

Brimberg v O'Mara

2010 NY Slip Op 31842(U)

July 2, 2010

Supreme Court, New York County

Docket Number: 107285/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Barnett J. Brimberg and
Esther Matthews Schudt

INDEX NO. 107285-07

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

- v -
Juvenile K. O'Mara and
Alexandra O'Mara

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 09 2010
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*IT to file NO/ no later
than 7/27/10*

Dated: JUL 02 2010

HON. JUDITH J. GISCHE ^{J.S.C.}

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
Barnett J. Brimberg and
Esther Matthews Schmidt,
Plaintiffs,

DECISION/ ORDER
Index No.: 107285-2007
Seq. No.: 005

-against-

PRESENT:
Hon. Judith J. Gische

Lawrence K. O'Mara and
Alexandra O'Mara,
Defendants.
-----X

FILED
JUL 09 2010
COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Defs' n/m (amend answer) w/LDS affirm, O'Marra affid (2) w/exhs . . .	1
Brimberg's x/m (amend complaint) w/SNB affirm, exhs	2
Defs' further support/opp w/LDS affirm, exh	3
Order 2/25/10	4
Steno minutes 4/15/10	5

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action arising from a dispute among adjoining property owners, each claiming rightful title to a strip of land ("the strip"). The parties have settled their claims as to plaintiff Esther Matthews Schmidt ("Schmidt"); however, the claims by Barnett J. Brimberg ("Brimberg") remain to be decided.

Presently before the court is defendants' ("O'Maras") motion for permission to serve an amended answer. The O'Maras also seek a protective order, precluding additional depositions demanded by Brimberg. The third branch of their motion is to compel Brimberg to disclose the opinions, and the bases therefore, of his expert witnesses.

Brimberg opposes that motion and has cross moved for permission to serve an amended complaint. The proposed amended complaint eliminates the claims brought by Schmidt and adds a new claim for treble damages, if the court affords relief at law and not in equity. Brimberg opposes the O'Maras' cross motion.

The underlying dispute and facts of this case are set forth in extensive detail in prior decisions and order by the court. They will only be restated here as necessary.

Arguments

Brimberg, Schmidt and the O'Maras own brownstones next to each other in New York City on 83rd Street between Lexington and Third Avenues, on the South side of the street. Brimberg owns the brownstone located at 158 East 83rd Street ("number 158"); Schmidt owns the brownstone located at 156 East 83rd Street ("number 156"); and the O'Maras own the brownstone located at 160 East 83rd Street ("number 160"). The parties have a longstanding history of disputes over a strip of land that runs behind their property in what can be best described as the shape of a flag. Prior to this plenary action, the O'Maras brought a special proceeding pursuant to RPAPL § 881 (Index No. 106588-06) for access to Brimberg's back yard. The O'Maras prevailed in getting an order from Justice Jane Solomon, allowing the O'Maras to erect scaffolding on Brimberg's property.

Brimberg previously brought an Article 78 proceeding against the New York City Board of Standards and Appeals. In that action, Brimberg challenged the Department of Building's ("DOB") issuance of a building permit to the O'Maras (Index No. 100319/07).

Brimberg contends that when the O'Maras renovated their brownstone and

added an extension, not only did they destroy a wooden fence that had enclosed a strip of land to which he had acquired title to through adverse possession, the addition they built encroaches on that strip of land. According to Brimberg, this was confirmed by a surveyor ("Wodkiewicz") who he hired shortly after the O'Maras completed their work.

The O'Maras now seek permission to serve an amended answer to expand on their present counterclaim for adverse possession. The counterclaim, in its present state, is largely based on a 70 year old brick wall the O'Maras allege stood on the north/south property line of 160 and 158. However, now that discovery has been (or is about to be) completed, the O'Maras claim they also have title by adverse possession based upon a 40 year old greenhouse standing along the east/west property line between 160 and 158.

The O'Maras deny there is any prejudice to Brimberg by allowing the proposed amendment because he is claiming title through adverse possession and this is the flip side of his claim. Thus, according to the O'Maras, if the brick wall is found to be situated on the property of 158, then the encroached property belongs to the defendants by adverse possession because of the structure (greenhouse) that has been located in it for over 40 years. Furthermore, the fence was part of the greenhouse. The O'Maras explain that they did not move to amend their complaint sooner because they learned of this additional adverse possession claim through discovery, when they deposed the surveyor ("Autar") who prepared the pre-sale survey for the property.

Brimberg opposes the O'Maras' motion on the basis that it has no merit; it is "unbelievable" they did not know of these facts sooner; and they obtained permission to

erect scaffolding in the backyard of number 158 based upon facts that are completely different than those they now present. Brimberg argues that the "new" counterclaim is contradicted by all the available evidence and therefore, the O'Maras are estopped from it.

Brimberg has cross moved to serve an amended complaint, whether or not the O'Maras' motion is granted. Brimberg's proposed amended seeks, among other things, to assert a new claim (5th cause of action) for treble damages pursuant to RPAPL § 853 which has to do with "ousters" and various types of tenancies.

Brimberg has also served the O'Maras with a Demand for Discovery and Inspection dated December 28, 2010. Among the items demanded are ambulance records and notes taken by a private investigator. After this action was commenced, the O'Maras hired a private investigator ("Crowley") to investigate the person who performed the survey for Brimberg after the O'Maras completed their renovation. Crowley is the former Commanding Officer of the NYPD's Manhattan D.A.'s Bureau. Crowley conducted a "sting" operation with another investigator which, according to Crowley, resulted in the surveyor ("Wodkiewicz") admitting he had intentionally falsified his survey and that the falsification was in Brimberg's favor.

Thereafter, in July 2009, Wodkiewicz died. A month later, on August 31, 2009, Mr. O'Mara was stabbed outside his home. At his deposition, Mr. O'Mara testified that when he was stabbed, the assailant threatened him and said words to the effect of "you have a nice house, a nice wife and kids. What are you doing all this for? . . . Just give your neighbor what he wants and stop talking to the cops . . ." Mr. O'Mara testified he took these threats to refer the ongoing disputes between himself and Brimberg,

because he has no other disputes with his neighbors. While the O'Maras stop short of directly implicating Brimberg in the attack, they believe Brimberg deliberately hired a "crooked" or unsavory surveyor who he expected would prepare a result oriented, if not false survey, following the Article 78 proceeding and after the O'Maras completed their renovation.

Brimberg demands a copy of the report prepared by the ambulance team that responded to the scene of the assault. Brimberg argues that this information will prove that Mr. O'Mara fabricated the entire story about his assailant said, simply to bolster his claims in this action. The O'Maras argue that not only is that information private, but even if it is discoverable, then the information is not material nor relevant to the real property claims being asserted by each side.

Brimberg also seeks documents related to Crowley's investigation and his contact with law enforcement. After Mr. O'Mara was attacked, Crowley spoke to the police and the district attorney and reported what Wodkiewicz had told him.

Since Wodkiewicz died while this proceeding was pending, the O'Maras agreed to let Crowley be deposed, although he is expected to be called as an expert witness at trial. In their expert disclosure (CPLR 3101[d][1]), the O'Maras indicated that Crowley and another private investigator (Roccapriore) will testify they investigated Wodkiewicz and that his survey did not "conform with normal and customary practices" and that the surveyor admitted he prepared the survey in such a way to avoid a "tear down" order. Brimberg has now demanded more information, specifically what Wodkiewicz told the police and the district attorney about the "crooked" surveyor and the stabbing. Brimberg now wants Crowley's notes, the notes of the other investigator and copies of

tapes, transcripts, emails, etc. having to do with his investigation, as well as what he told law enforcement.

Brimberg has also served non-party subpoenas. One subpoena is directed to the O'Maras' former architect, the other on Frank Nigro, their current architect. Brimberg has also served subpoenas on a subcontractor who did work for the O'Maras renovation and Philip Karmel, Esq., the lawyer who successfully represented the O'Maras in the RPAPL § 881 and Article 78 actions.

According to Brimberg, each of these subpoenas is expected to yield evidence that the O'Maras intentionally encroached on his property when they renovated and built the extension.

Although Brimberg has disclosed his (5) expert witnesses, the O'Maras contend the disclosure is non-compliant with the requirements of CPLR 3101 [d] [1] because there is insufficient detail about the areas the witnesses will testify about. Brimberg contends he disclosed everything he was required to under CPLR 3101 [d] [1], and just because the O'Maras disclosed more information than required does not obligate him to do the same.

Discussion

The proposed amended complaint

Leave to amend and supplement pleadings should be freely given upon such terms as may be just as a matter of discretion in the absence of prejudice or surprise. CPLR § 3025 (b); Stroock & Stroock & Lavan v. Beltramini, 157 A.D.2d 590 (1st Dept., 1990). This is true, particularly when the denial of the motion would create a greater prejudice than would be granting it. Murray v. City of New York, 43 NY2d 400

(1977). Leave, however, may not be granted where the amended pleading fails to state a cause of action. Stroock & Stroock & Lavan v. Beltramini, supra.

“If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrongdoer” (RPAPL § 853).

