IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LIONETTA WHITE Plaintiff,	)	
	)	Case No. 17-cv-2877
v.	)	
	)	Judge Maldonado
CITY OF CHICAGO, et al	)	Magistrate Judge Finnegan
Defendants.	)	

DEFENDANT KALLATT MOHAMMED'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED ANSWER TO PLAINTIFF'S COMPLAINT

Defendant, Kallatt Mohammed ("Mohammed"), by and through one of his attorneys, Special Assistant Corporation Counsel Eric S. Palles of Mohan Groble Scolaro, P.C., in further support of his motion for leave to file his Amended Answer to Plaintiff's Complaint replies as follows:

PLAINTIFF HAS NOT BEEN PREJUDICED

Defendant Mohammed has moved, pursuant to Fed. R. Civ. P. 15, to amend his April 21, 2018 Answer to Plaintiff's Complaint. In response to certain of the allegations contained in the Complaint, Mohammed asserted his Fifth Amendment privilege against self-incrimination. (Dkt. 84).

Rule 15 explicitly states that a court should freely grant leave to amend "when justice so requires." Case law makes clear that "justice so requires" in the absence of futility, undue delay, or, particularly, undue prejudice to the party opposing the motion. *Eastern Natural Gas Corp. v. ALCOA*, 126 F.3d 996, 999 (7th Cir. 1997); *Am. Hardware Mfrs. Ass'n v. Reed Elsevier, Inc*., No.

03 C 9241, 2006 U.S. Dist. LEXIS 49220, *6 (N.D.Ill., July 6, 2006). In his Response, Plaintiff does not mention the Rule nor does he claim any prejudice. (Dkt. 178, *passim*). The reason, of course, is that there is none. On November 15, 2023, Defendant Mohammed fully testified about the incident alleged by Plaintiff in his Complaint, as well as events that occurred contemporaneously to White's arrest. The trial of this matter is scheduled for July 7, 2025, with dispositive and Daubert motions due December 20, 2024. (Dkt 172, 175)

This should be sufficient to resolve the motion in Mohammed's favor. Unfortunately, however, Plaintiff's counsel has chosen to devote the entirety of the Response to unfounded and unsubstantiated claims that Mohammed (and, *a fortiori*, the undersigned counsel) asserted the Fifth Amendment in bad faith and in an effort to game the judicial system. Besides the *ad hominem* attacks, which are (or at least should be) beneath the Response signatories, the assertion, "If Mohammed can't remember the events, how could his answers to the complaint be incriminating?" is hopelessly simplistic.

Plaintiff's counsel papers over the absence of any evidence of bad faith by instead arguing "Mohammed is unable to point to anything showing that he acted in good faith in asserting the privilege." (Dkt 178 at p.8) Except, of course, that "[s]ubsequent investigation of Plaintiff's allegations revealed information that resulted in the undersigned counsel's determination that the privilege could, and should, be withdrawn." (Dkt. 176 ¶ 3.) Counsel dismisses this as "conclusory" and contends that the claimed need for investigation is meritless. (Dkt. 178 at p.9). Implicitly, the assertion of Fifth Amendment privilege is presumptively made in bad faith and must be rebutted. As doubtful as this proposition may be, we will address the circumstances surrounding the initial assertion of the Fifth Amendment in the Answer and its withdrawal by the time of the deposition.

THE FIFTH AMENDMENT INVOCATION WAS IN GOOD FAITH

The dramatic and panoramic Complaint alleges that Plaintiff was the victim of "a criminal enterprise run by convicted felon and former Chicago Police Sergeant Ronald Watts and his tactical team" and that the "Watts Gang" "engaged in robbery and extortion, used excessive force, planted evidence, fabricated evidence, and manufactured false charges" Dkt. 1 at 1,2 The use of language evocative of a RICO conspiracy could not have been unintentional. The Complaint further alleged a pattern of "lawlessness" known to CPD since 2004, culminating when Watts and Mohammed were criminally charged in federal court in February 2012 after "shaking down a federal informant they believed was a drug dealer." Defendant Mohammed pleaded guilty in 2012. *Id*. at 46, 67. In fact, the investigation disclosed that Watts and Mohammed had been convicted of the theft of $5200 in violation of 18 U.S.C. § 641 in Case No 12 CR 87(N.D. Ill.). The file also disclosed that an extensive federal criminal investigation had been undertaken, including Title III wiretaps, pen registers, and consensual recordings involving Watts and Mohammed. Counsel was also aware that Mohammed had made certain post-arrest statements to the FBI memorialized in FBI 302s. The undersigned did not have access to any of this information, and there was no evidence whether or not the federal investigation had been concluded.

