UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Allen Petroleum Company, Inc. Debtor.	C/A No. 97-06382-W
Allen Petroleum Creditors' Trust, Plaintiff, v. Mr. Sam Patel, d/b/a Lynchburg Grocery, Defendant.	Adv. Pro. No. 99-80357-W **JUDGMENT** Chapter 11

Based upon the Findings of Fact and Conclusion of Law as recited in the attached Order of the Court, Sam Patel's Motion to Amend Answer is granted.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
August 17, 2000.

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IN RE: Allen Petroleum Company, Inc. Debtor.	C/A No. 97-06382-W
Allen Petroleum Creditors' Trust, Plaintiff, v. Mr. Sam Patel, d/b/a Lynchburg Grocery, Defendant.	Adv. Pro. No. 99-80357-W **ORDER** Chapter 11

THIS MATTER comes before the Court upon the Motion to Amend Answer (the "Motion") filed by Sam Patel, d/b/a Lynchburg Grocery ("Defendant") on June 20, 2000. Defendant moves to amend his Amended Answer filed on January 12, 2000 to add the following defenses to Plaintiff's claims asserted in the Amended Complaint: (1) ordinary course of business exception to 11 U.S.C. §547(b); (2) Statute of Limitations, thereby withdrawing the Court's jurisdiction over the subject-matter of the litigation; and (3) improper party. Allen Petroleum Creditors' Trust ("Plaintiff") filed an Objection to Defendant's Motion to Amend on July 26, 2000. After reviewing the pleadings filed in this matter and considering the arguments of counsel at the hearing on the Motion, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52, made applicable in bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7052.[1]

[1] The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such; and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

FINDINGS OF FACT

1. Allen Petroleum Company, Inc. ("Debtor") originally filed for relief under Chapter 11 of the Bankruptcy Code on July 31, 1997.

2. On December 4, 1998, the case was closed and this Court entered its Final Decree Closing the Case.

3. On July 29, 1999, William H. Short, Jr., Esq., as Trustee for the Creditors' Trust of Allen Petroleum Company, Inc., filed a Motion to Reopen the Chapter 11 case for the purpose of pursuing and administering certain assets of Debtor.

4. By Order on Motion to Reopen entered September 28, 1999, the Court found that, pursuant to the terms of Debtor's confirmed Chapter 11 plan, it retained jurisdiction to accept for filing and to hear the matters raised in the adversary proceedings filed by the Trustee. The Court further held that it was not necessary to reopen the main case and directed the Clerk's office to accept as filed the pleadings submitted by the Trustee at the time of the filing of the Motion to Reopen.

5. The adversary proceeding which is the subject of this Order was commenced by Plaintiff on July 29, 1999, prior to the entry of the Court's Order on Motion to Reopen.

6. On October 28, 2000, Plaintiff filed a Motion to Amend the Complaint pursuant to Fed. R. Civ. P. 15, made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7015.

7. No objections nor replies to Plaintiff's Motion to Amend the Complaint were filed; therefore, on January 7, 2000, the Court entered an Order granting the Motion to Amend the Complaint.

8. Plaintiff filed an Amended Complaint on January 7, 2000, adding a fourth cause of action involving an objection to defendants' claims.

9. On January 12, 2000, Defendant filed an Amended Answer.[2]

10. On June 20, 2000, Defendant filed the Motion presently before the Court pursuant to Fed. R. Civ. 15, made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7015 to add several defenses which had not been asserted in the Amended Answer.[3]

CONCLUSIONS OF LAW

Defendant seeks to amend his Amended Answer to add the following defenses: (1) ordinary course of business exception to 11 U.S.C. §547(b); (2) Statute of Limitations, thereby withdrawing the Court's jurisdiction over the subject-matter of the litigation; and (3) improper party. Defendant relies on Fed. R. Civ. P. 15, made applicable in this case by Fed. R. Bankr. P. 7015, which provides in pertinent part:

> **(a) Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleadings is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. *Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.*

(Emphasis added). The Court has great discretion in deciding whether to grant leave to amend

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[2] Ms. Karen Anderson, d/b/a Tommy's #1, Mr. Nick Kremydas, d/b/a Delmae Grocery, and Short Stop Grocery, who were named defendants in both the initial and amended Complaint, did not respond to neither the initial Complaint nor the Amended Complaint; therefore, by Orders entered January 14, 2000 and June 29, 2000, the Court held them in default.

