IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GEORGE D. KNUTKOWSKI, II, individually and GEORGE D. KNUTKOWSKI, II, as personal representative of the ESTATE OF GEORGE D. KNUTKOWSKI,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 4889-VCG**
NONNIE CROSS, a/k/a NONNIE KNUTKOWSKI, a/k/a CHONGHAN KIM,	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: September 27, 2011
Date Decided: December 22, 2011

Kashif I. Chowdhry, Esquire of Parkowski, Guerke & Swayze P.A., Dover, Delaware, Attorney for Plaintiffs.

Michael G. Rushe, Esquire of Hudson, Jones, Jaywork & Fisher, LLC, Dover, Delaware, Attorney for Defendant.

NOBLE, Vice Chancellor

I. INTRODUCTION

This case involves the estate of George D. Knutkowski (the "Estate"). Plaintiff George D. Knutkowski, II is the decedent's son. Defendant Nonnie Cross is the decedent's widow. The plaintiff, individually and as personal representative of the Estate, has asserted claims against the defendant for, among other things, failing to repay two loans that the decedent made to the defendant (the "Loan Claims"). In her answer, filed on October 9, 2009, the defendant denied that she had failed to repay any loans,[1] but did not raise any other defenses to the Loan Claims. On August 27, 2010, the defendant moved to amend her answer (the "Amendment") to add the statute of limitations, laches, and waiver as affirmative defenses to the Loan Claims. The Master in Chancery granted that motion in a final report (the "Final Report") issued on June 2, 2011. The plaintiff has filed exceptions to the Final Report. This is the Court's decision on those exceptions.

II. CONTENTIONS

The plaintiff takes exception to the Master's decision granting the Amendment. The plaintiff argues that the defendant waived any statute of limitations, laches, waiver, or other time bar defense when the defendant purposefully chose not to raise any of those defenses in her answer. The plaintiff

[1] *See* Answer at ¶ 9 ("[A]ll loan agreements were paid in full prior to George D. Knutkowski's death."); *id.* at Second Defense ("Loan obligations were paid in full prior to George D. Knutkowski's death.").

also highlights that the parties engaged in at least eight months of litigation activities after the defendant filed her original answer. The plaintiff argues that, in light of that extensive litigation activity, it would be unfair and inequitable to allow the defendant now to change the scope of the litigation.

Although the Master granted the defendant's motion to amend her answer, the Master explained that "it would be inequitable to force the plaintiff to bear the extra litigation burden caused, not by the defenses themselves, but by the delay in asserting those defenses."[2] Thus, the Master determined:

> at the conclusion of this litigation, I will allow the plaintiff to demonstrate the reasonable amount of expenditures he incurred, representing the difference between what this litigation cost and what it would have cost if the defenses had been raised in the answer (and excluding the cost of litigating the . . . [Amendment]). That amount shall be entered as a court cost against the defendant, and on behalf of the plaintiff.[3]

The plaintiff takes exception to the Master's decision not to award him the attorney's fees and costs he incurred in opposing the Amendment.

The defendant responds that the plaintiff will not suffer any demonstrable prejudice if the defendant amends her answer. The defendant also argues that she is not seeking to raise additional defenses on the eve of trial or at the time of a case dispositive motion and, therefore, that leave to amend should be freely granted under Court of Chancery Rule 15. Finally, in response to the plaintiff's exception

[2] Final Report at 8-9 (citation omitted).
[3] *Id.* at 9.

to the Master's decision on fees and costs, the defendant argues that the Master correctly concluded that "the decision to oppose the motion was a tactical decision, for which the plaintiff will have to bear his own costs."[4]

III. ANALYSIS

"This Court reviews a Master's Report *de novo* as to both findings of fact and conclusions of law."[5]

Court of Chancery Rule 8(c) provides that "[i]n a pleading to a preceding pleading, a party shall set forth affirmatively . . . laches . . . , statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." Court of Chancery Rule 12(b) similarly provides that "[e]very defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required . . . ." Our Supreme Court has determined that Superior Court Rules 8(c) and 12(b), which are analogous to Court of Chancery Rules 8(c) and 12(b), "require a defendant to raise the defense of limitations either in a motion to dismiss or as an affirmative defense in a responsive pleading . . . ."[6] That determination, however, does not necessarily address when a defendant may amend a responsive pleading to add affirmative defenses that were originally omitted. Court of Chancery Rule 15(a), which specifically addresses amendments,

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[4] *Id.* at 7 (citation omitted).
[5] *Brown v. Wiltbank*, 2011 WL 5027057, at *5 (Del. Ch. Oct. 13, 2011) (citing *DiGiacobbe v. Sestak*, 743 A.2d 180, 184 (Del. 1999)). *See* Ct. Ch. R. 144.
[6] *Gadow v. Parker*, 865 A.2d 515, 516 (Del. 2005).

provides that "leave [to amend a pleading] shall be freely given when justice so requires." Both our Supreme Court and our Superior Court have suggested that, at least in certain circumstances, a defendant may amend her answer to add affirmative defenses, which were not originally pled.[7] Thus, taken together, Rules 8(c), 12(b), and 15(a) suggest that a defendant is required to plead affirmative defenses in her answer, but that, if the defendant fails to do so, the Court has discretion to allow the defendant to amend her answer.

Many Federal Courts have come to a similar conclusion in interpreting Federal Rules of Civil Procedure 8(c) and 15(a),[8] which are very similar to Court

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[7] *See Abdi v. NVR, Inc.*, 945 A.2d 1167, 2008 WL 787564, at *2 (Del. Mar. 25, 2008) (TABLE) ("NVR's motion for leave to amend its answer [to add a statute of limitations defense] was filed on December 1, 2005-within the deadline prescribed by the Superior Court's Scheduling Order for filing motions to amend or supplement pleadings. Nothing in the record indicates that the trial court abused its discretion in granting NVR's motion for leave to amend.") (citation omitted); *James v. Glazer*, 570 A.2d 1150, 1154 (Del. 1990) ("A second exception to the general rule, that affirmative defenses are waived if not pled, has been recognized when evidence of an unpled affirmative defense is admitted without objection."); *Kaplan v. Jackson*, 1994 WL 45429, at *2 (Del. Super. Jan. 20, 1994) ("Generally, if a defendant does not plead an affirmative defense, he or she waives that defense. . . . However, Delaware courts have recognized an exception to this general rule where evidence of an unpled affirmative defense is admitted without objection.") (citations omitted).

[8] *See, e.g.*, *Anthony v. City of New York*, 339 F.3d 129, 138 n.5 (2d Cir. 2003) ("Although affirmative defenses like qualified immunity must be pleaded in response to a pleading, *see* Fed. R. Civ. P. 8(c), the district court may, in its discretion, construe a motion for summary judgment as a motion pursuant to Fed. R. Civ. P. 15(a) for leave to amend the defendant's answer. . . . Because there was no showing of bad faith or undue prejudice, the district court did not abuse its discretion in construing defendants' motion for summary judgment as a motion to amend their answer to assert a qualified immunity defense. The defense of qualified immunity therefore was not waived below.") (citation omitted); *Jackson v. Rockford Hous. Auth.*, 213 F.3d 389, 392-93 (7th Cir. 2000) ("Federal Rule of Civil Procedure 8(c) requires a defendant to plead a statute of limitations defense and any other affirmative defense in its answer to the complaint. *See* FED. R. CIV. P. 8(c). On the other hand, the district court has the discretion to allow an answer to be amended to assert an affirmative defense not raised initially. *See* FED. R. CIV. P. 15(a).

of Chancery Rules 8(c) and 15(a).[9] The general rule in the Federal Courts is that a defendant is allowed to amend her answer to add affirmative defenses as long as the amendment does not unduly surprise or prejudice the plaintiff.[10] That is the rule that should be applied in this Court as well.

The plaintiff cannot tenably claim that he was unduly surprised by the Amendment because the basis for the Loan Claims is two dated promissory notes, which were attached, as exhibits, to the plaintiff's complaint. The existence of time bar defenses was apparent from documents that the plaintiff filed. Moreover, although the plaintiff claims to have been prejudiced by the Amendment, any prejudice would appear to be minimal. As the Master explained, "[t]his is not a situation where the matter is on the eve of trial or in the midst of case-dispositive

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Rule 15(a) states that 'leave shall be freely given when justice so requires.' *See id.* As a rule, we have allowed defendants to amend when the plaintiff had adequate notice that a statute of limitations defense was available, and had an adequate opportunity to respond to it despite the defendant's tardy assertion.") (citation omitted); *Manson v. City of Chicago*, 795 F. Supp. 2d 763, 769-70 (N.D. Ill. 2011) ("Though Federal Rule of Civil Procedure 8(c) requires that affirmative defenses be raised in a defendant's answer, Rule 15(a) instructs that courts should 'freely give leave' to amend pleadings 'when justice so requires.' The purpose of Rule 8(c) is fulfilled so long as a plaintiff receives notice of an affirmative defense and a chance to rebut it.") (citation omitted).

[9] Federal Rule of Civil Procedure 8(c) provides that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense," and Federal Rule of Civil Procedure 15(a)(2) provides that "[t]he court should freely give leave [to amend a pleading] when justice so requires."

[10] *See, e.g.*, *Jackson*, 213 F.3d at 393 ("The general rule that amendment is allowed absent undue surprise or prejudice to the plaintiff is widely adhered to by our sister courts of appeals.") (citing *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 612-13 (4th Cir. 1999)); *Brinkley*, 180 F.3d at 612 ("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. . . . This view is in accord with the vast majority of our sister circuits.") (citing five cases).

motions, nor does a discovery cut-off date loom."[11] Although Rules 8(c) and 12(b) required the defendant to plead any affirmative defenses in her answer, the Court, under Rule 15(a), has discretion to allow amendments to an answer when "justice so requires." The Master correctly exercised that discretion in allowing the Amendment. Therefore, the plaintiff's exceptions to that decision are denied.

Moving to the plaintiff's exception to the Master's decision not to award him attorney's fees and costs, the Master correctly recognized that "the decision to oppose the motion was a tactical decision, for which the plaintiff will have to bear his own costs."[12] The plaintiff correctly points out that the defendant failed to include certain affirmative defenses in her answer. But from that fact, the plaintiff seems to suggest that any attempt by the defendant to amend her answer is somehow problematic and, therefore, that the plaintiff is almost required to oppose the Amendment. That is not true. The defendant took the perfectly permissible action, under Rule 15(a), of seeking leave to amend her answer. The plaintiff then chose to oppose the defendant's request. That also was a perfectly permissible action. But, it was, as the Master explained, a "tactical decision." Therefore, the plaintiff's exception to the Master's decision not to award him the attorney's fees and costs he incurred in opposing the Amendment is denied.

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[11] Final Report at 8.
[12] *Id.* at 7.

IV. CONCLUSION

For the foregoing reasons, the plaintiff's exceptions to the Final Report are denied. An implementing order will be entered.