UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

In the Matter of:	HUDOA No. 10-H-CH-AWG100
AUTUMN CHOATE EWART,	Claim No. 78072096
Petitioner.	November 2, 2012

RULING ON MOTION TO RECONSIDER DECISION AND ORDER UPON RECONSIDERATION

On July 29, 2011, this Court issued an *Initial Decision and Order* in the above-captioned case, in which the Court held that the subject debt was enforceable in the amount claimed by the Secretary and that the Secretary was authorized to seek collection of the same by means of administrative wage garnishment.

On August 10, 2011, Petitioner filed a *Motion for Rehearing*, which was granted on February 10, 2012. ("Pet'r's First Rehearing Motion"). Upon due consideration, the Court thereafter issued a *Ruling and Order upon Reconsideration* in which the *Initial Decision and Order* was affirmed. Ruling and Order Upon Reconsideration ("Recon. Decision"), issued September 14, 2012. In response, Petitioner filed a *Motion for Rehearing on Ruling and Order upon Reconsideration* ("Pet'r's Second Rehearing Motion") on September 18, 2012.

STANDARD OF REVIEW

The purpose of reconsideration is not to afford a party the opportunity to reassert contentions that the Court has already considered and adjudicated. See Mortgage Capital of America, Inc., supra; Louisiana Housing Finance Agency, HUDBCA No. 02-D-CH-CC006 (March 1, 2004); Charles Waltman, HUDBCA No. 97-A-NY-W196 (September 21, 1999). Rather, the Court, at its discretion, will reconsider a previous decision only when compelling circumstances require it, e.g., when there is newly discovered material evidence, clear error of fact or law, or evidence that the debt has become legally unenforceable since the issuance of the previous decision. See Lawrence Syrovatka, HUDOA No. 07-A-CH-HH10 (January 8, 2009); Mortgage Capital of America, Inc., HUDBCA No. 04-D-NY-EEO32 (September 19, 2005); Paul Dolman, HUDBCA No. 99-A-NY-Y41 (November 4, 1999); Anthony Mesker, HUDBCA No. 94-C-CH-S379 (May 10, 1995); 24 C.F.R. § 17.69(d).

BACKGROUND

In Petitioner's First Rehearing Motion, Petitioner asserted that the Court erred in its refusal to consider her claim that the manufacturer and/or seller of her manufactured home violated the Texas Deceptive Trade Practices—Consumer Protection Act ("DTPA"). Pet'r's First Rehearing Motion, p. 1. Petitioner then admitted that the statutory limitations period to file the claim in the proper Texas venue had expired. Id. She contended, however, that her DTPA argument could still be brought before this Court "as a counterclaim pursuant to Section 17.505 of the DTPA and Section 16.069 of the Texas Civil Practice and Remedies Code." Id.

Upon review, the Court concluded that it did not err by not considering Petitioner's DTPA claim. The Court concluded that Petitioner could have filed the DTPA claim she identified as a counterclaim without regard to the original statute of limitations, as long as such claim was made within the required time frame. Recon Decision, pp. 3-4.

Petitioner now alleges, as a basis for the Second Rehearing Motion, that the Recon. Decision was in error because Petitioner claims she:

> [E]xpressly and specifically stated that the Secretary's claims were "completely offset" by Petitioner's damages. If not a counterclaim as the Administrative Judge found, then it would be an affirmative defense and the statute of limitations would not apply. The Administrative Judge erred in not considering the defense of offset in ruling against Petitioner.

Pet'r's Short Stat., p. 3, ¶ 4.

Petitioner states that she raised the issue of affirmative defense when she asserted that any damages awarded in connection with the DTPA claim would "completely offset" her present indebtedness. Petitioner's Short Statement of Contentions and Relevant Legal Argument ("Pet'r's Short Stat."), p. 3, filed July 28, 2010; Pet'r's Second Rehearing Motion, p. 1. She further claims that this complete offset is a recognized affirmative defense. Pet'r's Second Rehearing Motion, pp. 1-2. Petitioner contends that federal courts must consider affirmative defenses as such even when the pleading party mistakenly characterizes them as counterclaims. Id. Finally, Petitioner claims that the failure of the Court to consider the claim as an affirmative defense is "[a] clear error of law for which reconsideration is appropriate." Id. at p. 2.