As White points out, he was the second of almost 200 plaintiffs to claim similar conduct. By the time Mohammed's Answer was filed in April 2018, counsel estimates that there were already 23 individuals who had overturned their convictions overturned, based upon the Watts and Mohammed federal convictions. Specifically, on November 16, 2017, Judge LeRoy K. Martin, Jr. vacated 18 such convictions.

Accordingly, in answer to such allegations as contained, for example, in paragraph 74,

> As a direct and proximate result of the City's code of silence, Watts and his gang continued to engage in robbery, extortion, the use of excessive force, planting evidence, fabricating evidence, and manufacturing false charges against persons at the Ida B. Wells Homes, including but not limited to the wrongful arrest, detention, and prosecution of plaintiff, as described above.

Mohammed answered:

> Defendant Mohammed respectfully invokes the rights guaranteed him by the Fifth Amendment of the United States Constitution *regarding the subject matter of this paragraph.* (Emphasis added).

The assertion of the privilege against self-incrimination is appropriate where there is "some tendency to subject the person to criminal liability." *In re High Fructose Corn Syrup Antitrust Litig.,* 295 F.3d 651, 663-64 (7th Cir. 2002); see *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (privilege "protects against any disclosures which the witness reasonably believes could be used in a criminal proceeding or could lead to other evidence that might be so used.") The witness must have some objectively reasonable basis to perceive some real danger of prosecution. This perception must not be imaginary or fanciful. *Chagolla v. City of Chicago*, 529 F. Supp. 2d 941, 947(N.D. Ill. 2008) (Kennelly, J.), citing *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980): *Allen v. Starks*, No. 12 C 8543, 2013 U.S. Dist. LEXIS 74669, *6 (N.D. Ill., May 28, 2013) (Guzman, J.) (refusing to compel testimony of defendant officer that "could have some tendency to subject him to criminal liability. ")

The specter of potential prosecution has existed throughout the life of the litigation. The Civilian Office of Police Accountability (COPA) opened numerous investigations involving numerous Watts plaintiffs and officers who served on the team, including White's case and one involving a contemporaneous arrest of 11 people in a "reverse sting." (Exhibit 1). In March 2018, COPA investigators, together with FBI agents and attorneys from the Civil Rights Division of the United States Department of Justice jointly participated in an interview of Judge David

Navarro. (Exhibit 2) As early as February 2018, Watts plaintiffs were appearing with their attorneys before federal law enforcement authorities. (Exhibits 3, 4) Mohammed himself was subpoenaed by COPA in May 2019 and approached for an interview by an FBI agent and an Assistant United States Attorney some time after November 2022. Over the same period, COPA interviewed several of the co-defendant officers, as did the Cook County State's Attorney's Office (from 2019 to 2021). (Exhibit 5)

"A witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details." *Mitchell v. United States*, 526 U.S. 314, 321(1999); *Rogers v. United States*, 340 U.S. 367, 373 (1951). See also *United Auto Ins. v. Veluchamy*, No. 09 C5487, 2010 U.S. Dist. LEXIS 19432, *15, 2010 WL 749980 (N.D. Ill. Mar. 4, 2010) (Cole, M.J.) (raising issue whether defendant's answer waived possible Fifth Amendment claim). Consequently, rather than risk waiving the privilege in the early stages of litigation, Mohammed, on the advice of counsel, prudently and in good faith asserted the privilege.

SUBSEQUENT DEVELOPMENTS

Because Plaintiff offers no substantive evidence of bad faith, his attempt to elicit the specifics of the undersigned's investigation, which led to his 2023 advice to Mohammed to testify fully and waive his Fifth Amendment privilege, seems rather designed to invade both the attorney-client and work product privileges. It should suffice to note some significant events in the Watts Coordinated Proceedings that transpired over the subsequent 5 ½ years.

