UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

JON CHRISTOPHER EVANS,	**CASE NO. 09-03763-NPO**
DEBTOR.	**CHAPTER 7**

JOINTLY ADMINISTERED WITH RELATED CASES

G&B INVESTMENTS, INC.	**PLAINTIFF**
VS.	**ADV. PROC. NO. 10-00040-NPO**
DEREK A. HENDERSON, TRUSTEE FOR THE BANKRUPTCY ESTATE OF JON CHRISTOPHER EVANS, STEPHEN SMITH, TRUSTEE FOR THE BANKRUPTCY ESTATE OF CHARLES H. EVANS, JON CHRISTOPHER EVANS, ET AL.	**DEFENDANTS**

MEMORANDUM OPINION AND ORDER
ON BANK OF FOREST'S MOTION FOR AMENDMENT OF
MEMORANDUM OPINION AND ORDER (DKT. 446)

This matter came before the Court for hearing on December 14, 2011 (the "Hearing"), on Bank of Forest's Motion for Amendment of Memorandum Opinion and Order (Dkt. 446) (the "Motion") *(Adv. Dkt. 455)*[1] and Bank of Forest's Memorandum on Motion for Amendment of Memorandum Opinion and Order (Dkt. 446) (the "BOF Brief") *(Adv. Dkt. 456)* filed by Bank of Forest ("BOF") and the Response to Bank of Forest's Motion for Amendment of Memorandum Opinion and Order (Dkt. 446) *(Adv. Dkt. 463*) filed by Mississippi Valley Title Insurance Company and Old Republic National Title Insurance Company (the "Title Companies"), and Bank of Forest's Reply to Response to Motion for Amendment of Memorandum Opinion and Order (Dkt. 446) (the "Reply") *(Adv. Dkt. 464)* filed by BOF in the above-referenced adversary proceeding (the

[1] Citations to docket entries in the Adversary are italicized to distinguish them from citations that appear in the style of some of the pleadings.

"Adversary"). At the Hearing, William Liston, III represented BOF, and M. Scott Jones represented the Title Companies. At the conclusion of the Hearing, the parties submitted additional legal briefs, which include: Bank of Forest's Supplemental Brief in Support of Motion for Amendment of Memorandum Opinion and Order (Dkt. 446) (the "BOF Supp. Brief") *(Adv. Dkt. 467)* filed by BOF and Supplemental Brief in Opposition to Bank of Forest's Motion for Amendment of Memorandum Opinion and Order (Dkt. 446) *(Adv. Dkt. 472)* filed by the Title Companies.

In the Motion, BOF seeks amendment of the Court's 84-page Memorandum Opinion and Order on Cross-Claims of Mississippi Valley Title Insurance Company, Old Republic National Title Insurance Company, Bank of Forrest, and Heritage Banking Group Related to Tract IV Phase One: Liability and Uncontested Damages (the "Opinion") *(Adv. Dkt. 446)*, which was issued on October 7, 2011, after a bench trial. BOF asks the Court to remove all references in the Opinion to the affirmative defenses of election of remedies and/or waiver as a basis for its ruling in favor of the Title Companies. Having considered the briefs as well as the arguments of counsel presented at the Hearing, the Court finds that the Motion is not well taken and should be denied.

Jurisdiction

This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K) and (O). Notice of the Motion was proper under the circumstances.

Facts

The Court previously set forth the facts underlying BOF's claims against the Title Companies in the Opinion and will not repeat that lengthy discussion here. Only those facts that are necessary for an understanding of the relief sought by BOF are set forth below. They are taken directly from the Opinion, with the exception of certain facts regarding more recent procedural history.

1. In 2008 and in 2009, BOF made two independent loans to White Oaks Investment Company LLC ("White Oaks"), purportedly for the purchase of certain commercial real property in Madison County, Mississippi. White Oaks was controlled by Jon Christopher Evans ("Chris Evans"). His brother, Charles H. Evans, Jr. ("Charles Evans" or, together with Chris Evans, the "Evans Brothers"), prepared the certificates of title for both transactions.[2] At issue in the Motion is the second loan entered into between BOF and White Oaks in 2009.

