

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO.: 502009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

vs.

SCOTT ROTHSTEIN, individually, and
BRADLEY J. EDWARDS, individually,

Defendants/Counter-Plaintiffs.

_____ /

**PLAINTIFF/COUNTER-DEFENDANT JEFFREY EPSTEIN'S MOTION TO
FILE AN AMENDMENT TO HIS ANSWER AND AFFIRMATIVE DEFENSES
TO DEFENDANT/COUNTER-PLAINTIFF'S FOURTH AMENDED
COUNTERCLAIM**

Plaintiff/Counter-Defendant Jeffrey Epstein ("Epstein"), by and through his undersigned counsel and pursuant to Rule 1.190 of the *Florida Rules of Civil Procedure*, hereby moves this Honorable Court to permit the filing of the accompanying Amended Answer and Affirmative Defenses to Edwards's Fourth Amended Counterclaim to conform with the evidence. In support of this Motion, Epstein states:

Rule 1.190(a) of the *Florida Rules of Civil Procedure* governs amendments to pleadings, and provides, in relevant part, that "[l]eave of court shall be given freely when justice so requires." Fla. R.Civ. P. 1.190(a) (2013). Here, Epstein specifically reserved the right to amend his affirmative defenses when he filed his Answer and Affirmative Defenses to Edwards's Fourth Amended Counterclaim. Here, justice requires the amendment of Epstein's Affirmative Defenses because, if properly established, the

additional affirmative defense provides an absolute defense to at least one of the causes of action Edwards has asserted against Epstein. *See Royal Trust Bank, N.A. v. Von Zamft*, 511 So. 2d 654 (Fla. 3d DCA 1987). Consequently, Epstein should be permitted to amend his pleadings.

Furthermore, this amendment to Epstein's affirmative defenses will cause no prejudice to Edwards because Edwards has already sought discovery on this defense. Rule 1.190(b) of the *Florida Rules of Civil Procedure* provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Fla. R.Civ. P. 1.190(b) (2013). *See also Anglo American Auto Auctions, Inc. v. Tuminello*, 732 So. 2d 1218, 1221 (Fla. 5th DCA 1999). The crucial consideration for the court is the test of prejudice. *New River Yachting Center v. Bacchiocchi*, 407 So. 2d 607, 609 (Fla. 4th DCA 1981), *rev. denied*, 415 So.2 d 1360 (Fla.1982); FLA. R.CIV. P. 1.190(b). Leave to amend should not be denied unless the privilege has been abused or the pleading is clearly not amendable. *Osborne v. Delta Maintenance and Welding*, 365 So. 2d 425 (Fla. 2nd DCA 1978). This determination should be governed by a policy favoring resolution of cases on their merits, unless the privilege of amendment has abused. *Enstrom v. Dixon*, 354 So. 2d 1251 (Fla. 4th DCA 1978) (holding that "[i]t is the policy in this State to freely allow amendments to pleadings in order that causes may be tried on their merits and justice may be achieved. In exercising the discretion inherent in the trial court to allow or disallow amendments, all doubts should be resolved in favor of the former unless the privilege be abused."). As such, Epstein's pleading should be amended to conform with the evidence.

Here, Edwards's recently filed discovery request, in which he is seeking

information relating to advice of counsel, arguably constitutes implied consent to the litigation of this issue as contemplated by Rule 1.190(b). As such, the pleadings should confirm with the evidence that will be created through this discovery, as “the court may allow the pleadings to be amended to conform with the evidence and shall do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice the objecting party in maintaining an action or defense upon the merits.” *Trans World Marine Corp. v. Threlkeld*, 201 So. 2d 614 (Fla. 3d DCA 1967); FLA. R.CIV. P. 1.190(b) (2013).

WHEREFORE Plaintiff/Counter-Defendant Jeffrey Epstein seeks leave to file the proposed Amendment to his Answer and Affirmative Defenses to Edwards’s Fourth Amended Counterclaim as attached hereto.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served, via electronic service, to all parties on the attached service list, this September 11, 2013.

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