Motion Seq. No. 44

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

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,	:	Index No. 451625/2020
	:	IAS Part 3
Plaintiff,	:	Hon. Joel M. Cohen
v.	:	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	:	**ORAL ARGUMENT REQUESTED**
Defendants.	:	

DEFENDANT WAYNE LAPIERRE'S REPLY BRIEF IN FURTHER SUPPORT OF HIS CROSS-MOTION FOR LEAVE TO AMEND HIS ANSWER TO REPLEAD CERTAIN OF HIS AFFIRMATIVE DEFENSES

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Defendant Wayne LaPierre ("LaPierre"), by and through his counsel Correll Law Group, respectfully submits this reply brief in further support of his cross-motion for leave to amend his answer to replead certain of his affirmative defenses.

I.

PRELIMINARY STATEMENT

In response to the Attorney General's motion to dismiss certain of his affirmative defenses, LaPierre filed a cross-motion seeking leave of Court to amend his answer to replead certain of his affirmative defenses. In opposition to that cross-motion, the Attorney General argues that the cross-motion is untimely and that amendment would be futile. Those arguments are without merit because the cross-motion was filed timely, the defenses are adequately stated, have merit and raise triable issues of fact, and the Attorney General has failed to demonstrate surprise or prejudice.

II.

BACKGROUND

The Attorney General commenced this action in August 2020 (NYSCEF 1 and 11).[1] In February 2021, LaPierre answered the complaint, asserting the affirmative defenses the Attorney General is now asking the Court to dismiss (NYSCEF 226) and the NRA answered the complaint asserting affirmative defenses and counterclaims (NYSCEF 230). In June 2021, the Attorney General moved to dismiss counterclaims asserted by the NRA, but did not move to dismiss any of LaPierre's defenses or any of the NRA's defenses (NYSCEF 264). In August 2021, the Attorney

[1] The facts relating to this motion are set forth in the Affirmation of P. Kent Correll, Esq. dated 3/13/2023 (NYSCEF 1351) in support of LaPierre's opposition to the Attorney General's motion to dismiss certain defenses (hereinafter cited as "Correll Opposition Aff." and in support of his cross-motion for leave to amend his answer to replead certain of his affirmative defenses, and in the Reply Affirmative of P. Kent Correll, Esq. dated April 17, 2023, submitted in connection with this reply brief.

General filed an Amended and Supplemental Verified Complaint (NYSCEF 333) and, in September 2021, LaPierre moved, pursuant to CPLR 3211(a)(2), (3) and (7), to dismiss the causes of action asserted against him in the new complaint (NYSCEF 355). The Attorney General opposed the motion, but did not cross-move to dismiss any of LaPierre's affirmative defenses (NYSCEF 404).

In March 2022, this Court issued a decision and order granting in part and denying in part LaPierre's motion to dismiss (NYSCEF 609). LaPierre answered, again asserting the defenses the Attorney General is now asking the Court to dismiss (NYSCEF 620). In April 2022, within 20 days of service of that answer, LaPierre amended his answer, as of right, again asserting the defenses the Attorney General is now asking the Court to dismiss (NYSCEF 627), and, again, the Attorney General did not to move to dismiss the defenses.

In May 2022, after 20 months of litigation, which included extensive document production and fact depositions, as well as a bankruptcy proceeding involving multiple depositions and 12 days of trial testimony, the Attorney General served a Second Amended Verified Complaint precipitating another round of motions to dismiss, including one from LaPierre (NYSCEF 691). Again, in opposing the motions to dismiss, the Attorney General elected not to cross-move to dismiss any of LaPierre's (or anyone else's) affirmative defenses.

In June 2022, this Court issued a decision and order granting the Attorney General's motion to dismiss the NRA's counterclaims (NYSCEF 707). Fact discovery was substantially closed as of July 15, 2022 (NYSCEF 740). This Court issued a decision on the motions to dismiss in October 2022 (NYSCEF 845). LaPierre answered, again asserting the defenses the Attorney General is challenging (NYSCEF 865). In October 2022, the Attorney General served LaPierre with contention interrogatories seeking disclosure with respect to LaPierre's affirmative defenses. In

November 2022, LaPierre served his objections and responses to the interrogatories, disclosing facts supporting his defenses (*see* NYSCEF 1352, Exhibit 1 of Correll Opposition Aff.). The Attorney General did not challenge LaPierre's responses as deficient.