2. As to the first loan, the Title Companies issued a title commitment to BOF on July 17, 2008, that stated that title in the property was vested in G&B Investments, Inc. Thereafter, on July 21, 2008, BOF and White Oaks entered into a loan agreement in the amount of $1,296,500.00 (the "2008 White Oaks Loan"). The Title Companies issued a lender's title policy to BOF on September 17, 2008 (the "2008 Title Policy").

3. As to the second loan, the Title Companies issued a title insurance commitment to BOF on August 26, 2009 (the "2009 Title Commitment"). BOF and White Oaks entered into a loan agreement in the amount of $451,450.00 (the "2009 White Oaks Loan"). Shortly thereafter, the Title Companies discovered that the Evans Brothers had committed fraud and refused to issue BOF a title insurance policy in connection with the 2009 Title Commitment.

4. In Bank of Forest's Amended Crossclaims Against Defendants Mississippi Valley Title Insurance Company, and Old Republic National Title Insurance Company (the "Cross-Claims") *(Adv. Dkt. 101)* filed by BOF in the Adversary, BOF sought damages against the Title Companies in the amount of the loan proceeds it disbursed to White Oaks. BOF alleged twelve causes of action arising out of the 2008 Title Policy and/or the 2009 Title Commitment: (1) negligent

[2] Charles Evans and Chris Evans pled guilty to conspiracy to commit money laundering and bank fraud in January, 2011, and were sentenced to 20 and 14 years in prison, respectively.

misrepresentation; (2) intentional misrepresentation and fraud; (3) negligent hiring and retention of agent; (4) breach of contract 2009 Title Commitment; (5) breach of contract 2008 Title Policy; (6) promissory estoppel-2008 White Oaks Loan; (7) promissory estoppel-2009 White Oaks Loan; (8) breach of obligation of good faith and fair dealing in claims handling; (9) extent and validity of lien against property; (10) bad faith; (11) civil conspiracy; and (12) attorney's fees pursuant to Rule 7008(b) of the Federal Rules of Bankruptcy Procedure.

5. As to the 2009 White Oaks Loan, BOF alleged in the Cross-Claims that the Title Companies breached the 2009 Title Commitment by refusing to issue BOF a title insurance policy and, moreover, that they fraudulently or negligently misrepresented the condition of the title to the property in the 2009 Title Committment.

6. In the Title Companies' Answer and Affirmative Defenses to Cross-Claim filed by Bank of Forest (the "Answer") *(Adv. Dkt. 119)*, the Title Companies asserted numerous affirmative defenses to the Cross-Claims. Of particular relevance to the Motion are the affirmative defenses of election of remedies and waiver, both of which appear in the Answer on page two, in paragraph eight, under the heading, "Rule 8(c) Defenses."

7. The Title Companies filed the Title Companies' Motion for Summary Judgment against Bank of Forest *(Adv. Dkt. 282)* on December 22, 2010.

8. In Bank of Forest's Response to Title Companies' Motion for Summary Judgment *(Adv. Dkt. 342),* filed on January 4, 2011, BOF stated its intention to pursue only some of its original Cross-Claims. The Cross-Claims related to the 2009 Title Commitment that remained for trial, according to BOF, were its tort claims for negligent and intentional misrepresentation and fraud arising from the failure of the 2009 Title Commitment to disclose prior liens and encumbrances. BOF abandoned its breach of contract claim related to the 2009 Title Commitment.

9. On February 11, 2011, the Court issued the Memorandum Opinion Denying Motion for Summary Judgment against Bank of Forest *(Adv. Dkt. 371)*, in which the Court mentioned BOF's abandonment of its claim for breach of the 2009 Title Commitment.

10. The parties submitted a consolidated Pretrial Order (the "Pretrial Order") *(Adv. Dkt. 408)* signed by all counsel, which the Court approved on February 24, 2011. In the Pretrial Order, the Title Companies did not expressly identify election of remedies or waiver as defenses.

