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PERSPECTIVE

9th Circuit settles novel question over new answers

By James Sigel and Adam Sorensen

Sometimes important issues lie just beneath the surface of decisions resolving seemingly obscure procedural questions. The 9th Circuit U.S. Court of Appeal's recent decision in *KST Data v. Enterprise Services*, 2020 DJDAR 12206, is just such a case. Addressing an issue of first impression, the court held that defendants do not necessarily waive their affirmative defenses by failing to file a new answer when a plaintiff files an amended complaint. But within this seemingly narrow decision lie interesting lessons about the dangers for defendants lurking in amended pleadings and the benefits of the 9th Circuit's reliance on visiting judges.

The case began as a fairly routine contract dispute. Government contractor Enterprise Services subcontracted with KST Data and another small business, DME, to provide IT services to NASA. In Enterprise's telling, KST was secretly performing and getting paid for DME's work, in violation of the NASA's small business rules. When NASA fined Enterprise $5.4 million for the alleged violation, Enterprise withheld that amount from invoice payments to KST. KST then filed suit. Its first amended complaint alleged various contract claims. Enterprise filed an answer, asserting various affirmative defenses and counterclaims, and also moved to dismiss. The district court dismissed all of KST's claims — except its breach of contract claim. And it gave KST leave to amend while inviting Enterprise to file a new answer.

That's when things got interesting. KST filed a second amended complaint reasserting variations on its dismissed claims, and Enterprise again moved to dismiss all but the original breach claim. Importantly, however, Enterprise did not file another answer.

The district court again dismissed all but KST's breach claim. But after Enterprise moved for summary judgment on that claim, the district court sua sponte granted summary judgment for KST and *against* Enterprise. When Enterprise sought to assert its various affirmative defenses, the district court said that it had waived those defenses by failing to file an answer to the second amended complaint.

The 9th Circuit reversed. In a thorough opinion authored by visiting Judge Eric F. Melgren of the District of Kansas, the court first explained that "[u]nder Federal Rule of Civil Procedure 56(f), a district court may sua sponte grant summary judgment if the nonmovant has 'notice and a reasonable time to respond.'" The court held that because the district court did not give Enterprise "notice and the opportunity to assert its affirmative defenses," it "erred in granting summary judgment sua sponte."

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Of course, if Enterprise had waived its affirmative defenses, that error would be harmless. But the 9th Circuit disagreed with the district court on that point as well. Federal Rule of Civil Procedure 8(c) requires a party to "affirmatively state any avoidance or affirmative defense" in response to a pleading. If the party doesn't, those defenses are generally forfeited. But several district courts in the 9th Circuit have held that filing an additional answer to an amended complaint is optional, and "when an amended complaint does not add new parties, new claims, or significant new factual allegations, the previously filed response to the original pleading will suffice." The 9th Circuit adopted that reasoning. As it explained, Federal Rule of Civil Procedure 15(a)(3) — which provides that "any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later" — is not to the contrary, as that provision doesn't say a response is *always* required. Thus, the court held, "where the defendant did not respond to an amended complaint because it had filed an answer to the previous complaint that contained the same claim," a defendant is not required to file a new answer.

The court's decision in *KST Data* is notable for at least two reasons. First, it shows how amended pleadings can be something of a minefield for defendants. While Enterprise prevailed on appeal, it came very close to losing its strongest arguments in the trial court even after asserting them in its initial answer. And defendants cannot assume that their failure to file answers will always be harmless. Under the 9th Circuit's reasoning, minor differences between the plaintiff's complaints could have altered the outcome: A new answer might have been necessary to preserve affirmative defenses if the plaintiff had added different claims or new factual allegations. Moreover, even *filing* a new answer can have pitfalls. An 11th Circuit decision distinguished in *KST Data* held that a defendant forfeited assertions made in an earlier answer when it failed to include them in a new answer to an amended complaint. Suffice it to say, defendants must be very careful when responding to amended pleadings.

Second, *KST Data* demonstrates the value of the 9th Circuit's heavy reliance on visiting judges. Because of the court's nation-leading workload, the 9th Circuit regularly invites visiting judges to fill out the panels that hear cases. When considered together, these visiting judges hear many times more cases than the average 9th Circuit judge — the equivalent of six additional full-time members of the court. Most of these visitors are district court judges, like Judge Melgren, who *account for approximately 80% of all guest sittings*. For this reason, 9th Circuit panels often have a resident trial court expert on hand to help resolve difficult or obscure procedural issues that might be less familiar to some appellate judges. That expertise was on display in *KST Data*, where Judge Melgren (a former U.S. attorney and 12-year veteran of the trial bench) clearly aided resolution of the difficult and novel question presented. There are, it seems, some upsides to the 9th Circuit's ever-crowded docket. ■

James Sigel *is a partner in Morrison & Foerster's Appellate and Supreme Court group.* **Adam Sorensen** *is an associate in Morrison & Foerster's Appellate and Supreme Court group. Both are editors of Left Coast Appeals, leftcoast. mofo.com, a blog devoted to all things 9th Circuit.*