DISCUSSION

In support of her Second Rehearing Motion, Petitioner now contends that the offset she alleged in her *Short Statement* should be treated as an affirmative defense. Petitioner relies on Rule 8(c)(2) of the Federal Rules of Civil Procedure as support.

Rule 8(c)(2) provides, in relevant part:

> If a party *mistakenly designates a defense as a counterclaim*, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated … (emphasis added).

F.R.Civ.P. 8(c)(2).

A review of Rule 8(c) in its entirety shows that an offset (sometimes called a "setoff") is not listed among the approximately 15 common affirmative defenses identified in Rule 8(c)(1) of the *Federal Rules of Civil Procedure*. While this list is not considered exhaustive, the absence of the offset as a common affirmative defense does not strengthen Petitioner's position. But, Rule 8(c)(2) is, in essence, a saving mechanism to ensure that an inartful or inaccurate pleading does not cost a party their day in court. The purpose of the rule, as suggested in the text itself, is to ensure a just adjudication by correcting a mistakenly, or improperly, designated pleading.[1] It is not meant as a back door to evade the pleading rules or statutes of limitations. See Tex. Civ. Prac. & Rem. Code, § 16.069; E.P. Operating Co. v. Sonora Exploration Corp., 862 S.W. 2d 149 (Tex. App.-Houston [1st Dist.] 1993, writ. den.); See also Pet'r's First Rehearing Motion (in reference to § 16.069, Petitioner states "the statute was adopted to stop a party from using the tactic of waiting for a shorter statute of limitations to expire, and then file suit based on a longer statute of limitations to try to avoid the other party's claim."). The operative word in this provision is, however, "mistakenly."

As the record reflects, Petitioner was fully aware of the nature of the claim when she first identified it as a counterclaim in February 2011. See The facts in this case make clear that Petitioner's classification of the DTPA claim as a counterclaim was not the product of a mistake at all, and therefore was not subject to correction by Rule 8(c)(2).

For instance, under Texas' DTPA statute, a consumer intending to file a DTPA suit is required to provide written notice to the intended defendant at least 60 days prior to filing the suit. Tex. Bus. and Comm. Code § 17.505(a). Section 17.505(b) of the same provision further states:

> If the giving of 60 days' written notice is rendered impracticable by reason of the necessity of filing suit in order to prevent the expiration of the statute of limitations ***or*** if the consumer's claim is asserted ***by way of counterclaim***, the notice provided for in Subsection (a) of this section is not required…

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[1] During a symposium held soon after the Federal Rules were first enacted, then-Dean Charles C. Clark, one of the "architects" of the rules, elaborated on the theory underpinning Rule 8(c)(2). He stated that the rule applies "when the party or his attorney is mistaken … but often the mistake isn't his fault; it is just that he didn't know what the court was going to call the pleading." 5 Fed. Prac. & Proc. Civ. § 1275 (3d ed).

Tex. Bus. and Comm. Code § 17.505(b) (emphases added).

Section 17.505(a) clearly sets forth the notice requirements under the Texas DTPA statute. The notice requirement is met by advising the intended defendant, in reasonable detail, of "the consumer's specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including attorneys' fees, if any, reasonably incurred by the consumer." Tex. Bus. and Comm. Code § 17.505(a). As Texas courts have established, this prior notice serves the vital function of providing the opportunity for a resolution of the conflict without resorting to costly litigation. See Hash v. Hines, 796 S.W.2d 312, 315 (Tex.App.-Amarillo 1990); The Moving Co. v. Whitten, 717 S.W.2d 117, 123 (Tex.App.-Houston 1986).

However, it is also evident that § 17.505(b), the exception to the notice requirement for DTPA claims, was drafted as an "either/or" provision. According to that provision, there are only two bases upon which the notice requirement can be disregarded: (1) imminent expiration of the statute of limitations; or, (2) counterclaim. See, Patel v. Holiday Hospitality Franchising, Inc., 172 F. Supp. 2d 821, 826 (N.D. Tex. 2001).