11. BOF conceded in the Pretrial Order that the Title Companies were entitled to the entry of a judgment declaring that the Title Companies had no obligation to issue BOF a title insurance policy under the 2009 Title Commitment. (Pretrial Order at 6). BOF reiterated its intention to abandon its claim for breach of the 2009 Title Commitment. (Pretrial Order at 6).

12. The trial of the Adversary began on February 28, 2011, and ended on March 4, 2011 (the "Trial").

13. Thereafter, the parties filed post-trial briefs simultaneously on May 13, 2011: Bank of Forest's Memorandum on the Trial Liability Issues ("BOF Post-Trial Brief") *(Adv. Dkt. 443*) and the Post-Trial Memorandum of Mississippi Valley Title Insurance Company and Old Republic National Title Insurance Company (the "Title Cos. Post-Trial Brief") *(Adv. Dkt. 445)*. The Title Cos. Post-Trial Brief includes a two-page discussion of election of remedies and waiver, whereas the BOF Post-Trial Brief makes no reference to those defenses.

14. On October 7, 2011, the Court issued the 84-page Opinion.

15. Between May 13, 2011, when the post-trial briefs were filed, and October 7, 2011, when the Opinion was issued, neither BOF nor the Title Companies submitted any additional motions or briefs to the Court.

16. In the Opinion, the Court rejected BOF's claims for negligent misrepresentation,

intentional misrepresentation, and fraud on the ground that they were barred by the doctrines of election of remedies and/or waiver and also on the ground that they lacked merit. (Opinion, at 42-43).

Discussion

In the Motion, supported by the BOF Brief, the Reply, and the BOF Supp. Brief, BOF contends that the Title Companies waived the defenses of election of remedies and waiver by failing to include them in the Pretrial Order. BOF asks the Court to set aside the portion of the Opinion that considers these defenses under the provisions of Rule 60(b) of the Federal Rules of Civil Procedure.[3] Setting aside this portion of the Opinion will not change the outcome in favor of the Title Companies because the Court also considered, and rejected, BOF's tort claims on the merits.

A. Rule 60(b)

When considering a Rule 60(b) motion, courts take into consideration the following relevant factors: (1) that final judgments should not be disturbed lightly; (2) that the Rule 60(b) motion is not to be used as a substitute for an appeal; (3) that Rule 60(b) should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether the judgment was a default or dismissal; (6) whether the judgment was rendered after a trial on the merits and if the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack. Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. Unit A 1981). BOF invokes the residual clause of Rule 60(b), which states:

On motion and just terms, the court may relieve a party or its legal representative

[3] Rule 60(b) of the Federal Rules of Civil Procedure is made applicable to adversary proceedings by virtue of Rule 9024 of the Federal Rules of Bankruptcy Procedure.

from a final judgment, order, or proceeding for the following reasons:

* * *

(6) any other reason that justifies relief.

FED. R. CIV. P. 60(b)(6). The Fifth Circuit Court of Appeals has narrowly circumscribed the availability of amendments under Rule 60(b)(6), stating that "relief will be granted only if extraordinary circumstances are present." Balentine v. Thaler, 626 F.3d 842, 846 (5th Cir. 2010) (citation omitted).

B. Rule 16(d) and the Pretrial Order

The Fifth Circuit has noted that although "state law defines the nature of defenses, . . . the Federal Rules of Civil Procedure provide the manner and time in which defenses are raised and when waiver occurs." Morgan Guar. Trust Co. of N.Y. v. Blum, 649 F.2d 342, 344 (5th Cir. Unit B 1981) (citation omitted). It is undisputed by the parties that the defenses of election of remedies and waiver are affirmative defenses under Mississippi law. O'Briant v. Hull, 208 So. 2d 784, 785-86 (Miss. 1968) (election of remedies); Knox v. BancorpSouth Bank, 37 So. 3d 1257, 1261 (Miss. Ct. App. 2010) (waiver). The parties also do not dispute that these defenses are waivable. Rule 8(c) of the Federal Rules of Civil Procedure,[4] states, "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including . . . waiver."[5] FED. R. CIV. P. 8(c). The Title Companies raised the defenses in the Answer but did not identify them in the Pretrial Order.

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[4] Rule 8(c) of the Federal Rules of Civil Procedure is made applicable to adversary proceedings by virtue of Rule 7008 of the Federal Rules of Bankruptcy Procedure.

[5] The parties do not question whether affirmative defenses under Rule 8(c) are governed by the plausibility-pleading standard established under Rule 8(a) in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009). It does not appear that any federal appellate court has addressed the issue.

One purpose of the pretrial order is to provide fair notice to the parties as to the evidence they must present at trial. Rule 16(d) of the Federal Rules of Civil Procedure[6] states that a pretrial order "controls the course of the action unless the court modifies it." FED. R. CIV. P. 16(d). For this reason, the pretrial order supersedes all filed pleadings. McGehee v. Certainteed Corp., 101 F.3d 1078, 1080 (5th Cir. 1996). More importantly, any claim or issue omitted from the pretrial order is usually waived, even if it appeared in the complaint. Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188, 206 (5th Cir. 1998).

1. BOF

BOF contends that because the affirmative defenses of election of remedies and waiver were not raised in the Pretrial Order, they are waived. For this contention, BOF relies upon Broadhead v. Hartford Casualty Insurance Co., 101 F.2d 697 (5th Cir. 1996) (unpublished), where the Fifth Circuit Court of Appeals held that an insurer had waived its right to claim a set-off for amounts paid by other insurers because it failed to raise "set-off" as an affirmative defense in the pretrial order. BOF cites three additional cases in which the Fifth Circuit found that plaintiffs had waived claims that were omitted from the pretrial order: Valley Ranch Development Co. v. FDIC, 960 F.2d 550 (5th Cir. 1992); Kona Technology Corp. v. Southern Pacific Transportation Co., 225 F.3d 595 (5th Cir. 2000); In re Katrina Canal Breaches Litigation, 309 Fed. Appx. 836, 838 (5th Cir. 2009) (unpublished).

In Valley Ranch, the plaintiff sent the defendants and the district court a letter stating it had abandoned its original claims in favor of its settlement claims. Valley Ranch, 960 F.2d at 554. The Fifth Circuit concluded that the plaintiff omitted its original claims "either intentionally or with

[6] Rule 16 of the Federal Rules of Civil Procedure is made applicable to adversary proceedings by virtue of Rule 7016 of the Federal Rules of Bankruptcy Procedure.

extreme recklessness" and upheld the district court's dismissal of those claims. Id. In Kona, the Fifth Circuit held that a plaintiff could not raise claims for breach of fiduciary duty and forfeiture because they were not included in the pretrial order but were raised for the first time on appeal.

Finally, in Katrina Canal Breaches, the Fifth Circuit considered an appeal of a judgment rendered on the pleadings in favor of the Board of Commissioners of the Port of New Orleans ("Port") in a class-action lawsuit in which the plaintiffs sought damages for the levee breaches and flooding caused by Hurricane Katrina. Katrina Canal Breaches, 309 Fed. Appx. at 838. In a pretrial order entered under Rule 16, the district court ordered all class-action plaintiffs to file a single consolidated class-action complaint (the "Master Complaint"). The pretrial order stated that the Master Complaint "shall supersede and replace all previously filed class action complaints." Id. at 837. The Port filed a motion for judgment on the pleadings as to all claims asserted against it. No party opposed the Port's motion.

Almost seven months later, the district court granted the Port's motion for judgment on the pleadings on the ground that the Port had no duties under Louisiana law to maintain the levee or control flooding. One of the plaintiffs appealed the decision on the ground that her individual complaint, unlike the Master Complaint, asserted viable claims against the Port. The Fifth Circuit affirmed the district court's holding that the Master Complaint superseded all prior claims, a result that was mandated not only by Rule 16 but also by language included in the pretrial order. Thus, the Fifth Circuit agreed that the plaintiff's claims were waived.

