NY CLS CPLR § 3019

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New York

Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 30 Remedies and Pleading (§§ 3001 — 3045)

§ 3019. Counterclaims and cross-claims.

(a) Subject of counterclaims. A counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable.

(b) Subject of cross-claims. A cross-claim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more defendants, a person whom a defendant represents or a defendant and other persons alleged to be liable. A cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(c) Counterclaim against trustee or nominal plaintiff. In an action brought by a trustee or in the name of a plaintiff who has no actual interest in the contract upon which it is founded, a claim against the plaintiff shall not be allowed as a counterclaim, but a claim existing against the person beneficially interested shall be allowed as a counterclaim to the extent of the plaintiff's claim, if it might have been so allowed in an action brought by the person beneficially interested.

(d) Cause of action in counterclaim or cross-claim deemed in complaint. A cause of action contained in a counterclaim or a cross-claim shall be treated, as far as practicable,

as if it were contained in a complaint, except that separate process, trial or judgment may not be had unless the court so orders. Where a person not a party is alleged to be liable a summons and answer containing the counterclaim or cross-claim shall be filed, whereupon he or she shall become a defendant. Service upon such a defendant shall be by serving a summons and answer containing the counterclaim or cross-claim. Such defendant shall serve a reply or answer as if he or she were originally a party.

History

Add, L 1962, ch 308, eff Sept 1, 1963; amd, L 1966, ch 182, § 1, eff Sept 1, 1966; L 1994, ch 563, § 5, eff July 26, 1994.

Annotations

Notes

Derivation Notes

Earlier statutes: CPA §§ 264, 266– 269, 271, 424; CCP §§ 501, 502, 505, 506, 521; 2 RS 354, § 18, subds 8, 9; 2 RS 355, §§ 23– 25.

Advisory Committee Notes

After consideration of the problem, the advisory committee decided that adoption of a compulsory counterclaim rule in New York might raise more difficulties that it would solve.

While no attempt to outline all of the considerations will be made, it should be noted that Federal rule 13(a) requires any opposing claim arising “out of the transaction or occurrence that is the subject matter of the . . . claim” to be brought as a counterclaim or be barred. The quoted phrase seems to have created problems that outweight the gain in convenience of such a rule. Moreover, the rules of res judicata and collateral estoppel operate to bar some of these claims in any case. See, generally, Wright, Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading, 38 Minn L Rev 423 (1954).

Many states have adopted the Federal rule; some have made minor variations, such as the express statement in Iowa rule 29 that “final judgment on the merits shall bar such a counterclaim although not pleaded.”

Another class of compulsory counterclaim rules are those following the California pattern, which have essentially the same effect as the Federal rule. See Cal Code Civ Proc § 439 (West 1954).

The Arkansas rule states that “the defendant must set out in his answer as many grounds of . . . counterclaim . . . as he shall have.” Ark Stat Ann § 27-1121 (1947). This appears to state a broader rule, making all possible counterclaims compulsory. See also Ark Stat Ann § 27-1123 (1947).

The New Jersey practice, while based upon the Feneral rules, utilizes a substantially different compulsory counterclaim rule. New Jersey rule 4:13-1 requires that any “liquidated” claim or one “capable of being ascertained by calculation” is a compulsory counterclaim whether or not it arises from the same transaction. Such a rule does not affect negligence cases—the bulk of today’s litigation.

Other jurisdictions have rules tending to induce counterclaims although not compelling them. For example, Indiana’s rule, based on the Federal formula, bars a subsequent action by the defendant “except at his own costs” (Ind Ann Stat § 2-1019 (Burns 1946)), and four states generally prohibit the recovery of costs by the defendant in a subsequent action. Neb Rev Stat § 25-814 (1948); Ohio Rev Code Ann § 2323.40 (Baldwin 1953); Okla Stat Ann tit 12, § 275 (1951); Wyo Comp Stat Ann § 3-1314 (1945).

It is likely that the usual tactical considerations as well as the pressure of res judicata presently leads to counterclaims in many cases without a compulsory counterclaim rule. In negligence cases, the impact of our contributory negligence rule has a further substantial effect in compelling counterclaims. Moreover, the present relationships among insureds and collision and liability insurers often result in one attorney defending the action and another asserting what would be the counterclaim. The committee is also informed that the degree of freedom to utilize

arbitration agreements and negotiation among insurers might be impaired if counterclaims were compulsory.

Subd (a) of this section is substantially the same as CPA § 266. An executor or administrator may represent a decedent on claims that belonged to the latter before he died. This must be distinguished both from claims of the estate where the executor or administrator sues as an individual and from claims belonging personally to the executor or administrator. Similarly, claims that are asserted against an executor or administrator may be of various types. Cf. Thompson v Whitmarsh, 100 NY 35 (1885); Gross v Gross, 56 NYS 219 (Sup Ct 1899). This subdivision is not intended to alter the well-settled rule requiring a counterclaim to be a claim against the plaintiff in the capacity in which he sues.

The phrase “a person whom a defendant represents” has been added to eliminate the necessity of a separate provision such as the former CPA § 268 regarding counterclaims asserted by a representative. The first sentence of former § 269, which covered counterclaims asserted against a representative, is also omitted as unnecessary, since it is covered by the phrase “a person whom a plaintiff represents.” The last sentence of former § 269, its history indicates, meant no more than that leave to issue the execution must have been obtained from the surrogate who issued the letters testamentary or of administration, under Decedent Estate Law, § 151. See Code Civ Proc § 506, note (Throop ed 1880); 2 Rev Stat 355, pt 3, c 6 tit 2, §§ 23, 24 (1828). Since the Decedent Estate Law provision in terms applies to any execution against an executor or administrator in his representative capacity, the last sentence of CPA § 269 is unnecessary.

The first sentence of subd (b) of this section parallels subd (a) of this section, but it had no former counterpart in New York. No restriction on the subject matter of a cross-claim is made. Cf. Fed R Civ P 13(g). There is no provision for the assertion of a cross-claim or counterclaim by a plaintiff in a reply. The second sentence is based upon CPA § 264 as well as Federal rule 13(g).

Subd (c), (d) and (e) of this section are restatements of subd 1, 2 and 3 of CPA § 267, which were derived from the Revised Statutes. They were removed to the Code of Civil Procedure in 1877 and have survived all revisions of New York procedure almost verbatim. The remarkable reluctance of previous codifiers to tamper with those provisions is especially striking in the light of the recommendation of the Board of Statutory Consolidation (under Judge Rodenbeck) in 1915 that they be omitted. Such provisions of the consolidated laws as § 41 of the Personal Property Law and article 6 of the Decedent Estate Law are derived from a common source. See also § 167 of the Restatement of Contracts and the New York annotations. **Subd (c), (d) and (e)** represent only language changes and simplification.

The first sentence of subd (f) of this section is intended to eliminate the necessity for special rules covering the matters formerly treated in CPA §§ 424 and 477 and in part of CPA § 269. Judgments, including the situation formerly covered by CPA § 488 service of process, separate trial and other matters relating to counterclaims and cross-claims are treated in other articles of the new CPLR. The second sentence of subd (f) is a simplification of a provision formerly in CPA § 271. The requirement that summons be served with a copy of answer conforms the provisions to that governing third-party practice. See CPLR § 1007.

Commentary

PRACTICE INSIGHTS:

ASSERTING COUNTERCLAIMS AND JURISDICTIONAL OBJECTIONS

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INSIGHT

A defendant with jurisdictional objections must be careful when asserting counterclaims. If the counterclaim is related to the main claim asserted by the plaintiff, a defendant can assert it and

also contest jurisdiction. Asserting an unrelated counterclaim, however, will result in a waiver of jurisdictional defenses. The prudent attorney for the defendant could avoid asserting the counterclaim, litigate the jurisdictional objections and, if successful, sue the plaintiff in a more favorable jurisdiction.

ANALYSIS

Asserting related counterclaim does not waive defendant's jurisdictional objections.

Generally, in New York, counterclaims are not compulsory. Nevertheless, when sued, defendants frequently assert counterclaims, if available. If there are no jurisdictional issues, a defendant may freely assert those counterclaims. Moreover, if the counterclaim is related to the main claim, the defendant does not waive jurisdictional objections by pleading the counterclaim. A counterclaim is related when such counterclaim could potentially be barred under principles of collateral estoppel. If, for example, an attorney sued a client for unpaid fees, the client could assert a counterclaim for malpractice and also assert a jurisdictional objection.

Asserting unrelated counterclaim will result in waiver of jurisdictional defenses.

Asserting an unrelated counterclaim, however, will result in a waiver of jurisdictional objections, "because defendant is taking affirmative advantage of the court's jurisdiction." *Textile Technology Exchange, Inc. v. Davis*, 81 N.Y.2d 56, 58-59, 595 N.Y.S.2d 729, 730, 611 N.E.2d 768, 769 (1993). *See also USI Sys. AG v. Gliklad*, 176 A.D.3d 555, 111 N.Y.S.3d 270 (1st Dep't 2019), *app. denied*, 35 N.Y.3d 910, 125 N.Y.S.3d 388, 149 N.E.3d 82 (2020) "Defendant's assertion of counterclaims that were unrelated to plaintiff's claim and to his own affirmative defenses effected a waiver of his argument that he was not subject to personal jurisdiction in New York (citations omitted). Accordingly, the requisite jurisdiction was established for purposes of this article 53 proceeding, in which defendant raised substantive challenges to recognition of the Swiss judgment (citation omitted). The facts and issues that underlie the affirmative defenses are wholly distinct from the facts and issues from which the counterclaims arise, in particular, alleged breach of contract, and alleged torts by Kristy AG and its co-director, Nikolai

Makurin, in connection with the transfer of Kristy Oil's business to Kristy AG. Given that the counterclaims do not arise out of the same transaction as alleged in the complaint, and they seek distinct damages, the doctrine of equitable recoupment, codified by CPLR 203(d), is unavailable to defendant (citation omitted).").

As a result, if the counterclaim is unrelated, the better course could be for the defendant not to assert the counterclaim, litigate the jurisdictional objections and, if successful, sue the plaintiff in another jurisdiction, one preferably more advantageous to the defendant. If the jurisdictional challenge is denied, the defendant can then decide whether to move to amend to add the counterclaim or to bring a separate action. *See* CPLR 3025.

INCLUDING A COUNTERCLAIM OR CROSSCLAIM RENDERS ITS PLEADING A COMPLAINT

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INSIGHT

CPLR 3019(d) treats a claim asserted by a defendant by cross-claim or counterclaim as a complaint and its recipient, if a new party served with such a claim together with a summons, as a defendant. Care should be taken that, in so doing, the claimant does not take on any unfortunate consequences of being a plaintiff. In *Rodriguez v. Ford Motor Co.*, 301 A.D.2d 372, 753 N.Y.S.2d 63 (1st Dep't 2003), the owner and apparently the drunken driver would have been insulated from the revelation of the latter's DWI arrest had they not affirmatively claimed against the manufacturer of the vehicle. Typically such waiver of the physician-patient privilege would result from the allegedly drunken driver's doing more than merely defending the case against him by blaming a third party.

ANALYSIS

Claimant asserting cross-claim should avoid taking on unfortunate consequences of being plaintiff.

In *Rodriquez v. Ford Motor Co.*, the owner and driver defendants who denied the driver's intoxication as a proximate cause of an accident, but who cross-claimed against the car manufacturer (which plaintiff had sued on a theory of enhanced injury), thereby waived the statutory protection of CPL § 160.50 (sealing the record of driver's arrest and indictment). These defendants argued that waiver had only previously applied to “plaintiffs” in other cases. According to the First Department, the defendants became plaintiffs, with all attendant disabilities, including waiver of the privileges of confidentiality, when they cross-claimed:

[B]y denying that intoxication caused the driver to lose control of the car, and, by way of cross-claim, seeking to put the blame for the accident on the car manufacturer, [defendants] have affirmatively put the circumstances surrounding the driver's arrest and indictment in issue.

Rodriguez v. Ford Motor Co., 301 A.D.2d 372, 373, 753 N.Y.S.2d 63, 64 (1st Dep't 2003), app. denied, 17 A.D.3d 159, 792 N.Y.S.2d 468 (1st Dep’t 2005). Announcing in their appellate brief that these defendants had discontinued the cross-claim did not alter the outcome.

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I. Under CPLR

A. In General

1. Generally

Since the effective date of provisions of CPLR which permit the assertion of an outlawed counterclaim if it arose from the transactions, occurrences, or series of transactions or occurrences upon which the claim asserted in the complaint depended was September 1, 1963, these provisions were not available to the defendant to permit him to assert a tort counterclaim which arose out of an act on October 6, 1959 and which was barred at the end of three years. Chevron Oil Co. v Atlas Oil Co., 28 A.D.2d 644, 280 N.Y.S.2d 731, 1967 N.Y. App. Div. LEXIS 4077 (N.Y. App. Div. 4th Dep't 1967).

The affect of CPLR 3019, subd a, is to eliminate all historic limitations on setoffs and recoupments. Getlan v Hofstra University, 41 A.D.2d 830, 342 N.Y.S.2d 44, 1973 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 2d Dep't), app. dismissed, 33 N.Y.2d 646, 348 N.Y.S.2d 554, 303 N.E.2d 72, 1973 N.Y. LEXIS 1066 (N.Y. 1973).

Laches will seldom be a defense to a claim for contribution; apportionment may be made even in absence of a request therefor in pleading, so long as proof at trial is complete and notice and opportunity to prepare has been given. Howard v Chalk, 58 A.D.2d 526, 395 N.Y.S.2d 192, 1977 N.Y. App. Div. LEXIS 12485 (N.Y. App. Div. 1st Dep't 1977).

Where defendant waited until 4 years after action commenced and 6 months after change in law to permit apportionment along the lines of comparative negligence and until jury had been selected to file notice of vouching in, such defendant was guilty of laches precluding plaintiff from sufficient time to reasonably prepare a defense, and such procedure not permitted in light of fact that defendant could commence further legal proceedings in event deceased plaintiff was held to be contributorily negligent. Henriquez v Mission Motor Lines, Inc., 72 Misc. 2d 782, 339 N.Y.S.2d 478, 1972 N.Y. Misc. LEXIS 1461 (N.Y. Sup. Ct. 1972).

Statutes relating to kinds of pleadings permitted and pertaining to counterclaims and cross claims did not confer jurisdiction on Supreme Court, Special Term, and did not relieve town of binding effect of determination made by Public Service Commission in adjudicating claim by town and its lighting district against telephone utility, which subsequently sought to have rental charges imposed against town and district after they installed lighting equipment on utility's poles, for back damages due to discrimination in granting municipal discounts. New York Tel. Co. v North Hempstead, 86 Misc. 2d 487, 385 N.Y.S.2d 436, 1975 N.Y. Misc. LEXIS 3362 (N.Y. Sup. Ct. 1975), aff'd, 52 A.D.2d 934, 385 N.Y.S.2d 505, 1976 N.Y. App. Div. LEXIS 12804 (N.Y. App. Div. 2d Dep't 1976).

Unlike a setoff, recoupment at common law was required to arise out of the same set of transactions as the claim. Unlike a counterclaim recoupment does not seek damages in excess of sums already possessed by the defendant or in excess of those demanded by the complaint; it is manifestly pro tanto a defensive use of a cause of action possessed by the defendant. The right to plead recoupment as a defense remains intact, notwithstanding the subsequent absorption of the common-law doctrines of setoff and recoupment by the present statutory definition of counterclaim. Constantino v State, 99 Misc. 2d 362, 415 N.Y.S.2d 966, 1979 N.Y. Misc. LEXIS 2291 (N.Y. Ct. Cl. 1979).

CPLR 205 (subd [a]) which provides that, following the dismissal of an action because of a correctable defect, "the plaintiff * * * may commence a new action upon the same transaction * * * within six months after the termination", applies to a defendant's counterclaims (CPLR 3019,

subd [d]) and is applicable to counterclaims which were dismissed in a Federal action for lack of subject matter jurisdiction; for purposes of computing the six-month period following the dismissal of the counterclaims in the Federal action, the applicable termination date is the date of determination of the appeal rather than the date of the trial court's determination which date should be utilized in cases which deal with delaying tactics including the failure to prosecute an appeal. Gross v Newburger, Loeb & Co., 103 Misc. 2d 417, 426 N.Y.S.2d 667, 1980 N.Y. Misc. LEXIS 2133 (N.Y. Sup. Ct. 1980), modified, 85 A.D.2d 709, 445 N.Y.S.2d 830, 1981 N.Y. App. Div. LEXIS 16536 (N.Y. App. Div. 2d Dep't 1981).

Court did not have jurisdiction over state's counterclaim, and was powerless to enter judgment on counterclaim, where state mistakenly served its amended answer and counterclaim on its own former attorney rather than attorney for claimants, and service was never made on attorney for claim ants; judgment for state on counterclaim would be vacated despite state's contentions that, since its counsel referred to counterclaim during trial, claimants were not taken by surprise and suffered no prejudice from failure to serve counterclaim. Gildea v State, 133 Misc. 2d 269, 507 N.Y.S.2d 127, 1986 N.Y. Misc. LEXIS 2862 (N.Y. Ct. Cl. 1986).

2. Third-party practice

Only defendants may implead, counterclaim or cross-claim; there is no statutory authority which permits a plaintiff to bring a third-party action. Burgundy Basin Inn, Ltd. v Watkins Glen Grand Prix Corp., 51 A.D.2d 140, 379 N.Y.S.2d 873, 1976 N.Y. App. Div. LEXIS 11065 (N.Y. App. Div. 4th Dep't 1976).

Intervention by Motor Vehicle Accident Indemnification Corporation in action growing out of automobile collision was improper where such intervention was not preceded by motion for leave to amend, and MVAIC therefore could not properly assert cross claim in its own behalf. Wynn v Wynn, 51 A.D.2d 868, 380 N.Y.S.2d 159, 1976 N.Y. App. Div. LEXIS 11486 (N.Y. App. Div. 4th Dep't 1976).

In action in which tenant sought to recover against landlord and oil company retained by landlord to provide service for oil burner on theory that fire damage to tenant's retail clothing store was caused by negligent maintenance, in which company sued its maintenance contractor as a third-party defendant and in which contractor cross-claimed against landlord for apportionment, dismissal of contractor's cross claim against landlord was improper, in view of possibility that, regardless of initial causation, the damage had been aggravated by presence of rubbish. J. Bellini, Inc. v Chatham Associates, Inc., 58 A.D.2d 549, 396 N.Y.S.2d 14, 1977 N.Y. App. Div. LEXIS 12555 (N.Y. App. Div. 1st Dep't 1977).

As part of contractor's action against property owner, seeking damages for delay, contractor could not maintain causes of action for indemnity from owner for damages it would allegedly be obligated to pay to 3 subcontractors where contractor had not yet paid claims of its subcontractors and thus action for indemnification was premature; although CPLR establishes exception to prematurity rule by allowing third-party actions in certain circumstances before such actions are technically "ripe," exception did not apply where contractor had never admitted its liability to 2 subcontractors, did not assert claim "on behalf of" third subcontractor, and had not impleaded owner in third subcontractor's action against it. Mars Associates, Inc. v New York City Educational Constr. Fund, 126 A.D.2d 178, 513 N.Y.S.2d 125, 1987 N.Y. App. Div. LEXIS 41142 (N.Y. App. Div. 1st Dep't), app. dismissed, 70 N.Y.2d 747, 519 N.Y.S.2d 1033, 514 N.E.2d 391, 1987 N.Y. LEXIS 18620 (N.Y. 1987).

In action to recover for lead paint injuries sustained by plaintiffs' infant son, Appellate Division affirmed trial court's unappealed dismissal of action against landlords and, upon reversing trial court's erroneous dismissal of defendant county's cross claim against landlords, converted reinstated cross claim to third-party complaint; where landlords had been parties since commencement of action, no purpose would be served by compelling county to implead them formally as third-party defendants. Mc Cants v Thompson, 285 A.D.2d 967, 727 N.Y.S.2d 676, 2001 N.Y. App. Div. LEXIS 6964 (N.Y. App. Div. 4th Dep't 2001).

Where CLS Labor § 240 was gravamen of action brought by employee of New Jersey corporation who had been injured in New York construction accident, and parties did not share common domicile, law of New York applied and allowed New York defendants (owner and lessor of work site, general contractor and subcontractor) to counterclaim and cross-claim against worker's New Jersey employer for contribution, even though such actions would be barred in New Jersey. Augello v 20166 Tenants Corp., 224 A.D.2d 73, 648 N.Y.S.2d 101, 1996 N.Y. App. Div. LEXIS 10358 (N.Y. App. Div. 1st Dep't 1996).

Where the person not a party is sought to be sued as one liable to the named defendant for indemnification, proper impleader requires a third-party suit under CPLR 1007. Lynch v Flame Fuel Oil Corp., 53 Misc. 2d 535, 278 N.Y.S.2d 940, 1967 N.Y. Misc. LEXIS 1753 (N.Y. Sup. Ct. 1967).

Sections 3011 and 3019 CPLR limit counterclaims to defendants and a third party cannot be interpleaded except as a co-defendant. To bring in a third-party plaintiff the issuance of a summons, process or court mandate, so that the court may gain jurisdiction, is required and § 3019 indicates that jurisdiction must be had in personam before a court can adjudicate in such a proceeding, even though it might have jurisdiction in rem. Schultz v Wilson, 59 Misc. 2d 14, 297 N.Y.S.2d 478, 1969 N.Y. Misc. LEXIS 1766 (N.Y. City Ct. 1969).

A party who was brought in by the original defendant by way of counterclaim, cannot himself counterclaim against the original plaintiff or the defendant. Schultz v Wilson, 59 Misc. 2d 14, 297 N.Y.S.2d 478, 1969 N.Y. Misc. LEXIS 1766 (N.Y. City Ct. 1969).

Under CPLR § 3017, subd a, even though defendant had not requested such relief, a court permitted the amendment of defendant's counterclaim under CPLR § 3025, subd c to conform the pleadings to the evidence and to state a cause of action under CPLR § 3019, subd c against a non-party for the cost of correcting defects in defendant's newly completed home, where said non-party, a home builder, had actively participated in presenting evidence on defendant's original counterclaim against builder's escrow agent for breach of an escrow agreement, which

evidence went to the cost of correcting the aforementioned defects. Helman v Dixon, 71 Misc. 2d 1057, 338 N.Y.S.2d 139, 1972 N.Y. Misc. LEXIS 1377 (N.Y. Civ. Ct. 1972).

In action brought by executrix for conscious pain and suffering and wrongful death of decedent sustained in automobile accident involving vehicle owned by executrix and operated by decedent and vehicle operated by defendant, proper procedure by which defendant could interplead executrix as a purported contributing tort-feasor was third-party complaint rather than counterclaim. Grierson v Wagar, 78 Misc. 2d 479, 357 N.Y.S.2d 351, 1974 N.Y. Misc. LEXIS 1428 (N.Y. Sup. Ct. 1974).

Naming persons in plaintiff's summons did not make them parties, but personal service of summons, complaint and copy of answer containing cross claim was compliance with statute and was analogous to third-party complaint insofar as third persons were concerned, and they became defendants to extent of cross claims against them. Rubin v A. C. Kluger & Co., 86 Misc. 2d 1014, 383 N.Y.S.2d 828, 1976 N.Y. Misc. LEXIS 2567 (N.Y. Civ. Ct. 1976).

Third party practice under CPLR § 1007 is primarily a tool for the economical resolution of interrelated lawsuits and does not require that liability be rooted in indemnity or contribution; accordingly, in a stakeholder action brought by a mortgagor to determine the proper recipient of the mortgage payments, in which the creditors of the mortgagee and the assignee of the mortgage, but not the mortgagee itself, were named as defendants, a creditor could properly interpose a cross claim against the mortgagee seeking to have the mortgagee's transfer of the mortgage declared void as being fraudulent, and could thereby avoid the necessity for the commencement of an independent action against the mortgagee followed by a motion for consolidation, since a determination of the validity of the mortgagee's transfer was necessary in order to make the ultimate determination as to which party was entitled to receive the mortgage payments; as a matter of practice, the creditor would be permitted to join the mortgagee as a party through service, pursuant to CPLR § 3019(d), of a copy of the creditor's answer containing its cross claim setting forth the alleged basis of the mortgagee's liability to the creditor.

Schulenburg v Donald Zucker Co., 119 Misc. 2d 977, 464 N.Y.S.2d 923, 1983 N.Y. Misc. LEXIS 3630 (N.Y. Sup. Ct. 1983).

B. Cross-Claims

3. Generally

Where customer fell over stones on parking lot, deposited by contractor who had widened abutting highway, and sued both lot owner and contractor, lot owner who was held liable only on basis of constructive notice of a dangerous condition was not in pari delicto with the contractor, since it was passively negligent, and therefore was entitled to judgment on its cross-claim for indemnity against contractor. Jackson v Associated Dry Goods Corp., 13 N.Y.2d 112, 242 N.Y.S.2d 210, 192 N.E.2d 167, 1963 N.Y. LEXIS 1030 (N.Y. 1963).

Cross-claim which fails to allege any facts establishing the right to indemnity is insufficient. La France Carpets, Inc. v United States Rubber Co., 19 A.D.2d 812, 243 N.Y.S.2d 540, 1963 N.Y. App. Div. LEXIS 3127 (N.Y. App. Div. 1st Dep't 1963).

Under CPLR a cross-claim may be any cause of action, and need not be dependent on claim of plaintiff. La France Carpets, Inc. v United States Rubber Co., 19 A.D.2d 812, 243 N.Y.S.2d 540, 1963 N.Y. App. Div. LEXIS 3127 (N.Y. App. Div. 1st Dep't 1963).

Under CPLR, where owner of property sustains windstorm damage and sues his insurance company on his windstorm policy, the architect and general contractor for their negligence, and the designers and fabricators of the roof of the building for their negligence, the insurance company can cross claim against the other defendants for reimbursement if judgment is rendered against it. 50 New Walden, Inc. v Federal Ins. Co., 22 A.D.2d 4, 253 N.Y.S.2d 383, 1964 N.Y. App. Div. LEXIS 3003 (N.Y. App. Div. 4th Dep't 1964).

Where the defendant fire insurers might be held liable for the face amount of policies issued to the plaintiff because of the insurance agency’s unauthorized and wrongful acts in improperly

advising plaintiffs of their duties relative to monthly reports to be filed under reporting form policies so that the actual value of all property insured under the policy was not reported, the insurers' cross complaint against the agency stated a valid cause of action. Dunn v Commercial Union Ins. Co., 27 A.D.2d 240, 277 N.Y.S.2d 940, 1967 N.Y. App. Div. LEXIS 4629 (N.Y. App. Div. 3d Dep't 1967).

An order denying defendant-appellant's motion to compel defendant-respondent to accept an answer containing a cross-complaint was reversed, where it appeared the cross-complaint had originally been asserted in defendant-appellant's answer served on the plaintiff in 1963, since the delay in serving it upon the respondent until 1966 was not prejudicial because appellant could bring the suit against respondent on the theory alleged in the cross-complaint and appellant's cause of action would not accrue until liability against it was fixed. Manganaro v Estwing Mfg. Co., 27 A.D.2d 711, 276 N.Y.S.2d 891, 1967 N.Y. App. Div. LEXIS 4939 (N.Y. App. Div. 1st Dep't 1967).

This section specifically provides that a cross claim may be asserted against one who "is or may be liable to the cross claimant" and the fact that the cross claim involved a contract different from that upon which suit was brought, will not defeat the cross claim. A & R Constr. Co. v New York State Electric & Gas Corp., 27 A.D.2d 899, 278 N.Y.S.2d 165, 1967 N.Y. App. Div. LEXIS 4645 (N.Y. App. Div. 3d Dep't 1967).

In determining the sufficiency of a cross-complainant's action it must be noted that subsection b of this section contains none of the restrictions as to subject matter present in its predecessor under the Civil Practice Act § 264. It is proper to allege in a cross-claim a cause of action the existence of which depends on the outcome of the main action, and an indemnity cross-claim is available even against the contention that it is premature. Vander Veer v Tyrrell, 29 A.D.2d 255, 287 N.Y.S.2d 228, 1968 N.Y. App. Div. LEXIS 4592 (N.Y. App. Div. 3d Dep't 1968).

Statute specifying whether a defense or counterclaim is time barred applies as well to cross claim. Seligson v Chase Manhattan Bank, Nat'l Asso., 50 A.D.2d 206, 376 N.Y.S.2d 899, 1975 N.Y. App. Div. LEXIS 11469 (N.Y. App. Div. 1st Dep't 1975).

Prior litigation, which did not establish any right of football stadium lessee and individual except right to object to erection of billboard in stadium parking lot, and in which court was not called upon to decide whether lessee and individual conspired to interfere with corporation's contract rights to name stadium and whether any damages were sustained by reason of alleged conspiracy, did not bar corporation's cross claim seeking damages for interference with contract rights by res judicata or collateral estoppel. County of Erie v Buffalo Bills Div. of Highwood Service, Inc., 54 A.D.2d 1121, 388 N.Y.S.2d 793, 1976 N.Y. App. Div. LEXIS 15104 (N.Y. App. Div. 4th Dep't 1976).

A trial court's denial of a motion by defendant city to amend its answer by asserting a cross claim against defendant railroad after the court, over its objection, had granted plaintiffs' motion for a voluntary discontinuance of their action against the railroad does not require a new trial since the interposition of a cross claim would not have affected plaintiffs' rights against the city and the city may institute a separate action for contribution against the railroad. Leone v Utica, 66 A.D.2d 463, 414 N.Y.S.2d 412, 1979 N.Y. App. Div. LEXIS 10039 (N.Y. App. Div. 4th Dep't 1979), aff'd, 49 N.Y.2d 811, 426 N.Y.S.2d 980, 403 N.E.2d 964, 1980 N.Y. LEXIS 2925 (N.Y. 1980).

In an action brought by a shopper who was injured when she tripped over a protrusion in a sidewalk at a shopping center, the owner of the shopping center was not entitled to indemnification from a tenant absent a specific provision in the lease permitting indemnification, where the jury found both the owner and the tenant liable for negligence. Carman v Caldor, Inc., 87 A.D.2d 580, 447 N.Y.S.2d 764, 1982 N.Y. App. Div. LEXIS 15848 (N.Y. App. Div. 2d Dep't 1982).

In premises liability action against owners and lessee of commercial property, owners' motion for summary judgment against lessee on owners' cross claim for indemnity was not rendered premature by fact that injured plaintiff had not yet proved her case. La Vack v National Shoes, Inc., 124 A.D.2d 352, 507 N.Y.S.2d 293, 1986 N.Y. App. Div. LEXIS 61376 (N.Y. App. Div. 3d Dep't 1986).

Automobile owner's failure to cross-claim against lessee and driver of car in prior action for personal injuries did not constitute waiver of its right to bring indemnification claim against lessee and driver after paying settlement to injured party, since owner's right to indemnification did not accrue until it suffered loss by paying settlement; furthermore, parties' insurance carriers (real parties in interest) had agreed in writing that indemnification action could be brought after settlement. Denton Leasing Corp. v Breezy Point Surf Club, Inc., 133 A.D.2d 95, 518 N.Y.S.2d 634, 1987 N.Y. App. Div. LEXIS 49623 (N.Y. App. Div. 2d Dep't 1987).

In action by landowners against public utility, general contractor and blasting company for damages suffered as result of blasting, general contractor had standing to apply for summary judgment on its cross claim against blasting company, even though default judgment had been rendered against general contractor and severance of action against general contractor had been granted, since subsequent decisions continued to treat general contractor as party to action after severance and, even if that had not been case, cross claim of general contractor could be viewed as third party complaint. Guido v New York Tel. Co., 145 A.D.2d 203, 538 N.Y.S.2d 87, 1989 N.Y. App. Div. LEXIS 2001 (N.Y. App. Div. 3d Dep't 1989).

In personal injury action against estate of allegedly intoxicated underage driver and other defendants, town's cross claims for contribution against defendant taverns under CLS CPLR § 1401, based on alleged violations of Dram Shop Act, were not dependent on theory of liability asserted by plaintiffs, and thus plaintiffs' failure to appeal from dismissal of their Dram Shop causes of action against taverns did not preclude town from seeking reinstatement of its cross claims for contribution against taverns. Johnson v Plotkin, 172 A.D.2d 88, 577 N.Y.S.2d 329, 1991 N.Y. App. Div. LEXIS 15998 (N.Y. App. Div. 3d Dep't 1991), app. dismissed, 79 N.Y.2d 977, 583 N.Y.S.2d 195, 592 N.E.2d 803, 1992 N.Y. LEXIS 1008 (N.Y. 1992).

Trial court should have granted defendant's motion for judgment on its common-law indemnification cross claim against third party defendant because, contrary to the trial court's conclusion, defendant could properly bring the cross claim against third party defendant

pursuant to N.Y. C.P.L.R 3019(b). Hernandez v Ten Ten Co., 102 A.D.3d 431, 959 N.Y.S.2d 128, 2013 N.Y. App. Div. LEXIS 29 (N.Y. App. Div. 1st Dep't 2013).

Where the essence of the entire litigation is an indebtedness of the third-party defendant to the plaintiff, and a cross claim is properly asserted by the defendant under subd (b) of CPLR § 3019, the defendant is entitled under CPLR § 6001 to an attachment against the third-party defendant, and even though the defendant's third-party claim is contingent on the plaintiff's action, the defendant may hold its attachment when it would be entitled to a money judgment under CPLR § 6201 if it loses to the plaintiff. Cohen v Carl M. Loeb, Rhoades & Co., 48 Misc. 2d 159, 264 N.Y.S.2d 463, 1965 N.Y. Misc. LEXIS 1440 (N.Y. Sup. Ct. 1965).

The defendant's motion for summary judgment upon its cross claim for personal judgment for goods sold and delivered was granted in an action to foreclose a public improvement lien, since the policy of subd (b) of this section favoring cross claims should not be frustrated, and the Lien Law permitted such a judgment by preventing disruption of priority by providing that if defendant was later awarded judgment foreclosing its lien any payment made on account of either judgment shall be credited on the other. Vogel Bros. Contracting Corp. v Oyster Bay, 50 Misc. 2d 401, 270 N.Y.S.2d 431, 1966 N.Y. Misc. LEXIS 1936 (N.Y. Sup. Ct. 1966).

Although it was possible under prior law, it is not possible under subdivision b of this section for the plaintiff to assert a cross claim against a defendant in reply to a counterclaim asserted by the defendant. Chambland v Brewer, 51 Misc. 2d 231, 272 N.Y.S.2d 903, 1966 N.Y. Misc. LEXIS 1673 (N.Y. Sup. Ct. 1966).

Service by mail of an answer containing a cross claim is a nullity unless plaintiff has already effectuated personal service. Meckley v Hertz Corp., 88 Misc. 2d 605, 388 N.Y.S.2d 555, 1976 N.Y. Misc. LEXIS 2711 (N.Y. Civ. Ct. 1976).

The fact that summary judgment has been granted defendant hospital against plaintiff in a malpractice action by reason of a prior order of preclusion entered in favor of the hospital against plaintiff does not abridge the right of defendant physician to assert a claim for

contribution against the hospital (CPLR 1401 et seq.). However, since a cross claim can only be asserted against another defendant (CPLR 3019, subd [b]) and the hospital is no longer a defendant, defendant physician may not assert a cross claim against the hospital and rely on plaintiff's complaint and proof under that complaint to establish his right to relief but must instead serve a third-party complaint, alleging facts establishing a cause of action, thereby entitling the hospital to particulars of the claim, disclosure and all other procedural safeguards afforded a defendant in the main action. Figueroa v Kahn, 101 Misc. 2d 821, 422 N.Y.S.2d 274, 1979 N.Y. Misc. LEXIS 2770 (N.Y. Sup. Ct. 1979).

Prior court approval is required in order to properly plead cross claim in summary—or any other type of special—proceeding. Balaban v Phillips, 138 Misc. 2d 990, 526 N.Y.S.2d 347, 1988 N.Y. Misc. LEXIS 116 (N.Y. Civ. Ct. 1988).

In action by plaintiff who was injured when car in which she was riding collided with car owned and operated by defendant, defendant could not utilize CLS CPLR § 3019(d) to interpose cross claims for indemnification or contribution against owner and driver of vehicle in which plaintiff was riding, as they were not parties to action and nonparty may not be added on cross claim unless claim lies in some measure against someone already named and joined as party. Fleck v Goehrig, 167 Misc. 2d 208, 638 N.Y.S.2d 864, 1995 N.Y. Misc. LEXIS 679 (N.Y. Sup. Ct. 1995).

Unpublished decision: School district's breach of fiduciary duty claim against school board members was not a cross claim, where a counterclaim to deny coverage was asserted by an insurer against the school district and the board members, but rather was asserted directly in the school district's complaint against the board members pursuant to N.Y. C.P.L.R 3019(b). Barkan v N.Y. Sch. Ins. Reciprocal, 237 N.Y.L.J. 75, 2007 N.Y. Misc. LEXIS 2818 (N.Y. Sup. Ct. Mar. 22, 2007), aff'd in part, modified, app. dismissed in part, 65 A.D.3d 1061, 886 N.Y.S.2d 414, 2009 N.Y. App. Div. LEXIS 6433 (N.Y. App. Div. 2d Dep't 2009).

Trial court properly granted an individual a default judgment on a cross claim against a financial company pursuant to N.Y. C.P.L.R. 3019(d); the matter was controlled by N.Y. C.P.L.R. 3019(d), which provided that the financial company was required to serve a reply or answer, and

N.Y. C.P.L.R. 3011 did not relieve the financial company of the requirement that it file a reply or answer to the cross claim. Franzone v Quinn, 300 A.D.2d 857, 750 N.Y.S.2d 899, 2002 N.Y. App. Div. LEXIS 12438 (N.Y. App. Div. 3d Dep't 2002).

Although a car's driver and owner were defendants in a pedestrian's personal injury action, the appellate court, citing N.Y. C.P.L.R. 3019(d), found that, for purposes of waiving the protection of N.Y. Crim. Proc. Law § 160.50, they effectively made themselves "plaintiffs" by asserting a cross claim against the car's manufacturer. Rodriguez v Ford Motor Co., 301 A.D.2d 372, 753 N.Y.S.2d 63, 2003 N.Y. App. Div. LEXIS 64 (N.Y. App. Div. 1st Dep't 2003).

4. Dismissal and sufficiency

Sufficiency of cross-complaint should await determination of factual issues upon the trial. Straub v Livonia, 22 A.D.2d 749, 253 N.Y.S.2d 717, 1964 N.Y. App. Div. LEXIS 3034 (N.Y. App. Div. 4th Dep't 1964).

A court is reluctant to dismiss a cross claim since the dismissal of a cross claim would necessarily be without prejudice and hence require another action to determine liability when all the parties have already appeared together and presumably all irrelevant issues have been presented and aired. A cross claim which asserts a cause of action based on the active—passive negligent dichotomy and/or breach of contract and/or breach of warranty raises questions of substantive law and substantial factual questions, and should not be dismissed. Since the cross complaint must state a cause of action, if the original complaint can only be construed as charging the cross complainant with active negligence, the cross complaint must be dismissed. However if the complaint can be read to disclose any theory upon which the cross complainant would be entitled to indemnity it should be upheld. Vander Veer v Tyrrell, 29 A.D.2d 255, 287 N.Y.S.2d 228, 1968 N.Y. App. Div. LEXIS 4592 (N.Y. App. Div. 3d Dep't 1968).

Under evidence that customer had specifically called automobile dealership's attention to defect in seat back lock, that in process of making repairs dealership tightened lock, and that excessive tightening of lock could have stripped bolt, making lock defective and possibly causing

customer’s injuries, trial court was not justified in dismissing automobile manufacturer’s cross claim against such dealership. Howell v Bennett Buick, Inc., 52 A.D.2d 590, 382 N.Y.S.2d 338, 1976 N.Y. App. Div. LEXIS 12193 (N.Y. App. Div. 2d Dep't 1976).

In an action seeking damages, incurred when a subcontractor was required to replace pipe already installed, against the supplier and the architects, the trial court improperly dismissed the cross-claim of the supplier seeking contribution from the architects, notwithstanding that there was no privity of contract between those parties; nor was it essential to the cross-claim that the architect owe the subcontractor a duty which could subject it to liability, in that the cross-claim for an apportioned share of the damages owed to plaintiff could be founded on a breach of duty owed directly from the architects to the supplier. Haseley Trucking Co. v Great Lakes Pipe Co., 101 A.D.2d 1019, 476 N.Y.S.2d 702, 1984 N.Y. App. Div. LEXIS 18755 (N.Y. App. Div. 4th Dep't 1984).

In an action to foreclose on four mortgages in which several allegations which formed the bases for defendants’ counterclaims, cross claims and independent claims were also offered as affirmative defenses, the trial court, although it properly concluded that the claims were without merit and dismissed them, also improperly dismissed the affirmative defenses; the motions to dismiss were directed against the claims asserted by defendants, and there was no motion by plaintiff, pursuant to CPLR § 3211(b) to dismiss any affirmative defenses; a motion to dismiss a counterclaim does not search the record to allow a court to dismiss defenses. Key Bank of Northern New York, N. A. v Lake Placid Co., 103 A.D.2d 19, 479 N.Y.S.2d 862, 1984 N.Y. App. Div. LEXIS 18845 (N.Y. App. Div. 3d Dep't), app. dismissed, 64 N.Y.2d 644, 485 N.Y.S.2d 49, 474 N.E.2d 257, 1984 N.Y. LEXIS 4969 (N.Y. 1984).

In a negligence action against a contractor, the trial court properly dismissed defendant’s cross claim against its subcontractor based on the absence of any proof that the subcontractor’s personnel, or the laborers provided by it, had been involved with the alleged negligent condition, where the contract between defendant contractor and its subcontractor provided for indemnification by the subcontractor to the contractor only when an injury was caused in whole

or in part by the subcontractor's own acts or omissions. Sabatini v General Electric Co., 104 A.D.2d 581, 479 N.Y.S.2d 366, 1984 N.Y. App. Div. LEXIS 20028 (N.Y. App. Div. 2d Dep't 1984).

Court properly denied general contractor's cross motion for conditional summary judgment on its cross claim for indemnification from subcontractor where fact issue existed as to extent of respective responsibilities of general contractor and subcontractor for supervision and control of injured worker and of worksite. Farina v Plaza Constr. Co., 238 A.D.2d 158, 655 N.Y.S.2d 952, 1997 N.Y. App. Div. LEXIS 3199 (N.Y. App. Div. 1st Dep't 1997).

Cross claims against abstract company for indemnification were properly dismissed on summary judgment motion, although not specifically requested, where dismissal was plainly warranted in light of finding that company had breached no duty in connection with recording mortgage, and cross claimant had ample notice that issue on which his claims turned was to be decided. Lubov v Berman, 260 A.D.2d 236, 687 N.Y.S.2d 628, 1999 N.Y. App. Div. LEXIS 4001 (N.Y. App. Div. 1st Dep't 1999).

Where court had, in effect, directed dismissal of complaint as against particular defendant, it should also have dismissed cross claims against that defendant. Hoenig v Park Royal Owners, Inc., 260 A.D.2d 250, 688 N.Y.S.2d 531, 1999 N.Y. App. Div. LEXIS 4166 (N.Y. App. Div. 1st Dep't 1999).

C. Counterclaims

5. Generally

The present counterclaim is more comprehensive than the ancient pleas of set-off and recoupment and now includes them. Keon v Saxton & Co., 257 N.Y. 412, 178 N.E. 679, 257 N.Y. (N.Y.S.) 412, 1931 N.Y. LEXIS 873 (N.Y. 1931), reh'g denied, 258 N.Y. 578, 180 N.E. 340, 258 N.Y. (N.Y.S.) 578, 1932 N.Y. LEXIS 1242 (N.Y. 1932).

Seller’s counterclaim for fraud in inducement, alleging that buyer had no intention of abiding by geographical sales restrictions orally agreed to, alleged representation of present fact, not of future intent, which was collateral to contract and was inducement for contract, and thus such counterclaim was not duplicative of seller’s breach of contract claim nor was it barred by contract clause stating that contract contained all terms and conditions relating to agreement. Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 68 N.Y.2d 954, 510 N.Y.S.2d 88, 502 N.E.2d 1003, 1986 N.Y. LEXIS 20893 (N.Y. 1986).

Counterclaim seeking affirmative relief under the federal anti-trust laws was properly dismissed, but it was error to dismiss along with it counterclaims seeking relief under state law which alleged, inter alia, breach of contract, commingling of funds, conversion, and unjust enrichment. National Telefilm Associates, Inc. v Pamandia Productions, Inc., 42 A.D.2d 514, 344 N.Y.S.2d 418, 1973 N.Y. App. Div. LEXIS 3793 (N.Y. App. Div. 1st Dep't 1973).

Motorist by filing claim against state in Court of Claims for damages arising out of automobile accident waived right to jury trial of state’s counterclaim against motorist for indemnity for death of passenger. Valentino v State, 44 A.D.2d 338, 355 N.Y.S.2d 212, 1974 N.Y. App. Div. LEXIS 5047 (N.Y. App. Div. 3d Dep't 1974).

Trial court erred in failing to dismiss agent’s counter-claim to action filed by liquidator of insurance company where liquidation order contained provisions enjoining counterclaims against company. Schenck v Coordinated Coverage Corp., 50 A.D.2d 50, 376 N.Y.S.2d 131, 1975 N.Y. App. Div. LEXIS 11435 (N.Y. App. Div. 1st Dep't 1975).

Defendant-intervenor’s counterclaim for judgment declaring plaintiff to be alter ego of trust was not misuse of such relief and would not subject plaintiff to inequitable treatment, although plaintiff had not been party to prior action on note, where defendant-intervenor asserted that confession of judgment by trustee (plaintiff’s wife) in plaintiff’s favor was fraudulent conveyance intended to render its judgment on note unenforceable, and that need to join plaintiff as party to action on note had not become apparent until after trial. Posner v S. Paul Posner 1976

Irrevocable Family Trust, 260 A.D.2d 268, 688 N.Y.S.2d 548, 1999 N.Y. App. Div. LEXIS 4156 (N.Y. App. Div. 1st Dep't 1999).

In an action by a county employee for defamation and assault, wherein defendant without the consent of the court filed a counterclaim against the county for trespass and assault to which the county did not respond, the trial court improperly conditioned the entry of a default judgment against the county on the county's failure to serve a reply to the counterclaim within 20 days of the court's order, where under CPLR § 3019 defendant had the right to file a counterclaim against any person alleged to be liable and thus needed no court permission, where the county's reason for its failure to reply amounted to the unacceptable excuse of law office failure, and where the proper remedy to challenge an improper counterclaim was a motion to dismiss. Lane v Lizza, 91 A.D.2d 989, 457 N.Y.S.2d 848, 1983 N.Y. App. Div. LEXIS 16293 (N.Y. App. Div. 2d Dep't 1983).

In an action on a written contract, which provided that plaintiff would loan money to defendant to enable defendant to transfer his residence to Dallas, Texas as part of a job transfer and that defendant would repay the loan immediately if his job were terminated for any reason, the trial court erred in granting defendant's motion to amend his answer to assert as an affirmative defense that plaintiff had breached an oral agreement that he would be transferred to Tyler, Texas within one year of his transfer to Dallas as the alleged oral agreement could not be treated as a condition to the written agreement. Instead, the defendant's claim should have been treated as a counterclaim since it would not vary the terms of the written agreement and would not be barred by Gen Oblig Law § 5-701, as it could be performed within one year of its making. Liberty Mut. Ins. Co. v Abbott, 107 A.D.2d 962, 484 N.Y.S.2d 375, 1985 N.Y. App. Div. LEXIS 42523 (N.Y. App. Div. 3d Dep't 1985).

In contract action seeking payment of notes securing sale of cable television businesses, sellers were entitled to dismissal of buyer's affirmative defense alleging that buyer was permitted by agreement to offset half of value of note owed sellers, due to failure of cable system to meet certain cashflow tests, where agreement called for final determination of offset to be made in

arbitration and buyer failed to bring matter to arbitration when it first became aware that cashflow tests had not been met; however, since this affirmative defense should have been pleaded as counterclaim, buyer was entitled to replead defense as counterclaim. Kahn v New York Times Co., 122 A.D.2d 655, 503 N.Y.S.2d 561, 1986 N.Y. App. Div. LEXIS 59247 (N.Y. App. Div. 1st Dep't 1986).

In personal injury action stemming from automobile accident, attorney separately representing plaintiff on counterclaim asserted against him by defendants should have been permitted to participate in trial. Pizzolo v Bove, 123 A.D.2d 425, 506 N.Y.S.2d 729, 1986 N.Y. App. Div. LEXIS 60183 (N.Y. App. Div. 2d Dep't 1986).

Special Term erred in granting defendant’s motion for default judgment on 2 counterclaims and in denying plaintiff’s cross motion for leave to reply to those counterclaims, where counterclaims were part of defendant’s answer and were denominated “affirmative defense and counterclaim,” delay caused by failure to reply was not lengthy, defendant did not show he was prejudiced by delay, and delay was not willful, but was product of mistaken legal judgment in that plaintiff’s counsel thought hybrid labeling made reply unnecessary. Bradley v Rogers, 125 A.D.2d 782, 509 N.Y.S.2d 208, 1986 N.Y. App. Div. LEXIS 62999 (N.Y. App. Div. 3d Dep't 1986).

In action to foreclose mechanic’s lien, subcontractor was entitled to summary judgment dismissing contractor’s counterclaim for unsatisfactory performance, even though counterclaim was seeking damages in excess of amount sought under lien, since counterclaim was asserted with respect to 2 other contracts on independent and separate projects. P. S. Griswold Co. v Cortland Glass Co., 138 A.D.2d 869, 525 N.Y.S.2d 973, 1988 N.Y. App. Div. LEXIS 3164 (N.Y. App. Div. 3d Dep't 1988).

In cases where plaintiff’s action against defendant is dismissed on merits, court may still adjudicate counterclaims against plaintiff. Ballen v Aero Mayflower Transit Co., 144 A.D.2d 407, 533 N.Y.S.2d 1007, 1988 N.Y. App. Div. LEXIS 11780 (N.Y. App. Div. 2d Dep't 1988).

Counterclaims were improper insofar as they sought damages on behalf of nonparty as well as defendants; counterclaim may only be asserted on behalf of defendant already party to action. Bramex Associates, Inc. v CBI Agencies, Ltd, 149 A.D.2d 383, 540 N.Y.S.2d 243, 1989 N.Y. App. Div. LEXIS 5408 (N.Y. App. Div. 1st Dep't 1989).

Husband's third-party action against his wife's children by prior marriage, brought in wife's divorce action, was properly dismissed where he asserted that children had fraudulently dissipated "marital monies" that wife had allegedly converted to her own and children's use while she worked as bookkeeper at husband's hotel, and wife's own liability, as husband asserted in his counterclaim against her, was for equitable distribution of or constructive trust for marital assets allegedly converted; since wife's liability was neither function of nor related to any of alleged wrongdoing committed by children, proper remedy would be to bring counterclaim against children. Lucci v Lucci, 150 A.D.2d 649, 541 N.Y.S.2d 992, 1989 N.Y. App. Div. LEXIS 7082 (N.Y. App. Div. 2d Dep't 1989).

Counterclaim may be raised through separate litigation, even if it was imposed as defense in prior litigation, so long as party defendant does not remain silent in one action and then bring second suit on basis of pre-existing claim for relief that would impair rights or interests established in first action. Classic Autos. v Oxford Resources Corp., 204 A.D.2d 209, 612 N.Y.S.2d 32, 1994 N.Y. App. Div. LEXIS 5571 (N.Y. App. Div. 1st Dep't 1994).

No responsive pleading was required to defendants' counterclaim which merely controverted legal theory underlying complaint and sought very same relief in terms of declaration of parties' respective rights and obligations in roadway. Iovine v Caldwell, 256 A.D.2d 974, 682 N.Y.S.2d 288, 1998 N.Y. App. Div. LEXIS 13890 (N.Y. App. Div. 3d Dep't 1998).

New York State sued an assignee of an expired judgment to recover funds paid to it by the New York Comptroller's Office of Unclaimed Funds. While the assignee could assert a joint counterclaim in its answer against New York State and certain state officials, who were not parties to the action but were alleged to be liable, under N.Y. C.P.L.R. 3019(d), service of the answer on the state officials needed to be accompanied by a summons. State of New York v

International Asset Recovery Corp., 56 A.D.3d 849, 866 N.Y.S.2d 823, 2008 N.Y. App. Div. LEXIS 8198 (N.Y. App. Div. 3d Dep't 2008).

Denial of an architect's motion for summary judgment dismissing contribution and common-law indemnification cross claim and counterclaims asserted against it by a subcontractor was error because, between a claimant and an alleged tortfeasor, although the alleged tortfeasor may have asserted the claimant's own culpable conduct as an affirmative defense and as a ground for the reduction or offset of the claimant's recovery, N.Y. C.P.L.R. 1411, 3018(b), in the absence of a direct tort claim against it by another party, the alleged tortfeasor may not properly have sought contribution, N.Y. C.P.L.R. 1401, or common-law indemnification from the claimant, whether by means of a counterclaim or otherwise, since the relief sought by the tortfeasor did not constitute an independent cause of action, N.Y. C.P.L.R. 3019(a); no party other than the architect asserted a direct tort claim against the subcontractor that would have given rise to contribution or common-law indemnification claims on behalf of the subcontractor against the architect. Accordingly, the architect established its prima facie entitlement to judgment as a matter of law dismissing the contribution and common-law indemnification counterclaims asserted against it by the subcontractor, and, in opposition thereto, the subcontractor failed to raise a triable issue of fact. Capstone Enters. of Port Chester, Inc. v Board of Educ. Irvington Union Free Sch. Dist., 106 A.D.3d 856, 966 N.Y.S.2d 138, 2013 N.Y. App. Div. LEXIS 3366 (N.Y. App. Div. 2d Dep't 2013).

It is not presently necessary that two actions be related for one to be regarded as a counterclaim of the other, and service of process upon the attorney who represented the non-resident defendant in a prior action in which the defendant here was then plaintiff, and the current plaintiff was then a party defendant, will not be vacated, for the authorization so to make a valid service of process should be sustained whenever possible. Norry v Land, 44 Misc. 2d 556, 254 N.Y.S.2d 176, 1964 N.Y. Misc. LEXIS 1247 (N.Y. Sup. Ct. 1964).

In action for annulment, defendant may interpose counterclaim for separation. Botti v Botti, 55 Misc. 2d 269, 284 N.Y.S.2d 748, 1967 N.Y. Misc. LEXIS 1051 (N.Y. Sup. Ct. 1967).

When the party against whom relief is sought himself seeks affirmative relief by way of counterclaim or otherwise, the court should not permit the party who instituted the action in the first instance to unilaterally discontinue the action. Palmer v Palmer, 62 Misc. 2d 73, 308 N.Y.S.2d 562, 1969 N.Y. Misc. LEXIS 1260 (N.Y. Fam. Ct. 1969).

The prior commencement by defendant husband of an action for divorce against his wife did not constitute a bar to the wife bringing her own subsequent and independent matrimonial action, notwithstanding the husband's contention that the wife was limited to asserting a counterclaim in his action, since all counterclaims are permissive and the withholding of the assertion of a counterclaim does not result in a forfeiture of the right to bring a separate suit upon the cause of action. Urbanski v Urbanski, 107 Misc. 2d 215, 433 N.Y.S.2d 718, 1980 N.Y. Misc. LEXIS 2850 (N.Y. Sup. Ct. 1980).

In nonpayment proceeding brought by tenant who sublet apartment at illegal rate of rent, subtenants could counterclaim for rent overcharges based on sublessor's breach of sublease agreement by failure to provide essential services; sublessor had duty to subtenants by privity of contract for maintenance of apartment in habitable condition pursuant to CLS Real P § 235-b. However, subtenants could not maintain counterclaims for rent overcharges and triple damages pursuant to New York City Rent and Rehabilitation Law or Rent Stabilization Law, since building had been taken over by city in "in rem" proceeding, and thus was exempt from rent control and rent stabilization; however, counterclaims for overcharges would be sustained as matter of public policy regarding rent regulations since permitting sublessor to keep overcharges would in effect condone illegal activity and invite further abuses in housing market. Severin v Rouse, 134 Misc. 2d 940, 513 N.Y.S.2d 928, 1987 N.Y. Misc. LEXIS 2132 (N.Y. Civ. Ct. 1987).

Counterclaim for divorce could be asserted in action for annulment. Carinha v Carinha, 178 Misc. 2d 635, 679 N.Y.S.2d 901, 1998 N.Y. Misc. LEXIS 510 (N.Y. Sup. Ct. 1998).

Counterclaims involving condominium manager's failure to make necessary repairs to property were not "inextricably interwoven" and "inseparable" from issues raised in manager's action to collect overdue common charges and assessments, and thus did not require stay of entry of

judgment pending resolution of counterclaims. Board of Managers of the Mews at North Hills Condo. v Farajzadeh, 185 Misc. 2d 353, 712 N.Y.S.2d 722, 2000 N.Y. Misc. LEXIS 324 (N.Y. Dist. Ct. 2000), aff'd, 189 Misc. 2d 38, 730 N.Y.S.2d 180, 2001 N.Y. Misc. LEXIS 287 (N.Y. App. Term 2001).

