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, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL, Defendants.	Index No. 451625/2020 Hon. Joel M. Cohen Motion Sequence No. 44

DEFENDANT WILSON PHILLIPS'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS CERTAIN OF DEFENDANTS' AFFIRMATIVE DEFENSES

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Defendant Wilson H. Phillips ("Mr. Phillips") respectfully submits this memorandum of law in opposition to Plaintiff's Motion to Dismiss Certain of Defendants' Affirmative Defenses.

I. Preliminary Statement

Mr. Phillips's affirmative defenses of culpable conduct, mitigation of damages and contribution under Article 14 of the New York Civil Practice Law and Rules ("CPLR") should not be dismissed, as Mr. Phillips's pleadings of those defenses puts Plaintiff on sufficient notice, which is all that CPLR 3018(b) requires. Indeed, those affirmative defenses are basic legal principles relevant to the calculation of damages and, by their nature, do not need any further elaboration. As a result, Mr. Phillips's Second, Third, and Fifth Affirmative Defenses should remain. Mr. Phillips withdraws his Eighth, Ninth, and Twenty-Ninth Affirmative Defenses.

II. Background

A. Mr. Phillips's Affirmative Defenses

Mr. Phillips's Verified Answer to the Second Amended and Supplemental Verified Complaint (Doc. No. 682) (the "Complaint") raises relevant and proper affirmative defenses, including, but not limited to, the following defenses that Plaintiff seeks to dismiss:

- Second Affirmative Defense: Whatever damages may have been sustained were caused in whole or in part, or were contributed to, by the culpable conduct and/or want of care on the part of an entity or individuals over whom Phillips had no control.
- Third Affirmative Defense: The NRA, whom Plaintiff alleges sustained damages due to the actions of Phillips, failed to mitigate said damages.
- Fifth Affirmative Defense: The relative culpability of each party who is or may be liable for the damages alleged by the plaintiff in this action should be determined in accordance with the decisional and statutory law of the State of New York, and the equitable share of each party's liability for contribution should be determined and apportioned in accordance with the relative culpability, if any, of each such party pursuant to Article 14 of the CPLR.

III. Argument

A. Plaintiff Fails to Meet Its Burden under the Motion to Dismiss Standard or the Summary Judgment Standard.

When considering motions to dismiss affirmative defenses under CPLR 3211(b), the court must give the defendant "the benefit of every reasonable intendment of the pleading, which is to be liberally construed." (*See Warwick v. Cruz*, 270 A.D.2d 255, 255 [2d Dep't 2000]); *see also Galasso, Langione & Botter, LLP v. Liotti,* 81 A.D.3d 880, 882 [2d Dep't 2011] [internal citations omitted] ["In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference."). Further, "[a] defense should not be stricken where there are questions of fact requiring trial." (*1691 Fulton Ave. Assoc., LP v. Watson*, 55 Misc. 3d 1221(A) [Civ. Ct,. Bronx County 2017]).

Likewise, "[e]ven in the context of a motion for summary judgment by plaintiff, it is not defendants' burden to establish their affirmative defenses by admissible evidence, but plaintiff's burden to establish that they are legally inapplicable." (*Maliqi v. 17 E. 89th St. Tenants, Inc.*, 24 Misc. 3d 1219[A] [Sup. Ct., Bronx County 2008]); (*see*, *e.g.*, *Vita v. New York Waste Servs., LLC,* 34 A.D.3d 559(2d Dept. 2006); *Santilli v. Allstate Ins. Co.,* 19 A.D.3d 1031, 1032 [4th Dep't 2005]). As explained more fully below, Plaintiff has not met its burden.

B. Because There is No Likelihood that Plaintiff Would be Taken By Surprise by Mr. Phillips's Second, Third, or Fifth Affirmative Defenses, There is No Basis for Dismissing Them.

CPLR 3018(b) sets forth the circumstances under which an affirmative defense must be pleaded, providing that "a party shall plead all matters which if not pleaded": (1) "would be likely to take the adverse party by surprise," or (2) "would raise issues of fact not appearing on the face of a prior pleading." (CPLR 3018.) Consistent with these principles, New York courts have held

that "[e]ven an unpleaded defense may be raised on a summary judgment motion, as long as it would not be likely to surprise the adverse party or raise issues of fact not previously apparent." (*Brodeur v. Hayes*, 305 A.D.2d 754, 755 [3d Dep't 2003], relying on *Perelman v. Snowbird Ski Shop*, 215 A.D.2d 809, 810 [3d Dep't 1995] and CPLR 3018[b].) In other words, the purpose of pleading affirmative defenses is "to eliminate surprise and to permit the [claimant] to know what contentions will be interjected by way of defense to his claim." (5 New York Civil Practice: CPLR P 3018.13 [2022]).