Brimberg’s cross motion to serve an amended complaint asserting a cause of action under RPAPL § 853 is hereby denied. RPAPL § 853 is directed at unlawful evictions of tenants or other lawful occupants of property who are disseized, ejected, or put out of real property in forcible manner. It allows the tenant or other lawful occupant to recover treble, statutory, damages against wrongdoer. therewith. In the absence of force or fear of personal violence, there is no claim for treble damages and they cannot be awarded (Sam & Mary Housing Corp. v. Jo/Sal Market Corp., 100 A.D.2d 901 [2nd Dept 1984] app diss 62 NY2d 941 [1984]). Brimberg’s facts do not support the proposed cause of action and he does not have a claim for treble damages (Golonka v. Plaza at Latham LLC, 270 A.D.2d 667 [3rd Dept 2000]).

The second branch of Brimberg’s motion to amend his complaint is based upon Schmidt having settled her claims against the O’Maras. Permission to serve an amended complaint lies in the court’s discretion (Edenwald Contracting Co., Inc. v. City of New York, 60 N.Y.2d 957 [1983]). There is no explanation for why the complaint has to be amended, simply because Schmidt is no longer in the case. Examining the proposed amended complaint, there are still references to her building (“adjacent property at 156 East 83rd Street...”). Given how these three buildings are situated, and

how contentious the parties are, not only is nothing achieved by the proposed amended complaint, plaintiff has not shown the proposed amended will not prejudice the defendants' defenses and counterclaims. Therefore, Brimberg's cross motion to serve an amended complaint removing Schmidt's claims is denied.

The proposed amended answer

The proposed amended answer amplifies an existing counterclaim and it will be allowed. Not only have the O'Maras shown that Brimberg is not prejudiced by the proposed amendment, Brimberg's argument, that the O'Maras are collaterally estopped from asserting this claim, is misplaced. The doctrine of collateral estoppel precludes a party from re-litigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity (Beuchel v. Bain, 97 NY2d 295 *cert den* 535 US 1096 [2002]). Thus, the proponent of a collateral estoppel argument must establish the "identity and decisiveness of the issue" whereas the opponent must establish the "absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding" (Parker v. Blauvelt Volunteer Fire Co., 93 NY2d 343, 651 [1999] *quoting* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 [1984]).

Here, there has never been a determination or adjudication of the parties' boundary lines (*compare* Solow v. Liebman, 253 A.D.2d 808 [2nd Dept 1998]). The special proceeding under RPAPL § 881 was for the limited purpose of gaining access to Brimberg's back yard to erect scaffolding. In the Article 78 action, Brimberg challenged the decision by DOB to issue a building permit to the O'Maras. In neither action was the issue of boundary lines fully litigated or decided (see Koether v. Genera

low, 213 A.D.2d 379 [2nd Dept 1995]). Therefore, the O'Maras are not collaterally estopped from asserting the proposed amended counterclaim and they may serve the proposed amended answer with counterclaims

Discovery

In deciding these discovery disputes, the court is mindful of what the parties' claims are and what has to be proved at trial. To establish title by adverse possession, a party must demonstrate that the possession was hostile and under a claim of right, actual, open, notorious, and exclusive, and it must have been continuous for the statutory period (Guariglia v. Blima Homes, Inc., 224 A.D.2d 388, 389 [2nd Dept 1996] *aff'd* 89 N.Y.2d 851 [1996]). A trespass is an intentional entry onto the land of another without justification or permission (Woodhull v. Riverhead, 46 AD3d 802 [2nd Dept 2007]). The material elements of a trespass cause of action are: 1) intent or recklessness, 2) entry by a person or thing upon land, and 3) in the actual or constructive possession of another (Long Island Gynecological Services, P.C. v. Murphy, 298 A.D.2d 504 [2nd Dept 2002]).

1. O'Maras' motion to compel

Section 3101(d) of the CPLR provides that upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and "shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. "

The disclosure provided by Brimberg in response to the O'Maras' CPLR § 3101

[d][1] demand complies with the foregoing statutory requirements. Brimberg has provided the qualifications of each of his experts and he has stated with "reasonable detail" the subject matter each of them is expected to testify about. Although the O'Maras' response to Brimberg's demand was more thorough, presented in detailed bullet-item form, it does not follow that Brimberg must reciprocate in that kind of detail. Therefore the O'Maras' motion to compel a more detailed response to their CPLR 3101 [d] [1] demand is denied.

2. O'Mara's motion for a protective order (CPLR 3103)

a) EMT records

In deciding whether to enforce a discovery demand, the court applies a test of "usefulness and reason" (Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406 [1968]). Furthermore, where as here, a party moves for a protective order, the court may regulate the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice.

