

CPLR 3011: Counterclaim Not Permitted in Plaintiff's Reply

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31.¹⁴¹ The revisers considered such a specification unnecessary since, if consent is required, it may be proved when the motion is made or in the special proceeding.¹⁴²

The instant case, although not substantially altering established practice, presents a good illustration of the operation of the CPLR in this area.

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3011: Counterclaim not permitted in plaintiff's reply.

Under Section 272 of the Civil Practice Act, a plaintiff's reply to a counterclaim was generally limited to denials or defenses.¹⁴³ Thus, the plaintiff could not, in his reply, interpose an affirmative cause of action against the defendant. The First Report of the Advisory Committee declared that "there is no provision for the assertion of a crossclaim or counterclaim by a plaintiff in a reply."¹⁴⁴ CPLR 3011 provides that "there shall be a reply to a counterclaim." Whether or not a counterclaim could be contained in a reply under CPLR 3011, however, was not judicially resolved until *Habiby v. Habiby*.¹⁴⁵

In *Habiby*, the defendant moved to strike certain items from the plaintiff's reply, one of which was, in effect, a counterclaim. Granting the defendant's motion, the appellate division held that CPLR 3011 does not call for a departure from the old rule which prohibited the pleading of a counterclaim in a reply.

In spite of the fact that the court seems to have discretionary power to allow the assertion of a counterclaim in a reply,¹⁴⁶ if the plaintiff wants to assert a new cause of action against the defendant the proper procedure is to move to amend his original complaint under CPLR 3025(b). He thus has an ample procedural tool to assert additional claims; he does not need the reply as a means of asserting them.

¹⁴¹ Rule 31 required an acknowledgment of a consent to the payment and proof of identity of the applicant by some other person. See 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶2606.04 (1964).

¹⁴² THIRD REP. 418.

¹⁴³ E.g., *Seligmann v. Mandel*, 19 Misc. 2d 418, 190 N.Y.S.2d 388 (Sup. Ct. 1959); *Phillips v. Manufacturers Trust Co.*, 175 Misc. 1009, 26 N.Y.S.2d 58 (Sup. Ct. 1940), *aff'd*, 261 App. Div. 946, 27 N.Y.S.2d 185 (1st Dep't 1941).

¹⁴⁴ FIRST REP. 71.

¹⁴⁵ 23 App. Div. 2d 558, 256 N.Y.S.2d 634 (1st Dep't 1965).

¹⁴⁶ Cf. CPLR 3011. "There shall be no other pleading unless the court orders otherwise." *Ibid*.