Joseph v McCauley
2021 NY Slip Op 32904(U)
December 2, 2021
Supreme Court, Kings County
Docket Number: Index No. 6704/13
Judge: Lawrence S. Knipel

At an IAS Term, Part NJTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of December, 2021.

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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RENEE JOSEPH,

Plaintiff,

- against -

Index No. 6704/13

HANNAH MCCAULEY,

Defendant.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	15-17
Opposition (Affirmations) Annexed	18
Reply (Affirmations) Annexed	19

Upon the foregoing papers in this action for partition of the real property at 1161 East 103rd Street in Brooklyn (Property), which the parties own as tenants in common, defendant Hannah McCauley (defendant) moves (in motion sequence [mot. seq.] 11) for an order, pursuant to CPLR 3025 (b), granting her leave to amend her answer to include counterclaims for a constructive trust and fraudulent misrepresentation.

Defendant's Prior Motion to Amend

On May 27, 2021, defendant moved (in mot. seq. 10) for leave to amend her answer to assert counterclaims for a constructive trust and fraudulent misrepresentation

based entirely on an attorney affirmation with no attached exhibits. Defense counsel failed to submit copies of the original pleadings or defendant's proposed amended answer containing the counterclaims which defendant sought leave to assert. Consequently, by an August 11, 2021 decision and order (*see* NYSCEF Doc No. 14), this court denied defendant's motion for leave to amend her answer "without prejudice to renewal upon proper papers, including the pleadings and defendant's proposed amended answer."

Defendant's Instant Motion to Amend

On September 27, 2021, defendant filed the instant motion seeking, once again, leave to amend her answer to assert counterclaims against plaintiff for constructive trust and fraudulent misrepresentation.

Defendant's instant motion is based entirely on an attorney affirmation asserting that "[o]n August 2, 2013, Defendant's prior attorney served an answer to the Complaint" which "clearly asserted affirmative defenses which supports this application for amending the Answer to include constructive trust as a counterclaim." Defense counsel argues that:

> "[i]t is clear that the plaintiff shall not be prejudiced by allowing the Defendant to amend the answer to include constructive trust as a counterclaim since the defense was previously raised by the Defendant and it was solely through prior counsel's failure that the affirmative defenses were not listed as counterclaim[s] originally."

Defendant's new counsel explains that "Defendant's prior counsel who filed the answer was suspended from the practice of law . . . on March 18, 2020."

Notably, although defense counsel references and relies on the affirmative

defenses in defendant's 2013 answer, and this court's August 11, 2021 decision and order denied defendant's prior motion without prejudice to renewal upon proper papers *including the pleadings* and defendant's proposed amended answer[,]" the only exhibit annexed to defense counsel's moving affirmation is the proposed amended unverified answer.[1] Thus, defendant's original answer is not part of this record and cannot be considered by the court.

The proposed amended unverified answer denies the material allegations in the complaint and asserts three affirmative defenses, including that "Plaintiff has failed to make payments towards the mortgage and insurance of the subject property" and "Plaintiff has failed to make payments towards the property taxes on the subject property" (NYSCEF Doc No. 17 at ¶¶ 3-4). Defendant's proposed first counterclaim for fraudulent misrepresentation simply alleges that:

> "Plaintiff and Defendant are family members. Plaintiff agreed to purchase the property on behalf of defendant's husband. Defendant's husband provided the funds to purchase the property in 1997. Plaintiff then transferred half the interest in the property to the Defendant as tenants in common with no rights of survivorship with the understanding that the other half of the interest would be held in trust for Defendant and her husband.
>
> "Defendant would maintain the property and pay all bills.

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[1] Defendant's 2013 original answer to the complaint was not electronically filed, and thus, is not accessible to this court, since this action was only recently converted to electronic filing on January 26, 2021.

> The Defendant resides at the property.
>
> "Now after 20 years of Defendant paying to maintain the property with no contributions from Plaintiff the Plaintiff wants to split the property 50/50" (*id.* at ¶¶ 6-8).

Defendant's proposed second counterclaim for a constructive trust simply alleges that "Plaintiff has a duty to hold this property in constructive trust for Defendant and her husband" (*id.* at ¶ 10).

Defense counsel makes the following factual assertions in his moving affirmation without demonstrating that he has any personal knowledge and without an accompanying affidavit from defendant:[2]

> "[t]he Plaintiff in this matter misrepresented that he would hold this property in trust for Defendant so long as she handled the general upkeep of the property and paid off the mortgage and this is precisely what happened.
>
> "[i]n addition, the very money which made up the down-payment of this property was provided by the Defendant all with the understanding that the Plaintiff would hold the property in trust for her and take a nominal fee.
>
> "[n]ow, Plaintiff insists on half of the value of the property and seeks to kick the Defendant out of her home."

Plaintiff's Opposition

Plaintiff, in opposition, submits an attorney affirmation noting that this action for

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[2] Although defense counsel's affirmation states that "[f]or the reasons detailed *in the annexed affidavit* . . . Defendant's application should be granted[,]" there is no fact affidavit included with or annexed to defendant's second motion for leave to amend her answer (emphasis added).

partition and sale of the Property was commenced in April 2013 and defendant answered the complaint in August 2013. Plaintiff's counsel further notes that "[t]his matter was certified for trial with the service and filing of a Note of Issue on or around January 17, 2019[,]" and was thereafter adjourned at least three times based on defense counsel's representations that defendant would be filing a motion to amend the original answer. Plaintiff's counsel explains that on May 27, 2021, the fourth adjourn date in the trial ready part, defense counsel filed the first motion (in mot. seq. 10) for leave to amend the answer.