Applying this test to Brimberg's demand, the court grants a protective order and will not require that the O'Maras respond to the demand for Mr. O'Maras' statements to the ambulance crew. Whatever Mr. O'Mara told the ambulance workers about what happened to him is well beyond the scope of this action which is for a determination about who the rightful owner of the disputed strip of land is. The information demanded about what Mr. O'Mara told the ambulance workers when they arrived on the scene neither proves or disproves any of the adverse possession or trespass claims.

b) Private Investigator

The O'Maras allowed Brimberg to depose their private investigator because he

spoke to Wodkiewicz before his death and, according to Crowley, Wodkiewicz admitted to him that he falsified a survey. Thus, the O'Maras accommodated Brimberg to ameliorate any prejudice to them. Whether any of these statements are admissible at trial is not before the court to decide. The issue is more broadly whether Brimberg is entitled to any more information from Crowley about his investigation or what he reported to the authorities.

Not only was Crowley's investigation made in anticipation of trial and, therefore entitled to the qualified protections of CPLR § 3101 (d) (2) (a) from discovery, Crowley has also been disclosed as the O'Maras' expert witness. Brimberg has not shown he has a "substantial need" for the discovery demanded to establish any the material elements of his case or defenses against the counterclaims. Therefore, the court grants the O'Maras' motion for a protective order against Brimberg's demands for further documents, etc., from Crowley or about the sting operation.

c) Architects and subcontractor

Brimberg contends Novack, the subcontractor applied a certain coating to the exterior walls of the O'Maras' extension which was different than approved by the DOB, for which the DOB issued a violation. Brimberg seeks to depose Novack to ascertain why Novak did this, since none of the witnesses deposed thus far knows why. Brimberg has not established how this information is material or relevant. His explanation that the application of stucco made the encroachment deeper does not correlate to any of the material elements of either the adverse possession or trespass causes of action.

Brimberg's explanation for why he needs to depose the O'Maras' current

architect (Nigro) is based on Mr. O'Mara's testimony at his EBT and disclosure that Crowley will testify at trial about what Wodkiewicz told him. According to Mr. O'Mara, he decided to have Wodkiewicz investigated because "[Nigro] indicated he had heard that [Wodkiewicz] was famous for finding encroachments that nobody else could find." Mr. O'Mara also said that Nigro gave him the name of a surveyor to "confirm everything" but Mr. O'Mara could not recall that surveyor's name. It is unclear whether any of these (hearsay) statements are admissible, but even if they are, the discovery sought is so far afield from what the parties have to prove, it will not be allowed.

No subpoena has been served on the O'Maras' previous architect, and therefore, that issue is not directly before the court to decide. However, if as the O'Maras claim, Brimberg has already deposed a witness employed at that firm (i.e. Rosenberg & Kolb Architects, P.C.), then discovery is complete as to that witness.

d) Attorney Karmel

The sole reason given by Brimberg for wanting to depose Attorney Karmel is that he represented the O'Maras in each prior action and he issued an opinion letter to the O'Maras assuring them that the fence could be torn down. Brimberg argues that by relying on that opinion, the O'Maras have waived the attorney-client privilege and Brimberg has the right to find out what legal advice Attorney Karmel actually provided. The O'Maras have not, however, alleged any negligence on the part Attorney Karmel regarding his advice and, therefore, their communications with Attorney Karmel remains privileged (Stark v. Greenberg, Dauber & Epstein, 219 A.D.2d 571 [1st Dept 1995]). The O'Maras' motion for a protective order as to Attorney Karmel on the basis of privilege is also granted.

Conclusion

In accordance with the foregoing

It is hereby

ORDERED that the motion by the O'Maras for permission to serve an amended answer with counterclaims is granted; and it is further

ORDERED that Brimberg's cross motion to serve an amended complaint is denied for the reasons stated; and it is further

ORDERED that the O'Maras' motion for a protective order pursuant to CPLR 3103 (a) is also granted; and it is further

ORDERED that the branch of the O'Maras' motion seeking an order pursuant to CPLR 3101 [d][1] and 3124, compelling Brimberg to provide a more detailed expert witness disclosure is denied; and it is further

ORDERED that the O'Maras may serve their amended answer with counterclaims along with a copy of this decision/order with notice of entry; and it is further

ORDERED that discovery is complete and the plaintiff shall serve the Note of Issue no later than July 27, 2010; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Date: New York, New York
July 2, 2010

So Ordered:

Hon. Judith J. Gischel, J.S.C.

FILED
JUL 09 2010