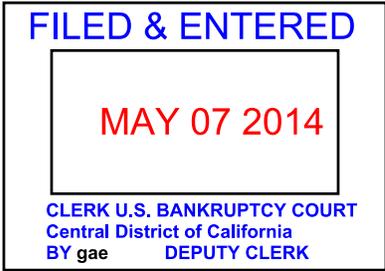


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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:
LEODIS CLYDE MATTHEWS,

Debtor.

WESTLAND ARCHITECTURE &
DEVELOPMENT CORPORATION, et al.

Plaintiffs,

vs.
LEODIS CLYDE MATTHEWS,

Defendant.

Case No. 2:12-bk-11628-RK
Chapter 7
Adv No. 2:12-ap-01499-RK

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS COMPLAINT

HEARING:
DATE: May 6, 2014
TIME: 1:30 p.m.
PLACE: Courtroom 1675
255 East Temple Street
Los Angeles, CA 90012

On December 2, 2013, defendant Leodis Clyde Matthews filed a Motion to Dismiss
Complaint for Lack of Capacity to Sue (Docket No. 78)(the "Motion"). The Motion came
on for hearing on January 21, 2014, February 18, 2014 and May 6, 2014. Having
reviewed and considered the moving and opposing papers, and the oral arguments of the
parties, it is hereby,

1 ORDERED that Defendant's Motion to Dismiss and for attorneys' fees is denied
2 because the statute of limitations defense based on lack of capacity was forfeited when
3 not raised in the answer to the complaint.

4 Generally, if not asserted in a responsive pleading, a nonjurisdictional affirmative
5 defense is deemed either forfeited or waived, and evidence of that defense is
6 inadmissible at trial. 2 Schwarzer, Tashima and Wagstaffe, *California Practice Guide:
7 Federal Civil Procedure Before Trial*, ¶ 8:968 at 8-108 (2013), *citing inter alia*, *John R.
8 Sand & Gravel Co. v. United States*, 552 U.S. 130, 133, 128 S.Ct. 750, 753 (2008); *see
9 also*, Fed. R. Bankr. P. 7008, incorporating by reference, Fed. R. Civ. P. 8(c)(requirement
10 of pleading of affirmative defenses, including statute of limitations, in a responsive
11 pleading) . A statute of limitations defense based on Fed. R. Bankr. P. 4004 or 4007 is
12 not jurisdictional. *In re Santos*, 112 B.R. 1001, 1005-1006 (9th Cir. BAP 1990).

13 Forfeiture or waiver may be avoided, however, where plaintiff receives adequate
14 notice through some other means (e.g., in motions or by way of discovery) that defendant
15 intends to assert a particular defense, and in such event, the court may find that plaintiff
16 has not been prejudiced by defendant's failure to plead the defense to warrant a finding
17 of waiver or forfeiture. 2 Schwarzer, Tashima and Wagstaffe, *California Practice Guide:
18 Federal Civil Procedure Before Trial*, ¶ 8:968 at 8-108 - 8-109, *citing inter alia*, *Camarillo
19 v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993). However, no notice that defendant had
20 intended to raise this defense was given after the pretrial conference and the joint pretrial
21 stipulation and order were approved and the case was ready for trial, and the issues were
22 previously identified and set in the joint pretrial stipulation and order. *Id.*, *citing*, Fed. R.
23 Civ. P. 16(d)("Forfeiture or waiver may also be avoided if the defense is included in the
24 pretrial order that controls the subsequent course of the action."); *see also*, Fed. R.
25 Bankr. P. 7016 (Fed. R. Civ. P. 16 applies to adversary proceedings). The defense of

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1 statute of limitations based on lack of capacity was not listed in the pretrial order, which
2 governs the subsequent course of this case. See also, Local Bankruptcy Rule 7016-1(b).
3 *Community Electric Service of Los Angeles, Inc. v. National Electrical Contractors*
4 *Association, Inc.*, 869 F.2d 1235 (9th Cir. 1989) is distinguishable because the
5 defendants in that case asserted the statute of limitations defense based on lack of
6 capacity in their answer, so that case did not involve a forfeiture or waiver of a
7 nonjurisdictional affirmative defense as in the case here. 869 F.2d at 1238.

8 IT IS SO ORDERED.

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Date: May 7, 2014



Robert Kwan
United States Bankruptcy Judge