Plaintiff's counsel argues that defendant's instant motion should be denied because "the surprise in the amendment is prejudicial to Plaintiff" because "[n]owhere in the Defendant's Answer, filed almost eight (8) years ago, are there allegations that would support a constructive trust." Plaintiff's counsel asserts that the allegations in the original answer regarding plaintiff's failure to contribute to the mortgage and insurance are insufficient to support a claim for a constructive trust and the original answer did not allege that "actual cash money passed from Defendant to Plaintiff in relation to the Property." Plaintiff's counsel also fails to submit a copy of defendant's 2013 answer to the complaint.

Plaintiff's counsel argues that defendant's motion should also be denied because "[t]he only ostensible excuse provided by the Defendant for the delay in this amendment is that their prior counsel was suspended from the practice of law on March 18, 2020" and

defendant offers no excuse why she did not allege that money exchanged hands from defendant to the plaintiff until this juncture. Plaintiff's counsel asserts that:

> "If Defendant had in fact given Plaintiff money in relation to the Property, in the context of a partition action, the Defendant's attempt herein to amend their Answer to include these facts now, eight years into the case, after the matter has been certified for trial for eleven months, is highly prejudicial to the Plaintiff."

Defendant's Reply

Defendant, in reply, submitted another attorney affirmation arguing that defendant's previous counsel "did not address these constructive trust issues" in the original answer and "[d]efendant should not be prejudiced by prior counsel's failures." Defense counsel also asserts that "since Plaintiff has not conducted a single deposition or conducted any discovery in nearly a decade, it is unclear what the purported prejudice would be . . ."

Discussion

"Generally, [i]n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Sampson v Contillo*, 55 AD3d 591, 592 [2008] [internal quotation marks and citations omitted]). "The decision to grant or deny leave to amend an answer is within the trial court's discretion" to be determined on a case by case basis (*Mayers v D'Agostino*, 58 NY2d 696, 698 [1982]). The Second Department has long held that "[w]hen a case has long been certified as ready for trial, judicial discretion in allowing amendments should be discreet, circumspect, prudent and cautious" and "[w]here a p[arty] has been guilty of an extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and one of merit should be submitted in support of the motion" (*Perricone v City of New York*, 96 AD2d 531, 533 [1983], *aff'd* 62 NY2d 661 [1984]; *see also Schreiber-Cross v State*, 57 AD3d 881, 884 [2008] [holding that "where there has been an unreasonable delay in seeking leave to amend, the [claimant] must establish a reasonable excuse for the delay, and submit an affidavit establishing the merits of the proposed amendment with respect to the new theories of liability"]). "Moreover, when . . . leave is sought on the eve of trial, judicial discretion should be exercised sparingly" (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 641 [2015] [internal quotation marks omitted]).

In *Fulford v Baker Perkins, Inc.*, (100 AD2d 861 [1984]), a procedurally

analogous case, the Second Department upheld an order by the trial court denying defendant's motion for leave to amend the answer to assert affirmative defenses nearly five years after the commencement of the action while the case was awaiting trial. The Second Department held that:

> "It may reasonably be inferred that defendant was possessed of the data underlying the defenses it belatedly seeks to introduce, either at the time of joinder of issue, or at the latest, defendant knew or should have been cognizant of such facts by the time disclosure was completed. In sum, such defenses could readily have been pleaded earlier, either in the original answer or by a more prompt application to amend that answer. Further, the explanation proffered by defendant – namely, the recent retention of new counsel is no excuse for its inordinate delay in moving to amend. Such neglect, coupled with the fact that plaintiff has been prejudiced by the expenditure of time and effort in preparing a case in response to a pleading from which significant material was needlessly omitted, constitutes sufficient reason for Special Term's denial of defendant's motion (*Fulford v Baker Perkins, Inc.*, 100 AD2d 861, 861-862 [1984]; *see also Civil Service Employees Assoc. v County of Nassau*, 144 AD3d 1075, 1076-1077 [2016] [holding that Supreme Court improvidently exercised its discretion in granting defendant's motion for leave to amend its answer where "motion was not made until approximately six years after service of its answer, after the parties had completed discovery, and after the note of issue had been filed[,]" the facts in support of the proposed defense were known to defendant at the time it served its answer and no excuse has been offered for the delay]).

Here, denial of defendant's second motion for leave to amend the answer is warranted since defendant failed to submit either an affidavit of merit or one evidencing a reasonable excuse by defendant for her extensive delay. Furthermore, defendant was

aware of the substance of the proposed amendments at the time she served her original answer (in August 2013) but waited until the eve of trial (eight years later) to plead them. Additionally, defense counsel's assertion that defendant's prior counsel is to blame does not constitute a reasonable excuse for defendant's inordinate delay in seeking leave to amend the answer (*Schreiber-Cross v. State*, 57 AD3d at 885 [holding that "(t)he change of attorneys on the eve of trial is not, standing alone, a sufficiently exceptional circumstance requiring a limitation on [the court's] discretion" in denying motion for leave to amend]). Accordingly, it is hereby

ORDERED that defendant's motion (in mot. seq. 11) for leave to amend the answer is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE