

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

-----X
PEOPLE OF THE STATE OF NEW YORK, BY :
LETITIA JAMES, ATTORNEY GENERAL OF :
THE STATE OF NEW YORK, : Index No. 451625/2020
:
Plaintiff, : IAS Part 3
:
v. : Hon. Joel M. Cohen
:
THE NATIONAL RIFLE ASSOCIATION OF : Motion Sequence No. 44
AMERICA, WAYNE LAPIERRE, :
WILSON PHILLIPS, JOHN FRAZER, and :
JOSHUA POWELL, :
:
Defendants. :
-----X

**DEFENDANT JOHN FRAZER'S REPLY MEMORANDUM OF LAW IN FURTHER
SUPPORT OF HIS CROSS-MOTION FOR LEAVE TO REPLEAD CERTAIN
AFFIRMATIVE DEFENSES**

GAGE SPENCER & FLEMING LLP
410 Park Avenue, Suite 810
New York, New York 10022
(212) 768-4900

Attorneys for Defendant John Frazer

TABLE OF CONTENTS

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT1

ARGUMENT2

 I. FRAZER’S CROSS MOTION TO REPLEAD HIS AFFIRMATIVE DEFENSES
 SHOULD BE GRANTED.....2

 A. Plaintiff Has Failed to Establish Prejudice3

CONCLUSION.....8

TABLE OF AUTHORITIES

Cases:

<i>Barbour v. Hosp. for Special Surgery</i> , 169 A.D.2d 385 (1991)	5
<i>Brewster v. Baltimore & O. R. Co</i> , 185 A.D.2d 653 (4th Dep’t 1992)	6
<i>Bronson v. Potsdam Urban Renewal Agency</i> , 74 A.D.2d 967 (3d Dep’t 1980)	6
<i>Cherebin v. Empress Ambulance Serv.</i> , 43 A.D.3d 364 (1st Dep’t 2007)	5
<i>Cirillo v. Lang</i> , 206 A.D.3d 611 (2d Dep’t 2022)	5, 6
<i>Citibank, N.A. v. Suthers</i> , 68 A.D.2d 790 (4th Dep’t 1979)	2
<i>Di Mauro v. Metro. Suburban Bus Auth.</i> , 105 A.D.2d 236 (2d Dep’t 1984)	3
<i>Dittmar Explosives v. Ottaviano, Inc.</i> , 20 N.Y.2d 498 (1967)	3
<i>Edenwald Contracting Co. v. New York</i> , 60 N.Y.2d 957 (1983)	4, 5
<i>Fahey v. Cty. of Ontario</i> , 44 N.Y.2d 934 (1978)	2
<i>Herrera v. Highgate Hotels, L.P.</i> , 213 A.D.3d 455 (1st Dep’t 2023)	8
<i>Hoffinger Stern & Ross, LLP v. Neuman</i> , 80 A.D.3d 428 (1st Dep’t 2011)	6
<i>Hughes Training Inc., Link Div. v. Pegasus Real-Time Inc.</i> , 255 A.D.2d 729 (3d Dep’t 1998)	6
<i>Jbgr v. Chi. Title Ins. Co.</i> , 195 A.D.3d 604 (2d Dep’t 2021)	4
<i>Kimso Apartments, LLC v. Gandhi</i> , 24 N.Y.3d 403 (2014)	3, 4

<i>Lattanzio v. Lattanzio</i> , 55 A.D.3d 431 (1st Dep’t 2008)	7
<i>Murray v. City of New York</i> , 43 N.Y.2d 400 (1977)	3
<i>Ness Tech. SARL v. Pactera Tech. Int’l Ltd.</i> , 180 A.D.3d 607 (1st Dep’t 2020)	7
<i>Norwood v. City of N.Y.</i> , 203 A.D. 2d 147 (1st Dep’t 1994)	4, 5, 6
<i>Pike v. N.Y. Life Ins. Co.</i> , 72 A.D.3d 1043 (2d Dep’t 2010)	3
<i>Public Adm’r v. Hossain Constr. Corp.</i> , 27 A.D.3d 714 (2d Dep’t 2006)	4
<i>Rife v. Union College</i> , 30 A.D.2d 504 (3d Dep’t 1968)	6
<i>Scholastic Inc. v. Pace Plumbing Corp.</i> , 129 A.D.3d 75 (1st Dep’t 2015)	3
<i>Shine v. Duncan Petroleum Transport, Inc.</i> , 60 N.Y.2d 22 (1983)	5
<i>U.S. Bank Nat’l Ass’n v. Cuesta</i> , 208 A.D.3d 821 (2d Dep’t 2022)	3, 4, 5
<i>Whalen v. Kawasaki Motors Corp., U.S.A.</i> , 92 N.Y.2d 288 (1998)	5

Rules and Statutes:

CPLR 3025.....	2, 4
----------------	------

Defendant John Frazer (“Frazer”), by and through his attorneys Gage Spencer & Fleming LLP, respectfully submits this reply memorandum of law in further support of his Cross-Motion for Leave to Replead Certain Affirmative Defenses. For the reasons which follow, if an amendment is even deemed necessary after the Court has evaluated the merits of Plaintiff’s underlying motion to dismiss certain of Frazer’s affirmative defenses, Frazer’s cross-motion for leave to amend should be granted.¹

Preliminary Statement

Should the Court determine that Frazer’s affirmative defenses are insufficiently pleaded, it should grant Frazer’s cross-motion for leave to amend. Plaintiff has filed her motion to dismiss well after the conclusion of an extensive discovery period when she could have probed the basis for those affirmative defenses. In that time, Frazer produced documents, was deposed, and testified for three further days in his corporate capacity. Despite these opportunities, Plaintiff devoted only one interrogatory request to Frazer’s affirmative defenses. After Frazer objected to its overbreadth – the interrogatory sought the identification of all facts, documents, and persons supporting each and every “defense and affirmative defense” either asserted in Frazer’s Answer or upon which he expected to rely at trial – Plaintiff never responded to the objection. She did not seek to narrow the request, ask to meet and confer, or even file a motion to compel. Instead, she has proceeded directly to a motion to dismiss.

Plaintiff now claims that Frazer’s proposed amended Answer, if permitted, would prejudice her because it would be untimely and futile. Her argument fails for several reasons. First, there is no prejudice because Frazer’s proposed amendment would merely add factual

¹ To the fullest extent relevant, Frazer incorporates by reference, and adopts, any and all arguments set forth in the cross-motion for leave to amend submitted by co-Defendant LaPierre.

substance about which the Attorney General is already aware. It would introduce nothing new or unknown, cause no surprise, and require no additional discovery.

Second, Plaintiff has created the very untimeliness she now claims prejudices her. Her challenge of Frazer's affirmative defenses – about which no complaint was uttered until now – occurred well after the close of discovery, and after she failed to use any of the tools available to discover the substance of what she now seeks to dismiss. Plaintiff should not be permitted to benefit from a circumstance she created.

Third, the proposed amendment is not futile. Necessarily viewed in a light most favorable to Frazer, the additional substance in the proposed pleading establishes meritorious defenses. Indeed, for the reasons given in Frazer's opposition to Plaintiff's motion to dismiss, his affirmative defenses are both legally sufficient and appropriately supported by record evidence and should not be dismissed.

Thus, even were the Court to decide that those affirmative defenses were not sufficiently pleaded, Plaintiff will suffer no prejudice if leave to replead is granted, for the reasons provided below.

Argument

I. Frazer's Cross-Motion to Replead His Affirmative Defenses Should be Granted

The standard for granting leave to amend pleadings is a liberal one. Permission to amend a pleading should be "freely given" (CPLR 3025(b); *Fahey v. Cty. of Ontario*, 44 N.Y.2d 934, 935 (1978) (leave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay). The intent of CPLR 3025(b) is to foster liberal amendment of pleadings prior to trial. *See Citibank, N.A. v. Suthers*, 68 A.D.2d 790, 795 (4th Dep't 1979) (citations omitted). "As a general rule, leave to amend a pleading should be granted where there is

no significant prejudice or surprise to the opposing party and where the documentary evidence submitted in support of the motion indicates that the proposed amendment may have merit.” *Pike v. N.Y. Life Ins. Co.*, 72 A.D.3d 1043, 1047 (2d Dep’t 2010) (citing cases). Where prejudice is not caused, courts are free to permit amendment even after trial. *Murray v. New York*, 43 N.Y.2d 400, 405 (1977). Though not the case here, “[t]his favorable treatment applies ‘even if the amendment substantially alters the theory of recovery.’” *Kimso Apartments, LLC v. Gandhi*, 24 N.Y.3d 403, 411 (2014) (quoting *Dittmar Explosives v. A. E. Ottaviano, Inc.*, 20 N.Y.2d 498, 502-503 (1967) (internal quotations omitted)).

A. Plaintiff Has Failed to Establish Prejudice

Plaintiff has not established that she will be prejudiced if Frazer is permitted to replead his affirmative defenses. Nor can she. Prejudice requires “some indication that the defendant has been hindered in the preparation of his [or her] case or has been prevented from taking some measure in support of his [or her] position[.]” *U.S. Bank Nat’l Ass’n v. Cuesta*, 208 A.D.3d 821, 823 (2d Dep’t 2022) (quotations and citations omitted); *see also Di Mauro v. Metro. Suburban Bus Auth.*, 105 A.D.2d 236, 240 (2d Dep’t 1984) (a party suffers prejudice where it is hindered in the preparation of his case or has been prevented from taking some measure in support of his position) (citations omitted). “[T]he burden is expressly placed upon one who attacks a pleading for deficiencies in its allegations to show that he [or she] is prejudiced . . .” *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 80 (1st Dep’t 2015).

