

**Platteau v Ouarti**

2022 NY Slip Op 30977(U)

March 28, 2022

Supreme Court, New York County

Docket Number: Index No. 162213/2019

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12

Justice

-----X

BART PLATTEAU,

Plaintiff,

- v -

ZOUBIR OUARTI,

Defendant.

-----X

INDEX NO. 162213/2019
MOTION DATE
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46-64 were read on this motion to strike pleadings.

Defendant moves pursuant to CPLR 3024(b) for an order striking portions of plaintiff's complaint, deeming defendant's deposition closed, and appointing a referee to supervise remaining depositions. Plaintiff opposes and cross-moves for an order directing defendant to produce outstanding discovery and complete his deposition, and to refrain from interposing speaking objections or directing his client not to answer questions which do not elicit privileged information. Defendant opposes plaintiff's cross-motion.

I. COMPLAINT (NYSCEF 2)

In his complaint, plaintiff alleges that on January 5, 2019 defendant, his neighbor and a member of their co-op board, pushed him down the stairs of their building, following a prolonged dispute related to ongoing construction in plaintiff's apartment. Plaintiff asserts causes of action for assault and battery, intentional infliction of emotional distress based on defendant's conduct leading up to the incident, and he seeks a permanent injunction and restraining order against defendant. He includes background facts concerning defendant's conduct from before the

incident in question and as to other building resident.

## II. CONTENTIONS

Defendant asserts that plaintiff's complaint contains multiple irrelevant allegations that are not based on plaintiff's personal knowledge, and some of which do not involve plaintiff, as confirmed at plaintiff's deposition. He contends that those allegations are inflammatory, irrelevant, and highly prejudicial, and should thus be stricken. Specifically, defendant requests that paragraphs numbered 1, 3, 11, 13-27, 29, 30, 45, and 54 be stricken. He also contends that at defendant's deposition, which lasted approximately six hours, plaintiff's counsel repeatedly questioned him about improper topics unrelated to the litigation and insulted defendant's counsel and, after defendant's counsel objected, plaintiff's counsel adjourned the deposition. Defendant asks that his deposition be deemed closed. Additionally, as discovery has become highly contentious, defendant asks that the court appoint a referee to monitor all future depositions, and that the cost be borne by plaintiff.

In opposition, plaintiff contends that defendant's motion to strike is untimely, for failing to file it within 20 days of service of the complaint. Even if timely, plaintiff argues that the allegations sought to be stricken are relevant in establishing that defendant acted out malice, as a basis for punitive damages, and to refute defendant's contention that he acted in self-defense. Plaintiff argues that a referee is not necessary, but if one is appointed, it should be at defendant's expense.

In support of his cross-motion, plaintiff contends that defendant should be required to produce items of discovery which it objected to on relevance grounds, as they are relevant to establishing defendant's malice, hostility, and bias towards plaintiff and other building residents. Additionally, he argues that defendant should be required to produce communications related to

video recordings of the accident and contends that at defendant's deposition, defendant's counsel improperly instructed his client not to answer certain questions, causing plaintiff's counsel to adjourn the deposition while reserving his rights. He argues that defendant should be required to complete his deposition, which should be done at defendant's expense.

In reply, defendant contends that plaintiff's allegations involving non-parties are irrelevant, and that the incident would be time-barred. He otherwise reiterates his arguments,

In opposition to plaintiff's cross-motion, defendant contends that it should be denied as plaintiff failed to file an affirmation of good faith. If considered, defendant contends that it fully responded to plaintiff's demands, except for those seeking privileged information, or are overly broad, unduly burdensome, and not tailored to lead to admissible evidence. Defendant contends that he should not be required to continue the deposition, which had nearly reached its time limit, and counsel should not be restricted from making objections. Additionally, plaintiff's request for costs and attorney fees is improper and baseless.

### III. DEFENDANT'S MOTION

#### A. CPLR 3024(b)

A party may move for an order striking any scandalous or prejudicial matter unnecessarily inserted in a pleading. (CPLR 3024[b]). The determination of such a motion requires inquiry into "whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." (*Soumayah v Minnelli*, 41 AD3d 390, 392 [1st Dept 2007]). And, "if the item would be admissible at the trial under the evidentiary rules of relevancy, its inclusion in the pleading, whether or not it constitutes ideal pleading, would not justify a motion to strike under CPLR 3024(b)." (*Soumayah*, 41 AD3d at 393).

Pursuant to CPLR 3024(c), such a motion must be served within 20 days after service of

the challenged pleading. (*See e.g. Wells Fargo Bank N.A. v Lawson Ho-Shing*, 168 AD3d 126 [1st Dept 2019] [motion to strike properly denied where defendant failed to serve notice of motion within 20 days of challenged pleading]; *Lau v Lungen*, 275 AD2d 506 [3d Dept 2000] [motion to strike prejudicial portions of defendant's answer time-barred as challenged pleadings served well beyond 20-day limit]; *but see Palmer v Cervone*, 2017 NY Slip Op 32476[U] [Sup Ct, Suffolk County 2017] [considering motion to strike prejudicial allegations served outside of the statutory time limit]; Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3024:5 [2018 supplement] [substantial objections may be entertained beyond expiration of 20-day period]). As defendant filed this motion nearly two years after plaintiff served the complaint, it is time-barred.

Even if timely, in light of the liberality with which evidence may be found relevant for admission in evidence at trial (*People v Harris*, 26 NY3d 1, 5 [2015] [relevant evidence is anything that has tendency to prove existence of material fact]), and in light of plaintiffs' stated purpose to provide the background and motives of defendant to explain his actions, there is an insufficiently substantial basis to strike any of the pleadings (*see e.g., Meridian Capital v Fifth Avenue 58/59*, 2007 NY Slip Op 33035[U] [Sup Ct, NY County 2007], *aff'd* 60 AD3d 434 [1st Dept 2009] [denying motion to strike allegations that otherwise constituted inadmissible settlement material, as relevant to motive]).

#### B. Defendant's deposition

Pursuant to CPLR 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action . . ." What is "material and necessary" is generally left to the court's sound discretion and may include "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. Assocs.*, 94 NY2d 740, 746 [2000], quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]).

Pursuant to 22 NYCRR § 221.1(a), objections at a deposition are strictly limited and all questions must be answered notwithstanding the objection. Speaking objections are also prohibited. The rule also provides that a deponent must answer all questions posed at a deposition except where a question may invade a privilege or right of confidentiality, where a court order precludes the question or when the question is plainly improper and would cause significant prejudice if answered. An attorney may not direct a witness not to answer a question except as provided in section 221.2 or CPLR 3115.

Here, defendant’s counsel acted improperly by directing defendant not to answer relevant and proper questions. Thus, plaintiff is entitled to complete his deposition at which defendant must answer all questions except those prohibited by CPLR 3115 and/or 22 NYCRR § 221.2. (22 NYCRR § 221.2[c] [if deponent does not answer question, examining party has right to complete remainder of deposition]; see *Yoshida v Hsueh-Chih Chin*, 111 AD3d 704 [2d Dept 2013] [court erred in denying further deposition of witness where counsel acted improperly by directing witness not to answer questions designed to elicit information material and necessary to defense of action]).

#### C. Appointment of a referee

Pursuant to CPLR 3104, on the motion of a party, the court may designate a referee, or the parties may stipulate that a named attorney act as a referee, to supervise disclosure. The decision to appoint a referee is discretionary with the trial court and is appropriate where a party is hostile or otherwise frustrates discovery. (*Kogan v Royal Indem. Co.*, 179 AD2d 399 [1st Dept 1992]). “The supervisory power conferred by CPLR 3104 should be exercised sparingly and its

exercise is not warranted in the absence of special circumstances.” (*Digiovanni v Pepsico, Inc.*, 120 AD2d 413, 414 [1st Dept 1986]). Here, absent a sufficient showing of such special circumstances, defendant’s request for the appointment of a referee to supervise the deposition is denied. Defense counsel is advised to review 22 NYCRR § 221.1.

#### IV. PLAINTIFF’S CROSS-MOTION

##### A. Outstanding discovery

In filing a disclosure-related motion, the movant must submit an affirmation reflecting efforts made in good faith to resolve the issues raised in the motion. (22 NYCRR § 202.7). Pursuant to 22 NYCRR § 202.20-f and this court’s part rules, available on the court’s website, the failure to submit such affirmation “may result in the denial of a discovery motion.” <https://www.nycourts.gov/legacypdfs/courts/1jd/supctmanh/Rules/part12-rules.pdf>.

As plaintiff fails to submit such an affirmation with “the time, place, and nature of the consultations that counsel had with [opposing] counsel to try to resolve the issues raised by the motion” (*Cashbamba v 1056 Bedford LLC*, 172 AD3d 415, 416 [1st Dept 2019]), the portion of the cross-motion pertaining to outstanding discovery falls short.

##### B. Defendant’s deposition

Although plaintiff is entitled to complete the deposition of defendant, he does not set forth a sufficient basis for ordering defendant to bear the cost of that deposition.

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant’s motion pursuant to CPLR 3024(b) for an order striking portions of plaintiff’s complaint, deeming defendant’s deposition closed, and appointing a referee is denied; it is further

ORDERED, that plaintiff's cross-motion for an order directing defendant to produce outstanding discovery and complete his deposition is granted to the extent that defendant is directed to complete his deposition, and is otherwise denied; and it is further

ORDERED, that the parties are directed to either enter into a stipulation encompassing their next compliance conference on or before June 1, 2022, or appear for the conference in room 341, 60 Centre Street, New York, New York, on June 1, 2022 at 2:15 pm or virtually if necessary.

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**BARBARA JAFFE, J.S.C.**

3/28/2022  
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE