

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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JOSE QUEZADA,	:		
	:	Index No.: 815858/2022E	
	:		
Plaintiff,	:		
	:		
	:		
v.	:		
	:		
ELECTRIC BIKE TECHNOLOGIES, INC.,	:	<b>Defendant’s Memorandum in</b>	
	:	<b>Opposition to Plaintiff’s Motion to</b>	
Defendant.	:	<b>Dismiss Counterclaim</b>	
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**Preliminary Statement**

In response to the complaint filed by Plaintiff Jose Quezada, Defendant Electric Bike Technologies, Inc. (Electric Bike) filed an answer, affirmative defenses, and a counterclaim seeking a declaratory judgment (Counterclaim). Plaintiff has moved to dismiss the declaratory judgment counterclaim (Motion). Electric Bike submits this memorandum in opposition to that motion.

In brief, Electric Bike properly seeks a declaratory judgment on the central disputed factual issue in this lawsuit, namely, whether the parties agreed to settle a previously filed and dismissed federal lawsuit. Although Electric Bike seeks a declaration from the Court that Plaintiff’s state court lawsuit alleging there was a federal court settlement is without merit and frivolous, the declaratory judgment counterclaim does not allege an independent cause of action for sanctions. But, by filing a cursory motion to dismiss the counterclaim, Plaintiff sidesteps the requirement of responding to the specific factual allegations of the counterclaim that make it self-evident that Plaintiff’s complaint is not only without merit, but it is also frivolous.

### Background

On Plaintiff's motion to dismiss, we take the allegations of the counterclaim as true. *Silverman v. Park Towers Tenants Corp.*, 206 A.D. 3d 417, 418 (1st Dept. 2022). In evaluating Plaintiff's motion to dismiss, it is important to put the factual dispute into context.

In a cut-and-paste complaint similar to over 1,500 other suits filed, but not litigated, by Plaintiff's counsel, Plaintiff sued Electric Bike in the Southern District of New York, incorrectly claiming that Defendant's website was inaccessible to blind people in violation of the Americans with Disabilities Act (ADA) and New York law. Counterclaim ¶¶ 59–62. Plaintiff and his counsel had no apparent intention of litigating the lawsuit against Electric Bike, but instead aimed to leverage the cost of defense to obtain a cost-of-litigation settlement. *Id.* ¶¶ 63–68.

On August 4, 2022, Plaintiff's counsel wrote to Electric Bike's counsel at the time offering to settle for less than the cost of fighting the federal lawsuit: "plaintiff's demand is \$4,950 plus website remediation." *Id.* ¶ 73. Plaintiff's counsel did not otherwise specify any of the terms of any proposed settlement. *Id.* Defense counsel responded: "[o]ur client accepts plaintiff's settlement demand of \$4,950;" did not respond to the additional demand of unspecified remediation of Defendant's website; and did not identify the other material terms of any proposed settlement, but added, significantly, "[w]e will draft the settlement agreement." *Id.* ¶ 74. In other words, the *only* term that had been agreed upon was the \$4,950 payment and the additional terms would be contained in a written settlement agreement to be drafted by Electric Bike's counsel.

The very next day, on August 5, 2022, defense counsel made plain that confidentiality was a material term, that Electric Bike did *not* agree to any confidentiality provision, and that if Plaintiff's counsel insisted upon it, there was *no* agreement on the \$4,950 settlement amount either:

**From:** David Stein  
**Sent:** Friday, August 5, 2022 1:09 PM  
**To:** Jarrett Charo  
**Cc:** David M. Nieporent  
**Subject:** RE: [External] Quezada v. Electric Bike Tech.

FOR SETTLEMENT PURPOSES ONLY

Jarrett:

Our client informs us that he will not agree to a confidentiality provision, and that if plaintiff insists on it, there is no agreement at \$4,950.

Sincerely,  
David Stein

Counterclaim ¶ 74.

Although there obviously was no agreement on the material terms, Plaintiff's counsel falsely represented to the federal court that the case had settled, and thus, on August 9, 2022, the district court dismissed the case, but allowed either side to restore the case to the docket within 30 days. *Id.* ¶¶ 75–78. Defense counsel subsequently sent a proposed settlement agreement to Plaintiff's counsel that did not contain a confidentiality provision, but Plaintiff never agreed to that proposal; Plaintiff's counsel instead repeatedly tried unsuccessfully to get Electric Bike to drop its opposition to any confidentiality provision. *Id.* ¶¶ 79–83.

On September 1, 2022, prior to the expiration of the 30-day window to reinstate the federal lawsuit, Electric Bike's current counsel made plain that there was no settlement and that Electric Bike intended to litigate this case:

**From:** Peter J. Brann <PBrann@brannlaw.com>  
**Sent:** Thursday, September 1, 2022 11:18 AM  
**To:** Joseph Mizrahi; Edward Kroub  
**Cc:** David M. Nieporent; David Stein  
**Subject:** Quezada v. Electric Bike Technologies Inc.; No. 22-cv-4867 (RA) (SN)

There apparently was a misunderstanding or miscommunication in the matter. Electric Bike did not agree to settle this matter on the terms proposed by the plaintiff, and will not agree to such a settlement. They have asked us to handle the defense and to litigate this matter if the plaintiff chooses to restore this case to the docket. If we are able to review the request to restore in advance, I would hope that we would be able to consent to that motion.

