

STATE OF NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 255

BIOMILQ, INC.,

Plaintiff and
Counterclaim Defendant,

v.

SHAYNE GUILIANO and 108LABS,
LLC,

Defendants and
Counterclaim Plaintiffs,

v.

LEILA STRICKLAND; MICHELLE
EGGER; BREAKTHROUGH
ENERGY VENTURES, LLC; BEV
JOHN DOES; BIOMILQ JOHN
DOES; and GOODWIN PROCTER
LLP,

Counterclaim Defendants.

**ORDER ON MOTION FOR ENTRY
OF PARTIAL DEFAULT AGAINST
PLAINTIFF AND COUNTERCLAIM
DEFENDANT BIOMILQ, INC.
PURSUANT TO RULE 55(a) OF THE
RULES OF CIVIL PROCEDURE**

1. **THIS MATTER** is before the Court on the 2 November 2023 filing by Defendants/Counterclaim Plaintiffs Shayne Guiliano and 108Labs, LLC (“Movants”) of the Motion for Entry of Partial Default Against Plaintiff and Counterclaim Defendant BIOMILQ, Inc. pursuant to Rule 55(a) of the North Carolina Rules of Civil Procedure (the “Motion”).¹ (ECF No. 219 [“Mot.”].)

¹ Pursuant to North Carolina Business Court Rule (“BCR”) 7.4, the Court, in its discretion, determines the Motion without oral argument. Furthermore, while consultation pursuant to BCR 7.3 is expressly optional, the Court is almost certain that BIOMILQ, Inc. opposes the Motion. Given that the Court’s conclusion is definite, it determines the Motion without awaiting the filing of a response to the Motion.

2. The Motion seeks entry of default against Plaintiff BIOMILQ, Inc. (“BIOMILQ”) for its failure to answer three counterclaims included in a pleading containing twenty-seven alleged causes of action.² (*See* Mot. 3–4; ECF No. 154.)

3. It is undisputed that Movants’ First Amended Joint Partial Answer to Plaintiff’s Second Amended Complaint and Second Amended Counterclaims and Third-Party Claim (the “Counterclaims”), (ECF No. 154), was served on BIOMILQ on 5 June 2023 by use of the Court’s electronic filing system. *See* BCR 3.9(a). It is also undisputed that on 4 August 2023, BIOMILQ timely filed BIOMILQ’s and Leila Strickland’s Motion to Dismiss Second Amended Counterclaims (the “Motion to Dismiss”) with an accompanying brief. (*See* ECF Nos. 175, 185–87.) BIOMILQ did not thereafter file or serve a reply to the three counterclaims that they do not seek to dismiss within thirty days. It is on this basis that Movants seek entry of default against BIOMILQ for the three claims in question. (*See* Mot.)

4. Rule 12(a) of the North Carolina Rules of Civil Procedure (the “Rule(s)”) states, in relevant part:

The plaintiff shall serve his reply to a counterclaim in the answer within 30 days after service of the answer or, if a reply is ordered by the court, within 30 days after service of the order, unless the order otherwise directs. Service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

² Specifically, Movants seek entry of default as to the Eighth (Trespass to Chattels), Ninth (Civil Liability for Larceny), and Fourteenth (Tortious Interference with a Contractual Relationship) claims for relief, contained in Movants’ First Amended Joint Partial Answer to Plaintiff’s Second Amended Complaint and Second Amended Counterclaims and Third-Party Claim, filed on 5 June 2023. (*See* ECF No. 154.)

a. The responsive pleading shall be served within 20 days after notice of the court's action in ruling on the motion or postponing its disposition until the trial on the merits.

N.C.G.S. § 1A-1, Rule 12(a)(1)(a).

5. Therefore, it follows that a motion filed pursuant to Rule 12(b)(6) is “a motion permitted under this rule” that “alters these periods.” *Id.*

6. Our Court of Appeals has held that “[a]lthough the motions provided for by Rule 12(b) are not pleadings, Rule 12(a) provides that the service of such a motion results in a postponement of the time for serving an answer, and, consequently, no default results pending disposition of these motions.” *Strauss v. Hunt*, 140 N.C. App. 345, 352 (2000) (cleaned up); *see also Moseley v. Branch Banking & Tr. Co.*, 19 N.C. App. 137, 141 (1973) (quoting 6 J. Moore's, *Fed. Prac. Par.* 55.02[3] at 55-16 (2d ed. 1948)), *cert denied*, 284 N.C. 121 (1973); *Brunson v. Office of the Twelfth Judiciary*, 2019 N.C. App. LEXIS 338, at *4–5 (2019) (unpublished) (affirming the denial of a motion for entry of default where defendant timely filed a motion to dismiss the complaint in full).

7. Movants cite no caselaw,³ persuasive or otherwise, for the proposition that a motion to dismiss pursuant to Rule 12(b)(6) as to less than all of the claims contained in a pleading somehow abrogates or modifies the clear rule that the time

³ Movants did not file a brief in support of the Motion. While not required pursuant to BCR 7.10(i), Movants' failure to cite any controlling or persuasive precedent in support of their position is telling.

to answer is tolled until the Court rules on the 12(b)(6) motion.⁴ “It is not the Court’s job to sift through the record and make [Defendants’] case for [them].” *Brewster v. Powell Bail Bonding, Inc.*, 2020 NCBC LEXIS 27, at *9 (N.C. Super. Ct. Mar. 11, 2020).

8. Notwithstanding Movants’ failure to cite any caselaw in support of the Motion, the Court determines that Rule 12 is clear: the time to answer a pleading is tolled pending the Court’s order on the pending Rule 12(b)(6) motion filed by BIOMILQ, and following entry of that order, BIOMILQ shall have 20 days to answer the pleading in question unless that time is otherwise modified by the Court.

9. **THEREFORE**, the Court, in its discretion, **DENIES** the Motion.

SO ORDERED, this the 3rd day of November, 2023.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases

⁴ G. Gray Wilson, in his treatise *North Carolina Civil Procedure*, Fourth Edition, agrees: “Even a Rule 12(b)(6) motion to dismiss fewer than all of the claims extends the time to answer others.” G. Gray Wilson, *N.C. Civ. Proc.*, § 12-2 at 12-6 (4th ed. 2020) (citing *Brocksopp Eng’g, Inc. v. Bach-Simpson, Ltd.*, 136 F.R.D. 485 (E.D. Wis. 1991)).