Plaintiff has failed to meet her burden. She presents two arguments. *See* Pl. Mem. at 18. First, citing to her own motion to dismiss, she insists that there are deficiencies in the challenged affirmative defenses which make amendment futile. For the reasons provided in opposition to that motion (NYSCEF Doc. No. 1334), and on the basis of the factual assertions in

our proposed amended pleading (NYSCEF Doc. No. 1356), those affirmative defenses are not deficient or futile but rather present critical triable questions of fact and law concerning the heart of the Attorney General's claims. Furthermore, as the proposed amended pleading clearly demonstrates, the affirmative defenses are based on record evidence which Plaintiff has long known about.

Second, Plaintiff contends that she would be prejudiced by the amendment at this late stage of the case. However, it is well-established that “[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side” *Edenwald Contracting Co. v. New York*, 60 N.Y.2d 957, 959 (1983) (citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3025:5, at 477); *Kimso Apartments, LLC*, 24 N.Y.3d at 413-14 (“[w]hile a delay in seeking to amend a pleading may be considered by the trial court, it does not bar that court from exercising its discretion in favor of permitting the amendment where there is no prejudice”); *Cuesta*, 208 A.D.3d at 823 (stating the same and finding that lateness was insufficient to dismiss the defendant's motion for leave to amend its pleadings); *Jbgr v. Chi. Title Ins. Co.*, 195 A.D.3d 604, 606 (2d Dep't 2021) (“[d]efendant's delay in moving for leave to amend did not warrant dismissal of the motion on the grounds that in moving for mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side”); *Pub. Adm'r v. Hossain Constr. Corp.*, 27 A.D.3d 714, 716 (2d Dep't 2006) (finding that the court improvidently exercised its discretion in denying a motion for leave to amend where the plaintiff failed to demonstrate prejudice in addition to lateness); *Norwood v. City of N.Y.*, 203 A.D.2d 147, 148 (1st Dep't 1994) (stating that “mere lateness is not a barrier to an amendment” and finding the fact that the defendants moved to amend their pleadings just prior to opening statements was not a bar to

granting leave); *Pomerance v. McGrath*, 124 A.D.3d 481, 482 (1st Dep't 2015) (mere lateness in moving to amend pleadings is not a barrier to amendment).

Even if there were an unwarranted delay here, which there is not, Plaintiff has not addressed, much less refuted, any of the legal authorities submitted in support of Frazer's cross-motion. That choice leaves uncontroverted the well-established principle that timeliness is not, as Plaintiff characterizes it to be, dispositive of a motion to amend pleadings. New York courts have long held that leave to amend pleadings should be granted as late as mid-trial, even after a jury verdict, in the absence of operative prejudice. *See Whalen v. Kawasaki Motors Corp., U.S.A.*, 92 N.Y.2d 288, 293 (1998) (granting leave to amend answer to include an affirmative defense granted after jury verdict); *see also Shine v. Duncan Petroleum Transport, Inc.*, 60 N.Y.2d 22 (1983) (leave to amend pleadings granted mid-trial); *Edenwald Contr. Co.*, 60 N.Y.2d at 959 (1983) (rejecting a 6-1/2 year delay from commencement of the action as establishing laches, the Court of Appeals stated that lateness alone is not a barrier to amend a pleading without significant prejudice); *Barbour v. Hosp. for Special Surgery*, 169 A.D.2d 385 (1st Dep't 1991) (motion to amend pleadings granted seven years after commencement of the action in absence of prejudice). Defendant's cross-motion to amend should not be dismissed on the grounds of lateness.

This is especially so given that Plaintiff makes no effort to establish prejudice from Frazer's proposed amendment, offering no explanation regarding how the amendment would introduce surprise, hinder her position, or unfairly prejudice preparation of her case. New York Courts have routinely granted leave to replead where a party fails to establish that its position would be hindered as a result of an amendment to the pleadings. *See, e.g., Cuesta*, 208 A.D.3d at 823; *Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365 (1st Dep't 2007); *see also Cirillo v. Lang*, 206 A.D.3d 611, 612 (2nd Dep't 2022) (reversing the Court's denial of the

defendant's motion for leave to amend its pleadings where plaintiff failed to demonstrate unfair prejudice or surprise from the proposed amendment); *Hoffinger Stern & Ross, LLP v. Neuman*, 80 A.D.3d 428, 429 (1st Dep't 2011) (granting defendants leave to replead their affirmative defenses where the Plaintiff did not establish that it would be prejudiced by defendants' repleading their affirmative defenses); *Bronson v. Potsdam Urban Renewal Agency*, 74 A.D.2d 967, 968 (3d Dep't 1980) ("[w]hen an opposing party cannot claim prejudice or surprise, it would be an abuse of discretion as a matter of law to deny a motion to amend a pleading").

Additionally, where, as here, Plaintiff is already aware of the underlying facts which support the affirmative defenses, she cannot establish prejudice. *See Hughes Training Inc., Link Div. v. Pegasus Real-Time Inc.*, 255 A.D.2d 729, 730-31 (3d Dep't 1998) (reversing denial of permission to amend answer to add affirmative defenses because, predicated as they were on factual and legal matters raised and explored in discovery and motion papers, plaintiff could not demonstrate significant prejudice); *Norwood*, 203 A.D.2d at 149 (plaintiff could not claim surprise since facts and circumstances with respect to the proposed amendment were fully explored during discovery); *Brewster v. Baltimore & O.R. Co.*, 185 A.D.2d 653, 653 (4th Dep't 1992) (leave to amend should be granted where a party does not surprise the other party with any new facts requiring additional discovery, but merely proposes a further legal basis); *Bronson*, 74 A.D.2d at 968 (a plaintiff cannot claim prejudice where it has full knowledge of the facts concerning the amendment); *Rife v. Union College*, 30 A.D.2d 504, 505 (3d Dep't 1968) (on a motion for amendment of pleadings before trial one cannot successfully claim prejudice when he has had full knowledge of all the facts and an opportunity to present his theory of the case is allowed). Here, as demonstrated by Exhibit A to our moving brief, Frazer does not intend to introduce new facts

of which Plaintiff is unaware, nor do the amendments require additional discovery. Plaintiff does not argue otherwise. *See* Pl. Mem. at 18 (making no mention of Frazer).

Finally, the cases Plaintiff cites are off point. The cases of *Ness Tech. SARL v. Pactera Tech. Int'l Ltd.*, 180 A.D.3d 607 (1st Dep't 2020) and *Lattanzio v. Lattanzio*, 55 A.D.3d 431 (1st Dep't 2008) do not provide any helpful guidance for the circumstances presented here. For instance, *Ness Tech* involved a proposed amendment naming two new parties and other potentially relevant individuals which was certain to entail substantial new discovery and resulting delays. *Ness Tech. SARL*, 180 A.D.3d at 607-08. There are no new parties or expansion of the case or its issues which would result from Frazer's proposed amendment, if an amendment even proves necessary. Nor would the proposed amendment be "palpably insufficient as a matter of law or patently devoid of merit," and therefore futile, as Plaintiff's citation to *Herrera v. Highgate Hotels, L.P.*, 213 A.D. 3d 455, 456-457 (1st Dep't 2023) suggests. The affirmative defenses present critical, yet unadjudicated, issues concerning the Attorney General's overreach and the factual insufficiency of her claims. That they are familiar to the Attorney General as well, having been addressed in deposition testimony, documentary evidence, and even previous motion practice, Plaintiff has had every opportunity and yet has failed to establish the lack of merit she baldly suggests. In sum, Plaintiff is unable to pinpoint or establish prejudice she would suffer should Frazer be permitted to replead to supplement his affirmative defenses as set forth in his proposed amendment.

Conclusion

For the reasons stated, if necessary following the Court's determination of the merits of Plaintiff's motion to dismiss certain affirmative defenses, Frazer's cross-motion for leave to replead those affirmative defenses should be granted.

Dated: New York, New York
April 17, 2023

GAGE SPENCER & FLEMING LLP

By: /s/ William B. Fleming
William B. Fleming
Ellen V. Johnson
410 Park Avenue, Suite 810
New York, New York 10022
Tel. (212) 768-4900
Email: wflaming@gagespencer.com
ejohnson@gagespencer.com
Counsel for Defendant John Frazer

To: PEOPLE OF THE STATE OF
NEW YORK, by LETITIA JAMES,
Attorney General of the State of New York (via NYSCEF)

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2023, a true and correct copy of Defendant John Frazer's foregoing Reply Memorandum of Law in Further Support of His Cross-Motion For Leave to Replead Certain Affirmative Defenses was served on all counsel of record by NYSCEF.

By: /s/ William B. Fleming

ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, William B. Fleming, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that Defendant John Frazer's Reply Memorandum of Law in Further Support of His Cross-Motion For Leave to Replead Certain Affirmative Defenses complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court because the memorandum of law contains 2221 words, excluding 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.

Dated: New York, New York
April 17, 2023

By: /s/ William B. Fleming
William B. Fleming