The record shows that by raising her DTPA claim as a counterclaim, Petitioner met one of the necessary requirements for disregarding the notice requirement. Petitioner's intent to raise her claim as a counterclaim is evident throughout the record of this proceeding. For example, Petitioner does not contend that she ever provided the requisite prior notice against the manufacturer/seller of the mobile home that is the subject of the instant debt. Petitioner in fact expressly denied that such notice was required because the claim was being raised as a counterclaim. Petitioner's Reply to Secretary's Supplemental Statement ("Pet'r's Resp. to Sec'y Supp. Stat."), p. 4, filed February 10, 2011.

There is likewise no record that Petitioner ever actually filed a lawsuit or ever had her DTPA claim adjudicated in Texas. By her own admission, Petitioner concedes that "Unfortunately the DTPA two (2) year statute of limitations prohibits Petitioner from filing suit against the Seller. § 17.565, Tex. Bus. & Comm. Code. Filing suit after the statute of limitations expired would be a groundless suit and could expose Petitioner to sanctions under § 17.50(c), DTPA." Pet'r's First Rehearing Motion, p. 1.

In addition, Petitioner also stated earlier in the proceeding, "however, Petitioner is permitted to assert the DTPA *as an offset by way of counterclaim*,"and that "Petitioner's claim ***is*** *a compulsory counterclaim which must be asserted this proceeding or it is barred*." [sic] (emphases added). Id. at 1,2. Relying on Petitioner's earlier claims that consistently and clearly designate her DTPA claim as a counterclaim, it is evident in the record that such counterclaim designation cannot be mistaken, and consequently is not a mistaken designation to which Rule 8(c)(2) of the Federal Rules would apply.

Had Petitioner asserted the DTPA claim as an affirmative defense, it would not have been excepted from the notice requirements of Section 17.505(b) because that section does not provide an exception for affirmative defenses. Based upon the argument that Petitioner now posits, she would have had to comply with the DTPA's notice requirements, without which her claim would have failed due to insufficient notice. As the record shows, Petitioner admitted that she did not comply with such notice requirements. Rather, she stated that she "was not required to send any pre-*counterclaim* notice." (emphasis added) See Pet'r's First Rehearing Motion, at 2.

Having failed to provide the required written notice prior to filing suit under the DTPA, Petitioner sought to assert her claim as a counterclaim.[2] Now, having failed to timely assert the counterclaim before this Court, Petitioner seeks to claim that the counterclaim could have been considered by the Court as an affirmative defense under Rule 8(c)(2).

The fact that an offset *could* be an affirmative defense does not mean that it should be treated as such in the instant case. The requirements of Rule 8(c)(2) must be met in order to be applied. In this case, the record supports that Petitioner has consistently categorized the DTPA claim as a counterclaim and pursued relief throughout the proceeding based upon this intentional designation. For the Court to treat the counterclaim as an affirmative defense, without regard to Petitioner's own unmistaken characterization of her claim as a counterclaim, would not render justice in this case but instead would be inconsistent with what the record supports. Pet'r's Second Rehearing Motion, p. 1.

Based upon the record, the Court finds that Petitioner did not mistakenly designate her DTPA claim as a counterclaim, but instead intentionally and deliberately designated her DTPA claim as a counterclaim for the relief that such designation rendered. Petitioner therefore cannot invoke Rule 8(c)(2) to re-designate her counterclaim as an affirmative defense on the basis of mistaken designation because the record does not support a claim of mistaken designation.

As additional support, Petitioner also relied upon case law precedent within the Fifth Circuit that, in general, considered offsets to be affirmative defenses. See U.S. v. Renda, 667 F.3d 651 (5th Cir. 2012); Giles v. Gen. Elec. Co., 245 F.3d 474, 496 (5th Cir. 2001) ("an offset indeed is an affirmative defense"). See also Rosenberg v. Trautwein, 624 F.2d 666 (5th Cir. 1980) (it is a "general rule" that an offset is an affirmative defense."); Brown v. American Transfer & Storage Co., 601 S.W. 2d 931 (Texas 1980); Southwestern Bell Tel. Co. v. Gravitt, 551 S.W. 2d 421 (Tex.Civ.App.-San Antonio 1976).

