

Patrick v Cox
2020 NY Slip Op 31257(U)
April 30, 2020
Supreme Court, Kings County
Docket Number: 3548/2016
Judge: Carolyn E. Wade
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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 30th day of April, 2020

PRESENT:

HON. CAROLYN E. WADE,

Justice

HERMUS PATRICK,

Plaintiff,

Index No. 3548/2016

-against-

DECISION and ORDER

KEITH COX, LENORE COX, and DUMAH COX,

Defendants.

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of plaintiff's motion (seq. #3) and defendants' cross-motion (seq. #5):

Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1
Cross-Motion and Affidavits/Affirmations.....	2
Answering Affidavits/Affirmations.....	3
Reply Affidavits/Affirmations.....	4
Memorandum of Law.....	

Upon the foregoing cited papers, and after oral argument, plaintiff HERMUS PATRICK moves to amend the Complaint, compel production of discovery, and for an order directing Defendants to pay costs for his motion (seq. #3). Defendants KEITH COX, LENORE COX, and DUMAH COX cross-move for leave to file two counterclaims against Plaintiff, to compel Plaintiff to provide responses to document demands, and to dismiss the case for willful failure to provide relevant documents.

Relevant facts

This action arises out of two real estate transactions concerning property located at 434 Pine Street (“434 Pine”) and 371 Douglass Street (“371 Douglass”) in Brooklyn, New York (collectively, the “Properties”). Plaintiff and Defendants are family members. As alleged in the Complaint, Defendants KEITH COX, LENORE COX, and DUMAH COX (collectively, “Defendants”) fraudulently removed plaintiff HERMUS PATRICK (“Plaintiff”) from the deeds to both Properties. Plaintiff claims that Defendants stole rental income from the Properties, and took out multiple mortgages without his knowledge. He further represents that Defendants impersonated him in court for unpaid debts that they had caused to accrue on the Properties, and impersonated his wife for life insurance purposes. The instant motions ensued.

Leave to amend pleadings

Arguments

In support of the branch of his motion to amend the Complaint, Plaintiff requests leave to add a new declaratory judgment cause of action pursuant to Article 15 of RPAPL, which is based on the occurrences and transaction pled in the original Complaint. He also proposes the inclusion of claims regarding his whereabouts that are premised on official U.S. Department of Homeland Security documents; and Defendants taking out a mortgage on 371 Douglass Street.

Defendants, in opposition, argue that Plaintiff did not provide a copy of the proposed amended pleading. They also contend that Plaintiff’s allegation regarding Keith Cox and Dumah Cox taking out a

mortgage on 434 Pine is irrelevant to this case, as they were added on the deed. Moreover, Defendants, by cross-motion, assert that upon reviewing testimony and documents submitted by their adversary, they now seek leave to add counterclaims for adverse possession and breach of contract.

In reply, Plaintiff contends that he has already provided a copy of the proposed amended pleading as an exhibit. He also asserts that Defendants unjustly enriched themselves because they took out a mortgage on 371 Douglass, and fraudulently removed him from the deed after this lawsuit was filed. To oppose Defendants' cross-motion to amend, Plaintiff argues that their proposed counterclaim for breach of contract is not supported by evidence, and is barred by the statute of limitations. Plaintiff further avers that Defendants' proposed counterclaim for adverse possession is without merit. Specifically, with respect to 371 Douglass, Defendants do not reside there; and ten years have not passed since Plaintiff was removed from the deed. As for 434 Pine, Defendants reside in the basement only; thus, they lack exclusive possession. Plaintiff asserts that if his underlying fraudulent transfer claims are successful, then Defendants' adverse possession claim will be meritless.

In rebuttal, Defendants claim that Plaintiff admitted in his discovery response that he and Lenore Cox verbally agreed to share income from 434 Pine. They also aver that Plaintiff's opposition is meritless because he seeks to add the same quiet title claim mentioned in his motion.

Analysis

A motion for leave to amend a pleading may be made "at any time" and "[l]eave shall be freely given upon such terms as may be just" (CPLR 3025[b]). "Absent prejudice or surprise resulting from the delay in making the motion, leave to amend should be granted unless the proposed amendment is patently without merit or palpably improper" (*Cullen v Torsiello*, 156 AD3d 680, 681 [2d Dept 2017]). "[T]he determination as to whether to grant such leave is within the court's discretion, and the exercise of that discretion will not be lightly disturbed" (*Travelers Prop. Cas. v Powell*, 289 AD2d 564, 565 [2d Dept 2001]).

Here, Plaintiff's proposed amendment to the Complaint is not patently without merit or palpably improper. The two factual allegations included in the proposed amended Complaint are supported by information ascertained during discovery. Moreover, the fact that Defendants were added to the deed does not bar Plaintiff's claim that they took out the mortgage without his consent. Defendants also did challenge the proposed declaratory judgment claim.

Defendants cross-moved to add counterclaims for adverse possession as to 434 Pine, and breach of contract. The breach of contract claim is clearly time-barred, as the alleged agreement in question is one "whereby [Plaintiff] would contribute to the maintenance, taxes, mortgage payments and upkeep from 1984 through 2004" (Ramin's aff, exhibit "B"). "A cause of action alleging breach of contract is governed by a six-year statute of limitations and accrues at the time of the alleged breach" (*CDx Labs., Inc. v Zila, Inc.*, 162 AD3d 972, 973 [2d Dept 2018]; see also CPLR 213[2]). The instant action was commenced in 2016. An answer cannot be amended to include counterclaims which were time-barred (*see Bernstein v Spatola*, 122 AD2d 97 [2d Dept 1986]).