[3] The Court notes that the Amended Answer of January 12, 2000 was filed by Glenn F. Givens, Esq., who signed pleadings on behalf of Defendant up until that point. The Motion which is presently before the Court, however, was filed by Robert F. Anderson on behalf of Defendant. At the hearing on the Motion, both Mr. Givens and Mr. Anderson were present on behalf of Defendant. It is unclear to the Court whether Defendant is still represented by both lawyers.

after the time for amendment as a matter of course has expired. Hargett v. Valley Fed. Savings Bank, 60 F.3d 754, 761 (11th Cir. 1995); Bireline v. Seagondollar, 567 F.2d 260, 262 (4th Cir. 1977). In Foman v. Davis, 371 U.S. 178 (1962), the Supreme Court established the following standard for courts to follow in their decision of whether to grant leave to amend a pleading:

> In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be 'freely given.'

Id. at 182; see also Hargett, 60 F.3d at 761.

In its objection, Plaintiff argues that the liberality of Fed. R. Civ. P. 15 must be tempered by the requirements of Fed. R. Civ. P. 8(c).[4] In other words, Plaintiff argues that the defenses that Defendant seeks to add in his Second Amended Answer are affirmative defenses that he was required, pursuant to Fed. R. Civ. P. 8(c), made applicable in this proceeding by Fed. R. Bankr. P. 7008, to raise in his initial Answer.[5] Although the Court agrees with Plaintiff that a failure to

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[4] Fed. R. Civ. P. 8(c) provides in pertinent part:

> In pleading to a preceding 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, statue of frauds, *statute of limitations*, waiver, *and any other matter constituting an avoidance or affirmative defense.*

(Emphasis added).

[5] Even though this Court considers the ordinary course of business exception to 11 U.S.C. §547(b) to be an affirmative defense, the defense as well as the improper party defense that Defendant seeks to add to his Answer are not expressly mentioned in Fed. R. Civ. P. 8(c); therefore, it is questionable whether they fall in the category of "other matter constituting an

plead an affirmative defense in the appropriate pleading generally results in a wavier, courts view "waiver of a defense [as] a harsh sanction [which] is not automatically applied merely because an affirmative defense is not included in the answer." Floyd v. Ohio General Ins. Co., 701 F. Supp. 1177, 1187 (D.S.C. 1988). There is ample authority among various jurisdictions that, absent unfair surprise or prejudice to a plaintiff, an affirmative defense is not waived for failure to raise it in the original answer. See id. at 1187 ("The harsh sanction of waiver is generally limited to circumstances where the plaintiff has no notice of the defense and is completely surprised and prejudiced by defendant's late assertion of the defense."); see also Brinkley v. Harbour Recreation Club, 180 F.3d 598, 612 (4th Cir. 1999) ("Although it is indisputably the general rule that a party's failure to raise an affirmative defense in the appropriate pleading results in waiver . . . there is ample authority in this Circuit for the proposition that absent unfair surprise or prejudice to the plaintiff, a defendant's affirmative defense is not waived when it is first raised in a pre-trial dispositive motion.").

Although, as previously mentioned, Fed. R. Civ. P. 8 technically requires that affirmative defenses be included in responsive pleadings, several courts have allowed such defenses to be raised for the first time in pre-trial dispositive motions. See, e.g., Vaughn v. King, 167 F.3d 347, 352 (7th Cir. 1999) ("Because the issue of undue influence was presented in the pretrial order, the plaintiff's claim that they were unfairly surprised by the submission of the issue to the jury is without merit, and it cannot be said that the defendants waived reliance upon it."); Ledo Financial Corp. v. Summers, 122 F.3d 825, 827 (9th Cir. 1997) (citing Camarillo v. McCarthy,

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avoidance or affirmative defense" mentioned in the rule. However, the Court does not need to determine whether those defenses are deemed to be affirmative defenses which, pursuant to Fed. R. Civ. P. 8(c), must be included in a responsive pleading, in that the outcome of the case is not altered by such a determination.

998 F.2d 638, 639 (9th Cir. 1993)) ("Although Rule 8 requires affirmative defenses to be included in responsive pleadings, absent prejudice to the plaintiff an affirmative defense may be plead for the first time in a motion for summary judgment."). In the case of Expertise, Inc. v. Aetna Fin. Co., 810 F.2d 968 (10th Cir. 1987), the court specifically held that defendant did not waive the statute of limitation defense by failing to include it in the answer, where such defense was included in the pretrial order. Id. at 973 (citing Allied Chemical Corp. v. Mackay, 695 F.2d 854, 855-56 (5th Cir. 1983)).

