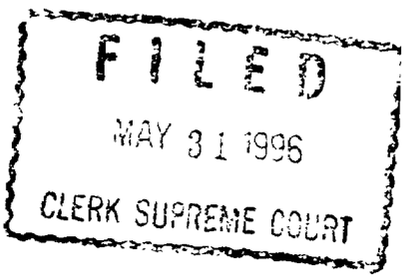
IN THE COURT OF APPEALS OF IOWA

No. 6-024 / 95-347



FEDERAL EXPRESS CORPORATION,

Appellee,

vs.

BURLINGTON BROADCASTING COMPANY, LTD.,

Appellant.

Appeal from the Iowa District Court for Des Moines County, John C. Miller, Judge.

The defendant appeals a district court judgment awarding plaintiff damages on its claim on an open account. **AFFIRMED.**

Steven S. Hoth of Steven S. Hoth Law Offices, Burlington, for appellant.

Gary L. Hoyer of Saunders, Humphrey, Johnson & Hoyer, Fort Madison, for appellee.

Considered by Sackett, P.J., and Cady and Streit, JJ. Vogel, J., takes no part.

PER CURIAM

This is an appeal by a defendant claiming that plaintiff's claims against it for payment on an open account were barred by the statute of limitations. The district court found defendant could not raise this issue because it had not been pled. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

In 1987, Burlington Broadcasting Company, Ltd. opened two credit accounts with Federal Express Corporation. Burlington sent and received packages through Federal Express, and was charged for these services. Burlington failed to make payments on the accounts after January 1988. Later that year, Federal Express placed Burlington on a cash only basis, and the parties continued on this basis until 1990.

Federal Express filed suit on February 22, 1994, alleging Burlington owed $5,153 on its accounts. During the trial, Burlington moved to amend its answer to include the affirmative defense of statute of limitations. The district court found that it was obvious from the petition that the claims might be barred by the statute of limitations, and concluded that defendant had waived its right to raise this affirmative defense because the defense had not been raised in its answer. The court entered judgment against Burlington for $4,611, plus interest. Burlington appeals.

I. Burlington first contends the district court should have granted its motion to amend its answer to conform to the proof. It claims this issue was tried by the

consent of the parties. A trial court has considerable discretion in ruling on a motion for leave to amend, and we will reverse only when a clear abuse of discretion is shown. *Stoner v. Kilen*, 528 N.W.2d 648, 650 (Iowa App. 1995). Such motions should not be granted on the eve of trial or later when the amendment to the pleadings will substantially alter any issue involved in the case. *In re Marriage of Titterington*, 488 N.W.2d 176, 180 (Iowa App. 1992).

We find no abuse of discretion under the facts of the present case. The motion was entered after plaintiff had rested its case, and the amendment would have substantially altered the issues in the case by raising for the first time the statute of limitations.

II. Burlington contends the district court erred in failing to grant its motion for directed verdict. It states plaintiff's claims are barred by the statute of limitations. We have found the district court did not abuse its discretion in refusing to allow defendant to amend its answer to raise the affirmative defense of statute of limitations. Defendants have a duty to plead the statute of limitations if they wish to rely on it. *Porter v. Good Eavespouting*, 505 N.W.2d 178, 182 (Iowa 1993). Because the limitations defense was not pled, the defendant waived it. *Id.*

We affirm the district court on all issues raised in this appeal. Costs of the appeal are assessed to Burlington Broadcasting Company.

AFFIRMED.