Counterclaim ¶ 84. Electric Bike’s counsel of record in the federal litigation reiterated the need for Plaintiff to act immediately to restore the case to the federal docket:

**From:** David Stein <[dstein@steinllp.com](mailto:dstein@steinllp.com)>  
**Sent:** Thursday, September 8, 2022 2:18:01 PM  
**To:** Edward Kroub <[ekroub@mizrahikroub.com](mailto:ekroub@mizrahikroub.com)>  
**Cc:** David M. Nieporent <[dnieporent@steinllp.com](mailto:dnieporent@steinllp.com)>  
**Subject:** [External] Quezada v. Electric Bike Technologies Inc.; No. 22-cv-4867 (RA) (SN)

Eddie:

As you know, the restoration deadline is today. What are your client’s intentions?

Sincerely,  
David Stein

Counterclaim ¶ 86. And yet, Plaintiff did nothing—he did not seek to reinstate the federal lawsuit; he did not assert to defense counsel or the federal court that there was an enforceable settlement agreement; he did not do anything, and thus the federal lawsuit was closed permanently. *Id.* ¶¶ 85, 87–90. Instead, using the same playbook of filing a lawsuit and using the cost of defense to try to extract a cost-of-litigation settlement, Plaintiff eventually filed this state court lawsuit seeking to “enforce” a nonexistent settlement, to which Electric Bike filed a counterclaim seeking a declaration that Plaintiff’s lawsuit is not only without merit, it is frivolous.

### Argument

Plaintiff’s motion to dismiss the counterclaim is based on a false premise, namely, that Electric Bike has filed “an *independent* cause of action for the imposition of sanctions” under N.Y. Comp. Codes R. & Regs. tit. 22 § 130-1.1(a), which New York does not recognize. Motion 1 (citing cases and section 130-1.1) (emphasis added). Indeed, all of the cases cited by Plaintiff involve parties that sought to assert an independent cause of action for the imposition of sanctions. *See* Motion 2.

Electric Bike has done nothing of the sort. It did not assert an independent cause of action for the imposition of sanctions. It did not cite section 130-1.1.

Instead, Electric Bike filed a counterclaim seeking a declaratory judgment that there was no settlement of the federal lawsuit. *See* Counterclaim ¶¶ 98–101. Suffice it to say, it is entirely appropriate to file a counterclaim seeking a declaratory judgment. *See, e.g., Sarkis v. Global Diamond Grp. Ltd.*, 2021 WL 6005250, \*2 (Sup. Ct., N.Y. Cty., Dec. 20, 2021) (denying motion to dismiss declaratory judgment) (“Generally, a court may not summarily determine the merits of a properly pleaded declaratory judgment cause of action based on the pleadings alone. Rather, a Court should only reach the merits of a declaratory judgment action upon a motion to dismiss in the event there are not questions of fact presented.”) (quotation omitted); *Continental Capital Grp., LLC v. Lazar Builders, LLC*, 2015 WL 4778341, \*6 (Sup. Ct., Kings Cty., Aug. 14, 2015) (same). Furthermore, it is entirely appropriate for Electric Bike to file a counterclaim even if the relief sought “mirrors the relief sought in the complaint.” *Sozo Investment Partners L.P. v. 1600 N 11th St. CRCP LLC*, 2022 WL 16924082, \*5 (Sup. Ct., N.Y. Cty., Nov. 14, 2022).

To be sure, Electric Bike contends that Plaintiff’s claim is not only meritless, it is frivolous. *See* Counterclaim ¶¶ 102–105. Regardless of whether the Court finds that Plaintiff’s claim is frivolous when it declares that there was no federal settlement, Electric Bike will need to—and will—seek sanctions in accordance with N.Y. Comp. Codes R. & Regs. tit. 22 § 130-1.1, including compliance with CPLR § 2214 or § 2215.

It should be apparent that the purpose of the motion to dismiss is Plaintiff did not want to respond paragraph-by-paragraph to the fact-specific allegations of the counterclaim, which would make it apparent that Plaintiff’s claim of a settlement in the prior federal case is entirely specious. Coupled with Plaintiff’s refusal to provide any substantive responses to the written discovery

served by Electric Bike (which will be the subject of a separate motion to compel), it should be evident that Plaintiff does not want discuss, much less litigate, the incontrovertible facts of this matter. But, as Joe Louis famously said, “you can run, but you cannot hide.” Once Plaintiff is ordered to respond to Electric Bike’s counterclaim and the outstanding discovery requests, it should be manifest that Plaintiff’s complaint is, in fact, without merit and frivolous.

### Conclusion

Electric Bike respectfully requests that the Court deny Plaintiff’s motion to dismiss Electric Bike’s counterclaim.

Dated: February 23, 2023

Respectfully submitted,

*/s/ Richard S. Mandaro*

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