

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NATIONAL RIFLE ASSOCIATION,

Plaintiff-
Counter Defendant,

v.

OLIVER NORTH,

Defendant-
Counter Plaintiff.

Index No. 653577/2019

**NORTH'S OPPOSITION TO THE NRA'S MOTION TO DISMISS
NORTH'S COUNTERCLAIM**

TABLE OF CONTENTS

PRELIMINARY STATEMENT1

STATEMENT OF FACTS2

LEGAL STANDARD.....4

ARGUMENT5

I. The NRA Bylaws Provide for the Indemnification North Seeks.....5

II. The NRA’s Reading of its Bylaws Fails To Give Meaning to Each Word.6

III. In the Event the Court Finds the Bylaw Language Ambiguous, Further Discovery
is Warranted.8

IV. The Court Should Not Dismiss North’s Affirmative Defenses.10

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

Baker v. Health Management Systems, Inc., 98 N.Y.2d 80 (2002) 7, 8
Morone v. Morone, 50 N.Y.2d 481, 484 (1980)..... 4
Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633, 634 (1976) 4

Treatises

Olson et al., Dir. & Off. Liab § 9:4..... 6

PRELIMINARY STATEMENT

Rather than live up to its obligation to indemnify and advance legal fees incurred by its Directors, the National Rifle Association sued LtCol Oliver North, setting forth an unsound theory as to why it does not owe indemnification or advancement to its Directors, including North. The NRA filed its lawsuit as part of retaliatory efforts against North because he raised questions in his role as Director and President of the NRA about the NRA's potential financial misconduct, including regarding expenses for the EVP/CEO Wayne LaPierre and the NRA's primary outside lawyer Bill Brewer.

The NRA asks this Court for a declaration that the indemnification rights granted in the NRA's bylaws do not exist. But the NRA's bylaws provide for indemnification as follows:

Section 4. Indemnification and Advancement of Expenses of Directors of the Association.

The indemnification and advancement of expenses of Directors granted pursuant to, or provided by, the corporate laws of the state under which the Association is incorporated shall not be exclusive of any other rights to which a Director seeking indemnification or advancement of expenses may be entitled, and each Director shall be entitled to such indemnification and expenses immediately to the fullest extent requested in writing to the Secretary or Executive Vice President by such Director **unless and only unless prohibited** by corporate laws of the state under which the Association is incorporated.

(emphasis added) (Dkt 34 at 15; Dkt 35 at 15.) The NRA now moves to dismiss North's counterclaim, which seeks the indemnification and advancement provided to Directors under the NRA's bylaws.

The NRA's Motion to Dismiss is premised on the theory that the right to indemnification and advancement under its bylaws is "coextensive with—and contingent upon—indemnification rights provided under New York law." (Dkt 31 at 1.) The NRA argues that New York law does not *require* indemnification and advancement of directors, and therefore the NRA's bylaw

provision titled “**Indemnification and Advancement of Expenses of Directors of the Association**” does not in fact provide indemnification or advancement to Directors.

The NRA is wrong. The Court should deny the NRA’s motion to dismiss.

STATEMENT OF FACTS

The NRA sued North, electing to turn North’s request for indemnification and advancement into an opportunity to take additional retaliatory actions against North.

After North was elected in 2018 to be President of the NRA, North learned of allegations of potential financial misconduct. North learned, for example, that LaPierre had improperly authorized payments amounting to roughly \$2 million per month to the NRA’s outside counsel, Bill Brewer. Through reporting by the *New Yorker* magazine, North learned of a series of allegations of financial misconduct—allegations that led a former head of the IRS Exempt Organizations division to state that the NRA’s alleged financial misconduct “reflect[ed] one of the broadest arrays of likely transgressions” he had ever seen. And North learned that over a period of years, LaPierre had received hundreds of thousands of dollars in clothing, private jet travel, and other personal benefits that appear to have been paid for via an NRA vendor.

In late 2018 and early 2019, North began confidentially and internally asking questions and requesting information through the NRA’s Audit Committee and other internal channels. In the first quarter of 2019, North repeatedly requested that a confidential, internal review of the allegations be conducted by independent professionals. For example, on April 18, 2019, he wrote a detailed memorandum to the NRA’s General Counsel and to the NRA’s Audit Committee to voice his concerns about potential financial misconduct. Each time that North raised questions or sought an independent review of allegations of financial misconduct—which allegations at this point were swirling in the press—North was stopped by LaPierre and Brewer.

On April 25, 2019, North formed a Special Committee of the NRA Board of Directors—the “Crisis Management Committee”—to confidentially look into the allegations. North had the power to do so as President of the NRA pursuant to the NRA’s bylaws. LaPierre and Brewer responded by pushing North out as President of the NRA and dissolving the “Crisis Management Committee.”

North’s attempts to confidentially address potential wrongdoing led to further acts of retaliation by LaPierre and Brewer against North. For example, on April 25, 2019, LaPierre blocked North’s re-nomination to be President of the NRA; LaPierre then sent a letter to all 76 members of the NRA Board of Directors falsely accusing North of attempting a “coup” to oust LaPierre as EVP/CEO of the NRA, as if LaPierre were a dictator and the NRA belonged to him rather than its members; and on May 31, 2019, LaPierre tried to force North to resign as a Director of the NRA. And LaPierre ultimately sued North in this lawsuit, filed by Brewer.

On May 3, 2019, the United States Senate Committee on Finance sent North a request for documents and information related to North’s service as an NRA Director. (Dkt 13.) The Committee on Finance cited North’s “experience as the NRA’s president”—who must serve on, and is elected by, the NRA Board of Directors—and declared him “uniquely suited to shed light on any potential improper activity within the organization or any of its vendors.” The Committee on Finance sought “letters [North] wrote to the NRA Board of Directors or NRA Executive Committee” related to North’s attempts to investigate financial mismanagement and waste at the NRA. The Senate committee specifically requested information related to the “NRA Crisis Management Committee” that North created during his last days of service as the NRA’s President. On May 6, 2019, North sought indemnification and advancement for his legal costs in connection with the U.S. Senate request. (Dkt 13.)

On May 13, 2019, the NRA responded to North's request for indemnification. The NRA did not assert that North had no right to indemnification. Instead, the NRA stated that it was "under no obligation to *advance* any of Col. North's legal fees and expenses" and "declin[ed] to do so *at this time.*" (Exhibit 1 (emphases added).)

On May 24, 2019, the NRA issued two subpoenas to North—one seeking documents from North and the other seeking deposition testimony from North—as part of the NRA's lawsuit against its vendor Ackerman McQueen. North cooperated with the NRA's subpoenas, and on June 6 North sought indemnification and advancement of his expenses. (Dkt 14.) The NRA responded by filing this lawsuit, via Brewer.

Since the NRA filed this lawsuit, North has requested indemnification and advancement of expenses related to both his defense of this lawsuit, and to a subpoena that he received from the New York Attorney General seeking documents related to "financial impropriety, mismanagement, misuse or waste of assets, governance failures or other wrongdoing" at the NRA. The NRA has not responded to either of these requests, other than by continuing to pursue this lawsuit to deny North the indemnification and advancement provided by the NRA's bylaws.

LEGAL STANDARD

In ruling on the NRA's motion to dismiss, the Court should liberally construe North's counterclaim, accept the facts as alleged, give him the benefit of every possible favorable inference, and decide only if the facts as alleged fit within any cognizable legal theory. *Morone v. Morone*, 50 N.Y.2d 481, 484 (1980); *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 634 (1976).

ARGUMENT

I. The NRA Bylaws Provide for the Indemnification North Seeks.

The NRA bylaws grant NRA Directors a broader right to indemnification than New York’s not-for-profit law, and they require the NRA to indemnify North here. According to the plain terms of Article IV, Section 4 of the NRA’s bylaws, the only limit to an NRA Director’s right to indemnification is where such indemnification is *prohibited* by New York law. The NRA’s new theory of the indemnification provision wrongly turns the bylaw upside down, arguing that indemnification and advancement are available only when *required* by New York law. “Simply put,” writes the NRA, “if New York law does not entitle an NRA director to indemnification, the Bylaws do not entitle him to indemnification, either.” (Dkt 31 at 1.) This reading ignores the text of the indemnification provision.

The chart below breaks the indemnification provision into its four parts: (1) its preliminary clause referring to the indemnification rights afforded under New York’s not-for-profit law; (2) its statement that New York law is not “coextensive” with and does not dictate the scope of indemnification for NRA directors; (3) its affirmative grant of “such” indemnification to NRA Directors; and (4) its limitation that NRA directors are not entitled to indemnification if prohibited by New York law.

| | NRA Bylaw Text | Plain Meaning |
|----|---|--|
| 1. | The indemnification and advancement of expenses of Directors granted pursuant to, or provided by, the corporate laws of the state under which the Association is incorporated | New York law |
| 2. | shall not be exclusive of any other rights to which a Director seeking indemnification or advancement of expenses may be entitled | is not the only source of indemnification or advancement rights to which an NRA director may be entitled |

| | | |
|----|---|--|
| 3. | and each Director shall be entitled to such indemnification and expenses immediately to the fullest extent requested in writing to the Secretary or Executive Vice President by such Director | and each NRA director has such rights immediately to the fullest extent requested in writing |
| 4. | unless and only unless prohibited by corporate laws of the state under which the Association is incorporated | <u>unless and only unless</u> prohibited by New York law. |

(Dkt 34 at 15; Dkt 35 at 15 (emphasis added).)

Further supporting this plain meaning—that NRA Directors are entitled to indemnification unless and only unless prohibited by New York law—are the expansive words and phrases used to confer an NRA Director’s right to indemnification. For example, NRA Directors “shall be entitled” to indemnification and advancement “immediately,” not “promptly” or “within a reasonable time.” Similarly, an NRA Director is entitled to indemnification and advancement “to the fullest extent,” which is a phrase that Courts have used to interpret indemnification provisions broadly. *See generally* Olson et al., Dir. & Off. Liab § 9:4 (describing use of the phrase “to the fullest extent” in corporate Charter and Bylaws provisions). Finally, words used to set the limits of an NRA Director’s right to indemnification—“unless and only unless”—emphasize the intended breadth of the right.

Given the broad grant of indemnification and advancement in the NRA bylaws, North has stated a claim that he is entitled to be indemnified and advanced legal fees in responding to and defending against inquiries, subpoenas, and lawsuits arising out of and related to his service as a Director of the NRA. The Court should deny the NRA’s motion to dismiss on this ground alone.

II. The NRA’s Reading of its Bylaws Fails To Give Meaning to Each Word.

The NRA repeatedly and wrongly attempts to minimize the NRA bylaw provision by ignoring its expansive language and insisting that “[a]ll [the Bylaws] do is spell out a mechanism”

for an NRA Director to request indemnification “to the extent that he or she is entitled to it under New York law.” (Dkt 31 at 6.) The NRA ignores the broad and urgent language used in the bylaws (e.g., “shall be entitled,” “immediate,” “to the fullest extent,” “unless and only unless”), and focuses instead on trying to minimize Directors’ indemnification rights. (Dkt 31 at 7.)

First, the NRA’s reading of its bylaws is clearly wrong because the bylaws expressly state that New York law is not the exclusive source of rights. The NRA willfully misreads what it calls the “first clause”—parts 1 and 2 in the chart above—which does not merely incorporate the indemnification rights afforded by New York law. To the contrary, the “first clause” in the NRA bylaws expressly provides that, while NRA Directors do have all the rights to indemnification provided by New York law, those rights “shall not be exclusive of any other rights to which a Director seeking indemnification or advancement of expenses may be entitled[.]” (Dkt 34 at 15; Dkt 35 at 15.) It therefore does not make sense that the word “such” in the “second clause” refers solely to indemnification *required* under New York law.

Second, because the word “such” in the “second clause” cannot refer to the indemnification rights created by New York law, it is clear that the word “such” instead refers to those “other rights to which a Director seeking indemnification or advancement of expenses may be entitled[.]” Thus, the bylaws’ statement that “each Director shall be entitled to *such* indemnification and expenses” is an affirmative grant of rights above and beyond the rights required by New York law.

North does not argue that New York law *requires* him to be indemnified; instead, he argues that the NRA’s bylaws provide him with indemnification and advancement. Therefore the NRA’s arguments in Part IV.B of its Motion to Dismiss are irrelevant to North’s indemnification claim. Still, the NRA’s citation to *Baker v. Health Management Systems, Inc.*, supports North’s claim for

indemnification and advancement, including his right to be indemnified for defending this lawsuit. 98 N.Y.2d 80 (2002).

In *Baker*, the Court of Appeals held that a CFO who had been a defendant in a securities lawsuit until all claims against him were dismissed was not entitled to so-called “fees on fees”— i.e., the fees he incurred prosecuting a lawsuit seeking the fees he incurred defending the securities suit. *Id.* at 85–88. Both the Majority and Dissenting opinions in *Baker*, however, noted that New York law “expressly provides that [its indemnification provision] is not an exclusive remedy and, thus, corporations remain free to provide indemnification for fees on fees in bylaws, employment contracts or through insurance.” *Id.* at 88; *see also id.* at 91 (“[W]e certainly join in the majority’s concluding observation that directors would do well to provide for such indemnification in bylaws, employment contracts and insurance, if they can.”). That is exactly what the NRA did here, by enacting a broad indemnification provision in its bylaws, which applies unless and only unless New York law *prohibits* indemnification, which it does not under North’s circumstances.

Because the NRA’s interpretation of Article IV, Section 4 of its bylaws fails to give that section its plain meaning and ignores its affirmative and expansive language, the Court should deny the NRA’s motion to dismiss North’s counterclaim seeking indemnification and advancement.

III. In the Event the Court Finds the Bylaw Language Ambiguous, Further Discovery is Warranted.

The plain meaning of the NRA bylaws supports North’s claim to indemnification. If, however, the Court finds that the meaning of the bylaw provision is ambiguous, North is entitled to discovery.

The NRA's affidavit by NRA employee Mark Ness does nothing to support the NRA's new theory regarding the meaning of the "Indemnification and Advancement of Expenses of Directors of the Association" provision of its bylaws.

For one, there is reason to doubt the veracity or completeness of the affidavit. Mr. Ness writes in his affidavit that he has "reviewed compilations of Board resolutions, as well as minutes of members' meetings, and am not aware of any Board or member resolutions that create indemnification rights for the NRA's officers or directors." (Dkt 32 ¶ 7; *see also* Dkt 31 at 13.) But the meeting minutes of the April 29, 2019 NRA Board of Directors meeting show that the NRA Audit Committee passed a resolution on this very topic. The Audit Committee noted that the Department of Justice and congressional committees were conducting investigations, including "interviewing various persons who could be potential witnesses, including officers, directors, and employees of the NRA, and that **"the NRA's Bylaws, Article IV, Section 4, provide for indemnification of directors[.]"** (Exhibit 2 at 13–14 (emphasis added).) The NRA Audit Committee therefore adopted a resolution that "provision of independent counsel based on the sound discretion of senior management is fair, reasonable, and in the best interest of the NRA." *Id.*

These NRA Board of Directors Meeting Minutes support North's claim for indemnification and advancement because they state that the NRA's bylaws provide for indemnification of Directors. These meeting minutes also undermine the credibility of the NRA's affidavit because this resolution is directly contrary to Mr. Ness's statement that he reviewed Board resolutions and was not aware of any resolutions that "create indemnification rights for the NRA's officers or directors." Dkt 32 ¶ 7. In addition, the NRA's bylaws were, of course, passed by the NRA Board, and Article IV, Section 4 of the bylaws creates a right to indemnification and advancement for the

NRA's Directors. Moreover, as discovery will show, the NRA has routinely provided indemnification to its officers and directors.¹

IV. The Court Should Not Dismiss North's Affirmative Defenses.

The Court should deny the NRA's terse argument that North's affirmative defenses should be dismissed. The NRA's argument is that many of the affirmative defenses are equitable in nature, and "North cannot rely on equitable principles to expand a narrow statutory right." Dkt 31 at 13. The right to indemnification granted in the NRA's bylaws is not a statutory right, nor is it narrow, and the NRA's argument in this regard is without merit.

CONCLUSION

For the reasons stated above, the Court should deny the NRA's motion to dismiss North's counterclaim.

Dated: August 30, 2019

WILLIAMS & CONNOLLY LLP

By: /s/ Steven M. Cady
Brendan V. Sullivan, Jr. (admitted *pro hac vice*)
Steven M. Cady
Alexander S. Zolan
725 Twelfth Street, N.W.
Washington, D.C. 20005
650 Fifth Avenue, Suite 1500
New York, NY 10019
(202) 434-5000
bsullivan@wc.com
scady@wc.com

¹ In just one example, various media outlets recently reported that the NRA even indemnified its officers for sexual harassment claims. "The National Rifle Association over the past two years has grappled with two separate sexual harassment allegations against Josh Powell, a senior official, including a case involving an employee. The employee's complaint was settled in 2017 using the nonprofit's funds, according to three sources familiar with the matter." The NRA Shielded a Top Executive Accused of Sexual Harassment, The Trace, Aug. 28, 2019 (emphasis added), available at <https://www.thetrace.org/2019/08/nra-josh-powell-sexual-harassment-ackerman-mcqueen>.

azolan@wc.com

Attorneys for LtCol Oliver North