

B R E W E R

ATTORNEYS & COUNSELORS

November 17, 2021

BY NYSCEF

Hon. Joel M. Cohen
 Supreme Court of the State of New York
 Commercial Division, New York County
 60 Centre Street
 New York, NY 10007

**Re: *People of the State of New York v National Rifle Association of America, et al.*,
 Index No. 451625/2020**

Dear Justice Cohen:

The NRA responds to the NYAG's letter dated November 12, 2021 (NYSCEF 437). Three months after the NYAG's deadline to file a reply to the NRA's amended counterclaims, she has failed to do so. Rather, she asks the Court to excuse her continued failure to file a timely reply.¹ The Court should deny the NYAG's request.

Factual Background

The facts are not in dispute. After the NYAG moved to dismiss the NRA's counterclaims on June 24, 2021, on July 2, 2021, the NYAG and the NRA stipulated that the NRA would *either* serve amended counterclaims *or* oppose the NYAG's motion to dismiss by July 20, 2021.² After the NRA amended its counterclaims on July 20, 2021,³ the NYAG did not reply to the amended counterclaims by August 9, 2021, as was required under CPLR 3011 and 3025(d). In addition, she failed to obtain an extension of her deadline to reply pursuant to CPLR 3025(d). Nor did she refile her previously filed motion to dismiss. Then, after the NRA consented to the NYAG's filing an amended complaint without leave of the Court,⁴ on August 16, 2021 the NYAG filed an Amended Complaint.⁵ The NYAG did not, however, seek the NRA's consent to excuse the NYAG's compliance with CPLR 3025(d)⁶ or her obligation to serve a timely reply.

¹ NYSCEF 437.

² NYSCEF 288.

³ NYSCEF 325.

⁴ NYSCEF 331, a true copy of which is enclosed herewith as Exhibit A.

⁵ NYSCEF 333.

⁶ Under CPLR 3025(d), "[e]xcept where otherwise prescribed by law or order of the court, there shall be [a] reply to an amended . . . pleading if . . . reply is required to the pleading being amended." Under the same rule, "[s]ervice of such . . . reply *shall be made* within twenty days after service of the amended . . . pleading to which it responds."

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The NYAG's request for relief is without merit and should be denied.

In her letter to the Court dated November 12, 2021, the NYAG asks the Court to excuse her failure to timely reply.⁷ Her request to the Court came on the heels of the NRA's notice to the NYAG, dated November 9, 2021, that the NRA would move for default judgment unless the NYAG agreed to file a reply to the NRA's amended counterclaims by November 17, 2021.⁸ Notably, the NYAG does not argue that her obligation to reply is excused because "law or order of the court" prescribes "otherwise." Instead, she advances two arguments, each of which lacks merit.

First, the NYAG argues erroneously that because she served an amended complaint after the NRA served its amended counterclaims, the amended counterclaims are a nullity.⁹ There is no authority for that proposition, and the cases the NYAG cites are inapposite.¹⁰ As a counterclaimant, the NRA is a plaintiff in its own right.¹¹ The amended counterclaims are "in essence a complaint by [the NRA] against the [NYAG] . . . upon which the [NRA] seeks judgment."¹² Therefore, the NRA's amended counterclaims survived the NYAG's amended complaint.

⁷ NYSCEF 437.

⁸ A true and correct copy of the NRA's notice to the NYAG, dated November 9, 2021, is enclosed herewith as Exhibit B.

⁹ NYSCEF 437 at 2-3.

¹⁰ For example, in *St. Lawrence Explosives Corp.*, the court considered whether to allow defendants to add—after plaintiff amended his complaint—allegations to their defenses and counterclaims. In permitting such amendments, the court stated that, after the complaint's amendment, "defendants' original answer has no effect." The court also said that because "a new responsive pleading must be substituted for the original answer," new allegations can be added to defenses or counterclaims. 170 A.D.2d 957, 957-58 (4th Dep't 1991). However, the issue *here* is not whether the NRA has the right allege new facts in further support of its defenses or counterclaims. Rather, here the issue is whether, by virtue of amending its complaint, the NYAG was excused from replying to the NRA's amended counterclaims. *St. Lawrence Explosives Corp.* simply does not speak to that issue, and the language from that opinion quoted out of context by the NYAG (NYSCEF 437 at 2) does not support the result the NYAG seeks. In fact, in *St. Lawrence Explosives Corp.*, the trial court and the Fourth Department each believed that the previously filed counterclaims survived the complaint's amendment. After all, the Fourth Department stated that "Supreme Court properly permitted defendants to *amend* the ad damnum clauses of their *counterclaims*." 170 A.D.2d at 957. The other two cases the NYAG cites are inapposite for the same reasons.