In January 2023, in response to this Court's Order Amending Caption (NYSCEF 921), LaPierre served an amended verified answer to take into account the change in the name and definition of the lead defendant, the National Rifle Association of America (NYSCEF 1023) in accordance with CPLR 3025(d). In his amended answer, LaPierre, again, asserted the defenses the Attorney General is now challenging (*id*.).

In February 2023, *two years* after being put on notice of LaPierre's affirmative defenses, the Attorney General belatedly moved to dismiss nine of LaPierre's affirmative defenses, under CPLR 3211(b) or, alternatively, CPLR 3212 (NYSCEF 1164). LaPierre opposed the motion (NYSCEF 1346), arguing that the challenged affirmative defenses were pleaded adequately and had merit. In addition, in response to the Attorney General's argument that his defenses were asserted as mere conclusions of law without any supporting factual allegations (*see, e.g.*, NYAG opening brief at 12), LaPierre cross-moved for leave to amend his answer to set forth additional factual allegations supporting his defenses (NYSCEF 1336), attaching a blacklined version of a proposed amended answer (NYSCEF 1354). In her reply papers, the Attorney General withdrew that portion of her motion seeking dismissal of several of the challenged affirmative defenses (*see* NYSCEF 1771, at 1, note 1), leaving only the three that she continues to challenge, i.e., the Second, Third and Twenty-Fourth affirmative defenses in the proposed amended answer.

Thus, having been on notice of LaPierre's affirmative defenses since February 2021, and having waited two years, until February 2023, to challenge any of them as deficient, the Attorney General now claims that LaPierre's cross-motion for leave to amend should be denied on the

ground that his delay in moving to amend his answer to add factual allegations supporting the defenses has resulted in unfair surprise and prejudice, and should be denied as untimely. In the alternative, she argues that the cross-motion should be denied because amendment would be futile.

In light of the foregoing, LaPierre respectfully submits that, for the reasons stated in his memorandum in opposition to the Attorney General's motion to dismiss certain of defendants' affirmative defenses, the memoranda in opposition to the Attorney General's motion submitted by the NRA and Frazer, the reasons stated in LaPierre's cross-motion for leave to amend his answer, and the additional reasons set forth below, the Attorney General's arguments in opposition to LaPierre's cross-motion should be rejected, LaPierre's cross-motion should be granted, and that branch of the Attorney General's motion seeking dismissal of the affirmative defenses asserted by LaPierre that the Attorney General continues to challenge should be denied.

III.

ARGUMENT

A. The Standard of Decision Applicable to LaPierre's Cross-Motion.

The standard of decision applicable to LaPierre's cross-motion is correctly stated in Frazer's reply brief and LaPierre incorporates that statement of the law by reference. In addition, LaPierre incorporates by reference the discussion in Frazer's reply brief as to why the cases cited by the Attorney General in opposition to LaPierre's and Frazer's cross-motions are distinguishable. Lastly, LaPierre incorporates by reference the arguments set forth in his brief, the NRA's brief and Frazer's brief in opposition to the Attorney General's motion to dismiss with regard to the merits of the affirmative defenses the Attorney General is continuing to challenge, as well as the discussion of the standard for determining whether or not to grant a motion for leave to amend.

B. The Attorney General's Untimeliness Argument Is Without Merit Because She Herself Is Responsible for the Delay She Complains of and She Has Failed to Demonstrate any Prejudice.

In opposition to LaPierre's cross-motion for leave to amend his answer to add factual allegations supporting his affirmative defenses, the Attorney General argues that the cross-motion is untimely and that the proposed amendment would be "futile."[2]

The first prong of the Attorney General's argument is without merit for several reasons. First, as shown above, the Attorney General has been on notice of LaPierre's affirmative defenses since he served his first answer in February 2021, interposing the defenses and putting in issue the question of whether the Attorney General's conduct has been equitable. The Attorney General

[2] The Attorney General's argument that the Court's dismissal of the NRA's counterclaims somehow precludes LaPierre from asserting his defenses is without merit. First, LaPierre was not a party to the briefing on the Attorney General's motion to dismiss the NRA's counterclaims. Second, the N-PCL expressly authorizes the Attorney General to bring an action for dissolution of a not-for-profit corporation, but it does not expressly authorize the Attorney General to bring an action against an officer of a not-for-profit corporation for a judgment banning him from nonprofit service *for life*. Indeed, the N-PCL implicitly prohibits it. Hence, the relief the Attorney General is seeking against LaPierre is unauthorized and unconstitutional and is being sought for an improper purpose, i.e., trying to shut the NRA down, not just to secure compliance with New York nonprofit law (as the Attorney General is pretending). The *ultra vires* nature of the Attorney General's demand for relief against LaPierre is underscored by the decision of the First Department in *People v. Grasso*, 42 A.D.3d 126, 142 (1st Dep't 2007), *aff'd* 11 N.Y.3d 64 (2008) (rejecting the proposition that "the executive branch officials who bring suit to *enforce* the law also enjoy the quintessentially legislative authority to *alter* the law" and holding that "the authority to bring suit in what the attorney general perceives to be the interest of the state cannot trump contrary determinations about the public interest made by the Legislature") (emphasis in original) and the decision of the Court of Appeals in *People v. Grasso*, 11 N.Y.3d 64, 70-71 (2008) ("Although the Executive must have flexibility in enforcing statutes, it must do so while maintaining the integrity of calculated legislative policy judgments. That balance falters where, as here, the Executive seeks to create a remedial device incompatible with the particular statute it enforces."), which hold that the Attorney General lacks authority to bring an action against an officer of a not-for-profit corporation except for the relief that is provided in section 720 of the N-PCL. The Attorney General is ignoring that limit on her power, authority, standing and legal capacity to sue, and on this Court's power and jurisdiction. In other words, here, rather than enforcing a legislative mandate against LaPierre, the Attorney General is violating a legislative mandate that precludes her from seeking this extraordinary and extreme relief against any nonprofit officer, and thumbing her nose at the First Department and the Court of Appeals.

had ample opportunity to inquire into the factual basis for the defenses during LaPierre's two days of deposition testimony, through motion practice, including moving or cross-moving to dismiss the defenses any time during the last two years, and/or through a motion to compel further disclosure in regard to LaPierre's responses to her contention interrogatories. Having elected not to press LaPierre for additional facts, the Attorney General cannot now be heard to complain of any surprise or prejudice.

Moreover, the Attorney General has actually received more than sufficient facts regarding the defenses through the last two years of litigation, including extensive document discovery, fact witness and expert witness depositions, a full-blown bankruptcy proceeding, including a trial, LaPierre's responses to the Attorney General's contention interrogatories, and now a proposed amended answer setting forth nine pages of factual allegations supporting LaPierre's defenses. The Attorney General has failed to establish that LaPierre is guilty of unreasonable delay in moving to amend his answer to add facts supporting his defenses, or that granting LaPierre leave to amend his answer to add factual allegations supporting his defenses will prejudice her; therefore, it would be an abuse of discretion to deny LaPierre's cross-motion for leave to amend his answer to add allegations supporting his defenses. *Cf. Detrinca v. De Fillippo*, 165 A.D.2d 505, 512 (1st Dep't 1991) ("Since our examination of the record indicates that there is merit to plaintiff's application to increase the *ad damnum* clause … and the defendants have not persuasively established that such an increase will unduly prejudice them, we find that the IAS court abused its discretion in denying the motion for leave to amend the *ad damnum* clause."); *Maddox v. City of New York*, 90 A.D.2d 535, 535 (2d Dep't 1982) (reversing order of Supreme Court, Queens County, which denied appellants' motion to amend complaint to increase ad damnum clause from $1.5 million to $10 million, holding: "Since there was no showing of prejudice to respondents indicating that they

had been hindered in preparing their case or prevented from taking some measure in support of their position, motion to amend complaint so as to increase ad damnum clauses should have been granted.").

Second, the scope of the proposed amendments is narrow, responds specifically to alleged pleading deficiencies complained of by the Attorney General, and do not involve any counterclaims or new defenses. The proposed amendment is not a substantial expansion of LaPierre's current answer. The theories are the same. Other than the fact that the NRA's former head of security and former outside counsel are deceased, the facts surrounding the notice made in the Char500s have been known since 2009, and the defenses have been known to the Attorney General since February 2021. The fact that the Attorney General did not seek dismissal of any of LaPierre's defenses, but, instead, served contention interrogatories requesting additional information about the defenses, which was provided, and did not take the position that LaPierre's responses were in any way inadequate, and waited until after discovery was closed to move to dismiss the defenses, militates strongly against a finding that she has been surprised or prejudiced by LaPierre's failure to provide the additional facts set forth in his proposed amended answer sooner.

Third, LaPierre's previous answers gave the Attorney General fair notice of the defenses in his proposed amended answer, and the Attorney General has not explained how allowing amendment to add the new factual allegations would cause any delay, particularly since a trial date has not been set and the parties have not attended their mandatory pre-trial settlement conference, there are several outstanding motions that need to be argued and decided.

Deficiencies in affirmative defenses may be remedied by an affidavit or affirmation submitted in opposition to a plaintiff's motion to dismiss the defenses. *See Kachalsky v.*

Nesheiwat, 55 Misc.3d 130(A), 2017 WL 1224989 (2d Dep't March 31, 2017) (cited by the Attorney General). Obviously, deficiencies in affirmative defenses can also be remedied by amendment of the answer to add factual allegations supporting the defenses.

As the Court of Appeals stated in *Morgenstern v. Cohon*, 2 N.Y.2d 302, 306-309 (1957), which is cited with approval, and relied on, by the Attorney General:

> Pleadings must be liberally construed with a view to substantial justice between the parties. Meticulous particularity in pleading the facts which must be shown by way of evidence to establish a cause of action is neither necessary nor proper. It bewilders the real issue and furnishes no safeguard against imposition or oppression. *** The rule which requires ultimate facts to be pleaded and not merely legal conclusions is predicated on the sound principle that the adversary should not be taken by surprise at trial but should be able to meet the proof adduced by the pleader. It is plaintiff's contention that the affirmative defense herein pleaded does not satisfy the requirements of that rule. This contention will not withstand analysis. (Internal quotation marks and citations omitted.)

Here, LaPierre has cured the alleged deficiencies in his defenses by submitting an affidavit and affirmation in opposition to the Attorney General's motion, along with a cross-motion seeking leave to amend his answer to add allegations supporting the challenged defenses, and, as required, has submitted with his cross-motion a proposed amended answer showing the proposed changes. That is all the liberal notice pleading standards require.

C. The Attorney General's Futility Argument Is Without Merit Because the Affirmative Defenses Asserted in LaPierre's Proposed Amended Answer Are Stated Sufficiently and Have Merit.

With regard to the second prong of the Attorney General's argument, amendment of LaPierre's answer to add factual allegations supporting the defenses the Attorney General is challenging would not be futile. As to laches, LaPierre alleges that, from 2009 until August 6, 2020, Attorneys General Cuomo, Schneiderman, Underwood and James, and the Charities Bureau, knew that the NRA was providing first class or charter travel to certain NRA executives, and did nothing for years, and that the NRA continued to do so, and that LaPierre continued to accept the charter travel

provided by the NRA, which the Attorney General is now trying to penalize him for, which states a legally sufficient defense of laches. As to unclean hands, LaPierre alleges that James accused the NRA publically of being a "terrorist organization" and "criminal enterprise," without any basis in fact, before having conducted any investigation, and promised that, if elected, she would use the power of her office and public resources to go after the NRA and try to shut it down, and that, shortly after taking office in 2019 she announced an investigation of the NRA publically, in a press conference, and, then, in August 2020 filed a complaint in which she sought a judgment against LaPierre for relief that she is not authorized to seek in an action against an officer of a not-for-profit corporation, including his permanent removal from the office of Executive Vice President of the NRA, a lifetime ban on service to any nonprofit in any capacity, and a forfeiture of all compensation earned over his 29 years as EVP of the NRA, with the motive, intent, purpose and objective of silencing LaPierre because of his views on the Second Amendment and the right of the people to keep and bear arms without infringement by the government, and his support of political opponents, thus acting *ultra vires*, illegally and unconstitutionally, which states a legally sufficient defense of unclean hands, culpable conduct, and unconstitutional selective enforcement and discrimination.

Contrary to the Attorney General's assertion, the authority cited by the Attorney General is not controlling, or even apposite, because the issue of whether equitable defenses may be asserted against a government agency turns on the facts of each case, and the cases cited by the Attorney General are clearly distinguishable.

There is plenty of authority for the proposition that equitable defenses may be asserted against government agencies in appropriate cases. For example, in *Landmark Colony at Oyster Bay v Bd. of Sup'rs*, 113 A.D.2d 741, 743-44 (2d Dep't 1985), the Second Department stated:

> Although plaintiff may not have exercised sufficient diligence in pursuit of approval for its project at the various levels of government, we agree with the trial court's conclusion that 'plaintiff was more a victim of bureaucratic confusion and deficiencies than the perpetrator of an inexcusable violation'. Thus, the doctrine of equitable estoppel should apply to preclude imposition of the penalty in this case. It is settled that a municipality or other governmental subdivision may be estopped where its wrongful or negligent conduct induces a party relying thereon to change his position to his detriment. Although estoppel should not be invoked against governmental entities in the absence of exceptional circumstances, we have not hesitated to do so where a municipality's misleading nonfeasance would otherwise result in a manifest injustice. In this case, application of the penalty provision of Nassau County Ordinance No. 229–80, which was enacted after plaintiff had commenced the approval process for its condominium project, constituted such a manifest injustice that the penalty, plus interest, must be returned. (Citations omitted.)

