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LITIGATION REVIEW

Affirmative Steps to Preserve Affirmative Defenses

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A recent decision of the Commercial Division of the Supreme Court in Nassau County resolved several interesting, reoccurring, issues arising from a motion to dismiss affirmative defenses, providing helpful guidance on standards, rules and strategies relating to the pleading of affirmative defenses.

In *Armstrong v. Forgione*, Index No. 2988/05 (NYLJ, Jan. 8, 2007), Justice Leonard B. Austin was faced with a motion to dismiss all of defendants' affirmative defenses in a shareholder/joint venture dispute alleging, among other things, breach of fiduciary duty. As is customary in New York practice, defendants alleged their nine "affirmative defenses" in general, conclusory terms.

Justice Austin observed the rather amorphous (albeit common) setting with which he was confronted: "This motion is an outgrowth of the nonspecific nature of the pleadings. The amended complaint makes a series of general allegations regarding the parties, the projects and their status. These general allegations are then incorporated by reference into the twelve substantive causes of action. Similarly, the affirmative defenses do not specify against which causes of action or Plaintiffs they are asserted."

Although the pleadings therefore provided the court with little assistance in clarifying and determining the issues, Justice Austin noted the liberal standards applied to affirmative defenses when considering a motion to dismiss under CPLR 3211(b), which require the court to "assume [that] all the factual allegations relating to the affirmative defense are true" and to "give the defendant the benefit of all reasonable inferences that can be drawn from the pleadings and any other extrinsic proof submitted in support of the defense." Moreover, the court observed that "[i]f there is any doubt as to the availability of the defense, it should not be dismissed."

In fact, the standards governing the pleading of affirmative defenses are particularly lax under New York practice. As Professor David D. Siegel notes, "brevity is not only permissible, but encouraged." NY Practice § 223, at p. 370 (4th ed. 2005). The most illustrative example often cited is the New York Court of Appeals' ruling that merely pleading the phrase "statute of limitations" is sufficient to preserve that defense. See *Immediate v. St. John's Queens Hospital*, 48 N.Y.2d 671, 421 N.Y.S.2d 875, 397 N.E.2d 385 (1979).

Justice Austin then determined the validity of each affirmative defense seriatim, only dismissing a defense if there was no conceivable basis to sustain it. For example, the defendant alleged that "the Plaintiff failed to bring the action in the form prescribed by statute," elaborating in its motion papers "that this affirmative defense was directed at Plaintiff's request for a judicial dissolution" of the joint venture. Taking a practical view of that alleged defense, Justice Austin dismissed it, finding no meaningful difference as to whether the matter was commenced by way of summons and complaint or petition in a special proceeding for dissolution - observing that in either case the court had jurisdiction to adjudicate the controversy.

Justice Austin considered another common defense often pleaded in conclusory terms - "laches." Although the court noted that to prove laches defendants "must establish an injury, change in position, loss of evidence or prejudice resulting from the delay," it allowed the defense to stand even though it was "poorly pled."

While defendants merely asserted that the affirmative defense was premised upon an allegation that plaintiff "abandoned" the entities in question "for a two year period," Justice Austin sustained this defense because laches derives from equity and plaintiff was seeking the equitable remedy of an accounting.

The court resolved in a similar practical manner the issues concerning two other affirmative defenses often alleged with sparse factual support: "fraud in the inducement" and "unclean hands." The court noted that "[f]raud is an affirmative defense which must be pled with the same detail as if it were alleged in a complaint."

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It also observed that both of these affirmative defenses were alleged with "one-sentence conclusions of law" and therefore were insufficient on their face. Nevertheless, the court recognized that "[d]ismissing [these] affirmative defense[s] without granting Defendants leave to replead will almost certainly result in another round of motions wherein Defendant[s] will seek leave to amend the answer," so the court granted defendants leave to replead both of these otherwise deficient defenses to afford them the opportunity to supply the missing factual support.

The court addressed another interesting question often raised in the context of pleading affirmative defenses: how to deal with defenses that are actually elements of plaintiff's prima facie case, upon which plaintiff has the burden of proof. The defendants characterized certain allegations as "affirmative defenses," but the court found that neither was really an affirmative defense. One was that the agreement was void because of "lack of consideration," while the other was that the agreement failed to contain sufficient terms to constitute an enforceable contract.

With respect to "lack of consideration," the court noted that while "[i]t is not entirely clear whether this needs to be pled as an affirmative defense[,] . . . proof of consideration is a part of plaintiff's affirmative proof on a cause of action for breach of contract." As such, the court held that it does not have to "be pled as an affirmative defense."

Similarly, with respect to the allegation that the terms of the alleged agreement were not certain, the court found that "for Plaintiffs to prevail on their claims . . . they will have to prove the existence of a valid partnership or joint venture" through "an express or implied contract." It was unnecessary, therefore, for defendant to plead that allegation. Continuing its practical approach, however, the court declined to "dismiss" these gratuitous allegations, finding that they were, in effect, harmless surplusage, citing Second Department authority.

'Separate Defenses'

As illustrated by *Armstrong*, defendants can be faced with uncertainty when considering whether to characterize an allegation as an affirmative defense where the matter may fall within plaintiff's prima facie case, and thus, burden of proof. Some practitioners attempt to avoid the problem by calling their defenses "separate defenses" rather than "affirmative defenses." The fear, of course, is that a court might find that the defendant has assumed the burden of pleading and proving something that is actually plaintiff's burden to plead and prove. There are several sound reasons, however, for pleading a matter as an affirmative defense when any doubt exists and for the courts to refrain from any artificial burden-shifting.

By definition, an "affirmative defense" is a defense that must be pleaded affirmatively in order to be preserved. If it is not so pleaded, it is potentially waived. Failure to plead, therefore, could have drastic consequences. While CPLR 3018(b) does identify a list of affirmative defenses, it specifically states that the affirmative obligation to plead certain defenses "shall not be confined to the instances enumerated."

In determining what else is required to be alleged affirmatively, CPLR 3018(b) provides two independent factors: "all matters which if not pleaded [1] would be likely to take the adverse party by surprise or [2] would raise issues of fact not appearing on the face of a prior pleading." As Professor Siegel so aptly recommends: "The defendant's rule of thumb should be to treat as an affirmative defense - pleading it and being prepared to prove it - anything she is not sure of being able to introduce pursuant to her denials." N.Y. Practice § 223, at 369.

Professor Siegel also notes that pleading something as an affirmative defense that may be covered by a mere denial "carries little risk" while the consequence of omitting the defense, if it is ultimately determined to be required, would clearly be more harmful than any risk in unnecessarily pleading it.

As Justice Austin recognized in *Armstrong*, there is no prejudice to plaintiff when a defendant pleads more than necessary. Needless motion practice seeking to strike such allegations should, therefore, be avoided.

As to the issue whether a defendant should be deemed to have assumed a burden simply by being cautious and affirmatively alleging even that which it has no burden to allege or prove, the courts should take an equally practical approach. Because the rule of pleading affirmative defenses is designed to avoid surprising a plaintiff, a defendant should not be penalized for being as expansive as possible in placing plaintiff on notice of potential defenses.

'Beece'

In *Beece v. Guardian Life Ins. Co. of Am.*, 110 A.D.2d 865, 867, 488 N.Y.S.2d 422, 424 (2d Dep't 1985), the Second Department fortunately held that where the plaintiff has the burden of proving elements of its cause of action, that burden does not "shift merely because the defendant labeled its denial an 'affirmative defense.'"

While *Beece* supported its conclusion with a citation to Siegel's Practice Commentaries, it curiously added a "but cf" citation to the Third Department decision in *Beare v. Prudential Ins. Co. of Am.*, 66 A.D.2d 936, 411 N.Y.S.2d 442 (3d Dep't 1978), causing some confusion on this issue. However, *Beare* seems to have misconstrued the only authority it cites for the proposition that raising an issue as an affirmative defense somehow assumes the burden of proving it, citing, apparently incorrectly, *Imbrey v. Prudential Ins. Co.*, 286 N.Y. 434, 436, 36 N.E.2d 651, 652 (1941).

Imbrey did not address at all the question as to shifting the burden of proof on affirmative defenses. It merely addressed a substantive question under insurance law, finding that the defendant had the burden of proving it had adequately and timely sent notice of cancellation of a life insurance policy in the event of nonpayment. There should be no reason, therefore, for a court to penalize a defendant for characterizing matter as an "affirmative defense" where the burden is actually plaintiff's.

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