In arguing that Mr. Phillips's Second, Third, and Fifth Affirmative Defenses (the "Contested Defenses") should be dismissed, Plaintiff relies on a series of cases which state the general proposition that affirmative defenses that are pleaded as conclusions of law but not supported by factual allegations are insufficient. (*See* Pl.'s Mem. in Support of its Mot. to Dismiss Certain of Defs.' Affirmative Defenses at 19, Doc. No. 1178 [citing *Kachalsky v. Nesheiwat*, 55 Misc. 3d 130(A) [App. Term 2017]; *170 W. Vill. Assocs. v. G & E Realty, Inc.*, 56 A.D.3d 372, 372–73 [1st Dep't 2008]; *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 79 [1st Dep't 2015]; *Morgenstern v. Cohon*, 2 N.Y.2d 302, 307 [1957]). However, as the Court of Appeals explained in *Morgenstern,* the question of whether a particular affirmative defense is adequately pleaded requires more than an isolated analysis of the language pleading that defense. (*Morgenstern v. Cohon*, 2 N.Y.2d 302 [1957]). The Court thus noted: "Resort to the cases is of little value in determining this question. We can be guided only by a sound judgment exercised within the framework of, and with an appreciation for, the underlying purpose for the rule prohibiting allegations of legal conclusions only." *Id*. at 306. And, as to that underlying purpose, the Court stated, "[t]he rule which requires ultimate facts to be pleaded, and not mere legal

conclusions, is predicated upon 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." *Id.* at 308.

Plaintiff makes no attempt to explain how any of the Contested Defenses would be likely to take it by surprise and, thus, fails to make the showing necessary to dismiss any of them. To the contrary, when the Contested Defenses are considered in the context of the pleadings as a whole and the record in this case, as *Morgenstern* directs, it is clear that Plaintiff is sufficiently on notice as to the nature of, and factual support for, each of them.

To begin with, Mr. Phillips's Second Affirmative Defense puts Plaintiff on notice that any damages or fault attributed to Mr. Phillips should be offset to the extent such damages were caused by the culpable conduct of another party. Specifically, Mr. Phillips's Second Affirmative Defense is pleaded as follows: "Whatever damages may have been sustained were caused in whole or in part, or were contributed to, by the culpable conduct and/or want of care on the part of an entity or individuals over whom Phillips had no control."

In *Cody v. State of New York*, the court found similar language sufficient to raise the defense of culpable conduct at trial. In *Cody,* the defendant pleaded that the plaintiff's:

> "culpable conduct contributed to the damages he sustained as a result of that accident, a factor which is relevant to the instant trial. To the court's mind, defendant's pleading was more than sufficient to apprise claimant that the State was asserting, not only that his conduct contributed to causing the accident itself, but also that it 'caused or failed to minimize the damages arising from the accident.'" (*Cody v. State of N.Y.*, 59 Misc. 3d 302, 316 [Ct. Cl. 2017]).

Here, too, Mr. Phillips's culpable conduct affirmative defense has put Plaintiff sufficiently on notice that the conduct of individuals beyond Mr. Phillips's control contributed to the alleged damages at issue. Moreover, the Complaint itself contains lengthy allegations that Mr. Phillips's co-defendants were culpably involved in the same conduct as Mr. Phillips. (*See, e.g.*, Second Amended Verified Complaint, Dkt. 646 at ¶ 5 ["Like LaPierre, each of [Phillips, Powell and

Frazer] regularly ignored, overrode or otherwise violated the bylaws and internal policies and procedures that they were charged with enforcing"]; ¶ 6 ["LaPierre, Phillips, and Powell regularly used this pass-through arrangement to conceal private travel and other costs that were largely personal in nature, wasting substantial charitable resource"]; ¶190 [alleging the NRA paid LaPierre's Travel Consultant in violation of the NRA Purchasing Policy and that LaPierre and Phillips were aware of this arrangement]; ¶ 232 [alleging that Financial Services Division staff complained about being "frequently directed to process payments in contravention of NRA policy because …"[LaPierre] or Woody or Josh [Powell] said that these are okay"]; ¶¶ 267–271 [alleging Powell and Phillips negligently entered into multimillion-dollar contracts with NRA vendor McKenna & Associates]; ¶ 564 [alleging that Phillips and Frazer signed the 2015 and 2016 CHAR 500s and that "Frazer and Phillips knew that those CHAR500s, and their attachments, included materially misleading information concerning the NRA's financial condition, and falsely attested to the accuracy of the information provided, under penalty of perjury."]. Under these circumstances, Plaintiff cannot possibly be taken by surprise by this Affirmative Defense at trial.

Similarly, Mr. Phillips's mitigation of damages defense (Third Affirmative Defense) puts Plaintiff fully on notice that, to the extent Plaintiff is able to establish that the NRA suffered damages as a result of Mr. Phillips's conduct, any such damages should be reduced to the extent that the NRA failed to mitigate those alleged damages. Here, too, the Complaint itself is replete with allegations of such failures. *See, e.g.,* Second Amended Verified Complaint, Dkt. 646 at Section III.A ¶¶ 412-28 ("The NRA Board Failed to Follow an Appropriate Process to Determine Reasonable Compensation for NRA Executives"); Section III.B ¶¶ 429-44 ("The Officers Compensation Committee and the NRA Board Failed to Consider or Approve LaPierre's and Phillips's Complete Compensation Prior to Making Compensation Determinations"); Section V

¶¶ 494-551 ("The NRA Board's Failures Resulting in Violations of Law"). Plaintiff, therefore, has sufficient notice that Mr. Phillips seeks to argue at trial – if necessary – that the NRA failed to mitigate its damages.

Mr. Phillips's Fifth Affirmative Defense, which puts Plaintiff on notice that the relative culpability of the defendants should be addressed in accordance with Article 14 of the CPLR, is also sufficient. That Affirmative Defense states that "the relative culpability of each party who is or may be liable for the damages alleged by the plaintiff in this action should be determined in accordance with the decisional and statutory law of the State of New York, and the equitable share of each party's liability for contribution should be determined and apportioned in accordance with the relative culpability, if any, of each such party pursuant to Article 14 of the CPLR." Article 14 of the CPLR "provides that two or more persons responsible for the same injury to person or property may claim contribution among themselves for the loss, and the right to contribution will be determined in accordance with the relative culpability of each responsible party." (§ 10:19. Contribution—CPLR Article 14: Codification of *Dole v. Dow*, 14 N.Y. Prac., New York Law of Torts § 10:19); (*see also Simoneit v. Mark Cerrone, Inc.*, 122 A.D.3d 1246, 1249 [4th Dep't 2014], *amended on rearg*., 126 A.D.3d 1428 [4th Dep't 2015] [noting that CPLR 1411 "encompasses any culpable conduct that had a 'substantial factor in causing the harm for which recovery is sought'"]).

In short, the Fifth Affirmative Defense is merely a statement of the legal principle for apportioning damages between parties. And, as discussed above in connection with the Second Affirmative Defense, the Complaint itself contains detailed allegations of the involvement of others in the culpable conduct allegedly undertaken by Mr. Phillips. Accordingly, Plaintiff is adequately on notice as to this defense, as well.

IV. Conclusion

For these reasons, Plaintiff's Motion to Dismiss Mr. Phillips's Affirmative Defenses should be denied as to Mr. Phillips's Second, Third, and Fifth Affirmative Defenses.

Dated: March 13, 2023
New York, New York

Respectfully submitted,

By: */s/ Seth C. Farber*

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CERTIFICATE OF COMPLIANCE

1. I am an attorney at the law firm of Winston & Strawn LLP, I am admitted to practice in the State of Texas and am admitted *pro hac vice* in this action and have appeared on behalf of Defendant Wilson Phillips in this action.

2. This Memorandum of Law In Opposition to Plaintiff's Motion to Dismiss Certain of Defendants' Affirmative Defenses was prepared in the processing system Microsoft Word, with Times New Roman typeface, 12-point font.

3. Pursuant to the Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202.70(g)), I certify that this memorandum of law complies with the word count limit set out in Rule 17, as it contains 1,999 words (excluding the parts of the brief exempted by Rule 17).

Dated: March 13, 2023
Dallas, Texas

By: */s/ Rebecca Loegering*
Rebecca Loegering