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[2] It is worth noting that Petitioner cannot take advantage of the § 17.505(b) exception simply by claiming it. The exception is not automatic. Rather, Petitioner must plead and provide evidence that the circumstances of her case bring her within the exception. David v. Wells Fargo Bank, N.A., Civil Action No. V-11-47, 2011 WL 6148989 (S.D. Tex. December 7, 2011); McDonald v. Hightower, Alexander & Cook, P.C., No. 05-91-01066-CV 1992 WL 211060, at *6 (Tex.App.-Dallas, August 31, 1992). Based upon the record, Petitioner has never filed any pleading in any court relating to a DTPA claim, much less provided any evidence that pre-suit notice was impracticable.

There are, however, a line of cases that support a position contrary to that of Petitioner. In 1994, for example, the Fifth Circuit stated that an offset is "a form of equitable counterclaim" that resolves competing claims between the same parties. Capital Concepts Properties 85-1 v. Mutual First, Inc., 35 F.3d 170, 179 (5th Cir. 1994); See also, Mehler Texnologies, Inc. v. Monolithic Constructors, Inc., Civil Case No. 3:09-CV-655-M 2010 WL 850614, at *3 (N.D. Texas, March 11, 2010); Principle Life Ins., Co. v. Renaissance Healthcare Sys. Inc., Civil Case No. 06-2973, 2007 WL 3228103, at *2, n. 1 (S.D. Texas, October 30, 2007) ("an offset is an equitable counterclaim, not an affirmative defense.") (internal quotation omitted).

With the existence of such intra-circuit conflict in the Fifth Circuit, and no apparent resolution of the same, this Court is not fully persuaded that Petitioner's position is supported by controlling case law precedent. This lingering ambiguity is further supported by Petitioner's own acknowledgement of such ambiguity where, in reference to Rule 8(c)(2) Petitioner states, "A counterclaim *is not* an affirmative defense but can be construed as such." (emphasis added); Pet'r's Second Rehearing Motion, ¶ 1 at 2. Petitioner further adds "It is not clear whether set-offs and recoupments should be viewed as defenses or counterclaims." Id. The Court agrees with Petitioner that it simply is not clear, and as such I find this case law unpersuasive.

Finally, Petitioner contends, "the Administrative Judge found Petitioner's offset claim in the Short Statement was not a counterclaim and that a counterclaim was not asserted until much later, and the Administrative Judge did not relate the counterclaim back to the Short Statement, which would have tolled the statute of limitations." Id. It is unclear whether Petitioner is now reasserting his counterclaim or whether he is reasserting the statute of limitations, but, both issues have been previously adjudicated and as such will not be addressed again in this proceeding. What the Court actually found was, "Although Petitioner's first mention of DTPA violations occurred on July 28, 2010, it was not identified as a counterclaim until much later. At that point when Petitioner raised DTPA violations as a counterclaim defense, the window for Petitioner to assert a DTPA counterclaim that previously was opened by Section 16.069(a) had again closed." (Recon. Decision 4.)

It is the Court's determination that Petitioner has not introduced sufficient evidence to establish that a clear error of law was made in this case. Additionally, Petitioner does not meet the criteria set forth in Rule 8(c)(2) of the Federal Rules because her original designation of the claim as a counterclaim was not mistaken or unintentional.

Based on the foregoing, there is no error of law or fact upon which Petitioner could rely to warrant a rehearing of the *Decision and Order upon Reconsideration*. Petitioner also has not offered any new material evidence to again warrant rehearing this case. Accordingly, her Motion for Rehearing is **DENIED**. It is hereby

ORDERED that the **DECISION AND ORDER** issued in this matter on July 29, 2011, shall remain in **FULL FORCE AND EFFECT, unless Petitioner's debt has been paid in full. If said debt has been paid in full by Petitioner, the Secretary is no longer authorized to collect said debt by means of administrative wage garnishment**.

Vanessa L. Hall
Administrative Judge