure for identifying issues and defenses for trial and provide requisite guidance to attorneys **and pro se litigants** for asserting claims and defenses. The rules provide that parties may make denial and assert affirmative defenses in a responsive document to plaintiff's petition." [Emphasis added]

Weber v. Weber, 908 S.W.2d 356 at 359 (Mo., 1995).

The defendants' second set of affirmative defenses must be dismissed as being prohibited under Missouri Rule 55.08 for being untimely and conclusory. A claim that an

affirmative defense has not been pled with the particularly required by Rule 55.08, is actionable if raised by motion of the opposing party. *Walters Auto Body v. Farmers Insurance Company*, 829 S.W.2d 637, 640 (Mo.App.1992); *McGuire v. Bode*, 607 S.W.2d 165, 167 (Mo.App.1980).

I. Untimely Affirmative Defenses

The affirmative defenses contained in GE's answer were untimely because they were not contained in the first responsive pleading as required under Missouri Rule 55.08. The first sentence of Rule 55.08 commands that the affirmative defenses "shall" be in the filing following the pleading they are raised against:

"In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, comparative fault, state of the art as provided by statute, seller in the stream of commerce as provided by statute, 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, truth in defamation, waiver, and any other matter constituting an avoidance or affirmative defense." [Emphasis added]

First sentence of Missouri Rule 55.08.

In *Detling v. Edelbrock*, 671 S.W.2d 265, the Missouri Supreme Court mandated that affirmative defenses not responsively raised against the plaintiff's petition are waived. The court ordered that even in a motion to dismiss

filed instead of an answer as the *Edelbrock* defendants did and this action's GE defendants have done, omitted affirmative defenses must be waived:

"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.** Furthermore, nothing before us indicates that appellants either impliedly or expressly consented to trying the case on the defense. *Schimmel Fur Co. v. American Indemnity*, 440 S.W.2d 932, 939 (Mo.1969); *Duncan v. Price*, 620 S.W.2d 70, 71 (Mo.App.1981) (consent to the trial of non-pleaded affirmative defenses should not be implied unless it clearly appears that plaintiff tacitly agreed to join the such defense). **Having failed to raise the defense in a timely fashion, the defense was waived.**" [Emphasis added]

Detling v. Edelbrock, 671 S.W.2d 265 at 271 (Mo., 1984). The plaintiff has timely objected to each set of affirmative defenses raised by the defendants.

II. Conclusory Affirmative Defenses

The second set of affirmative defenses contained in the defendants' answer must be dismissed under Missouri Rule 55.08 for being conclusory. The second set of affirmative defenses (§§ 113-117 of the defendants' answer to the

petition) have no short and plain statement of facts showing GE is entitled to any defense or avoidance as required in the second sentence of Missouri Rule 55.08:

"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."
[Emphasis added]

Second sentence of Missouri Rule 55.08. Interpretation of this requirement can be guided from related statutes *in pari materia* prohibiting only conclusions and not facts being pled in defenses. Rule 55.07 requires that "[a] party shall state in short and plain terms his defenses to each claim." The Missouri Supreme Court has observed Rule 55.01 requires that "[a] defense consisting of an affirmative avoidance to any matter alleged in a preceding pleading must be pleaded." *Weber v. Weber*, 908 S.W.2d 356 at 358 (Mo., 1995)

"Rule 55.03(b)(3) provides, *inter alia*, that by pleading an affirmative defense, a litigant certifies that "the allegations and other factual contentions have evidentiary support, or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

Hoover v. Brundage-Bone Concrete Pumping, 193 S.W.3d 867 at 871 (Mo. App., 2006) citing Brundage-Bone's arguments adopted by the court.

Rule 55.05 declares that pleadings "shall contain (1) a short statement of the facts showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the pleader claims to be entitled." 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).

Missouri courts have found that affirmative defenses by their very nature require additional facts outside of the complaint:

"An affirmative defense contemplates additional facts not included in the allegations necessary to support plaintiff's case and avers that plaintiff's theory of liability, even though sustained by the evidence, does not lead to recovery because the

affirmative defense allows the defendant to avoid legal responsibility (citations omitted). *Parker v. Pine*, 617 S.W.2d 536, 542 (Mo.App.1981)."

Rice v. James, 844 S.W.2d 64 at 66 (Mo. App. E.D., 1992). Rule 58.08's requirement has been interpreted that affirmative defenses must be plead to the standard of claims in the plaintiff's petition:

"[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." This means that when "pleading affirmative defenses, their factual basis must be set out in the same manner as is required for pleading claims." *Tindall v. Holder*, 892 S.W.2d 314, 325[18] (Mo.App.1994)."

Hoover v. Brundage-Bone Concrete Pumping, 193 S.W.3d 867 at 871 (Mo. App., 2006) citing Brundage-Bone's argument adopted by the court.

"An affirmative defense seeks to defeat or avoid the plaintiff's cause of action, and avers that even if the allegations of the petition are taken as true, the plaintiff cannot prevail **because there are additional facts that permit the defendant to avoid the legal responsibility** alleged." Id. at 257; see also *Rice v. James*, 844 S.W.2d 64, 66 (Mo. App. E.D. 1992) (quoting *Parker v. Pine*, 617 S.W.2d 536, 542 (Mo. App. W.D. 1981) ("`An **affirmative defense contemplates additional facts not included in the allegations necessary to support plaintiff's case** and avers that plaintiff's theory of liability, even though sustained by the evidence, does not lead to recovery because the affirmative defense allows the defendant to avoid legal responsibility.'"). "`Any **evidence which tends to show plaintiff's cause never had legal existence** is admissible on a general denial even though the facts are affirmative, **if and insofar as they are adduced only to negative the plaintiff's cause of action** and are not by way of confession and avoidance.'" *Rice*, 844

S.W.2d at 66 (quoting *Parker*, 617 S.W.2d at 542).” [Emphasis added]

Smith v. Thomas, No. WD 65881 (Mo. App. 10/3/2006) (Mo. App., 2006).

The second set of affirmative defenses (§§ 113-117 of the defendants’ answer to the petition) fail to give the plaintiff notice of any defense because they have no facts or averments of circumstances identifying any particular basis for relief.

The affirmative defense asserted in § 113 states “Plaintiff’s claims are barred because they fail to state claims upon which they can be granted.” This is an assertion contradicted by this court’s overruling of the defendants’ dismissal motion and fails to identify what claims or what facts support the assertion of this affirmative defense.

The affirmative defense asserted in § 114 is an avoidance without even specifying the particular legal conclusion “estoppel, waiver or laches” on which it might be based, much less any facts that could create circumstances to support the application of any of the suggested theories.

The affirmative defense asserted in § 115 suggests the possibility of avoidance because “Plaintiff contributed to

its damages" without specifying what conduct or circumstances create the "contribution".

The affirmative defense asserted in ¶ 116 reflects the failure of notice in ¶ 115 by contradictorily suggesting an unnamed "someone other than the GE defendants" caused or contributed to the plaintiff's damages without suggesting what the "cause" or "contribution" was, how, when or where.

The affirmative defense asserted in ¶ 117 suggests the "plaintiff's own failure to perform" without describing the conduct the plaintiff was required to perform or when such conduct was to be performed.

The defendants' second set of affirmative defenses are as void of necessary particularity as the Missouri Court of Appeals encountered in *Mobley v. Baker*, 72 S.W.3d 251:

"In the appellants' answer to the respondent's petition, they alleged in paragraph 12 that "plaintiff's claims are barred by lack of consideration and failure of consideration." The respondent contends that this allegation was insufficient to satisfy the requirements of Rule 55.08 in that it was **conclusory in nature and failed to set forth any facts showing that the appellants were entitled to the defense alleged.** We would agree."

Mobley v. Baker, 72 S.W.3d 251 at pg.1 (Mo. Ct. App., 2002).

III. Timeliness of Plaintiff's Motion

Plaintiff's Motion to Dismiss the second set of affirmative defenses is timely once jurisdiction returns to

state court because the case was removed to federal court on the same day GE Defendant's answer was filed in state court (7-17-06), raising the second set of defenses. The US District court lacked jurisdiction over the action, even on the face of the defendants' removal filing. Plaintiff's next motions are due five days from receipt of the certified letter containing the order from the Western District of Missouri remanding the case by the 16th Circuit Clerk at Independence Missouri under Rule 43.02 (a).

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 11th day of December, 2006, by first class mail postage prepaid to:

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

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Pro se