

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.

MICHELLE EGGER;  
BREAKTHROUGH ENERGY  
VENTURES, LLC; BEV JOHN DOES;  
and BIOMILQ JOHN DOES,

Counterclaim Defendants.

**ORDER AND OPINION ON  
GUILIANO'S MOTION FOR RULE 60  
RELIEF FROM JUDGMENT**

1. **THIS MATTER** is before the Court on the 19 December 2023 filing of Defendant Shayne Guiliano's ("Mr. Guiliano") Motion for Rule 60 Relief From Judgment (the "Motion").<sup>1</sup> (ECF No. 239 ["Mot."].) Pursuant to Rule 60 of the North Carolina Rules of Civil Procedure (the "Rule(s)"), the Motion requests reconsideration of "the Order and Opinion on Defendants' joint partial motion to dismiss [P]laintiff's second amended complaint and reconsideration of Rule 12(b) Motions already filed, or in the alternative[,] consider a new motion for Rule 12(g) dismissal by adopting already filed Rule 12(h)(2) defenses herein." (Mot. 1.)

---

<sup>1</sup> Pursuant to North Carolina Business Court Rule ("BCR") 7.4, the Court, in its discretion, elects to decide the Motion without oral argument.

*Robinson, Bradshaw & Hinson, P.A., by J. Dickson Phillips and Stephen D. Feldman, and Goodwin Procter, LLP, by Rachel M. Walsh, for Plaintiff BIOMILQ, Inc.*

*Shayne Guiliano, pro se.*

Robinson, Judge.

2. As an initial matter, Rule 60(b) applies only to relief “from a final judgment.” N.C.G.S. § 1A-1, Rule 60(b). To be clear, Rule 60(b) “has no application to *interlocutory* judgments, orders, or proceedings of the trial court. It only applies, by its express terms, to *final* judgments.” *Sink v. Easter*, 288 N.C. 183, 196 (1975) (citation omitted); *Rupe v. Hucks-Follis*, 170 N.C. App. 188, 191 (2005).

3. The Court’s order denying Defendants’ motion to dismiss, (ECF No. 145), was an interlocutory order, (*see* ECF No. 221). Therefore, the Court does not have the authority to grant relief from it under Rule 60(b). *Rupe*, 170 N.C. App. at 191. The Motion is therefore **DENIED** in part to the extent it seeks reconsideration under Rule 60(b).

4. Next, the Court addresses Mr. Guiliano’s request that the Court enter an order “which either treats Guiliano’s most recent Rule 12(b)(6) as a Rule 12(g)+Rule 12(h)(2) defense, or otherwise grants [Mr.] Guiliano an opportunity to enter a clean and simpler Rule 12(g)+Rule 12(h)(2) Motion[.]” (Br. Supp. Mot. 17, ECF No. 240 [“Br. Supp.”].)

5. Rule 12(g) provides that “[i]f a party makes a motion under [Rule 12] but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the

defense or objection so omitted, except a motion as provided in section (h)(2) hereof on any of the grounds there stated.” N.C.G.S. § 1A-1, Rule 12(g). Rule 12(h)(2) provides, in relevant part, that “[a] defense of failure to state a claim upon which relief can be granted, a defense of failure to join a necessary party, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a)[.]” *Id.* Rule 12(h)(2).

6. Plaintiff BIOMILQ, Inc. argues that a new motion under Rule 12(b)(6) pursuant to Rules 12(g) and (h)(2) would be improper because those rules “do not authorize or permit a party to make a pre-trial motion under Rule 12(b)(6) after the party has answered.” (Br. Opp’n Mot. 3, ECF No. 249 [“Br. Opp.”].) The Court agrees and otherwise declines to reconsider its 13 November 2023 Order and Opinion. (*See* ECF No. 221.)

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

**IT IS SO ORDERED**, this the 29th day of February, 2024.

/s/ Michael L. Robinson

---

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