Courts are usually willing to hold that an affirmative defense is not waived if not included in a responsive pleading as long as it is raised at a "pragmatically sufficient time" which does not prejudice the opposing party." United States v. Shanbaum, 10 F.3 305, 312 (5th Cir. 1994). In considering whether the defense of res judicata, raised for the first time in defendant's trial brief, that was filed the same day as the pre-trial order, the court in Shanbaum considered the holding of Lucas v. Untied States, 807 F.2d 414 (5th Cir. 1986) that the defense of a statutory cap on the amount of damages raised for the first time at trial was raised at a pragmatically sufficient time. The court in Shanbaum concluded that, by including the defense of res judicata in the trial brief, the defendant gave plaintiff an adequate opportunity to respond to the defense and ultimately held that res judicata was raised at a "pragmatically sufficient time." Shanbaum, 10 F.3d at 312.

In this case, as to the Statute of Limitations defense that Defendant is seeking to introduce in his Second Amended Answer, the Court finds that such defense was brought at a sufficient time, thus preventing any undue prejudice to Plaintiff. Plaintiff argues that there was a great delay in raising such defenses. The Court acknowledges the fact that the case was commenced over a year ago; however, the Court takes into consideration the fact that Plaintiff amended the Complaint on January 7, 2000; thus, the delay cannot be solely attributed to

Defendant. Further, Plaintiff has failed to convince the Court that it will be prejudiced in any way Defendant were allowed to amend his Answer to include the Statute of Limitation defense. First, despite the discovery deadline of August 8, 2000 in the Amended Order of the Court entered June 15, 2000, discovery has yet to be concluded because Defendant's deposition was suspended due to his inability to answer Plaintiff's questions absent documentation presently in the hands of the Internal Revenue Service. Second, the Statute of Limitation defense is a factual issue which depends on the application of the facts in this case to 11 U.S.C. §546(a), on which no further discovery is necessary. Therefore, the Court concludes that the affirmative defense of Statute of Limitations is not waived by Defendant's failure to include it in his initial Answer.[6]

Upon the Court's conclusion that the defenses that Defendant seeks to add were not waived by his failure to include them in the initial Answer, the next issue becomes whether leave to amend the Answer should be granted. "The propriety of a motion to leave to amend is generally determined by reference to several factors: (1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party." Hurn v. Retirement Fund Trust, 648 F.2d 1252, 1254 (9th Cir. 1981) (citing Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973)). As previously discussed in connection with the issue of waiver of affirmative defenses, Plaintiff would not be prejudiced by the amendment of the Answer in that discovery has not been completed and, at the deposition of Defendant, which has been rescheduled, Plaintiff will have sufficient time to explore the defenses that Defendant seeks to add. Due to the fact that discovery has been suspended and Defendant's scheduled deposition was canceled because some

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[6] If the other two defenses were deemed to be affirmative defenses for purposes of Fed. R. Civ. P. 8(c), the Court would also conclude that they were not waived because allowing them would not prejudice Plaintiff.

necessary documentation was in the possession of the Internal Revenue Service, no delay will be caused by allowing the Answer to be amended. See, e.g., Hurn, 648 F.2d at 1254 (quoting Howey, 481 F.2d at 1190-91) ("Delay alone does not provide sufficient grounds for denying leave to amend: 'Where there is lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion.'"). Lastly, the Court finds that Defendant's defenses that he seeks to add to the Answer do not appear frivolous and there is no indication that Defendant is seeking to amend his Answer in bad faith. Therefore, leave to amend Defendant's Answer should be granted pursuant to Fed. R. Civ. P. 15(a), made applicable in this proceeding by Fed. R. Bankr. P. 7015. It is therefore,

IT IS ORDERED that Sam Patel's Motion to Amend Answer is granted.

IT IS FURTHER ORDERED THAT the proposed Second Amended Answer submitted along with the Motion on June 20, 2000 shall be accepted by the Clerk's Office for filing.

AND IT IS SO ORDERED.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
August 17, 2000.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

AUG 18 2000

Anderson, Scott, Givens, Short ~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~ jgmt index via BNC

VANNA L. DANIEL

Deputy Clerk