

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

KEVIN JORDAN
Plaintiff

CIVIL ACTION

VERSUS

NO. 15-1226

ENSCO OFFSHORE COMPANY
Defendant

SECTION: "E" (1)

ORDER AND REASONS

Before the Court is Plaintiff Kevin Jordan's motion to strike allegations of fraud in the proposed pre-trial order.¹ The motion is opposed.² For the reasons that follow, the motion to strike is **GRANTED**.

Plaintiff moves to strike Defendant ENSCO Offshore Company's allegations of fraud in the pre-trial order. Plaintiff argues the allegations of fraud first appeared in the pre-trial order, having not been raised in any of Defendant's answers or prior filings.³ For that reason, Plaintiff contends the defense of fraud has been waived and cannot now be asserted by Defendant.

Fraud is classified as an affirmative defense under Federal Rule of Civil Procedure 8(c)(1).⁴ Rule 8(c) requires that affirmative defenses must be affirmatively pleaded in the answer or raised as a cause of action in a counterclaim; otherwise, the defense is deemed waived.⁵ In the parties' proposed pre-trial order, the Defendant lists as a contested issue of fact: "Whether Kevin Jordan is committing a fraud on Ensco in making this claim for

¹ R. Doc. 81.

² R. Doc. 87.

³ R. Doc. 81-1 at 1.

⁴ See also *Callon Petroleum Co. v. Frontier Ins. Co.*, No. Civ.A. 01-1502, 2002 WL 31819127, at *2 (E.D. La. Dec. 11, 2002).

⁵ See, e.g., FED. R. CIV. P. 8(c); *Higgins v. NMI Enterprises, Inc.*, No. 09-6594, 2012 WL 5997951, at *8 (E.D. La. Nov. 30, 2012); *GE Capital Commercial, Inc. v. Wright & Wright, Inc.*, No. 3:09-CV-572-L, 2011 WL 13758, at *1 (N.D. Tex. Jan. 4, 2011); *Polles v. Federal Deposit Ins. Corp.*, 749 F. Supp. 136, 138-39 (N.D. Miss 1990).

damages.”⁶ Also, listed as a contested issue of law in the proposed pre-trial order is: “Whether Kevin Jordan is committing a fraud in bringing this claim.”⁷ The Defendant also notes in the proposed pre-trial order that Joanna Jordan, the Plaintiff’s ex-wife, and Marti George, Plaintiff’s former mother-in-law, both have “knowledge of fraud.”⁸ Joanna Jordan and Marti George are both listed as defense witnesses.

Defendant did not allege fraud as a defense in its answer, nor did Defendant assert fraud as a cause of action in a counterclaim against Plaintiff. Allegations of fraud first appeared as an issue in this case in the proposed pre-trial order, which was filed into the record on April 25, 2016. As a result, the defense was waived and may not be raised as an affirmative defense at trial. Moreover, permitting the Defendant to pursue the affirmative defense of fraud would be unjust and would greatly prejudice the Plaintiff, given that fraud was first alleged as a defense in the proposed pre-trial order, approximately one month before trial.

The Court hereby strikes the allegations of fraud in the proposed pre-trial order. As stated above, Defendant lists as a contested issue of fact: “Whether Kevin Jordan is committing a fraud on Ensco in making this claim for damages.”⁹ Also, listed as a contested issue of law is: “Whether Kevin Jordan is committing a fraud in bringing this claim.”¹⁰ Both allegations are stricken from the proposed pre-trial order. Furthermore, the jury will not be instructed on fraud as an affirmative defense. The Defendant will, however, be permitted to introduce evidence that the Plaintiff’s injury pre-existed the accident-in-question and otherwise call into question the Plaintiff’s credibility. With

⁶ R. Doc. 64 at 20 (Proposed Pre-Trial Order).

⁷ R. Doc. 64 at 22 (Proposed Pre-Trial Order).

⁸ R. Doc. 64 at 33, 34 (Proposed Pre-Trial Order).

⁹ R. Doc. 64 at 20 (Proposed Pre-Trial Order).

¹⁰ R. Doc. 64 at 22 (Proposed Pre-Trial Order).

respect to witness testimony, witnesses will not be permitted to characterize any of Plaintiff's actions or behavior as fraudulent, but witnesses will be permitted to testify as to facts within their knowledge.

IT IS SO ORDERED.

New Orleans, Louisiana, this 16th day of May, 2016.

Susie Morgan
SUSIE MORGAN
UNITED STATES DISTRICT JUDGE