Unpublished decision: Although a former school board member referred to herself as a "third party defendant" in her motion for summary judgment, the insurer styled its claim as a counterclaim rather than as a third party claim. Thus, the summary judgment court referred to the board member as a counterclaim defendant pursuant to N.Y. C.P.L.R. 3019(a). Barkan v N.Y. Sch. Ins. Reciprocal, 237 N.Y.L.J. 75, 2007 N.Y. Misc. LEXIS 2818 (N.Y. Sup. Ct. Mar. 22, 2007), aff'd in part, modified, app. dismissed in part, 65 A.D.3d 1061, 886 N.Y.S.2d 414, 2009 N.Y. App. Div. LEXIS 6433 (N.Y. App. Div. 2d Dep't 2009).

Petitioner, a disabled firefighter receiving disability retirement benefits under N.Y. Gen. Mun. Law § 207-a(2) sued respondents, a city and its employee benefits coordinator (city), from reducing those benefits by supplemental retirement benefits the firefighter received pursuant to N.Y. Retire. & Soc. Sec. Law § 378; in reversing dismissal of counterclaim, appeals court reinstated city's counterclaim to recoup disability retirement plan benefits it paid to the firefighter for amounts firefighter received under supplemental state plan; city had common law right to recoup overpayments. Farber v City of Utica, 1 A.D.3d 942, 767 N.Y.S.2d 758, 2003 N.Y. App. Div. LEXIS 12254 (N.Y. App. Div. 4th Dep't 2003).

Estoppel as a defense to an action for recoupment is severely limited. Farber v City of Utica, 1 A.D.3d 942, 767 N.Y.S.2d 758, 2003 N.Y. App. Div. LEXIS 12254 (N.Y. App. Div. 4th Dep't 2003).

Condominium board was authorized to regulate the use of its residential elevators; moreover, N.Y. C.P.L.R. 3019(d) did not provide for joinder, thus the resident's motion to add individual board members as counterclaim defendants was properly denied. Bd. of Managers v Orenstein, 1 A.D.3d 206, 768 N.Y.S.2d 1, 2003 N.Y. App. Div. LEXIS 11919 (N.Y. App. Div. 1st Dep't 2003).

Because the differences between affirmative defenses and counterclaims set forth in N.Y. C.P.L.R. 3018(b) and 3019(b) were substantive, an insurer was not required to defend the insured against an affirmative defense filed in response to an action filed by the insured. P.J.P. Mech. Corp. v Commerce & Indus. Ins. Co., 65 A.D.3d 195, 882 N.Y.S.2d 34, 2009 N.Y. App. Div. LEXIS 4893 (N.Y. App. Div. 1st Dep't 2009).

In a proceeding under Surrogate's Court plaintiff's substantive claims could be asserted as counterclaims in the action pending in the state court. Simon v Silfen, 247 F. Supp. 762, 1965 U.S. Dist. LEXIS 6113 (S.D.N.Y. 1965), limited, Kettenbach v Demoulas, 822 F. Supp. 43, 1993 U.S. Dist. LEXIS 7371 (D. Mass. 1993).

Officer's counterclaim for assault would likely constitute a compulsory counterclaim under Fed. R. Civ. P. 13(a). New York law, as illustrated by N.Y. C.P.L.R. § 3019, does not have a compulsory counterclaim rule. Lieberman v City of Rochester, 681 F. Supp. 2d 418, 2010 U.S. Dist. LEXIS 9581 (W.D.N.Y. 2010).

6. Against trustee or nominal plaintiff

Counterclaims by beneficiary of pension plan fund against fund trustees in trustees' action to recover moneys allegedly unlawfully removed from fund were improper. Ronas v Wildman, 45 A.D.2d 1047, 358 N.Y.S.2d 178, 1974 N.Y. App. Div. LEXIS 4313 (N.Y. App. Div. 2d Dep't 1974).

Since plaintiff was daughter of intestate decedent for whose estate she also served as administratrix, counterclaims against her were allowable in her individual capacity under CLS CPLR § 3019(c) to extent of her interest in estate, and in her representative capacity under CLS CPLR § 3019(a) as another person alleged to be liable with bank. Birjah v Citibank, N.A., 224 A.D.2d 228, 637 N.Y.S.2d 403, 1996 N.Y. App. Div. LEXIS 941 (N.Y. App. Div. 1st Dep't 1996).

In an action brought by an insurance company under its subrogation rights where the summons and complaint were brought solely in the name of the insured and there was nothing to indicate

that the plaintiff was a nominal party, the defendant was required to accept the named plaintiff as the real party in interest and had all the rights of a defendant in an action brought by the person beneficially interested including the right to file a counterclaim. Schiel v Dickman, 63 Misc. 2d 764, 313 N.Y.S.2d 440, 1970 N.Y. Misc. LEXIS 1384 (N.Y. Dist. Ct. 1970).

Insurer, subrogee of insured whose car was damaged after being delivered to garage for repairs, was subject to defenses and counterclaims in its action against garage to which insured would have been subject had the insured himself brought the action. Allstate Ins. Co. v Babylon Chrysler, Plymouth, Inc., 75 Misc. 2d 604, 348 N.Y.S.2d 656, 1973 N.Y. Misc. LEXIS 2131 (N.Y. App. Term 1973), rev'd, 45 A.D.2d 969, 359 N.Y.S.2d 583, 1974 N.Y. App. Div. LEXIS 4052 (N.Y. App. Div. 2d Dep't 1974).

Since action by landlord’s trustee in bankruptcy to recover allegedly unpaid rent was suit brought in petitioner’s capacity as successor to landlord’s interest, counterclaims for rent overcharge, breach of warranty of habitability, and attorney’s fees were properly asserted pursuant to CLS CPLR § 3019(c) because they could have been asserted against landlord beneficially interested. Pereira v Phillips, 154 Misc. 2d 155, 583 N.Y.S.2d 793, 1992 N.Y. Misc. LEXIS 187 (N.Y. Civ. Ct. 1992).

7. Assigned contracts (prior to 1966 repeal of former subdivisions (c) and (d))

Under the CPLR a counterclaim in the nature of a recoupment (arising out of same contract or transaction which results in the assignment) may be asserted against an assignee even if it matures after the assignment, though a counterclaim in the nature of a setoff cannot be asserted against an assignee if it arises after the assignment. James Talcott, Inc. v Winco Sales Corp., 14 N.Y.2d 227, 250 N.Y.S.2d 416, 199 N.E.2d 499, 1964 N.Y. LEXIS 1152 (N.Y. 1964).

Assignee’s rights to refund moneys in event application for liquor license denied vested at the time of the assignment and not at the time the refund came into existence, and were subject to any setoffs available to State against applicant based on facts existing prior to assignment or

prior to knowledge of assignment by State. Chemical Bank New York Trust Co. v State, 27 A.D.2d 427, 279 N.Y.S.2d 813, 1967 N.Y. App. Div. LEXIS 4176 (N.Y. App. Div. 3d Dep't 1967).

Subd (c) of this section does not permit a wife's counterclaim in an action brought by a holder in due course to foreclose a mortgage. The court pointed out the statute would seem to refer to executory contracts generally, and that the confusion generated by the statutory provisions had been tentatively resolved by the elimination of subdivisions (c) and (d), effective September 1, 1966. Gramatan Co. v D'Amico, 50 Misc. 2d 233, 269 N.Y.S.2d 871, 1966 N.Y. Misc. LEXIS 1933 (N.Y. Sup. Ct. 1966).

An assignee succeeds to the benefits of the assignor's claim, but is chargeable to the extent of such benefits with the assignor's liabilities to the obligor. Accordingly, under our comparative negligence law (CPLR art 14-A), where plaintiff, an insurance company that is its subrogor's automobile collision insurance carrier, but is not its liability carrier, sues in negligence to recover damages to its subrogor's automobile, which was involved in an accident with defendant's automobile, and defendant counterclaims in negligence for damages to its automobile in an amount in excess of the claim-in-chief, defendant's counterclaim will be allowed, but will be limited to use as a setoff or recoupment; plaintiff can then pursue the claim without risk of an affirmative judgment against it and defendant can fight the claim with all available weapons or, if defendant wants affirmative relief, it may commence an independent action against subrogor, which can thereafter be consolidated, or it may itself implead the subrogor on the counterclaim. (CPLR 3019, subd [d].) Motors Ins. Corp. v Coral Service Corp., 100 Misc. 2d 468, 419 N.Y.S.2d 837, 1979 N.Y. Misc. LEXIS 2488 (N.Y. Civ. Ct. 1979).

8. Attorney fees at issue

Counterclaim by law firm for services rendered in connection with representation of plaintiff in divorce proceeding did not meet requirement of CLS CPLR § 3016(f) to set forth and number items of each claim and reasonable value of price of each where it was undisputed that plaintiff paid over $11,500 on his account, but counterclaim set forth all charges on account and did not

identify unpaid items. Green v Harris Beach & Wilcox, 202 A.D.2d 993, 609 N.Y.S.2d 505, 1994 N.Y. App. Div. LEXIS 3361 (N.Y. App. Div. 4th Dep't 1994).

Defendant's failure to specifically plead his entitlement to contractual attorney fees in connection with his counterclaim did not warrant denial of such fees where appropriate request was contained in both ad damnum and "wherefore" clauses of his answer. Marrotta v Blau, 241 A.D.2d 664, 659 N.Y.S.2d 586, 1997 N.Y. App. Div. LEXIS 7347 (N.Y. App. Div. 3d Dep't 1997).

Motion to dismiss counterclaim setting forth cause of action for attorney's fees and sanctions would be granted, although attorney's fees and sanctions are permitted to penalize frivolous conduct under 22 NYCRR § 130-1.1(d) and CLS CPLR § 8303-a, since award of fees is matter for court's discretion and party may not plead right to them as distinct cause of action. Yankee Trails, Inc. v Jardine Ins. Brokers, Inc., 145 Misc. 2d 282, 546 N.Y.S.2d 534, 1989 N.Y. Misc. LEXIS 647 (N.Y. Sup. Ct. 1989).

9. Capacity in which plaintiff sues

Counterclaims against a plaintiff are restricted to the capacity in which he sues. Ehrlich v American Moninger Greenhouse Mfg. Corp., 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890, 1970 N.Y. LEXIS 1464 (N.Y. 1970).

Test of a counterclaim is whether it is sufficient to support an independent cause of action against plaintiff in the same capacity in which plaintiff sues. Geddes v Rosen, 22 A.D.2d 394, 255 N.Y.S.2d 585, 1965 N.Y. App. Div. LEXIS 5011 (N.Y. App. Div. 1st Dep't), aff'd, 16 N.Y.2d 816, 263 N.Y.S.2d 10, 210 N.E.2d 362, 1965 N.Y. LEXIS 1244 (N.Y. 1965).

A defendant may counterclaim against the plaintiff only in the capacity in which he is sued because of the possibility of prejudice to the person represented. Conant v Schnall, 33 A.D.2d 326, 307 N.Y.S.2d 902, 1970 N.Y. App. Div. LEXIS 5395 (N.Y. App. Div. 3d Dep't 1970).

Cable television company, as defendant in action for abuse of process, was not entitled to interpose counterclaim against all suspected cable "pirates," and against all members of

plaintiff's proposed class, which consisted of persons cable company had already sued for signal interception, since such relief was unwarranted both by cable company's position that plaintiff was not qualified to represent proposed class and by company's having already commenced individual actions against those persons it now sought to sue in class action. Lewis v Pay Television of Greater New York, Inc., 124 A.D.2d 559, 507 N.Y.S.2d 704, 1986 N.Y. App. Div. LEXIS 61874 (N.Y. App. Div. 2d Dep't 1986).

In action by Superintendent of Insurance in his capacity as liquidator of insurance company under CLS Ins Art 74, seeking to enforce company's contractual right to renew directors and officers liability and corporation reimbursement policy issued by defendant insurance company prior to liquidation, defendant could not assert defenses or counterclaims based on superintendent's alleged malfeasance as regulator of insurance industry since superintendent, in his capacity as liquidator, acts in separate and distinct capacity from his role as regulator and is subject only to defenses that could be raised against corporation in liquidation; final fund held for benefit of creditors and policyholders of liquidated corporation should not be reduced simply because their representative allegedly contributed to loss acting in different capacity and role. Corcoran v National Union Fire Ins. Co., 143 A.D.2d 309, 532 N.Y.S.2d 376, 1988 N.Y. App. Div. LEXIS 8953 (N.Y. App. Div. 1st Dep't 1988).

Contractor was proper party to seek extension of plaintiff's amended notice of pendency in order to preserve contractor's own mechanic's lien, which would otherwise terminate, where it had asserted cross claim and counterclaim for foreclosure of lien when it was named as defendant (as it was required to do under CLS Lien § 44(5)); amended notice of pendency filed by plaintiff continued contractor's lien, and contractor was thus also plaintiff for purposes of its own claims. L & L Painting Co. v Columbia Sussex Corp., 225 A.D.2d 670, 639 N.Y.S.2d 491, 1996 N.Y. App. Div. LEXIS 2645 (N.Y. App. Div. 2d Dep't 1996).

In action for pain and suffering and wrongful death commenced by parents of psychiatric patient whose death allegedly resulting from his having been placed in wrist and ankle restraints, defendant hospital was entitled to amend its answer to assert counterclaim for indemnification or

contribution against plaintiff father in his individual capacity as physician, where plaintiff father allegedly committed medical malpractice by treating his son with certain medications that resulted in need to use restraints. Speken v Columbia Presbyterian Medical Ctr., 168 Misc. 2d 40, 641 N.Y.S.2d 218, 1996 N.Y. Misc. LEXIS 101 (N.Y. Sup. Ct. 1996).

10. Damages at issue, generally

A summary judgment may not ordinarily be granted where a counterclaim in excess of the amount demanded in the complaint has been interposed. However where the allegations in plaintiff's complaint are undisputed, there is no need to require the plaintiff to go to trial on a clearly meritorious, uncontested cause of action and summary judgment could be entered for the plaintiff but entry of the judgment on the complaint should be stayed pending the determination of the counterclaim. Conant v Schnall, 33 A.D.2d 326, 307 N.Y.S.2d 902, 1970 N.Y. App. Div. LEXIS 5395 (N.Y. App. Div. 3d Dep't 1970).

In quantum meruit action by contractor arising from defendant town's failure to make instalment payments under construction contract, town was permitted to counterclaim under CPLR 3019, subd a for liquidated damages allegedly incurred as a result of contractor's delays preceding town's breach. Paterno & Sons, Inc. v New Windsor, 43 A.D.2d 863, 351 N.Y.S.2d 445, 1974 N.Y. App. Div. LEXIS 5875 (N.Y. App. Div. 2d Dep't 1974).

Defendant watershed district's failure to counterclaim against plaintiff contractor in action for damages resulting from defendant's termination of construction contract did not bar subsequent suit by watershed district against contractor seeking damages caused by contractor's failure to perform work on time, since there is no requirement of compulsory pleading of counterclaims in jurisdiction and, at most, counterclaim would have been offset against defendant's right to payment for work performed prior to termination of contract. Batavia Kill Watershed Dist. v Charles O. Desch, Inc., 83 A.D.2d 97, 444 N.Y.S.2d 958, 1981 N.Y. App. Div. LEXIS 14759 (N.Y. App. Div. 3d Dep't 1981), aff'd, 57 N.Y.2d 796, 455 N.Y.S.2d 597, 441 N.E.2d 1115, 1982 N.Y. LEXIS 3708 (N.Y. 1982).

In an action brought by the purchaser of real property seeking the return of her deposit after the bank rejected her application for a mortgage to finance the purchase, in which action the vendor counterclaimed for damages based on the purchaser's alleged breach of contract, "substantial justice" was done between the parties by properly dismissing the purchaser's claim, although the vendor would not be allowed to reap the benefit of repairs through the increased value of the property and also be reimbursed by the purchaser for the cost of those repairs. Manupella v Marine Midland Bank, 89 A.D.2d 641, 453 N.Y.S.2d 80, 1982 N.Y. App. Div. LEXIS 17753 (N.Y. App. Div. 3d Dep't 1982).

In summary nonpayment proceeding, tenants' counterclaim for harassment would be dismissed without prejudice since it did not intertwine with landlord's simple action for rent; furthermore, tenants failed to plead special damages as required in actions alleging prima facie tort, such as harassment. Severin v Rouse, 134 Misc. 2d 940, 513 N.Y.S.2d 928, 1987 N.Y. Misc. LEXIS 2132 (N.Y. Civ. Ct. 1987).

11. —Punitive damages

Defendant's counterclaim seeking punitive damages failed to state cause of action since defendant had not alleged that plaintiff's acts caused him damage; absent claim of compensatory damage, defendant could not recover punitive damages. North American Co. for Life & Health Ins. v Pennington, 132 A.D.2d 972, 518 N.Y.S.2d 500, 1987 N.Y. App. Div. LEXIS 49438 (N.Y. App. Div. 4th Dep't), modified, 133 A.D.2d 547, 518 N.Y.S.2d 500, 1987 N.Y. App. Div. LEXIS 50077 (N.Y. App. Div. 4th Dep't 1987).

12. —Setoffs

Customers of railroad were not precluded from responding to bankrupt railroad's action seeking recovery of freight charges by filing counterclaim in which such customers sought to recover for alleged damage to goods carried by railroad, despite fact that counterclaim contained allegation that railroad's agent gave customers credit on freight bill for such damage and despite fact that

Interstate Commerce Act did not permit setoff against freight charges for damage to such goods upon private agreement between railroad and customers. Baker v Rosenthal, 54 A.D.2d 1135, 388 N.Y.S.2d 777, 1976 N.Y. App. Div. LEXIS 15134 (N.Y. App. Div. 4th Dep't 1976).

Whether setoff is affirmative defense or is more akin to counterclaim, facts in support thereof must be pleaded in answer, and defendant's failure to do so constituted waiver. Kivort Steel, Inc. v Liberty Leather Corp., 110 A.D.2d 950, 487 N.Y.S.2d 877, 1985 N.Y. App. Div. LEXIS 48848 (N.Y. App. Div. 3d Dep't 1985).

Plaintiff was entitled to summary judgment to recover sum due and owing under contract where both parties agreed from beginning of dispute that money deposited in escrow account was due and owing to plaintiff; fact that defendants' answer did not contain any counterclaims for alleged setoffs referred to in their motion papers undermined their unsubstantiated claim that setoffs existed. Affiliated Credit Adjustors, Inc. v Carlucci & Legum, 139 A.D.2d 611, 527 N.Y.S.2d 426, 1988 N.Y. App. Div. LEXIS 4389 (N.Y. App. Div. 2d Dep't 1988).

In product liability action in which defendant counterclaimed for cost of goods sold and delivered, court erred in prohibiting plaintiff, at trial of counterclaim, from offsetting counterclaim, which sounded in contract, with evidence of damages that it incurred due to fire allegedly caused by defendant's negligent sale to it of defective product. Merritt Meridian Constr. Co. v Paramount Fabricators, 221 A.D.2d 420, 633 N.Y.S.2d 812, 1995 N.Y. App. Div. LEXIS 12002 (N.Y. App. Div. 2d Dep't 1995).

In action by State Insurance Fund commissioners to recover unpaid workers' compensation policy premiums, insured employer's counterclaim for overpaid premiums was cognizable only in Court of Claims even though it was presented as setoff to commissioners' claim in Supreme Court. Commissioners of the State Ins. Fund v Netti Wholesale Bev. Co., 245 A.D.2d 48, 665 N.Y.S.2d 84, 1997 N.Y. App. Div. LEXIS 12850 (N.Y. App. Div. 1st Dep't 1997).

In action involving reciprocal trusts, Act § 201 to compel an executor to set off $1,000 for the surviving widow, as required by § 200 subdivision 4 of the Surrogate's Court Act, the executor

was entitled to a counterclaim against her claim for $1,000, provided he first promptly proceeded with the prosecution of a discovery proceeding to obtain a determination of the assets in question. In re Leaf's Estate, 51 Misc. 2d 985, 274 N.Y.S.2d 329, 1966 N.Y. Misc. LEXIS 1359 (N.Y. Sur. Ct. 1966).

Affirmative defenses and counterclaims alleging the wrongful diversion of assets of a bankrupt mortgagor to the mortgagee at a time when members of a named family were officers and directors and held controlling stock interests in both corporations by the mortgagor’s trustee in bankruptcy who entered no defense to the mortgage claim, where the allegations might constitute a valid counterclaim or setoff against the petitioner if, as transferee, it was chargeable with knowledge of the alleged fraudulent acts, counterclaims could be asserted in view of the broad principles of adjudicating the rights of the parties in one action, although the members of the named family were not parties to a proceeding by the mortgagee to adjust a condemnation award. Utica v Gold Medal Packing Corp., 54 Misc. 2d 721, 283 N.Y.S.2d 603, 1967 N.Y. Misc. LEXIS 1236 (N.Y. Sup. Ct. 1967), modified, 31 A.D.2d 730, 297 N.Y.S.2d 166, 1968 N.Y. App. Div. LEXIS 2722 (N.Y. App. Div. 4th Dep't 1968).

Provision in lease that tenant agreed in the event of a nonpayment summary proceeding that no setoff or counterclaim whatever of any nature will be interposed by or on behalf of tenant in any such proceeding did not preclude court’s granting setoff where tenants had in good faith sought Real Property Actions and Proceedings Law § 755 order to withhold rent for failure to provide heat and hot water during a number of days in the winter and where consideration of that application required court to hear all of the evidence relevant to the question of a setoff. Steinberg v Carreras, 74 Misc. 2d 32, 344 N.Y.S.2d 136, 1973 N.Y. Misc. LEXIS 1929 (N.Y. Civ. Ct. 1973), rev'd, 77 Misc. 2d 774, 357 N.Y.S.2d 369, 1974 N.Y. Misc. LEXIS 1239 (N.Y. App. Term 1974).

Although “setoff” is still common and understood in legal parlance, it does not constitute form of pleading under Civil Practice Law and Rules and is merely another expression for counterclaim

which does not exceed value of complaint. West Seventy-Ninth Street Associates v Lemi, Inc., 141 Misc. 2d 830, 535 N.Y.S.2d 325, 1988 N.Y. Misc. LEXIS 706 (N.Y. Civ. Ct. 1988).

State could assert a counterclaim for payment of services against a patient who filed a negligence action because the recovery provisions of former N.Y. Mental Hyg. Law § 24(6) were not repealed when the law was recodified; the State was not seeking contribution, which had as a condition precedent the ability to pay, but instead was seeking recovery against the patient's "asset," his lawsuit, and under that circumstance, the patient's financial ability to pay was not a condition precedent to liability. Langevin v State, 196 Misc. 2d 809, 763 N.Y.S.2d 730, 2003 N.Y. Misc. LEXIS 971 (N.Y. Ct. Cl. 2003).

Although nothing under N.Y. Mental Hyg. Law § 43.07 specifically authorizes the use of a setoff for the purposes of collecting fees, the State Comptroller has the authority to do so as a function of his constitutional and statutory duty to audit all vouchers before payment; moreover, N.Y. C.P.L.R. 3019(a) eliminates all of the historic limitations on setoffs and recoupments, and the State Comptroller has a common law right of setoff to collect a debt owed to the State, even where the State's claim has not been reduced to a judgment or when the setoff is unrelated to the State's debt to the claimant. The State could thus assert a counterclaim for payment of services against a patient who had filed a negligence action. Langevin v State, 196 Misc. 2d 809, 763 N.Y.S.2d 730, 2003 N.Y. Misc. LEXIS 971 (N.Y. Ct. Cl. 2003).

13. Interposing counterclaims; arbitration

Respondents' cross motion for default judgment on counterclaims for legal malpractice was properly denied where petitioner gave timely notice of defense that counterclaims were arbitrable; public policy does not require that legal malpractice claims be adjudicated solely by courts where there is no showing that retainer agreement on its face violates any rules of ethics. Derfner & Mahler, LLP v Rhoades, 257 A.D.2d 431, 683 N.Y.S.2d 509, 1999 N.Y. App. Div. LEXIS 240 (N.Y. App. Div. 1st Dep't 1999), app. denied, 1999 N.Y. App. Div. LEXIS 5220 (N.Y. App. Div. 1st Dep't Apr. 22, 1999).

14. —Defenses

Interposing counterclaim related to plaintiff's claims will not waive defense of lack of personal jurisdiction, but asserting unrelated counter claim does waive such defense because defendant is taking affirmative advantage of court's jurisdiction; however, counterclaim will only be "related" for purposes of jurisdictional defense when such counterclaim could potentially be barred under principles of collateral estoppel. Textile Technology Exch., Inc. v Davis, 81 N.Y.2d 56, 595 N.Y.S.2d 729, 611 N.E.2d 768, 1993 N.Y. LEXIS 646 (N.Y. 1993).

Where purchase money for mortgage which plaintiff was seeking to foreclose did not prohibit setoffs, pleading of setoff was proper as they may be interposed as a matter of law and do not depend upon agreement. Getlan v Hofstra University, 41 A.D.2d 830, 342 N.Y.S.2d 44, 1973 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 2d Dep't), app. dismissed, 33 N.Y.2d 646, 348 N.Y.S.2d 554, 303 N.E.2d 72, 1973 N.Y. LEXIS 1066 (N.Y. 1973).

As long as counterclaim is valid, it can be interposed regardless of its subject matter and whether or not it has any connection with the plaintiff's case. By commencing suit in Court of Claims, a claimant impliedly consents to the interposition by the state of a counterclaim which the court may entertain and on which it can grant an affirmative judgment, at least where the counterclaim arises out of the same or similar transactions giving rise to the claimant's cause of action so that there will be an identity of factual issues to be resolved in determining both the claim and the counterclaim. Valentino v State, 44 A.D.2d 338, 355 N.Y.S.2d 212, 1974 N.Y. App. Div. LEXIS 5047 (N.Y. App. Div. 3d Dep't 1974).

Where, in response to hospital's suit against father for recovery of reasonable value of services rendered, father interposed counterclaim for malpractice on behalf of his daughter, daughter was not named as defendant, and daughter was over age of 21 years at time action was commenced, any cause of action which daughter might have had against hospital belonged to her, and father could not properly interpose counterclaim on her behalf as her representative. But, father's claim seeking to recover moneys paid to hospital was properly asserted as

counterclaim. Rye Psychiatric Hospital Center v Persky, 54 A.D.2d 711, 387 N.Y.S.2d 456, 1976 N.Y. App. Div. LEXIS 14299 (N.Y. App. Div. 2d Dep't 1976).

In action by unsecured creditors of bankrupt toy wholesaler against wholesaler's accountants for fraud and gross negligence in preparation of wholesaler's certified financial statement upon which creditors allegedly relied in selling toys and games to wholesaler on open and unsecured credit, accountants' allegations of unfair competition and breach of antitrust laws by creditors would not have merit as counterclaims since accountants suffered no direct injury therefrom; however, accountants would be allowed to replead those allegations negating creditors' reliance upon factors alleged to be misleading in financial statements so as to clarify issues and to avoid surprise at trial. Hasbro Bradley, Inc. v Coopers & Lybrand, 128 A.D.2d 218, 515 N.Y.S.2d 461, 1987 N.Y. App. Div. LEXIS 43541 (N.Y. App. Div. 1st Dep't), app. dismissed, 70 N.Y.2d 927, 524 N.Y.S.2d 433, 519 N.E.2d 344, 1987 N.Y. LEXIS 19970 (N.Y. 1987).

Court did not abuse its discretion in denying defendant's cross motion for leave to amend its answer to assert counterclaim against plaintiff where defendant had known facts forming basis of proposed amendment before it interposed its original answer and yet waited, without explanation, until it was faced with plaintiff's motion for summary judgment before seeking to interpose counterclaim. Herbert F. Darling, Inc. v Contegra Corp., 216 A.D.2d 962, 629 N.Y.S.2d 714, 1995 N.Y. App. Div. LEXIS 7380 (N.Y. App. Div. 4th Dep't 1995).

Plaintiff was entitled to summary judgment dismissing defendants' defamation counterclaim, because plaintiff's conduct in posting memorandum outlining present litigation on company bulletin board was protected by CLS Civ R § 74, where memorandum accurately reflected substance of lawsuit, did not suggest more egregious conduct than that recounted in complaint, and did not present defendants' purported wrongdoing as established fact rather than allegation, and defendants did not prove that action was commenced solely to shield plaintiff from liability for dissemination of defamatory accusations. Hughes Training Inc., Link Div. v Pegasus Real-Time Inc., 255 A.D.2d 729, 680 N.Y.S.2d 721, 1998 N.Y. App. Div. LEXIS 11922 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff's motion to dismiss counterclaim was properly granted, even though motion was based on defense not pleaded in plaintiff's reply, where defendant could not claim surprise by plaintiff's reliance on terms of lease between parties as defense to counterclaim. Syracuse Equip. Co. v Lebis Contr., 255 A.D.2d 992, 680 N.Y.S.2d 338, 1998 N.Y. App. Div. LEXIS 12280 (N.Y. App. Div. 4th Dep't 1998).

Motion to amend answer to add counterclaim for divorce on grounds of cruel and inhuman treatment or constructive abandonment, after completed trial before referee of plaintiff's claim of constructive abandonment, was properly denied; even if counterclaim set forth valid cause of action, amendment would unjustifiably prejudice plaintiff by belatedly introducing new theory. Brown v Brown, 257 A.D.2d 467, 682 N.Y.S.2d 844, 1999 N.Y. App. Div. LEXIS 433 (N.Y. App. Div. 1st Dep't 1999).

Where it was claimed that a counterclaim failed to allege the absence of an adequate remedy at law, if the facts alleged indicate an action in equity will be necessary if the affirmative defense of cancellation be proven, it is unnecessary to allege such facts in terms. Nussenblatt v Nussenblatt, 62 Misc. 2d 792, 309 N.Y.S.2d 397, 1970 N.Y. Misc. LEXIS 1743 (N.Y. Sup. Ct. 1970).

Motion for leave to amend reply to assert claim of title by adverse possession to counterclaim seeking declaration of rights and legal relations of parties in and to subject property should be granted in the absence of any proof of prejudice by the delay. Brink v Central School Dist., 63 Misc. 2d 293, 311 N.Y.S.2d 424, 1970 N.Y. Misc. LEXIS 1696 (N.Y. Sup. Ct. 1970), aff'd, 36 A.D.2d 796, 320 N.Y.S.2d 896, 1971 N.Y. App. Div. LEXIS 5585 (N.Y. App. Div. 2d Dep't 1971).

Defendant's motion to amend answer to allege counterclaim against plaintiff for the latter's negligence in contributing to accident was denied where appellate decisions had made inroads on contribution theory only as to defendants inter se and not as to parties generally under a comparative negligence theory. Carhart v Albright, 72 Misc. 2d 23, 338 N.Y.S.2d 274, 1972 N.Y. Misc. LEXIS 1372 (N.Y. Sup. Ct. 1972).

Although defendant in personal injuries and wrongful death action seeking to assert a claim against a plaintiff should have brought a counterclaim by way of a motion to amend the pleadings, his filing of notice of vouching in, in view of the understanding and consequent liberality exercised by courts in deciding post-Dole motions would construe the notice of vouching in as a counterclaim, in light of fact that plaintiffs have received notice of defendant's actual claim. Henriquez v Mission Motor Lines, Inc., 72 Misc. 2d 782, 339 N.Y.S.2d 478, 1972 N.Y. Misc. LEXIS 1461 (N.Y. Sup. Ct. 1972).

Affirmative defense to counterclaim should be set forth in reply to counterclaim, rather than answer. Vassar v Jackson, 72 Misc. 2d 652, 340 N.Y.S.2d 151, 1973 N.Y. Misc. LEXIS 2284 (N.Y. Sup. Ct.), aff'd, 42 A.D.2d 693, 344 N.Y.S.2d 1020, 1973 N.Y. App. Div. LEXIS 7558 (N.Y. App. Div. 2d Dep't 1973).

Although the definition of cross-claim contained in CPLR § 3019, subd b, includes a claim of a "respondent" against a "judgment debtor" in a special proceeding brought pursuant to CPLR § 5227, counterclaim was not proper in special proceeding where court had not granted garnishee permission to file such counterclaim, and where counterclaim, set forth in "wherefore" clause of garnishee's answer failed to comply with separate pleading requirements of CPLR § 3014. Michigan Associates v Emigrant Sav. Bank, 74 Misc. 2d 495, 345 N.Y.S.2d 329, 1973 N.Y. Misc. LEXIS 1888 (N.Y. Civ. Ct. 1973).

Fact that plaintiff, who commenced divorce action by service of summons and who simultaneously filed petition and writ of habeas corpus seeking child custody, did not serve a complaint prior to expiration of time for so doing did not preclude defendant, who prior to adjourned return date of writ agreed to accord plaintiff visitation with one child, from thereafter seeking her own divorce, notwithstanding that papers which she filed were labeled "verified answer and counterclaim"; such documents were not required to be stricken on ground that no answer may be interposed when a complaint has not been served. Edelman v Edelman, 88 Misc. 2d 156, 386 N.Y.S.2d 331, 1976 N.Y. Misc. LEXIS 2602 (N.Y. Sup. Ct. 1976).

As proceeding to review child's foster care was properly initiated under the Social Services Law, the counterclaim filed by the child's natural father and paternal grandmother, who as interested parties were served with notice of the proceedings, was an appropriate manner provided by law for the respondents to place before the court their contentions as to custody within the purview of the Family Court Act and the Civil Practice Law and Rules, in the absence of another specified procedure of the Family Court Act. In re T., 88 Misc. 2d 702, 389 N.Y.S.2d 86, 1976 N.Y. Misc. LEXIS 2729 (N.Y. Fam. Ct. 1976).

In a negligence action, the plaintiffs' motion to dismiss the defendant's counterclaim against plaintiff wife for indemnification for any damages defendant might be required to pay to plaintiff husband, on his claim for damages for loss of his wife's services and expenses incurred as a result of his wife's injuries, in excess of defendant's proper share of such damages, is granted, since the court determines that there is no basis for a counterclaim for damages against the plaintiff wife, inasmuch as CPLR 1411 requires a proportionate abatement of the husband's derivative action to the same extent as the wife's right to recover is diminished. A husband who, prior to the adoption of CPLR 1411, would have recovered nothing at common law in the event of his wife's contributory negligence, should not now, in his derivative action, fare even better than his wife, through whom his rights are derived. Abbate v Big V Supermarkets, Inc., 95 Misc. 2d 483, 407 N.Y.S.2d 821, 1978 N.Y. Misc. LEXIS 2451 (N.Y. Sup. Ct. 1978).

In a suit for damages for breach of contract, the defendant would not be allowed to defend on the ground that the plaintiff was a monopoly and in violation of the anti-trust laws, since an anti-trust counterclaim would undoubtedly lead to protracted litigation which could unnecessarily confuse a jury and prejudice the rights of the plaintiff. Axiom Market Research Bureau, Inc. v Times Mirror Magazines, Inc., 107 Misc. 2d 118, 433 N.Y.S.2d 523, 1980 N.Y. Misc. LEXIS 2836 (N.Y. Sup. Ct. 1980).

In action to recover difference in telex charges as based on correct tariff filed with Federal Communications Commission and charges plaintiff billed its customer calculated under mistaken quotation, plaintiff was entitled to dismissal of counterclaim for breach of contract and

misrepresentation, which sought same amount as demanded in complaint, for even though defendant framed counterclaim differently than its affirmative defenses, both pleadings were, in essence, seeking to avoid payment of telex charges pursuant to tariff rate, and since affirmative defenses of mistake and undue delay were inapplicable, to allow defendant to interpose counterclaim would permit it to indirectly circumvent tariff. RCA Global Communications, Inc. v Caribbean Hospitality Corp., 140 Misc. 2d 30, 529 N.Y.S.2d 951, 1988 N.Y. Misc. LEXIS 337 (N.Y. Civ. Ct. 1988).

In commercial nonpayment summary proceeding involving premises alleged to be commercial space in loft, tenant's mere mailing of its answer with purported counterclaim to nonparty New York City Loft Board by certified mail was insufficient to bring Loft Board into proceeding via counterclaim, or otherwise acquire personal jurisdiction over Board, since counterclaim was against nonparty Board alone; further, in absence of proper service on Board, counterclaim could not be properly converted into third-party action under CLS CPLR § 1007. Linzer v Bal, 184 Misc. 2d 132, 706 N.Y.S.2d 831, 2000 N.Y. Misc. LEXIS 106 (N.Y. Civ. Ct. 2000).

15. Jurisdictional matters

Counterclaims interposed by New York reseller of textile equipment were not related to North Carolina seller's complaint for breach of oral partnership agreement, and thus reseller waived his jurisdictional defense by asserting such counterclaims, where counterclaims involved series of transactions which arose prior to oral agreement in which reseller acted as liquidator rather than as partner. Textile Technology Exch., Inc. v Davis, 81 N.Y.2d 56, 595 N.Y.S.2d 729, 611 N.E.2d 768, 1993 N.Y. LEXIS 646 (N.Y. 1993).

Imposition of counterclaim which is unrelated to subject matter of plaintiff's claim as set forth in complaint places defendant in position of plaintiff who initially invokes jurisdiction of court, and by doing so defendant effectively waives any jurisdictional objection he might have had against prime action. Liebling v Yankwitt, 109 A.D.2d 780, 486 N.Y.S.2d 292, 1985 N.Y. App. Div. LEXIS 47270 (N.Y. App. Div. 2d Dep't 1985).

Supreme Court lacked subject matter jurisdiction to hear counterclaim against state for property damage allegedly incurred during state's cleanup of petroleum at site owned by defendants, since counterclaim was clearly one for money damages against state for torts of its officers or employees over which Court of Claims has exclusive jurisdiction. State v Dewey, 260 A.D.2d 924, 688 N.Y.S.2d 840, 1999 N.Y. App. Div. LEXIS 4241 (N.Y. App. Div. 3d Dep't 1999).

New York State sued an assignee of an expired judgment to recover funds paid to it by the New York Comptroller's Office of Unclaimed Funds. While the assignee could assert a joint counterclaim in its answer against New York State and certain state officials, who were not parties to the action but were alleged to be liable, under N.Y. C.P.L.R. 3019(d), service of the answer on the state officials needed to be accompanied by a summons. State of New York v International Asset Recovery Corp., 56 A.D.3d 849, 866 N.Y.S.2d 823, 2008 N.Y. App. Div. LEXIS 8198 (N.Y. App. Div. 3d Dep't 2008).

In a suit for loss under an insurance policy, a counterclaim which alleged "racketeering activities" under RICO consisting of using the mails to file a fraudulent and exaggerated insurance claim would not be permissible, even though state courts have concurrent jurisdiction over civil actions for damages under RICO (18 USC § 1961 et seq.), since an insurance claim, even if "willfully exaggerated," does not constitute a pattern of "racketeering activity," and since a counterclaim cannot be premised on the wrongful bringing of the lawsuit itself, in that such a claim may be made only after the original complaint has been found to be without basis. Ebnan Antique Rugs & Tapestries, Inc. v New York Marine Managers, Inc., 128 Misc. 2d 84, 488 N.Y.S.2d 534, 1984 N.Y. Misc. LEXIS 3776 (N.Y. Sup. Ct. 1984).

In commercial nonpayment summary proceeding involving premises alleged to be commercial space in loft, counterclaim, even if valid, would be dismissed for lack of personal jurisdiction where respondent did not properly serve summons and answer containing counterclaims as required by CLS CPLR §§ 3019(d) and 3012(a). Linzer v Bal, 184 Misc. 2d 132, 706 N.Y.S.2d 831, 2000 N.Y. Misc. LEXIS 106 (N.Y. Civ. Ct. 2000).

16. Mootness

Judgment of divorce would be reversed and matter would be remitted for trial of defendant husband's counterclaims for divorce based on cruel and inhuman treatment and adultery, even though wife established her entitlement to "conversion" divorce based on written agreement entered into between parties more than one year prior to her action; trial court improperly precluded husband from offering evidence with respect to his counterclaims on basis that they would be rendered moot after "conversion" divorce. Carlan v Carlan, 142 A.D.2d 664, 530 N.Y.S.2d 605, 1988 N.Y. App. Div. LEXIS 7919 (N.Y. App. Div. 2d Dep't 1988).

Plaintiff's cross motion to dismiss counterclaim for charges by shipper in action to recover damages for breach of shipping contract was improperly dismissed as moot at time summary judgment was granted to shipper dismissing plaintiff's complaint, and cross motion would be remitted for consideration on merits since counterclaim should have been treated pursuant to CLS CPLR § 3019(d) as if it were contained in complaint. Ballen v Aero Mayflower Transit Co., 144 A.D.2d 407, 533 N.Y.S.2d 1007, 1988 N.Y. App. Div. LEXIS 11780 (N.Y. App. Div. 2d Dep't 1988).

17. Res judicata; collateral estoppel

A watershed district's failure to counterclaim against a contractor in an action by the contractor for damages resulting from the district's termination of a contract for the construction of a dam, in which the jury found that the district's termination of the contract was justified by the contractor's failure to timely perform, did not bar a subsequent suit by the district against the contractor and the insurance company that issued the bond guaranteeing the performance of the contract; thus, the contractors motion for summary judgment dismissing the complaint on the grounds of res judicata or collateral estoppel would be denied. Batavia Kill Watershed Dist. v Charles O. Desch, Inc., 83 A.D.2d 97, 444 N.Y.S.2d 958, 1981 N.Y. App. Div. LEXIS 14759 (N.Y. App. Div. 3d Dep't 1981), aff'd, 57 N.Y.2d 796, 455 N.Y.S.2d 597, 441 N.E.2d 1115, 1982 N.Y. LEXIS 3708 (N.Y. 1982).

Defendants were not collaterally estopped from asserting counterclaim against plaintiff based on prior grant of summary judgment dismissing similar counterclaim in suit brought by third party against one defendant; even assuming issues in both cases were identical, lack of full and fair opportunity to litigate in prior forum was demonstrated by difference in amounts and vigor of defenses where claim against defendant in other suit was made in City Court and was for $800, while defendant's potential liability in present action was $18,938.39. David Sanders, P.C. v Harris A. Sanders, Architects, P.C., 140 A.D.2d 787, 527 N.Y.S.2d 660, 1988 N.Y. App. Div. LEXIS 4669 (N.Y. App. Div. 3d Dep't 1988).

Plaintiff waived his right to assert defenses of collateral estoppel and res judicata in response to defendant's counterclaim by failing to either plead them in response or timely move to dismiss counterclaim on such grounds. Ouyang v Jeng, 260 A.D.2d 618, 689 N.Y.S.2d 175, 1999 N.Y. App. Div. LEXIS 4272 (N.Y. App. Div. 2d Dep't 1999).

18. Severance of counterclaim

It was error for court to dismiss seller's counterclaims at close of trial on buyer's action for specific performance of contract for sale of real property where counterclaims had been severed from buyer's claims during trial, and evidence at trial was limited to issue of specific performance; seller's counterclaims were not formally before court when it ordered them dismissed. Dahm v Miele, 136 A.D.2d 586, 523 N.Y.S.2d 851, 1988 N.Y. App. Div. LEXIS 352 (N.Y. App. Div. 2d Dep't 1988).

19. Stating cause of action

In a "counterclaim," a cause of action is generally asserted by one or more defendants against one or more plaintiffs and other persons alleged to be liable; in contrast, a "cross-claim" is asserted against one or more codefendants and others also alleged to be liable. Seligson v Chase Manhattan Bank, Nat'l Asso., 50 A.D.2d 206, 376 N.Y.S.2d 899, 1975 N.Y. App. Div. LEXIS 11469 (N.Y. App. Div. 1st Dep't 1975).

A fraud counterclaim was insufficient to state a cause of action and plaintiff's motion to dismiss was improperly denied, where the counterclaim lacked a named plaintiff and did not state the conduct these plaintiffs allegedly engaged in which constituted the complained-of wrong. Abrams v Community Services, Inc., 86 A.D.2d 555, 446 N.Y.S.2d 74, 1982 N.Y. App. Div. LEXIS 15080 (N.Y. App. Div. 1st Dep't 1982).

Preliminary injunction granted to plaintiff in action for wrongful interference with contractual relationships would not serve as predicate for defendant's counterclaim of abuse of process where defendant failed to state elements essential to that cause of action in its pleading. Barrier Gasoline Service, Inc. v Shoreline Oil Co., 126 A.D.2d 692, 510 N.Y.S.2d 1023, 1987 N.Y. App. Div. LEXIS 41835 (N.Y. App. Div. 2d Dep't 1987).

Defendants retailer and manufacturer of deep fryer had no cause of action against father of child for contribution as counterclaim to child's action against defendants for injuries received when his hands became immersed in boiling fat due to fryer's defective design, even though father could be faulted for negligently supervising child by permitting him to come too close to fryer, since actions of father were not likely to cause physical injury to third parties and thus father owed no duty to defendants. Wilson v Sears, Roebuck & Co., 126 A.D.2d 954, 511 N.Y.S.2d 726, 1987 N.Y. App. Div. LEXIS 42061 (N.Y. App. Div. 4th Dep't 1987).

Seller was not entitled to summary judgment on buyer's counterclaims for fraudulent inducement in action to recover balance due on promissory notes where counterclaim raised triable issues of fact and notes themselves did not contain merger clause or specific disclaimer foreclosing defense or counterclaim based no fraud, nor was there any language to bar parol evidence of fraudulent misrepresentations; moreover, counterclaims asserted damages in excess of those sought in complaint, involving claims directly related to those in complaint. GTE Automatic Electric, Inc. v Martin's, Inc., 127 A.D.2d 545, 512 N.Y.S.2d 107, 1987 N.Y. App. Div. LEXIS 43016 (N.Y. App. Div. 1st Dep't 1987).

In employees' action seeking to recover consulting fees alleged to be due them pursuant to agreement entered into incident to their retirement, Special Term erred in dismissing employer's

counterclaim alleging tortious interference with business relationships where that counterclaim was legally sufficient to state claim for relief when considered together with allegations of breach of fiduciary duty not to compete with employer or to interfere with its business which court had sustained as separate counterclaim. Lazar v Nico Industries, Inc., 128 A.D.2d 408, 512 N.Y.S.2d 693, 1987 N.Y. App. Div. LEXIS 44115 (N.Y. App. Div. 1st Dep't 1987).

Counterclaim in automobile accident case sufficiently alleged cause of action for contribution and indemnification from plaintiff driver in event that plaintiff passenger recovered judgment against defendant (driver of vehicle which allegedly struck plaintiffs' vehicle) where defendant alleged that plaintiff driver's negligence contributed to or caused accident; specific acts of his negligence could be demanded in bill of particulars. Mabb v McIntyre, 137 A.D.2d 943, 525 N.Y.S.2d 68, 1988 N.Y. App. Div. LEXIS 1774 (N.Y. App. Div. 3d Dep't), app. dismissed, 72 N.Y.2d 952, 533 N.Y.S.2d 58, 529 N.E.2d 426, 1988 N.Y. LEXIS 2470 (N.Y. 1988).

Malicious prosecution counterclaim (based on plaintiff's filing of lis pendens), brought by defendant in pending action for specific performance of real estate contract, was premature and would be dismissed since essential element of malicious prosecution is allegation that underlying action complained of has terminated in favor of party claiming malicious prosecution. Laval Realty, Inc. v Shell Realty Co., 151 A.D.2d 321, 542 N.Y.S.2d 585, 1989 N.Y. App. Div. LEXIS 7885 (N.Y. App. Div. 1st Dep't 1989).

Court properly dismissed counterclaim which asserted that plaintiff's action was frivolous and had been commenced in bad faith as attempt to intimidate and punish defendant since cause of action sounding in malicious prosecution can not be interposed as counterclaim in very civil action that was allegedly instituted wrongfully. Sasso v Corniola, 154 A.D.2d 362, 545 N.Y.S.2d 839, 1989 N.Y. App. Div. LEXIS 12261 (N.Y. App. Div. 2d Dep't 1989).

Where counterclaim sought judgment over against plaintiff in event defendants were held liable to different plaintiff in currently pending New Jersey action, it was contingent and therefore did not allege viable cause of action. Efdey Electrical Contractors, Inc. v Melita, 167 A.D.2d 501, 562 N.Y.S.2d 172, 1990 N.Y. App. Div. LEXIS 14301 (N.Y. App. Div. 2d Dep't 1990).

In action to recover payment for goods sold and delivered, court should have dismissed buyers' affirmative defense and counterclaim asserting that seller discriminated against them in violation of federal and state antitrust laws by selling same goods to others at lower price, since alleged violation of antitrust laws is not defense to such action, and allegations of price discrimination did not state cause of action under state antitrust laws. TDK Electronics Corp. v M & A Enterprises, 172 A.D.2d 603, 568 N.Y.S.2d 424, 1991 N.Y. App. Div. LEXIS 4610 (N.Y. App. Div. 2d Dep't 1991).

Defendant's counterclaim against individual plaintiff for recovery on promissory note should not have been dismissed solely on basis of plaintiff's production of corporate promissory note where there was conflicting testimony as to whether corporate note was intended to supersede personal note, and questions of fact concerning collateralization of loan had also been raised. Gelmin v Sequa Capital Corp., 223 A.D.2d 525, 636 N.Y.S.2d 813, 1996 N.Y. App. Div. LEXIS 184 (N.Y. App. Div. 2d Dep't 1996), aff'd, 269 A.D.2d 492, 707 N.Y.S.2d 108, 2000 N.Y. App. Div. LEXIS 1929 (N.Y. App. Div. 2d Dep't 2000).

In cable company's action to compel building owners to permit installation of upgraded cable television facilities in their building, leave to permit owners to assert counterclaim, based on alleged vandalism by cable company's employees, was properly denied where all damages had been repaired by separate nonparty entity, cable company already had deposed key defense witnesses, who were prevented by defense counsel from answering questions on vandalism, so that cable company would be prejudiced by amendment, there was no explanation for owners' delay in asserting counterclaim, and facts underlying counterclaim were not only known when original answer was drafted but were used to support pleading of vandalism as affirmative defense. People v Gonzalez, 240 A.D.2d 255, 658 N.Y.S.2d 305, 1997 N.Y. App. Div. LEXIS 6499 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 1011, 666 N.Y.S.2d 106, 688 N.E.2d 1390, 1997 N.Y. LEXIS 3958 (N.Y. 1997).

In action by alleged partners for accounting and breach of contract against managing partners of merged accounting firm, defendants' counterclaim for breach of fiduciary duty was properly

dismissed where plaintiffs were justified in seeking professional association elsewhere after defendants wrongfully reduced plaintiffs' compensation, plaintiffs did not solicit defendants' clients away from their firm, and it would be inequitable to prevent plaintiffs from reacquiring their own former clients. Muhlstock v Cole, 245 A.D.2d 55, 666 N.Y.S.2d 116, 1997 N.Y. App. Div. LEXIS 12843 (N.Y. App. Div. 1st Dep't 1997).

Counterclaim for breach of fiduciary duty and fraud was properly dismissed where sole fiduciary duty allegedly breached was duty not to defraud, and counterclaimants' own pleadings indicated that they never relied on any representation or omission of any present adversary. Conduct of condominium's board of managers was not extreme and outrageous, and thus did not support counterclaim against it for intentional infliction of emotional distress, where board was entitled to exercise its right of first refusal under condominium's bylaws and to foreclose on lien filed for unpaid common charges and interest thereon. Counterclaim for "harassment" was properly dismissed because there is no such cause of action; if counterclaim were construed as claim for prima facie tort, it would fail where there was no allegation of sole motive to harm counterclaimants and no allegation of special damages. Motion to amend counterclaim was properly denied where there was no evidentiary showing of merit, and proposed amended pleading was not placed before court until 5 months after prior motion practice had been adjudicated. Board of Managers of Exec. Plaza Condo. v Jones, 251 A.D.2d 89, 674 N.Y.S.2d 304, 1998 N.Y. App. Div. LEXIS 6682 (N.Y. App. Div. 1st Dep't), app. dismissed, 92 N.Y.2d 1002, 684 N.Y.S.2d 188, 706 N.E.2d 1212, 1998 N.Y. LEXIS 4941 (N.Y. 1998).

Counterclaim for malicious abuse of process should be dismissed where complaint had been issued and used for its intended purpose, recovery of $120,000 from defendant; mere service of summons and complaint is not legally considered process capable of being abused. Pomeranz v Bourla, 257 A.D.2d 516, 684 N.Y.S.2d 527, 1999 N.Y. App. Div. LEXIS 712 (N.Y. App. Div. 1st Dep't 1999).

Counterclaim by defendant bus company, in personal injury action brought by five and a half year-old child, against parent of the child alleging that he allowed the boy to play on the street

and was thus contributorily negligent in failing to supervise the activities of the child in a place known to be potentially hazardous did not state a cause of action. Collazo v Manhattan & Bronx Surface Transit Operating Authority, 72 Misc. 2d 946, 339 N.Y.S.2d 809, 1972 N.Y. Misc. LEXIS 1216 (N.Y. Sup. Ct. 1972).

Counterclaim which, if proven, would have effectively reduced damages assessible against defendant who allegedly injured child, stated no cause of action where defendant failed to allege either that unusual parental care was required under the circumstances or that the parent's actions constituted malice or indifference, and failed to even set forth sufficient allegations as to a general lack of parental supervision. Kiernan v Jones, 73 Misc. 2d 829, 342 N.Y.S.2d 873, 1973 N.Y. Misc. LEXIS 2071 (N.Y. Sup. Ct. 1973).

In action for unjust enrichment, court would dismiss counterclaim for prima facie tort alleging that action was brought by plaintiffs solely for purpose of harassing defendants and burdening them with additional legal fees since (1) proceeding initiated by plaintiffs had not been terminated favorably to defendant, and (2) there was no abuse of process, no perverting of process to obtain collateral objective, and no interference with personal property occasioned by bringing action; public policy bars introduction of such retaliatory counterclaim. Cunningham v Merchant Sterling Corp., 148 Misc. 2d 52, 560 N.Y.S.2d 163, 1989 N.Y. Misc. LEXIS 886 (N.Y. Sup. Ct. 1989).

In action alleging termination in violation of whistleblowers' statute, CLS Labor § 740, counterclaim alleging that plaintiff breached fiduciary duty would be dismissed since defendant had previously moved to dismiss on ground (found to have merit) that federal agencies had exclusive jurisdiction over matter because it involved operation of nuclear research laboratory subject to federal regulations; defendant would not be permitted to reverse its position by asserting that state court was appropriate forum to initiate inquiry into issues presented by its counterclaim. Bordell v General Elec. Co., 147 Misc. 2d 475, 556 N.Y.S.2d 234 (N.Y. Sup. Ct. 1990).

II. Under Former Civil Practice Laws

A. Counterclaims

i. In General

20. Generally

The policy of the law is to construe liberally provisions relating to counterclaims to assist in avoiding a multiplicity of suits. Stafford Sec. Co. v Kremer, 232 A.D. 265, 249 N.Y.S. 670, 1931 N.Y. App. Div. LEXIS 13785 (N.Y. App. Div.), rev'd, 258 N.Y. 1, 179 N.E. 32, 258 N.Y. (N.Y.S.) 1, 1931 N.Y. LEXIS 786 (N.Y. 1931).

CPA § 266, as added by Laws 1936, chap 324, was retroactive. Kugel v Telsey, 250 A.D. 638, 295 N.Y.S. 148, 1937 N.Y. App. Div. LEXIS 8421 (N.Y. App. Div. 1937).

Defendant must be given benefit of all that can be drawn from allegations in counterclaim by reasonable and fair intendment. Stone v Freeman, 273 A.D. 600, 78 N.Y.S.2d 745, 1948 N.Y. App. Div. LEXIS 4645 (N.Y. App. Div.), rev'd, 298 N.Y. 268, 82 N.E.2d 571, 298 N.Y. (N.Y.S.) 268, 1948 N.Y. LEXIS 791 (N.Y. 1948).

A counterclaim which raised no issues as between plaintiffs and defendants was not a counterclaim as defined by CPA § 266. Mortgage Com. v Hill, 2 N.Y.S.2d 543, 166 Misc. 794, 1938 N.Y. Misc. LEXIS 1313 (N.Y. Sup. Ct. 1938).

CPA § 266 was to be construed with § 271. Tauro v Queens-Nassau Transit Lines, Inc., 6 N.Y.S.2d 176, 168 Misc. 879, 1938 N.Y. Misc. LEXIS 1813 (N.Y. Sup. Ct. 1938).

Cross-claim under CPA § 264 distinguished from counterclaim under CPA § 266. Paretta v White Acres Realty Corp., 76 N.Y.S.2d 69, 190 Misc. 649, 1948 N.Y. Misc. LEXIS 2046 (N.Y. Sup. Ct. 1948).

In accordance with CPA §§ 262 (Rule 3014 now Civ Rights Law 78) and 266, a counterclaim could be any cause of action in favor of the defendant and was not required to be related to the issues of the complaint. Moser v Fieland, 5 Misc. 2d 937, 158 N.Y.S.2d 1020, 1956 N.Y. Misc. LEXIS 1423 (N.Y. App. Term 1956).

Where defendant brings in new party by interposing counterclaim against plaintiff and that party, he can not thereafter interpose a separate counterclaim against the new party alone, which does not allege joint liability with the original plaintiff, even though the claim arose out of the same series of transactions. John D. Quinn, Inc. v Inspiration Enterprises, Inc., 23 Misc. 2d 433, 200 N.Y.S.2d 253, 1960 N.Y. Misc. LEXIS 3684 (N.Y. Sup. Ct. 1960).

Counterclaim within CPA § 266 could have been improper under CPA § 267. Jayell Films, Inc. v A. F. E. Corp., 67 N.Y.S.2d 77, 1946 N.Y. Misc. LEXIS 3184 (N.Y. Sup. Ct. 1946).

Counterclaim is not defense, but rather cross-action against plaintiff, upon which defendant may have affirmative judgment. 532 Fulton St., Inc. v Crown Drug Stores, Inc., 113 N.Y.S.2d 48, 1952 N.Y. Misc. LEXIS 2734 (N.Y. Sup. Ct.), app. dismissed, 113 N.Y.S.2d 748 (N.Y. App. Div. 1952).

The distinction between a counterclaim and an affirmative defense lies in whether the facts stated show a need for affirmative relief or, if proven, would merely defeat plaintiff's cause of action. Reswick v Owens-Illinois Glass Co., 156 N.Y.S.2d 712 (N.Y. Sup. Ct. 1956).

21. —Former practice

For examples of decisions under the former practice, materially limiting the scope of counterclaims by various restrictions, such as the requirement that the counterclaim in tort action must be connected with or arise out of the same transaction as the cause of action alleged in the complaint, and other requirements, see Edgerton v Page, 20 N.Y. 281, 20 N.Y. (N.Y.S.) 281, 18 How. Pr. 359, 1859 N.Y. LEXIS 193, 1859 N.Y. Misc. LEXIS 334 (N.Y. 1859),

limited, Eastside Exhibition Corp. v 210 E. 86th St. Corp., 18 N.Y.3d 617, 942 N.Y.S.2d 19, 965 N.E.2d 246, 2012 N.Y. LEXIS 309 (N.Y. 2012).

22. Striking in interests of justice

This section does not bar the court in the interests of justice from striking out a counterclaim whenever it deems it proper so to do. Ritter v Mountain Camp Holding Corp., 252 A.D. 602, 299 N.Y.S. 876, 1937 N.Y. App. Div. LEXIS 5736 (N.Y. App. Div. 1937).

In judgment creditor's action to set aside conveyance of realty from defendant to codefendant wherein defendant counterclaimed against codefendant charging that deed was a forgery and also seeking to have deed set aside, codefendant's counterclaim for damages against defendant for having maliciously complained to district attorney of forgery was dismissed since it could not be conveniently and justly determined with plaintiff's cause of action. David J. Hodder & Son, Inc. v Pennetto, 32 Misc. 2d 764, 223 N.Y.S.2d 685, 1961 N.Y. Misc. LEXIS 1860 (N.Y. Sup. Ct. 1961).

The courts are reluctant to permit counterclaims to an action for the misapplication of money or failure to pay plaintiff money belonging to him, and will exercise their discretion to strike and leave the defendant to an independent action in such cases. Jayell Films, Inc. v A. F. E. Corp., 67 N.Y.S.2d 77, 1946 N.Y. Misc. LEXIS 3184 (N.Y. Sup. Ct. 1946).

23. Unliquidated damages

Section 151 of the Debtor and Creditor Law did not modify CPA § 266 but merely conferred upon a defendant the right to set off an unmatured debt in cases where formerly this could not have been done. Fistere v Janapoll, 241 A.D. 353, 272 N.Y.S. 332, 1934 N.Y. App. Div. LEXIS 8249 (N.Y. App. Div. 1934).

Section 151 of the Debtor and Creditor Law applies to a set-off of mutual debts where they have not matured, but not to other causes of action. The right to a set-off does not exist where

plaintiff's claim is for money diverted unlawfully and without consideration from plaintiff's assignor and does not constitute an "indebtedness" of defendant. Fistere v Janapoll, 241 A.D. 353, 272 N.Y.S. 332, 1934 N.Y. App. Div. LEXIS 8249 (N.Y. App. Div. 1934).

There is nothing to be set off against the amount plaintiff shows himself entitled to recover where unliquidated damages are pleaded and not proved. Scribner v Levy, 4 N.Y.S. 918, 52 Hun 611, 1889 N.Y. Misc. LEXIS 1782 (N.Y. Sup. Ct. 1889).

A counterclaim for money loaned and advanced to plaintiff is good without averring that it is due. Clute v McCrea, 12 N.Y. St. 647.

A counterclaim may be for either liquidated or unliquidated damages. Schubart v Harteau, 34 Barb. 447, 1861 N.Y. App. Div. LEXIS 94 (N.Y. Sup. Ct. May 6, 1861).

The line is really drawn at uncertain damages, for the demand need not be liquidated nor undisputed. Davidson v Alfaro, 16 Hun 353 (N.Y.), modified, 80 N.Y. 660, 80 N.Y. (N.Y.S.) 660, 1880 N.Y. LEXIS 183 (N.Y. 1880).

24. Contingent counterclaims

Contingent counterclaim, which is not in existence when interposed, is not sufficient. Atlantic Gulf & West Indies S.S. Lines v New York, 271 A.D. 1008, 69 N.Y.S.2d 796, 1947 N.Y. App. Div. LEXIS 5606 (N.Y. App. Div. 1947).

25. Set-off and recoupment

Counterclaim is traditionally more extensive than either set-off or recoupment: Vassear v Livingston, 13 N.Y. 248, 13 N.Y. (N.Y.S.) 248, 1855 N.Y. LEXIS 78 (N.Y. 1855).

If facts not pleaded as a counterclaim, which fail as a defense, are proved without objection so as to establish an equitable right of set-off, the defendant is entitled to the benefit thereof. Acer v Hotchkiss, 97 N.Y. 395, 97 N.Y. (N.Y.S.) 395, 1884 N.Y. LEXIS 187 (N.Y. 1884).

Counterclaim in nature of set-off for unliquidated damages is good. Keon v Saxton & Co., 257 N.Y. 412, 178 N.E. 679, 257 N.Y. (N.Y.S.) 412, 1931 N.Y. LEXIS 873 (N.Y. 1931), reh'g denied, 258 N.Y. 578, 180 N.E. 340, 258 N.Y. (N.Y.S.) 578, 1932 N.Y. LEXIS 1242 (N.Y. 1932).

A set-off is the subject of counterclaim and cannot be proved under a plea of payment. Birdsall v Read, 188 A.D. 46, 176 N.Y.S. 369, 1919 N.Y. App. Div. LEXIS 7101 (N.Y. App. Div. 1919).

So-called “counterclaims” or “offsets” arising out of the same relationship, transaction or contract were properly pleaded as ground for dismissal of plaintiff’s action although no affirmative relief was demanded. National Surety Co. v Pastor, 212 A.D. 546, 209 N.Y.S. 210, 1925 N.Y. App. Div. LEXIS 9503 (N.Y. App. Div. 1925).

In action for specific sum of money claimed to be due plaintiff from defendant, defendant may offset amount shown to be due to latter from former. Loudee Iron & Metal Co. v D. Alper & Co., 286 A.D. 707, 146 N.Y.S.2d 422, 1955 N.Y. App. Div. LEXIS 4123 (N.Y. App. Div. 1955).

A claim which was obviously acquired by the defendant board of education of the city of New York from said city, for the purpose of a setoff in an action to recover a deposit made with the defendant in connection with a certain bid for a contract is properly interposed as a counterclaim. Scientific & Hospital Supply Corp. v Board of Education, 16 N.Y.S.2d 91, 172 Misc. 770, 1939 N.Y. Misc. LEXIS 2494 (N.Y. Mun. Ct. 1939).

26. Jury trial

A plaintiff, who has brought a suit in equity to set aside the award of an arbitrator, and who failed to move within ten days after issue to have issues on defendant’s counterclaim asking ejectment settled for trial by jury, should not be granted a jury trial. Ettlinger v Trustees of Sailors' Snug Harbor, 122 A.D. 681, 107 N.Y.S. 779, 1907 N.Y. App. Div. LEXIS 2532 (N.Y. App. Div. 1907).

27. —Settlement of issues

Where there are no issues of fact arising on the complaint and the only issues of fact are those arising on the counterclaim, the defendant may notice such issues for trial at the trial term without having them settled. Herb v Metropolitan Hospital & Dispensary, 80 A.D. 145, 80 N.Y.S. 552, 12 N.Y. Ann. Cas. 415, 1903 N.Y. App. Div. LEXIS 528 (N.Y. App. Div. 1903).

28. Claims and liabilities in different rights or capacities

Claim and counterclaim must be between same parties in same capacity. Ruzicka v Rager, 305 N.Y. 191, 111 N.E.2d 878, 305 N.Y. (N.Y.S.) 191, 1953 N.Y. LEXIS 824 (N.Y.), reh'g denied, 305 N.Y. 798, 113 N.E.2d 306, 305 N.Y. (N.Y.S.) 798, 1953 N.Y. LEXIS 1306 (N.Y. 1953).

Stockholder, suing derivatively, is not subject to counterclaim against him as individual. Binon v Boel, 271 A.D. 505, 66 N.Y.S.2d 425, 1946 N.Y. App. Div. LEXIS 2787 (N.Y. App. Div. 1946), aff'd, 297 N.Y. 528, 74 N.E.2d 466, 297 N.Y. (N.Y.S.) 528, 1947 N.Y. LEXIS 1022 (N.Y. 1947).

While amendment of CPA § 266 in 1936 liberalized the practice as to counterclaims, it did not abolish the rule that debts asserted between plaintiff and defendant in this manner must be mutual, that is, must be to and from the same persons in the same capacity. Select Theatres Corp. v Harms, Inc., 273 A.D. 505, 78 N.Y.S.2d 159, 1948 N.Y. App. Div. LEXIS 4624 (N.Y. App. Div.), app. denied, 273 A.D. 1007, 79 N.Y.S.2d 880, 1948 N.Y. App. Div. LEXIS 5742 (N.Y. App. Div. 1948).

A counterclaim against the plaintiff personally was not available against him in his capacity as guardian. Gallagher v David Stevenson Brewing Co., 34 N.Y.S. 94, 13 Misc. 40, 1895 N.Y. Misc. LEXIS 544 (N.Y.C.P. 1895).

In action by a trustee of a bankrupt corporation against director for maladministration of corporate affairs, defendant may not offset an indebtedness due him from the corporation. Walker v Man, 253 N.Y.S. 472, 142 Misc. 288, 1931 N.Y. Misc. LEXIS 1506 (N.Y. Sup. Ct. 1931).

In an action by director against the president of a corporation for misconduct, the defendant may not counterclaim for moneys loaned the corporation. Burgess v Stevens, 266 N.Y.S. 79, 148 Misc. 450, 1933 N.Y. Misc. LEXIS 1229 (N.Y. Sup. Ct. 1933).

Claims to be offset against each other must not only be between the same parties but between such parties in the same capacity. In re Chinese Merchants' Bank, Ltd., 272 N.Y.S. 764, 151 Misc. 425, 1934 N.Y. Misc. LEXIS 1423 (N.Y. Sup. Ct. 1934).

In action by infant plaintiff through her guardian ad litem, and not by latter in his individual capacity, to rescind for infancy contract to purchase automobile, counterclaim against guardian cannot lie unless it is also good against guardian father. Scalone v Talley Motors, Inc., 2 Misc. 2d 13, 149 N.Y.S.2d 574, 1956 N.Y. Misc. LEXIS 2272 (N.Y. Sup. Ct. 1956), modified, 3 A.D.2d 674, 158 N.Y.S.2d 615, 1957 N.Y. App. Div. LEXIS 6681 (N.Y. App. Div. 2d Dep't 1957).

A defendant cannot set off against plaintiff a demand in favor of one for whom he alleged he acted as agent in the transactions set out in the complaint, and who was the sole party in interest, when the action is against defendant personally. Wood v Davis, 15 N.Y.S. 554, 1891 N.Y. Misc. LEXIS 40 (N.Y. Super. Ct. 1891).

29. —Against or by state

Counterclaim cannot be interposed against the state without its consent. People v Brandreth, 36 N.Y. 191, 36 N.Y. (N.Y.S.) 191, 34 How. Pr. 171, 1867 N.Y. LEXIS 30, 1867 N.Y. Misc. LEXIS 239 (N.Y. 1867).

A counterclaim asking in the alternative for an affirmative judgment against a foreign state will not be stricken on motion by plaintiff; for whether a judgment can be validly entered against a sovereign state is a matter for the trial court. Irish Free State v Guaranty Safe Deposit Co., 215 N.Y.S. 255, 127 Misc. 86, 1926 N.Y. Misc. LEXIS 909 (N.Y. Sup. Ct. 1926).

Claim against State Insurance Fund is cognizable only in Court of Claims, and may not be presented as a set-off or counterclaim in Supreme Court. Commissioners of State Ins. Fund v

Cosmopolitan Mut. Ins. Co., 26 Misc. 2d 857, 209 N.Y.S.2d 1019, 1960 N.Y. Misc. LEXIS 2120 (N.Y. Sup. Ct. 1960).

30. Limitations of action and laches

A promissory note, barred by the statute of limitations, was not available as a set-off. De Lavallette v Wendt, 75 N.Y. 579, 75 N.Y. (N.Y.S.) 579, 1879 N.Y. LEXIS 446 (N.Y. 1879).

A cause of action for malpractice, barred after two years, may not after that time be used as a counterclaim to a complaint by the physician suing for the cost of his services in the same original transaction in which the counterclaim arose. Fish v Conley, 221 A.D. 609, 225 N.Y.S. 27, 1927 N.Y. App. Div. LEXIS 6518 (N.Y. App. Div. 1927).

In an action in contract, the defendant could set up as a counterclaim a demand for damage by reason of the default of plaintiff in performing the contract, though more than six years elapsed between the time this demand accrued and the time the answer was served. Herbert v Day, 33 Hun 461 (N.Y.).

A warranty made more than six years previous could be counterclaimed in an action on a note to which the statute had not run. Maders v Lawrence, 2 N.Y.S. 159, 49 Hun 360, 1888 N.Y. Misc. LEXIS 80 (N.Y. Sup. Ct. 1888).

31. Where barred by pending action or prior judgment

An action may not be maintained on matter set up as counterclaim in a prior action after judgment therein. Timpano v Davis Stevenson Brewing Co., 123 A.D. 903, 107 N.Y.S. 317, 1907 N.Y. App. Div. LEXIS 3099 (N.Y. App. Div. 1907).

Where a defendant pleads a prior judgment on another account as a bar, because the matters involved in the present action were therein set up as a counterclaim, the burden is on the defendant to show that it was litigated, as no presumption arises from the fact that it was

pleaded. Barber v Ellingwood, 137 A.D. 704, 122 N.Y.S. 369, 1910 N.Y. App. Div. LEXIS 763 (N.Y. App. Div. 1910).

Counterclaim stricken out because matters alleged had been litigated and determined in a foreign jurisdiction. Tatum v Maloney, 226 A.D. 62, 234 N.Y.S. 614, 1929 N.Y. App. Div. LEXIS 8648 (N.Y. App. Div. 1929).

Counterclaim, in action brought by one joint tort wrongdoer against the other, after two actions had been brought against them to recover for negligence, and judgments obtained. Fulton County Gas & Electric Co. v Hudson River Tel. Co., 113 N.Y.S. 22, 60 Misc. 247, 1908 N.Y. Misc. LEXIS 664 (N.Y. Sup. Ct. 1908), rev'd, 130 A.D. 343, 114 N.Y.S. 642, 1909 N.Y. App. Div. LEXIS 207 (N.Y. App. Div. 1909).

For pending action on attorney’s retainer as barring counterclaim in later action, see Loehr v Sheffield, 81 N.Y.S.2d 871, 1948 N.Y. Misc. LEXIS 2988 (N.Y. Sup. Ct. 1948).

A counterclaim cannot be made the subject of an independent action when it results from an alleged contract, the existence of which in material respects is directly negatived by the judgment in a former action. NEMETTY, 63 How. Pr. 387, 1882 N.Y. Misc. LEXIS 180 (N.Y.C.P. June 1, 1882), aff'd, Nemetty v Naylor, 100 N.Y. 562, 3 N.E. 497, 100 N.Y. (N.Y.S.) 562, 1885 N.Y. LEXIS 1012 (N.Y. 1885).

32. —Prior action as bar to counterclaim not determined therein

Defendant may prosecute a separate action for any demand he has against plaintiff as he is not bound to set it up as a counterclaim. Gillespie v Torrance, 25 N.Y. 306, 25 N.Y. (N.Y.S.) 306, 1862 N.Y. LEXIS 137 (N.Y. 1862).

In an action in a court of record, the defendant is not bound to avail himself of an independent cause of action as a counterclaim. Brown v Gallaudet, 80 N.Y. 413, 80 N.Y. (N.Y.S.) 413, 1880 N.Y. LEXIS 113 (N.Y. 1880).

It would not be an answer to a subsequent action by the defendant on the counterclaim that an attachment is granted and a judgment is recovered against him in the first action. RUPPERT v HAUG, 87 N.Y. 141, 87 N.Y. (N.Y.S.) 141, 62 How. Pr. 364, 1881 N.Y. Misc. LEXIS 247 (N.Y. 1881).

A defendant cannot be compelled to set up a counterclaim which exists in his favor against the plaintiff; he has a right to reserve his own claims for a cross-action and to confine his defense in the action brought against him to such matters as would defeat the claims there set up. Walkup v Mesick, 110 A.D. 326, 97 N.Y.S. 142, 1905 N.Y. App. Div. LEXIS 3912 (N.Y. App. Div. 1905).

Where defendant, in an action on one contract urged only a part of a counterclaim where it was available to the extent of the jurisdiction of the court, and which was also a defense to several other contracts, he could not interpose the balance as defense to an action on another of the contracts. Brinn v Harry Hindlemann, Inc., 199 A.D. 329, 192 N.Y.S. 34, 1922 N.Y. App. Div. LEXIS 8017 (N.Y. App. Div. 1922).

If a counterclaim is not necessarily involved in determining a plaintiff's claim, the defendant may interpose it, or withhold it to make it the subject of a separate action. Warshor v Warshor, 223 N.Y.S. 705, 130 Misc. 262, 1927 N.Y. Misc. LEXIS 1020 (N.Y. Sup. Ct. 1927).

Rule that a decree in equity on the merits is conclusive upon the parties as to all issues necessarily involved, applied to tenant's counterclaim in summary proceedings. Macross Holding Corp. v Siller, 236 N.Y.S. 351, 134 Misc. 860, 1929 N.Y. Misc. LEXIS 1222 (N.Y. Mun. Ct. 1929).

33. Waiver

The right of set-off may be waived and an agreement therefor upon good consideration will be enforced. Gutchess v Daniels, 49 N.Y. 605, 49 N.Y. (N.Y.S.) 605, 1872 N.Y. LEXIS 213 (N.Y. 1872).

34. Revival of counterclaim

Revival of counterclaim by representatives of a deceased defendant is allowed. Livermore v Bainbridge, 49 N.Y. 125, 49 N.Y. (N.Y.S.) 125, 1872 N.Y. LEXIS 144 (N.Y. 1872).

CPA §§ 23 (§ 205 herein) and 26 (§ 203(c) herein) applied to counterclaim. Lebrecht v Orefice, 105 N.Y.S.2d 318, 199 Misc. 1025, 1951 N.Y. Misc. LEXIS 1919 (N.Y. App. Term 1951).

ii. Pleading and Procedure

35. Generally

If the plaintiff has no claim there can be no counterclaim. Gates v Preston, 41 N.Y. 113, 41 N.Y. (N.Y.S.) 113, 1869 N.Y. LEXIS 230 (N.Y. 1869).

Testimony to sustain facts pleaded cannot be excluded, if objected to solely on the ground that it is not alleged that they will be relied on as a counterclaim. Van Brunt v Day, 81 N.Y. 251, 81 N.Y. (N.Y.S.) 251, 1880 N.Y. LEXIS 230 (N.Y. 1880).

The test of the propriety of a counterclaim is whether the defendant may upon the same facts maintain a separate action. Cragin v Lovell, 88 N.Y. 258, 88 N.Y. (N.Y.S.) 258, 1882 N.Y. LEXIS 99 (N.Y. 1882).

An objection that a counterclaim was not of the character specified in CPA § 266, distinctly specified the objection within the meaning of former CPA § 280. Eckert v Gallien, 40 A.D. 525, 58 N.Y.S. 85, 1899 N.Y. App. Div. LEXIS 1160 (N.Y. App. Div. 1899).

Although a defendant is entitled to prove his counterclaim, if he can, judgment therefor cannot be entered without proof. Balleisen v Schiff, 121 A.D. 285, 105 N.Y.S. 692, 1907 N.Y. App. Div. LEXIS 1758 (N.Y. App. Div. 1907).

Counterclaim seeking same relief as that sought by the plaintiff was not proper counterclaim. Fliess v Hoy, 150 A.D. 555, 135 N.Y.S. 44, 1912 N.Y. App. Div. LEXIS 7164 (N.Y. App. Div. 1912).

Where a plaintiff, after commencing an action by the service of a summons and notice and before serving a complaint, moved to discontinue the action, the motion should have been granted notwithstanding defendant had, pending a return on the notice of motion, served a purported answer setting up a counterclaim, since the right given by CPA §§ 266, 267 was qualified by the nature of the cause of action as disclosed by the complaint and hence the right to set up the same did not exist in advance of the service of the complaint. Stevenson v Diamond Fuel Co., 198 A.D. 345, 190 N.Y.S. 379, 1921 N.Y. App. Div. LEXIS 8094 (N.Y. App. Div. 1921).

Under CPA § 270 and § 261 (§§ 3011, 3018 herein), an answering defendant, seeking no affirmative relief by reason of a counterclaim, was not entitled to judgment on the answer. Hewitt v Farmers' Loan & Trust Co., 204 A.D. 797, 198 N.Y.S. 744, 1923 N.Y. App. Div. LEXIS 9575 (N.Y. App. Div. 1923).

Instance where a counterclaim was equivalent to a declaration that defendant owed plaintiff only the amount exceeding the claim set up thereby. Dairymen's League Co-op. Ass'n v Egli, 228 A.D. 164, 239 N.Y.S. 152, 1930 N.Y. App. Div. LEXIS 12127 (N.Y. App. Div. 1930).

It was never contemplated that a counterclaim for a declaratory judgment should be a request for a declaration that certain legal defenses are sufficient. Slowmach Realty Corp. v Leopold, 236 A.D. 330, 258 N.Y.S. 500, 1932 N.Y. App. Div. LEXIS 5968 (N.Y. App. Div. 1932).

The sole test of a counterclaim should be whether it can be conveniently and justly determined in connection with the plaintiff’s cause of action, and even if it cannot, the court, under § 262, may sever and order separate trials, or direct the priority of the trials. Panzer v Panzer, 274 A.D. 940, 83 N.Y.S.2d 526, 1948 N.Y. App. Div. LEXIS 4179 (N.Y. App. Div. 2d Dep't 1948).

Availability of counterclaim against codefendant, see Amy Corp. v Wendt, 277 A.D. 1088, 101 N.Y.S.2d 149, 1950 N.Y. App. Div. LEXIS 4561 (N.Y. App. Div. 1950).

Where a counterclaim is pleaded, the granting of a motion for leave to discontinue the action upon payment of costs is a matter of discretion. Fizburg v Ramsey, 97 N.Y.S. 359, 49 Misc. 216, 1906 N.Y. Misc. LEXIS 524 (N.Y. App. Term 1906).

A counterclaim is a cause of action pleaded against plaintiff and governed by the same rules as a complaint. Bank of United States v Frost, 255 N.Y.S. 763, 142 Misc. 589, 1932 N.Y. Misc. LEXIS 1407 (N.Y. Mun. Ct. 1932).

For all practical purposes counterclaim by defendant is same as complaint by plaintiff. Wanger v United States Trust Co., 74 N.Y.S.2d 251, 190 Misc. 73, 1947 N.Y. Misc. LEXIS 3220 (N.Y. Sup. Ct. 1947).

Primary test of counterclaim is that it must be sufficient to support independent cause of action against person or persons against whom it is asserted, including “a plaintiff or a plaintiff and another person or persons alleged to be liable.” O'Donnell v Vanecek, 3 Misc. 2d 20, 150 N.Y.S.2d 819, 1956 N.Y. Misc. LEXIS 2054 (N.Y. Sup. Ct. 1956).

To include an equitable counterclaim in a defense all that is necessary is that the equities when established be destructive of the plaintiff’s rights. Handler v Belmare Lighting Co., 8 Misc. 2d 687, 168 N.Y.S.2d 288, 1957 N.Y. Misc. LEXIS 2331 (N.Y. Sup. Ct. 1957).

Counterclaim, like a complaint, must contain plain and concise statement of material facts and must be pleaded in substantially the same manner. Kilidjian v Mazza, 20 Misc. 2d 285, 193 N.Y.S.2d 319, 1959 N.Y. Misc. LEXIS 2925 (N.Y. Sup. Ct. 1959).

A defendant who makes an affirmative claim against the plaintiff is required to set it up with the same particularity that is required of plaintiff in his complaint. Landau v Lavner, 195 N.Y.S. 301, 1922 N.Y. Misc. LEXIS 1384 (N.Y. Sup. Ct. 1922).

Counterclaim must state facts sufficient to constitute independent cause of action, and not merely facts which controvert plaintiff's claim and serve merely to defeat it. Teitelbaum v Goodman, 51 N.Y.S.2d 682, 1944 N.Y. Misc. LEXIS 2596 (N.Y. Sup. Ct. 1944).

Where defendant was not party to transactions between her husband and plaintiff and so could not maintain independent action against plaintiff, she could not maintain counterclaim based thereon. Acme Investors Corp. v Kahn, 65 N.Y.S.2d 918, 1946 N.Y. Misc. LEXIS 2960 (N.Y. Sup. Ct. 1946).

Where it was not possible to determine the extent, manner, nature or cause of "damaged or defective condition" of water heaters, as alleged in counterclaim, same was struck out, with leave to amend. Thermo Electric Corp. v Kremers, 143 N.Y.S.2d 252, 1955 N.Y. Misc. LEXIS 3646 (N.Y. Sup. Ct. 1955).

No counterclaim could have been entertained in CPA Article 78 (Article 78 herein) proceeding. Fun Fair Park, Inc. v Municipal Court of New York, 201 N.Y.S.2d 706 (N.Y. Sup. Ct. 1960).

Counterclaim containing no allegation that any sum is presently due to the defendant from the plaintiff is insufficient. Bates v 55 & 57 East 65th St. Corp., 249 A.D. 119, 291 N.Y.S. 211, 1936 N.Y. App. Div. LEXIS 5050 (N.Y. App. Div. 1936).

36. Conclusory and hypothetical pleading

It was not allowable to plead a counterclaim hypothetically. Stroock Plush Co. v Talcott, 129 A.D. 14, 113 N.Y.S. 214, 1908 N.Y. App. Div. LEXIS 1232 (N.Y. App. Div. 1908).

A counterclaim must state a cause of action; it will be stricken where pleading only conclusions. Schrieber v Sawyer, 243 N.Y.S. 716, 137 Misc. 498, 1930 N.Y. Misc. LEXIS 1395 (N.Y. Sup. Ct. 1930).

Where defense and counterclaim presented instance of permissible hypothetical pleading, they were not stricken. R. & L. Goldmuntz Sprl v Fischer, 57 N.Y.S.2d 489, 1945 N.Y. Misc. LEXIS 2280 (N.Y. Sup. Ct. 1945).

Allegation that deeds were made solely for purpose of defrauding defendant, was conclusory. Olsen v Kleinhenz, 86 N.Y.S.2d 178, 1948 N.Y. Misc. LEXIS 3886 (N.Y. Sup. Ct. 1948).

Where it was not possible to determine the extent, manner, nature or cause of “damaged or defective condition” of water heaters, as alleged in counterclaim, same was struck out, with leave to amend. Thermo Electric Corp. v Kremers, 143 N.Y.S.2d 252, 1955 N.Y. Misc. LEXIS 3646 (N.Y. Sup. Ct. 1955).

37. Number and consistency of counterclaims

The inconsistency of counterclaim is no objection to the interposition of as many as the defendant has. Bruce v Burr, 67 N.Y. 237, 67 N.Y. (N.Y.S.) 237, 1876 N.Y. LEXIS 377 (N.Y. 1876).

Where in an action upon a promissory note, the defendant sets up several counterclaims pursuant to § 266 and the plaintiff does not reply to such counterclaims, the defendant may take such proper judgment as he is entitled to because of the failure of the plaintiff to reply; there was no distinction, regarding the necessity of a reply between a counterclaim under CPA § 266 and any other counterclaim. Hunter v Fiss, 92 A.D. 164, 86 N.Y.S. 1121, 1904 N.Y. App. Div. LEXIS 613 (N.Y. App. Div. 1904).

When sued in successive actions by the same plaintiff, defendant may not impose the same counterclaim, except by pleading it as a defense. A. B. Aldus Realty Co. v Breslof, 231 N.Y.S. 640, 133 Misc. 149, 1928 N.Y. Misc. LEXIS 1156 (N.Y. City Ct. 1928).

Defendant cannot plead the same counterclaim in three independent actions of the same plaintiff. Tuckerman v Corbin, 66 How. Pr. 404, 1884 N.Y. Misc. LEXIS 47 (N.Y. City Ct. Feb. 1, 1884).

A party who has brought an action and sets up the same claim as a counterclaim will be compelled to elect between the two. Tuckerman v Corbin, 66 How. Pr. 404, 1884 N.Y. Misc. LEXIS 47 (N.Y. City Ct. Feb. 1, 1884).

38. Designating counterclaim

A statement in the answer will be construed as a defense instead of a counterclaim in the absence of an allegation that it is intended for the latter. Bates v Rosekrans, 37 N.Y. 409, 37 N.Y. (N.Y.S.) 409, 1867 N.Y. LEXIS 159 (N.Y. 1867).

In an action to foreclose a mortgage the defendant set up, “as a further and second defense,” facts tending to show that the mortgage was usurious, and concluded with a demand for judgment canceling the bond and mortgage: Held, that this was a defense, and not a counterclaim. The court, in giving judgment, said: “When the defense is intended as a counterclaim, it should be explicitly stated in the answer; so as to advise the opposite party, and in the absence of such an allegation, especially when the party defines and characterizes his answer as a defense, and it is uncertain whether a counterclaim is intended, such party is not in a position to insist that he has actually set up a counterclaim, and the answer should be construed and considered as a defense. The defendant is bound by his own definition of the answer, and cannot at his own volition change the nature of the pleading which he has characterized, and by so doing may have misled the plaintiff.” Equitable Life Assurance Soc. v Cuyler, 75 N.Y. 511, 75 N.Y. (N.Y.S.) 511, 1878 N.Y. LEXIS 897 (N.Y. 1878).

When a defendant has an election to set up a cross claim of any kind to diminish or overcome the claim of the plaintiff, or to bring an independent action thereon, such claim, if asserted, must be set up as a counterclaim in the action, whether it constitutes what was formerly denominated a recoupment, or any other claim coming within the definition of a counterclaim; if a counterclaim is relied upon, it must be alleged in the answer and not left to inference. Richard Deeves & Son v Manhattan Life Ins. Co., 195 N.Y. 324, 88 N.E. 395, 195 N.Y. (N.Y.S.) 324, 1909 N.Y. LEXIS

1021 (N.Y.), reh'g denied, 195 N.Y. 607, 89 N.E. 1111, 195 N.Y. (N.Y.S.) 607, 1909 N.Y. LEXIS 1227 (N.Y. 1909).

It is the substance of plaintiff's cause of action and not the form of the action which determines the right of setoff. Charlotte v Keon, 207 N.Y. 346, 100 N.E. 1116, 207 N.Y. (N.Y.S.) 346, 1913 N.Y. LEXIS 1278 (N.Y.), reh'g denied, 208 N.Y. 524, 101 N.E. 1124, 208 N.Y. (N.Y.S.) 524, 1913 N.Y. LEXIS 1101 (N.Y. 1913).

Where new matter set up in an answer may be either a counterclaim or an affirmative defense, it will be treated as a defense only, unless characterized as a counterclaim. Otto Huber Brewery v Sieke, 146 A.D. 467, 131 N.Y.S. 271, 1911 N.Y. App. Div. LEXIS 1914 (N.Y. App. Div. 1911).

Allegations allowed to stand as counterclaim though not separately stated. Loew v McInerney, 159 A.D. 513, 144 N.Y.S. 546, 1913 N.Y. App. Div. LEXIS 8174 (N.Y. App. Div.), reh'g denied, 160 A.D. 902, 144 N.Y.S. 1126, 1913 N.Y. App. Div. LEXIS 8558 (N.Y. App. Div. 1913).

Where matter pleaded as a separate defense was in substance a counterclaim, plaintiff was justified in serving a reply. Hume v Woodruff, 197 A.D. 510, 189 N.Y.S. 382, 1921 N.Y. App. Div. LEXIS 7492 (N.Y. App. Div. 1921).

If the proper facts are stated as a counterclaim with a prayer for affirmative relief, the pleading need not necessarily be labeled as such, but the better practice is to do so. National Bank of Rochester v Erion-Haines Realty Co., 213 A.D. 54, 209 N.Y.S. 522, 1925 N.Y. App. Div. LEXIS 8432 (N.Y. App. Div. 1925).

Where a defendant insists upon a counterclaim, it must be pleaded as such, otherwise it can be resorted to and used only as a defense. New York Trust Co. v American Realty Co., 213 A.D. 272, 210 N.Y.S. 64, 1925 N.Y. App. Div. LEXIS 8474 (N.Y. App. Div. 1925).

Where an answer shows by the relief demanded that a counterclaim was intended it is sufficient. Metropolitan Trust Co. v Tonawanda V. & C. R. Co., 43 Hun 521, 7 N.Y. St. 90 (N.Y.), aff'd, 106 N.Y. 673, 13 N.E. 937, 106 N.Y. (N.Y.S.) 673, 1887 N.Y. LEXIS 963 (N.Y. 1887).

39. —Effect on reply

Where the matter in an answer is not pleaded as a counterclaim, even though technically such, no reply is needed. Avery v New York C. & H. R. R. Co., 6 N.Y.S. 547, 1889 N.Y. Misc. LEXIS 678 (N.Y. Super. Ct.), aff'd, 117 N.Y. 660, 22 N.E. 1134, 117 N.Y. (N.Y.S.) 660, 1889 N.Y. LEXIS 1543 (N.Y. 1889).

Where the defense which might also constitute a counterclaim is not so described in the answer, a motion by the defendant for judgment for want of a reply should be denied. Favilla v Moretti, 13 N.Y.S. 707, 1890 N.Y. Misc. LEXIS 3250 (N.Y. Sup. Ct. 1890).

40. Counterclaim combined with defense

Matter which cannot be pleaded in an answer as an affirmative defense cannot be pleaded in a complaint as a ground for affirmative relief. MacQuoid v Queens Estates, 143 A.D. 134, 127 N.Y.S. 867, 1911 N.Y. App. Div. LEXIS 776 (N.Y. App. Div. 1911).

A defense and counterclaim may be combined in the answer where the facts constitute both a defense and counterclaim. Defenses pleaded were insufficient. Goelet v Goldstein, 229 A.D. 456, 242 N.Y.S. 586, 1930 N.Y. App. Div. LEXIS 10418 (N.Y. App. Div. 1930).

There is no objection to combining defense and a counterclaim where it is claimed that the same facts constitute both, but a counterclaim must be a cause of action in favor of the defendants and facts showing the cause of action must be stated therein. Tauszig v Kantor, 188 N.Y.S. 92, 115 Misc. 366, 1920 N.Y. Misc. LEXIS 1994 (N.Y. App. Term 1920).

While defense and counterclaim may be combined if same facts constitute both, pleader must specify cause of action to which they are directed. Berkley v Berkley, 142 N.Y.S.2d 273, 1955 N.Y. Misc. LEXIS 2790 (N.Y. Sup. Ct. 1955).

41. Reference to other parts of answer

A counterclaim may be perfect in itself or may refer to other parts of the answer or to papers annexed. Cragin v Lovell, 88 N.Y. 258, 88 N.Y. (N.Y.S.) 258, 1882 N.Y. LEXIS 99 (N.Y. 1882).

Resort cannot be had to other parts of an answer in aid of a separate and distinct defense, which must contain every allegation essential to make it a complete defense or counterclaim. Biedler v Malcolm, 121 A.D. 145, 105 N.Y.S. 642, 1907 N.Y. App. Div. LEXIS 1728 (N.Y. App. Div. 1907).

Reiteration in the counterclaim of denials in the answer are improper and should be disregarded. Levine v Hogan-Levine Co., 200 A.D. 487, 193 N.Y.S. 226, 1922 N.Y. App. Div. LEXIS 8208 (N.Y. App. Div. 1922).

Facts to constitute a counterclaim must amount to an independent cause of action and the repetition of the allegations of the affirmative defense as a counterclaim is insufficient and calls for no reply. McGee v Felter, 135 N.Y.S. 267, 75 Misc. 349, 1912 N.Y. Misc. LEXIS 671 (N.Y. County Ct. 1912), aff'd, 154 A.D. 957, 139 N.Y.S. 1132, 1913 N.Y. App. Div. LEXIS 4832 (N.Y. App. Div. 1913).

Counterclaim must be complete in itself, without resort to complaint or parts of answer not incorporated in counterclaim by reference or otherwise. Davalos v Davalos, 130 N.Y.S.2d 824, 1954 N.Y. Misc. LEXIS 2096 (N.Y. Sup. Ct. 1954).

42. Jurisdiction of court, where counterclaim exceeds

While the jurisdiction of the county court is limited to actions in which the complaint demands judgment for a sum not exceeding two thousand dollars, yet the court has jurisdiction and power to render judgment on a counterclaim for any amount. Howard Iron Works v Buffalo Elevating Co., 176 N.Y. 1, 68 N.E. 66, 176 N.Y. (N.Y.S.) 1, 1903 N.Y. LEXIS 771 (N.Y. 1903).

When a counterclaim exceeds the jurisdiction of the court, it may be set up to defeat the action and a new action brought for the balance. International Post Card Co. v Lithograph & Mfg. Co., 144 A.D. 72, 128 N.Y.S. 780, 1911 N.Y. App. Div. LEXIS 1625 (N.Y. App. Div. 1911).

The fact that a defendant has interposed a counterclaim in excess of plaintiff's demand gives him no right to affirmative relief, and hence does not deprive the trial court of its discretionary power to permit the plaintiff to discontinue the action, on payment of the accrued costs. Archer v Niagara Sprayer Co., 198 N.Y.S. 97, 1923 N.Y. Misc. LEXIS 1519 (N.Y. Sup. Ct. 1923).

iii. Particular Applications; Actions and Counter-claims

43. Accounting and account stated

In an action for an accounting the defendant is entitled to an affirmative judgment, though his answer makes no demand therefor. Consolidated Fruit Jar Co. v Wisner, 110 A.D. 99, 97 N.Y.S. 52, 1905 N.Y. App. Div. LEXIS 3875 (N.Y. App. Div. 1905), aff'd, 188 N.Y. 624, 81 N.E. 1162, 188 N.Y. (N.Y.S.) 624, 1907 N.Y. LEXIS 1304 (N.Y. 1907).

In an action for an accounting the defendant is entitled to an affirmative judgment, though his answer makes no demand therefor. Consolidated Fruit Jar Co. v Wisner, 110 A.D. 99, 97 N.Y.S. 52, 1905 N.Y. App. Div. LEXIS 3875 (N.Y. App. Div. 1905), aff'd, 188 N.Y. 624, 81 N.E. 1162, 188 N.Y. (N.Y.S.) 624, 1907 N.Y. LEXIS 1304 (N.Y. 1907).

In an action upon an account stated where the defense was a general denial, the defendant should not be permitted to introduce evidence showing that the plaintiff was indebted to him for matters altogether outside the matter embraced in the account. Uhlhorn v Hovey, 97 N.Y.S. 1040, 49 Misc. 638, 1906 N.Y. Misc. LEXIS 656 (N.Y. App. Term 1906).

A counterclaim which failed to show a sufficient reason why the accounting should not be had was stricken out. United States Trust Co. v Greiner, 209 N.Y.S. 105, 124 Misc. 458, 1925 N.Y. Misc. LEXIS 730 (N.Y. Sup. Ct.), aff'd, 215 A.D. 659, 212 N.Y.S. 931, 1925 N.Y. App. Div. LEXIS 5421 (N.Y. App. Div. 1925).

Damages on invalid sale of stock for plaintiff may be set up in action for account between banks. Ulster County Sav. Inst. v Fourth Nat'l Bank, 8 N.Y.S. 162, 54 Hun 638, 1889 N.Y. Misc. LEXIS 2219 (N.Y. Sup. Ct. 1889).

Where under agreement between exhibitor and distributor of films rights of parties are clear and specific and amount of defendant's damages under agreement are not difficult of ascertainment, failure of plaintiffs to render to defendant daily box-office-receipt statements did not justify equity accounting as distinguished from accounting at law. Goldwurm v Levey, 135 N.Y.S.2d 213, 1954 N.Y. Misc. LEXIS 2910 (N.Y. Sup. Ct. 1954).

44. Arbitration

Agreement to arbitrate is not properly pleaded as a counterclaim. Nagy v Arcas Brass & Iron Co., 242 N.Y. 97, 150 N.E. 614, 242 N.Y. (N.Y.S.) 97, 1926 N.Y. LEXIS 963 (N.Y. 1926).

45. Attorney and client

It is sufficient that an answer did not set up a technical counterclaim where in a suit against attorneys to recover moneys collected by them, it alleged the performance and value of the services and the right of defendants to retain therefor the whole sum realized. Ward v Craig, 87 N.Y. 550, 87 N.Y. (N.Y.S.) 550, 1882 N.Y. LEXIS 39 (N.Y. 1882).

In an action against an attorney for conversion in refusing to turn over to the executor money which he had been given for certain funds, it was necessary to allege facts other than "he converted the same to his own use," the complaint held to be one for moneys he had received, and the defendant was entitled to set up counterclaim for sums due on other contracts. Lange v Schile, 117 A.D. 233, 101 N.Y.S. 1080, 1907 N.Y. App. Div. LEXIS 226 (N.Y. App. Div. 1907).

Counterclaim of defendant, a former attorney, against money advanced by client for costs and disbursements, was not maintainable under the contract of employment. Stiles v Annabel, 226 A.D. 268, 235 N.Y.S. 508, 1929 N.Y. App. Div. LEXIS 8701 (N.Y. App. Div. 1929).

In mortgage foreclosure seeking no deficiency, counterclaim by attorney for professional services rendered long before delivery of mortgage was struck out without prejudice to another action. Smyth v McDonogh, 260 A.D. 889, 22 N.Y.S.2d 631, 1940 N.Y. App. Div. LEXIS 5238 (N.Y. App. Div. 1940).

In an action by an attorney for his fees, the defendant's counterclaim that plaintiff appropriated her bank account to his own use on the pretense of bailing out a relative and that such affair was the only dealing she ever had with plaintiff, constitutes a valid counterclaim. Coppola v Di Benedetto, 215 N.Y.S. 722, 127 Misc. 276, 1926 N.Y. Misc. LEXIS 964 (N.Y. App. Term 1926).

For counterclaim of conspiracy between plaintiff and his attorney, in action for assault, see Dallas v Fassnacht, 42 N.Y.S.2d 415, 1943 N.Y. Misc. LEXIS 2017 (N.Y. Sup. Ct. 1943).

Pending action for breach of retainer agreement barred counterclaim alleging same matter in later action by attorney's assignee for legal services. Loehr v Sheffield, 81 N.Y.S.2d 871, 1948 N.Y. Misc. LEXIS 2988 (N.Y. Sup. Ct. 1948).

Services rendered by an attorney may be set off in an action against him for money received as attorney. 53 How. Pr. 278, 1875 N.Y. Misc. LEXIS 200.

46. Bankruptcy, insolvency, and liquidation

Where plaintiff was indebted to the firm of which defendant was a member in an amount exceeding his claim, and was insolvent, on his motion to strike defendant's counterclaim and for judgment, the counterclaim should have been allowed on the ground of an equitable set-off. Burns v Lopez, 256 N.Y. 123, 175 N.E. 537, 256 N.Y. (N.Y.S.) 123, 1931 N.Y. LEXIS 1033 (N.Y. 1931).

In an action by the liquidator of a bank to recover from indorser the amount due on a note, the indorser may not offset the amount of a deposit to her credit in the bank where the maker of the note is solvent. Bank of United States v Braveman, 259 N.Y. 65, 181 N.E. 50, 259 N.Y. (N.Y.S.) 65, 1932 N.Y. LEXIS 904 (N.Y. 1932).

A finding that a plaintiff was entitled to the balance of a fund deposited by a bankrupt, was reversed for erroneous refusal to permit the defendants to offer evidence on their counterclaim setting up ownership of the fund. Redondo S.S. Co. v Irving Bank-Columbia Trust Co., 219 A.D. 825, 221 N.Y.S. 83, 1927 N.Y. App. Div. LEXIS 12322 (N.Y. App. Div. 1927).

Under Bankruptcy Act, § 68, paragraph a, debts to be the subject of setoff and counterclaim must be “mutual debts.” Brown v Deposit Nat'l Bank, 234 A.D. 524, 256 N.Y.S. 82, 1932 N.Y. App. Div. LEXIS 10480 (N.Y. App. Div. 1932).

A bank in which a surety company, which is being liquidated, had a deposit, has no right to set off its unmatured claim against a demand made on it by the Superintendent of Insurance for payment of the amount of the deposit. In re Equitable Casualty & Surety Co., 235 A.D. 250, 256 N.Y.S. 561, 1932 N.Y. App. Div. LEXIS 7935 (N.Y. App. Div. 1932).

In action by State Superintendent of Insurance as liquidator of surety company to recover deposit in defendant bank to the credit of said company, defendant is entitled to set off a claim against said company as guarantor of a note. Van Schaick v Pennsylvania Exchange Bank, 236 A.D. 453, 260 N.Y.S. 37, 1932 N.Y. App. Div. LEXIS 5993 (N.Y. App. Div. 1932).

Indorser was entitled to set off balance of deposit due from insolvent bank to him, the maker of the note being insolvent. Carnegie Trust Co. v Kistler, 152 N.Y.S. 240, 89 Misc. 404, 1915 N.Y. Misc. LEXIS 964 (N.Y. App. Term 1915).

As against rent which became due after bankruptcy of defendant, in action by the trustee, a judgment obtained before adjudication could not be offset. Crandell v Rappaport, 233 N.Y.S. 32, 133 Misc. 598, 1928 N.Y. Misc. LEXIS 1225 (N.Y. App. Term 1928).

Counterclaim not maintainable against bank in liquidation by superintendent of banks unless Banking Law § 76 complied with. Bank of United States v Frost, 255 N.Y.S. 763, 142 Misc. 589, 1932 N.Y. Misc. LEXIS 1407 (N.Y. Mun. Ct. 1932).

In an action by trustee in bankruptcy of a non-resident against a corporate defendant and the sureties to recover damages resulting from a wrongful attachment, a claim for services rendered the bankrupt by the corporate defendant could not be offset against a claim due to invalid attachment, since claims were not mutual. Hughes v Frank M. Murphy, Inc., 6 N.Y.S.2d 833, 169 Misc. 239, 1938 N.Y. Misc. LEXIS 1950 (N.Y. App. Term 1938).

47. Bills and notes

A bank may set off a customer's note it has discounted against his deposit. Robinson v Howes, 20 N.Y. 84, 20 N.Y. (N.Y.S.) 84, 1859 N.Y. LEXIS 162 (N.Y. 1859).

In action at law by liquidator of a bank to recover from an indorser the amount due on a note, the indorser may not offset the amount of a deposit to her credit in the bank where the maker of the note is solvent. Bank of United States v Braveman, 259 N.Y. 65, 181 N.E. 50, 259 N.Y. (N.Y.S.) 65, 1932 N.Y. LEXIS 904 (N.Y. 1932).

In action on note, allegations that plaintiff had entered into an agreement as to other matters to share in losses was not available where not pleaded as an equitable counterclaim. French Over-Seas Corp. v Five Continents Corp., 190 A.D. 733, 180 N.Y.S. 374, 1920 N.Y. App. Div. LEXIS 4233 (N.Y. App. Div. 1920).

Where consideration for a note failed in part, counterclaim was proper to the extent of the failure, for the amount paid on it, as for money had and received by mistake. United Transp. Co. v Glenn, 225 A.D. 171, 232 N.Y.S. 373, 1929 N.Y. App. Div. LEXIS 11588 (N.Y. App. Div. 1929).

In an action on a note given plaintiff by her husband for procuring a divorce, counterclaim that the divorce was illegally obtained in another state, was good. McDonald v McDonald, 228 A.D. 341, 239 N.Y.S. 533, 1930 N.Y. App. Div. LEXIS 12168 (N.Y. App. Div. 1930).

In action on a note maker's counterclaim that others whom he sought to bring in agreed to pay the note, was insufficient. National City Bank v Holzworth, 231 A.D. 688, 248 N.Y.S. 584, 1931 N.Y. App. Div. LEXIS 16139 (N.Y. App. Div. 1931).

In action on a note given in partial payment for construction work, answer alleging damages because of defective work was allowed to stand. Armstrong Cork & Insulation Co. v Pirone, 238 N.Y.S. 522, 135 Misc. 819, 1930 N.Y. Misc. LEXIS 930 (N.Y. City Ct. 1930).

Motion to strike answer and counterclaim in an action on a note, granted on the ground that they were sham, frivolous and interposed for delay. Armstrong Cork & Insulation Co. v Pirone, 238 N.Y.S. 522, 135 Misc. 819, 1930 N.Y. Misc. LEXIS 930 (N.Y. City Ct. 1930).

In action by one bank against another to recover funds paid out on forged instruments and to fictitious persons, damages from plaintiff's negligence and defendant's freedom from contributory negligence should have been set up in a counterclaim. Stuyvesant Credit Union v Manufacturers' Trust Co., 245 N.Y.S. 39, 138 Misc. 122, 1930 N.Y. Misc. LEXIS 1565 (N.Y. Sup. Ct. 1930).

In action against drawee of bills of exchange, drawee may counterclaim that payee never acquired bills for value but was mere agent for collection for drawer allegedly indebted to drawee. Yokohama Specie Bank, Ltd., New York Agency v Milbert Importing Corp., 44 N.Y.S.2d 71, 182 Misc. 281, 1943 N.Y. Misc. LEXIS 2387 (N.Y. Sup. Ct. 1943).

Where check was drawn by bank upon itself, plaintiff is entitled to treat it as promissory note, and it is subject to defenses of lack or failure of consideration; as a check, it is subject to defense of discharge by loss caused by delay in presentment for payment. In re Pascal's Estate, 3 Misc. 2d 136, 146 N.Y.S.2d 364, 1955 N.Y. Misc. LEXIS 2272 (N.Y. Sup. Ct. 1955).

48. —Collateral

It constitutes a good counterclaim in an action on a note to allege that it was obtained by fraud and that defendant has sustained damages in consequence thereof. Isham v Davidson, 52 N.Y. 237, 52 N.Y. (N.Y.S.) 237, 1873 N.Y. LEXIS 243 (N.Y. 1873).

A conversion of collateral given in pledge for the payment of a note can be counterclaimed in an action on the note. Cass v Higenbotam, 100 N.Y. 248, 3 N.E. 189, 100 N.Y. (N.Y.S.) 248, 1885 N.Y. LEXIS 975 (N.Y. 1885).

In action on a note secured by collateral, defendant should set forth the fact that the collateral has not been surrendered by way of counterclaim, and pray that upon payment of the amount due plaintiff he be required to deliver up the collateral. In the instant case the answer was treated as a counterclaim. National Bank of Rochester v Erion-Haines Realty Co., 213 A.D. 54, 209 N.Y.S. 522, 1925 N.Y. App. Div. LEXIS 8432 (N.Y. App. Div. 1925).

In action upon a note secured by deposit of collateral, the proper practice is to set up the facts in a counterclaim and ask that upon payment of the note the plaintiff be required to deliver up the collateral. Kelly v Eggers, 225 A.D. 511, 233 N.Y.S. 638, 1929 N.Y. App. Div. LEXIS 11683 (N.Y. App. Div. 1929).

In an action on a promissory note an allegation that the plaintiff had collateral as security to the debt does not constitute the allegation of a counterclaim. First Trust & Deposit Co. v Potter, 278 N.Y.S. 847, 155 Misc. 106, 1935 N.Y. Misc. LEXIS 1094 (N.Y. Sup. Ct. 1935).

49. —Fraud

In an action to recover the unpaid principal and interest on notes given for the purchase of land, a counterclaim charging bad faith on the part of a trustee through whom the land was purchased, and who was a director of the real purchaser and who owned all of defendant's stock, is insufficient as the defendant still retains the land; but allegations that the trustee purchased the land knowing that defendant's subsidiary would purchase, to make a large profit,

is sufficient as charging fraud. New York Trust Co. v American Realty Co., 244 N.Y. 209, 155 N.E. 102, 244 N.Y. (N.Y.S.) 209, 1926 N.Y. LEXIS 641 (N.Y. 1926).

A counterclaim which alleges that a codefendant obtained the notes sued on by fraud and that plaintiff received them with knowledge of such fraud states a good cause of action and should not be stricken. National Butchers' & Drovers' Bank v Gottfried, 221 A.D. 1, 222 N.Y.S. 291, 1927 N.Y. App. Div. LEXIS 6355 (N.Y. App. Div. 1927).

Where it was sought to restrain negotiation of a note alleged to have been fraudulently obtained in renewal of others, counterclaims were proper. Newton v Otselic Valley Nat'l Bank, 224 A.D. 527, 231 N.Y.S. 526, 1928 N.Y. App. Div. LEXIS 10054 (N.Y. App. Div. 1928).

In action on note signed by buyer of machinery, buyer may counterclaim for breach of warranty and fraud despite resale of machinery. Bernstein v Wittner, 266 A.D. 978, 44 N.Y.S.2d 357, 1943 N.Y. App. Div. LEXIS 5579 (N.Y. App. Div. 1943).

50. Brokers

In action for broker’s commissions, counterclaim alleging conspiracy to violate PL § 439, by giving or offering to give bonus to purchasing agent, was insufficient. Stone v Freeman, 298 N.Y. 268, 82 N.E.2d 571, 298 N.Y. (N.Y.S.) 268, 1948 N.Y. LEXIS 791 (N.Y. 1948).

In broker’s action for balance due on account of stock transactions, counterclaim that orders were placed for immediate delivery and that no delivery was made, was insufficient for not alleging a demand and tender of purchase price, the stock being pledged for payment of the price. Faroll v K. Japha & Co., 232 A.D. 473, 250 N.Y.S. 362, 1931 N.Y. App. Div. LEXIS 13853 (N.Y. App. Div. 1931).

In an action to recover broker’s commission for procuring a loan, an answer that alleges defendant informed plaintiff he would need the money in ten days to close a purchase of real estate and he suffered damage from not getting the money in that time, is insufficient as a counterclaim, in the absence of an allegation that the plaintiff’s agreement was to procure the

money within that period. Burr v Penfield, 105 N.Y.S. 939, 55 Misc. 543, 1907 N.Y. Misc. LEXIS 662 (N.Y. City Ct. 1907).

51. Carriers

A lake carrier of goods having received goods transported by canal carriers and paid the latter their proportion of the freight, and delivered the goods at the termination of the lake route, under a bill of lading subjecting the goods to the entire freight, is entitled to recover the whole freight, and the owner cannot recoup a claim against the canal carrier for damages to the goods. Merrick v Gordon, 20 N.Y. 93, 20 N.Y. (N.Y.S.) 93, 1859 N.Y. LEXIS 164 (N.Y. 1859).

Damages for delay in transportation may be offset in a carrier's action for damages done the vessel by owners of freight. Starbird v Barrons, 43 N.Y. 200, 43 N.Y. (N.Y.S.) 200, 1870 N.Y. LEXIS 109 (N.Y. 1870).

A judgment in favor of a carrier, in an action by him to recover freight is a bar to an action by the owner of the goods shipped to recover damages for destruction of the property, caused by a failure on the part of the carrier to perform his contract of transportation. Where the goods are so destroyed the shipper is excused freight, the failure to perform is a defense, going to the whole cause of action for freight, and may be proved under the general issue. The principle of recoupment does not apply where the fact upon which it is based is necessarily fatal to the whole action. Dunham v Bower, 77 N.Y. 76, 77 N.Y. (N.Y.S.) 76, 1879 N.Y. LEXIS 741 (N.Y. 1879).

Damages to a cargo, caused by a breach of the charter party or bill of lading by the master or owner of a vessel, could be set off against a liability for freight. Elwell v Skiddy, 77 N.Y. 282, 77 N.Y. (N.Y.S.) 282, 1879 N.Y. LEXIS 772 (N.Y. 1879).

