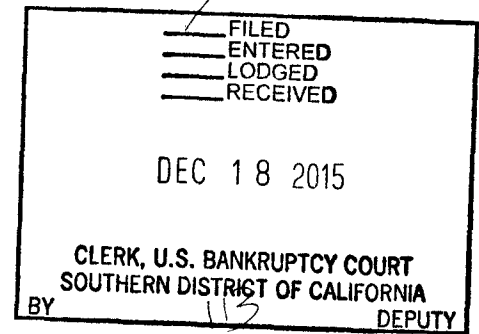




NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA

In re

DAVID JAMES FOTI

Debtors.

KDR PARTNERSHIP, *et al.*

Plaintiffs,

v.

DAVID JAMES FOTI, *et al.*

Defendants.

Case No. 12-01941-LA7

Adv. No. 12-90163-LA7

MEMORANDUM DECISION

Defendant David James Foti ("Defendant") has filed a motion for leave to file a first amended Answer ("Motion for Leave") in the above-referenced adversary proceeding filed by plaintiffs KDR Partnership *et al.* ("Plaintiffs"). The Court has reviewed the Motion for Leave, the opposition filed by the Plaintiffs and the reply filed by the Defendant. For the following reasons, the Motion for Leave is denied.

I.

FACTUAL BACKGROUND

On February 12, 2012, Debtor filed a voluntary chapter 7 petition. On May 13, 2012, Plaintiffs timely initiated this adversary proceeding by filing a complaint objecting to the Debtor's discharge under § 727(a)(3) and to the dischargeability of debts under §§ 523(a)(2), (a)(4) and (a)(6). On June 25, 2012, Defendant filed an answer to the complaint in *pro per*. The answer asserted only one affirmative defense: failure to state a claim upon which relief may be granted. All of Plaintiffs' claims are factually based.

On October 29, 2012, Donald E. Wolfe of Wolfe Attorney & Mediators ("Mr. Wolfe"), substituted in to represent the Defendant and appeared at the initial pre-trial status conference. Mr. Wolfe continues to represent the Defendant in this action. From October 2012 through October 2015, the parties participated in an unsuccessful mediation, completed their discovery including requests for production of documents and multiple depositions, and filed and defended various motions including a motion to compel and a motion for summary adjudication. Further, the Court scheduled and continued in excess of twelve pre-trial status conferences to monitor the progress of the action. [See ECF Nos. 21, 22, 27, 29, 30, 31, 40, 41, 42, 44, 46, 49, 51, and 56] There is no record of any discussions by the Defendant regarding the amendment of his answer.

The deadlines for discovery and dispositive motions have passed, and the trial is fixed for the week of January 11- 15, 2016. At the in-chambers conference held on December 2, 2015, the Defendant requested permission to file this Motion to Amend.

The Motion to Amend seeks to amend the Defendant's answer to assert the following additional affirmative defenses: unclean hands; waiver; estoppel; laches; statute of limitations; and lack of standing. Additionally, Defendant seeks leave to amend his prayer to include a request for recovery of attorney's fees,

1 allegedly based on the attorney's fee provisions in several (unidentified)
2 agreements which were signed by the parties. There is no declaration or other
3 evidence filed to support the relief requested in the Motion to Amend, as required
4 by Local Bankruptcy Rule 9013-7(a)(1).

6 II.

7 LEGAL ANALYSIS

8 Under Federal Rules Civil Procedure 8(a) and 8(c), made applicable to
9 adversary proceedings by Federal Rule Bankruptcy Procedure 7008, a party must
10 (with limited exceptions) raise every affirmative defense in the first responsive
11 pleadings, or they are deemed waived. *Morrison v. Mahoney*, 399 F.3d 1042,
12 1046 (9th Cir. 2005). However, this general rule of waiver must be read in
13 conjunction with Federal Rule Civil Procedure 15(a), made applicable by Federal
14 Rule Bankruptcy Procedure 7015. Pursuant to Rule 15(a)(2), a party may seek
15 leave to amend its answer to assert a previously omitted affirmative defense and
16 leave shall be freely granted when justice so requires. *See Kontrick v. Ryan*, 540
17 U.S. 443, 459 (2004); *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d
18 708, 712 (9th Cir. 2001)(both recognizing that Rule 15(a) can be invoked to grant
19 leave to amend an answer to plead an omitted affirmative defense).

20 Justice does not always require a court to grant leave to amend. Whether to
21 grant leave to amend is generally determined by considering the following factors:
22 (1) undue delay; (2) bad faith in seeking the amendment; (3) futility of the
23 amendment; and (4) undue prejudice to the party opposing the amendment. *In re*
24 *Rogstad*, 126 F.3d 1224, 1228 (9th Cir. 1997). The presence of one of more of
25 these factors is sufficient to support denial of the amendment. *In re Stapleton*, 2006
26 WL 6811031, *13 (9th Cir. BAP April 27, 2006)(citing *Acri v. International Assoc.*
27 *of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1985)). Late
28 amendments to assert new theories are not viewed favorably when the facts

1 and theories have been known to the party seeking amendment since the inception
2 of the cause of action. *Acri*, 781 F.2d at 1398.

3 Applied here, the Court finds and concludes that the Motion to Amend
4 should be denied for the following reasons:

5 (1) Undue Delay in Seeking Leave to Amend: This factor favors denial of
6 the Motion to Amend. Defendant blames his failure to promptly assert the
7 additional defenses on the fact that he was in *pro per* when he filed his answer.
8 [See Motion at 5:7-8] This explanation ignores the fact that Mr. Wolfe substituted
9 in as his attorney very early in this case on October 29, 2012. Defendant has
10 offered no reason why Mr. Wolfe waited over three years from the date he
11 substituted into the action to file this Motion to Amend. The litigation is in its final
12 stages: discovery has concluded; the dispositive motions have been heard; and the
13 trial dates are fixed. The Defendant has unduly delayed the assertion of these new
14 defenses.