Here, the allegations set forth in LaPierre's proposed amended answer in support of his affirmative defenses, accepted as true and viewed in the light most favorable to LaPierre, with all reasonable inferences drawn in his favor, support the conclusion that, with regard to his acceptance of compensation provided by the NRA and his acceptance of charter travel provided by the NRA, LaPierre was more a victim of bureaucratic confusion and deficiencies (by government officials), than the perpetrator of an inexcusable violation. Moreover, the allegations would support a fair inference (indeed, an inescapable inference), that the misleading nonfeasance of the succession of attorneys general could, absent estoppel, result in a manifest injustice, *i.e.*, lifetime banishment from nonprofit service, based, in part, on his acceptance of charter travel provided by the NRA that, apparently, none of these four attorneys general ever saw anything wrong with until James decided to target LaPierre and try to get him ejected and banished from the political arena for personal, political, partisan and ideological reasons.[3]

[3] *See In re Albion Disposal, Inc.*, 217 B.R. 394 (W.D.N.Y. 1997) (Under New York law, estoppel may be applied to governmental entities only in exceptional cases, where failing to apply estoppel would result in manifest injustice. This is an exceptional case in which failing to apply estoppel and laches would result in manifest injustice.)

By way of further example, in *Carney v Newburgh Park Motors*, 84 A.D.2d 599, 600 (3d Dep't 1981), the Third Department stated:

> Essentially, the Fund asserts that laches and estoppel may not be imputed to it as a state agency in the absence of specific statutory authority. While laches cannot generally be imputed to the sovereignty, the defense is available in cases where the government acts in its private or proprietary capacity. A similar rule applies with respect to estoppel against a governmental body. While the State Insurance Fund is an agency of the State, its function is akin to that of a private insurance carrier and, especially in matters of litigation, it is considered to be an entity separate from the State itself. It follows that in a proper case, laches and estoppel may be imputed to the Fund. Here, the Fund's failure to raise the issue of noncoverage prejudiced and precluded respondent Glens Falls Insurance Co. from asserting two potential bases for securing its interests through assertion of a third-party claim under section 29 (subd. 2) of the Workers' Compensation Law and a claim for reimbursement against the Special Disability Fund under section 15 (subd. 8) of the statute. The Fund's delay in raising the coverage issue effectively precluded respondent's remedies and is a basis for application of the doctrine of laches. The board's decision, supported by substantial evidence, is affirmed.

Here, the Attorney General purports to be acting, at least in part, to protect private interests, i.e., the interests of the NRA, its members, donors and beneficiaries. To the extent that she is acting in the interest of private parties, she cannot claim to be acting solely in an official capacity. Moreover, she is acting, at least in part, outside the scope of the authority granted to her by the Legislature by seeking a judgment against LaPierre banning him from nonprofit service. If the allegations set forth by LaPierre in his proposed amended answer are accepted as true and viewed in the light most favorable to him, with all reasonable inferences drawn in his favor, they support the conclusion that the Attorney General is acting, in part, to advance private interests – including her own. Hence, this is a proper case for imputation of laches and estoppel to the attorneys general who sat on their hands for a decade while the NRA provided charter service to LaPierre, since their failure to raise the issue of whether the NRA's provision of charter travel was in compliance with New York law created the impression that they had no concerns about the NRA's provision of charter travel.

Thus, there are triable issues of fact that must be resolved before a determination may be made as to whether these defenses are available against the Attorney General.

IV.

CONCLUSION

For the reasons stated above, that branch of the Attorney General's motion seeking dismissal of the three affirmative defenses asserted by LaPierre that the Attorney General continues to challenge should be denied, and LaPierre's cross-motion for leave to amend should be granted.

Dated: New York, New York
April 17, 2023

Respectfully submitted,

/s/ P. Kent Correll

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RULE 17 CERTIFICATE OF COMPLIANCE

I, P. Kent Correll, an attorney duly admitted to practice law before the courts of the State of New York, certify that the memorandum of law complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)), because the memorandum of law contains 3,957 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law and affirmation.

Dated: New York, New York
April 17, 2023

/s/ P. Kent Correll
P. Kent Correll, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record on this 17th day of April 2023.

/s/ P. Kent Correll
P. Kent Correll