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Reply Allowed to State What Appears To Be a Counterclaim

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defendant had notice of the setoff prior to notice of the assignment. Whether it had in fact existed prior to the assignment was not examined by the court.[178] Rather, the court indicated, somewhat inaccurately, that,

> an assignee is subject to *setoffs* available against the assignor whenever the *setoffs* are based on facts existing *prior to knowledge* by the obligor of the assignment. . . .[179]

The court failed to cite *Talcott* and, in addition, indicated that its statement was inconsistent with CPLR 3019(c) [180] and with several prior decisions.[181]

Although the decision would not have been altered by a proper pronouncement of the court, such inaccuracy must be indicated. Imprecise dicta can only serve to confuse practitioners as to the exact nature of the setoff counterclaim.

Reply allowed to state what appears to be a counterclaim.

A reply is the pleading, designated by CPLR 3011, to be served in response to a counterclaim. A reply may also be required, in other circumstances,[182] by court order.[183] It has been firmly established that only defenses and denials may be pleaded in a reply regardless of why the reply was served.[184]

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[178] "The Court need not decide, and the record does not establish, whether the bonds [from which transaction the setoff arose] were delivered to Arlee before or after receipt of the securities from, and delivery of the check to, Meadow Brook on May 26, although both events took place on the same day. The important fact is that it was not until after delivery of bonds . . . that it was revealed to the broker [defendant] that Chatham [plaintiff] . . . had obtained an interest in its principal's securities." *Ibid.*

[179] *Ibid.* (Emphasis added.)

[180] *Ibid.*

[181] Fera v. Wickham, 135 N.Y. 223, 31 N.E. 1028 (1892); Michigan Sav. Bank v. Millar, 110 App. Div. 670, 96 N.Y. Supp. 568 (1st Dep't), *aff'd*, 186 N.Y. 606, 79 N.E. 1111 (1906).

[182] An affirmative defense may be one such circumstance. *E.g.*, Palmer v. Anderson, 243 App. Div. 618, 276 N.Y. Supp. 478 (2d Dep't 1935).

[183] CPLR 3011. See, *e.g.*, Mercantile Nat'l Bank v. Corn Exch. Bank, 73 Hun 78, 25 N.Y. Supp. 1068 (Sup. Ct. 1893).

[184] Although the provisions of the procedure statutes have not explicitly restricted the inclusion of counterclaims in a reply, courts have never been hesitant to infer this restriction. The restriction was present under the Code of Civil Procedure § 514 as illustrated in Cohn v. Husson, 66 How. Pr. 150 (N.Y. City Ct. 1883). In Seligmann v. Mandel, 19 Misc. 2d 418, 190 N.Y.S.2d 388 (Sup. Ct. 1959), the court held that under CPA § 272, counterclaims were not includible in a reply. The provisions of CPA § 272 are now embodied in Sections 3011, 3014 and 3018(a) of the CPLR. This division has not changed the policy of excluding counterclaims. See, *e.g.*, Habiby v. Habiby, — App. Div. 2d —, 256 N.Y.S.2d 634 (1st Dep't 1965); *In re* Cohen (Sup. Ct. N.Y. County) 150 N.Y.L.J., Nov. 25, 1963, p. 12, col. 4.

A counterclaim therefore may never appear in a reply. If a counterclaim could be asserted in a reply, in essence, the court would be allowing the amendment of the complaint without compelling plaintiff to comply with the requisites of such amendment.

The rule then is clear. Its application, however, can get somewhat imprecise, since it may be difficult to distinguish between a counterclaim [185] and an affirmative defense which may always be included in a reply.

This problem is reflected in *Rill v. Darling*.[186] In *Rill* the plaintiff brought an action to recover damages for the death of her husband which, she claimed, was accelerated by defendant's negligence. Defendant's answer alleged a release from the plaintiff. Plaintiff replied admitting the release, but asked the court to rescind the agreement.

Plaintiff's claim for rescission in the reply was unchallenged. Since rescission is an equitable cause of action the plaintiff asserted a counterclaim.

Apparently defendant's counsel did not object to the reply. The issue of the case then became the right of the defendant to have the question of rescission tried by a jury. However, that issue need never have been reached had defendant's counsel moved to dismiss the reply for stating a counterclaim.

Amendment to pleading refused when substantial prejudice results.

CPLR 3025(b), which requires that leave to amend be freely given, does not preclude the court from exercising its discretion and denying a defendant's motion for leave to amend his answer. So held the court in *Ciccone v. Glenwood Holding Corp.*,[187] where plaintiff, a tenant in defendant's building, alleged that she was injured in December 1961 by a ceiling which collapsed. A complaint was served in February 1963 and in April 1963 defendant interposed an answer. Defendant moved in August 1964 for leave to amend his answer so that he could allege that plaintiff was in his employ at the time of the accident and could, therefore, receive workmen's compensation. The court denied the defendant's motion to amend, indicating that plaintiff's right to workmen's compensation was lost since an action therefor must be brought within two years of an accident.[188]

This decision is based upon a firm foundation of cases [189] which indicate that freedom to amend pleadings is bridled by the

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[185] A counterclaim must state a cause of action.

[186] 44 Misc. 2d 174, 253 N.Y.S.2d 184 (Sup. Ct. 1964).

[187] 44 Misc. 2d 273, 253 N.Y.S.2d 576 (Civ. Ct. 1964).

[188] N.Y. WORKMEN'S COMP. LAW § 28.

[189] See, *e.g.*, Zulinsky v. Bradford, 279 App. Div. 765, 108 N.Y.S.2d 756 (2d Dep't 1951); Jennings v. Perkins, 277 App. Div. 1143, 101 N.Y.S.2d 303 (2d Dep't 1950).