In an action for freight, damage to the cargo by delay caused by detention arising from a violation of the law may be set off by the consignee. Elwell v Skiddy, 77 N.Y. 282, 77 N.Y. (N.Y.S.) 282, 1879 N.Y. LEXIS 772 (N.Y. 1879).

In an action by a private carrier to recover for services rendered in transporting merchandise defendant cannot recover on counterclaim for the value of goods lost without alleging and proving that loss was due to negligence of plaintiff. Gerhard & Hey, Inc. v Cattaraugus Tanning Co., 241 N.Y. 413, 150 N.E. 500, 241 N.Y. (N.Y.S.) 413, 1926 N.Y. LEXIS 580 (N.Y. 1926).

In carrier's action for demurrage, counterclaim which did not arise out of same transaction upon which carrier sued, was dismissed as improper but without reference to this section as amended. New York C. R. Co. v Niagara Fruit Industries, Inc., 278 A.D. 892, 104 N.Y.S.2d 814, 1951 N.Y. App. Div. LEXIS 5089 (N.Y. App. Div. 1951).

In action by carrier to recover freight charges, shipper can set up damage to shipment as counterclaim, notwithstanding requirement of Interstate Commerce Act that freight charges be paid in currency. Pennsylvania R. Co. v Bellinger, 166 N.Y.S. 652, 101 Misc. 105, 1917 N.Y. Misc. LEXIS 555 (N.Y. Sup. Ct. 1917).

Where plaintiffs agreed to pay drafts accompanied by bills of lading, drawn on them by third parties in the payment of goods shipped by the third parties to defendants and defendants guaranteed that all bills of lading would be genuine; and where such third parties drew a draft on plaintiffs for goods shipped and sent with it a bill of lading which stated that goods were shipped on deck at shipper's risk, which draft the plaintiffs paid. A counterclaim on the part of the defendants, that by reason of the plaintiffs having accepted such draft accompanied by the qualified bill of lading, they committed a breach of duty, and the goods having been lost at sea, the defendants had sustained certain damages by loss of profits, is not sufficient, for the reason that plaintiffs owed no duty to defendants as to the manner of shipments. Gossler v Lau, 14 N.Y.S. 287, 59 N.Y. Super. Ct. 354, 1891 N.Y. Misc. LEXIS 1949 (N.Y. Super. Ct. 1891).

52. Contracts

In an action on contract any distinct cause of action of the defendant against plaintiff upon contract existing at the time of the commencement of the action could be set up as a

counterclaim even under former practice, whether it was of legal or equitable nature. Vassear v Livingston, 13 N.Y. 248, 13 N.Y. (N.Y.S.) 248, 1855 N.Y. LEXIS 78 (N.Y. 1855).

Upon the trial of an action upon contract for failure to make certain payments the defendant was allowed to amend his answer by setting up an overpayment, and demanding judgment therefor. It appeared that the overpayment was made since the commencement of the action. Held, that the defendant was entitled to judgment for the overpayment. It was proper counterclaim, which might have been set up by a supplemental answer, and the amendment had the effect of a supplemental answer. Howard v Johnston, 82 N.Y. 271, 82 N.Y. (N.Y.S.) 271, 1880 N.Y. LEXIS 353 (N.Y. 1880).

If defendant sued on a contract claims a mistake and a reformation on that account, he should allege the facts entitling him thereto by way of counterclaim. Born v Schrenkeisen, 110 N.Y. 55, 17 N.E. 339, 110 N.Y. (N.Y.S.) 55, 16 N.Y. St. 412, 1888 N.Y. LEXIS 851 (N.Y. 1888).

Action by Superintendent of Insurance against Trust Company, having officers and directors common with insolvent corporation, to recover amount alleged to have been paid to it for worthless mortgages by insolvent corporation, is not an action on contract within the meaning of this section, as it existed prior to the enactment of Chap. 324 of the Laws of 1936. Pink v Title Guarantee & Trust Co., 274 N.Y. 167, 8 N.E.2d 321, 274 N.Y. (N.Y.S.) 167, 1937 N.Y. LEXIS 831 (N.Y.), reh'g denied, 274 N.Y. 610, 10 N.E.2d 575, 274 N.Y. (N.Y.S.) 610, 1937 N.Y. LEXIS 994 (N.Y. 1937).

Where the complaint in an action brought in the municipal court is framed upon a quantum meruit, while the proof establishes the existence of an express contract, the court may disregard the variance. Lundine v Callaghan, 82 A.D. 621, 81 N.Y.S. 1052, 1903 N.Y. App. Div. LEXIS 1237 (N.Y. App. Div. 1903).

A defendant sued in the supreme court for moneys paid to him to construct an engine which he refused to deliver, is not bound to counterclaim a demand for the value of material and services

furnished, but may merely set up his lien as a defense. Miller v Baillard, 124 A.D. 555, 108 N.Y.S. 973, 1908 N.Y. App. Div. LEXIS 2148 (N.Y. App. Div. 1908).

An agreement too indefinite and uncertain to constitute a contract cannot be made the basis of a counterclaim and such counterclaim should be stricken on motion. Royal Bank of Canada v Williams, 220 A.D. 603, 222 N.Y.S. 425, 1927 N.Y. App. Div. LEXIS 9371 (N.Y. App. Div. 1927).

Where the parties had orally agreed to execute a written contract modifying an agreement under seal and plaintiff refused to execute same, counterclaim was sufficient for expenses incurred in performing acts required by the parol agreement before it was repudiated. Enthoven v Enthoven, 225 A.D. 309, 232 N.Y.S. 599, 1929 N.Y. App. Div. LEXIS 11626 (N.Y. App. Div. 1929).

Answer set forth no valid counterclaim because of failure to allege performance, or readiness or willingness to perform the contract alleged by defendant. Hoffman v Whitebread, 227 A.D. 733, 236 N.Y.S. 578, 1929 N.Y. App. Div. LEXIS 7732 (N.Y. App. Div. 1929).

Where defendant sought to avoid payment of the balance of the price of a heating plant, answer that he had rescinded the contract for fraud and was entitled to recover the amount paid, and was entitled to damages for breach of express warranty, raised the question for the jury whether plaintiff’s statements were mere expressions of opinion of what the heater would do or were affirmations of facts. Bareham & McFarland v Kane, 228 A.D. 396, 240 N.Y.S. 123, 1930 N.Y. App. Div. LEXIS 12181 (N.Y. App. Div. 1930).

Counterclaim alleging oral agreement by plaintiff and all defendants, so uncertain as not to disclose intention of parties, was insufficient. Vanguard Military Equipment Corp. v Schulein, 266 A.D. 912, 42 N.Y.S.2d 526, 1943 N.Y. App. Div. LEXIS 5150 (N.Y. App. Div. 1943).

A separate and distinct cause of action for damages for breach of contract remains a counterclaim, although pleaded as a set-off. S. Liebmann's Sons Brewing Co. v De Nicolo, 91 N.Y.S. 791, 46 Misc. 268, 1905 N.Y. Misc. LEXIS 46 (N.Y. App. Term 1905).

A counterclaim based on a parol termination of a written contract and a new oral contract was insufficient in that it did not affirmatively say that the written contract was abrogated and a new oral contract substituted. Spirit v Black Diamond Furniture Works, 241 N.Y.S. 194, 137 Misc. 398, 1930 N.Y. Misc. LEXIS 1177 (N.Y. City Ct. 1930).

In action for breach of contract to publish plaintiff's song and for plagiarism of such song by defendant, counterclaim for damages from plaintiff's misrepresentations charging breach of trust, was sufficient. Stamps v Mills Music, Inc., 92 N.Y.S.2d 79, 196 Misc. 480, 1949 N.Y. Misc. LEXIS 2762 (N.Y. Sup. Ct. 1949).

Where counterclaim is based on written contract, allegations of knowledge of special circumstances as a basis for special damages are relevant and should not be stricken, but allegations as to negotiations and conversations prior to contract, and those relating to breach of warranty should be stricken, sole claim being one for damages for nondelivery. T. H. Symington Co. v John Thomson Press Co., 172 N.Y.S. 677 (N.Y. Sup. Ct. 1918), aff'd, 187 A.D. 922, 174 N.Y.S. 923, 1919 N.Y. App. Div. LEXIS 6366 (N.Y. App. Div. 1919).

In action for money lent, defendant may counterclaim for reasonable value of room and board and services furnished to plaintiff. Roth v Ward, 112 N.Y.S.2d 154, 1952 N.Y. Misc. LEXIS 2619 (N.Y. Sup. Ct. 1952).

In action for breach of contract defendant stated a sufficient counterclaim for cancellation of the contract where he alleged that he had been fraudulently induced by plaintiff to sign a blank paper believing it would be used for a letter and not a contract. Gantell v Friedmann, 197 N.Y.S.2d 605 (N.Y. Sup. Ct. 1959).

In action for breach of written contract, counterclaim for damages for intentional harm was sufficient where defendant alleged that plaintiff had fraudulently induced him to sign blank paper, which he believed would be used for a letter and not a contract, which caused him to suffer actual damage in his economic and legal relationships. Gantell v Friedmann, 197 N.Y.S.2d 605 (N.Y. Sup. Ct. 1959).

In a suit by plaintiff a subcontractor against the contractor on the subcontract wherein defendant set up a general denial and payment, he cannot prove that plaintiff used stone which by the contract was reserved to the owner; for that is in the nature of a counterclaim and should have been pleaded. Read v Decker, 5 Hun 646 (N.Y.), aff'd, 67 N.Y. 182, 67 N.Y. (N.Y.S.) 182, 1876 N.Y. LEXIS 368 (N.Y. 1876).

53. —Agency

An agent could counterclaim the failure of plaintiff to perform a contract to employ him as agent for the sale of goods at an agreed compensation, in an action for money received by the agent from the sale of goods. Grierson v Mason, 60 N.Y. 394, 60 N.Y. (N.Y.S.) 394, 1875 N.Y. LEXIS 193 (N.Y. 1875).

Where a principal sued his agent for conversion of moneys collected upon sales, the agent could interpose a counterclaim for commissions on such sales as such a counterclaim was within CPA § 266, subd. 1 “connected with the subject of the action.” Benton v Moore, 87 N.Y.S. 717, 42 Misc. 660, 1904 N.Y. Misc. LEXIS 71 (N.Y. County Ct. 1904).

54. —Employment

A counterclaim for damages resulting from the plaintiff’s failure to properly care for boilers, under his charge as an employee of the defendant, is based on contract. Hagin v Cayuga Lake Cement Co., 105 A.D. 269, 93 N.Y.S. 428, 1905 N.Y. App. Div. LEXIS 2052 (N.Y. App. Div. 1905).

In an action by a public accountant for services rendered, the defendants could counterclaim for damages suffered by reason of the negligence of the plaintiff in failing to check accounts in violation of the contract of employment. Smith v London Assurance Corp., 109 A.D. 882, 96 N.Y.S. 820, 1905 N.Y. App. Div. LEXIS 3682 (N.Y. App. Div. 1905).

Where plaintiff agreed in a contract of employment, not to work for any other person, but did so, and still defendant continued the employment for the entire term, he cannot counterclaim the liquidated damages, without alleging any damage caused by the partial breach; and the counterclaim being bad, it was not error to refuse to allow defendant to show that plaintiff worked for other parties, or any other modification of the contract not alleged in the answer. Brownold v Rodbell, 130 A.D. 371, 114 N.Y.S. 846, 1909 N.Y. App. Div. LEXIS 214 (N.Y. App. Div. 1909).

A counterclaim should not have been stricken for insufficiency on allegations of accord and satisfaction and that plaintiff's claim for compensation under a contract of employment was essentially unliquidated in being partly based on a percentage of profits. Hesselbrock v Detmer Woolen Co., 220 A.D. 427, 221 N.Y.S. 585, 1927 N.Y. App. Div. LEXIS 9321 (N.Y. App. Div. 1927).

In action by former vice-president against corporation for breach of written employment contract, counterclaim was deficient in failing to allege nature of duties to be performed by plaintiff for defendant, and to allege facts from which damage would naturally result. Smith v D. A. Schulte, Inc., 280 A.D. 913, 116 N.Y.S.2d 212, 1952 N.Y. App. Div. LEXIS 4158 (N.Y. App. Div. 1952).

In action to rescind employment contract wherein defendant counterclaimed for breach of agreement of incorporators to make him officer of corporation, pleadings, documents and affidavits presented issue as to whether claim of illegality is sustained with respect to agreement made before incorporation and subsequent employment agreement. Overseas Raw Materials Corp. v Coster, 285 A.D. 1021, 139 N.Y.S.2d 718, 1955 N.Y. App. Div. LEXIS 6538 (N.Y. App. Div.), app. denied, 285 A.D. 1142, 142 N.Y.S.2d 365, 1955 N.Y. App. Div. LEXIS 6950 (N.Y. App. Div. 1955).

In action by sales representative against manufacturer for commissions, counterclaim raised issues of fact as to whether plaintiff exercised his best efforts to promote sales of defendant's products to customers listed in agreement, barring dismissal of counterclaim. Raycarr Sales Corp. v Herman Rynveld's Son Corp., 1 A.D.2d 952, 150 N.Y.S.2d 619, 1956 N.Y. App. Div.

LEXIS 5627 (N.Y. App. Div. 1st Dep't), reh'g denied, 2 A.D.2d 746, 153 N.Y.S.2d 565, 1956 N.Y. App. Div. LEXIS 4775 (N.Y. App. Div. 1st Dep't 1956).

In an action for wages the defendant could not counterclaim money expended in a certain business in which plaintiff was interested without an agreement that it was to be applied on the wages. Foulks v White, 4 N.Y.S. 95, 51 Hun 644, 1889 N.Y. Misc. LEXIS 210 (N.Y. Sup. Ct. 1889).

A cause of action for damages for breach of an agreement to employ, is on contract, and could formerly be properly set up as a counterclaim in an action founded on contract. Denny v Horton (N.Y.C.P. Mar. 15, 1883).

55. —Insurance

An answer in an action for premiums under policies of liability insurance which attempts to set up a counterclaim for insurance for injuries to defendant’s employees, but does not set out the insurance contract, nor facts from which the court may infer that such a contract was entered into, is insufficient. Aetna Life Ins. Co. v North Star Mines Co., 107 N.Y.S. 140, 56 Misc. 164, 1907 N.Y. Misc. LEXIS 731 (N.Y. Sup. Ct. 1907).

Counterclaim cannot plead provision of theft policy merely by incorporating it by reference. Manhattan Fire & Marine Ins. Co. v Paul Tishman Co., 118 N.Y.S.2d 511, 203 Misc. 452, 1953 N.Y. Misc. LEXIS 1461 (N.Y. Sup. Ct. 1953).

Counterclaim on theft policy must allege insurable interest in defendant, by alleging his ownership. Manhattan Fire & Marine Ins. Co. v Paul Tishman Co., 118 N.Y.S.2d 511, 203 Misc. 452, 1953 N.Y. Misc. LEXIS 1461 (N.Y. Sup. Ct. 1953).

56. Corporations, stock and stockholders

As to the mode of setting up the liability of a stockholder under §§ 32, 35 and 46 of the former Manufacturing Act, by way of counterclaim, see Chambers v Lewis, 16 Abb. Pr. 433, 1863 N.Y. Misc. LEXIS 138 (N.Y. Sept. 1, 1863).

Under former practice, in an action brought against a stockholder by a creditor of the corporation he could offset the indebtedness of the company to him. Wheeler v Millar, 90 N.Y. 353, 90 N.Y. (N.Y.S.) 353, 1882 N.Y. LEXIS 390 (N.Y. 1882).

In equitable action to require delivery of corporate stock under contract whereby plaintiff was to deliver patents and machines, defendant could set up counterclaim at law for damages for failure to deliver machines and for defects in machines, and was entitled to jury trial of counterclaim. Maag v Maag Gear Co., 193 A.D. 759, 184 N.Y.S. 630, 1920 N.Y. App. Div. LEXIS 5643 (N.Y. App. Div. 1920).

In an action by a corporation against a minority stockholder for moneys claimed to be due, a counterclaim by the defendant against the plaintiff and its directors for mismanagement, and an accounting was proper. Gilbert Geer, Jr., & Co. v Fagan, 255 A.D. 253, 7 N.Y.S.2d 395, 1938 N.Y. App. Div. LEXIS 4704 (N.Y. App. Div. 1938).

For counterclaim against stockholder individually in derivative action by such stockholder, see Binon v Boel, 271 A.D. 505, 66 N.Y.S.2d 425, 1946 N.Y. App. Div. LEXIS 2787 (N.Y. App. Div. 1946), aff'd, 297 N.Y. 528, 74 N.E.2d 466, 297 N.Y. (N.Y.S.) 528, 1947 N.Y. LEXIS 1022 (N.Y. 1947).

In action to rescind employment contract wherein defendant counterclaimed for breach of agreement of incorporators to make him officer of corporation, pleadings, documents and affidavits presented issue as to whether claim of illegality is sustained with respect to agreement made before incorporation and subsequent employment agreement. Overseas Raw Materials Corp. v Coster, 285 A.D. 1021, 139 N.Y.S.2d 718, 1955 N.Y. App. Div. LEXIS 6538 (N.Y. App. Div.), app. denied, 285 A.D. 1142, 142 N.Y.S.2d 365, 1955 N.Y. App. Div. LEXIS 6950 (N.Y. App. Div. 1955).

In action by corporation to set aside deed of realty and transfer of stock of plaintiff corporation to defendant as trustee, wherein defendant counterclaimed for amount taken from him by employee of plaintiff, where instruments involved were voluntarily executed by plaintiff and were not induced by coercion or threats and where defendant failed to establish any written agreement of promissory nature made by plaintiff, defendant could not recover on his counterclaim. Crescenzo v Rubinow, 286 A.D. 880, 142 N.Y.S.2d 387, 1955 N.Y. App. Div. LEXIS 4431 (N.Y. App. Div. 1955), reh'g denied, 1 A.D.2d 1018, 152 N.Y.S.2d 423, 1956 N.Y. App. Div. LEXIS 5390 (N.Y. App. Div. 2d Dep't 1956), aff'd, 1 N.Y.2d 849, 153 N.Y.S.2d 226, 135 N.E.2d 729, 1956 N.Y. LEXIS 838 (N.Y. 1956).

In stockholder’s derivative action, counterclaim against plaintiff as an individual may not be asserted. Aschkenasy v Teichman, 12 A.D.2d 904, 210 N.Y.S.2d 593, 1961 N.Y. App. Div. LEXIS 12691 (N.Y. App. Div. 1st Dep't 1961).

Counterclaim by a stockholder of a corporation in his individual capacity, claiming to be the sole owner of the stock of the corporation, will be dismissed where there is no allegation of assignment from the corporation. Security Trust Co. v Pritchard, 205 N.Y.S. 725, 123 Misc. 493, 1924 N.Y. Misc. LEXIS 991 (N.Y. Sup. Ct. 1924).

In an action by a stockholder acting for his corporation, against certain directors, they were held entitled to counterclaims for the value of services rendered the corporation. Vas Nunes v Schwab, 221 N.Y.S. 339, 129 Misc. 404, 1927 N.Y. Misc. LEXIS 725 (N.Y. Sup. Ct. 1927).

In an action by a stockholder acting as representative of his corporation, the corporation as defendant cannot set forth as counterclaim that the plaintiff has not paid up his stock subscription, such counterclaim if allowed being in favor of the corporation against itself. Vas Nunes v Schwab, 221 N.Y.S. 339, 129 Misc. 404, 1927 N.Y. Misc. LEXIS 725 (N.Y. Sup. Ct. 1927).

In action against corporation to recover loan counterclaim was not subject to a motion to strike, where it alleged that acts of corporation’s agent, amounting to duress were the procuring cause

of execution of instrument sued on. Criterion Holding Co. v Cerussi, 250 N.Y.S. 735, 140 Misc. 855, 1931 N.Y. Misc. LEXIS 1394 (N.Y. Sup. Ct. 1931).

For individual counterclaims to derivative actions by directors against other directors or officers, see Walker v Man, 253 N.Y.S. 472, 142 Misc. 288, 1931 N.Y. Misc. LEXIS 1506 (N.Y. Sup. Ct. 1931).

In stockholder's derivative action counterclaim by defendants for relief not against plaintiffs or plaintiff but against defendant corporation was unwarranted. Hall v Crailo Sweets, Inc., 29 N.Y.S.2d 381, 177 Misc. 120, 1941 N.Y. Misc. LEXIS 2081 (N.Y. Sup. Ct.), aff'd, 262 A.D. 866, 29 N.Y.S.2d 512, 1941 N.Y. App. Div. LEXIS 6313 (N.Y. App. Div. 1941).

In action by corporation against stockholder and former officer and director for accounting for funds wrongfully diverted, defendant cannot change nature of litigation to that of stockholder's derivative suit by counterclaim against plaintiff corporation along with its directors for mismanagement and for accounting and payment to defendant of his share of corporate income misappropriated. Orto Theatres Corp. v Newins, 138 N.Y.S.2d 550, 207 Misc. 414, 1955 N.Y. Misc. LEXIS 2641 (N.Y. Sup. Ct. 1955).

57. —Banks

In action to enforce statutory liability by superintendent of banks liquidating trust company, a defendant cannot set up the counterclaim based on services by him to the trust company. Van Tuyl v Schwab, 148 N.Y.S. 292, 85 Misc. 172, 1914 N.Y. Misc. LEXIS 802 (N.Y. Sup. Ct.), aff'd, 164 A.D. 933, 149 N.Y.S. 1116, 1914 N.Y. App. Div. LEXIS 8396 (N.Y. App. Div. 1914).

Superintendent of banks permitted to set off stockholder's statutory liability to insolvent bank against his distributive share of assets. Finkelstein v Bank of United States, 255 N.Y.S. 8, 142 Misc. 403, 1931 N.Y. Misc. LEXIS 994 (N.Y. Sup. Ct. 1931).

58. Dower

Defendant cannot set up as counterclaim that plaintiff in an action of dower has received the entire rent of the estate, unless she claims damages for the detention of her dowers. Elliott v Gibbons, 31 N.Y. 67, 31 N.Y. (N.Y.S.) 67, 1865 N.Y. LEXIS 19 (N.Y. 1865).

Dower interest in land that arose prior to execution of mortgage could not be set up as a counterclaim in an action to foreclose the mortgage. Hildenbrand v Ruckert, 182 N.Y.S. 747, 111 Misc. 237, 1920 N.Y. Misc. LEXIS 1484 (N.Y. Sup. Ct. 1920).

59. Factors

Where one buys of a seller knowing him to be a broker or factor for another, or being chargeable with such knowledge, he cannot counterclaim demands against the broker in an action by the principal. McLachlin v Brett, 105 N.Y. 391, 12 N.E. 17, 105 N.Y. (N.Y.S.) 391, 8 N.Y. St. 33, 1887 N.Y. LEXIS 729 (N.Y. 1887).

A counterclaim stating that defendants placed with the firm of which plaintiff was a member a quantity of fruit “to be sold on commission, with instructions not to export any of it under any circumstances; that said firm exported the whole of said fruit contrary to said instructions without defendant’s knowledge, whereby defendants were damaged upwards of $1,000; succeeded to its assets and assumed and agreed to pay and become liable for all of its obligations prior to the commencement of the action,” states a cause of action on contract in favor of the defendants against plaintiff. Carroll v Sharp, 122 N.Y.S. 694, 67 Misc. 254, 1910 N.Y. Misc. LEXIS 236 (N.Y. Sup. Ct. 1910).

In an action to recover the proceeds of goods consigned to defendant for sale, a claim for commissions, freight, cartage, storage and advertising is a valid counterclaim. Crocker v Fairbanks, 29 Hun 142 (N.Y. 1883).

60. Foreign judgments

In an action to recover upon a foreign judgment, a motion will be granted to compel the defendant to make her counterclaim more definite and certain by alleging certain facts. Pearce v Weidemeyer, 102 N.Y.S. 505, 52 Misc. 456, 1907 N.Y. Misc. LEXIS 43 (N.Y. App. Term 1907).

61. Fraud

In suit in equity to cancel for fraud a contract to purchase corporate stock, claim for instalments due could be interposed as a counterclaim. Stevenson v Devins, 158 A.D. 616, 143 N.Y.S. 916, 1913 N.Y. App. Div. LEXIS 7431 (N.Y. App. Div. 1913).

In action for fraudulent concealment and representations, counterclaim charging improper practices to defendant's damage, was proper and sufficient. Throckmorton v Johnson, 232 A.D. 495, 250 N.Y.S. 426, 1931 N.Y. App. Div. LEXIS 13859 (N.Y. App. Div. 1931).

Allegations in counterclaim to action for fraud that defendant's credit "was impaired" by plaintiff's action for fraud and that damage resulted, and that defendant "lost" money "as a result", are conclusions and not statements of ultimate fact, and counterclaim was dismissed. Baraban v Tichenor, 285 A.D. 975, 139 N.Y.S.2d 59, 1955 N.Y. App. Div. LEXIS 6348 (N.Y. App. Div. 1955).

In a suit by general creditors to set aside a fraudulent conveyance, defendant assignee of a judgment creditor may counterclaim for appointment of a receiver and the just distribution of the funds among the creditors. Libman-Spanjer Corp. v Royal Hall, Inc., 263 N.Y.S. 98, 146 Misc. 348, 1932 N.Y. Misc. LEXIS 1808 (N.Y. Sup. Ct. 1932).

A counterclaim founded on contract could not, under former practice, be allowed in an action founded on fraud, People v Dennison, 84 N.Y. 272, 84 N.Y. (N.Y.S.) 272, 1881 N.Y. LEXIS 396 (N.Y. 1881), although the plaintiff waived the tort. Chambers v Davis, 11 Abb. Pr. 207.

62. —As counterclaim

Where a counterclaim of fraudulent omission and concealment of items in a settlement was set up, fraud must be shown, and refusal to submit to the jury whether the omission was by mistake, was proper. Dudley v Scranton, 57 N.Y. 424, 57 N.Y. (N.Y.S.) 424, 1874 N.Y. LEXIS 301 (N.Y. 1874).

Where in an action on a note given in payment for personal property, the defendants set up fraud as a defense and counterclaim, and claimed damages therefor. Held, that they were not bound to allege a rescission of, or offer to rescind the sale. Litchhult v Treadwell, 74 N.Y. 603, 74 N.Y. (N.Y.S.) 603, 1878 N.Y. LEXIS 789 (N.Y. 1878).

Counterclaim stated a good cause of action in fraud and deceit. Fay v Moehlenpah, 242 N.Y.S. 618, 136 Misc. 913, 1930 N.Y. Misc. LEXIS 1333 (N.Y. Sup. Ct. 1930).

Counterclaim that licensee induced issuance of exclusive license by his fraudulent representations that he would devote all his time to exploiting patent, was sufficient. Guardino Tank Processing Corp. v Olsson, 88 N.Y.S.2d 540, 1948 N.Y. Misc. LEXIS 3957 (N.Y. Sup. Ct. 1948).

63. Gambling loss

Money lost in betting is a good counterclaim. McDougall v Walling, 51 N.Y. 666, 1873 N.Y. LEXIS 608 (N.Y. 1873).

64. Guaranties, bonds and undertakings

A surety cannot counterclaim a demand of his principal against plaintiff. Lasher v Williamson, 55 N.Y. 619, 55 N.Y. (N.Y.S.) 619, 1874 N.Y. LEXIS 54 (N.Y. 1874).

In an action between cosureties for contribution, the defendant cannot avail himself of an indebtedness of the plaintiff to the principal as a defense. Semble, however, that if the plaintiff has received from the principal any money or property as payment or security, he will be obliged

to account for the same. Davis v Toulmin, 77 N.Y. 280, 77 N.Y. (N.Y.S.) 280, 1879 N.Y. LEXIS 771 (N.Y. 1879).

A set-off of a debt of plaintiff or his assignor to the principal will not be allowed in an action against principals and sureties on an undertaking. Coffin v McLean, 80 N.Y. 560, 80 N.Y. (N.Y.S.) 560, 1880 N.Y. LEXIS 128 (N.Y. 1880).

Under a compromise of an action on a foreign judgment plaintiff paid defendant $500 and defendant gave his bond to save plaintiff harmless against all claims in that action. This action was brought on the bond, defendant set up a counterclaim that he compromised with plaintiff, relying upon the truth of the answer to the suit on the judgment, which was false, and asked damages. And it was held a proper counterclaim. Thomson v Sanders, 118 N.Y. 252, 23 N.E. 374, 118 N.Y. (N.Y.S.) 252, 1890 N.Y. LEXIS 964 (N.Y. 1890).

A surety on the bond of an assignee for the benefit of creditors, sued at law by the trustee of his assignor for a sum found due on a bankruptcy accounting in a federal court, may set up as a defense the lack of jurisdiction over him in that proceeding; but he cannot plead it as an equitable counterclaim to entitle him to an injunction against the further prosecution of the action. Cohen v American Surety Co., 129 A.D. 166, 113 N.Y.S. 375, 1908 N.Y. App. Div. LEXIS 1261 (N.Y. App. Div. 1908).

In an action by seller to recover a sum claimed to be due on a contract of guaranty, the guarantor is entitled to recover on its counterclaim for a sum recited in the contract to have been paid to the seller where it appears that the guaranty has been breached by the seller. Bellanca Aircraft Corp. v Pere, 235 A.D. 89, 256 N.Y.S. 234, 1932 N.Y. App. Div. LEXIS 7888 (N.Y. App. Div. 1932).

That plaintiff has assigned and covenanted that a mortgage on the premises is due and guaranteed its payment is good counterclaim. O'Dougherty v Remington Paper Co., 1 N.Y. St. 523.

The sureties on a joint and several undertaking may counterclaim individual demands on plaintiff. Cornell v Donovan, 14 N.Y. St. 687 (N.Y.C.P. Dec. 5, 1887).

When the principal is not joined in an action against a guarantor of bonds he cannot counterclaim a cause of action in favor of such principal. Burroughs v Garrison, 15 Abb. Pr. (n.s.) 144, 1873 N.Y. Misc. LEXIS 56 (N.Y.C.P. May 1, 1873).

65. Husband and wife

In action by husband against wife, her counterclaim, seeking to recover moneys paid by her for carrying, maintenance and utility charges relating to property owned by them as tenants by entirety, was sufficient. Enzler v Enzler, 30 Misc. 2d 600, 145 N.Y.S.2d 173, 1955 N.Y. Misc. LEXIS 2315, 1955 N.Y. Misc. LEXIS 3301 (N.Y. Sup. Ct. 1955).

In action by husband against wife for accounting, her counterclaim that they owned residential property as tenants by entirety and that he continued to occupy such property to her exclusion by treating her cruelly and forcing her to live elsewhere, was insufficient, since she had no right to compel him to pay to her one-half of reasonable value for use and occupation of such premises. Koff v Koff, 150 N.Y.S.2d 302, 1956 N.Y. Misc. LEXIS 2505 (N.Y. Sup. Ct. 1956), modified, 4 A.D.2d 967, 168 N.Y.S.2d 353, 1957 N.Y. App. Div. LEXIS 3847 (N.Y. App. Div. 2d Dep't 1957).

66. Judgment as counterclaim

A judgment previously obtained by defendants against the plaintiff was not a counterclaim as that term was used in CPA § 816 (Rule 6112(a), 6212(a), 6312(a), § 6214(e) herein and CPA § 903 (§§ 1503, 6201(1), Rule 6212(a) herein). Brown v English, 115 A.D. 884, 100 N.Y.S. 1107, 1906 N.Y. App. Div. LEXIS 3147 (N.Y. App. Div. 1906).

A judgment may be pleaded as a counterclaim. Clinton v Boehm, 139 A.D. 73, 124 N.Y.S. 789, 1910 N.Y. App. Div. LEXIS 2126 (N.Y. App. Div. 1910).

Municipal court judgment for rent in favor of lessors against lessee should have been allowed as an offset in latter's action against former to recover security deposited under lease. Pollack v Springer, 95 N.Y.S.2d 527, 196 Misc. 1015, 1949 N.Y. Misc. LEXIS 3179 (N.Y. App. Term 1949).

Judgments against plaintiff in other actions were not a subject of counterclaim unless it appeared that execution had been issued on said judgments. O'Dougherty v Remington Paper Co., 1 N.Y. St. 523.

A judgment on contract could, under former practice, be set up as a counterclaim in an action on contract. Badlam v Springsteen, 41 Hun 160 (N.Y.).

Judgment on a note was a good subject of counterclaim against parties to it not parties to the judgment. Kelsey v Bradbury, 21 Barb. 531, 1856 N.Y. App. Div. LEXIS 8 (N.Y. Sup. Ct. Apr. 8, 1856); and see Lowell v Lane, 33 Barb. 292, 1861 N.Y. App. Div. LEXIS 8 (N.Y. Sup. Ct. Jan. 22, 1861).

67. Landlord and tenant

In landlord's action against tenant, the answer, considered as a counterclaim for fraud, was erroneously stricken on motion. Elbs v Shulman, 231 A.D. 787, 246 N.Y.S. 126, 1930 N.Y. App. Div. LEXIS 7754 (N.Y. App. Div. 1930).

Lease, executed by co-owner, may afford basis of counterclaim against such co-owner where in fact a plaintiff. Ziegler v Von Sebo, 271 A.D. 604, 66 N.Y.S.2d 900, 1946 N.Y. App. Div. LEXIS 2806 (N.Y. App. Div. 1946).

In an action to recover rent, due before a fire, a claim for the untenantable condition while repairs were being made can be pleaded only as a counterclaim and not as a partial defense. Einstein v Tutelman, 110 N.Y.S. 1025, 59 Misc. 462, 1908 N.Y. Misc. LEXIS 553 (N.Y. App. Term 1908).

In summary proceedings for recovery of possession and rent, tenant may counterclaim for his deposit for security. Trebuhs Realty Co. v Pieschel, 229 N.Y.S. 788, 132 Misc. 517, 1928 N.Y. Misc. LEXIS 926 (N.Y. Mun. Ct. 1928).

In summary proceedings to dispossess, a counterclaim for damages for harassment was not maintainable because defendant had not abandoned the premises. Assembly v Giller, 236 N.Y.S. 308, 134 Misc. 657, 1929 N.Y. Misc. LEXIS 1212 (N.Y. Mun. Ct. 1929), rev'd, 239 N.Y.S. 280, 135 Misc. 542, 1930 N.Y. Misc. LEXIS 978 (N.Y. App. Term 1930).

Counterclaim for damages from defective repairs made by landlord to premises exclusively controlled by defendant, was proper in action for rent. Parker v Jenkins, 239 N.Y.S. 344, 135 Misc. 666, 1930 N.Y. Misc. LEXIS 986 (N.Y. County Ct. 1930).

Counterclaim for deposit of security allowed in action to recover rent. Basirico v Zahn, 261 N.Y.S. 574, 146 Misc. 97, 1932 N.Y. Misc. LEXIS 1719 (N.Y. City Ct. 1932).

In a summary proceeding for nonpayment of rent in the Municipal Court of the City of New York, the tenant may plead as a counterclaim that the landlord negligently allowed water draining from the roof of an adjoining building to enter on the demised premises. Harfried Realty Co. v Spuyten Amusement Corp., 270 N.Y.S. 692, 150 Misc. 904, 1934 N.Y. Misc. LEXIS 1203 (N.Y. App. Term 1934).

For judgment for rent as counterclaim or offset in action to recover deposit under lease, see Pollack v Springer, 91 N.Y.S.2d 847, 195 Misc. 523, 1949 N.Y. Misc. LEXIS 2720 (N.Y. City Ct.), modified, 95 N.Y.S.2d 527, 196 Misc. 1015, 1949 N.Y. Misc. LEXIS 3179 (N.Y. App. Term 1949).

Counterclaim based on conversion of deposit as security dismissed in summary proceeding for possession of premises. Houston Varick Operating Corp. v 206-208 Varick Street Corp., 255 N.Y.S. 60, 142 Misc. 863, 1932 N.Y. Misc. LEXIS 943 (N.Y. Mun. Ct. 1932).

Counterclaim raising question whether plaintiff landlord was estopped from claiming or waived its rights to claim that option to renew lease had expired, was sufficient. Koss Holding Corp. v Liquori, 99 N.Y.S.2d 482, 1950 N.Y. Misc. LEXIS 1964 (N.Y. Sup. Ct. 1950).

68. Matrimonial matters

In an action for separation for abandonment, a wife may set up cruelty as a counterclaim and get judgment for separation and reasonable support. Waltermire v Waltermire, 110 N.Y. 183, 17 N.E. 739, 110 N.Y. (N.Y.S.) 183, 17 N.Y. St. 175, 1888 N.Y. LEXIS 868 (N.Y. 1888).

Where husband and wife agreed to arbitrate controversies under support agreement, though arbitration clause did embrace tax refunds, he had right to assert any claim he may have had against plaintiff wife by way of offset. Stone v Freezer, 280 A.D. 103, 111 N.Y.S.2d 710, 1952 N.Y. App. Div. LEXIS 3401 (N.Y. App. Div.), aff'd, 304 N.Y. 649, 107 N.E.2d 509, 304 N.Y. (N.Y.S.) 649, 1952 N.Y. LEXIS 881 (N.Y. 1952).

In an action for divorce, allegations of cruel and inhuman treatment on the part of the plaintiff and his failure to support defendant may not be stricken from the answer as irrelevant, and the fact that the answer did not define such allegations as a counterclaim is not fatal. Mason v Mason, 94 N.Y.S. 868, 46 Misc. 361, 1905 N.Y. Misc. LEXIS 71 (N.Y. Sup. Ct. 1905).

In action by husband to declare him owner of savings account in her name, her counterclaim (prior to repeal of CPA § 1168, in 1948) for separation for cruelty was disallowed, but her counterclaim for support of self and child was allowed. Waring-Laconia Co. v No. 964 Grand Concourse & Boulevard, Inc., 232 N.Y.S. 659, 233 N.Y.S. 316, 133 Misc. 577, 1929 N.Y. Misc. LEXIS 690 (N.Y. Sup. Ct. 1929).

In action by wife against husband for expenses for necessaries, he may counterclaim for her conversion of his personalty. Saxon v Saxon, 36 N.Y.S.2d 488, 178 Misc. 781, 1942 N.Y. Misc. LEXIS 1814 (N.Y. Sup. Ct. 1942).

In wife’s action for necessaries, her conversion of husband’s personalty was subject of his counterclaim. Dorfman v Dorfman, 77 N.Y.S.2d 267, 191 Misc. 227, 1947 N.Y. Misc. LEXIS 3685 (N.Y. Sup. Ct. 1947).

In pending divorce action, counterclaim to set aside separation agreement was authorized. Thompson v Thompson, 85 N.Y.S.2d 75, 194 Misc. 41, 1948 N.Y. Misc. LEXIS 3713 (N.Y. City Ct. 1948).

The repeal of CPA § 1168, in 1948, removed the limitation imposed by that section and matrimonial counterclaims can now be imposed in other actions, so, here, in an action by husband for partition, defendant wife could counterclaim for annulment of the marriage, but court could sever and order separate trials. Cecil v Cecil, 102 N.Y.S.2d 874, 198 Misc. 653, 1950 N.Y. Misc. LEXIS 2445 (N.Y. Sup. Ct. 1950).

In matrimonial action, husband’s counterclaim for annulment based on wife’s misrepresentation that she was validly married to former husband, when in fact she was merely living with him illicitly, sufficiently stated cause of action for annulment, since such misrepresentation was material inducement to marriage. Ciulla v Ciulla, 136 N.Y.S.2d 176, 207 Misc. 122, 1954 N.Y. Misc. LEXIS 3106 (N.Y. Sup. Ct. 1954), aff'd, 285 A.D. 1062, 139 N.Y.S.2d 924, 1955 N.Y. App. Div. LEXIS 6678 (N.Y. App. Div. 1955).

Where in an action brought by a wife against her husband for separation, the answer sets up as a defense and counterclaim adultery of the plaintiff, such defense and counterclaim is not subject to demurrer as insufficient, because it is not alleged that the adultery was without the connivance, privity or procurement of the defendant. Van Benthuysen v Van Benthuysen, 2 N.Y.S. 238, 1888 N.Y. Misc. LEXIS 117 (N.Y. Sup. Ct. 1888).

In an action for divorce, on the ground of adultery, the defendant may set up the invalidity of the marriage and ask for a judgment declaring the same null and void. Finn v Finn, 62 How. Pr. 83, 1878 N.Y. Misc. LEXIS 249 (N.Y. Super. Ct. Aug. 1, 1878).

69. Mechanic’s lien

In an action by a subcontractor to foreclose a mechanic’s lien, the general contractor cannot counterclaim for the plaintiff’s delay in completing the work where the delay was caused by his own failure to prepare the foundation for the ironwork. Phoenix Iron Co. v Metropole Const. Co., 125 A.D. 479, 109 N.Y.S. 858, 1908 N.Y. App. Div. LEXIS 2809 (N.Y. App. Div. 1908).

A failure to perform the contract, causing damages to the owner, is the subject of counterclaim in an action to foreclose a mechanic’s lien. Bulkly v Healy, 12 N.Y.S. 54, 58 Hun 608, 1890 N.Y. Misc. LEXIS 3548 (N.Y. Sup. Ct. 1890).

70. Mortgages

In action of ejectment against mortgagees who foreclosed and purchased property, defendants could properly set up counterclaim for the amount of the mortgage, interest, taxes paid, and improvements made in good faith, and it was immaterial that counterclaim was an alternative and asked for dismissal of complaint if it be found that plaintiff had properly been served in foreclosure action. Kelly v Struth, 164 A.D. 705, 150 N.Y.S. 391, 1914 N.Y. App. Div. LEXIS 8517 (N.Y. App. Div. 1914).

Debts due a contractor from the mortgagor cannot be set off or counterclaimed in an action to enforce a covenant to pay a mortgage assumed on a purchase of property. Boyle v Youmans, 9 N.Y.S. 14, 55 Hun 612, 1890 N.Y. Misc. LEXIS 7 (N.Y. Sup. Ct. 1890), aff'd, 134 N.Y. 614, 31 N.E. 629, 134 N.Y. (N.Y.S.) 614, 1892 N.Y. LEXIS 1579 (N.Y. 1892).

71. —Foreclosure

In action to foreclose a mortgage a counterclaim for breach of covenant of seizin not supported by sufficient proof. Deschenes v Tallman, 248 N.Y. 33, 161 N.E. 321, 248 N.Y. (N.Y.S.) 33, 1928 N.Y. LEXIS 1219 (N.Y. 1928).

Counterclaim for breach of agreement to advance money to pay off a second mortgage, was good in action to foreclose a mortgage. Avalon Const. Corp. v Kirch Holding Co., 256 N.Y. 137, 175 N.E. 651, 256 N.Y. (N.Y.S.) 137, 1931 N.Y. LEXIS 1035 (N.Y. 1931).

Where defendants gave a chattel mortgage as further security for a debt covered by a realty mortgage under an agreement that resort should be had first to the realty mortgage, a counterclaim for damages for breach of such agreement cannot be interposed in an action to foreclose the realty mortgage. McEchron v Martine, 111 A.D. 805, 97 N.Y.S. 951, 1906 N.Y. App. Div. LEXIS 257 (N.Y. App. Div. 1906).

On foreclosure of a purchase money mortgage, counterclaim for breach of covenant of quiet enjoyment contained in the deed was insufficiently pleaded. Ferraro v Marrillard Builders, 227 A.D. 448, 238 N.Y.S. 188, 1929 N.Y. App. Div. LEXIS 6458 (N.Y. App. Div. 1929).

On foreclosure of a purchase money mortgage where the complaint demanded a deficiency judgment against defendant, his counterclaims at law for damages for breach of warranty of quiet enjoyment, fraudulent misrepresentations as to title, and eviction, were proper. Fout v Wolfe, 231 A.D. 11, 245 N.Y.S. 505, 1930 N.Y. App. Div. LEXIS 6987 (N.Y. App. Div. 1930).

In an action to foreclose a purchase-money mortgage a counterclaim by the mortgagor alleging wrongful interference by plaintiff with a contract between the mortgagor and a mortgage company and breach of an agreement to release property from the lien of the mortgage is sufficient. County Plains Corp. v Nosband Corp., 234 A.D. 588, 256 N.Y.S. 10, 1932 N.Y. App. Div. LEXIS 10496 (N.Y. App. Div. 1932).

For counterclaim by attorney for professional services rendered prior to mortgage being foreclosed, see Smyth v McDonogh, 260 A.D. 889, 22 N.Y.S.2d 631, 1940 N.Y. App. Div. LEXIS 5238 (N.Y. App. Div. 1940).

For counterclaim of joint venture in foreclosure action, see Century Federal Sav. & Loan Ass'n v Sullivan, 281 A.D. 830, 118 N.Y.S.2d 479, 1953 N.Y. App. Div. LEXIS 3465 (N.Y. App. Div. 1953).

In action to foreclose mortgage on realty, where mortgagor defaulted on mortgage and parties made agreement granting mortgagee possession of mortgaged premises, counterclaim that mortgagee unlawfully took possession did not raise triable issue, and should have been struck out under RCP Rule 113 (Rule 3212(a)–(f) herein) and not under former RCP Rule 109 subd. 5. Longworth Mortg. Co. v Builders Fabricators, Inc., 2 A.D.2d 699, 152 N.Y.S.2d 872, 1956 N.Y. App. Div. LEXIS 4981 (N.Y. App. Div. 2d Dep't), app. denied, 2 A.D.2d 819, 155 N.Y.S.2d 784, 1956 N.Y. App. Div. LEXIS 4370 (N.Y. App. Div. 2d Dep't 1956).

In an action to foreclose a mortgage, a counterclaim was proper which alleged damages by reason of mortgagee’s breach of agreement which gave rise to the mortgage and bond, and having been pleaded as a set-off tended to diminish plaintiff’s recovery, since he sought a deficiency judgment against the mortgagor. Waring-Laconia Co. v No. 964 Grand Concourse & Boulevard, Inc., 232 N.Y.S. 659, 233 N.Y.S. 316, 133 Misc. 577, 1929 N.Y. Misc. LEXIS 690 (N.Y. Sup. Ct. 1929).

In action to foreclose a mortgage, motion to strike counterclaim was properly denied, where reformation of the contract pursuant to which the mortgage was executed, was asked. Waring-Laconia Co. v No. 964 Grand Concourse & Boulevard, Inc., 232 N.Y.S. 659, 233 N.Y.S. 316, 133 Misc. 577, 1929 N.Y. Misc. LEXIS 690 (N.Y. Sup. Ct. 1929).

In mortgage foreclosure, motion to strike counterclaim based upon usury was granted, no offer to pay the amount actually advanced having been made. North River Mortg. Corp. v 254 Sixth Ave. Realty Corp., 240 N.Y.S. 654, 136 Misc. 342, 1930 N.Y. Misc. LEXIS 1112 (N.Y. Sup. Ct.), aff'd, 229 A.D. 865, 243 N.Y.S. 850, 1930 N.Y. App. Div. LEXIS 11982 (N.Y. App. Div. 1st Dep't 1930), aff'd, 229 A.D. 865, 243 N.Y.S. 851, 1930 N.Y. App. Div. LEXIS 11983 (N.Y. App. Div. 1st Dep't 1930).

Defense and counterclaim in mortgage foreclosure insufficient where alleging that public administrator illegally evicted defendant from and illegally sold mortgaged premises, it appearing that eviction and sale were under court order and judgment legally obtained. Contessa v Haink's Heirs at Law, 142 N.Y.S.2d 653, 1955 N.Y. Misc. LEXIS 3512 (N.Y. Sup. Ct. 1955).

In an action to foreclose a purchase money mortgage in which judgment for deficiency is demanded, a breach of the covenant of seizin in the deed to defendant may be set up as a counterclaim. Merritt v Gouley, 12 N.Y.S. 132, 58 Hun 372, 1890 N.Y. Misc. LEXIS 3355 (N.Y. Sup. Ct. 1890).

72. Municipal corporations

A claim for services presented to the board of audit but not passed upon is not a good counterclaim to an action against a supervisor for money unaccounted for. Guilford v Cooley, 58 N.Y. 116, 58 N.Y. (N.Y.S.) 116, 1874 N.Y. LEXIS 480 (N.Y. 1874).

Counterclaim to restrain a village from the continuance of trespass and nuisance, with incidental damages, is insufficient insofar as it seeks money damages where it fails to allege compliance with the statute requiring notice, but may stand insofar as it seeks equitable relief only. Victor v Angelo, 13 A.D.2d 889, 215 N.Y.S.2d 105, 1961 N.Y. App. Div. LEXIS 10965 (N.Y. App. Div. 4th Dep't 1961).

73. Partition

In partition action, answer of defendant that certain codefendant had collected rents for a number of years, and had not accounted therefor to the answering defendant, set up a proper counterclaim. Moses v Moses, 170 A.D. 211, 155 N.Y.S. 1066, 1915 N.Y. App. Div. LEXIS 5148 (N.Y. App. Div. 1915).

In action by husband against wife to partition realty, he may counterclaim for annulment, but court may sever action and order separate trials. Cecil v Cecil, 102 N.Y.S.2d 874, 198 Misc. 653, 1950 N.Y. Misc. LEXIS 2445 (N.Y. Sup. Ct. 1950).

The answer of a defendant who asks simply that plaintiff’s lien be declared subsequent to his, need not be served on the other defendants. Bullymore v Seward, 27 Hun 400 (N.Y. 1882).

74. Partnership and joint venture

It was a valid counterclaim under former practice in an action on contract to answer that a claim arose out of partnership transactions between the parties and that the partnership was dissolved before the commencement of the action. Waddell v Darling, 51 N.Y. 327, 51 N.Y. (N.Y.S.) 327, 1873 N.Y. LEXIS 540 (N.Y. 1873).

It has been held that a defendant may not set off, at law, a claim owing by plaintiff to a copartnership of which defendant is a member, but since in equity right of set-off depends upon the existing equities, especially where plaintiff is insolvent, such a set-off is permissible; counterclaim permitted as in nature of equitable set-off. Burns v Lopez, 256 N.Y. 123, 175 N.E. 537, 256 N.Y. (N.Y.S.) 123, 1931 N.Y. LEXIS 1033 (N.Y. 1931).

In action to enforce partnership claim, counterclaim cannot be set up to impose non-partnership liability against partners individually (one of whom is limited partner). Ruzicka v Rager, 305 N.Y. 191, 111 N.E.2d 878, 305 N.Y. (N.Y.S.) 191, 1953 N.Y. LEXIS 824 (N.Y.), reh'g denied, 305 N.Y. 798, 113 N.E.2d 306, 305 N.Y. (N.Y.S.) 798, 1953 N.Y. LEXIS 1306 (N.Y. 1953).

A counterclaim in an action for an accounting of a partnership which alleged the defendant was entitled to the purchase of plaintiff’s share but did not allege due performance on his part of conditions precedent on his part, was stricken on plaintiff’s motion, with leave to serve an amended answer. Corr v Hoffman, 219 A.D. 278, 219 N.Y.S. 656, 1927 N.Y. App. Div. LEXIS 10900 (N.Y. App. Div. 1927).

In action against a partnership one partner may counterclaim in favor of the firm, although he answers separately, and, in an action against the individual partners, a defendant may set off a debt due the firm by plaintiff. Fox Chase Knitting Mills, Inc. v Handal, 232 A.D. 498, 250 N.Y.S. 416, 1931 N.Y. App. Div. LEXIS 13860 (N.Y. App. Div. 1931).

Where in an action on contract against all the members of a partnership one partner was served and he alone answered, said partner may interpose a counterclaim on contract on behalf of the

firm. Alpaugh v Battles, 235 A.D. 321, 257 N.Y.S. 126, 1932 N.Y. App. Div. LEXIS 7956 (N.Y. App. Div. 1932).

In this action for an accounting of a law partnership, counterclaims arising out of a partnership between appellant and plaintiff in certain activities outside the scope of the law partnership were properly interposed. Kugel v Telsey, 250 A.D. 638, 295 N.Y.S. 148, 1937 N.Y. App. Div. LEXIS 8421 (N.Y. App. Div. 1937).

In action to foreclose several mortgages, defense by mortgagor that parties entered into joint venture and that mortgages were not intended to create any indebtedness was insufficient as ultra vires plaintiff association and contrary to public policy, but defendant was allowed to plead such matter by way of counterclaim. Century Federal Sav. & Loan Ass'n v Sullivan, 281 A.D. 830, 118 N.Y.S.2d 479, 1953 N.Y. App. Div. LEXIS 3465 (N.Y. App. Div. 1953).

In this action by the plaintiffs, suing as a partnership, for work, labor and services a counterclaim based on a loan to the partnership, made at the request of an individual partner, states a cause of action. However, a counterclaim for a loan to an individual partner, which alleges that the partner used it in the business of the partnership, but failing to allege that the loan was made to the partnership, is insufficient. Ravold v Fred Beers, Inc., 270 N.Y.S. 894, 151 Misc. 628, 1933 N.Y. Misc. LEXIS 1812 (N.Y. County Ct. 1933).

Any cause of action on contract could be set up under former practice as a counterclaim to an action for a partnership accounting. Petrakion v Arbeely, 26 N.Y.S. 731 (N.Y.C.P. 1893).

In an action upon a joint partnership obligation, one defendant may set up a counterclaim. McMagh v Fensterer, 180 N.Y.S. 90, 1920 N.Y. Misc. LEXIS 1061 (N.Y. App. Term 1920).

In action for breach of joint venture contract to build house, defense and counterclaim for damages for failure to perform in specified particulars were sufficient. Batt v Lyngert Corp., 93 N.Y.S.2d 889, 1949 N.Y. Misc. LEXIS 3023 (N.Y. Sup. Ct. 1949), aff'd, 276 A.D. 964, 94 N.Y.S.2d 920, 1950 N.Y. App. Div. LEXIS 5359 (N.Y. App. Div. 1950).

75. Patents, copyrights and trademarks

The defendant in an action to enjoin the use of a trade-mark may counterclaim his claim to the use of the trade-mark and enjoin plaintiff's use thereof. Glen & Hall Mfg. Co. v Hall, 61 N.Y. 226, 61 N.Y. (N.Y.S.) 226, 1874 N.Y. LEXIS 631 (N.Y. 1874).

A counterclaim for royalties already paid by the licensee is not good when the answer does not show that the license was surrendered and the benefits received by the licensee restored to the plaintiff. Outcault v Bonheur, 120 A.D. 168, 104 N.Y.S. 1099, 1907 N.Y. App. Div. LEXIS 1136 (N.Y. App. Div. 1907).

In action for trade-mark infringement, counterclaim alleging that plaintiff had filed unfounded petition to cancel defendant's Federal registration of trade-mark, that plaintiff maliciously inserted false statements as to defendant's trade-mark, such as that defendant was using it to violate United States and New York antitrust laws, has fraudulently obtained its Federal registration and has infringed plaintiff's trade-marks and that plaintiff's actions have caused defendant severe damage, stated cause of action. Herbert Products, Inc. v Oxy-Dry Sprayer Corp., 1 Misc. 2d 71, 145 N.Y.S.2d 168, 1955 N.Y. Misc. LEXIS 2294 (N.Y. Sup. Ct. 1955).

In action for trade-mark infringement, counterclaim charging plaintiff with fraudulent institution of cancellation proceeding and of instant action in bad faith solely to damage defendant and with conducting groundless, vexatious and oppressive litigation, alleged cause of action for malicious use of legal process solely to inflict injury to another. Herbert Products, Inc. v Oxy-Dry Sprayer Corp., 1 Misc. 2d 71, 145 N.Y.S.2d 168, 1955 N.Y. Misc. LEXIS 2294 (N.Y. Sup. Ct. 1955).

76. Real property actions

In an action brought to obtain possession of real property, defendant could not set up by way of counterclaim a lien on said land arising by virtue of a bequest to defendant which by the terms of the will was made a charge upon the land in question. Dinan v Coneys, 143 N.Y. 544, 38 N.E. 715, 143 N.Y. (N.Y.S.) 544, 1894 N.Y. LEXIS 987 (N.Y. 1894).

In an action to recover moneys expended for the benefit of the real estate of a client, a bill of particulars should be required as to matter alleged as a counterclaim. Washburn v Graves, 117 A.D. 343, 101 N.Y.S. 1043, 1907 N.Y. App. Div. LEXIS 252 (N.Y. App. Div. 1907).

Covenant to return property in as good condition as when originally delivered ran with the land and was available as a counterclaim by a devisee of the lessor who had executed several renewals of the lease. Thurber v Losee, 192 A.D. 148, 182 N.Y.S. 623, 1920 N.Y. App. Div. LEXIS 7451 (N.Y. App. Div. 1920).

In action to declare that plaintiff owned building on premises owned by defendant, defendant may ask for judgment declaring his rights, alleging that he was not owner and that building could not be removed without great damage to freehold. Viall v Cohen, 270 A.D. 1059, 63 N.Y.S.2d 63, 1946 N.Y. App. Div. LEXIS 5307 (N.Y. App. Div. 1946).

Counterclaim for breach of covenant against incumbrances not sustainable, the alleged incumbrance being so far beneath the surface that conceivably the owner could make no use of the land. Boehringer v Montalto, 254 N.Y.S. 276, 142 Misc. 560, 1931 N.Y. Misc. LEXIS 935 (N.Y. Sup. Ct. 1931).

In an action to enjoin defendant property owners from violating a zoning ordinance of the plaintiff town, a counterclaim interposed by said defendants against the town and the defendant town officials for an injunction restraining them from taking any steps to enforce another ordinance which prohibits the removal of top soil was sufficient under this section. Harrison v Sunny Ridge Builders, Inc., 8 N.Y.S.2d 632, 170 Misc. 161, 1938 N.Y. Misc. LEXIS 2227 (N.Y. Sup. Ct. 1938).

77. Replevin

In replevin, a counterclaim for foreclosure of a security interest in the property is proper. Scognamillo v Passarelli, 210 N.Y. 550, 105 N.E. 199, 210 N.Y. (N.Y.S.) 550, 1914 N.Y. LEXIS 1264 (N.Y. 1914).

Where title of plaintiff in replevin depended upon the fact that defendant had transferred its title to him within four months of an adjudication in bankruptcy, trustee in bankruptcy substituted as defendant could set up as a counterclaim that the transfer was a preference. Gleason v Bush, 166 A.D. 865, 152 N.Y.S. 54, 1915 N.Y. App. Div. LEXIS 7311 (N.Y. App. Div. 1915).

In replevin by two plaintiffs, defendant could not set up as counterclaim breach of contract by one plaintiff. Jacobs v Mulford, 197 A.D. 835, 189 N.Y.S. 481, 1921 N.Y. App. Div. LEXIS 7567 (N.Y. App. Div. 1921).

Replevin being a possessory action, a counterclaim for damages can neither diminish nor defeat a claim for the recovery of specific chattels so an answer setting up such counterclaim was held bad for insufficiency. Spaus v Stolwein, 134 N.Y.S. 603, 75 Misc. 1, 1911 N.Y. Misc. LEXIS 34 (N.Y. Sup. Ct. 1911).

In action to replevin automobile, defendant's allegation that from the time the manufacturer of the automobile in question parted with title thereto, defendant had been the sole and absolute owner thereof, did not constitute a counterclaim, since it did not state a cause of action against the plaintiff. Humphrey v Conroy Motor Corp., 298 N.Y.S. 330, 164 Misc. 51, 1937 N.Y. Misc. LEXIS 1725 (N.Y. Sup. Ct. 1937).

In an action by an administrator for replevin of certain household goods, counterclaim by the defendant warehouse company based on its lien for storage charges, was proper. Mingey v Queensboro Storage Warehouse, Inc., 7 N.Y.S.2d 614, 169 Misc. 347, 1938 N.Y. Misc. LEXIS 2081 (N.Y. Mun. Ct. 1938).

78. Sales

A counterclaim for the rent of machinery which could have been obtained if a steam engine had been delivered as agreed, was good in an action for the price of the engine. Griffin v Colver, 16 N.Y. 489, 16 N.Y. (N.Y.S.) 489, 1858 N.Y. LEXIS 2 (N.Y. 1858).

A claim for the price of goods was a good counterclaim in action to compel the delivery thereof. Thompson v Kessel, 30 N.Y. 383, 30 N.Y. (N.Y.S.) 383, 1864 N.Y. LEXIS 97 (N.Y. 1864).

Damages for failure to deliver promptly could be counterclaimed in an action for goods. Phillips v Taylor, 101 N.Y. 639, 4 N.E. 727, 101 N.Y. (N.Y.S.) 639, 1 N.Y. St. 27, 1886 N.Y. LEXIS 709 (N.Y. 1886).

Buyer of goods may not counterclaim damages for failure to timely deliver same, where he waived his right to rescind the contract for the same reason. William C. Atwater & Co. v Panama R. Co., 255 N.Y. 496, 175 N.E. 189, 255 N.Y. (N.Y.S.) 496, 1931 N.Y. LEXIS 706 (N.Y. 1931).

In an action to recover for goods sold, the defendant alleged that plaintiffs conspired to exact an exorbitant price from him; held good. Siebrecht v Siegel-Cooper Co., 38 A.D. 549, 56 N.Y.S. 425, 1899 N.Y. App. Div. LEXIS 563 (N.Y. App. Div. 1899).

A counterclaim in an action in equity brought in the supreme court for a rescission of the contract for the sale of personal property, considered. Kerngood v Pond, 84 A.D. 227, 82 N.Y.S. 723, 1903 N.Y. App. Div. LEXIS 1745 (N.Y. App. Div. 1903).

Fact that defendant erroneously construed his contract with plaintiff as one of employment instead of one for sale of goods, held not to debar him from recovery of damages for plaintiff's breach where the facts alleged were sufficient. Kaempfer v Eisenberg, 200 A.D. 691, 193 N.Y.S. 742, 1922 N.Y. App. Div. LEXIS 8256 (N.Y. App. Div. 1922).

Counterclaim construed as setting forth a contract of sale, which failed to allege any tender of the goods and refusal of plaintiff to accept or pay for same, or other breach by him, was properly dismissed. Kaempfer v Eisenberg, 200 A.D. 691, 193 N.Y.S. 742, 1922 N.Y. App. Div. LEXIS 8256 (N.Y. App. Div. 1922).

In an action on a contract for sale and delivery of intoxicating liquors, defendant's construction thereof as set forth in his answer and counterclaim would render it illegal and insufficient. Ciocca-Lombardi Wine Co. v Fucini, 204 A.D. 392, 198 N.Y.S. 114, 1923 N.Y. App. Div. LEXIS

9476 (N.Y. App. Div.), aff'd, 236 N.Y. 584, 142 N.E. 293, 236 N.Y. (N.Y.S.) 584, 1923 N.Y. LEXIS 1017 (N.Y. 1923).

In action for the price, buyer could counterclaim damages incurred, on a sale for re-sale contract, where the quality of the goods had been misrepresented and he thereby became liable to his vendees. De Vaughn v Frank E. McGray Co., 222 A.D. 533, 226 N.Y.S. 474, 1928 N.Y. App. Div. LEXIS 8108 (N.Y. App. Div. 1928).

In an action for the price of goods sold, contract between the parties for exclusive agency for the goods was without mutuality and insufficient to support a counterclaim for its breach. Smtih v Diem, 223 A.D. 572, 229 N.Y.S. 56, 1928 N.Y. App. Div. LEXIS 6269 (N.Y. App. Div.), aff'd, 249 N.Y. 590, 164 N.E. 595, 249 N.Y. (N.Y.S.) 590, 1928 N.Y. LEXIS 942 (N.Y. 1928).

Where defendant rejected part of a consignment of goods and plaintiff acquiesced therein, in action for the price defendant’s counterclaim was proper. Reichel v Standard Rice Co., 225 A.D. 628, 234 N.Y.S. 137, 1929 N.Y. App. Div. LEXIS 11715 (N.Y. App. Div. 1929), aff'd, 254 N.Y. 86, 171 N.E. 916, 254 N.Y. (N.Y.S.) 86, 1930 N.Y. LEXIS 1008 (N.Y. 1930).

Contract of sale entered into by plaintiff’s agent and breach thereof by plaintiff having been established, it was error to dismiss defendant’s counterclaim. Standard Oil Co. v Siraco, 226 A.D. 266, 235 N.Y.S. 1, 1929 N.Y. App. Div. LEXIS 8700 (N.Y. App. Div. 1929).

In action on a note given by a minor in part payment for an automobile, his counterclaim for the value of the car turned in and cash paid, on the theory of disaffirmance after majority, was not supported by the evidence. Washington Street Garage v Maloy, 230 A.D. 266, 243 N.Y.S. 467, 1930 N.Y. App. Div. LEXIS 8592 (N.Y. App. Div. 1930).

In action for price of goods sold, counterclaims for damages because of allowances to customers; loss sustained on resale; loss of customers and injury to business, all because of inferior goods, were proper, notwithstanding the proper measure of damages was not set up. Cramerton Mills, Inc. v Nathan & Cohen Co., 231 A.D. 28, 246 N.Y.S. 259, 1930 N.Y. App. Div. LEXIS 6991 (N.Y. App. Div. 1930).

In action for the price, allegations of counterclaim based upon unfitness of the goods, were improperly stricken by the trial court since without same there was no allegation of breach of warranty, or of timely notice to seller, but as defendant did not appeal, the entire counterclaim was stricken because stating no cause of action. Weinstein v Ken-Wel Sporting Goods Co., 231 A.D. 51, 246 N.Y.S. 270, 1930 N.Y. App. Div. LEXIS 6996 (N.Y. App. Div. 1930).

Where the complaint was for goods sold and delivered, a counterclaim for the value of other goods alleged to have been converted could be set up. Starr Cash Car Co. v Reinhart, 20 N.Y.S. 872, 2 Misc. 116, 1892 N.Y. Misc. LEXIS 221 (N.Y.C.P. 1892).

In action by buyer to recover back deposit where he fails to prove that shipping instructions were given or excused, and defendant counterclaims for breach of contract in failing to furnish shipping instructions, he must plead and prove ability to perform, although tender of performance was excused. Tamargo v S. Silberstein & Sons, Inc., 210 N.Y.S. 40, 125 Misc. 81, 1925 N.Y. Misc. LEXIS 816 (N.Y. App. Term 1925).

Defensive allegations in answer and counterclaim that plaintiff’s purchase of its rights from the Alien Property Custodian, for infringement of which it sues, was fraudulent, must be stricken as irrelevant on the ground that title acquired from the government cannot be questioned nor can title be questioned by a stranger thereto. American Bosch Magneto Corp. v Robert Bosch Magneto Co., 215 N.Y.S. 387, 127 Misc. 119, 1926 N.Y. Misc. LEXIS 939 (N.Y. Sup. Ct. 1926), aff'd, 223 A.D. 759, 227 N.Y.S. 765, 1928 N.Y. App. Div. LEXIS 6865 (N.Y. App. Div. 1928).

Loss of profits should be specially pleaded as a counterclaim to complaint for sales price of furniture manufactured for defendants, and cannot be proven under a general allegation of damages. Stevens v Sonto, 2 N.Y.S. 484, 1888 N.Y. Misc. LEXIS 802 (N.Y. City Ct. 1888).

79. —Warranty

A breach of warranty of goods was a good counterclaim in an action for their price. Dounce v Dow, 57 N.Y. 16, 57 N.Y. (N.Y.S.) 16, 1874 N.Y. LEXIS 261 (N.Y. 1874).

Rescission for fraud or mistake and breach of warranty could be set up in an action for breach of contract of sale. Bruce v Burr, 67 N.Y. 237, 67 N.Y. (N.Y.S.) 237, 1876 N.Y. LEXIS 377 (N.Y. 1876).

A defendant could recover for breach of warranty discovered after the stating of the account, in an action for goods sold. Samson v Freedman, 102 N.Y. 699, 7 N.E. 419, 102 N.Y. (N.Y.S.) 699, 2 N.Y. St. 434, 1886 N.Y. LEXIS 961 (N.Y. 1886).

In an action for goods sold and delivered, where the answer did not deny the allegations of the complaint and admitted an agreement to sell and purchase goods of certain specifications without warranty, counterclaims based on the existence of a warranty should be dismissed. Smith v Coe, 170 N.Y. 162, 63 N.E. 57, 170 N.Y. (N.Y.S.) 162, 1902 N.Y. LEXIS 1054 (N.Y. 1902).

When the seller of a power plant made an express warranty as to its performance the buyer could keep the plant although not as warranted, and when sued for the purchase price could counterclaim damages for a breach of warranty. Ames v Norwich Light Co., 122 A.D. 319, 106 N.Y.S. 952, 1907 N.Y. App. Div. LEXIS 2426 (N.Y. App. Div. 1907).

Counterclaim for breach of oral warranty by agent was erroneously dismissed, since agent's authority was a question for the jury. J. & H. Goodwin, Ltd. v Dingfelder, 224 A.D. 543, 231 N.Y.S. 552, 1928 N.Y. App. Div. LEXIS 10059 (N.Y. App. Div. 1928).

In action for balance of purchase price of a service station "oil fountain," the evidence failed to support defendant's counterclaim for the amount paid on the theory of breach of implied warranty. S. F. Bowser & Co. v McCormack, 230 A.D. 303, 243 N.Y.S. 442, 1930 N.Y. App. Div. LEXIS 8601 (N.Y. App. Div. 1930).

In action for goods sold, defendant may counterclaim for breaches of covenant and of warranty as to other sales. Nussbaum v Sobel, 269 A.D. 105, 54 N.Y.S.2d 228, 1945 N.Y. App. Div. LEXIS 2934 (N.Y. App. Div.), reh'g denied, 269 A.D. 767, 55 N.Y.S.2d 117, 1945 N.Y. App. Div. LEXIS 3708 (N.Y. App. Div. 1945).

Breach of warranty is only pleadable as a counterclaim. Cabella v Cabella, 252 N.Y.S. 188, 141 Misc. 69, 1931 N.Y. Misc. LEXIS 1610 (N.Y. Mun. Ct. 1931).

In an action to foreclose a lien upon an automobile sold under a conditional sales contract, wherein defendant set up a breach of warranty as a defense, but made no counterclaim thereon, it was error to award defendant a money judgment for damages. Studebaker Corp. of America v Silverberg, 199 N.Y.S. 190, 1923 N.Y. Misc. LEXIS 931 (N.Y. App. Term 1923).

80. Specific performance

Counterclaim that by mutual mistake written agreement failed to express actual agreement of parties in action for specific performance thereof was sufficient. Selmar Garage Corp. v Rink Realty Corp., 276 A.D. 786, 93 N.Y.S.2d 262, 1949 N.Y. App. Div. LEXIS 3324 (N.Y. App. Div. 1949).

In action for specific performance of contract to sell real property, defense and counterclaim based on allegations that plaintiff brought the action knowing there was no legal justification therefor, and with intent to prevent the defendant from conveying the property to another maliciously filed a lis pendens therein, were insufficient absent allegation that the lis pendens was used for a purpose other than permitted by law. Bronstein v Dayton Peninsula Corp., 11 A.D.2d 1036, 206 N.Y.S.2d 12, 1960 N.Y. App. Div. LEXIS 7853 (N.Y. App. Div. 2d Dep't 1960).

In action for specific performance of contract to sell real property, defense and counterclaim based on allegations that plaintiff brought the action knowing there was no legal justification therefor, were insufficient; since if the action was malicious and without probable cause, defendant was not entitled to recover therefor until the action had terminated favorably to him. Bronstein v Dayton Peninsula Corp., 11 A.D.2d 1036, 206 N.Y.S.2d 12, 1960 N.Y. App. Div. LEXIS 7853 (N.Y. App. Div. 2d Dep't 1960).

Counterclaim for damages for breach of contract to convey is not inconsistent with claim for specific performance. Clarkson Bldg. Corp. v Schafer-Nebenzahl Investing Co., 247 N.Y.S. 458, 138 Misc. 750, 1931 N.Y. Misc. LEXIS 1047 (N.Y. Sup. Ct. 1931).

81. Summary proceedings

A counterclaim for money damages could not be interposed in a summary proceeding on the ground that the tenant held over after the expiration of his term. The broadened procedure under CPA § 266 was inapplicable. Metropolitan Life Ins. Co. v Shapiro, 296 N.Y.S. 563, 163 Misc. 76, 1937 N.Y. Misc. LEXIS 1310 (N.Y. App. Term), aff'd, 252 A.D. 855, 300 N.Y.S. 1004, 1937 N.Y. App. Div. LEXIS 6554 (N.Y. App. Div. 1937).

82. Torts and personal injuries

Where, in an action for a tort, the answer alleged that a former recovery was had for the same tort against a joint tortfeasor, the failure of the plaintiff to reply to the answer was not an admission of the allegation that such judgment was paid, as such defense was not a counterclaim, and required no reply; it merely set out matter in avoidance. Reno v Thompson, 111 A.D. 316, 97 N.Y.S. 744, 1906 N.Y. App. Div. LEXIS 153 (N.Y. App. Div. 1906).

As a general rule one tort could not, under former practice, be pleaded as a counterclaim to an action on another, where there was no necessary or legal connection between them; but the Code intended to secure adjustment in a single action of all controversies between the parties concerning the same subject matter, and to that end it should be liberally construed. Kelly v Webster, 143 A.D. 737, 128 N.Y.S. 58, 1911 N.Y. App. Div. LEXIS 917 (N.Y. App. Div. 1911).

Motion to strike defenses and counterclaim denied under the rule that no contract of immunity can be drawn that will protect against acts in bad faith. Christian Mills, Inc. v Savoia Macaroni Mfg. Co., 228 A.D. 717, 239 N.Y.S. 283, 1930 N.Y. App. Div. LEXIS 12662 (N.Y. App. Div. 1930).

In an action for personal injuries in an automobile accident brought jointly by the one injured and his insurer by virtue of an assignment pro tanto of the cause of action following settlement of the insurer's liability under the policy, the defendant held entitled to interpose a counterclaim for damage to his automobile. Gilboy v Lennon, 193 N.Y.S. 606, 118 Misc. 467, 1922 N.Y. Misc. LEXIS 1141 (N.Y. Sup. Ct. 1922).

Counterclaim that plaintiff committed wilful and malicious acts which caused defendant to become nervous, sick and upset, was sufficient. Bergman v Rubenfeld, 66 N.Y.S.2d 895, 1946 N.Y. Misc. LEXIS 3166 (N.Y. City Ct. 1946).

In action for personal injuries, counterclaim for destruction of property was properly interposed, but it did not state sufficient ultimate facts in support of conclusion that property was damaged to extent of $2,500. Halpern v Hindin, 141 N.Y.S.2d 799, 1955 N.Y. Misc. LEXIS 2745 (N.Y. Sup. Ct. 1955).

83. —Assault

In an action for assault and battery committed on the plaintiff by the defendant, the defendant could interpose as a counterclaim an assault on him by the plaintiff during the affray out of which the cause of action arose; the word "transaction" as used in former CPA § 266, subd. 1 including torts. Deagan v Weeks, 67 A.D. 410, 73 N.Y.S. 641, 10 N.Y. Ann. Cas. 360, 1901 N.Y. App. Div. LEXIS 2710 (N.Y. App. Div. 1901).

In answer to a complaint for assault, a counterclaim for assault on the same occasion and for malicious prosecution was proper. Schechner v Wittner, 224 N.Y.S. 66, 130 Misc. 424, 1927 N.Y. Misc. LEXIS 1065 (N.Y. City Ct. 1927).

In action for personal injuries, counterclaim for assault and battery held properly interposed and to state cause of action therefor. Halpern v Hindin, 141 N.Y.S.2d 799, 1955 N.Y. Misc. LEXIS 2745 (N.Y. Sup. Ct. 1955).

84. —Conspiracy

For counterclaim of conspiracy in action for broker's commission see Stone v Freeman, 298 N.Y. 268, 82 N.E.2d 571, 298 N.Y. (N.Y.S.) 268, 1948 N.Y. LEXIS 791 (N.Y. 1948).

In action by stove manufacturer against appliance dealer for admitted balance due, counterclaim based on conspiratorial violation of General Business L § 340, was sufficient as against a motion to dismiss even though defendant made no countershowing, and his charge of conspiracy was given little elaboration and substantiation in the pleading. J. Rose & Co. v Unity Stove Co., 3 A.D.2d 829, 161 N.Y.S.2d 686, 1957 N.Y. App. Div. LEXIS 5731 (N.Y. App. Div. 1st Dep't 1957).

In action for assault, counterclaim for conspiracy between plaintiff and his attorney, alleging no facts showing that attorney acted wrongfully or outside scope of his duties, was insufficient. Dallas v Fassnacht, 42 N.Y.S.2d 415, 1943 N.Y. Misc. LEXIS 2017 (N.Y. Sup. Ct. 1943).

85. —Conversion

A defendant, a first mortgagee of land sued for conversion of wood, could set up as a counterclaim that plaintiff, a second mortgagee in possession, cut the wood with intent to deprive the defendant of his security, which was insufficient, thereby wasting the land and leaving a large deficiency upon foreclosure of defendant's mortgage. Carpenter v Manhattan Life Ins. Co., 93 N.Y. 552, 93 N.Y. (N.Y.S.) 552, 1883 N.Y. LEXIS 317 (N.Y. 1883).

A counterclaim in an action for conversion formerly had to arise out of the transaction or contract set forth in the complaint or be connected with the subject of the action. Savage v Buffalo, 50 A.D. 136, 63 N.Y.S. 941, 1900 N.Y. App. Div. LEXIS 945 (N.Y. App. Div. 1900).

In an action of tort for the conversion of money a counterclaim of a margin deposited to secure a purchase of stock ordered but not purchased was, under former practice, so "connected with the subject of the action," as to be proper under CPA § 266, subd. 1. O'Brien v Dwyer, 76 A.D. 516, 78 N.Y.S. 600, 1902 N.Y. App. Div. LEXIS 2592 (N.Y. App. Div. 1902).

In an action for conversion of the security of a debt, if a counterclaim interposed by defendants asks the rescission of a sale of the debt as affirmative relief, and the plaintiff has not replied thereto, the defendant's motion for judgment on the counterclaim should be granted. Flynn v Smith, 111 A.D. 870, 98 N.Y.S. 56, 1906 N.Y. App. Div. LEXIS 271 (N.Y. App. Div. 1906).

In an action for conversion in the detinet proof of title in a third person may be given under a general denial. McLaughlin v Harriot, 35 N.Y.S. 684, 14 Misc. 343, 1895 N.Y. Misc. LEXIS 862 (N.Y.C.P. 1895), limited, Northridge v Astariata, 47 A.D. 486, 62 N.Y.S. 441, 1900 N.Y. App. Div. LEXIS 136 (N.Y. App. Div. 1900).

In action for conversion of horses, where defendant claimed that he sold the horses for $300 and that plaintiff was indebted to him for $375, court held to have erred in not permitting consideration of a counterclaim for $75 in order that plaintiff might get the benefit of the $375 owing him. Waters v Lang, 139 N.Y.S. 844, 79 Misc. 240, 1913 N.Y. Misc. LEXIS 949 (N.Y. App. Term 1913).

Where wife sued railroad as assignee of her husband in conversion, defendant could set up a counterclaim for conversion committed by plaintiff and her husband. Lupo v Erie R. Co., 161 N.Y.S. 66, 96 Misc. 693, 1916 N.Y. Misc. LEXIS 1266 (N.Y. App. Term 1916).

A pledgee of shares who converted them in separate lots, could set off in an action for the conversion of one of the lots a proportional amount of the debt secured. New York, L. E. & W. R. Co. v Davies, 38 Hun 477 (N.Y.).

In an action for conversion of moneys alleged to have been collected by an agent which he had no right to collect under his contract of employment, claims for money due to the defendant under the contract and for conspiracy and confederation of plaintiff and others to deprive defendant of his rights under such contract were held to be so connected with the subject of the action that they could be pleaded as counterclaims. Ter Kuile v Maraland, 31 N.Y.S. 5, 81 Hun 420 (1894).

86. —Libel and slander

Counterclaims for slander were not proper in a libel case. Udovichky v Bacheff, 195 A.D. 860, 187 N.Y.S. 474, 1921 N.Y. App. Div. LEXIS 4850 (N.Y. App. Div. 1921).

In an action for damages caused by the negligent and unskilled performance by the defendant of an agreement to design an airplane for the plaintiff, counterclaims for slander in that the plaintiff had stated that the defendant had done a “rotten job” and had proved himself an “incompetent aeronautical engineer” were properly interposed as tending to diminish or defeat the plaintiff’s recovery. McPherson v Klemin, 244 A.D. 767, 280 N.Y.S. 296, 1935 N.Y. App. Div. LEXIS 6301 (N.Y. App. Div. 1935), aff'd, 270 N.Y. 511, 200 N.E. 294, 270 N.Y. (N.Y.S.) 511, 1936 N.Y. LEXIS 1585 (N.Y. 1936).

Where defendant’s counterclaim is founded in slander, in the absence of allegations establishing criminal innuendo or special damages, such counterclaim dismissed. Bruno v Schukart, 12 Misc. 2d 383, 177 N.Y.S.2d 51, 1958 N.Y. Misc. LEXIS 2880 (N.Y. Sup. Ct. 1958).

In an action to recover damages for slander, the defendant could not set up by way of counterclaim, a cause of action in slander against the plaintiff, for defamatory words used on the same occasion and immediately after the slanderous words concerning plaintiff were spoken by defendant. Sheehan v Pierce, 23 N.Y.S. 1119, 70 Hun 22 (1893).

87. —Malicious prosecution and false arrest

Counterclaim, based upon abuse of process and malicious prosecution, which failed to state a cause of action was dismissed on motion. Silverman v Ufa Eastern Div. Distribution, Inc., 236 N.Y.S. 18, 135 Misc. 814, 1929 N.Y. Misc. LEXIS 1168 (N.Y. Sup. Ct. 1929).

In an action for false imprisonment under an order of arrest, a judgment recovered against the plaintiff in the action in which he was arrested was not a proper subject of counterclaim. Ferris v Armstrong Mfg. Co., 10 N.Y.S. 750, 57 Hun 592 (N.Y. Sup. Ct. 1890), aff'd, 125 N.Y. 722, 26 N.E. 756, 125 N.Y. (N.Y.S.) 722, 1891 N.Y. LEXIS 1544 (N.Y. 1891).

Malicious prosecution may be interposed in action claimed to constitute malicious prosecution, without alleging termination of action. Herendeen v Ley Realty Co., 75 N.Y.S.2d 836, 1947 N.Y. Misc. LEXIS 3487 (N.Y. Sup. Ct. 1947).

88. —Malpractice

In action to recover for medical services, a counterclaim for malpractice may be interposed. Clifton Springs Sanitarium Co. v De Voyst, 240 N.Y.S. 729, 136 Misc. 293, 1930 N.Y. Misc. LEXIS 1128 (N.Y. Sup. Ct. 1930).

89. —Negligence

In action by infant for personal injuries and by father for medical expenses and loss of services, defendant's counterclaim against father based on indemnity agreement against loss resulting from settlement of infant's claim without court approval was dismissed since such agreement is unenforceable as an evasion of requirement of court approval of settlement of infant's claim. Valdimer v Mt. Vernon Hebrew Camps, Inc., 9 A.D.2d 900, 195 N.Y.S.2d 24, 1959 N.Y. App. Div. LEXIS 5726 (N.Y. App. Div. 2d Dep't 1959), aff'd, 9 N.Y.2d 21, 210 N.Y.S.2d 520, 172 N.E.2d 283, 1961 N.Y. LEXIS 1565 (N.Y. 1961).

Where a complaint alleged that plaintiff, while a passenger in an automobile, was injured in a collision with a bus owned by the defendant, counterclaims which charged the driver and owner of the automobile with responsibility for the collision but did not seek any affirmative relief from them and counterclaims which demanded that the complaint be dismissed but did not mention the plaintiff, were insufficient. Tauro v Queens-Nassau Transit Lines, Inc., 6 N.Y.S.2d 176, 168 Misc. 879, 1938 N.Y. Misc. LEXIS 1813 (N.Y. Sup. Ct. 1938).

In action for personal injuries, counterclaim for destruction of property was properly interposed, but it did not state sufficient ultimate facts in support of conclusion that property was damaged to

extent of $2,500. Halpern v Hindin, 141 N.Y.S.2d 799, 1955 N.Y. Misc. LEXIS 2745 (N.Y. Sup. Ct. 1955).

90. Usury

Usury is ordinarily not a counterclaim but a substantive defense not requiring a reply. Equitable Life Assurance Soc. v Cuyler, 75 N.Y. 511, 75 N.Y. (N.Y.S.) 511, 1878 N.Y. LEXIS 897 (N.Y. 1878).

In an action by a national bank where usury has been taken, the defendant could, under §§ 5197, 5198 of the U. S. Rev. St., have a counterclaim for the full amount of the interest. National Bank of Auburn v Lewis, 75 N.Y. 516, 75 N.Y. (N.Y.S.) 516, 1878 N.Y. LEXIS 898 (N.Y. 1878).

Where defendants claim that a note on which the action is based was part of a former usurious note, they could not set up a counterclaim for double the amount of the usurious interest paid under the provisions of the banking law, Laws 1892, ch 689, § 55, but must bring a penal action. Caponigri v Altieri, 165 N.Y. 255, 59 N.E. 87, 165 N.Y. (N.Y.S.) 255, 1901 N.Y. LEXIS 1413 (N.Y. 1901).

A counterclaim on the ground of usury in the mortgage sought to be foreclosed must plead usury by facts showing it and not by general terms. Yormark v Waldman, 217 N.Y.S. 501, 127 Misc. 748, 1926 N.Y. Misc. LEXIS 681 (N.Y. Sup. Ct. 1926).

For counterclaim to mortgage foreclosure based on usury see North River Mortg. Corp. v 254 Sixth Ave. Realty Corp., 240 N.Y.S. 654, 136 Misc. 342, 1930 N.Y. Misc. LEXIS 1112 (N.Y. Sup. Ct.), aff'd, 229 A.D. 865, 243 N.Y.S. 850, 1930 N.Y. App. Div. LEXIS 11982 (N.Y. App. Div. 1st Dep't 1930), aff'd, 229 A.D. 865, 243 N.Y.S. 851, 1930 N.Y. App. Div. LEXIS 11983 (N.Y. App. Div. 1st Dep't 1930).

Where the defense of usury has not been set up in the form of a counterclaim and a verdict has been found for plaintiff, it is not competent for the court to hold that plaintiff’s claim should be

reduced by the alleged usurious payments. Pixley v Ingram, 6 N.Y.S. 360, 53 Hun 93, 1889 N.Y. Misc. LEXIS 576 (N.Y. Sup. Ct. 1889).

91. Vendor and purchaser

In a suit to recover money overpaid for real estate, the defendant could not counterclaim money paid in consequence of the failure of a contractor to finish a house on the property. Canaday v Stiger, 55 N.Y. 452, 55 N.Y. (N.Y.S.) 452, 1874 N.Y. LEXIS 32 (N.Y. 1874).

A counterclaim averring readiness and a tender of a deed and offer to perform and asking for a specific performance was good in an action by a purchaser of real estate to recover his deposit. Moser v Cochrane, 107 N.Y. 35, 13 N.E. 442, 107 N.Y. (N.Y.S.) 35, 11 N.Y. St. 200, 1887 N.Y. LEXIS 981 (N.Y. 1887).

In an action to compel a purchaser to take title which is justly refused because of a cloud thereon, the defendant could counterclaim for the percentage paid on purchase, the expense of examination of title and auctioneer’s fees. Wetmore v Bruce, 118 N.Y. 319, 23 N.E. 303, 118 N.Y. (N.Y.S.) 319, 1890 N.Y. LEXIS 973 (N.Y. 1890).

Counterclaim is not sufficiently pleaded to charge a liability to plaintiff for failure to exercise an option to purchase property on which defendant had made improvements relying thereon; no fault of plaintiff is alleged to have caused the loss. Mozart Verein Von New York v Yorkville Square Club, Inc., 235 A.D. 708, 255 N.Y.S. 956, 1932 N.Y. App. Div. LEXIS 8909 (N.Y. App. Div. 1932).

Under the rule that an oral extension of time of performance of a contract to convey cannot be shown unless it appears that the vendor could have performed within the time originally set, counterclaim in an action to recover the down payment was stricken out. Esperanza Realty Corp. v Loft, Inc., 230 N.Y.S. 380, 132 Misc. 460, 1928 N.Y. Misc. LEXIS 991 (N.Y. Sup. Ct. 1928).

Counterclaim by vendee for damages for breach of contract to convey was not inconsistent with former claim for specific performance. Clarkson Bldg. Corp. v Schafer-Nebenzahl Investing Co., 247 N.Y.S. 458, 138 Misc. 750, 1931 N.Y. Misc. LEXIS 1047 (N.Y. Sup. Ct. 1931).

In an action to enjoin the committing of waste, and to recover damages for injuries already done the freehold, defendant could under former practice counterclaim a demand for the specific performance of a contract to convey. Boyle v Youmans, 9 N.Y.S. 14, 55 Hun 612, 1890 N.Y. Misc. LEXIS 7 (N.Y. Sup. Ct. 1890), aff'd, 134 N.Y. 614, 31 N.E. 629, 134 N.Y. (N.Y.S.) 614, 1892 N.Y. LEXIS 1579 (N.Y. 1892).

Where an owner agrees in a lease to convey to the lessee at any time during the lease for a certain sum upon a certain notice, another purchasing the property with notice of the agreement after notice of the lessee’s intention to purchase, suing the lessee for waste is subject to the counterclaim demanding specific performance of an agreement. .

A claim for rent for use of part of premises by plaintiff after a deed which is sought to be set aside with a contract to reconvey on the ground that they were in fact a mortgage to cover a usurious loan, is a proper counterclaim, an accounting for rents and profits being asked by plaintiff. Barnes v Gilmore.

92. Work, labor, and services

Defendant can counterclaim the cost of completing the work plaintiff was required to do, but refused to do, the contract giving defendant the right to charge such completion to the plaintiff. Taylor v New York, 83 N.Y. 625, 83 N.Y. (N.Y.S.) 625, 1881 N.Y. LEXIS 48 (N.Y. 1881).

In an action brought by a subcontractor against general contractors for balance of work done, the defendants cannot set up as counterclaims damages claimed in actions still pending for negligence of such subcontractors, but may counterclaim damages which have been recovered against them in similar actions and sums voluntarily paid by them upon proof of their liability and

the reasonableness of the amount paid. Dunn v Uvalde Asphalt Paving Co., 175 N.Y. 214, 67 N.E. 439, 175 N.Y. (N.Y.S.) 214, 1903 N.Y. LEXIS 970 (N.Y. 1903).

In an action for services brought by a civil engineer, a counterclaim was good under this section, which alleged a breach of the contract on the part of the engineer, in that he failed to examine the payrolls and certified fraudulent payrolls to the damage of the defendant. Pecke v Hydraulic Const. Co., 23 A.D. 393, 48 N.Y.S. 225, 1897 N.Y. App. Div. LEXIS 2646 (N.Y. App. Div. 1897).

In an action to recover for a sum due on a contract, for work, labor and services, the defendant is not entitled to a judgment on a counterclaim for the cost of completing the contract for the same must be deducted from the contract price. Brown v Mader, 120 A.D. 515, 105 N.Y.S. 70, 1907 N.Y. App. Div. LEXIS 1236 (N.Y. App. Div. 1907).

93. Miscellaneous applications

Pleading asking that rival claimants be required to interplead together concerning their claims to property, that original defendants be permitted to deliver property demanded in complaint into court to be disposed of in accord with final order or judgment, and upon doing so that these defendants be discharged of liability from adverse claims, was sufficient to constitute counterclaim of stakeholder. O'Donnell v Vanecek, 3 Misc. 2d 20, 150 N.Y.S.2d 819, 1956 N.Y. Misc. LEXIS 2054 (N.Y. Sup. Ct. 1956).

To a suit to prevent the alleged wrongful diversion of water from a river and plaintiff’s mills, a counterclaim that plaintiff was subject to a right of defendant to have a customary flow through his canal which plaintiff had impaired and defendant proposed to restore, was allowable. Grange v Gilbert, 44 Hun 9, 6 N.Y. St. 423 (N.Y.).

B. Cross-Claims

i. In General

94. Generally

CPA § 264 was simply a regulation of practice and confers no new power upon the court. Albany City Sav. Institution v Burdick, 87 N.Y. 40, 87 N.Y. (N.Y.S.) 40, 1881 N.Y. LEXIS 313 (N.Y. 1881).

A defendant may claim affirmative relief against a codefendant where by the judgment their ultimate rights as between themselves may be determined. Derham v Lee, 87 N.Y. 599, 87 N.Y. (N.Y.S.) 599, 1882 N.Y. LEXIS 46 (N.Y. 1882).

A cross-claim over against another defendant, cannot be reasonably construed as an admission of liability or the relinquishment of any right or defense. Kirchner v Muller, 280 N.Y. 23, 19 N.E.2d 665, 280 N.Y. (N.Y.S.) 23, 1939 N.Y. LEXIS 1282 (N.Y. 1939).

In order to avoid a multiplicity of suits, a defendant, who is not primarily responsible for the injury complained of by the plaintiff, may serve a cross-complaint against the defendant whose active negligence or wrongdoing is responsible for the liability, providing the bringing of such cross-action shall not delay a judgment to which the plaintiff may be entitled. Birchall v Clemons Realty Co., 241 A.D. 286, 271 N.Y.S. 547, 1934 N.Y. App. Div. LEXIS 8232 (N.Y. App. Div. 1934).

A party to action may claim over as against any other party, plaintiff or defendant, to avoid multiplicity of suits and to determine in one action all issues arising out of given circumstances. D'Onofrio v New York, 284 A.D. 688, 134 N.Y.S.2d 569, 1954 N.Y. App. Div. LEXIS 3470 (N.Y. App. Div. 1954).

The purport and intent of CPA § 264 was to avoid a multiplicity of suits. Cohen v Dugan Bros., Inc., 235 N.Y.S. 118, 134 Misc. 155, 1929 N.Y. Misc. LEXIS 835 (N.Y. Sup. Ct. 1929).

CPA § 193-a (§§ 1007, 1008, 1011, 3012(a), Rule 4111 herein) and § 264 were both intended to accomplish the same purpose, under different circumstances with somewhat different pleading and procedural requirements. Lanser v Baumrin, 2 Misc. 2d 610, 151 N.Y.S.2d 466, 1956 N.Y. Misc. LEXIS 1933 (N.Y. App. Term 1956).

Defendant impleaded under CPA § 271 could have cross claimed under CPA § 264 against plaintiff. Bennett Excavators Corp. v Lasker Goldman Corp., 15 Misc. 2d 802, 181 N.Y.S.2d 864, 1958 N.Y. Misc. LEXIS 2526 (N.Y. Sup. Ct. 1958).

Distinguishing between a cross-claim and a counterclaim. See Bennett Excavators Corp. v Lasker Goldman Corp., 15 Misc. 2d 802, 181 N.Y.S.2d 864, 1958 N.Y. Misc. LEXIS 2526 (N.Y. Sup. Ct. 1958).

Impleader under CPA § 193-a (§§ 1007, 1008, 1011, 1020, 3012(a), Rule 4111 herein) and cross-claim under CPA § 264 were limited to liability over for all or part of the recovery of the suitor's claim against the impleader or claimant over, and the latter could not assert an affirmative claim for his own damages. Bennett Excavators Corp. v Lasker-Goldman Corp., 19 Misc. 2d 926, 186 N.Y.S.2d 680, 1959 N.Y. Misc. LEXIS 3858 (N.Y. Sup. Ct. 1959), app. dismissed, 11 A.D.2d 734, 204 N.Y.S.2d 706, 1960 N.Y. App. Div. LEXIS 8991 (N.Y. App. Div. 2d Dep't 1960).

Any party may cross-claim against any other party by demanding such relief in his pleading. Bennett Excavators Corp. v Lasker-Goldman Corp., 19 Misc. 2d 926, 186 N.Y.S.2d 680, 1959 N.Y. Misc. LEXIS 3858 (N.Y. Sup. Ct. 1959), app. dismissed, 11 A.D.2d 734, 204 N.Y.S.2d 706, 1960 N.Y. App. Div. LEXIS 8991 (N.Y. App. Div. 2d Dep't 1960).

Where counterclaim is interposed against moving defendant's codefendant for damages for breach of warranty of title but fails to raise any issue affecting plaintiff and presently existing cause of action, it is improperly labeled as counterclaim, but will be deemed as cross-claim. Quick v Bauer, 102 N.Y.S.2d 379, 1950 N.Y. Misc. LEXIS 2402 (N.Y. Sup. Ct. 1950).

The intent of CPA § 264 was to remove disability of third-party defendant to cross-claim against plaintiff which existed prior to its enactment. Commercial Trading Co. v Zeisel Machinery Co., 133 N.Y.S.2d 308, 1954 N.Y. Misc. LEXIS 2180 (N.Y. Sup. Ct. 1954).

CPA § 264 extended application and practical effect of CPA § 474 (§ 5011, Rule 5012, herein), so as to embrace within the term counterclaim some claims which the practice before did not

make available as such. Metropolitan Trust Co. v Tonawanda V. & C. R. Co., 43 Hun 521, 7 N.Y. St. 90 (N.Y.), aff'd, 106 N.Y. 673, 13 N.E. 937, 106 N.Y. (N.Y.S.) 673, 1887 N.Y. LEXIS 963 (N.Y. 1887).

95. Sufficiency of cross answer or cross-complaint generally

Answer was sufficient to entitle respondent to assert cross-claim. Lasher v Montgomery Ward & Co., 253 A.D. 564, 3 N.Y.S.2d 32, 1938 N.Y. App. Div. LEXIS 8495 (N.Y. App. Div. 1938).

The fact that the main complaint may be construed as charging active as well as passive negligence does not warrant a dismissal of the cross complaint. Brady v Stanley Weiss & Sons, Inc., 6 A.D.2d 241, 175 N.Y.S.2d 850, 1958 N.Y. App. Div. LEXIS 5104 (N.Y. App. Div. 4th Dep't 1958).

Where the basis of the cross complaint is contractual indemnity, it is insufficient if it fails to plead the facts from which the basis for such claim may be found or be fairly inferable. Bush Terminal Bldgs. Co. v Luckenbach S.S. Co., 11 A.D.2d 220, 202 N.Y.S.2d 172, 1960 N.Y. App. Div. LEXIS 8652 (N.Y. App. Div. 1st Dep't 1960), reh'g denied, 11 A.D.2d 991, 207 N.Y.S.2d 993, 1960 N.Y. App. Div. LEXIS 7779 (N.Y. App. Div. 1st Dep't 1960), rev'd, 9 N.Y.2d 426, 214 N.Y.S.2d 428, 174 N.E.2d 516, 1961 N.Y. LEXIS 1369 (N.Y. 1961).

A cross-complaint was sufficient, where the cross-complainant asserted that it was not responsible for the injury complained of by the plaintiff but that the remaining defendants by their negligence were responsible. Podbeilak v Central Packing Corp., 9 N.Y.S.2d 954, 170 Misc. 88, 1939 N.Y. Misc. LEXIS 1534 (N.Y. Sup. Ct. 1939).

Cross claim is proper where proof as to plaintiff’s claim and defendant’s cross-complaint will be substantially same, except as to damages. Jefno Realty Corp. v Lloyds Film Storage Corp., 73 N.Y.S.2d 186, 191 Misc. 471, 1947 N.Y. Misc. LEXIS 2974 (N.Y. Sup. Ct. 1947).

A cross claim cannot be asserted by merely conclusory allegations without any facts. Ling v New York C. R. Co., 4 Misc. 2d 132, 153 N.Y.S.2d 657, 1956 N.Y. Misc. LEXIS 2231 (N.Y. Sup. Ct. 1956).

Mere conclusory allegations are insufficient to sustain cross-claim. Ling v New York C. R. Co., 4 Misc. 2d 132, 153 N.Y.S.2d 657, 1956 N.Y. Misc. LEXIS 2231 (N.Y. Sup. Ct. 1956).

Cross claims must be allowed to stand provided that there may really be an issue to be decided under them. Berns v Pearce & Pearce Co., 10 Misc. 2d 983, 172 N.Y.S.2d 518, 1958 N.Y. Misc. LEXIS 3574 (N.Y. Sup. Ct. 1958).

Where the allegations of a cross complaint indicate that one defendant might be liable over to another, motion to dismiss denied. Rezza v Isaacson, 13 Misc. 2d 794, 178 N.Y.S.2d 481, 1958 N.Y. Misc. LEXIS 2696 (N.Y. Sup. Ct. 1958).

Where main complaint indiscriminately charges all defendants with both active and passive negligence, fate of cross-claim or third-party complaint should be reserved for decision upon trial. Macrina v Scerra, 28 Misc. 2d 260, 211 N.Y.S.2d 799, 1961 N.Y. Misc. LEXIS 3534 (N.Y. Sup. Ct. 1961).

All that is required is demand, in answer by defendant, that his ultimate rights be determined, as against another also charged with liability to plaintiff. McCreech v Howard R. Ware Corp., 53 N.Y.S.2d 192, 1945 N.Y. Misc. LEXIS 1469 (N.Y. Sup. Ct. 1945).

In action arising out of collapse of scaffold against six defendants, cross-complaint is insufficient which merely sets forth institution of action by plaintiff and then alleges that recovery against cross-complainant would subject other defendants to liability to him, since factual allegations are required to support conclusion of liability over. Scholom v Samuel Sumers, Inc., 139 N.Y.S.2d 679, 1955 N.Y. Misc. LEXIS 3477 (N.Y. Sup. Ct. 1955).

96. —Defendant respondent not negligent

A cross complaint of one defendant against another was properly dismissed where there was no proof of any actionable negligence on the part of the defendant respondent which was the proximate cause of the accident and where the record demonstrates conclusively that the accident was caused by the active negligence of a third party and such third party was not the employee of the defendant respondent but was the employee of an independent contractor that danger was not inherent in his work or reasonably to be anticipated, no cause of action is shown. Mostrototaro v Seas Shipping Co., 5 A.D.2d 701, 169 N.Y.S.2d 493, 1957 N.Y. App. Div. LEXIS 3427 (N.Y. App. Div. 2d Dep't 1957).

A cross complaint was properly dismissed where there was no proof of actionable negligence on the part of the defendant respondent as claimed by defendant appellant. Mostrototaro v Seas Shipping Co., 5 A.D.2d 701, 169 N.Y.S.2d 493, 1957 N.Y. App. Div. LEXIS 3427 (N.Y. App. Div. 2d Dep't 1957).

The fact that defendants in their answer deny any liability to the plaintiff does not bar a claim over for indemnity. Brady v Stanley Weiss & Sons, Inc., 6 A.D.2d 241, 175 N.Y.S.2d 850, 1958 N.Y. App. Div. LEXIS 5104 (N.Y. App. Div. 4th Dep't 1958).

97. —Dangerous condition, cross claimant responsible

Where on the state of the pleadings one defendant might be held responsible for having created a dangerous condition, he should be permitted to cross complain against the party that created the danger and it is immaterial whether the primary complaint alleges a breach by such defendant of a nondelegable statutory duty. Weisman v Hyams, 5 A.D.2d 1000, 173 N.Y.S.2d 396, 1958 N.Y. App. Div. LEXIS 6311 (N.Y. App. Div. 2d Dep't 1958).

Cross complaint alleging that codefendant created and maintained condition pleaded in plaintiff’s complaint as the cause of accident and injury to plaintiff, was sufficient. Poslusny v Pineford Realty Corp., 79 N.Y.S.2d 680, 191 Misc. 858, 1948 N.Y. Misc. LEXIS 2453 (N.Y. Sup. Ct. 1948).

98. Necessity for right of indemnity over

Where neither complaint nor crossclaim pleads any facts from which basis of crossclaim for indemnity may be found or be fairly inferable, cross answer was insufficient. Shass v Abgold Realty Corp., 277 A.D. 346, 100 N.Y.S.2d 121, 1950 N.Y. App. Div. LEXIS 3052 (N.Y. App. Div. 1950).

In action for personal injuries from explosion of glass bottle against bottle manufacturer, bottling company and retail store proprietor, allegation in complaint of affirmative negligence of bottling company barred dismissal of cross complaint against bottle manufacturer. Ruping v Great Atlantic & Pacific Tea Co., 283 A.D. 204, 126 N.Y.S.2d 687, 1953 N.Y. App. Div. LEXIS 3004 (N.Y. App. Div. 1953).

As a matter of substantive law upon principles of indemnification as between a passive and active wrongdoer where plaintiff sues them both in negligence and the defendants are respectively owner and repairman the owner may in a proper case cross claim against a co-defendant rendering services in and about the premises though the owner be charged with violation of a nondelegable duty to the plaintiff. As a matter of adjective law, however, the owner must affirmatively set forth allegations in his cross complaint either expressly or by reference to the allegations in the main complaint which if proved will establish his right to indemnification. Glasgow v Drakes, 5 A.D.2d 693, 169 N.Y.S.2d 603, 1957 N.Y. App. Div. LEXIS 3442 (N.Y. App. Div. 2d Dep't 1957).

A cross complaint is sufficient on its face if the factual situation alleged is such that the answering defendant may be held liable to the plaintiff on a ground or theory which would entitle the defendant to be indemnified by a co-defendant. Brady v Stanley Weiss & Sons, Inc., 6 A.D.2d 241, 175 N.Y.S.2d 850, 1958 N.Y. App. Div. LEXIS 5104 (N.Y. App. Div. 4th Dep't 1958).

In an action for personal injuries against the retailer for breach of warranty and against the manufacturer for negligence in the sale of impure food, judgment for plaintiff against both was proper, and motion by the retailer to amend the minutes and for a judgment against the

manufacturer, was granted. Cohen v Dugan Bros., Inc., 235 N.Y.S. 118, 134 Misc. 155, 1929 N.Y. Misc. LEXIS 835 (N.Y. Sup. Ct. 1929).

Cross-complaint may properly be employed where one defendant alleges right of indemnification against codefendant. Patterson v New York, 57 N.Y.S.2d 427, 185 Misc. 610, 1945 N.Y. Misc. LEXIS 2261 (N.Y. Sup. Ct. 1945).

Facts upon which claim for indemnification is based must be alleged; mere allegation by one defendant that another defendant is or may be liable over to him is insufficient. Bonn v Jacob Kotler Co., 107 N.Y.S.2d 283, 203 Misc. 407, 1951 N.Y. Misc. LEXIS 2338 (N.Y. Sup. Ct. 1951).

Cause of action for indemnity sought under CPA § 264, authorizing determination of rights between two or more defendants, did not accrue until actual payment of main claim, whether such payment be made pursuant to judgment, or loss or damage be voluntarily paid by innocent party, who is legally charged, without waiting for judgment. Lanser v Baumrin, 2 Misc. 2d 610, 151 N.Y.S.2d 466, 1956 N.Y. Misc. LEXIS 1933 (N.Y. App. Term 1956).

Third-party defendant, surety, had the right to cross-claim for indemnity against its indemnitors, the plaintiff and the individual defendants, for amount it might be called upon to pay corporate defendant. Bennett Excavators Corp. v Lasker-Goldman Corp., 19 Misc. 2d 926, 186 N.Y.S.2d 680, 1959 N.Y. Misc. LEXIS 3858 (N.Y. Sup. Ct. 1959), app. dismissed, 11 A.D.2d 734, 204 N.Y.S.2d 706, 1960 N.Y. App. Div. LEXIS 8991 (N.Y. App. Div. 2d Dep't 1960).

If defendant’s liability may be predicated only on active negligence, a crossclaim by such defendant is improper as matter of law, since an actively negligent tortfeasor is not entitled to indemnity. Egan v Syracuse Sav. Bank, 28 Misc. 2d 256, 209 N.Y.S.2d 612, 1961 N.Y. Misc. LEXIS 3565 (N.Y. Sup. Ct. 1961).

Defendant who is active wrongdoer is liable over to defendant who is guilty only of passive negligence. Tangney v Skapof, 81 N.Y.S.2d 831, 1948 N.Y. Misc. LEXIS 2970 (N.Y. Sup. Ct. 1948).

Where tenant sued gas company and another for injuries caused by leaking refrigerator gas pipes in plaintiff's apartment, cross complaint by individual defendant alleging that he was passively negligent while gas company was active wrongdoer and liable on theory of implied indemnity, was not dismissed for intermingling tort and contract causes. Judge v Brooklyn Union Gas Co., 83 N.Y.S.2d 169, 1948 N.Y. Misc. LEXIS 3314 (N.Y. Sup. Ct. 1948).

Where facts showing right of indemnification do not appear from complaint, facts establishing right of crosscomplainants to indemnification against codefendant must be alleged. McCooey v St. Francis Hospital, 111 N.Y.S.2d 17, 1952 N.Y. Misc. LEXIS 2475 (N.Y. Sup. Ct. 1952).

In action for injuries sustained at unprotected excavation, where one defendant, on discovering that codefendant had removed barrier at excavation, moved to file cross-complaint against latter for active negligence, court granted his motion so that he might establish right to indemnification. Farrell v New York, 123 N.Y.S.2d 319, 1953 N.Y. Misc. LEXIS 1968 (N.Y. Sup. Ct. 1953).

Where indemnitee is at most passively negligent and indemnitor is actively negligent, former may recover against latter, but where indemnitee is actively negligent, there can be no recovery against indemnitor unless agreement unequivocally so provides. New Broad Co. v Bay Chester Marble & Tile Co., 147 N.Y.S.2d 831, 1956 N.Y. Misc. LEXIS 2280 (N.Y. County Ct. 1956).

Notwithstanding CPA § 264 was not complied with, judgment exonerating one codefendant from liability for injury of an employee of both did not preclude the other from recovering over from the one primarily liable. The No. 34, 25 F.2d 602, 1928 U.S. App. LEXIS 3025 (2d Cir. N.Y.), cert. denied, 278 U.S. 606, 49 S. Ct. 11, 73 L. Ed. 533, 1928 U.S. LEXIS 460 (U.S. 1928).

99. Necessity for connection with plaintiff's cause

Whether complaint states cause of action against one of several defendants must be determined from the allegations of the complaint without regard to answers interposed by other defendants. Insurance Co. of Pennsylvania v Park & Pollard Co., 190 A.D. 388, 180 N.Y.S. 143,

1920 N.Y. App. Div. LEXIS 4174 (N.Y. App. Div.), aff'd, 229 N.Y. 631, 129 N.E. 936, 229 N.Y. (N.Y.S.) 631, 1920 N.Y. LEXIS 835 (N.Y. 1920).

CPA § 264 did not authorize defendants to litigate, as between themselves, independent cross-demands not connected with the cause of action set forth in the complaint. Nauss v Nauss Bros. Co., 195 A.D. 328, 187 N.Y.S. 165, 1921 N.Y. App. Div. LEXIS 4741 (N.Y. App. Div. 1921).

Demands foreign to the cause of action set up in the complaint cannot be determined, and disposition of trust estate could not be determined in an action by a trustee for an accounting. Eysaman v Nelson, 140 N.Y.S. 183, 79 Misc. 304, 1913 N.Y. Misc. LEXIS 1043 (N.Y. Sup. Ct. 1913), aff'd, 165 A.D. 950, 150 N.Y.S. 1085, 1914 N.Y. App. Div. LEXIS 8769 (N.Y. App. Div. 1914).

In replevin against city property clerk to recover stolen jewelry, insurer joined as defendants former holders of stolen property and asked that they be declared to have no title therein; cross-complaint by one holder against another for fraud was improper. Franklin Fire Ins. Co. v Simmons, 39 N.Y.S.2d 391, 179 Misc. 497, 179 Misc. 498, 1942 N.Y. Misc. LEXIS 2335 (N.Y. Sup. Ct. 1942).

1948 amendment of CPA § 264 did not enlarge or change rule against impleading independent cause of action disconnected with plaintiff’s cause. Jefno Realty Corp. v Lloyds Film Storage Corp., 73 N.Y.S.2d 186, 191 Misc. 471, 1947 N.Y. Misc. LEXIS 2974 (N.Y. Sup. Ct. 1947).

Where defendant, charged with having injured plaintiff, asserts cross-claim against another for damages which he himself sustained as result of same incident, such independent cause of action is connected with plaintiff’s claim and is authorized. Deneau v Beatty, 91 N.Y.S.2d 190, 195 Misc. 649, 1949 N.Y. Misc. LEXIS 2558 (N.Y. Sup. Ct. 1949).

CPA § 264 applied only to those cases where the relief sought by defendants was based on facts involved in the litigation of plaintiff’s claim; and in foreclosure proceedings the mortgagor, who had conveyed the land to her codefendants by a deed absolute on its face, would not be permitted to litigate with them in the question whether the deed was intended, merely as a

security for a debt, and thereby delay plaintiff in obtaining satisfaction of his mortgage. Mutual Life Ins. Co. v Cranwell, 10 N.Y.S. 404, 56 Hun 645, 1890 N.Y. Misc. LEXIS 2138 (N.Y. Sup. Ct. 1890).

CPA § 264 did not sanction litigation between defendants which is entirely independent of and in no way connected with demand of plaintiff who as passenger in streetcar sued streetcar company and truck owner for injuries in collision between car and truck. Chiaradia v Union R. Co., 23 N.Y.S.2d 798, 1940 N.Y. Misc. LEXIS 2373 (N.Y. City Ct. 1940).

Defense by 4th-party defendant that he did not warrant quality of goods purchased by plaintiff from 3d-party defendant who in turn purchased from 4th-party defendant, was not material to plaintiff's claim and so was insufficient. Pichardo v Baez, 79 N.Y.S.2d 151, 1948 N.Y. Misc. LEXIS 2374 (N.Y. Sup. Ct. 1948).

If plaintiff is not the real party in interest no adjudication between codefendants can be had, for that must be founded upon the subject matter in litigation between the plaintiff and some other defendant. Dusenbury v Fisher, 47 Super Ct (15 Jones & S) 482.

100. —Dismissal of complaint; effect on cross claims

Where a defendant has been brought in to enforce another lien held by the original defendant, under § 17 of the Lien Law, the new issues may be retained to avoid a multiplicity of actions, even where the original complaint is dismissed. Lincoln Nat'l Bank v John Peirce Co., 228 N.Y. 359, 127 N.E. 253, 228 N.Y. (N.Y.S.) 359, 1920 N.Y. LEXIS 943 (N.Y.), reh'g denied, 229 N.Y. 537, 129 N.E. 906, 229 N.Y. (N.Y.S.) 537, 1920 N.Y. LEXIS 737 (N.Y. 1920).

If complaint failed to set up a good cause of action and was dismissed, the court could not go forward with the trial of the action for the purpose of determining issues raised by defendants as between themselves. Leske v Wolf, 154 A.D. 233, 138 N.Y.S. 859, 1912 N.Y. App. Div. LEXIS 11225, 1912 N.Y. App. Div. LEXIS 9912 (N.Y. App. Div. 1912).

Defendants' cross-claims automatically fall upon dismissal of complaint. Castella v Caristo Constr. Corp., 12 A.D.2d 605, 208 N.Y.S.2d 577, 1960 N.Y. App. Div. LEXIS 6554 (N.Y. App. Div. 1st Dep't 1960), aff'd, 10 N.Y.2d 945, 224 N.Y.S.2d 23, 179 N.E.2d 863, 1961 N.Y. LEXIS 897 (N.Y. 1961).

Claim for affirmative relief against codefendant based on cause of action dismissed from complaint is unauthorized by this section. Levy v 139 East Seventy-Ninth Street, Inc., 27 N.Y.S.2d 247, 1941 N.Y. Misc. LEXIS 1721 (N.Y. Sup. Ct. 1941).

Where there is no recovery by plaintiff as against codefendant, no disposition need be made of its cross-complaint. Victor A. Harder Realty & Constr. Co. v City of New York, 64 N.Y.S.2d 310, 1946 N.Y. Misc. LEXIS 2615 (N.Y. Sup. Ct. 1946).

Where plaintiff, injured by fall on icy steps of building, sued both owner and builder, and complaint was dismissed against builder, he was entitled to dismiss cross-complaint by owner. Secor v Levine, 73 N.Y.S.2d 109, 1947 N.Y. Misc. LEXIS 2948 (N.Y. Sup. Ct. 1947), aff'd, 273 A.D. 899, 77 N.Y.S.2d 226, 1948 N.Y. App. Div. LEXIS 5194 (N.Y. App. Div. 1948).

101. Interpleader and third parties

In action for personal injuries suffered by plaintiff as a result of opening window while working in loft building owned by appellant and leased to respondents, plaintiff's employers, motion to strike out owner's cross-complaint interposed against impleaded tenants, denied. Mirsky v Seaich Realty Co., 256 A.D. 658, 11 N.Y.S.2d 191, 1939 N.Y. App. Div. LEXIS 4806 (N.Y. App. Div. 1939).

Third party defendant, impleaded by defendant in action for personal injury, may file cross-complaint against another codefendant. Portnoy v United Engineers & Constructors, Inc., 274 A.D. 891, 82 N.Y.S.2d 464, 1948 N.Y. App. Div. LEXIS 3917 (N.Y. App. Div. 1948).

In an equitable action for accounting, additional defendants against whom the original defendant claimed right to recover over were permitted to be brought in. Gilliland v Lincoln-Alliance Bank & Trust Co., 244 N.Y.S. 241, 137 Misc. 709, 1930 N.Y. Misc. LEXIS 1461 (N.Y. Sup. Ct. 1930).

Third-party plaintiff is rightfully entitled to assert cross-claim against third-party defendant who has been brought in as defendant by plaintiff. Cunningham v Cirker's Moving & Storage Co., 89 N.Y.S.2d 33, 195 Misc. 1005, 1949 N.Y. Misc. LEXIS 2213 (N.Y. Sup. Ct. 1949).

In action by bank as trustee to determine which of two claimants is entitled to fund in possession of trustee, by counterclaim and cross-claim one defendant may allege that as to plaintiff such fund is rightfully hers and may ask money judgment against codefendant in same amount counterclaimed against plaintiff. Chase Nat'l Bank v Jones, 68 N.Y.S.2d 849, 1947 N.Y. Misc. LEXIS 2166 (N.Y. Sup. Ct. 1947).

Impleader is permitted where third party may be liable to defendant for all or part of plaintiff’s claim against defendant and such third-party claim is related to main action by question of law or fact common to both controversies. Fuchs v Silverman, 73 N.Y.S.2d 805, 1947 N.Y. Misc. LEXIS 3136 (N.Y. Sup. Ct. 1947).

Third-party defendant may counterclaim against plaintiff and third-party plaintiff and implead second third-party defendant. Acco Products, Inc. v Cooperative G. L. F. Holding Corp., 96 N.Y.S.2d 541, 1950 N.Y. Misc. LEXIS 1567 (N.Y. Sup. Ct.), aff'd, 277 A.D. 954, 99 N.Y.S.2d 725, 1950 N.Y. App. Div. LEXIS 3978 (N.Y. App. Div. 1950).

102. Necessity for appearance by cross-claimant

Defaulting defendant can have no relief against codefendant where former has not appeared and answered in respect to claim made against them by plaintiff. Franklin Fire Ins. Co. v Simmons, 39 N.Y.S.2d 53, 179 Misc. 497, 1942 N.Y. Misc. LEXIS 2293 (N.Y. Sup. Ct. 1942).

103. Service of cross claim

CPA § 264 did not apply where the relief asked in the codefendant's answer is substantially that demanded in the complaint. Edwards v Downs, 13 NY Week Dig 57, revd on other grounds 90 N.Y. 396 (1882).

Requirement of CPA § 264 that the party to be affected was to be served with a copy of the answer was peremptory, and no affirmative relief could be granted to one defendant against another without such service. Edwards v Woodruff, 90 N.Y. 396, 90 N.Y. (N.Y.S.) 396, 1882 N.Y. LEXIS 398 (N.Y. 1882).

CPA § 474 (§ 5011, Rule 5012 herein) was to be construed with CPA § 264. Earle v Earle, 73 A.D. 300, 76 N.Y.S. 851, 1902 N.Y. App. Div. LEXIS 1556 (N.Y. App. Div. 1902), aff'd, 173 N.Y. 480, 66 N.E. 398, 173 N.Y. (N.Y.S.) 480, 1903 N.Y. LEXIS 1174 (N.Y. 1903).

A defendant may not serve his answer and counterclaims on a codefendant who has not been served with the summons and complaint and has never voluntarily appeared as a defendant. Bennett v Bird, 237 A.D. 542, 261 N.Y.S. 540, 1933 N.Y. App. Div. LEXIS 10662 (N.Y. App. Div.), reh'g denied, 238 A.D. 786, 262 N.Y.S. 907, 1933 N.Y. App. Div. LEXIS 9937 (N.Y. App. Div. 1933).

In an action by the holder in due course of a promissory note against a part of the endorsers, where defendant sets up no counterclaim against plaintiff, but seeks to obtain relief from an endorser not joined by forcing plaintiff to bring an action against him, there is no controversy between defendants themselves to be settled by cross-answers. Citizens Trust Co. v Zoller, 201 N.Y.S. 179, 121 Misc. 451, 1923 N.Y. Misc. LEXIS 1224 (N.Y. Sup. Ct. 1923).

Where action is brought against two persons named as defendants but only one of such persons is served, the defendant who is served cannot serve a cross complaint for judgment over against the defendant not served and section 264 is not applicable but the defendant served who claims a right to indemnity may bring a third party action against the defendant not served in the prime action. Schneiberg v Utz, 8 Misc. 2d 535, 167 N.Y.S.2d 832, 1957 N.Y. Misc. LEXIS 2405 (N.Y. Sup. Ct. 1957).

CPA § 264 did not apply where a codefendant has not appeared in the action. Parker v Commercial Tel. Co., 3 N.Y. St. 174.

104. —Time for service

Under CPA § 264 cross answers were required to be served at least twenty days before the trial. Eysaman v Nelson, 140 N.Y.S. 183, 79 Misc. 304, 1913 N.Y. Misc. LEXIS 1043 (N.Y. Sup. Ct. 1913), aff'd, 165 A.D. 950, 150 N.Y.S. 1085, 1914 N.Y. App. Div. LEXIS 8769 (N.Y. App. Div. 1914).

Neither defendant is entitled to serve cross-complaint until collection of judgment has been had against other defendant. Miller v Green, 26 N.Y.S.2d 54, 176 Misc. 303, 1941 N.Y. Misc. LEXIS 1531 (N.Y. Sup. Ct. 1941).

105. Answer by co-defendant served

Reply by a defendant upon whom a codefendant has served an answer demanding affirmative relief is not required to put at issue all the facts alleged in the answer upon which it is based the right to such affirmative relief against the codefendant. Werner v Franklin Nat'l Bank, 49 A.D. 423, 63 N.Y.S. 383, 1900 N.Y. App. Div. LEXIS 762 (N.Y. App. Div. 1900), aff'd, 166 N.Y. 619, 59 N.E. 1132, 166 N.Y. (N.Y.S.) 619, 1901 N.Y. LEXIS 1364 (N.Y. 1901).

No answer or reply by a defendant upon whom a codefendant has served an answer demanding affirmative relief is required to put at issue all the facts alleged in the answer upon which is based the right to such affirmative relief against the codefendant. Furshpin v Monticello Co-operative Fire Ins. Co., 249 A.D. 366, 293 N.Y.S. 150, 1937 N.Y. App. Div. LEXIS 9592 (N.Y. App. Div. 1937).

CPA § 288 (§ 3101(a), Rule 3106(a) herein) construed with CPA § 264 in holding that defendant who has filed cross-complaint against impleaded codefendant may examine latter before trial. Parodis v Hearn Dep't Stores, 33 N.Y.S.2d 553, 178 Misc. 191, 1942 N.Y. Misc. LEXIS 1385

(N.Y. Sup. Ct. 1942), aff'd, Parodis v Hearn Dep't Stores, Inc., 267 A.D. 951, 48 N.Y.S.2d 469, 1944 N.Y. App. Div. LEXIS 5676 (N.Y. App. Div. 1944).

Affirmative relief need not be demanded to warrant examination of defendant by codefendant, both sued by passengers injured in one of two colliding cars. Frost v Walsh, 90 N.Y.S.2d 174, 195 Misc. 391, 1949 N.Y. Misc. LEXIS 2387 (N.Y. Sup. Ct.), aff'd, 275 A.D. 1017, 91 N.Y.S.2d 746, 1949 N.Y. App. Div. LEXIS 5505 (N.Y. App. Div. 1949).

CPA § 264 made no provision for any answer by affected party to such cross-claim or cross-answer, thus indicating that no further pleadings were appropriate. Smith v Benjamin, 147 N.Y.S.2d 524, 1955 N.Y. Misc. LEXIS 3040 (N.Y. Sup. Ct. 1955), aff'd, 2 A.D.2d 666, 153 N.Y.S.2d 545, 1956 N.Y. App. Div. LEXIS 5064 (N.Y. App. Div. 1st Dep't 1956).

106. Judgment

Where defendant’s answering affidavit did not oppose granting relief to plaintiff but sought affirmative relief against his defaulting codefendant who had been properly served, his affidavit was treated as a motion for judgment against codefendant and was granted on default. Edward Thompson Company v Pincus, 195 N.Y.S.2d 855 (N.Y. Sup. Ct. 1959).

107. Special findings

Where the principal complaint is tried by jury and, by stipulation, court tries cross claim and asks jury to make special findings with respect to cross claim such findings were held to be binding and not advisory. Kennard v Housing Associates, Inc., 26 Misc. 2d 1000, 209 N.Y.S.2d 479, 1961 N.Y. Misc. LEXIS 3611 (N.Y. Sup. Ct. 1961), aff'd, 27 A.D.2d 578, 277 N.Y.S.2d 817, 1966 N.Y. App. Div. LEXIS 2719 (N.Y. App. Div. 2d Dep't 1966).

108. Consolidated actions

Where actions to foreclose mortgage and to foreclose mechanic's lien against same defendants were consolidated, and lienors did not answer in foreclosure action, and served answer in lien action on plaintiff but not on remaining defendants, such defendants were in default in pleading and in appearance on trial. Perlmutter v Gross, 266 A.D. 694, 40 N.Y.S.2d 37, 1943 N.Y. App. Div. LEXIS 3921 (N.Y. App. Div. 1943).

Defendant in consolidated action is codefendant of another defendant in that action, irrespective of their status in separate prior actions, and certain remedies under CPA § 264 became available to them vis-a-vis each other. Vidal v Sheffield Farms Co., 141 N.Y.S.2d 82, 208 Misc. 438, 1955 N.Y. Misc. LEXIS 2473 (N.Y. Sup. Ct. 1955).

ii. Particular Applications

109. Abutting and adjoining landowners

In action against city and church for personal injuries sustained by infant plaintiff from fall on public sidewalk adjacent to property owned by defendant church, cross-complaint by city against church alleging active negligence by church in using sidewalk as crossing to and from commercial lot owned by church and that church was required to indemnify city for any liability because of sidewalk conditions, was sufficient. Galka v Albany, 285 A.D. 27, 135 N.Y.S.2d 249, 1954 N.Y. App. Div. LEXIS 3266 (N.Y. App. Div. 1954).

In action by customer against storekeeper, owner of premises, and City of New York for personal injuries received when customer tripped and fell on broken stone coping adjacent to sidewalk, jury found all three defendants negligent, and trial judge directed recovery over by City of New York, which was passively negligent, against owners and storekeeper who were actively negligent. Olivia v Gouze, 285 A.D. 762, 140 N.Y.S.2d 438, 1955 N.Y. App. Div. LEXIS 5580 (N.Y. App. Div. 1955), aff'd, 1 N.Y.2d 811, 153 N.Y.S.2d 71, 135 N.E.2d 602, 1956 N.Y. LEXIS 854 (N.Y. 1956).

In action for sidewalk injury to pedestrian, city could not cross complain against abutting owners, where they were joint tortfeasors in pari delicto; city because of its active participation in creation of defect and abutters because of their failure to properly maintain in reasonably safe condition shut off pipe imbedded in sidewalk for their special benefit. Mahar v Albany, 103 N.Y.S.2d 574, 198 Misc. 904, 1950 N.Y. Misc. LEXIS 2488 (N.Y. Sup. Ct. 1950), aff'd, 278 A.D. 1003, 105 N.Y.S.2d 1009, 1951 N.Y. App. Div. LEXIS 5483 (N.Y. App. Div. 1951).

In action for personal injuries from defective sidewalk, defendant-tenant may cross-complain against defendant abutting owner as liable for all or part of plaintiff’s claim. Seltzer v Rosenberg, 101 N.Y.S.2d 738, 199 Misc. 4, 1950 N.Y. Misc. LEXIS 2326 (N.Y. Sup. Ct.), aff'd, 277 A.D. 1138, 101 N.Y.S.2d 940, 1950 N.Y. App. Div. LEXIS 4756 (N.Y. App. Div. 1950).

In action against city and property owner for injuries to plaintiff who fell on sidewalk adjoining property of owner, city’s delay of 18 months in bringing cross-action against property owner constituted laches, barring city’s motion to amend answer containing cross-action against property owner. Channell v Rochester, 140 N.Y.S.2d 920, 207 Misc. 854, 1955 N.Y. Misc. LEXIS 2456 (N.Y. Sup. Ct. 1955).

In action by father and minor son for injuries to son by fall on metal grating abutting premises owned by defendant, defendant may not implead minor’s father as third-party defendant, but he may plead cross-claim for indemnification on proper allegations of fact. Lesser v Klein, 140 N.Y.S.2d 794, 1955 N.Y. Misc. LEXIS 2435 (N.Y. Sup. Ct. 1955).

110. Associations

Even where the constitution of a mutual benefit association provided that the supreme council shall have the right, in case of adverse claimants of a benefit fund, to pay such fund into court, in proceedings in the nature of an interpleader, and such right is made a condition to the right of persons entitled to participate in such fund, yet such right is not absolute and like the statutory provisions in such cases clearly relates to cases of controversy between claimants for the fund alone, and not to a case in which different parties claim a liability on the part of the association

arising out of its wrongful or negligent acts, where its presence as a party is necessary to a proper determination of the controversy. Fanning v Supreme Council of Catholic Mut. Ben. Ass'n, 61 A.D. 190, 70 N.Y.S. 437, 1901 N.Y. App. Div. LEXIS 914 (N.Y. App. Div. 1901).

111. Automobile cases

Where motorists sued tractor and trailer owners and trailer owner cross-complained against tractor owner latter may cross-complain against trailer owner, asserting agreement by latter to indemnify former against all claims from operating tractor and trailer. Cairns v Fort, 272 A.D. 244, 70 N.Y.S.2d 402, 1947 N.Y. App. Div. LEXIS 3263 (N.Y. App. Div. 1947).

In action for wrongful death of automobile driver resulting from collision between automobile and tractor owned by defendant, latter may not set up claim against administrator to contribute to satisfaction of any judgment resulting from intestate’s negligence. In re State of Maryland use of D'Agostino, 285 A.D. 1078, 139 N.Y.S.2d 746, 1955 N.Y. App. Div. LEXIS 6713 (N.Y. App. Div. 1955).

Where injured plaintiff sued dealer for having sold new car with defective brakes, and purchaser and driver for negligent operation thereof, dealer was charged with active negligence and could not cross claim against codefendant. Gilbert v Barouch, 10 A.D.2d 984, 202 N.Y.S.2d 429, 1960 N.Y. App. Div. LEXIS 9714 (N.Y. App. Div. 2d Dep't 1960).

Cross-answers and counterclaims in actions for damages arising out of an automobile collision were sufficient. Bigelow v Du Buque, 252 N.Y.S. 79, 141 Misc. 29, 1930 N.Y. Misc. LEXIS 1808 (N.Y. Sup. Ct. 1930).

Employer of driver, who has been made additional defendant in action for personal injuries against driver and owner of injuring auto, arising out of negligent operation thereof by driver, may not maintain cross-complaint against owner without alleging intention to rely on some defective mechanism as causing accident. Miller v Green, 26 N.Y.S.2d 54, 176 Misc. 303, 1941 N.Y. Misc. LEXIS 1531 (N.Y. Sup. Ct. 1941).

In action for personal injuries against automobile owner and driver, driver may not interpose cross-complaint against owner for breach of contract to carry liability insurance protecting driver. Darcey v Greater New York Brewery, 40 N.Y.S.2d 950, 179 Misc. 1088, 1943 N.Y. Misc. LEXIS 1771 (N.Y. City Ct. 1943).

In action for death of infant struck by tractor owned by defendant and operated by 2nd defendant and hauling tractor owned by 3d defendant, cross complaint by latter against other defendants to indemnify him in case plaintiff recovered against him, was proper. Cote v Autocar Sales & Service Co., 79 N.Y.S.2d 130, 191 Misc. 988, 1948 N.Y. Misc. LEXIS 2369 (N.Y. Sup. Ct. 1948).

Driver charged with active negligence in principal complaint cannot assert claim over against third-party defendant for alleged defective repairs to brakes or breaches of warranty of fitness of vehicle for use. Cohen v Wasserman, 28 Misc. 2d 58, 208 N.Y.S.2d 865, 1960 N.Y. Misc. LEXIS 2296 (N.Y. Sup. Ct. 1960).

Where, in action for death by automobile, driver and employer were sued, employer may counterclaim against driver and claim that employee was not acting within scope of employment. Kriulko v Dykstra, 80 N.Y.S.2d 435, 1948 N.Y. Misc. LEXIS 2578 (N.Y. Sup. Ct. 1948).

In action against employer and employee for personal injury by automobile owned and operated by defendant employee, employer, as passive wrongdoer, may cross-complain against employee, as active wrongdoer, for indemnity from liability. Smart v Morard, 124 N.Y.S.2d 634, 1953 N.Y. Misc. LEXIS 2223 (N.Y. Sup. Ct. 1953).

In action against owners and operators of two colliding automobiles for personal injuries to passengers riding in defendant’s car, cross-complaint by codefendant against defendant, alleging that latter was solely negligent and was sole cause of accident, that former was free from negligence, and claiming personal injuries and property damages from former, was insufficient to state cause of action. Levinson v Levine, 142 N.Y.S.2d 213, 1955 N.Y. Misc. LEXIS 2782 (N.Y. Sup. Ct. 1955).

112. —Passengers

Where automobile passenger sued for personal injuries received when car driven by her husband ran into unguarded excavation and her husband sued for loss of services, defendant colessee may not file cross complaint against plaintiff husband on ground that wife's injuries were caused solely by husband's negligence. D'Onofrio v New York, 284 A.D. 688, 134 N.Y.S.2d 569, 1954 N.Y. App. Div. LEXIS 3470 (N.Y. App. Div. 1954).

In action by automobile passengers injured when car in which they were riding struck debris deposited on street by contractor constructing nearby school for City of Albany, against City and contractor, cross-complaint by City against contractor was good as against contractor in relationship of indemnitor to City against liability imposed on City in prosecution of contracts, and good as to liability imposed on City as result of some special use allowed to be made of street by contractor creating danger to public. Di Prizzio v Raymond Concrete Pile Co., 1 A.D.2d 723, 146 N.Y.S.2d 877, 1955 N.Y. App. Div. LEXIS 3744 (N.Y. App. Div. 3d Dep't 1955).

In action by passenger in bus struck by truck purchased from dealer who authorized buyer to use dealer's plates, dealer may cross-complain against buyer by alleging that collision occurred after permission to use dealer's plates had expired. Young v Central Greyhound Lines, Inc., 136 N.Y.S.2d 519, 206 Misc. 1045, 1955 N.Y. Misc. LEXIS 3371 (N.Y. Sup. Ct. 1955).

In action by infant passenger riding in automobile owned by defendant and operated by second defendant and struck by another automobile owned and operated by third defendant, complaint by owner of first car, alleging that he was free from negligence in that his car was being driven by bailee on his business and in his exclusive control, and that injury was caused by negligence of other defendants, was sufficient as alleging cause of action for common-law indemnification against third defendant. Petro v Eisenberg, 138 N.Y.S.2d 705, 207 Misc. 380, 1955 N.Y. Misc. LEXIS 2668 (N.Y. Sup. Ct. 1955).

In action by automobile passenger against railroad and city for injuries received when automobile struck railroad bumper located in street, city's cross-claim against railroad was

insufficient to allege right of indemnification but it was allowed to amend its cross-claim where complaint alleged that railroad negligently erected bumper and city negligently permitted bumper to be so erected. Tucci v Syracuse, 143 N.Y.S.2d 451, 207 Misc. 904, 1955 N.Y. Misc. LEXIS 2852 (N.Y. Sup. Ct. 1955).

Where complaint, in action by taxicab passenger for injuries received in collision between cars of two defendants, charged both defendants with active and primary negligence and responsibility, there was no basis in law or in fact for indemnity. Bueno v National Transp. Co., 11 Misc. 2d 591, 125 N.Y.S.2d 310, 1953 N.Y. Misc. LEXIS 1406 (N.Y. Sup. Ct. 1953).

In action against owners and operators of two colliding automobiles for personal injuries to passengers riding in defendant's car, cross-complaint by codefendant against defendant, alleging that latter was solely negligent and was sole cause of accident, that former was free from negligence, and claiming personal injuries and property damages from former, was insufficient to state cause of action. Levinson v Levine, 142 N.Y.S.2d 213, 1955 N.Y. Misc. LEXIS 2782 (N.Y. Sup. Ct. 1955).

113. Contingent claims

Contingent claim by defendant against codefendant, to determine contingent liability between them, is not permitted. Atlantic Gulf & West Indies S.S. Lines v New York, 271 A.D. 1008, 69 N.Y.S.2d 796, 1947 N.Y. App. Div. LEXIS 5606 (N.Y. App. Div. 1947).

114. Contractors and sub-contractors

Where injured employee of carpentry subcontractor sued general contractor and lumber supplier, and general contractor impleaded carpentry subcontractor as third-party defendant and latter served cross-complaint on said lumber supplier, dismissal of cross-complaint should provide leave to replead, since lumber supplier may be liable over to carpentry subcontractor for failure to inspect defective lumber supplied. Crawford v Blitman Constr. Corp., 1 A.D.2d 398,

150 N.Y.S.2d 387, 1956 N.Y. App. Div. LEXIS 5656 (N.Y. App. Div. 1st Dep't), app. denied, 2 A.D.2d 746, 153 N.Y.S.2d 565, 1956 N.Y. App. Div. LEXIS 4776 (N.Y. App. Div. 1st Dep't 1956).

In action by employee of masonry subcontractor against building general contractor and concrete subcontractor for injuries to plaintiff when struck by piece of concrete falling during removal of concrete forms from floor above level on which he was working on common way, cross-complaint of general contractor against subcontractor was improperly dismissed where evidence was insufficient to show that general contractor was guilty of active or primary negligence. Basciano v George A. Fuller Co., 3 A.D.2d 14, 157 N.Y.S.2d 534, 1956 N.Y. App. Div. LEXIS 3520 (N.Y. App. Div. 1st Dep't 1956).

In action by owner against contractor and subcontractor for fire damage to building caused by defective material and installation of heater and air conditioning unit, subcontractor who had supplied insulation material and had performed all installation and mechanical work could not cross claim against contractor since if he were liable at all it would be for his own active negligence, but contractor could cross claim against subcontractor. Garden Party House, Inc. v Sheehan Equipment Co., 10 A.D.2d 902, 200 N.Y.S.2d 148, 1960 N.Y. App. Div. LEXIS 10426 (N.Y. App. Div. 4th Dep't 1960).

In owner’s action against contractor and sand and gravel company for property damage, contractor’s cross complaint against gravel company alleging that if plaintiff recovered against it the damage had been caused not by its negligence but by the negligence of the gravel company was sufficient as matter of law and fact that original complaint could be construed as charging active as well as passive negligence did not warrant dismissal of cross complaint. Zogby v Mid-State Builder, Inc., 22 Misc. 2d 667, 199 N.Y.S.2d 333, 1960 N.Y. Misc. LEXIS 3189 (N.Y. County Ct. 1960).

In action against contractor and brick subcontractor by construction employee injured by falling brick, cross-complaint by subcontractor alleging that contractor was actively negligent in failing to provide safe place to work and that any negligence of subcontractor was merely passive, was insufficient, where original complaint alleged that employee of subcontractor negligently dropped

brick causing injury. Savelli v 320 West Ninetieth St. Corp., 142 N.Y.S.2d 207, 1955 N.Y. Misc. LEXIS 2781 (N.Y. Sup. Ct. 1955).

In action for negligence against landlord who filed cross-complaint against contractor, cross-complaint by landlord against contractor, alleging that latter agreed to "maintain adequate protection of said work" and to "make good any damage and injury," was sufficient. Sid v Stokes Associates, Inc., 145 N.Y.S.2d 368, 1955 N.Y. Misc. LEXIS 3342 (N.Y. Sup. Ct. 1955).

115. Corporations and stockholders

Stockholders suing derivatively are not subject to counterclaims brought against them individually. Handler v Belmare Lighting Co., 8 Misc. 2d 687, 168 N.Y.S.2d 288, 1957 N.Y. Misc. LEXIS 2331 (N.Y. Sup. Ct. 1957).

A stockholder made a party defendant in a suit brought at his request by the corporation against the president and treasurer for mismanagement, may, it seems, set up against his codefendants their mismanagement of the corporation. Ithaca Gas-Light Co. v Treman, 30 Hun 212 (N.Y.), app. dismissed, 93 N.Y. 660, 93 N.Y. (N.Y.S.) 660, 1883 N.Y. LEXIS 383 (N.Y. 1883).

116. Insurance

Mortgagee is necessary party to suit on fire policy, and may assert his claim against insurer by answer. O'Neil v Franklin Fire Ins. Co., 159 A.D. 313, 145 N.Y.S. 432, 1913 N.Y. App. Div. LEXIS 8924 (N.Y. App. Div. 1913), aff'd, 216 N.Y. 692, 110 N.E. 1045, 216 N.Y. (N.Y.S.) 692, 1915 N.Y. LEXIS 906 (N.Y. 1915).

117. Intervening bondholders

In an action by a city against the receivers of two street railway companies, to abate a nuisance, the intervening bondholders of one company may have the questions of which defendant has

the primary duty of abatement and the obligation to reimburse, litigated. New York v Montague, 149 A.D. 475, 134 N.Y.S. 87, 1912 N.Y. App. Div. LEXIS 6428 (N.Y. App. Div. 1912).

118. Joint tort-feasors

In action against town by infant who while riding in car owned by his father and driven by his mother was injured when car went off road due to town's negligence in maintaining highway, since town can be held liable in damages only on evidence that it was guilty solely of active negligence, town's cross-claim against father alleging accident due to negligent operation of car, and town's third party complaint against mother for reckless driving, were properly dismissed. Berg v Huntington, 7 N.Y.2d 871, 196 N.Y.S.2d 1001, 164 N.E.2d 871, 1959 N.Y. LEXIS 947 (N.Y. 1959).

In action for injuries from fall on icy porch steps from water leak from repaired gutters, owner and contractor were joint tortfeasors. Secor v Levine, 273 A.D. 899, 77 N.Y.S.2d 226, 1948 N.Y. App. Div. LEXIS 5194 (N.Y. App. Div. 1948).

In action against landlord and gas company as joint tortfeasors for personal injuries to tenant from gas explosion, where no fact is alleged in complaint or in landlord's cross-complaint against gas company tending to show that latter had agreed to perform landlord's duty to maintain gas pipes in good repair, cross-complaint was dismissed. Lichten v Brooklyn Union Gas Co., 282 A.D. 720, 122 N.Y.S.2d 269, 1953 N.Y. App. Div. LEXIS 4790 (N.Y. App. Div. 1953).

Allegations which are merely conclusory are insufficient to sustain a cross complaint which seeks merely to fasten liability on a co-defendant who appears to be an active joint tort-feasor. There must be set forth sufficient facts from which a right to indemnification can be spelled out. Glasgow v Drakes, 5 A.D.2d 693, 169 N.Y.S.2d 603, 1957 N.Y. App. Div. LEXIS 3442 (N.Y. App. Div. 2d Dep't 1957).

In action by trustees under deeds of trust for an accounting and for instructions as to distribution, where some defendants filed answer asking for affirmative relief from all defendants, and all

persons interested in the estate are before the court, the court may determine the respective rights of the defendants. Maynard v Maynard, 178 N.Y.S. 329, 108 Misc. 362, 1919 N.Y. Misc. LEXIS 920 (N.Y. Sup. Ct. 1919).

Trial of an affirmative cause of action by one defendant against another in a negligence action was not permitted. Murray v Mastroeni, 244 N.Y.S. 180, 137 Misc. 708, 1930 N.Y. Misc. LEXIS 1447 (N.Y. Sup. Ct. 1930).

One joint tort-feasor is not entitled to serve a cross-complaint against the other. Mongiovi v Olna Realty Corp., 10 N.Y.S.2d 528, 170 Misc. 403, 1939 N.Y. Misc. LEXIS 1608 (N.Y. City Ct. 1939).

Where there were three separately stated causes of action, one as to each defendant and without any assertion of joint liability, and one defendant in its answer asserted that one or both of the co-defendants would be liable over to it if the plaintiff recovered, but neither the complaint nor the cross claim alleged passive negligence or any other facts upon which indemnity could be claimed and the pleadings showed tort feasors in pari delicto, the cross claim must be struck with leave to replead facts showing the right to indemnity such as passive negligence. Buffalo Terrace Corp. v Buffalo, 10 Misc. 2d 634, 171 N.Y.S.2d 608, 1958 N.Y. Misc. LEXIS 3700 (N.Y. Sup. Ct. 1958).

Where motion made to dismiss cross claim of defendant but the complaint charges only that the defendants caused the plaintiff's injuries, such cross claim may not be dismissed but must await the trial of the action and if it is shown that defendants are in pari delicto and joint tort feasors then the cross claim may be dismissed. Berns v Pearce & Pearce Co., 10 Misc. 2d 983, 172 N.Y.S.2d 518, 1958 N.Y. Misc. LEXIS 3574 (N.Y. Sup. Ct. 1958).

Where an amended complaint has charged all defendants with active negligence, a cross claim of one defendant against three others must be dismissed since a recovery over may not be had as between joint tort feasors in pari delicto. Great Eastern Fuel Co. v Powell, 12 Misc. 2d 1029, 174 N.Y.S.2d 683, 1958 N.Y. Misc. LEXIS 3492 (N.Y. Sup. Ct. 1958).

In action by passenger against owner and operator of car in which he was riding, for personal injuries caused by their active negligence, third party complaint by defendants against garage operator charging that plaintiff's injuries were due to third party defendant's failure to properly repair brakes should be dismissed for insufficiency, since in the absence of an express agreement of indemnity defendants have no right of recovery over against a joint tort-feasor contributing to plaintiff's damage by his own active negligence and in pari delicto with them. Lipsman v Warren, 17 Misc. 2d 807, 188 N.Y.S.2d 426, 1959 N.Y. Misc. LEXIS 3939 (N.Y. Sup. Ct. 1959), modified, 10 A.D.2d 868, 199 N.Y.S.2d 761, 1960 N.Y. App. Div. LEXIS 10709 (N.Y. App. Div. 2d Dep't 1960).

Where the liability of each of several tortfeasors is based on the violation of an absolute and nondelegable statutory duty to furnish a safe scaffold, the cross claim of each against the other must be dismissed. Cole v Long Island Lighting Co., 24 Misc. 2d 221, 196 N.Y.S.2d 187, 1959 N.Y. Misc. LEXIS 2350 (N.Y. Sup. Ct. 1959).

In absence of right of indemnification either express or implied, one joint tort feasor does not have right to crossclaim against another. Tangney v Skapof, 81 N.Y.S.2d 831, 1948 N.Y. Misc. LEXIS 2970 (N.Y. Sup. Ct. 1948).

Where complaint alleges that all defendants are joint tortfeasors and in pari delicto, and there is no allegation in cross complaint of right of indemnification, cross complaint is improper. Tangney v Skapof, 81 N.Y.S.2d 831, 1948 N.Y. Misc. LEXIS 2970 (N.Y. Sup. Ct. 1948).

Where pedestrian, struck by car while walking in roadway because another car was illegally blocking sidewalk, sued owners of both cars alleging they were joint tortfeasors in pari delicto, owner of parked car could not cross-complain against other motorist where he did not allege right of indemnification. Tangney v Skapof, 81 N.Y.S.2d 831, 1948 N.Y. Misc. LEXIS 2970 (N.Y. Sup. Ct. 1948).

In action by electric power company for indemnity for money paid by reason of defendant's active negligence, resulting in judgment against plaintiff for death of defendant's employee when

defendant's equipment came in contact with plaintiff's high voltage wires, complaint held not to allege plaintiff's active negligence so as to allege that it was joint tortfeasor with defendant. Central Hudson Gas & Electric Corp. v V. J. Costanzi, Inc., 140 N.Y.S.2d 185, 1955 N.Y. Misc. LEXIS 3092 (N.Y. Sup. Ct. 1955).

Mere fact that both defendants may be guilty of negligence in law as to injured plaintiff does not necessarily mean that both defendants are particeps criminis or in pari delicto as to each other, where one defendant cross-complains against codefendant in action against them for personal injuries. Mohr v New York, 147 N.Y.S.2d 854, 1955 N.Y. Misc. LEXIS 3216 (N.Y. City Ct. 1955).

119. Lessor and lessee

In action against lessor and sublessee for death of window washer due to defective window catch, lessor's cross-complaint against sublessee for recoupment of damages which plaintiff may recover from former held proper where court cannot determine such liability from pleadings. Walkowicz v Whitney's, Inc., 34 N.Y.S.2d 175, 178 Misc. 331, 1942 N.Y. Misc. LEXIS 1480 (N.Y. Sup. Ct. 1942).

In action by tenants of multiple dwelling against owner, plumber and gas company for gas leakage, owner could cross-complain against plumber employed by him, but not against gas company. Shass v Abgold Realty Corp., 102 N.Y.S.2d 707, 198 Misc. 1052, 1950 N.Y. Misc. LEXIS 2434 (N.Y. Sup. Ct. 1950).

In action for personal injuries against owner and lessee of dock, owner may cross-complain against lessee for indemnification by alleging the former was passively negligent and the latter was actively negligent. Datria v Socony Vacuum Oil Co., 96 N.Y.S.2d 522, 1950 N.Y. Misc. LEXIS 1563 (N.Y. Sup. Ct. 1950).

120. Malpractice

Where patient's complaint against hospital and two doctors for negligence showed that negligence was doctors', hospital's cross complaint against the doctors showing hospital was in no way responsible for accident, was held sufficient since hospital was not joint tort feasor in pari delicto, but at most was passively negligent. Mandello v Brooklyn Doctors Hospital, 8 A.D.2d 845, 190 N.Y.S.2d 436, 1959 N.Y. App. Div. LEXIS 7897 (N.Y. App. Div. 2d Dep't 1959).

In action against hospital and physician for personal injuries to patient, where hospital cross-complained against physician for any sum recovered by patient, physician could answer cross-complaint and seek affirmative relief against hospital for its failure to comply with agreement to obtain insurance insuring him against malpractice. Lieberman v Solomon, 104 N.Y.S.2d 950, 1951 N.Y. Misc. LEXIS 1835 (N.Y. Sup. Ct. 1951).

In action for foot injuries against chiropodist and two physicians wherein complaint alleged that chiropodist negligently treated callus on plaintiff's foot causing infection and that subsequently defendant physicians negligently treated plaintiff's foot causing further injuries requiring amputation of plaintiff's toe, chiropodist's cross-complaint against physicians for negligent treatment and consequent liability over was sufficient. Primes v Ross, 123 N.Y.S.2d 702, 1953 N.Y. Misc. LEXIS 2019 (N.Y. Sup. Ct. 1953).

121. Matrimonial actions

In action for annulment of a marriage, no attempt was made to fix and determine any controversy as between the defendant husband and his first wife, where latter did not file a cross-answer. Brown v Brown, 299 N.Y.S. 487, 164 Misc. 792, 1937 N.Y. Misc. LEXIS 1849 (N.Y. Sup. Ct. 1937).

122. Mechanics' liens

CPA § 264 was designed to prevent a multiplicity of suits, and is applicable to actions for the enforcement of mechanics' liens when a defendant serves an answer upon one of his

codefendants. Hinkle v Sullivan, 108 A.D. 316, 95 N.Y.S. 788, 1905 N.Y. App. Div. LEXIS 3177 (N.Y. App. Div. 1905).

Where contractor sued owner and subcontractor to foreclose mechanic's lien and owner counterclaimed for breach of contract and subcontractor crossclaimed against owner and counterclaimed against plaintiff, contractor in his reply to subcontractor's answer may crossclaim for any amount which owner might recover from plaintiff on its counterclaim. Paretta v White Acres Realty Corp., 76 N.Y.S.2d 69, 190 Misc. 649, 1948 N.Y. Misc. LEXIS 2046 (N.Y. Sup. Ct. 1948).

123. Mortgages

In mortgage foreclosure, answers of lien defendants held to require court to determine the validity and priority of liens as between defendants. Flaum v Picarreto, 226 N.Y. 468, 123 N.E. 739, 226 N.Y. (N.Y.S.) 468, 1919 N.Y. LEXIS 892 (N.Y. 1919).

In foreclosure proceedings, defendants whose claims are upon the equity of redemption, having no interest in opposition to the claims of plaintiff, should not litigate their claims to the surplus as between themselves, until it is ascertained that there will be a surplus. Lobbett v Galpin, 228 A.D. 65, 239 N.Y.S. 76, 1930 N.Y. App. Div. LEXIS 12100 (N.Y. App. Div. 1930).

Failure of defendants to join issue over a controversy between them will not preclude their pursuing other appropriate action. Lobbett v Galpin, 228 A.D. 65, 239 N.Y.S. 76, 1930 N.Y. App. Div. LEXIS 12100 (N.Y. App. Div. 1930).

Consolidated foreclosures of mortgage and mechanics' liens, see Perlmutter v Gross, 266 A.D. 694, 40 N.Y.S.2d 37, 1943 N.Y. App. Div. LEXIS 3921 (N.Y. App. Div. 1943).

CPA § 264 was to be followed by a defendant in a suit to foreclose a mechanic's lien who sought to enforce his own lien when same was not admitted by the complaint and was contested. Atlantic Terra Cotta Co. v Rubenfield Constr. Corp., 213 N.Y.S. 21, 126 Misc. 279, 1926 N.Y. Misc. LEXIS 862 (N.Y. Sup. Ct. 1926).

Defense and cross-answer in foreclosure action, comprising claim among defendants, not of such character that judgment may determine their ultimate rights among themselves, dismissed. Security Mut. Life Ins. Co. v Danzilio, 260 N.Y.S. 222, 145 Misc. 750, 1932 N.Y. Misc. LEXIS 1574 (N.Y. Sup. Ct. 1932).

In an action to foreclose a mortgage, L, H, & G were made codefendants with the mortgagor, as having interests or liens, which accrued subsequently to the lien of the plaintiff's mortgage. G did not answer. L & H answered, denying that their liens were subsequent to that of the mortgage, and demanded and obtained judgment that the property be sold, subject to their liens. G moved to set aside the sale, and to strike out the clause of the judgment declaring the liens of the other two to be prior. Held, that the motion should be granted; that it was not necessary for L or H to answer. Payn v Grant, 23 Hun 134 (N.Y.).

The owner of the equity must take the initiative to save his interests in a controversy between the plaintiffs in foreclosure and a junior mortgagor. Dobbs v Niebuhr, 3 N.Y.S. 415, 1888 N.Y. Misc. LEXIS 653 (N.Y.C.P. 1888).

A defendant in foreclosure alleging the invalidity of the mortgage between plaintiff and a codefendant for usury, may protect himself by litigating the question with his codefendant but cannot compel an amendment of the complaint. Newman v Dickson, 1 Abb NC 307; and see Smart v Bement.

124. Municipal corporations

In action against city for damages from breaking of water main, defendant city may assert claim against defendant telegraph company by reason of agreement in bond filed by latter, despite care in construction work. E. W. Edwards & Son v Buffalo, 264 A.D. 984, 37 N.Y.S.2d 249, 1942 N.Y. App. Div. LEXIS 5620 (N.Y. App. Div. 1942).

In action by pedestrian for injuries from fall on icy sidewalk, caused by defendant undertaking to remove snow but doing so negligently, city cannot file cross-complaint for indemnity. Zysk v New

York, 274 A.D. 915, 83 N.Y.S.2d 339, 1948 N.Y. App. Div. LEXIS 4020 (N.Y. App. Div. 1948), aff'd, 300 N.Y. 507, 89 N.E.2d 244, 300 N.Y. (N.Y.S.) 507, 1949 N.Y. LEXIS 1397 (N.Y. 1949).

In action against city and sewer contractor for personal injuries to pedestrian from fall on defective highway, wherein city cross-complained against contractor, complaint and cross-answer sufficiently alleged, respectively, that contractor was negligent and is liable over as active and primary wrongdoer. Seidner v New York, 286 A.D. 1016, 144 N.Y.S.2d 616, 1955 N.Y. App. Div. LEXIS 5019 (N.Y. App. Div.), reh'g denied, 286 A.D. 1104, 146 N.Y.S.2d 681, 1955 N.Y. App. Div. LEXIS 5318 (N.Y. App. Div. 1955).

Although complaint of pedestrian injured in fall on broken sidewalk charged defendant-city with active and passive negligence, since city could be held liable only if it were actively negligent, it could not cross-claim against codefendant-property owner. Egan v Syracuse Sav. Bank, 28 Misc. 2d 256, 209 N.Y.S.2d 612, 1961 N.Y. Misc. LEXIS 3565 (N.Y. Sup. Ct. 1961).

Where city was held liable to pedestrian for personal injuries from fall on sidewalk on ground that city had constructive notice of dangerous condition, city could recover full amount of judgment from impleaded contractor which created dangerous condition in demolishing building, since contractor was actively negligent whereas city was only passively negligent. Shapiro v New York, 141 N.Y.S.2d 320, 1955 N.Y. Misc. LEXIS 2521 (N.Y. Sup. Ct. 1955).

In action for personal injuries against City of New York and reorganization trustee of surface transportation corporation, where City cross-complained against such trustee, and where spilling of oil and grease from trustee’s buses developed slippery condition and was principal cause of accident, and rendered trustee liable for creating dangerous condition, and negligence of City in failing to keep highway reasonably safe was passive, City was entitled to judgment over against trustee. Mohr v New York, 147 N.Y.S.2d 854, 1955 N.Y. Misc. LEXIS 3216 (N.Y. City Ct. 1955).

125. Nuisance

In this action based on negligent nuisance for injuries received by the plaintiff in tripping over a wooden sill, part of a shed, which rested on a sidewalk of the defendant city and was constructed by the defendant contractor, the failure of the jury to render a verdict on the cross-claim of the defendant city should not delay a judgment to which the plaintiff is entitled, where the plaintiff has established her case against both defendants. West v New York, 280 N.Y.S. 229, 155 Misc. 688, 1935 N.Y. Misc. LEXIS 1216 (N.Y. Sup. Ct. 1935).

126. Partition

In an action of partition, where the complaint alleges that a defendant is seized as a tenant in common of an undivided three-fourths part of the real property in suit and no answer is served upon her by another defendant putting such alleged title in issue, she may safely default in appearance and pleading and assume that her interest in the property will not be adjudged to be different than that set out in the complaint. Coles v Carroll, 273 N.Y. 86, 6 N.E.2d 107, 273 N.Y. (N.Y.S.) 86, 1937 N.Y. LEXIS 1176 (N.Y. 1937).

127. Partnerships

In action by injured wife of insured partner against insurer on public liability policy insuring plaintiff's husband and his partner, partner sued was liable for full amount of judgment for wife's negligent personal injuries, and wife having obtained judgment against her husband's partner may proceed against defendant partner in collection of her judgment, though he may be entitled to contribution or indemnity from his partner. Jacobs v United States Fidelity & Guaranty Co., 2 Misc. 2d 428, 152 N.Y.S.2d 128, 1956 N.Y. Misc. LEXIS 1918 (N.Y. Sup. Ct. 1956).

128. Settlement and discontinuance

Settlement by corporate codefendant with plaintiff, followed by discontinuance against such corporation, bars cross complaint by it against individual defendants. Leichtman v Smith, 264 A.D. 119, 34 N.Y.S.2d 629, 1942 N.Y. App. Div. LEXIS 4080 (N.Y. App. Div. 1942).

129. Trust proceedings

CPA § 264 did not apply to proceeding under CPA § 1307 et seq. for judicial settlement of accounts of trustee under inter vivos trust. In re Vanderbilt's Will, 279 A.D. 587, 107 N.Y.S.2d 39 (N.Y. App. Div. 1951).

Cross claims by one defendant against another were not allowed in special proceeding under CPA §§ 1307-1319. In re Fields' Trust, 84 N.Y.S.2d 656, 193 Misc. 781, 1948 N.Y. Misc. LEXIS 3645 (N.Y. Sup. Ct. 1948), aff'd, 276 A.D. 835, 93 N.Y.S.2d 267 (N.Y. App. Div. 1949).

130. Wrongful death

In administrator’s action against operating surgeon, his assistant and hospital for wrongful death of intestate, assistant’s cross-complaint alleging that surgeon had performed the operation and that assistant had acted under his supervision and with his approval, and that all assistant’s acts were performed in skillful and professional manner was sufficient to state cause of action against surgeon. Pringleton v Bronx Hospital, 21 Misc. 2d 960, 198 N.Y.S.2d 517, 1960 N.Y. Misc. LEXIS 3779 (N.Y. Sup. Ct. 1960).

131. Miscellaneous applications

In an action for moneys paid insolvent corporation predicated on misappropriation by creditors with knowledge of insolvency, a counterclaim and cross cause of action by assignee for benefit of other creditors who claim that creditors receiving moneys unlawfully preferred themselves was proper, since the cross claim will not in any way delay the determination of plaintiffs’ claim. Wm. H. Rankin Co. v Edward Langer Printing Co., 237 A.D. 48, 260 N.Y.S. 680, 1932 N.Y. App. Div. LEXIS 5264 (N.Y. App. Div. 1932).

In an action against two defendants for damages to personal property caused by the overflow of water, a defendant who serves a copy of his answer upon the codefendant claiming damages

against the latter for property damage caused by the same condition is entitled to cross relief against the codefendant in the same suit, under this section. Ribbon Narrow Fabric Co. v Wellington Shoe Co., 272 N.Y.S. 516, 151 Misc. 796, 1934 N.Y. Misc. LEXIS 1388 (N.Y. Mun. Ct. 1934).

In action against storekeeper and animal owner for injury to shopper bitten by dog, storekeeper may cross-complain against animal owner, since latter was primarily liable for bringing vicious dog into store. Pally v F. W. Woolworth & Co., 88 N.Y.S.2d 378, 194 Misc. 211, 1949 N.Y. Misc. LEXIS 2107 (N.Y. City Ct. 1949).

Where flour stored on pier sank in East River when pier collapsed due to negligence of dock company and storage company, vessel owner as insurer of importer was awarded judgment over against dock company for amount recovered from owner of vessel by importer. Stein Hall & Co. v Sealand Dock & Terminal Corp., 2 Misc. 2d 727, 149 N.Y.S.2d 537, 1955 N.Y. Misc. LEXIS 2096 (N.Y. Sup. Ct. 1955).

In action for injury to infant's hand caught in electric wringer on display in store, store was not entitled to indemnification from mother where cross-complaint did not allege that store was passively negligent and that mother was actively negligent, since there can be no indemnification between joint or concurring wrongdoers. Siegel v Sears, Roebuck & Co., 3 Misc. 2d 963, 153 N.Y.S.2d 356, 1956 N.Y. Misc. LEXIS 1869 (N.Y. Sup. Ct. 1956).

In action against railroad and construction companies for injuries due to negligence of flagman stationed at crossing at request of construction company, where complaint did not allege any contractual responsibility by either defendant for flagman's negligence, cross-complaint by construction company against railroad, alleging no fact to establish right of indemnification, was insufficient as being conclusory. Ling v New York C. R. Co., 4 Misc. 2d 132, 153 N.Y.S.2d 657, 1956 N.Y. Misc. LEXIS 2231 (N.Y. Sup. Ct. 1956).

In action arising out of collapse of scaffold against six defendants, cross-complaint is insufficient which merely sets forth institution of action by plaintiff and then alleges that recovery against

cross-complainant would subject other defendants to liability to him, since factual allegations are required to support conclusion of liability over. Scholom v Samuel Sumers, Inc., 139 N.Y.S.2d 679, 1955 N.Y. Misc. LEXIS 3477 (N.Y. Sup. Ct. 1955).

C. Counterclaim as Complaint for Trial Purposes

132. Generally

A motion made under CPA § 424 that the equitable issue raised by the pleading be first tried by the court was properly denied where it appeared that the matter alleged as a counterclaim constituted a defense and relieved the party as fully as if the counterclaim prevailed; the section was intended to provide a mode of trial of an issue arising upon a counterclaim in which the facts did not constitute a defense. Bennett v Edison Electric Illuminating Co., 164 N.Y. 131, 58 N.E. 7, 164 N.Y. (N.Y.S.) 131, 1900 N.Y. LEXIS 867 (N.Y. 1900).

Under former CPA §§ 422, 424, 425 (§ 4101 herein), equitable defenses were triable in the same way as defenses that were legal. Susquehanna S.S. Co. v A. O. Andersen & Co., 239 N.Y. 285, 146 N.E. 381, 239 N.Y. (N.Y.S.) 285, 1925 N.Y. LEXIS 966 (N.Y. 1925).

CPA § 424 only applied to those cases where an affirmative judgment might be obtained by the defendant against the plaintiff for the cause of action set up in the counterclaim. City Real-Estate Co. v Foster, 44 A.D. 114, 60 N.Y.S. 577, 1899 N.Y. App. Div. LEXIS 2192 (N.Y. App. Div. 1899).

On foreclosure of a purchase money mortgage where the complaint demanded a deficiency judgment against defendant, his counterclaim at law for damages for breach of warranty of quiet enjoyment, fraudulent misrepresentations as to title, and eviction were triable by a jury under CPA §§ 424, 425 (§ 4101 herein) and 429 (§ 4102(b) herein) without adopting the practice authorized by RCP rule 157 (Rules 4015, 4212 herein). Fout v Wolfe, 231 A.D. 11, 245 N.Y.S. 505, 1930 N.Y. App. Div. LEXIS 6987 (N.Y. App. Div. 1930).

Assertion of a suit for damages under the disability clause of an insurance policy as a counterclaim in an equitable action to rescind the policy for fraud is only triable after the latter action as a separate action on the issues raised by the reply. Equitable Life Assurance Soc. v Fillat, 215 N.Y.S. 277, 127 Misc. 68, 1926 N.Y. Misc. LEXIS 916 (N.Y. Sup. Ct. 1926).

133. Jury trial

In the case of a counterclaim for money in an equity case it would seem that the defendant was not entitled to a jury as of course, or as a constitutional right. MacKellar v Rogers, 109 N.Y. 468, 17 N.E. 350, 109 N.Y. (N.Y.S.) 468, 16 N.Y. St. 406, 1888 N.Y. LEXIS 750 (N.Y. 1888).

Where it appears from an examination of the complaint that the cause of action of plaintiff is referable, yet if the counterclaim sets up a cause of action in favor of the defendant which would entitle him to a trial by jury he does not lose his right to such a trial although so much of the action as involves the plaintiff’s claim is referred. Hoffman House, New York v Hoffman House Cafe, 36 A.D. 176, 55 N.Y.S. 763, 1899 N.Y. App. Div. LEXIS 19 (N.Y. App. Div. 1899).

Under CPA § 425 (§ 4101 herein) which provided that an issue of fact in an action in which the complaint demands judgment for a sum of money only, had to be tried by a jury, and CPA § 424, which provided that where the defendant interposes a counterclaim the mode of trial of an issue of fact is the same as if it arose in an action, brought by the defendant against the plaintiff for the cause of action stated in the counterclaim, and demanding the same judgment, the defendant was entitled, as a matter of right, to a jury trial of the issues arising on a counterclaim. Herb v Metropolitan Hospital & Dispensary, 80 A.D. 145, 80 N.Y.S. 552, 12 N.Y. Ann. Cas. 415, 1903 N.Y. App. Div. LEXIS 528 (N.Y. App. Div. 1903).

A plaintiff who has brought a suit in equity to set aside the award of an arbitrator and who failed to comply with rule in moving within ten days after issue to have issues on defendant’s counterclaim asking ejectment settled for trial by jury, should not be granted a jury trial. Ettlinger v Trustees of Sailors' Snug Harbor, 122 A.D. 681, 107 N.Y.S. 779, 1907 N.Y. App. Div. LEXIS 2532 (N.Y. App. Div. 1907).

Where legal counterclaim is set up in action in equity, defendant timely moving for settlement of issues, is entitled to jury trial. Maag v Maag Gear Co., 193 A.D. 759, 184 N.Y.S. 630, 1920 N.Y. App. Div. LEXIS 5643 (N.Y. App. Div. 1920).

On foreclosure of a purchase money mortgage where the complaint demanded a deficiency judgment against defendant, his counterclaims at law for damages for breach of warranty of quiet enjoyment, fraudulent misrepresentations as to title, and eviction were triable by a jury under CPA §§ 424, 425 (§ 4101 herein) 429 (§ 4102(b) herein) without adopting the practice authorized by RCP rule 157 (Rules 4015, 4212 herein). Fout v Wolfe, 231 A.D. 11, 245 N.Y.S. 505, 1930 N.Y. App. Div. LEXIS 6987 (N.Y. App. Div. 1930).

In an action in equity in which the defendant interposed a legal counterclaim and seeks a money judgment, the plaintiff is entitled as a matter of right to a jury trial of the issues raised by the counterclaim and the reply. Voges Mfg. Co. v New York & Queens Electric Light & Power Co., 261 A.D. 377, 25 N.Y.S.2d 570, 1941 N.Y. App. Div. LEXIS 7334 (N.Y. App. Div. 1941).

Where defendant counterclaimed for breach of warranty in sale of merchandise, in action to foreclose vendor’s lien on personalty sold to defendant, he is entitled to jury trial as of right. Lipton v Marks, 269 A.D. 1055, 58 N.Y.S.2d 920, 1945 N.Y. App. Div. LEXIS 5243 (N.Y. App. Div. 1945).

Defendants waived right to jury trial by interposing counterclaims which were independent causes of action unrelated to the complaint and sought relief beyond that encompassed by the complaint. Federman v Berger, 13 A.D.2d 766, 216 N.Y.S.2d 61, 1961 N.Y. App. Div. LEXIS 10588 (N.Y. App. Div. 1st Dep't 1961).

Where a defendant interposes a counterclaim, demanding an affirmative judgment for money only, he is entitled as matter of right to a jury trial of the issues raised by the counterclaim and reply. Deeves v Metro., 26 N.Y.S. 23, 6 Misc. 91, 1893 N.Y. Misc. LEXIS 654 (N.Y.C.P. 1893), aff'd, 141 N.Y. 587, 36 N.E. 739, 141 N.Y. (N.Y.S.) 587, 1894 N.Y. LEXIS 1213 (N.Y. 1894).

A counterclaim interposed in a summary proceeding was held so separate that it could be tried by a jury, if the cause is for money. Joray Realty Co. v Steinberg, 223 N.Y.S. 838, 130 Misc. 436, 1927 N.Y. Misc. LEXIS 1046 (N.Y. Mun. Ct. 1927).

Plaintiff suing for specific performance of alleged oral contract to sell real property is entitled to jury trial on counterclaim for ejectment. Noto v Headley, 28 Misc. 2d 294, 213 N.Y.S.2d 936, 1961 N.Y. Misc. LEXIS 3027 (N.Y. Sup. Ct. 1961).

134. Separate trial of equitable counterclaim

The trial of the issues at the trial term would be stayed until the issue raised by an equitable counterclaim could be tried at the special term; where an answer set up an equitable counterclaim under the provisions of CPA § 424 the defendant was entitled to have the issues raised by such counterclaim tried at special term. Thomas v Bronx Realty Co., 60 A.D. 365, 70 N.Y.S. 206, 1901 N.Y. App. Div. LEXIS 707 (N.Y. App. Div. 1901).

Where, in an action at law, the defendant as a second separate defense and by way of counterclaim sets up an equitable cause of action which, if established, would entitle him to an affirmative judgment appropriate only to a suit in equity, the proper practice is to move for an order directing separate trials of the separate issues in the appropriate forum and the order of trial thereof. Goss v C. S. Goss & Co., 126 A.D. 748, 111 N.Y.S. 115, 1908 N.Y. App. Div. LEXIS 3441 (N.Y. App. Div. 1908).

Where equitable counterclaim if established would extinguish plaintiff’s cause of action, suit arising thereon must be first tried. Brody, Adler & Koch Co. v Hochstadter, 150 A.D. 527, 135 N.Y.S. 550, 1912 N.Y. App. Div. LEXIS 7160 (N.Y. App. Div. 1912).

Defendant in law action is entitled to separate trial of equitable counterclaim. Johnson v Johnson, 157 A.D. 289, 142 N.Y.S. 416, 1913 N.Y. App. Div. LEXIS 6574 (N.Y. App. Div. 1913).

In action to recover back money paid under contracts for the purchase of real property based upon false representations, defendant could set up specific performance as a counterclaim and

have the issues arising upon the counterclaim tried at special term, but the common-law issues should be first tried at the trial term. Epstein v Rockville Centre Improv. Co., 164 A.D. 177, 149 N.Y.S. 638, 1914 N.Y. App. Div. LEXIS 7741 (N.Y. App. Div. 1914).

Where in an action by the assignee of a policy of credit insurance for a loss under such policy, in which the plaintiff's assignors were impleaded as defendants, the defendant insurer pleaded both a defense and a counterclaim based upon the alleged fraud of the individual defendants asking the cancellation of the assignment, in view of CPA §§ 424 and 443, subd 3 (§ 603 herein), the insurer was entitled to a separate trial of its counterclaim at Special Term, since the court could not give the relief demanded on its law side. Samuel Strauss & Co. v American Credit Indem. Co., 203 A.D. 361, 196 N.Y.S. 708, 1922 N.Y. App. Div. LEXIS 7198 (N.Y. App. Div. 1922).

Motion for separate and prior trial at Special Term of issues raised by first counterclaim and denials and plaintiff's reply denied. Sweeny v Carrier Engineering Corp., 235 A.D. 664, 255 N.Y.S. 901, 1932 N.Y. App. Div. LEXIS 8560 (N.Y. App. Div. 1932).

In a suit in equity for an accounting defendant cannot have issues framed for a jury on a counterclaim which is in itself equitable and not legal. Norwegian Atlas Ins. Co. v Northern Underwriters' Agency, Inc., 207 N.Y.S. 277, 124 Misc. 185, 1924 N.Y. Misc. LEXIS 1072 (N.Y. Sup. Ct. 1924), aff'd, 212 A.D. 805, 207 N.Y.S. 886, 1925 N.Y. App. Div. LEXIS 9589 (N.Y. App. Div. 1925).

Where complaint stated four causes of action for legal separation and one for ejectment, to which defendant interposed counterclaim for determination of claim to real property, he was not entitled to a jury trial as to issues arising out of the causes of action for legal separation. Salsman v Salsman, 15 Misc. 2d 842, 183 N.Y.S.2d 389, 1959 N.Y. Misc. LEXIS 4141 (N.Y. Sup. Ct. 1959).

In an action to recover upon a written contract of marine insurance, where the answer sets up as a counterclaim an alleged mistake in the terms of the policy and asks that it be reformed, the

issue raised by this counterclaim and the reply thereto is properly triable at special term as being an equitable cause of action, and the trial of the cause of action set forth in the complaint should be stayed until this equitable cause of action has been disposed of. COLVILLE v CHUBB, 26 Abb. N. Cas. 372, 1891 N.Y. Misc. LEXIS 3306 (N.Y. Sup. Ct. Feb. 1, 1891).

In an action at law either defendant or plaintiff is entitled to a separate trial of the issues arising on defendant's equitable counterclaim. Steinbugler v William C. Atwater & Co., 16 N.Y.S.2d 851, 1939 N.Y. Misc. LEXIS 2615 (N.Y. Sup. Ct. 1939).

Equitable counterclaim to legal cause of action should be tried first. Appel v Denni, 75 N.Y.S.2d 112, 1947 N.Y. Misc. LEXIS 3355 (N.Y. Sup. Ct. 1947).

135. Right to open and close

Interposition of a counterclaim does not affect plaintiff's right to open and close. See Brink's Express Co. v Burns, 230 A.D. 559, 245 N.Y.S. 649, 1930 N.Y. App. Div. LEXIS 8677 (N.Y. App. Div. 1930).

136. Proof

When a defendant interposes a counterclaim and thereupon demands an affirmative judgment, the defendant has the affirmative of the issue and the burden of proof, erroneous admission of assignment of contract executed after commencement of action. Liberty Wall Paper Co. v Stoner Wall Paper Mfg. Co., 178 N.Y. 219, 70 N.E. 501, 178 N.Y. (N.Y.S.) 219, 1904 N.Y. LEXIS 703 (N.Y. 1904).

Evidence in rebuttal of counterclaim was improperly excluded, even though such evidence would have been proper as part of plaintiff's affirmative case. Seguin v Berg, 260 A.D. 284, 21 N.Y.S.2d 291, 1940 N.Y. App. Div. LEXIS 4577 (N.Y. App. Div. 1940).

In action by dentist for services and counterclaim by defendant patient for malpractice, refusal of trial judge to charge jury that burden of proof was upon defendant to prove allegations of

counterclaim was error. Warren v Traub, 280 A.D. 962, 116 N.Y.S.2d 506, 1952 N.Y. App. Div. LEXIS 4381 (N.Y. App. Div. 1952).

137. Effect of default

In an action for goods sold and delivered, the defendant interposed a counterclaim alleging breach of warranty, defaulted in appearance at the trial, the result of which was under CPA § 424 the same as a failure to appear in an action; the judgment obtained against him was a non-suit to counterclaim, and was not a bar to a subsequent action for a breach of the warranty. Spies v National City Bank, 174 N.Y. 222, 66 N.E. 736, 174 N.Y. (N.Y.S.) 222, 1903 N.Y. LEXIS 1323 (N.Y. 1903).

The result of the failure of a defendant to appear and sustain a counterclaim is the same as a failure to appear and sustain a cause of action; the effect of the judgment obtained against him is nothing more than a nonsuit as to the counterclaim, and such judgment is not a bar to a subsequent action brought on the subject matter in the counterclaim. Honsinger v Union Carriage & Gear Co., 175 N.Y. 229, 67 N.E. 436, 175 N.Y. (N.Y.S.) 229, 1903 N.Y. LEXIS 973 (N.Y. 1903).

138. Counterclaim on account

It seems that CPA § 424 applied only where the counterclaim set up matter, for which a separate action might be maintained. In an action for the dissolution of a co-partnership and for an accounting, the answer set up an appropriation to himself by the plaintiff of the good will of the business, in violation of a provision in the articles, providing for a sale of the good will to such of the partners as should bid the highest price, and that the value of the good will was $200,000; which the defendant interposed as a counterclaim against any sum found due to the plaintiff. As a further counterclaim, the defendant alleged a fraudulent misappropriation by the plaintiff of partnership property. Held, that as those matters were proper to be proved upon an

accounting, the defendant was not entitled to a jury trial. Cook v Jenkins, 79 N.Y. 575, 79 N.Y. (N.Y.S.) 575, 1880 N.Y. LEXIS 34 (N.Y. 1880).

139. Mechanic's lien

Lien law, § 54, may be given effect without depriving the parties of their constitutional right to a jury trial; in case the validity of the lien is not established, either party is entitled to have issues framed for trial by jury, as a matter of right, or, if the court determines that the lien is invalid, by introducing an interlocutory judgment to that effect and allowing the remaining issues to be sent to a jury for trial. Hawkins v Mapes-Reeves Const. Co., 82 A.D. 72, 81 N.Y.S. 794, 1903 N.Y. App. Div. LEXIS 1116 (N.Y. App. Div. 1903), aff'd, 178 N.Y. 236, 70 N.E. 783, 178 N.Y. (N.Y.S.) 236, 1904 N.Y. LEXIS 705 (N.Y. 1904).

D. Allowance of Counterclaim

i. In General

140. Generally

Application of CPA § 267 did not extend to counterclaims arising under former § 266, subd 1. Stafford Sec. Co. v Kremer, 258 N.Y. 1, 179 N.E. 32, 258 N.Y. (N.Y.S.) 1, 1931 N.Y. LEXIS 786 (N.Y. 1931).

CPA § 262 (Rule 3014, now Civ Rights Law 78) authorized interposition of any counterclaim which defendant had, subject only to provisions of CPA § 267. De Bermingham v De Bermingham, 116 N.Y.S.2d 697, 203 Misc. 529, 1952 N.Y. Misc. LEXIS 1939 (N.Y. Sup. Ct. 1952).

Counterclaim within CPA § 266 might have been improper under CPA § 267. Jayell Films, Inc. v A. F. E. Corp., 67 N.Y.S.2d 77, 1946 N.Y. Misc. LEXIS 3184 (N.Y. Sup. Ct. 1946).

CPA § 267 embraced some claims not counterclaims before the Code of Civil Procedure. Metropolitan Trust Co. v Tonawanda V. & C. R. Co., 43 Hun 521, 7 N.Y. St. 90 (N.Y.), aff'd, 106 N.Y. 673, 13 N.E. 937, 106 N.Y. (N.Y.S.) 673, 1887 N.Y. LEXIS 963 (N.Y. 1887).

141. Assigned claim as setoff or counterclaim

A national banking association cannot offset a debt due from a stockholder against a claim of the stockholder's assignee for liquidation dividends payable upon his assignor's stock. Bridges v National Bank of Troy, 185 N.Y. 146, 77 N.E. 1005, 185 N.Y. (N.Y.S.) 146, 1906 N.Y. LEXIS 884 (N.Y. 1906).

The sureties in an action brought upon an undertaking by an assignee are entitled to interpose as a counterclaim, a demand, which they purchased from the defendant on the attachment suit before receiving notice that the undertaking was signed. Bien v Freund, 26 A.D. 202, 49 N.Y.S. 971, 1898 N.Y. App. Div. LEXIS 374 (N.Y. App. Div. 1898).

Counterclaim in conversion pleaded merely as offset arising out of relationship and transactions between defendant and plaintiff's assignor, proper and sufficient although demanding only dismissal of complaint. National Surety Co. v Pastor, 212 A.D. 546, 209 N.Y.S. 210, 1925 N.Y. App. Div. LEXIS 9503 (N.Y. App. Div. 1925).

An assignee of a claim against a bankrupt may plead such claim as a counterclaim in an action brought on a claim assigned by the bankrupt. Stich v Berman, 96 N.Y.S. 743, 49 Misc. 104, 1905 N.Y. Misc. LEXIS 555 (N.Y. App. Term 1905).

142. —Against assignee of judgment or award of damages

Where, upon dissolving an injunction, a specific amount is awarded by the court as damages to a party against whom the injunction was granted and the award is assigned to him, and an action brought thereon by the assignee, any counterclaim will be valid against the latter, that

would have been valid against the assignor, if it belonged to the defendant before he received notice of the assignment. Newburger v Manneck Mfg. Co. (N.Y.C.P. Dec. 5, 1881).

143. Judgment as counterclaim against assignor

A right to set off a judgment in favor of A against B against a judgment in favor of B against A cannot be asserted by motion in behalf of A, where B had assigned his claim to a third person, before the judgment in his favor was rendered. In such a case, if A has any equity, it must be enforced by action. Swift v Prouty, 64 N.Y. 545, 64 N.Y. (N.Y.S.) 545, 1876 N.Y. LEXIS 104 (N.Y. 1876).

In an action on a judgment by the assignee thereof, defendant may offset a judgment obtained by a third person against the assignor prior to the assignment, although the defendant purchased the judgment after the assignment if he purchased in good faith and without notice; a court of equity will compel the assignee of an insolvent to allow as an offset a claim against the insolvent where injustice would otherwise result, though an action at law could not have been maintained. Wyckoff v Williams, 136 A.D. 495, 121 N.Y.S. 189, 1910 N.Y. App. Div. LEXIS 61 (N.Y. App. Div. 1910).

Although if a judgment is assigned on condition that it can be set off, otherwise the assignment to be void, set-off will be disallowed. Cornell v Donovan, 13 N.Y. St. 704, 741.

In an action by an assignee, a judgment recovered against the assignor after the assignment of the chose in action cannot be set off. Lucas v East Stroudsburg Glass Co., 38 Hun 581 (N.Y.).

In an action brought by the assignee of a cause of action the defendants cannot interpose, by way of counterclaim, a judgment recovered by them against the plaintiff’s assignor, where the assignment was made before the defendants obtained their judgment, commenced their action, or even had the cause of action. Eder v Gildersleeve, 32 N.Y.S. 1056, 85 Hun 411 (1895), aff'd, 155 N.Y. 672, 49 N.E. 1096, 155 N.Y. (N.Y.S.) 672, 1898 N.Y. LEXIS 993 (N.Y. 1898).

144. Counterclaim against representative

One cannot set off an adjusted loss against a receiver's suit for premium in a marine insurance company. Lawrence v Nelson, 21 N.Y. 158, 21 N.Y. (N.Y.S.) 158, 1860 N.Y. LEXIS 80 (N.Y. 1860).

A claim for services done an insolvent estate under the employment of the receiver is a good counterclaim in an action by the receiver. Davis v Stover, 58 N.Y. 473, 58 N.Y. (N.Y.S.) 473, 1874 N.Y. LEXIS 528 (N.Y. 1874).

When the plaintiff transfers an account against an estate to an assignee and agrees to pay back the money paid therefor, if not collected, and the assignee duly presents the claim, it being allowed and dividends paid upon it, in an action upon the assignment the assignee may counterclaim the amount paid for the account more than was so collected. Schmitz v Langhaar, 88 N.Y. 503, 88 N.Y. (N.Y.S.) 503, 1882 N.Y. LEXIS 132 (N.Y. 1882).

A defendant in an action by the receiver of an insurance company upon claims of the company against him cannot set off the reserve value of two endowment policies of the company payable to his wife in case of his death, otherwise to himself. Newcomb v Almy, 96 N.Y. 308, 96 N.Y. (N.Y.S.) 308, 1884 N.Y. LEXIS 494 (N.Y. 1884).

In an action to foreclose a mortgage brought by a substituted trustee, so much of a counterclaim for services performed for the benefit of the trust estate may be allowed as will satisfy the plaintiff's demand; but an affirmative judgment for the excess cannot be rendered against such plaintiff. United States Trust Co. v Stanton, 139 N.Y. 531, 34 N.E. 1098, 139 N.Y. (N.Y.S.) 531, 1893 N.Y. LEXIS 1033 (N.Y. 1893).

In action by corporation's trustee in bankruptcy to recover from directors an unlawfully declared dividend, counterclaim for corporate indebtedness assigned to defendant was subject to a motion to strike. Irving Trust Co. v Gunder, 234 A.D. 252, 254 N.Y.S. 630, 1932 N.Y. App. Div. LEXIS 10403 (N.Y. App. Div. 1932).

Counterclaims in action by equity receivers held insufficient under subd 3 of this section. Atkinson v Fox, 242 A.D. 707, 272 N.Y.S. 894, 1934 N.Y. App. Div. LEXIS 6893 (N.Y. App. Div.), app. denied, 266 N.Y. 404, 195 N.E. 127, 266 N.Y. (N.Y.S.) 404, 1934 N.Y. LEXIS 905 (N.Y. 1934).

CPA § 266 was subject to CPA § 267 subd 3. Binon v Boel, 271 A.D. 505, 66 N.Y.S.2d 425, 1946 N.Y. App. Div. LEXIS 2787 (N.Y. App. Div. 1946), aff'd, 297 N.Y. 528, 74 N.E.2d 466, 297 N.Y. (N.Y.S.) 528, 1947 N.Y. LEXIS 1022 (N.Y. 1947).

In an action brought by the receiver of an insolvent foreign corporation, a claim against such corporation acquired by defendant and maturing after the receiver’s appointment cannot be set off or counterclaimed. Hall v Holland House Co., 33 N.Y.S. 50, 12 Misc. 55, 1895 N.Y. Misc. LEXIS 316 (N.Y.C.P. 1895).

An assignee of a claim against a bankrupt may plead such claim as a counterclaim in an action brought on a claim assigned by the bankrupt. Stich v Berman, 96 N.Y.S. 743, 49 Misc. 104, 1905 N.Y. Misc. LEXIS 555 (N.Y. App. Term 1905).

In action by trustee in bankruptcy who assumed the lease, for rent becoming due after adjudication, judgment for rent before adjudication was not a proper offset. Crandell v Rappaport, 233 N.Y.S. 32, 133 Misc. 598, 1928 N.Y. Misc. LEXIS 1225 (N.Y. App. Term 1928).

One who has bought goods of trustees in liquidation of a corporation cannot counterclaim demands against the corporation before the assignment, on the fraud of the corporation in procuring his consent to the agreement of liquidation. Otis v Shantz, 8 N.Y.S. 293, 55 Hun 603, 1889 N.Y. Misc. LEXIS 2281 (N.Y. Sup. Ct. 1889), aff'd, 128 N.Y. 45, 27 N.E. 955, 128 N.Y. (N.Y.S.) 45, 1891 N.Y. LEXIS 954 (N.Y. 1891).

In an action by an overseer of the poor for the penalty for violating the excise law, there cannot be allowed defendant a counterclaim for money loaned to plaintiff as such overseer. Denniston v Trimmer, 27 Hun 393 (N.Y.).

A cotenant sued by the guardian of another for money had and received cannot counterclaim for improvements made without plaintiff’s consent. Coakley v Mahar, 36 Hun 157 (N.Y.).

That a party has sued on a claim assigned merely nominally to him without consideration and for the benefit of the assignor and to enable him to evade the demands of his creditors and defendant was insufficient to enable defendant to counterclaim demands against the assignor. Willover v First Nat'l Bank, 40 Hun 184 (N.Y.).

A counterclaim of a demand for salary as vice-president is good against a suit by a receiver against a trustee for creditors to have the funds in his hands as such applied to pay a debt due from the creator of the trust to the bank, the complainant alleging that there were no debts except those of plaintiffs remaining to be paid. Pendergast v Greenfield, 40 Hun 494, 1 N.Y. St. 422 (N.Y.).

The claim against the bank purchased after its insolvency or before the receiver was appointed could not have been set off under CPA § 267 as against the claim of the bank. Davis v Knipp, 36 N.Y.S. 705, 92 Hun 297 (1895).

ii. Counterclaims Against Assignees of Contracts

145. Generally

Contract for brick held not divisible and not separately assignable as to brick delivered, so that the assignor’s breach may be asserted, in a proper case, as a counterclaim against the assignee. Seibert v Dunn, 216 N.Y. 237, 110 N.E. 447, 216 N.Y. (N.Y.S.) 237, 1915 N.Y. LEXIS 797 (N.Y. 1915).

Several counterclaims against defendants dismissed on motion for judgment on the pleadings under RCP Rule 12 (Rule 2101 herein), because none of them stated a cause of action against the plaintiff. Stokes v Ottoman American Development Co., 223 A.D. 739, 227 N.Y.S. 265, 1928 N.Y. App. Div. LEXIS 6676 (N.Y. App. Div. 1928).

Provisions of subdivision 1 of CPA § 267 were mandatory. Stafford Sec. Co. v Kremer, 232 A.D. 265, 249 N.Y.S. 670, 1931 N.Y. App. Div. LEXIS 13785 (N.Y. App. Div.), rev'd, 258 N.Y. 1, 179 N.E. 32, 258 N.Y. (N.Y.S.) 1, 1931 N.Y. LEXIS 786 (N.Y. 1931).

In an action by an assignee only such claims against the assignee can be set off or counterclaimed as were due or matured at the time of the assignment and were acquired by defendant in good faith before he had knowledge or notice thereof. Norton v McCarthy, 30 N.Y.S. 1057, 10 Misc. 222, 1894 N.Y. Misc. LEXIS 935 (N.Y. City Ct. 1894).

In action by assignee of claim for automobile sold, defendant was entitled to counterclaim for reimbursement of moneys paid out on behalf of assignor prior to assignment. Rindskopf v Zimmer, 145 N.Y.S. 984, 84 Misc. 32, 1914 N.Y. Misc. LEXIS 684 (N.Y. App. Term 1914).

In an assignee's action to recover money paid to the defendant on account of work which the defendant agreed to do but did not do, a defense that the assignment was fraudulent and "made to deprive defendant on its counterclaim against the assignor personally" is without merit, in view of the provisions of subdivision 1. Klein v Carey Printing Co., 199 N.Y.S. 19, 120 Misc. 548, 1923 N.Y. Misc. LEXIS 893 (N.Y. App. Term 1923).

In an action for rent a supplemental answer may be served stating a counterclaim upon a cause of action on a bond acquired by assignment after the commencement of the litigation. Bricken Const. Corp. v Cushman, 297 N.Y.S. 194, 163 Misc. 371, 1937 N.Y. Misc. LEXIS 1364 (N.Y. Sup. Ct. 1937).

By reading CPA § 267 and § 9 of Court of Claims Act together, such statutory provisions limited right of setoff as against assignee to claims of State existing against assignor at time of assignment. Manufacturers Trust Co. v State, 137 N.Y.S.2d 225, 207 Misc. 152, 1955 N.Y. Misc. LEXIS 3392 (N.Y. Ct. Cl. 1955).

CPA § 267, subd 1 was not to be read in contravention of § 193-a subd 2 (§§ 1008, 3012(a) herein). Fitzgerald v American Surety Co., 3 Misc. 2d 609, 150 N.Y.S.2d 128, 1956 N.Y. Misc. LEXIS 1983 (N.Y. City Ct. 1956).

Where defendant’s counterclaim arose out of a claim against plaintiff’s assignor, and hence under this section would be allowable only to the extent of the plaintiff’s demand, defendant’s prayer for relief that the complaint be dismissed, with costs, was sufficient, and a motion to dismiss the counterclaim because no affirmative relief was asked, was properly denied. Lynn Air Conditioning Co. v George F. Hinrichs, Inc., 199 N.Y.S. 240, 1923 N.Y. Misc. LEXIS 944 (N.Y. Sup. Ct. 1923).

Set-off or counterclaim as a defense against an assignee is wholly statutory and must be pleaded in express terms. Willover v First Nat'l Bank, 40 Hun 184 (N.Y.).

146. Existence of counterclaim at time of assignment

Leasehold was assigned to petitioner subject to a sublease; in summary proceedings for nonpayment of rent accruing thereafter, subtenant could not counterclaim for rent of other buildings due from assignor at time of assignment since no cause of action existed in favor of the assignor at the time of the assignment. Stafford Sec. Co. v Kremer, 258 N.Y. 1, 179 N.E. 32, 258 N.Y. (N.Y.S.) 1, 1931 N.Y. LEXIS 786 (N.Y. 1931).

A counterclaim in an action by the assignee of a contract must have existed against the assignor at the time of the assignment. Seibert v Dunn, 126 N.Y.S. 974, 70 Misc. 422, 1911 N.Y. Misc. LEXIS 107 (N.Y. Sup. Ct. 1911), aff'd, 157 A.D. 387, 142 N.Y.S. 253, 1913 N.Y. App. Div. LEXIS 6551 (N.Y. App. Div. 1913).

Set-offs pleaded which are founded on independent contracts, and not those contracts on which the claims against the defendant are based, and which were not in existence at the time of the assignments to the plaintiff and notice thereof to the defendant, are improper, and are stricken out. James Talcott, Inc. v Weiss, 273 N.Y.S. 1003, 153 Misc. 317, 1934 N.Y. Misc. LEXIS 1607 (N.Y. City Ct. 1934).

To be a counterclaim a demand against the assignor must have existed against him and belonged to defendant and been capable of allowance against assignor when the contract sued upon belonged to him. Willover v First Nat'l Bank, 40 Hun 184 (N.Y.).

147. Maturity of claim or counterclaim

A set-off or counterclaim may be defeated by the assignment by the opposite party of his claim at any time before the demand becomes due, although the assignor be insolvent and his demand be not payable when assigned. Myers v Davis, 22 N.Y. 489, 22 N.Y. (N.Y.S.) 489, 1860 N.Y. LEXIS 51 (N.Y. 1860).

In an action by the assignee of an account for goods sold, the buyer cannot counterclaim a discount under the contract of sale, the right to which had not matured at the time of the assignment. Collens v Philipsborn's Inc., 209 A.D. 483, 205 N.Y.S. 210, 1924 N.Y. App. Div. LEXIS 8660 (N.Y. App. Div. 1924), aff'd, 239 N.Y. 611, 147 N.E. 217, 239 N.Y. (N.Y.S.) 611, 1925 N.Y. LEXIS 1002 (N.Y. 1925).

Counterclaims properly dismissed because not showing that claims matured at time of assignment. Neander v Tillman, 232 A.D. 189, 249 N.Y.S. 559, 1931 N.Y. App. Div. LEXIS 13766 (N.Y. App. Div. 1931).

Last part of subdivision 1 of CPA § 267 meant that counterclaim must have been a matured claim before its assignment so that it could have been made the basis of an independent action against the assignor before the assignment. Stafford Sec. Co. v Kremer, 232 A.D. 265, 249 N.Y.S. 670, 1931 N.Y. App. Div. LEXIS 13785 (N.Y. App. Div.), rev'd, 258 N.Y. 1, 179 N.E. 32, 258 N.Y. (N.Y.S.) 1, 1931 N.Y. LEXIS 786 (N.Y. 1931).

148. Claim for unliquidated damages as setoff or counterclaim

An assigned claim for bricks delivered is subject to the right of the debtor to claim damages for a violation, prior to its enforcement, by the assignor of his obligation. Seibert v Dunn, 216 N.Y. 237, 110 N.E. 447, 216 N.Y. (N.Y.S.) 237, 1915 N.Y. LEXIS 797 (N.Y. 1915).

Counterclaim in the nature of set-off for unliquidated damages is good and may be urged against an assignee who acquired title to the claim after assignor's breach of contract, but recovery thereon is limited to assignee's claim. Keon v Saxton & Co., 257 N.Y. 412, 178 N.E. 679, 257 N.Y. (N.Y.S.) 412, 1931 N.Y. LEXIS 873 (N.Y. 1931), reh'g denied, 258 N.Y. 578, 180 N.E. 340, 258 N.Y. (N.Y.S.) 578, 1932 N.Y. LEXIS 1242 (N.Y. 1932).

Where a counterclaim or offset claimed by defendant arises out of the contract upon which plaintiff's action is based, it may be used to defeat the claim of plaintiff and it is not necessary that the amount of the counterclaim or offset be liquidated. Termini v John Arthur Exhibitions, Inc., 9 Misc. 2d 557, 169 N.Y.S.2d 584, 1957 N.Y. Misc. LEXIS 3740 (N.Y. Sup. Ct. 1957), aff'd, 5 A.D.2d 973, 173 N.Y.S.2d 243, 1958 N.Y. App. Div. LEXIS 6396 (N.Y. App. Div. 1st Dep't 1958).

For pending action for breach of retainer as barring counterclaim in subsequent action by attorney's assignee for services, see Loehr v Sheffield, 81 N.Y.S.2d 871, 1948 N.Y. Misc. LEXIS 2988 (N.Y. Sup. Ct. 1948).

149. Notice of assignment

When, in an action for the breach of a contract, the answer, as a counterclaim, alleges a breach of contract by the plaintiff's assignor after the contract was modified in particulars set forth, a reply which alleges that the defendant "has at all times had knowledge of the manner" in which the plaintiff's assignor carried out the provisions of the contract, "and fully assented to the carrying out the same" in that manner, does not state a defense to the counterclaim. Pope Mfg. Co. v Rubber Goods Mfg. Co., 110 A.D. 341, 97 N.Y.S. 73, 1905 N.Y. App. Div. LEXIS 3916 (N.Y. App. Div. 1905).

Where vendor had knowledge of assignment of contract for sale of realty to plaintiff's original assignor, such knowledge precluded assertion by vendor, as against plaintiff, of any cause of action it may have against such assignor arising subsequent to such knowledge. World Exhibit Corp. v City Bank Farmers Trust Co., 270 A.D. 654, 61 N.Y.S.2d 889, 1946 N.Y. App. Div. LEXIS 3760 (N.Y. App. Div.), aff'd, 296 N.Y. 586, 68 N.E.2d 876, 296 N.Y. (N.Y.S.) 586, 1946 N.Y. LEXIS 1177 (N.Y. 1946).

In an action upon an assigned claim against the defendant, a counterclaim by the defendant upon an assigned claim against plaintiff's assignor which does not allege that the assignment of the latter cause of action was made before notice of the assignment of plaintiff's cause of action, was not a valid counterclaim under subd 1 of CPA § 267. Lindemann v Globe Indem. Co., 205 N.Y.S. 547, 123 Misc. 530, 1924 N.Y. Misc. LEXIS 970 (N.Y. App. Term 1924).

"Good faith" requirement of CPA § 267 did not relate to merits of counterclaim but to defendant's acquisition of counterclaim as to time defendant received notice of assignment of contract upon which plaintiff sues. Chas. Chipman's Sales Co. v Ely & Walker Dry Goods Co., 48 N.Y.S.2d 483, 183 Misc. 531, 1944 N.Y. Misc. LEXIS 1958 (N.Y. Sup. Ct. 1944), aff'd, 270 A.D. 808, 60 N.Y.S.2d 282, 1946 N.Y. App. Div. LEXIS 4039 (N.Y. App. Div. 1946).

In action by assignee of claim arising out of contract between defendant and plaintiff's assignor, defendant may counterclaim against assignor on claim which defendant had against assignor prior to assignment and without notice thereof, arising out of different transaction. Frank v Amicale Yarns, Inc., 148 N.Y.S.2d 727, 1956 N.Y. Misc. LEXIS 2316 (N.Y. Sup. Ct. 1956).

In action by assignee of claims, debtor may allege any defenses, equities and matters by way of setoff or recoupment which he had or acquired prior to notice of assignment. Edelstein v Hacker, 152 N.Y.S.2d 525 (N.Y. County Ct. 1956).

The assignee of a claim must give notice of the assignment to the debtor if he desires to protect himself against the purchase and set-off by the debtor of claims against the assignor. Faulkner v Swart, 8 N.Y.S. 239, 55 Hun 261, 1889 N.Y. Misc. LEXIS 2256 (N.Y. Sup. Ct. 1889).

F assigned his prospective earnings to plaintiff, but defendants had no notice thereof, and after such assignment two-thirds of a note on which F was liable as indorser was transferred to defendants. It was held that defendants could counterclaim that liability against plaintiff's action for the services. Faulkner v Swart, 8 N.Y.S. 239, 55 Hun 261, 1889 N.Y. Misc. LEXIS 2256 (N.Y. Sup. Ct. 1889).

And an answer is frivolous which fails to allege that the set-off contained belonged to the defendant before he had notice of the assignment to plaintiff of the claim sued upon. Venable v Harlin.

150. Municipal corporations

In an action against a municipal corporation to recover a salary, brought by an assignee, a claim against the officer for moneys of the corporation unlawfully paid to and received by him, was a proper set-off. Laws 1875, ch 49, did not deprive a municipality of the right to such a set-off, although it arose out of a transaction which might be the subject of a suit in behalf of the people. Wood v New York, 73 N.Y. 556, 73 N.Y. (N.Y.S.) 556, 1878 N.Y. LEXIS 649 (N.Y. 1878).

Where an assignee brought suit on claims for work and materials furnished the city of New York and also the county, the claims of the city and county against the assignor are a proper counterclaim. Taylor v New York, 82 N.Y. 10, 82 N.Y. (N.Y.S.) 10, 1880 N.Y. LEXIS 320 (N.Y. 1880).

151. Negotiable instruments

Notes of plaintiff's assignor not due and not in defendant's possession at the time of the assignment, but indorsed to him later, cannot be set off in an action by an assignor. See Cummings v Morris, 25 N.Y. 625, 25 N.Y. (N.Y.S.) 625, 1862 N.Y. LEXIS 174 (N.Y. 1862).

A note by an assignor which fell due after the assignment of the subject of the assignee's action cannot be offset. Martin v Kunzmuller, 37 N.Y. 396, 37 N.Y. (N.Y.S.) 396, 1867 N.Y. LEXIS 157 (N.Y. 1867).

A party who promises to pay the debt of a firm in consideration of its assets, cannot set off a claim held by her against the claim of an assignee of a partnership note before maturity, which was not due when defendant's promise was made. Barlow v Myers, 64 N.Y. 41, 64 N.Y. (N.Y.S.) 41, 1876 N.Y. LEXIS 28 (N.Y. 1876).

The maker of a note which a bank indorsed and afterward paid, though he has a deposit in the bank larger than the note, does not have a setoff to a judgment on the note, although the holder of the note disregarded his request that collaterals held for his benefit should be availed of, and transferred to the assignee of the indorsing bank. Munger v Albany City Nat'l Bank, 85 N.Y. 580, 85 N.Y. (N.Y.S.) 580, 1881 N.Y. LEXIS 127 (N.Y. 1881).

In an action by the assignee of a non-negotiable certificate of deposit against the issuing bank, the pleading was sufficient on the assigned claim as well as on a negotiable instrument, although technically, further facts should have been alleged. State Bank v Central Mercantile Bank, 248 N.Y. 428, 162 N.E. 475, 248 N.Y. (N.Y.S.) 428, 1928 N.Y. LEXIS 1283 (N.Y. 1928).

In an action by the assignee of a draft, the debtor cannot offset a note of the assignor, which, though made and delivered before the assignment, did not mature until after such assignment; such note not yet matured is not a defense or counterclaim "existing" against the transferor at the time of the assignment within the meaning of Personal Property Law, § 41. Michigan Sav. Bank v Miller, 110 A.D. 670, 96 N.Y.S. 568, 1906 N.Y. App. Div. LEXIS 45 (N.Y. App. Div.), aff'd, 186 N.Y. 606, 79 N.E. 1111, 186 N.Y. (N.Y.S.) 606, 1906 N.Y. LEXIS 1314 (N.Y. 1906).

Where defendant sold skins to plaintiff's assignor and purchased fur coats from the latter, trade acceptances made by the assignor could not be set up by way of counterclaim against the assignee where they did not mature until more than a month after defendant received notice of

the assignment. Golden v D. R. Paskie & Co., 205 A.D. 610, 200 N.Y.S. 123, 1923 N.Y. App. Div. LEXIS 5096 (N.Y. App. Div. 1923).

In action by subcontractor on notes made by property owner, owner's counterclaim based on assignment of general contractor's claim against subcontractor for delay in performance of subcontract, was sufficient. Port Chester Electrical Constr. Corp. v Hastings Terraces, Inc., 284 A.D. 966, 134 N.Y.S.2d 656, 1954 N.Y. App. Div. LEXIS 4260 (N.Y. App. Div. 1954).

A counterclaim in an action upon a promissory note must allege that the note was transferred to plaintiff after maturity. Roldan v Power, 35 N.Y.S. 697, 14 Misc. 480, 1895 N.Y. Misc. LEXIS 912 (N.Y. Super. Ct. 1895).

Where payee of note transferred it to a bank before due, and it was not paid when due, and he took it up and then transferred it to another, the last transferee took it subject to counterclaim. Woods v Sizer, 169 N.Y.S. 86, 102 Misc. 453, 1918 N.Y. Misc. LEXIS 756 (N.Y. Sup. Ct. 1918), aff'd, 187 A.D. 913, 173 N.Y.S. 927, 1919 N.Y. App. Div. LEXIS 5789 (N.Y. App. Div. 1919).

In an action on a trade acceptance, defendant, maker, could counterclaim for damages suffered by reason of the willful and intentional breach of a contract of sale, between plaintiff's assignor, as seller, and defendant, as buyer. Forsstrom v Utility Steel Co., 229 N.Y.S. 626, 132 Misc. 409, 1928 N.Y. Misc. LEXIS 912 (N.Y. App. Term 1928).

In action against drawee of bills of exchange, drawee may counterclaim that payee never acquired bills for value but was mere agent for collection for drawer allegedly indebted to drawee. Yokohama Specie Bank, Ltd., New York Agency v Milbert Importing Corp., 44 N.Y.S.2d 71, 182 Misc. 281, 1943 N.Y. Misc. LEXIS 2387 (N.Y. Sup. Ct. 1943).

In action by assignee against acceptor of trade acceptance, defendant could counterclaim for damages for breach of warranty, the assignor bank having merely discounted the acceptance. Sobel v Engels, 188 N.Y.S. 436, 1921 N.Y. Misc. LEXIS 1378 (N.Y. App. Term 1921).

Where old bank assigned its assets to new bank which accepted renewal note of old bank's debtor and depositor, indorser of renewal note could set off maker's deposit in new bank. Meeker v Halsey, 87 F.2d 299, 1937 U.S. App. LEXIS 2483 (2d Cir. N.Y. 1937).

A counterclaim on a note when it does not appear when the defendant became its owner is insufficient in an action on contract. Moody v Steele.

iii. Particular Applications

152. Assigned certificate of bank deposit

In an action by the assignee of a non-negotiable certificate of deposit against the issuing bank, latter, unless estopped by conduct, could interpose a counterclaim against the depositor. State Bank v Central Mercantile Bank, 248 N.Y. 428, 162 N.E. 475, 248 N.Y. (N.Y.S.) 428, 1928 N.Y. LEXIS 1283 (N.Y. 1928).

153. Construction contracts

In an action by the assignees of a contractor for work done under a contract, in which there is nothing making the defendants liable for the wages of laborers employed by the contractor, the defendants cannot interpose a counterclaim for wages due to the laborers, but they may be allowed for actual payments of board bills of the laborers, made at the contractor's request. Senear v Woods, 74 N.Y. 615, 74 N.Y. (N.Y.S.) 615, 1878 N.Y. LEXIS 808 (N.Y. 1878).

154. Matrimonial actions and counterclaims

In action for separation, court would not entertain counterclaim for damages against wife's parent for joining in fraudulent representation that wife was willing to bear children and that she was free to enter into marital relations. Pilot v Pilot, 6 Misc. 2d 651, 163 N.Y.S.2d 261, 1957

N.Y. Misc. LEXIS 3201 (N.Y. Sup. Ct.), aff'd, 4 A.D.2d 1020, 169 N.Y.S.2d 415 (N.Y. App. Div. 1st Dep't 1957).

155. Mortgage assignment

The assignment of a mortgage is subject to every counterclaim which might have been set up against the assignor; one of two defendants may set up a counterclaim against plaintiff's assignor. American Guild of Richmond v Damon, 186 N.Y. 360, 78 N.E. 1081, 186 N.Y. (N.Y.S.) 360, 1906 N.Y. LEXIS 1121 (N.Y. 1906).

Assignee takes mortgage subject to all equities existing between the original parties. Sherwood v Fred O. H. Fincke Co., 196 A.D. 97, 187 N.Y.S. 755, 1921 N.Y. App. Div. LEXIS 5488 (N.Y. App. Div. 1921).

156. —Foreclosure of assigned mortgage

The purchaser of premises subject to a mortgage, and who has endeavored before it was due to have a debt to him of the holders who were solvent applied thereon, may have his debt set off, upon foreclosure of the mortgage by the assignees thereof for the benefit of creditors, and does not lose the right of set-off because of having procured a judgment for his debt against the assignors, execution upon it having been returned unsatisfied. Richards v La Tourette, 119 N.Y. 54, 23 N.E. 531, 119 N.Y. (N.Y.S.) 54, 1890 N.Y. LEXIS 1058 (N.Y. 1890).

E. Counterclaim Involving Representative

157. Generally

Claim held by one in his own right cannot be offset against his liability as a fiduciary. Allaire v Silberberg, 210 A.D. 109, 205 N.Y.S. 634, 1924 N.Y. App. Div. LEXIS 6667 (N.Y. App. Div. 1924).

Where defendant’s counterclaim raises an issue between plaintiff, other defendants and himself, section applies both at law and in equity. Duffy v Credit Discount Corp., 225 A.D. 673, 231 N.Y.S. 99, 1928 N.Y. App. Div. LEXIS 9010 (N.Y. App. Div. 1928).

An equitable set-off is not available to a fiduciary who has misapplied trust funds. Irving Trust Co. v Gunder, 234 A.D. 252, 254 N.Y.S. 630, 1932 N.Y. App. Div. LEXIS 10403 (N.Y. App. Div. 1932).

In an action of replevin against a receiver of an insolvent firm to retake goods alleged to have been obtained by the vendors by fraud, a counterclaim that sheriff did not seize certain goods but did take other goods which never belonged to the vendors is bad. Marshall v Friend, 71 N.Y.S. 221, 35 Misc. 101, 1901 N.Y. Misc. LEXIS 298 (N.Y. Sup. Ct.), aff'd, 66 A.D. 624, 73 N.Y.S. 1140, 1901 N.Y. App. Div. LEXIS 2632 (N.Y. App. Div. 1901).

Counterclaim is proper only in actions which decedent might have prosecuted. Nunns v Begun, 235 N.Y.S. 675, 134 Misc. 470, 1929 N.Y. Misc. LEXIS 1150 (N.Y. Mun. Ct. 1929).

A note due and payable after death of plaintiff’s intestate could not be set up as a counterclaim where the claim sued upon was due and payable before decedent’s death, but otherwise where the claim did not become due until after decedent’s death. Nunns v Begun, 235 N.Y.S. 675, 134 Misc. 470, 1929 N.Y. Misc. LEXIS 1150 (N.Y. Mun. Ct. 1929).

158. Counterclaim arising after death of decedent

Counterclaim arising after death of decedent was not within CPA § 268. In re Britton's Estate, 71 N.Y.S.2d 272, 1947 N.Y. Misc. LEXIS 2543 (N.Y. Sur. Ct. 1947).

159. Fraudulent or preferential transfers as counterclaims

In action to set aside transfer by one defendant to another defendant without notice to former’s creditors, counterclaim by trustee in bankruptcy that plaintiff’s lien and levy on property of second defendant were void, on ground that latter was then insolvent, was maintainable. Schiff v

Alvee Sportswear Co., 106 N.Y.S.2d 198, 199 Misc. 368, 1951 N.Y. Misc. LEXIS 2023 (N.Y. Sup. Ct.), aff'd, 279 A.D. 749, 108 N.Y.S.2d 665, 1951 N.Y. App. Div. LEXIS 3642 (N.Y. App. Div. 1951).

If an attorney sues an administrator for services rendered the intestate it is good set-off that the attorney has fraudulently transferred property of the intestate obtained under the employment, dating the instrument of transfer back to the time when the deceased was living. Lerche v Brasher, 37 Hun 385 (N.Y.), rev'd, 104 N.Y. 157, 10 N.E. 58, 104 N.Y. (N.Y.S.) 157, 4 N.Y. St. 335, 1887 N.Y. LEXIS 578 (N.Y. 1887).

160. Offsets against legacies

An executor or administrator has the right to retain as against a legatee or distributee sufficient to discharge the debt or obligation of the legatee or distributee, to decedent, paying merely the balance, if any remains, or if there is not sufficient to pay the debt or obligation, to retain what is due such legatee or distributee to apply upon such debt or obligation. In re Bradley's Estate, 203 N.Y.S. 490, 122 Misc. 184, 1924 N.Y. Misc. LEXIS 715 (N.Y. Sur. Ct. 1924).

161. Counterclaims against foreclosure of mortgages

On a foreclosure of a mortgage made by a testator his representatives may counterclaim for injury done to the lands by the mortgagee by flooding the same with waters from a dam, whereby the value was reduced. Such fact, if true, is available to diminish or defeat the plaintiff’s claim and is connected with the subject-matter of the action. Ft. Miller Pulp & Paper Co. v Bratt, 119 A.D. 685, 104 N.Y.S. 350, 1907 N.Y. App. Div. LEXIS 3224 (N.Y. App. Div. 1907).

A note held by the administrator of a mortgagor may be interposed as a counterclaim in an action by the administrator of the mortgagee to foreclose the mortgage. Thornton v Moore, 56 N.Y.S. 1100, 26 Misc. 120, 1899 N.Y. Misc. LEXIS 1171 (N.Y. County Ct.), aff'd, 41 A.D. 617, 58 N.Y.S. 1150, 1899 N.Y. App. Div. LEXIS 1469 (N.Y. App. Div. 1899).

162. Existence of claim at death

Where action of personal representative was for breach of contract after death of deceased, defendant could set up a counterclaim for a breach occurring after death of deceased. Griggs v Renault Selling Branch, Inc., 179 A.D. 845, 167 N.Y.S. 355, 1917 N.Y. App. Div. LEXIS 9388 (N.Y. App. Div. 1917).

Where bank was owner and holder of depositor's demand note for amount greater than depositor's account at date of depositor's death, bank had right to set off balance in checking account against indebtedness so owing, despite his death and claim of waiver or estoppel by bank's payment of interest on account after such death. In re Dimon's Estate, 32 N.Y.S.2d 239, 1941 N.Y. Misc. LEXIS 2524 (N.Y. Sur. Ct. 1941).

The counterclaim must have been in existence at the testator's death and cannot be based upon causes of action arising or acquired by defendant thereafter. Wakeman v Everett, 41 Hun 278, 2 N.Y. St. 643 (N.Y.), aff'd, 110 N.Y. 675, 18 N.E. 481, 110 N.Y. (N.Y.S.) 675, 18 N.Y. St. 1029, 1888 N.Y. LEXIS 983 (N.Y. 1888).

163. Counterclaim against representative individually

A conversion by executors of stocks and securities deposited with a testator, cannot be set off against their action for money loaned by the testator to defendant. Wakeman v Everett, 41 Hun 278, 2 N.Y. St. 643 (N.Y.), aff'd, 110 N.Y. 675, 18 N.E. 481, 110 N.Y. (N.Y.S.) 675, 18 N.Y. St. 1029, 1888 N.Y. LEXIS 983 (N.Y. 1888).

164. —Individually and as representative

In action by plaintiff individually and as executor, to dissolve corporation and distribute assets, cause of action for accounting by plaintiff as executor for moneys belonging to plaintiff's sisters and intrusted to deceased for investment held good counterclaim. Fliess v Hoy, 150 A.D. 555, 135 N.Y.S. 44, 1912 N.Y. App. Div. LEXIS 7164 (N.Y. App. Div. 1912).

Where an administrator sues in his representative capacity, but the estate has merged with his individual ownership and the title to the claim upon which he sues has become vested in him individually, a claim against him in his individual capacity may be interposed as a counterclaim. Anderson v Carlson, 201 A.D. 260, 194 N.Y.S. 112, 1922 N.Y. App. Div. LEXIS 6298 (N.Y. App. Div. 1922).

165. Counterclaim to death action under limited letters

In an action brought by an administrator, whose authority was limited by his letters of administration to the prosecution of an action pursuant to § 130 of the Decedent Estate Law to recover for the death of his intestate as the result of the collision of an automobile which he was driving with a motor bus belonging to the defendant in that action, a counterclaim for damage to the motor bus was improperly set up. No claim of the defendant against the general estate of the decedent could diminish or defeat a recovery by the administrator. Central New York Coach Lines, Inc. v Syracuse Herald Co., 277 N.Y. 110, 13 N.E.2d 598, 277 N.Y. (N.Y.S.) 110, 1938 N.Y. LEXIS 959 (N.Y. 1938).

166. Rejected claim as counterclaim

In an action by an executor or administrator, defendant may set up as a counterclaim a demand against the decedent belonging at the time of his death to the defendant, though his claim had been rejected and he did not bring suit thereon within three months, under Surrogate's Court Act, § 211. Carpenter v Newland, 156 N.Y.S. 438, 92 Misc. 596, 1915 N.Y. Misc. LEXIS 1152 (N.Y. Sup. Ct. 1915).

167. Particular counterclaims

In an action by the plaintiff, as administratrix of her husband and son to recover money received by defendant from the state, for damages in appropriating for public purposes land of her husband, who died before the appraisal of damages, leaving his son as sole heir, held, that the

defendant could not set up as a counterclaim a note held by him against the plaintiff's husband. Ballou v Ballou, 78 N.Y. 325, 78 N.Y. (N.Y.S.) 325, 1879 N.Y. LEXIS 915 (N.Y. 1879).

In an action by an executor to recover the purchase price of property of the estate sold by him on credit, the defendant could not counterclaim an unpaid note of plaintiff's decedent held by him. Thompson v Whitmarsh, 100 N.Y. 35, 2 N.E. 273, 100 N.Y. (N.Y.S.) 35, 1885 N.Y. LEXIS 939 (N.Y. 1885).

In an action to recover personal property delivered to defendants by plaintiff's testatrix, defendants could set up as a counterclaim, a parol agreement that they were to have the property at the death of testatrix. Adenaw v Piffard, 137 A.D. 470, 121 N.Y.S. 825, 1910 N.Y. App. Div. LEXIS 708 (N.Y. App. Div. 1910), rev'd, 202 N.Y. 122, 95 N.E. 555, 202 N.Y. (N.Y.S.) 122, 1911 N.Y. LEXIS 997 (N.Y. 1911).

168. Under old code

The law of set-off in force when an action is commenced is to govern, though, pending the action, the law is changed. In an action against a bank, commenced prior to the going into effect of Code of Civil Procedure, by the personal representatives of a deceased customer, to recover a deposit which was due and payable to the deceased in his lifetime, held, that the defendant could not, as a matter of law, and in the absence of facts entitling it to equitable relief, set off a claim against the deceased which did not become due until after his death. A demand, to be set off in such an action, must have been due and payable from the decedent in his lifetime. Merritt v Seaman, 6 N.Y. 168, 6 N.Y. (N.Y.S.) 168, 1852 N.Y. LEXIS 52 (N.Y. 1852).

See Jordan v National Shoe & Leather Bank, 74 N.Y. 467, 74 N.Y. (N.Y.S.) 467, 1878 N.Y. LEXIS 768 (N.Y. 1878).

F. New Parties in Counterclaim

i. In General

169. Generally

CPA § 271 was taken from the English Practice Act and was to be construed in conformity with the construction placed upon it by the English courts. Williams v Edward De V. Tompkins Inc., 208 A.D. 574, 204 N.Y.S. 168, 1924 N.Y. App. Div. LEXIS 5093 (N.Y. App. Div. 1924).

CPA § 271 was primarily intended to permit a joinder of parties defendant only in contract actions where there was a joint liability or in some tort cases where the liability arose in the same acts of fraud or conspiracy, or under other circumstances where the proof against one defendant would have been the same as against another. Warren v May, 243 A.D. 620, 276 N.Y.S. 520, 1935 N.Y. App. Div. LEXIS 7365 (N.Y. App. Div. 1935).

170. Questions between defendant, plaintiff and others

A defendant may not join as parties those liable separately from the plaintiff; and where alternative relief is asked against the persons sought to be brought in, they are not persons liable along with the plaintiff within the purview of the statute. Williams v Edward De V. Tompkins Inc., 208 A.D. 574, 204 N.Y.S. 168, 1924 N.Y. App. Div. LEXIS 5093 (N.Y. App. Div. 1924).

CPA § 271 contemplated a joint cause of action against the plaintiff and the parties sought to be added. National City Bank v Holzworth, 231 A.D. 688, 248 N.Y.S. 584, 1931 N.Y. App. Div. LEXIS 16139 (N.Y. App. Div. 1931).

To invoke the provisions of CPA § 271 this section a defendant had to state facts showing a valid counterclaim against both plaintiff and the defendant brought in. Federal Credit Bureau v Narice Holding Corp., 239 N.Y.S. 244, 136 Misc. 37, 1930 N.Y. Misc. LEXIS 972 (N.Y. City Ct. 1930).

A counterclaim did not come within CPA § 271, where no joint theory of obligation against the plaintiff and the third party could possibly be spelled out of the facts. Sport-Craft, Inc. v Garment

Center Capitol, Inc., 3 N.Y.S.2d 321, 167 Misc. 425, 1938 N.Y. Misc. LEXIS 1426 (N.Y. Sup. Ct.), aff'd, 254 A.D. 669, 4 N.Y.S.2d 989, 1938 N.Y. App. Div. LEXIS 7041 (N.Y. App. Div. 1938).

A counterclaim may be interposed where it raises questions with "the plaintiff along with any other persons." Such a counterclaim is not authorized where it involves a controversy between the defendants only. Csicsics v Hallay, 10 N.Y.S.2d 440, 170 Misc. 364, 1939 N.Y. Misc. LEXIS 1584 (N.Y. Sup. Ct. 1939).

In summary proceeding for eviction, defendant could interpose an equitable defense to disprove landlord's right to possession but could not counterclaim for money damages impleading third persons. Krutzeck v Kruse, 6 Misc. 2d 718, 165 N.Y.S.2d 244, 1957 N.Y. Misc. LEXIS 2751 (N.Y. County Ct. 1957).

Where a defendant in a counterclaim based upon two contracts did not raise any questions between the defendant and the plaintiff along with the additional defendant, such counterclaim was dismissed since CPA § 271 was not intended to be operative where the liability was joint and several and where different proof was required to establish the cause of action against the party brought in. Beaunit Mills, Inc. v Tanbro Fabrics Corp., 6 Misc. 2d 878, 160 N.Y.S.2d 644, 1957 N.Y. Misc. LEXIS 3474 (N.Y. Sup. Ct. 1957).

Counterclaim which raises questions between defendant and plaintiff and another person not a party to the action was not authorized by CPA § 271. Bennett Excavators Corp. v Lasker Goldman Corp., 15 Misc. 2d 802, 181 N.Y.S.2d 864, 1958 N.Y. Misc. LEXIS 2526 (N.Y. Sup. Ct. 1958).

Although president of corporation, individually, was not a plaintiff in action brought by corporation, defendants could make him a party on a counterclaim if facts are alleged upon which affirmative relief on counterclaim could be granted against plaintiff corporation as well as against him individually. Renis Fabrics Corp. v Millworth Converting Corp., 25 Misc. 2d 280, 201 N.Y.S.2d 13, 1960 N.Y. Misc. LEXIS 3273 (N.Y. Sup. Ct. 1960).

Defendant may not plead counterclaim against plaintiff and “new party defendant” who is in no way concerned with cause of action contained in complaint. Scheinberg v Churnin, 132 N.Y.S.2d 612, 1953 N.Y. Misc. LEXIS 2709 (N.Y. Sup. Ct. 1953).

171. Questions between defendant and third persons only

Separate cause of action against named defendant, raising no issue affecting plaintiff, was improper. Hillary Holding Corp. v Brooklyn Jockey Club, 273 A.D. 538, 78 N.Y.S.2d 151, 1948 N.Y. App. Div. LEXIS 4630 (N.Y. App. Div.), reh'g denied, 273 A.D. 996, 79 N.Y.S.2d 868, 1948 N.Y. App. Div. LEXIS 5661 (N.Y. App. Div. 1948).

Under CPA § 271, parties sought to be impleaded could not be brought in unless the proposed counterclaim was against the plaintiff along with such new party. Humphrey v Conroy Motor Corp., 298 N.Y.S. 330, 164 Misc. 51, 1937 N.Y. Misc. LEXIS 1725 (N.Y. Sup. Ct. 1937).

In order to invoke CPA § 271, a defendant had to state facts showing a valid counterclaim against the plaintiff in the action as well as against the defendant sought to be brought in. Mortgage Com. v Hill, 2 N.Y.S.2d 543, 166 Misc. 794, 1938 N.Y. Misc. LEXIS 1313 (N.Y. Sup. Ct. 1938).

In action by infant, through her guardian ad litem, to rescind for infancy contract to purchase automobile, counterclaim by seller against guardian ad litem, infant’s father, for misrepresenting infant’s age, will not lie. Scalone v Talley Motors, Inc., 2 Misc. 2d 13, 149 N.Y.S.2d 574, 1956 N.Y. Misc. LEXIS 2272 (N.Y. Sup. Ct. 1956), modified, 3 A.D.2d 674, 158 N.Y.S.2d 615, 1957 N.Y. App. Div. LEXIS 6681 (N.Y. App. Div. 2d Dep't 1957).

Where defendant brings in new party by interposing counterclaim against plaintiff and that party, he can not thereafter interpose a separate counterclaim against the new party alone, which does not allege joint liability with the original plaintiff, even though the claim arose out of the same series of transactions. John D. Quinn, Inc. v Inspiration Enterprises, Inc., 23 Misc. 2d 433, 200 N.Y.S.2d 253, 1960 N.Y. Misc. LEXIS 3684 (N.Y. Sup. Ct. 1960).