¹¹ *Valiotis v. State*, 151 A.D.3d 980, 981 (2d Dep't 2017), demonstrates that, although the NYAG's original complaint is a nullity, the NRA's amended counterclaims are not. There, the court, agreeing with the position *taken by the NYAG* in that case, held that a "judgment denying the [petitioners'] petition and dismissing the proceeding [against the respondent] . . . did not foreclose consideration of the [respondent's] counterclaims [against the petitioner]." *Id.*; see also *Edelman v. Edelman*, 88 Misc.2d 156, 159-60 (Sup. Ct. Nassau Cnty. 1976) (plaintiff served a summons but did not serve a complaint and moved to strike counterclaim against him on that basis; motion to strike counterclaim denied). Indeed, a counterclaim is "not a responsive pleading merely because it is contained in a responsive paper [such as an answer]." See *Tri Terminal Corp. v. CITC Industries, Inc.*, 419 N.Y.S.2d 817, 819-20 (Sup. Ct. NY Cnty. 1979). Nor are the NRA's amended counterclaims defenses to the NYAG's claims. See *Edelman*, 88 Misc.2d at 158 (noting that, in fact, a counterclaim "need have no relationship to the basic cause of action of the plaintiff and indeed the counterclaim may assert any claim which the defendant has against the plaintiff regardless of origin or character").

¹² See *Tri Terminal Corp.*, 419 N.Y.S.2d at 818.

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Second, the NYAG belatedly argues that, “even accepting . . . that the NYAG had to respond to the NRA’s Amended . . . Counterclaims notwithstanding the NYAG’s subsequent filing of its FAC, the NYAG’s then-pending motion to dismiss (Motion Sequence No. 13) the NRA’s original counterclaims . . . *could and should* be deemed asserted against the amended counterclaims.”¹³ The NYAG, therefore, asks the Court “that [her] motion to dismiss the NRA’s counterclaims . . . be deemed applicable as against the NRA’s Amended Answer and Counterclaims.”¹⁴ She then requests that the NRA file an opposition to her motion to dismiss by next week, November 23, without a return date. This request is procedurally improper, unsupported by the CPLR and further highlights the NYAG’s untenable position.¹⁵

The request lacks merit and should be rejected. The NYAG’s previously filed Motion to Dismiss, Motion Sequence No. 13, is no longer a live motion—the return date has long since passed—and in the July 2 Stipulation,¹⁶ the NRA clearly contemplated the filing of a subsequent, timely motion by the NYAG. Indeed, the NYAG did not ask for the relief she now seeks before August 9, 2021, the deadline for her reply.¹⁷ Nor did she ask for this relief on or about September 22, 2021, or October 22, 2021, when the NRA filed letters with the Court reminding the NYAG that her reply was late.¹⁸ Moreover, the cases the NYAG cites are not to the contrary.¹⁹

¹³ NYSCEF 437 at 3 (emphasis added).

¹⁴ NYSCEF 437 at 1.

¹⁵ See CPLR 2214, requiring that a notice of motion specify a return date, and that time to serve opposition to a motion is based on the return date.

¹⁶ NYSCEF 288.

¹⁷ See CPLR 3025(d) (reply to amended counterclaim is due within 20 days); CPLR 3211(e) (“At any time *before service of the responsive pleading is required*, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted.” (emphasis added)); 3211(f) (“Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) *before service of a pleading responsive to the cause of action* . . . sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.” (emphasis added)). CPLR 3211(e) contemplates that a motion to dismiss be filed *subsequent* to the filing of a responsive pleading. Here, the NYAG’s reply has not been filed.

¹⁸ Letters filed by the NRA, NYSCEF 374 (stating that the NRA intends to serve discovery in furtherance of, among other things, its counterclaims, and the NRA therefore asks that the NYAG serve her reply, which is late) and NYSCEF 414 (“It is clear from the terms of the July Stipulation and the CPLR, that, once the NRA filed its Amended Counterclaims, the NYAG was required to reply to the Amended Counterclaims under CPLR 3025(d), or move to dismiss the Amended Counterclaims. The NYAG did neither.”).

¹⁹ NYSCEF 437 at 3. In *Uptown Healthcare, v. Allstate*, 117 A.D.3d 542, 543 (1st Dep’t 2014), the court stated that “[w]here an amended pleading is submitted in response to a pre-answer motion to dismiss, the provident course of action for the motion court is to include the amended complaint in the record on the pending motion, which should then be granted or denied based on the sufficiency of the amended pleading.” Had the NYAG asked on a timely basis that the Court include the amended counterclaims in the record on the NYAG’s motion to dismiss, the NRA certainly would not have objected. However, the NRA does object to this relief now.

Similarly, *Sage Realty Corp. v. Proskauer Rose*, 251 A.D.2d 35, 38 (1st Dep’t 1998), the court stated that where a party responds to a motion to dismiss by amendment, “a court *may* ‘properly appl[y] the dismissal motion’ to the amended pleading.” *Sage Realty*, however, likewise did not involve a request by a plaintiff to excuse her failure to plead for months in the face of an amended pleading and a clear legal requirement to do so. For those reasons, the cases the NYAG cites are inapposite.

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Having failed to reply to the NRA's amended counterclaims, the NYAG "failed to plead" within the meaning of CPLR 3215, entitling the NRA to seek default judgments on its amended counterclaims against the NYAG.

The NYAG's failure to serve a reply has prejudiced the NRA.

The NYAG's failure to abide by her statutory obligations prejudiced the NRA. With the note of issue date fast approaching (currently set for April 20, 2022), the NRA still has no information to which it is entitled under CPLR 3018. The NYAG has not informed the NRA of the statements in the amended counterclaims which she admits or denies, and she has not provided the NRA with notice of her affirmative defenses or "matters 'which if not pleaded would be likely to . . . surprise [the NRA] . . .'"²⁰ In addition, because of the NYAG's violation of the procedural rules, the NRA is unable to exercise its statutory right to move dismiss a defense.²¹

Accordingly, the NRA respectfully submits that the Court should order the NYAG to file, within 14 days, a reply to the NRA's amended counterclaims, or face a motion for default judgment.

Respectfully,

/s/ Svetlana Eisenberg

Svetlana Eisenberg

BREWER, ATTORNEYS & COUNSELORS

750 Lexington Avenue, 14th Floor

New York, New York 10022

**ATTORNEYS FOR DEFENDANT-
COUNTERCLAIM PLAINTIFF
THE NATIONAL RIFLE ASSOCIATION OF
AMERICA**

cc: Counsel for all Parties

4876-3279-5651.3

²⁰ See CPLR 3018 (listing mandatory components of a reply).

²¹ CPLR 3211 (b) ("Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.").

EXHIBIT A

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,

Plaintiff,

v.

THE NATIONAL RIFLE ASSOCIATION
OF AMERICA, INC., WAYNE LAPIERRE,
WILSON PHILLIPS, JOHN FRAZER, and
JOSHUA POWELL,

Defendants.

Index No. 451625/2020
(Cohen, J.)

**Stipulation to File Amended and
Supplemental Complaint under
CPLR 3025(b)**

WHEREAS, on August 6, 2020, Plaintiff The People of the State of New York by Letitia James, The Attorney General of the State of New York (“NYAG”), filed the above-captioned action (“Action”);

WHEREAS, the NYAG provided the proposed Amended and Supplemental Complaint to all parties in the Action for their review pursuant to Rule 3025(b) of the New York Civil Practice Law and Rules and requested their consent for filing of the Amended and Supplemental Complaint; and

WHEREAS all parties in the Action consented to such filing;

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective counsel, that:

1. The NYAG may file the Amended and Supplemental Complaint under CPLR Rule 3025(b), a copy of which pleading is attached hereto as Exhibit A.

2. Defendants shall answer, move, or otherwise respond to the amended and supplemental complaint within 30 days of its filing.

IT IS FURTHER STIPULATED AND AGREED that this Stipulation can be executed in counterparts and/or by using electronic, scanned or telefaxed signatures, with the same effect as original signatures.

IN WITNESS WHEREOF, this Stipulation is executed by counsel for the parties on August 13, 2021.

For Plaintiff/Counterclaim-
Defendant

For Defendant/Counterclaim Plaintiff
The National Rifle Association of America

ATTORNEY GENERAL
OF THE STATE OF NEW YORK

BREWER, ATTORNEYS AND
COUNSELORS

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For Defendant Wayne LaPierre

For Defendant Wilson Phillips

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Dallas, TX 75209
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2. Defendants shall answer, move, or otherwise respond to the amended and supplemental complaint within 30 days of its filing.

IT IS FURTHER STIPULATED AND AGREED that this Stipulation can be executed in counterparts and/or by using electronic, scanned or telefaxed signatures, with the same effect as original signatures.

IN WITNESS WHEREOF, this Stipulation is executed by counsel for the parties on August 13, 2021.

For Plaintiff/Counterclaim-
Defendant

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OF THE STATE OF NEW YORK

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EXHIBIT B

From: [Svetlana Eisenberg](#)
To: [Connell, Monica](#); [Conley, Jonathan](#); [Thompson, Stephen](#)
Cc: [David Partida](#)
Subject: NYAG v. NRA: NYAG's Failure to Reply to the NRA's Amended Counterclaims
Date: Tuesday, November 09, 2021 8:16:49 AM

Counsel,

I write to follow up on our telephonic meet and confer. As you know, we discussed the NYAG's failure to reply to the NRA's amended counterclaims. During the meet and confer, you stated that the NYAG does not intend to file a reply but requested authorities that support the NRA's position that a reply was required and is now significantly past due. As noted below, the NRA will seek default judgments against the NYAG unless she advises the NRA by no later than 5 pm ET on Wednesday, November 10, 2021, that she will file a reply within seven (7) days.

As you know, CPLR 3011 provides that "[a]n answer may include a counterclaim against a plaintiff." Accordingly, in this case, the NRA asserted in its answer to the NYAG's complaint Counterclaims against the NYAG, which the NRA then amended on July 20, 2021. CPLR 3011 also states that "[t]here shall be a reply to a counterclaim denominated as such." Furthermore, CPLR 3025(d) requires that "there shall be a[] . . . reply to an amended . . . pleading if a[] . . . reply is required to the pleading being amended." Therefore, because a reply was required to the counterclaims, a reply is required to the NRA's amended counterclaims.

Under CPLR 3025(d), the NYAG's reply to the NRA's amended counterclaims was due 20 days after the NRA amended the counterclaims, that is **on August 9, 2021**. CPLR 3025 ("Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds.").

Pursuant to CPLR 3018, in the reply, the NYAG had an obligation to:

- deny those statements in the NRA's amended counterclaims known or believed by her to be untrue;
- specify those statements as to the truth of which she lacks knowledge or information sufficient to form a belief; and
- plead all matters "which if not pleaded would be likely to take the [NRA] by surprise or would raise issues of fact not appearing on the face of a prior pleading."

Although the rules clearly require the NYAG to reply to the NRA's amended counterclaims, **3 months after its deadline to do so**, the NYAG has not done so. The NYAG has not identified the NRA's statements that the NYAG denies, any statements by the NRA as to whose truth the NYAG claims to have insufficient knowledge to form a belief, or a single affirmative defense.

Contrary to the NYAG's argument during yesterday's meet and confer call, the NYAG's amendment of its complaint on August 16, 2021, did not render the NRA's amended counterclaims a nullity or excuse the NYAG's failure to comply with the above-mentioned requirements. A counterclaim is "not a responsive pleading merely because it is contained in a responsive paper [i.e., an answer]." See *Tri Terminal Corp. v. CITC Industries, Inc.*, 100 Misc.2d 477 (Sup. Ct. NY Cnty.

1979); *Edelman v. Edelman*, 88 Misc.2d 156 (Sup. Ct. Nassau Cnty. 1976) (plaintiff served a summons but failed to serve a complaint and attempted to strike counterclaim on that basis; motion to strike counterclaim denied). Nor is the NRA's amended counterclaim a defense to the NYAG's claims. See *Edelman v. Edelman*, 88 Misc.2d 156 (noting that, indeed, a counterclaim "need have no relationship to the basic cause of action of the plaintiff and indeed the counterclaim may assert any claim which the defendant has against the plaintiff regardless of origin or character").

As the pleader of the amended counterclaims, the NRA is a plaintiff in its own right. See *Tri Terminal Corp. v. CITC Industries, Inc.*, 100 Misc.2d 477 (Sup. Ct. NY Cnty. 1979). The amended counterclaims are "in essence a complaint by [the NRA] against the [NYAG] . . . upon which the [NRA] seeks judgment." See *id.*; see also *Edelman v. Edelman*, 88 Misc.2d 156; *Valiotis v. State*, 151 A.D.3d 980 (2d Dep't 2017) (holding that "decision and judgment denying the [petitioners'] petition and dismissing the proceeding [against the respondent] . . . did not foreclose consideration of the [respondent's] counterclaims [against the petitioner]").

Having failed to reply to the NRA's amended counterclaims, the NYAG "failed to plead" within the meaning of CPLR 3215 (Default Judgment), entitling the NRA to seek a default judgment against the NYAG. This is what the NRA intends to do unless the NYAG advises the NRA by **no later than 5 p.m. ET on November 10, 2021**, that it will file a reply on the schedule mentioned above. The NRA reserves all rights, including to seek to strike any portion of the NYAG's reply to the NRA's amended counterclaims to the extent the reply's belated filing prejudices the NRA.

Regards,
Svetlana

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