15 The Defendant admits that virtually all of the new defenses were
16 ascertainable from the outset. Specifically, the additional affirmative defenses
17 alleging inequitable conduct (unclean hands, waiver, estoppel and laches), are
18 “standard” – all factually-based defenses – which are based upon facts already
19 contained in his initial answer. [Reply at 2:19-21] The new prayer for attorney’s
20 fees is based upon the same agreement identified by the Plaintiffs in their
21 complaint. [Reply at 2:24-26] A delay of over three years to assert defenses that
22 were ascertainable from the outset is undue delay. To allow the Defendant to plead
23 again would cause more delay, as discovery would necessarily have to begin again.

24 (2) Bad Faith in Seeking the Amendment: The Court makes no findings on
25 this factor.

26 (3) Futility of the Amendment: With respect to the recently discovered
27 statute of limitations/standing defenses, they are futile. The record establishes that
28 the nondischargeability action was filed timely, so there is no federal statute of

1 limitations issue regarding this nondischargeability action. [Main Case ECF
2 Nos. 5, 44]

3 Further, there is no evidence of a state law statute of limitations issue. The
4 filing of a timely state court action on any theory is sufficient to preserve a
5 creditor's right to "establish" an enforceable debt for purposes of litigating the
6 issue of its nondischargeability in bankruptcy. *See In re Banks*, 263 F.3d 862,
7 867-68 (9th Cir. 2001)(explaining that a timely state court action preserves the
8 creditor's right to litigate the issue of the debt's nondischargeability for fraud,
9 notwithstanding that there is no state court judgment and the state court action
10 sounded only in contract and the fraud action would be time barred); *see also*
11 *Brown v. Felson*, 442 U.S. 127, 138-39 (1979); *In re Daley*, 776 F.2d 834, 837-38
12 (9th Cir. 1995)(both holding that failure to assert a fraud claim in a prior state court
13 litigation did not preclude the creditor from seeking a declaration that the debt was
14 nondischargeable on grounds of fraud).

15 Here, the record reflects that the Plaintiffs filed a prepetition state court
16 action against the Debtor for debts arising from, *inter alia*, fraudulent concealment,
17 intentional misrepresentation/fraud, breach of fiduciary duty, elder abuse, and
18 fraudulent conveyance. [Adv. Complaint at ¶ 66] The Defendant has offered no
19 factual analysis or evidence which would enable this Court to conclude the state
20 court action was time barred. Therefore, the statute of limitations/standing
21 defenses are futile.

22 (4) Undue Prejudice to the Plaintiffs: This factor supports denial of the
23 Motion to Amend. The Defendant makes the conclusory assertion, without
24 supporting factual analysis or evidence, that the Plaintiffs would not be prejudiced
25 by the proposed amendments because there would be no need to reopen discovery.
26 The Court does not agree.

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1 While the non-moving party bears the burden of showing that it would be
2 unduly prejudiced by permitting the amendment, that burden grows lighter with the
3 passage of time: "The longer the period of unexplained delay, the less will be
4 required of the nonmoving party in terms of a showing of prejudice." *Phelps v.*
5 *McClellan*, 30 F.3d 658, 662 (6th Cir. 1994). Here, the long passage of time is
6 significant, and Plaintiffs have presented evidence that they would be prejudiced by
7 the amendment. Plaintiffs state that they relied upon the Defendant's answer in
8 deciding what discovery to undertake and the questions to ask. They assert that if
9 the motion to amend had been made earlier, and before the discovery cut off date
10 had passed, they would have had time to test through a variety of discovery
11 methods the newly asserted affirmative defenses. This argument is both logical
12 and sound.

13 The defenses of unclean hands, waiver, estoppel and laches are factually
14 driven. Thus, the Court agrees that discovery would need to be reopened for the
15 Plaintiffs to ascertain and test the facts, documents, and witnesses that form the
16 basis for these equitable defenses. At this late stage, there is an undue risk of
17 fading memories and lost documents. Key witnesses/parties are either advanced in
18 age or now deceased. Therefore, the burden of showing undue prejudice is met.

19 Finally, with respect to the request for attorney's fees, to the extent that the
20 Plaintiffs have claimed a right to recover attorneys fees in their complaint arising
21 from a contractual attorney's fee provision, the right to attorney's fees is reciprocal.
22 *Santisas v. Goodin*, 17 Cal. 4th 599, 610-11 (1998); *see also Cohen v De La Cruz*,
23 523 U.S. 213, 223 (1998)(holding that all of the damages flowing from the fraud,
24 including the contractual right to recover attorney's fees, comprises the
25 nondischargeable debt). Consequently, there is no need to amend the answer to
26 add this prayer for relief.

27 ///

28 ///

III.

CONCLUSION

The Motion to Amend is denied. The general rule is that affirmative defenses must be raised in the answer or they are waived. Although Rule 15(a) permits leave to amend with liberality when justice so requires, the right to amend is not absolute. The Court has considered the various factors to determine if the Motion to Amend should be granted, along with the supporting arguments and evidence, or lack thereof. It finds and concludes that the Motion to Amend should be denied. A separate order shall be entered by the Court.

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[Revised July 1985]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 12-01941-LA7
Adv. No. 12-90163-LA7

Case Name: In re DAVID JAMES FOTI;
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MEMORANDUM DECISION

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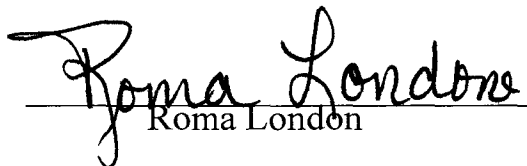
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