In the BOF Supp. Brief, BOF cites three additional cases from other jurisdictions that have applied the waiver rule to defenses omitted from a pretrial order even though they had been raised in an earlier responsive pleading. For example, in Youren v. Tintic School District, 343 F.3d 1296, 1304 (10th Cir. 2003), the Tenth Circuit Court of Appeals held that a school district had waived its

statute of limitations defense by not including it in the pretrial order. In so holding, the Tenth Circuit noted that the school district had pled statute of limitations as an affirmative defense in its answer.

Similarly, in MEI International, Inc. v. Schenkers International Forwarders, Inc., 807 F. Supp. 979, 989 (S.D.N.Y. 1992), the district court found that a statute of limitations defense not included in the pretrial order had been waived. Finally, in McGinnis v. Ingram Equipment Co., 918 F.2d 1491, 1494 (11th Cir. 1990), the Eleventh Circuit ruled that the defense of failure to state a claim had been waived because the defendant had abandoned the defense in the pretrial order.

2. Title Companies

The Title Companies do not directly challenge BOF's factual assertion that the defenses of election of remedies and waiver were not expressly mentioned in the Pretrial Order. Instead, the Title Companies insist that the standard that BOF applies in determining the effect of a pretrial order under Rule 16 is overly formalistic. They point out that the Fifth Circuit has stated that "[w]e do not adjudicate by labels. We adjudicate cases on the facts and law as they fit and support each other in the trial as the cases progresses." United States v. Shanbaum, 10 F.3d 305, 312 (5th Cir. 1994). The Title Companies assert numerous reasons why no waiver occurred in the specific context of this Adversary because: (1) BOF received notice of the defenses at a "pragmatically sufficient time"; (2) BOF was not prejudiced in its ability to respond; (3) the Pretrial Order implicitly raised the defenses; (4) BOF consented to the trial of the issues; and (5) BOF's Motion is untimely.

The Title Companies first argue that an affirmative defense is not waived if a defendant raises a defense at a "pragmatically sufficient time," and if the plaintiff is not prejudiced in its ability to respond. Lucas v. United States, 807 F.2d 414, 418 (5th Cir. 1986); Talbert v. Am. Risk Ins. Co., 405 Fed. Appx. 848, 851 (5th Cir. 2010) (unpublished) ("technical failure to comply precisely with Rule 8(c) is not fatal."); Bayou Fleet, Inc. v. Alexander, 234 F.3d 852 (5th Cir. 2000) (finding no

unfair surprise and no prejudice where the plaintiff knew about issue omitted from the pleadings throughout most of the discovery process); Pasco v. Knoblauch, 566 F.3d 572, 577 (5th Cir. 2009) ("[U]nder Rule 8(c) we do not take a formalistic approach to determine whether an affirmative defense was waived."); Arismendez v. Nightingale Home Health Care, Inc., 493 F.3d 602, 610 (5th Cir. 2007) (noting that plaintiff failed to show how she was prejudiced by the delay in raising the defense).

Here, the Title Companies first raised election of remedies and waiver as defenses in the Answer filed on September 30, 2010. Therefore, according to the Title Companies, BOF received notice of these affirmative defenses at a "pragmatically sufficient time." The Title Companies rely on Marine Overseas Services, Inc. v. Crossocean Shipping Co., 791 F.2d 1227 (5th Cir. 1986). There, the defendant raised its agency status as a defense to contractual liability after the first appeal of the district court's judgment. The plaintiff argued in the second appeal that the defendant had waived this affirmative defense because of the defendant's failure to include it in its responsive pleading. The Fifth Circuit rejected the plaintiff's waiver argument on the ground that the parties were well aware of the claimed agency relationship throughout the litigation, as evidenced by language in the pretrial order. Id. at 1233. Therefore, the Fifth Circuit concluded that the plaintiff had fair notice of the agency defense. Id.

The Title Companies maintain that BOF was not prejudiced at Trial. Lucas v. United States, 807 F.2d 414, 418 (5th Cir. 1986) (holding that no waiver occurred despite the fact that defendants never raised an affirmative defense but issue was raised at trial and the plaintiffs were not prejudiced in their ability to respond). "[T]he prejudice inquiry considers whether the plaintiff had sufficient notice to prepare for and contest the defense, and not simply whether the defense, and evidence in support of it, were detrimental to the plaintiff (as every affirmative defense is)." Rogers v.

McDorman, 521 F.3d 381, 387 (5th Cir. 2008) (rejecting plaintiff's waiver argument because there was no explanation of how defendants' failure to plead an affirmative defense prejudiced their ability to develop their case pretrial, or hindered their ability to contest the defense at trial.). The Fifth Circuit has recognized that the purpose of requiring the pleading of affirmative defenses is to prevent a defendant from being able to "lie behind a log" and "ambush" a plaintiff with an unexpected defense. Ingraham v. United States, 808 F.2d 1075, 1079 (5th Cir. 1987). BOF had full knowledge about the defenses during the period of discovery. The contrasting legal theories of fraud and breach of contract were sprinkled throughout the pleadings. BOF also had a fair opportunity to present its case at Trial proving the viability of both theories of liability, although it elected to abandon its contract claim.

In the alternative, the Title Companies contend that the issues of election of remedies and waiver were raised implicitly, although not expressly, by language in the Pretrial Order. Sundbeck v. Sundbeck, 2011 WL 4626282, 2011 U.S. Dist. LEXIS 113831, *11 (N.D. Miss. Sept. 30, 2011) (factual issues raised in affirmative defense came as no surprise to the plaintiffs because these facts and this position had been littered throughout numerous pleadings). The Title Companies' portion of the Pretrial Order consistently describes BOF's dispute as purely contractual in nature. (Pretrial Order at 4, ¶ 7(1)(3)) ("The relief sought by the Title Companies turns exclusively on basic principles of contract construction."); (Pretrial Order at 20, ¶ 10(1)) ("At all times pertinent, the relationship between the Title Companies and the Bank of Forest was purely contractual in nature . . ."). BOF recognized this issue in the Pretrial Order by objecting to the Title Companies' characterization of their relationship. (Pretrial Order at 34, ¶ 21(B)) ("Bank of Forest objects to the Title Companies' contention that the relationship between the parties was purely contractual in nature.").

Even absent such language in the Pretrial Order, the Title Companies contend that the defenses were tried by implied consent. In that regard, the Fifth Circuit has held that the issue of implied consent depends upon "whether the parties recognized that the unpleaded issue entered the case at trial, [and] whether the evidence that supports the unpleaded issue was introduced at trial without objection." Shanbaum, 10 F.3d at 312; Cleere Drilling Co. v. Dominion Exploration & Prod., Inc., 351 F.3d 642, 653 (5th Cir. 2003) (rejecting contention that defendant waived an affirmative defense where the issues were implicitly considered at trial). Evidence regarding BOF's pursuit of claims for both breach of contract and tort placed the issues of waiver and election of remedies before the Court, so say the Title Companies. Specifically, evidence was introduced at Trial, without objection, that BOF had tendered payment of the premium under the 2009 Title Commitment for the issuance of the title insurance policy, which supported the waiver defense in particular.

BOF itself inserted into the Trial the related issue of rescission of a contract procured through fraud by discussing the question in the Trial Brief Submitted by Bank of Forest *(Adv. Dkt. 409)*. BOF stated that by refusing to issue the title policy, the Title Companies simply saved it the trouble of having to seek rescission. This gloss on the Title Companies' conduct was inconsistent with BOF's allegations in the Cross-Claims *(Adv. Dkt. 101)* that it had met all conditions precedent for the issuance of the title policy.

Finally, the Title Companies contend that BOF failed to raise the waiver issue in a timely manner after BOF became aware of its potential existence. (They do not dispute, however, that BOF filed its Motion within a reasonable period of time after entry of the Opinion.) Each of the parties submitted a post-trial brief on May 13, 2011. In the Title Cos. Post-Trial Brief, the Title Companies articulated facts supporting the basis for their affirmative defenses of election of remedies and

waiver. To the extent the articulation of these facts presented BOF with a procedural objection, the Title Companies insist that BOF should have interposed an objection then. Instead, BOF waited until after the Court had ruled in favor of the Title Companies. If BOF were truly surprised by the assertion of election of remedies and waiver, The Title Companies assert that BOF should have filed a motion seeking leave to respond to the Title Cos. Post-Trial Brief. In its discussion of the post-trial briefing schedule at the end of Trial, the Court anticipated this possibility by stating:

> Everybody gets 50 pages. That's it. Now, somebody would have to do something outrageous in a brief, cite something that has clearly been overruled or something. You can file a motion if somebody does something like that. But if somebody really does something in there that you really feel is outrageous that it's almost tantamount to a fraud on the Court, certainly bring that to my attention.

(Trial Tr. at 712:22-713:6).

3. Court's Analysis

The Court is persuaded by the authorities cited, and the arguments presented, by the Title Companies that the failure to include an affirmative defense in a pretrial order is not a *per se* waiver of that defense. The Court is further persuaded that no such waiver occurred here. BOF asks this Court to ignore the facts of this Adversary and adopt a *per se* waiver argument. The Court, however, finds that the proper legal standard requires a fact-specific inquiry. This more flexible approach to Rule 16 is consistent with the inquiry undertaken by the Fifth Circuit in Shanbaum. In that case, the government did not raise the affirmative defense of *res judicata* in any pleadings in the case, Shanbaum, 10 F.3d at 305. As the Fifth Circuit explained:

> [T]he fact that the government did not formally raise [the affirmative defense] in the pretrial order does not end the inquiry. We have previously explained that "where the matter is raised in the trial court in a manner that does not result in unfair surprise, . . . technical failure to comply precisely with Rule 8(c) is not fatal."

Id. at 312 (citation omitted). More recently, the Fifth Circuit in McConathy v. Dr. Pepper/Seven Up

Corp., 131 F.3d 558 (5th Cir. 1998), affirmed the district court's decision based on an affirmative defense raised *sua sponte* by the district court. Although the defendant did not raise judicial estoppel as an affirmative defense, the Fifth Circuit held that the district court was not procedurally forbidden from granting summary judgment on that basis. The Fifth Circuit noted that the district court's reliance on the unpled affirmative defense did not prejudice the plaintiff.

The Court recognizes that most of the cases cited by the Title Companies, including Marine Overseas upon which they principally rely, do not expressly apply Rule 16. Instead, these cases question whether a party had "fair notice" of a defense under Rule 8(c). The Fifth Circuit, however, has recognized that Rule 16 and Rule 8 share the same purpose, which is "to inform the court and the parties how the case will be tried." Morris v. Homco Int'l, Inc., 853 F.2d 337 (5th Cir. 1988). BOF's bright-line approach to Rule 16 ignores the context of the Fifth Circuit's decisions holding that claims omitted from a pretrial order are waived. In those cases, the Fifth Circuit held only that the district court did not abuse its discretion in excluding new matters raised after entry of the pretrial order. *See* Morris, 853 F.2d at 342-43. Finally, the Court notes that an issue that justified the filing of a Rule 60 motion is of sufficient weight to garner BOF's attention *before* the Court issued the 84-page Opinion.

Conclusion

In conclusion, the Court finds that the Motion is not well taken and should be denied. Final judgment will not be entered at this time because the denial of the Motion does not result in the disposition of all claims asserted in this Adversary.

SO ORDERED.

Neil P. Olack
United States Bankruptcy Judge
Dated: February 17, 2012