1. Lionel White gave a statement to COPA on November 19, 2018, which tended to exonerate Mohammed.

2. Counsel received the contents of the COPA investigations relating both to the Lionel White arrest and to the contemporaneous sting operation.
3. After several years of litigation, negotiations and a July 24, 2023 order by Judge Valderrama in the Coordinated Proceedings (19 C 1717, Dkt. 574) the parties began to receive recordings from the FBI, DEA, and ATF in August 2023. In fact, the United States has yet to turn over in excess of 100 consensual recordings taken by the FBI, although counsel listened to pertinent ones at FBI headquarters in January and February 2024. None of these disclosed any unlawful activity related to the instant case.
4. The apparent quiescence of the investigations, in addition to the simple passage of time and its corresponding impact upon any potential criminal statutes of limitation, resulted in counsel's determination that prosecution unlikely.

By November 2023, the argument for maintaining the Fifth Amendment privilege during a deposition was, at least, more tenuous. Accordingly, Mohammed, on the advice of counsel, agreed that the privilege could no longer be maintained.

Plaintiff's "bad faith" claim seems disingenuous. If his counsel truly believed that Mohammed's claims of privilege were unwarranted, he could have complained at the time that Mohammed asserted them. Instead, he contented himself with the benefits that the adverse inference provided him. Similarly, he did not object that Mohammed was gaming the system when he was advised that Mohammed would waive the privilege fully and testify about the events surrounding the subject arrest or when Mohammed subsequently waived.

Courts must liberally construe the privilege against compulsory self-incrimination in favor of the right it was intended to secure. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

In contrast to a criminal proceeding, assertion of the Fifth Amendment privilege in civil litigation comes with a catch: an adverse inference against the asserting the privilege may be drawn from the Fifth Amendment silence. *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 390 (7th Cir. 1995). Nonetheless, the Supreme Court has cautioned against "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly'." *Baxter v, Palmigiano,* 425 U.S. 308, 329 (1976). "Because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." *Johnson v Guevara*, No 20 C 4156, 2023 U.S. Dist. LEXIS 131972 (N.D. Ill. July 31, 2023). Consequently, the Court must consider whether the remedy that Plaintiff seeks, denial of the amendment, would serve the interests of justice.

Here, the Response offers no guidance. If the Fifth Amendment was invoked in bad faith, is plaintiff requiring Mohammed to nonetheless persist in invoking it during the course of trial? If the original Answer is allowed to stand, it will do nothing to advance any dispositive motions subsequently filed by either party. Mohammed's Fifth Amendment assertions are denials, not admissions. See *National Acceptance Co. of America v. Bathalter,* 705 F.2d 924 (7th Cir. 1983); *United Auto Ins. v. Veluchamy, supra*, 2010 U.S. Dist. LEXIS 19432,*4, *King v. Evans*, No. 13 C 1937,2015 U.S. Dist. LEXIS 121488, *6 (September 11, 2015) (Gilbert, M.J.). It might reasonably be anticipated that Plaintiff would try to impeach Mohammed concerning his prior Fifth Amendment assertions if he testifies. Suppose, however, that Mohammed chose not to testify? If Plaintiff were allowed to call Mohammed solely for the purpose of dramatizing his previous and obsolete assertion against self-incrimination, this exercise would be unduly prejudicial and a detriment that is disproportionate. *Cf. Martinez v. City of Chicago*, No. 14 C 369, 2016 U.S. Dist. LEXIS 84231 (June 29, 2016), at *26, 29, 62.

There is demonstrably no prejudice to the Plaintiff by reason of the amendment to the Answer; prejudice hasn't been alleged. Nor is there any basis to deny the amendment as a sanction for a bad faith assertion of the privilege against self-incrimination. There was no bad faith and, in any event, denying leave to amend is a sanction too "costly" under the circumstances of this case.

WHEREFORE, Defendant, Kallatt Mohammed, moves this Court for leave to file his Amended Answer to Plaintiff's Complaint.

Respectfully submitted,

/s/ Eric S. Palles #2136473
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