Counterclaim raising question only between defendant and third person sought to be impleaded, is unauthorized. Kail v Cedric Realty Co., 63 N.Y.S.2d 461, 1946 N.Y. Misc. LEXIS 2435 (N.Y. Sup. Ct. 1946).

172. English cases

Since CPA § 271 was derived from the English act, English cases could be used in its construction. Williams v Edward De V. Tompkins Inc., 208 A.D. 574, 204 N.Y.S. 168, 1924 N.Y. App. Div. LEXIS 5093 (N.Y. App. Div. 1924).

ii. Pleading and Procedure

173. Generally

Counterclaim must assert cause of action against party plaintiff, and that if counterclaim be not properly interposed against plaintiff, it is not proper as to others. Ruzicka v Rager, 305 N.Y. 191, 111 N.E.2d 878, 305 N.Y. (N.Y.S.) 191, 1953 N.Y. LEXIS 824 (N.Y.), reh'g denied, 305 N.Y. 798, 113 N.E.2d 306, 305 N.Y. (N.Y.S.) 798, 1953 N.Y. LEXIS 1306 (N.Y. 1953).

Under CPA §§ 237 (Rule 320 herein), 263 (§ 3012(a) herein), 271, a motion for preference was prematurely made where a surety company, against which defendants set up a cause of action as an alternative to their counterclaim against plaintiffs, had neither replied nor appeared and its time to do so had not expired. Gettinger v Glasser, 204 A.D. 828, 199 N.Y.S. 43, 1923 N.Y. App. Div. LEXIS 9582 (N.Y. App. Div. 1923).

In action for money lent, defendant may counterclaim on joint agreement by plaintiff and another with defendant to pay for his legal services, though cross-claim was mislabeled third-party complaint. Hirsch v Schiffman, 101 N.Y.S.2d 913, 199 Misc. 883, 1950 N.Y. Misc. LEXIS 2357 (N.Y. Sup. Ct. 1950).

Defendant impleaded under CPA § 271 could have cross claimed against plaintiff. Bennett Excavators Corp. v Lasker Goldman Corp., 15 Misc. 2d 802, 181 N.Y.S.2d 864, 1958 N.Y. Misc. LEXIS 2526 (N.Y. Sup. Ct. 1958).

Original defendant is not “plaintiff” as to additional defendant, though former pleaded counterclaim against latter and plaintiff, so as to entitle additional defendant to require security for costs under CPA § 1522 (§ 8501 herein). Kendall v Lecody, 77 N.Y.S.2d 178, 1947 N.Y. Misc. LEXIS 3675 (N.Y. Sup. Ct. 1947).

Characterization and description of parties under CPA § 271 as third-party complainant and third-party defendant was improper. Fass v Ellen, 94 N.Y.S.2d 746, 1949 N.Y. Misc. LEXIS 3129 (N.Y. Sup. Ct. 1949).

174. Motion to implead

An order granting a motion to strike out a defendant impleaded under CPA § 271 did not establish the law of the case on a subsequent motion by the proposed party to be brought into the action under section 193. O'Leary v Grant, 255 A.D. 517, 8 N.Y.S.2d 196, 1938 N.Y. App. Div. LEXIS 4791 (N.Y. App. Div. 1938).

175. Motion by defendant to dismiss

Defendant brought in under CPA § 271 could not move under RCP Rule 109 (Rule 3211 herein) to dismiss counterclaims against plaintiff which did not affect him. See Stokes v Ottoman American Development Co., 223 A.D. 739, 227 N.Y.S. 265, 1928 N.Y. App. Div. LEXIS 6676 (N.Y. App. Div. 1928).

Counterclaim failing to raise issues required was stricken. Jacrov Amusement Co. v Fischel, 229 N.Y.S. 539, 132 Misc. 529, 1928 N.Y. Misc. LEXIS 903 (N.Y. Sup. Ct. 1928).

Motion to strike counterclaim by defendant brought in under CPA § 271, granted, allegations of facts being insufficient. Federal Credit Bureau v Narice Holding Corp., 239 N.Y.S. 244, 136 Misc. 37, 1930 N.Y. Misc. LEXIS 972 (N.Y. City Ct. 1930).

A defendant brought in pursuant to CPA § 271 could not move under RCP rule 109 (Rule 3211 herein) to dismiss a counterclaim for failure to state a cause of action, nor could his motion be considered as made under rule 112, since he had served no reply. Leiter v Spingarn, 244 N.Y.S. 21, 137 Misc. 381, 1930 N.Y. Misc. LEXIS 1412 (N.Y. App. Term 1930).

A defendant could move to dismiss an unauthorized counterclaim, notwithstanding Rule 109 of the Rules of Civil Practice (Rule 3211 herein) providing for the making of such a motion by the plaintiff. Csicsics v Hallay, 10 N.Y.S.2d 440, 170 Misc. 364, 1939 N.Y. Misc. LEXIS 1584 (N.Y. Sup. Ct. 1939).

176. Payment of costs as condition of amendment

Amendment of answer to set up defenses or counterclaims raising questions between defendant and plaintiff along with another to be brought in, permitted on payment of costs. Jiminez Export Corp. v Cia De Navegacion Veritas, S. A., 276 A.D. 1078, 97 N.Y.S.2d 186, 1950 N.Y. App. Div. LEXIS 5823 (N.Y. App. Div. 1950).

iii. Particular Applications

177. Assignor of contract in litigation

It is proper, in a counterclaim arising out of the breach of a contract, in an action by the second assignee of the original contractors, to implead the original contractors. May v Haight, 218 A.D. 90, 218 N.Y.S. 241, 1926 N.Y. App. Div. LEXIS 5865 (N.Y. App. Div. 1926).

A counterclaim is allowable which arises out of the cause of action in the complaint although it brings in and seeks an accounting against the plaintiff’s assignors for securities for loans

advanced to them and does not warrant affirmative relief against the plaintiff. Smith v Triangle Silk Mfg. Co., 222 N.Y.S. 353, 129 Misc. 669, 1927 N.Y. Misc. LEXIS 901 (N.Y. Sup. Ct. 1927).

In action by assignee of claim arising out of contract between defendant and plaintiff's assignor, where prior to such assignment and without notice thereof defendant had claim against plaintiff's assignor arising out of different transaction, defendant may counterclaim on such claim against said assignor, and after plaintiff's assignor is served with defendant's answer become codefendant in action. Frank v Amicale Yarns, Inc., 148 N.Y.S.2d 727, 1956 N.Y. Misc. LEXIS 2316 (N.Y. Sup. Ct. 1956).

178. Automobile accidents, negligence

In an action for personal injuries in an automobile accident brought jointly by the one injured and his insurer by virtue of a pro tanto assignment of the cause of action following settlement of the insurer's liability under its policy, held defendant entitled to interpose a counterclaim for damages to his automobile. Gilboy v Lennon, 193 N.Y.S. 606, 118 Misc. 467, 1922 N.Y. Misc. LEXIS 1141 (N.Y. Sup. Ct. 1922).

Where complaint alleged that plaintiff, while a passenger in an automobile, was injured in a collision with a bus owned by the defendant, counterclaims which charged the driver and owner of the automobile with responsibility for the collision but did not seek any affirmative relief from them, and counterclaims which demanded that the complaint be dismissed but did not mention the plaintiff, were insufficient. Tauro v Queens-Nassau Transit Lines, Inc., 6 N.Y.S.2d 176, 168 Misc. 879, 1938 N.Y. Misc. LEXIS 1813 (N.Y. Sup. Ct. 1938).

Where collision insurer paid collision insurance to insured, took assignment and then sued owner of other car in collision, defendant could not implead insured and counterclaim against him for damages in accident. Travelers Ins. Co. v Foeldes, 80 N.Y.S.2d 627, 192 Misc. 613, 1948 N.Y. Misc. LEXIS 2632 (N.Y. County Ct. 1948).

Where common employee of two corporate employers sues one of them for personal injuries sustained while riding in car owned by both employers, employer sued may not implead other employer. New Amsterdam Casualty Co. v Kirschenbaum, 85 N.Y.S.2d 866, 194 Misc. 104, 1948 N.Y. Misc. LEXIS 3869 (N.Y. Sup. Ct. 1948).

179. Conspiracy to defraud

Where a sheriff, sued because of his alleged negligent failure to attach certain securities belonging to plaintiff and in possession of a bank, set up in a counterclaim facts tending to show a conspiracy between such bank and a third person whereby the securities were fraudulently taken from the bank and without the state so as to prevent attachment, such counterclaim raised no issue between plaintiff and defendant along with the said bank, so as to warrant making the bank a party defendant in this action. Kelvin Engineering Co. v Knott, 212 A.D. 413, 208 N.Y.S. 729, 1925 N.Y. App. Div. LEXIS 9471 (N.Y. App. Div. 1925).

Parties charged jointly with plaintiff with conspiracy to defraud defendant were properly brought in by his counterclaim for damages and it was error to strike out the counterclaim. George W. Woods, Inc. v Althauser, 212 A.D. 618, 209 N.Y.S. 416, 1925 N.Y. App. Div. LEXIS 9517 (N.Y. App. Div. 1925).

In action on a contract alleged to have been procured through conspiracy and false representations, co-conspirators were properly brought in. Galloway v Wolfe, 232 A.D. 163, 249 N.Y.S. 608, 1931 N.Y. App. Div. LEXIS 13759 (N.Y. App. Div. 1931).

180. Insurance

In an action for work, labor and services wherein the defendants counterclaimed for the value of goods furnished to plaintiffs from which they were to manufacture dresses, but which were lost while in plaintiff's possession, defendants were entitled, under their allegation that the goods in question were stolen from the premises of the plaintiffs under circumstances such as to make a

named insurance company liable to defendants on a policy covering such goods, to have such insurance company joined as a party defendant in the action. Gettinger v Glasser, 204 A.D. 829, 199 N.Y.S. 41, 1923 N.Y. App. Div. LEXIS 9583 (N.Y. App. Div. 1923), limited, John D. Quinn, Inc. v Inspiration Enterprises, Inc., 23 Misc. 2d 433, 200 N.Y.S.2d 253, 1960 N.Y. Misc. LEXIS 3684 (N.Y. Sup. Ct. 1960).

Where defendant in an action for work, labor and services in manufacturing raw material into garments, answered by setting up, inter alia, an alleged counterclaim against an insurance company, impleaded by ex parte order on his application, based upon the alleged liability of such company to him under a policy of insurance issued in his name covering the goods in suit, which were stolen from his premises, the insurance company's motion to strike its name as defendant was improperly denied, the alleged counterclaim not having raised any questions between himself and plaintiff along with any other persons, within the meaning of this section. Youngman v New York Indem. Co., 199 N.Y.S. 420, 120 Misc. 687, 1923 N.Y. Misc. LEXIS 967 (N.Y. App. Term 1923).

In action by assignee of life insurance policies to collect the cash surrender value, the defendant insurer, under this section, brings in by way of counterclaim four defendants, claimed beneficiaries under a trust prior to the assignment which took away the right of the insured to change the beneficiaries, and claims that the assignments are void and unenforceable. But a similar counterclaim on behalf of the defendant insured and the latter's demand for damages are not sustainable, since the plaintiff assignee and defendant insurer will contest these issues, and since the insured cannot recover anything from the plaintiff. Union Trust Co. v Prudential Ins. Co., 282 N.Y.S. 130, 156 Misc. 355, 1935 N.Y. Misc. LEXIS 1399 (N.Y. Sup. Ct. 1935).

181. Marital rights

In action for separation, court would not entertain counterclaim for damages against wife's parent for joining in fraudulent representation that wife was willing to bear children and that she was free to enter into marital relations. Pilot v Pilot, 6 Misc. 2d 651, 163 N.Y.S.2d 261, 1957

N.Y. Misc. LEXIS 3201 (N.Y. Sup. Ct.), aff'd, 4 A.D.2d 1020, 169 N.Y.S.2d 415 (N.Y. App. Div. 1st Dep't 1957).

182. Mortgages, foreclosure

Counterclaim in action to foreclose a mortgage was proper, since it raised a question between the mortgagor and the other defendants. Waring-Laconia Co. v No. 964 Grand Concourse & Boulevard, Inc., 232 N.Y.S. 659, 233 N.Y.S. 316, 133 Misc. 577, 1929 N.Y. Misc. LEXIS 690 (N.Y. Sup. Ct. 1929).

In action for rent by mortgagee as purchaser at foreclosure against mortgagor and tenant, tenant's counterclaim alleging that tenant paid rent to mortgager who in turn paid it to another who in turn paid it to plaintiff held to raise questions between plaintiff and defendant and other new parties, barring dismissal of complaint. Dold Packing Corp. v N. L. Kaplan, Inc., 37 N.Y.S.2d 390, 1942 N.Y. Misc. LEXIS 2036 (N.Y. County Ct. 1942), aff'd, 265 A.D. 1032, 39 N.Y.S.2d 776, 1943 N.Y. App. Div. LEXIS 6709 (N.Y. App. Div. 1943).

Where plaintiff's action was based on mortgage entered into between plaintiff and defendant, and defendant's counterclaim was based on contract between him and another, latter was unnecessary party. Truman Homes, Inc. v Lane Holding Corp., 88 N.Y.S.2d 406, 1949 N.Y. Misc. LEXIS 2113 (N.Y. Sup. Ct. 1949).

183. Partnership

In action on note, by counterclaim and defense defendant may raise questions between himself and plaintiff, who were partners, along with impleaded defendant who was then accountant for partnership, involving confidential relationship. Zacher v Bogie, 84 N.Y.S.2d 404, 1948 N.Y. Misc. LEXIS 3589 (N.Y. Sup. Ct. 1948).

184. Stockholders

In an action involving the sale of shares of stock and the transfer of a certificate representing the same, a counterclaim against the plaintiff, together with another person, may properly be set forth in the answer. Davis v O'Callaghan, 255 A.D. 387, 7 N.Y.S.2d 629, 1938 N.Y. App. Div. LEXIS 4751 (N.Y. App. Div. 1938).

In stockholders' derivative action such action, counterclaim for relief not against plaintiffs or plaintiff but against person sought to be impleaded or against defendant corporation and such person, was unwarranted. Hall v Crailo Sweets, Inc., 29 N.Y.S.2d 381, 177 Misc. 120, 1941 N.Y. Misc. LEXIS 2081 (N.Y. Sup. Ct.), aff'd, 262 A.D. 866, 29 N.Y.S.2d 512, 1941 N.Y. App. Div. LEXIS 6313 (N.Y. App. Div. 1941).

In action by corporation against stockholder and former officer and director for accounting for funds wrongfully diverted, defendant cannot change nature of litigation to that of stockholder's derivative suit by counterclaim against plaintiff corporation along with its directors for mismanagement and for accounting and payment to defendant of his share of corporate income misappropriated. Orto Theatres Corp. v Newins, 138 N.Y.S.2d 550, 207 Misc. 414, 1955 N.Y. Misc. LEXIS 2641 (N.Y. Sup. Ct. 1955).

185. Trademarks, designs, unfair competition

Where dress fabric manufacturer obtained permission of nationally known concerns to use their symbols on dress fabrics, such manufacturer may, in action against it to enjoin such use, file counterclaim and name another violator as party defendant and obtain injunction against such party. Varsity Sportswear, Inc. v Princess Fabrics Co., 19 N.Y.S.2d 723, 174 Misc. 298, 1940 N.Y. Misc. LEXIS 1719 (N.Y. Sup. Ct. 1940).

186. Trusts

In action by certain beneficiaries of a trust agreement to compel the sole surviving trustee and his deceased cotrustees to account, plaintiffs were not entitled to orders striking out the wife of

the sole surviving trustee as an impleaded defendant, where impleaded defendant had a legal interest in the subject-matter, consisting of her dower in the real estate involved in the trust, and the counterclaim asserted by the sole surviving trustee “raises questions between himself and the plaintiffs, along with any other person.” O'Leary v Grant, 255 A.D. 517, 8 N.Y.S.2d 196, 1938 N.Y. App. Div. LEXIS 4791 (N.Y. App. Div. 1938).

187. Vendor and vendee

The vendor of a contract for the sale of realty may counterclaim against the assignee of his vendee, who sues the vendor for the down payment, for specific performance of the contract and may bring in said original vendee as a party defendant. Nasha Holding Corp. v Ridge Bldg. Corp., 221 A.D. 238, 223 N.Y.S. 223, 1927 N.Y. App. Div. LEXIS 6417 (N.Y. App. Div. 1927).

In an infant’s action to compel the repayment of a down payment on the purchase of real estate, the defendants cannot, by way of counterclaim, bring in new parties alleged to have been principals in the deal, as there is no joint obligation, and, hence, the section has no application. Zauderer v Market St. Long Beach Realty Corp., 218 N.Y.S. 669, 128 Misc. 364, 1926 N.Y. Misc. LEXIS 791 (N.Y. Sup. Ct. 1926), aff'd, 221 A.D. 760, 222 N.Y.S. 925, 1927 N.Y. App. Div. LEXIS 6625 (N.Y. App. Div. 1927).

188. Wills

In action to declare valid joint will executed by parents of plaintiff and all defendants and to declare invalid certain instruments changing terms of joint will, counterclaims by some defendants against codefendants and plaintiff to declare such instruments valid were proper and not merely converse of relief sought by plaintiff. Del Terzo v Del Terzo, 86 N.Y.S.2d 729, 1949 N.Y. Misc. LEXIS 1823 (N.Y. Sup. Ct. 1949).

189. Zoning

In action to enjoin the defendant property owners from violating a zoning ordinance of the plaintiff town, counterclaim interposed by defendants against the town may join the defendant town officials. Harrison v Sunny Ridge Builders, Inc., 8 N.Y.S.2d 632, 170 Misc. 161, 1938 N.Y. Misc. LEXIS 2227 (N.Y. Sup. Ct. 1938).

Research References & Practice Aids

Cross References:

This section referred to in CLS NYC Civil Ct Act §§ 408., 907.; CLS UCCA §§ 408., 907.; CLS UDCA §§ 408., 907.; CLS UJCA § 907.

Particularity of statements generally, CLS CPLR § 3013.

Statements, CLS CPLR § 3014.

Amended and supplemental pleadings, CLS CPLR Rule 3025.

Issues triable by a jury revealed before trial, CLS CPLR § 4101.

Demand and waiver of trial by jury; specification of issues, CLS CPLR § 4102.

Motion to dismiss, CLS CPLR Rule 3211.

Debts which may be proved against the estate, CLS Dr & Cr § 13.

Effect of transfer of claim or demand, CLS Gen Oblig § 13-105.

Service of answer on state or public corporation, CLS Lien § 63.

Federal Aspects:

Pleadings, generally, USCS Court Rules, Federal Rules of Civil Procedure, Rules 7 to 16 .

Defenses and objections, USCS Court Rules, Federal Rules of Civil Procedure, Rule 12.

Counterclaims and cross-claims, USCS Court Rules, Federal Rules of Civil Procedure, Rule 13.

Interpleader in United States District Courts, 28 USCS §§ 1335., 1397., 2361.

Set-offs in the United States Court of Federal Claims, 28 USCS § 1503.

Jurisprudences:

6 NY Jur 2d Article 78 and Related Proceedings § 271. .

23 NY Jur 2d Contribution, Indemnity, and Subrogation § 108. .

24 NY Jur 2d Cotenancy and Partition § 194. .

47A NY Jur 2d Domestic Relations § 1971. .

73 NY Jur 2d Judgments § 47. .

73A NY Jur 2d Jury §§ 20., 23. .

75 NY Jur 2d Liens § 86. .

84 NY Jur 2d Pleading §§ 4, 156, 157, 159, 163, 170, 171, 173— 178, 180, 183, 184, 195, 197.

86 NY Jur 2d Process and Papers § 1. .

97 NY Jur 2d Summary Judgment and Pretrial Motions to Dismiss § 148. .

105 NY Jur 2d Trial §§ 205., 212. .

8 Am Jur 2d, Automobiles and Highway Traffic §§ 943., 948.

9 Am Jur 2d, Bankruptcy §§ 662.– 678.

20 Am Jur 2d, Counterclaim, Recoupment, and Setoff §§ 5 et seq.

45 Am Jur 2d, Interpleader § 3.

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 254.

59 Am Jur 2d, Parties §§ 410.– 415.

61A Am Jur 2d, Pleading §§ 182.– 186.

75 Am Jur 2d, Trial §§ 11 et seq.

7C Am Jur Pl & Pr Forms (Rev), Counterclaim, Recoupment, and Setoff, Forms 1.– 3.

19B Am Jur Pl & Pr Forms (Rev), Pleading, Forms 134.– 146.

Law Reviews:

Cross-claims. 31 Brook. L. Rev. 110.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3019, Counterclaims and Cross-Claims.

3 Rohan, New York Civil Practice: EPTL ¶ 5-4.2; 7 Rohan, New York Civil Practice: EPTL ¶ 12-2.1, 12-2.2.

1 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 4.03; 2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 34.03; 3 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 38.02.

1 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 306.15, 307.08.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 6.01. Joinder of claims and consolidation of actions; joint trials.

CPLR Manual § 11.04. Determining the damages of a partially culpable claimant.

CPLR Manual § 19.08. Special rules governing pleading of specific issues.

CPLR Manual § 19.11. Counterclaims.

CPLR Manual § 19.12. Cross-claims.

CPLR Manual § 21.03. CPLR 3211 — Grounds for dismissal.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 3.05. Answering Complaint.

LexisNexis AnswerGuide New York Negligence § 5.29. Preparing Answer and Asserting Affirmative Defenses.

Annotations:

Claim barred by limitation as subject of setoff, counterclaim, recoupment, cross bill, or cross action. 1 ALR2d 630.

Claim for wrongful death as subject of counterclaim or cross action in negligence action against decedent's estate, and visa versa. 6 ALR2d 256.

Right of trustee to withhold trust payments from beneficiary to obtain payment of personal debt of latter to him, or to set off such debt against payment to beneficiary. 8 ALR2d 209.

Over payments of dividends on preferred stock as deductible in payment of dividends for later years. 10 ALR2d 241.

Cause of action in tort as counterclaim in tort action. 10 ALR2d 1167.

Claim of government against taxpayer (or one in privity with him) which is barred by lapse of time as available to defeat or diminish claim of taxpayer against government, or vice versa. 12 ALR2d 815.

Misrepresentation as to loan commitment on real estate as ground of action, counterclaim, or recession by vendee. 14 ALR2d 1347.

Jurisdiction and venue of Federal court, under Federal interpleader statutes, to entertain cross claim by one interpleaded party against another. 17 ALR2d 741.

Failure to assert matter as counterclaim as precluding assertion thereof in subsequent action, under federal rules or similar state rules or statutes. 22 A.L.R.2d 621.

Permissibility of counterclaim or cross action for divorce where plaintiff's action is one other than for divorce, separation, or annulment. 30 ALR2d 795.

Right of defendant in action for personal injury, property damage, or death, to bring in new parties as cross defendants to his counterclaim or the like. 46 ALR2d 1253.

Waiver or estoppel with respect to debtor's assertion, as setoff or counterclaim against assignee, of claim valid as against assignor. 51 ALR2d 886.

Independent venue requirements as to cross complaint or similar action by defendant seeking relief against a codefendant or third party. 100 ALR2d 693.

Right in equity suit to jury trial of counterclaim involving legal issue. 17 ALR3d 1321.

Tort claim against which period of statute of limitations has run as subject of setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident. 72 ALR3d 1065.

Who is an "opposing party" against whom a counterclaim can be filed under Federal Civil Procedure Rule 13 (a) or (b). 1 ALR Fed 815.

Claim as to which right to demand arbitration exists as subject of compulsory counterclaim under Federal Rules of Civil Procedure 13(a). 2 ALR Fed 1051.

Insured as indispensable or necessary party in federal court action between his liability insurer and actual or potential tort-claimants. 8 ALR Fed 738.

Joinder of counterclaim under Rule 13(a) or 13(b) of Federal Rules of Civil Procedure with jurisdictional defense under Rule 12(b), as waiver of such defense. 17 ALR Fed 388.

Claim for underlying debt as compulsory or permissive in action asserting creditor's civil liability under § 130(a) of Truth in Lending Act (15 USCS § 1640(a)) for violation of Act. 51 ALR Fed 509.

Effect of filing as separate federal action claim that would be compulsory counterclaim in pending federal action. 81 A.L.R. Fed. 240.

Matthew Bender's New York Checklists:

Checklist for Answering Complaint LexisNexis AnswerGuide New York Civil Litigation § 3.04.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR Form No. 3018:1 et seq.

Bender's Forms for the Civil Practice Form No. CPLR 3019:1 et seq.

LexisNexis Forms FORM 75-CPLR 3019:1.—Skeletal Form of Answer Setting Forth Counterclaims.

LexisNexis Forms FORM 75-CPLR 3019:10.—Answer of Third-Party Defendant Making Cross-Claim Against Some of Original Defendants.

LexisNexis Forms FORM 75-CPLR 3019:11.—Summons to Counterclaim Defendant.

LexisNexis Forms FORM 75-CPLR 3019:11A.—Summons to Cross-Claim Defendant.

LexisNexis Forms FORM 75-CPLR 3019:12.—Judgment in Favor of Defendant Upon Counterclaim for Cancellation of Mortgage and Damages.

LexisNexis Forms FORM 75-CPLR 3019:13.—Judgment Where Counterclaim for Less Than Plaintiff's Award.

LexisNexis Forms FORM 75-CPLR 3019:14.—Judgment Where Counterclaim Exceeds Plaintiff's Award.

LexisNexis Forms FORM 75-CPLR 3019:15.—CPLR 3019(d) Decretal Provision Counterclaim Dismissed.

LexisNexis Forms FORM 75-CPLR 3019:2.—Counterclaim Against Plaintiff and Plaintiff's Assignor Based Upon Breach of Contract by Assignor.

LexisNexis Forms FORM 75-CPLR 3019:2A.—Counterclaim by Landlord Against Tenant Assignor of Lease and Individual Guarantor for Lost Rent After Eviction of Tenant's Assignee.

LexisNexis Forms FORM 75-CPLR 3019:3.—Answer of Third-Party Defendant Containing Counterclaim Against Original Plaintiff.

LexisNexis Forms FORM 75-CPLR 3019:4.—Order to Show Cause to Strike Counterclaim Relating to Third Parties.

LexisNexis Forms FORM 75-CPLR 3019:5.—Affidavit in Support of Order to Show Cause to Strike Counterclaim Relating to Third Parties.

LexisNexis Forms FORM 75-CPLR 3019:6.—Order Dismissing Counterclaim Against Third Person.

LexisNexis Forms FORM 75-CPLR 3019:7.—General Form of Cross-Claim.

LexisNexis Forms FORM 75-CPLR 3019:8.—Cross-Claim for Indemnity Against Co-Defendant Based Upon Express Indemnity Agreement.

LexisNexis Forms FORM 75-CPLR 3019:9.—Cross-Claim for Indemnity by Owner of Real Property Against General Contractor; Negligence Action.

LexisNexis Forms FORM 120-9:5.—Demand for Relief on Counterclaim.

LexisNexis Forms FORM 120-9:6.—Demand for Relief in Cross-Claim.

LexisNexis Forms FORM 521-11-40.—Skeletal Form of Answer Setting Forth Counterclaims.

LexisNexis Forms FORM 521-11-41.—Counterclaim Against Father for Contribution; Son Killed in Motorcycle Accident.

LexisNexis Forms FORM 521-11-42.—Cross-Claim for Indemnity Against Co-Defendant Based Upon Express Indemnity Agreement.

LexisNexis Forms FORM 521-11-43.—Cross-Claim for Indemnity by Owner of Real Property Against General Contractor; Negligence Action.

LexisNexis Forms FORM 1434-19167.—CPLR 305, 3011, 3019: Summons to Counterclaim Defendant.

LexisNexis Forms FORM 1434-19168.—CPLR 305, 3011, 3019: Summons to Cross-Claim Defendant.

1 Medina's Bostwick Practice Manual (Matthew Bender), Forms 14:101 et seq .(remedies and pleadings).

Texts:

2 Bergman on New York Mortgage Foreclosures (Matthew Bender) § 19.07.

Hierarchy Notes:

NY CLS CPLR, Art. 30

Forms

Forms

Form 1

Directory Part of Order Striking Out Counterclaim Without Prejudice to Bringing of Another Action

Ordered, adjudged and decreed that the amended answer herein be and the same is hereby stricken out, without prejudice to the bringing of another action on the counterclaims set forth therein.

Form 2

Counterclaim; Introductory Paragraph

For a counterclaim to the alleged cause of action set forth in the complaint, defendant alleges:

[Another form] For a counterclaim to each and all of the alleged causes of action mentioned in the complaint, defendant alleges:

[Where two or more counterclaims] For a second [or, as the case may be] separate and distinct counterclaim, defendant alleges:

[Defense and counterclaim] For a separate defense and counterclaim, defendant alleges:

Form 3

Counterclaim; Skeleton Form

[Caption and introductory paragraph]

1 Denies _____.

For a First Separate and Distinct Defense, Defendant Alleges:

2 That _____.

For a Second Separate and Distinct Defense, Defendant Alleges:

3 That _____.

For a Counterclaim [or, “For a First Counterclaim” or “For a Counterclaim to the First Cause of Action in the Complaint Herein,” or the like], Defendant Alleges:

4 That _____ [state facts to show a cause of action in favor of defendant against plaintiff the same as if the cause of action was stated in a complaint].

Wherefore defendant demands judgment against plaintiff dismissing the complaint herein, and granting defendant judgment against plaintiff for _____ [include demand for affirmative relief as if the demand was in a complaint wherein the position of the parties was reversed].

[Indorsement, address. Telephone number and verification]

Form 4

Counterclaim; Contents

The forms of complaints under CPLR 3011 supra, as well as the forms of complaints elsewhere in the Civil Law Practice and Rules may be used, with minor changes, for forms of counterclaims for like causes of action.

Form 5

Counterclaim; Prayer for Money Relief

Wherefore, defendant demands judgment against plaintiff, dismissing the complaint of plaintiff herein, with the costs of this action, together with a judgment in favor of defendant against plaintiff for the sum of _____ dollars together with the interest on _____ dollars thereof from _____, 20_____, being the balance due defendant from plaintiff on said _____ account.

Form 6

Counterclaim; Repetition of Allegations in Answer

Defendant repeats and realleges as part of this counterclaim each and every allegation contained in paragraph [or, “paragraphs”] numbered _____ [or,

"_____ and _____"] of this answer with the same force and effect as if they were herein set out at length.

Form 7

Counterclaim; Against Assignee; Claim Against Plaintiff's Assignor

Further answering the said complaint and as and for a counterclaim to each and all of the alleged causes of action mentioned in the complaint, said defendant alleges:

1 Upon information and belief, that on the _____ day of _____, 20_____, and from said day up to the _____ day of _____, 20_____, the _____ Company was a corporation organized and existing under the laws of the State of _____, and during all of said time carried on business in the State of New York, and had an office for the transaction of business in this State.

2 On information and belief, such corporation has applied for authority to do business in the State of New York pursuant to Article 13 of the Business Corporation Law (Article 13 of the Not-for Profit Corporation Law, if applicable) and such authority has not been surrendered, suspended or annulled and thereafter and for more than _____ months after said date, the said Company maintained a place or factory in this State where it manufactured bricks.

3 That on or about the _____ day of _____, 20_____, at the City of New York, the _____ Company and the defendant made an agreement in writing duly subscribed and delivered by the parties thereto, whereby it was mutually agreed between them that the said _____ Company should sell and deliver to the defendant, and the said defendant agreed to purchase from the said company, all the vitrified brick which the said defendant might require in the performance of the work under its contract with the City of New York, dated _____, 20_____, for sewers and appurtenances, on _____, _____ Avenue, thence

through _____ Street to _____ Street and through _____ Street to the _____ River.

4 That a copy of said contract is annexed to the complaint, and is hereby made a part of this answer, as if it were annexed hereto, and that the defendant duly complied with all the terms thereof on his part to be kept and performed.

5 That said company agreed to deliver the said brick in cargo lots as the same might be ordered by the defendant, and that the same should be delivered to the defendant on the dock at _____ Street and _____ River, and that it was agreed that the defendant should pay to the said Company _____ for every 1000 bricks so delivered, accepted and approved, as in said contract specified, which payment was to be made as in said contract mentioned, to which the defendant begs to refer.

6 That the defendant duly demanded from the said Company the vitrified bricks which he required in the performance of the work in said contract mentioned, and that more than a reasonable time for the delivery of the said brick, as ordered by the defendant, has elapsed, and that the defendant [etc., stating all the facts necessary to make out a cause of action against the _____ Company, which was the assignor of the cause of action sued upon.]

WHEREFORE said defendant demands judgment against said plaintiff that the complaint be dismissed, and that he have judgment against any recovery in favor of the plaintiff, to the extent of the amount of the defendant's counterclaim and offset as above mentioned, besides the costs and disbursements of this action.

Form 8

Counterclaim Against Plaintiff Executor; Claim Against Decedent

[Introductory paragraph, as in Form 2, supra.]

1 That on or about _____, 20_____, the decedent above named made and delivered to defendant his promissory note in writing, of which the following is a copy: [insert copy of note]

2 That said decedent died on _____, 20_____.

3 That defendant at the time of said death was, and still is, the owner of said note.

4 That no part of said note was paid by decedent prior to his death, nor has any part thereof been paid since then, and there is now due to defendant on said note the sum of _____ dollars with interest thereon from _____, 20_____, from said decedent.

Wherefore, defendant demands judgment against plaintiff that the complaint be dismissed with costs, and that he have judgment against plaintiff as executor of the said _____, deceased, for the sum of _____ dollars, with interest thereon _____, as the sum of money due defendant from said decedent.

Form 9

Counterclaim by Representative; Claim of Decedent

[Introductory paragraph, as in Form 2, supra.]

1 That on or about _____, 20_____, and prior to his death, the decedent herein, at the special instance and request of plaintiff, sold and delivered certain goods [state character of goods] to plaintiff which were reasonably worth and for which plaintiff agreed to pay _____ dollars.

2 That no part of said sum of _____ dollars has been paid although duly demanded.

WHEREFORE, defendant demands against plaintiff that the complaint be dismissed, and that he have judgment against plaintiff in the sum of _____, with interest thereon, together with costs and disbursements.

Form 10

Counterclaim Against Plaintiff and Third Person Not Party to Action

[Title of court]

John Doe,

Plaintiff,

against — Counterclaim

Richard Roe, — Index No. _____ [if assigned]

Defendant.

by original summons, and between the said

Richard Roe,

Plaintiff,

against — Counterclaim

John Doe, Frank Smith, — Index No. _____ [if assigned]

Defendants.

brought in as parties to answer the counterclaim herein.

[Another form of title]

[Title of court]

_____,

Plaintiff,

against — [Nature of paper and

_____, — [Title of court]

_____,

Defendant,

brought in as a party to answer the counterclaim herein.

Defendant _____ answering the complaint,

1 [Insert denials and defenses desired]

As a counterclaim against plaintiff and against _____, hereby made a party defendant, to this action, defendant _____, alleges

2 That plaintiff and defendant _____ heretofore made and delivered to this defendant their promissory note in writing, of which the following is a copy: [insert copy of note]

3 That no part of said note has been paid.

4 That this defendant is the owner and holder of said note.

5 That there is now due to defendant _____ on said note from plaintiff and defendant _____ the sum of _____ dollars with interest from _____, 20_____.

6 That defendant _____ is made a defendant herein by the service of this answer to the intent that this counterclaim against him along with plaintiff may be determined.

WHEREFORE defendant _____ demands judgment against plaintiff that the complaint be dismissed, and judgment against plaintiff and defendant _____ in the sum of _____ dollars, with interest thereon from _____, with costs, together with such other and further relief against plaintiff and defendant _____ as the court may deem just and proper.

[Indorsement, address, telephone number and verification]

Form 11

Notice of Appearance by Third Party Named in Counterclaim

[Title as in Form 10]

PLEASE TAKE NOTICE that defendant _____ named in the counterclaim herein interposed by defendant _____ in this action, hereby appears herein, and that we are [or, I am] retained as attorneys for said defendant _____.

Dated _____, 20_____.

Yours, etc.

_____

Attorney for Defendant

_____

Office and P. O. Address

_____

_____

Telephone number _____

Form 12

Reply of Third Party Named in Counterclaim

[Caption]

The defendant, A, replying to the counterclaim contained in the answer of defendant B herein:

1 Denies _____ [insert such denials as are necessary].

For a separate defense, defendant A alleges:

2 That _____ [insert any new matter available].

Wherefore, defendant A demands judgment dismissing the counterclaim, with costs.

[Indorsement, address, telephone number and verification]

Form 13

Body of Order to Show Cause to Strike Allegations of Counterclaim Relating to Third Parties

On the annexed affidavit _____, sworn to _____, 20_____, the summons and complaint herein, and the answer verified _____, 20_____, let the defendant _____ and the plaintiff herein, or their attorneys, show cause at a [motion] Term [Part

_____] of this Court, held in and for the County of _____, at the County Court House, in the City of _____, State of New York, on the _____ day of _____, 20_____, at _____ o'clock a.m., or as soon thereafter as counsel can be heard, why an order should not be made and entered herein, striking out the name of _____ as alleged party herein, and striking out all the allegations contained in the alleged counterclaim contained in the said answer in relation to said _____ or in, or by, or upon which a judgment or decree or other relief is demanded against the said _____, and dismissing as against the said _____ said alleged separate and distinct counterclaim set forth in the said answer, and eliminating the said _____ as parties to this action, and relieving the said _____ of any obligation to appear or reply to the said answer or any part thereof, upon the grounds,

1 That the said alleged counterclaim is not one which may be properly interposed in this action.

2 That the said alleged counterclaim is not one which may be set up in this action against the said _____, pursuant to section 3019 of the Civil Practice Law and Rules, or otherwise; and granting such other, further and distinct relief as to the court may seem proper.

Sufficient cause appearing therefor, let service of this order and of the annexed affidavit on the attorneys for the plaintiff and the attorney for the defendant _____, either personally, or at their office, or at their residence, in accordance with the provisions of Rule 2103 of the Civil Practice Law and Rules on or before _____, 20_____, be sufficient service thereof.

Form 14

Affidavit in Support of Order to Show Cause to Strike Allegations of Counterclaim Relating to Third Parties

[Caption and introductory paragraph]

1 That he is an attorney at law, with offices at _____ and has been retained by _____ for the sole purpose of appearing herein to make this motion to strike out the name of said _____ as alleged parties herein, and for the other relief set forth in the proposed order to show cause hereto annexed.

2 That this is an action [describe cause of action]. Upon information and belief, that the action was commenced by the service of a notice of appearance on behalf of defendant _____, on or about _____, 20_____; that a copy of the answer herein, verified _____, 20_____, was served on _____ on _____, 20_____.

3 That the answer sets forth what is designated as follows: _____ [introductory paragraph of counterclaim]. That the prayer for relief includes the following: _____.

4 That said defendant bases this demand for judgment upon allegations contained in the answer to the effect that [describe in detail].

5 That there is no authority in law for making the said _____ parties to this action, under the allegations set forth in the said answer of the defendant. The said _____ denies all the material allegations contained in the said alleged counterclaim, and dispute the defendant's right, both on the facts and the law, to secure any of the relief prayed for against them, and the rights of said _____ will be seriously prejudiced if they should be compelled to become parties to this action and litigate with the defendant the various issues which would be raised as to their rights and obligations as to the various matters alleged in the said alleged counterclaim.

Deponent applies for an order to show cause instead of giving the usual five days' notice of motion for the reason that the time of said _____ to appear and plead with respect to the said answer, if this motion were denied, expires on _____,

20_____, and if five days' notice were given, this motion could not be heard and determined until after the expiration of such time.

No previous application for the relief herein prayed for or for similar relief has been made.

_____

[Signature]

[Print name to be signed]

[Jurat]

Form 15

Body of Order Dismissing Counterclaim Against Third Person

A motion having been made by _____, by notice of motion, [or, by order to show cause] dated _____, 20_____, for an order dismissing the counterclaim contained in the defendant's answer against the said _____, upon the ground that said counterclaim is not one which may be properly interposed in this action, for the following reason, to wit, that the counterclaim improperly attempts to bring in the moving party, and said motion having duly come on to be heard; upon reading and filing the notice of motion herein, [or, order to show cause] with proof of due service thereof, and the complaint and answer submitted in support of said motion, and exhibits, and after hearing _____, of counsel for _____, in support of said motion, and _____, of counsel for the defendant, in opposition thereto, and due deliberation having been had, upon filing the opinion of the court, it is, on motion of _____, attorney for _____,

Ordered, that said motion be and the same hereby is granted with ten dollars cost to _____ and with leave to the defendant to serve an amended answer within twenty days after the service on the attorney for the defendant of a copy of this order with notice of entry.

Form 16

General Form of Cross Claim

As and for a cross claim against defendant [or, respondent] _____, defendant [or, respondent] _____ alleges,

[State facts showing cause of action against defendant or respondent.]

Wherefore defendant [or, respondent] _____ demands that the judgment to be rendered herein determine as between himself and defendant [or, respondent] _____ that [defendant _____ is the owner of and entitled to the possession of _____ (the property described in the complaint)].

[Indorsement, address, telephone number and verification]

Form 17

Cross-claim Against Impleaded Defendant for Indemnity Against Judgment and Cost of Defense

[Caption]

Defendant city of _____ for its cross-claim against defendant _____, impleaded in this action, alleges,

1 That defendant city of _____, at all the times mentioned in the complaint was, and still is, a domestic municipal corporation.

2 That impleaded defendant _____ at all the times mentioned in the complaint was, and still is, a domestic corporation.

3 That on or about _____, 20_____, plaintiff commenced this action against defendant city of _____ to recover damages for personal injuries suffered as alleged in the complaint in this action.

4 That heretofore and on or about the _____ day of _____, 20_____, defendant city of _____, by its Department of Sanitation duly entered into a contract in writing with impleaded defendant _____ for the privilege of removing from certain Department-land-fills such articles and materials (except ashes and garbage) as the contractor may desire, wherein and whereby said impleaded defendant _____ agreed to and with defendant city of _____ to save the city of _____ free and harmless from any and all damages arising from each and every act of omission and commission mentioned in the complaint, reference being made to the said contract for greater particularity.

5 That it was provided in said contract hereinbefore mentioned as follows: [indemnity provisions of contract].

6 That if the plaintiff sustained the injuries and damages as alleged in the complaint, they were suffered or sustained within the provisions of said contract and the terms and conditions hereinbefore mentioned, and any and all damages that may be awarded to the plaintiff herein are to be paid solely by said impleaded defendant _____.

7 That by reason of this suit and action, and the matters and things set forth in this complaint, defendant city of _____ has been put to costs and expenses, none of which have been paid by said impleaded defendant _____.

WHEREFORE defendant city of _____ demands judgment dismissing the complaint herein as to it, with costs, and further demands that the ultimate rights of defendant city of _____ and impleaded defendant _____ as between themselves be determined and that defendant city of _____ have judgment over and against impleaded defendant _____ for any sum which

shall or may be recovered herein by the plaintiff against defendant city of _____ together with the costs and disbursements of this action and for any expenses incurred in defense thereof.

[Indorsement, address, telephone number and verification]

Form 18

Cross-claim of Tenant in Negligence Action Where Both Landlord and Tenant are Defendants

[Caption]

For a complete defense to the entire amended complaint herein, and as a basis for affirmative relief against _____ Corporation, this defendant alleges:

12 That heretofore and on or about the _____ day of _____, 20_____, defendant A leased to this defendant by instrument in writing all those premises situated in the City of _____, County of _____, known as No. _____ _____ Avenue, for the term of one year from the first day of _____, 20_____, to the last day of _____, 20_____.

13 That by the terms of said lease, the said A, _____, as landlord, reserved to itself the right to make repairs at any time, to any portion or portions of the premises aforesaid, and to enter into and upon said premises at any time, and further reserved to itself complete control with the right to make repairs to the glass and plate glass store windows in the store of said premises, and in accordance with such reservation and with its conduct thereafter, did obligate itself to keep the exterior portions of the premises and sidewalks in such condition as not to cause injury to the public or to third persons lawfully using same.

14 That during the times aforesaid and for a long time prior and subsequent thereto, said defendant, A, its servants, agents, and employees, entered into and upon aforesaid premises,

exercised control, authority, supervision, and management over the same, and made examinations, inspections, and recommendations with respect to the safe and proper operation and occupancy thereof, and its preservation, and did in fact make divers repairs to various exterior and interior portions thereof.

15 That if plaintiff herein recovers a verdict against this defendant, _____, for the injuries alleged to have been sustained at the time and place and on the occasion mentioned in the complaint, such liability will have been brought about and caused wholly and solely by reason of the careless or negligent act or acts or omissions and conduct of defendant A, its agents, servants, or employees, in causing or permitting a portion or section of the sidewalk in the front of or in the vicinity of aforesaid premises, to be in a defective, dangerous, broken, irregular, or out of order condition, or in a condition imminently hazardous to human life and limb; or in causing portions of the said sidewalk to be repaired in a negligent, improper, unsafe or defective manner, or in such manner as to be imminently hazardous to human life and limb, or in failing to place proper and appropriate safeguards around and about said alleged repairs, or repair work done to the said sidewalk; or in creating or maintaining or permitting to exist, a defective and dangerous condition in, on, or about the sidewalk in front of, or adjacent to the said premises, amounting to a nuisance; or in being otherwise negligent or at fault, and all of the above without any negligence or fault on the part of defendant, _____, his agents, servants, or employees in any wise contributing thereto.

16 That because of the facts hereinabove stated the question of liability for negligence and nuisance has arisen between this defendant and said A, co-defendant.

Wherefore, this defendant demands judgment dismissing the complaint as to him with costs, and that the ultimate rights of this defendant and said A, co-defendant, be determined as between themselves and that this defendant have judgment against said A, for any sum which may be recovered herein by plaintiff against this defendant, together with the costs and disbursements of this action.

[If the premises leased are rented for a multiple dwelling or tenement house, add an additional allegation between paragraphs 14 and 15, as follows:] That landlord violated the provisions of $ 78 of the Multiple Dwelling Law of the State of New York in that defendant as owner of the premises aforesaid, failed in his (its) duty to keep the premises in repair.

[Indorsement, address, telephone number and verification]

Form 19

Cross-claim of One Defendant in Negligence Action to Obtain Indemnity if Held Liable for Negligence of Other Defendants

[Caption]

The defendant A Company, by _____, its attorney, for a cross-complaint against the defendants B Company, C Company and D Incorporated, alleges upon information and belief:

1 That at all the times hereinafter mentioned defendant A was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with a place of business in the City of _____.

2 That at all the times hereinafter mentioned defendant B was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with a place of business in the City of _____.

3 That at all the times hereinafter mentioned defendant C was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with a place of business in the City of _____.

4 That at all the times hereinafter mentioned defendant D was and still is a foreign corporation duly organized and existing under and by virtue of the laws of the State of _____ and duly authorized to conduct its business in the State of New York and said defendant has duly qualified for such purposes in the State of New York.

5 That on and prior to _____, 20_____, defendant A was the owner of the premises known as _____ _____ Avenue in the City of _____, and as such owner it entered into a contract with defendant B as general contractor for the erection of a building upon the premises _____ Avenue, in the City of _____.

6 That on or about _____, 20_____, defendant B, as general contractor, entered into a contract with defendant C for the complete furnishing and installation of all double hung window frames and sash, according to certain plans and specifications therein referred to.

7 That subsequent thereto defendant C did manufacture and install the window frames provided for in said contract, including those for the windows on the _____ floor of said premises.

8 That attached to and forming a part of said window frames were certain appliances or fixtures commonly known as window cleaner bolts which were fastened to the frames by means of screws made of brass or a similar metal.

9 That the screws used to fasten the said window cleaner bolts to the window frames were manufactured by defendant D.

10 That the said window cleaner bolts were attached to the window frames by the agents, servants and employees of defendant C by means of the bolts of brass or a similar metal manufactured by defendant D, and the said frames together with the window cleaner bolts attached were installed or fastened in the building of defendant A by defendant C.

11 That defendant B as general contractor was in charge of the work incident to the erection of the said building and premises and exercised the supervision over the work performed by its various subcontractors and the inspection of the materials furnished, including the windows and their appurtenances referred to herein.

12 That in the amended complaint served by the plaintiff herein it is alleged that on _____, 20_____, plaintiff's intestate was lawfully, carefully and properly around and about said premises in connection with the duties of his employer and carefully and properly performing his work as aforementioned; that he was caused to fall from his position upon and about one of the window ledges of said property to the ground below causing him to sustain injuries from which he died the same day; that the said accident and death of plaintiff's intestate was due to negligence in that the bolts fastening a window cleaner's hook were carelessly and negligently caused, allowed and permitted to be and remain in a defective, disordered, weak, improper and insecure position and in such condition that the said bolts could not be properly used in connection with the standard safety belt used by plaintiff's intestate and became loose from said safety belt while plaintiff's intestate was using same in connection with the performance of his duties aforementioned, and in that the screws used to fasten the said bolt were defectively manufactured and strained and twisted in the assembling and in that reasonable care in the selection of the screws both as to the type of metal and in the use of same was not exercised and that the said screws were defective in other respects, and further in that proper supervision and inspection over the hooks and their component parts were not made and no inspection or test made for defective or unsound screws, causing plaintiff's intestate to fall.

13 That if the plaintiff herein recovers a verdict against defendant A for the injuries and death alleged to have been sustained at the time and place mentioned in the complaint, such liability will have been brought about and caused wholly and solely by reason of the careless or negligent act or acts and conduct of the servants, agents and employees of defendants B, C, and D, and without any negligence upon the part of defendant A, its agents, servants or employees, in any wise contributing in that the said window cleaner bolt was improperly attached to the frame; that the brass screws manufactured by the defendant D were insufficient for the purposes to which they were put; in that the said screws were defectively manufactured; in that in the assembling of the said frame said screws were strained and twisted by the agents, servants or employees of defendant C; in that the said agents, servants or employees of

defendant C failed to exercise reasonable care in the selection of the screws, both as to the type of metal and in the use of screws which were defective in other respects; in that proper inspection was not made of the assembled window frames after the window cleaner hooks had been attached by defendant C and defendant B, as general contractor, failed to exercise proper supervision and inspection over the selection of the hooks and their component parts and failed to make any inspection or test for defective and unsound screws.

Wherefore, defendant A demands judgment dismissing the complaint of the plaintiff herein, together with costs and disbursements of this action; or in the event that a verdict is recovered against it by plaintiff that it have judgment over and against defendants B, C and D for the same amount, together with the costs and disbursements of this action.

[Indorsement, address, telephone number and verification]

Form 20

Answer and Cross-complaint by Defendant Contractor Against Co-defendant Subcontractor, Counts for Indemnity Against Active and Also Passive Negligence

[Caption and introductory paragraph]

Defendant _____ [general contractor], answering the complaint of the plaintiff herein:

1 Denies upon information and belief the allegations contained in the paragraphs of the complaint designated _____ [“5” and “7”].

2 Denies upon information and belief the allegations contained in the paragraphs of the complaint designated _____ [“13”, “18”, “19”, “20”, and “22”] in so far as said allegations pertain to and affect this answering defendant.

3 Denies upon information and belief the allegations contained in the paragraph of the complaint designated _____ [“14”] except it admits that _____

[it had up a sidewalk bridge above the said sidewalk and a wooden fence adjacent to the sidewalk at the time and place mentioned in the complaint which it maintained].

4 Denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in the paragraphs of the complaint designated _____ [“15” and “17”].

5 Denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in the paragraph of the complaint designated _____ [“21”] and specifically denies on information and belief that it was in any way negligent or careless and that plaintiff was in any way injured or damaged by reason thereof.

AS AND FOR A DEFENSE DEFENDANT _____ [general contractor]

ALLEGES UPON INFORMATION AND BELIEF:

6 That at all times hereinafter mentioned in the complaint, more particularly on or about the _____ day of _____ [date of accident] the premises _____ [No. 485 Lexington Avenue described as Lexington Avenue between 46th and 47th Streets, etc.] and all the appurtenances thereof, were lawfully and properly maintained, erected and operated in accordance with all the laws and ordinances in effect in the _____ [City] and State of New York, and by permission of the local and state authorities.

AS A BASIS FOR AFFIRMATIVE RELIEF AGAINST THE CO-DEFENDANT

_____ [sewer contractor]

DEFENDANT _____ [general contractor], DEMANDS JUDGMENT THAT THE ULTIMATE RIGHTS OF THE ANSWERING DEFENDANT AND THE SAID CO-DEFENDANT AS BETWEEN THEMSELVES BE DETERMINED IN THIS ACTION.

AS AND FOR FIRST CAUSE OF ACTION:

7 That at all times hereinafter mentioned defendant _____ [general contractor] was and still is a domestic corporation organized _____ [etc.].

8 That at all times hereinafter mentioned defendant _____ [sewer contractor] was and still is a domestic corporation organized _____ [etc.].

9 Prior to _____ [date of accident], defendant _____ [general contractor] had a contract for the construction of a building at premises _____ [No. 485 Lexington Avenue, etc. as above].

10 That prior to _____ [date of accident], defendant _____ [general contractor] as contractor entered into a contract with defendant _____ [sewer contractor] as subcontractor wherein and whereby the latter agreed to furnish all labor, materials, tools, equipment, appliances, and all other things necessary to _____ [complete the sewer and water connection work] for the building under construction at the aforesaid location in accordance with plans and specifications, the terms of which contract defendant _____ [general contractor] begs leave to refer to at the time of the trial.

11 Thereafter and on _____ [date of accident], pursuant to terms of its aforesaid contract, defendant _____ [sewer contractor], its agents, servants and employees was engaged in carrying out the terms of its contract with defendant _____ [general contractor] at the aforesaid building under construction.

12 That in carrying out the terms of the aforesaid contract, and on _____ [date of accident], and for some time prior thereto, defendant _____ [sewer contractor], its agents, servants, and employees, constructed or erected a _____ [platform and ramp on the sidewalk of Lexington Avenue in front of the building under construction as aforesaid to cover excavations and pipe laying etc.].

13 That the aforesaid contract, among other things, provided as follows:

[Set out contract clause whereby subcontractor indemnifies contractor against liability for damages “whether such injuries to persons or damages to property are due to any negligence of

the subcontractor, the owner, or the contractor, its or their employees or agents or any other person," construed to indemnify general contractor against even his own negligence, Laverty v Uris Bros., Inc., — AD2d —, 196 S2d 597.]

14 That the plaintiff in his complaint alleges in substance that _____ [summarize the allegations of the complaint as to the happening of the accident, and the amount of damages] or as is more particularly set forth in the plaintiff's complaint to which defendant _____ [general contractor] begs leave to refer at the time of the trial.

15 That by reason of the provisions of the aforesaid contract, if plaintiff herein should recover judgment from the defendant _____ [general contractor] then said defendant _____ [general contractor] would be entitled to recover judgment over and against defendant _____ [sewer contractor] for the same amount of damages that may be awarded to the plaintiff herein.

AS AND FOR A SECOND CAUSE OF ACTION:

16 Defendant _____ [general contractor] further alleges that if the plaintiff recovers judgment against defendant _____ [general contractor] by reason of the premises as set forth in his complaint, such liability will have been brought about and caused by the negligence of the defendant _____ [sewer contractor] its agents, servants and employees, in the performance of its work at the aforesaid construction job in that it negligently and carelessly and without due regard for pedestrians constructed, erected and maintained a _____ [platform and ramp on the Lexington Avenue sidewalk in front of the premises in question] to cover its construction work and thereby created and caused the condition as alleged in the plaintiff's complaint, without any negligence on the part of _____ [general contractor] contributing thereto.

17 That by reason of the aforesaid, defendant _____ [sewer contractor] is primarily liable for any and all injuries sustained by the plaintiff and said defendant _____ [sewer contractor] is obligated to indemnify the defendant

_____ [general contractor] for any and all damages that may be imposed upon it by reason of the occurrences mentioned and described in the plaintiff's complaint.

WHEREFORE, the answering defendant _____ [general contractor] demands judgment dismissing the complaint herein, as to it, together with the costs and disbursements of this action and further demands that the ultimate rights as between the answering defendant and the co-defendant _____ [sewer corporation] be determined in this action and that the answering defendant have judgment over and against the co-defendant for any sum which may be recovered herein by the plaintiff against the answering defendant, together with the costs and disbursements and reasonable counsel fees incurred in the defense of this action.

[Indorsement, address, telephone number and verification]

Form 21

Counterclaim Summons

[Caption]

TO THE ABOVE-NAMED COUNTERCLAIM DEFENDANT:

YOU ARE HEREBY SUMMONED to reply to or answer the counterclaim against you alleged in the answer of defendants in this action and to serve a copy of your reply or answer on defendants' attorneys within 20 days after the service of this counterclaim summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to reply or answer, judgment will be taken against you by default for the relief demanded in the counterclaim.

[Indorsement, address, telephone number and verification]

§ 3019. Counterclaims and cross-claims.

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