Defendants' proposed adverse possession claim as to 371 Douglass is meritless, as ten years have not passed since ownership was removed from Plaintiff. However, the Court finds that, as to 434 Pine, Plaintiff has not established that an adverse possession claim is patently without merit or palpably improper. At this juncture, it can not be presumed that Plaintiff succeeded on his underlying fraudulent claims to defeat Defendants' adverse possession counterclaim.

Based on the foregoing, the branch of Plaintiff's motion to amend is **granted in its entirety**; the branch of Defendants' motion to amend is **granted to the extent** that they are **permitted to add the First Counterclaim for adverse possession as to 434 Pine**.

Compel Discovery

Arguments

In support of the branch of his motion to compel discovery, Plaintiff argues that his requests for Lenore and Keith Cox's bank statements are necessary to show the source of funds for the down payment used to purchase 434 Pine Street, and to disclose where Defendants deposited the funds from the various mortgages that they took out on the Properties. He further claims that the requested tax returns are necessary to disclose Defendants' rental income and property expenditures.

Defendants, in opposition, aver that Plaintiff should serve a subpoena to obtain such information, instead of asking them to sign blanket bank and IRS authorizations. In support of their cross-motion to compel discovery, Defendants additionally contend that Plaintiff's tax returns during his employment with Defendants are crucial in determining whether their adversary had declared ownership of both Properties.

In reply, Plaintiff argues that there is no justification for Defendants' refusal to sign the bank authorizations. In opposition to Defendants' cross-motion, Plaintiff alleges that he previously objected to the discovery demand on the ground that he was never employed by Defendants. Furthermore, he notes that he has already provided Defendants with his Social Security Administration records.

Defendants, in rebuttal, contend that Plaintiff's responses to their discovery demands were improper.

Analysis

CPLR 3101(a) requires, in pertinent part, "full disclosure of all matter material and necessary in the prosecution or defense of an action." "However, the principle of 'full disclosure' does not give a party the right to uncontrolled and unfettered disclosure, and the trial courts have 'broad power to regulate discovery to prevent abuse' (*Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007], citing *Barouh Eaton Allen Corp. v Intl. Bus. Machines Corp.*, 76 AD2d 873, 874 [2d Dept 1980]). "What is 'material and

necessary' is left to the sound discretion of the lower courts and includes 'any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity' (Andon *ex rel. Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000]).

At the outset, the Court notes that Defendants' reply to their cross-motion contains new arguments in opposition to Plaintiff's motion (see aff of Ramin at 2, which indicates that the affirmation was submitted "in further opposition to Plaintiff's motion" [emphasis added]). "Unauthorized sur[-]replies containing new arguments generally should not be considered by the court" (*Gluck v New York City Tr. Auth.*, 118 AD3d 667, 668 [2d Dept 2014]). Here, Defendants were never granted permission to file a sur-reply to further oppose Plaintiff's motion. Consequently, those arguments will not be considered.

After a meticulous examination of the respective submissions, the Court finds that Plaintiff's discovery demands are material and necessary. Notably, Defendants' argument that Plaintiff should serve a subpoena is unavailing. With regard to Defendants' cross-motion to compel, Document Request 6 specifically seeks "[a]ll tax returns that Plaintiffs[sic] filed during their employment with the Defendants" (aff of Ramin, p 10-11). Plaintiff already responded that "[he] was never employed with Defendants" (*id.*). Unless this response is rebutted, Plaintiff cannot be compelled to produce tax returns.

The Court further notes that Defendants improperly challenged, for the first time in their reply papers, other discovery responses made by Plaintiff (*i.e.* his response to Interrogatory 13, Document Request 12 and Document Request 13). As Plaintiff was not afforded an opportunity to respond to those contentions, this Court will not consider them (*see Yechieli v Glissen Chem. Co., Inc.*, 40 AD3d 988, 989 [2d Dept 2007]; *see also Lewis v Boyce*, 31 AD3d 395, 396 [2d Dept 2006]).

Based on the foregoing, the branch of Plaintiff's motion to compel is **granted**. The branch of Defendants' motion to compel is **denied**. It necessarily follows that the branch of Defendants' motion to dismiss the case for willful failure to provide documents is also **denied**.

Lastly, the Court, in the exercise of its discretion, declines to award Plaintiff costs pursuant to CPLR 8106.

Conclusion

Accordingly, based on the above, it is

ORDERED that plaintiff HERMUS PATRICK's motion (seq. #3) is **GRANTED TO THE EXTENT** that the branches of his application to amend the Complaint, and compel production of discovery are **GRANTED**. The branch of his motion for an award of costs is **DENIED**. And it is further,

ORDERED that defendants KEITH COX, LENORE COX, and DUMAH COX's cross-motion (seq. #5) is **GRANTED TO THE EXTENT** that Defendants are permitted to add the First Counterclaim for adverse possession as to 434 Pine. All other relief sought in Defendants' motion is **DENIED**.

This constitutes the Decision and Order of the court.



**HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE**