IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

B. LEWIS PRODUCTIONS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 02-93-KAJ
	)	
VAUGHN BEAN,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

This is a breach of contract and fraud action, brought under the diversity jurisdiction of this court. (*See* Docket Item ["D.I."] 1.) Plaintiff and counterclaim defendant B. Lewis Productions, Inc. ("BLP"), a New York corporation with its principal place of business in New York, and third-party defendant Butch Lewis ("Lewis"), a citizen of Delaware, filed a motion *in limine* (D.I. 62 at 18-23; the "Motion") seeking to prevent the defendant, Vaughn Bean ("Bean"), a citizen of Illinois, (D.I. 35 at ¶¶ 14-16) from introducing at trial any evidence of damages predating February 4, 1999, because "Bean's counterclaims and third-party claims are barred by the applicable statute of limitations ... ."[1] The case is scheduled to go to trial next week. As I indicated during the pretrial conference last week (1/18/05 Tr. at 14-15), the Motion is nothing less than

[1]BLP and Bean are parties to a contract pursuant to which BLP was to provide services promoting Bean as a heavyweight boxer. As originally filed, BLP's and Lewis's motion *in limine* sought to prevent any evidence of damages predating July 11, 2000, three years prior to Bean's filing of his counterclaims and third-party claims. (*See* D.I. 62 at 18.) In a follow-up letter to the court, Plaintiff amended the requested date to preclude evidence of damages prior to February 4, 1999, three years prior to the filing of the Complaint. (*See* D.I. 66 at 4-5.)

a motion for partial summary judgment and, therefore, should have been raised by BLP and Lewis no later than the dispositive motion deadline set in the scheduling order.

Bean has rightly complained of the dereliction of BLP and Lewis in this regard. (D.I. 72.) He asserts that their affirmative statement in a stipulated scheduling order in this case that "the parties agree that neither will make a case-dispositive motion" (D.I. 51 at 3) should be taken as effecting a waiver of the statute of limitations defense that they now seek to raise. BLP and Lewis counter that they are not bound by a decision to forego an earlier dispositive motion and that, having raised the affirmative defense in their replies to the counterclaims and third-party claims, they should be free to raise the statute of limitations defense as late as a motion for judgment as a matter of law under Rule 50.[2]

Bean has a serious argument that, under the circumstances, the earlier representations and litigation of conduct of BLP and Lewis should constitute a waiver of their statute of limitations defense. Ultimately, however, the substantive rights of the parties in this case ought not turn on a procedural failure when there is a dispositive legal issue that both sides have been on notice of from the pleadings and on which no one has been deprived of the opportunity to take discovery or to present argument. I therefore decline to hold that there has been a waiver of the statute of limitations defense or a procedural default warranting a sanction akin to waiver.

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[2]The cases they cite, however, are not enlightening, since they merely note that a statute of limitations defense was addressed in the context of a Rule 50 motion and they say nothing of whether the movant had ignored a specific scheduling order. Nor do they address the circumstance where a party affirmatively represents that no dispositive motions will be made.

As to the substance of the Motion, the parties agree, it seems, that if Delaware's three year statute of limitations applies, then Bean has no counterclaim or third-party claim for damages flowing from events that occurred prior to February 4, 1999. The parties also apparently agree that New York law applies to the substantive claims in the case and that, if New York's six year statute of limitations also applies, the counterclaims and third-party claims will reach back to February of 1996. (*See* D.I. 62 at 18-23.) The dispute, of course, is over which statute of limitations applies. BLP and Lewis argue that, under Delaware's borrowing statute, Delaware's three year statute must apply. (*Id*. at 18-21.) Bean argues that the Delaware Supreme Court's recent interpretation of the borrowing statute means that New York's lengthier statute of limitations applies. (*Id*. at 21-23.) Bean's view is the correct one.

Bean's argument includes the assertion that critical aspects of his counterclaims and third-party claims would not be time barred under the longer New York statute of limitations and that it would be manifestly unfair to allow BLP and Lewis to bring this case in Delaware, forcing Bean to bring his compulsory counterclaims, and thereby deprive him of the longer statute of limitations that would have applied had he been permitted to bring his action in New York.

Delaware's borrowing statute states as follows:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply.

10 *Del. C.* § 8121.

Counterclaims are "actions" for statue of limitations purposes. *See Delaware Chemicals, Inc. v. Reichhold Chemicals, Inc.*, 121 A.2d 913, 918 (Del. Ch. 1956) ("a counterclaim seeking affirmative relief is an 'action' within the meaning of the statute [of limitations]"). But that does not necessarily mean that they are "actions" for purposes of the borrowing statute. On the contrary, two weeks ago, the Delaware Supreme Court issued its *en banc* decision in *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 2005 WL 120789 (Del. Jan. 14, 2005), in which it held, in circumstances with similarities to those here, that a "literal construction of the borrowing statute, if adopted, would subvert the statute's underlying purpose[,]" which is to discourage forum shopping. *Id.* at *9. The court observed that,

> [b]orrowing statutes such as [Delaware's] are typically designed to address a specific kind of forum shopping scenario--cases where a plaintiff brings a claim in a Delaware court that (i) arises under the law of a jurisdiction other than Delaware and (ii) is barred by that jurisdiction's statute of limitations but would not be time-barred in Delaware, which has a longer statute of limitations. Under that 'standard scenario,' the borrowing statute operates to prevent the plaintiff from circumventing the shorter limitations period mandated by the jurisdiction where the cause of action arose.

Id. However, the court noted, a literal application of the statute cannot be countenanced when it would circumvent the purpose of the statute, as is the case when a plaintiff can be seen to be taking advantage of the shorter Delaware statute of limitations to deprive a defendant of claims he would otherwise have. *Id.* at *10 (holding that literal application of borrowing statute would subvert the statute by allowing plaintiff "to prevail on a limitations defense that would never have been available to it had the [defendants'] ... claims been brought in the jurisdiction where the cause of action arose").

Delaware's connection to this matter appears to be far less significant than New York, which BLP and Lewis have themselves conceded is the jurisdiction whose substantive law applies. (D.I. 62 at 3 n.1.) While the contract was executed in Delaware, neither of the parties to the contract, BLP and Bean, are citizens of this state, nor does it appear that performance of the contractual obligations was anticipated to take place in this state. The tort claims too appear to be wholly unrelated to this jurisdiction. Indeed, BLP and Lewis acknowledge that "Bean was not a Delaware resident and his claims arose outside of Delaware." (D.I. 66 at 4.)

Thus, the same kinds of considerations that operated to make the literal application of Delaware's borrowing statute inappropriate in *Saudi Basic* appear to be applicable here. Allowing BLP and Lewis to bring suit here and have the advantage of the shorter statute of limitations would effectively encourage the forum shopping denounced by the Delaware Supreme Court, and it would unfairly deprive Bean of rights to which he may otherwise be entitled.[3] Consequently, I hold that Delaware's borrowing

[3]I emphasize that, on a more developed record, my conclusions about the locus of the disputes would perhaps be different, but the lack of record support for BLP's and Lewis's late-filed Motion is a problem of their own creation. I also reiterate that this is not a case where discovery had closed without an opportunity to explore facts and legal theories pertinent to the Motion, nor is it a case where significant expense had been invested by either side in reliance on positions taken during discovery or motions practice. On the contrary, this case has been notable chiefly for the absence of pretrial engagement by the parties. Hence, considering the Motion on its merits is unfair to neither party, and the outcome is not influenced by factors which might exist in the context of a more developed record. If, for any reason, a higher court should disagree with my ruling on this issue, the trial record should be sufficiently clear, both in the presentation of the evidence and in the form of the verdict, to permit damages predating February 4, 1999 to be backed out of the verdict without the necessity of a retrial. The parties are instructed to prepare their proofs accordingly and to confer on an appropriate form of verdict.

statute does not apply and, therefore, neither does Delaware's three year statute of limitations. *See Saudi Basic*, 2005 WL 120789 at *10 ("because the Superior Court properly ruled that the borrowing statute did not apply, it follows that that court also correctly held that [the defendants'] counterclaims ... were not time-barred.") The Motion is DENIED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

January 28, 2005
Wilmington, Delaware