

**Quinn Emanuel Urquhart & Sullivan, LLP v Avra  
Surgical Robotics, Inc.**

2016 NY Slip Op 32497(U)

December 20, 2016

Supreme Court, New York County

Docket Number: 158148/14

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. PAUL WOOTEN**  
*Justice*

**PART 7**

**QUINN EMANUEL URQUHART &  
SULLIVAN, LLP**

**Plaintiff,**

**INDEX NO. 158148/14**

**MOTION SEQ. NO. 003**

**- v -**

**AVRA SURGICAL ROBOTICS, INC.,  
Defendant.**

The following papers, numbered 1 to 5, were read on this motion by plaintiff for leave to reargue and renew pursuant to CPLR 2221.

**Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...**

**PAPERS NUMBERED**

**1, 2, 3**

**Answering Affidavits — Exhibits (Memo) \_\_\_\_\_**

**4**

**Replying Affidavits (Reply Memo) \_\_\_\_\_**

**5**

**Cross-Motion:  Yes  No**

This action was commenced by the plaintiff against defendant, its former client, for the nonpayment of legal fees. In its Complaint filed on August 19, 2014, plaintiff states claims for breach of contract and unjust enrichment/quantum meruit. Issue was joined when defendant e-filed its answer on September 18, 2014, which included a counterclaim for breach of fiduciary duty for disclosing confidential information in this action. On November 6, 2014, plaintiff moved for a default judgment against defendant for failing to answer, and on November 19, 2014 defendant cross-moved for a default judgment on its counterclaim. On February 4, 2015, this Court denied both motions and so-ordered a stipulation between the parties, in which it was agreed that "plaintiff shall amend its complaint by removing paragraphs 5-13 which contain confidential information that Defendant imparted to Plaintiff in confidence. Plaintiff may replace the confidential information alleged with claims that do not allege confidential information" (see Decision and Order dated February 4, 2015). The parties also set a schedule for plaintiff to amend its Complaint and for defendant to respond. Thereafter, plaintiff filed its Amended

Complaint on February 17, 2015, and defendant answered on March 23, 2015, again setting forth a counterclaim that plaintiff disclosed confidential information. On May 12, 2015 plaintiff moved for summary judgment on its claim for legal fees, and on May 22, 2015 defendant cross-moved for summary judgment on its counterclaim. In support of its summary judgment motion, plaintiff submitted an affidavit from attorney Peter Keilty (Keilty), in which he addressed defendant's counterclaim as "baseless and without merit." In a separate affidavit in opposition to the cross-motion, Keilty stated, *inter alia*, that "plaintiff has disclosed no confidential information." In a Decision and Order dated November 12, 2015 and entered on November 13, 2015 (2015 Order), this Court denied plaintiff's motion for summary judgment and granted defendant's cross-motion for summary judgment on its counterclaim for breach of fiduciary duty because plaintiff failed to answer said counterclaim contained within defendant's answer to the Amended Complaint.

Before the Court is a motion by the plaintiff for an Order 1) pursuant to CPLR 2221(d) and (e) seeking leave to reargue and renew the 2015 Order to the extent that this Court granted a default judgment to defendant on its counterclaim; and (2) pursuant to CPLR 3012(d) for leave to file an out-of-time reply to the defendant's counterclaim. The defendant is in opposition to the herein application.

In support of its motion plaintiff states that it has a meritorious defense to the counterclaim as it did not disclose any confidential information, that the counterclaim was resolved by the so-ordered stipulation, and that defendant has suffered no prejudice from any delay as plaintiff has repeatedly made its position on the counterclaim clear. Moreover, plaintiff contends that any failure to submit a reply was inadvertent, inasmuch as Keilty, who appeared on behalf of plaintiff for its summary judgment motions believed the confidential information issue to be fully resolved by the stipulation.

In opposition, defendant maintains that this motion should be denied because plaintiff

fails to meet the standard for reargument or renewal. Defendant contends that plaintiff is judicially estopped from claiming it did not publicly disclose confidential information, that the stipulation entered into between the parties did not settle defendant's breach of fiduciary claim against plaintiff as damage has already been done to defendant's business, and that plaintiff fails to establish a reasonable excuse or a meritorious defense to the counterclaim.

#### DISCUSSION

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]; see *Kent v 534 E. 11th St.*, 80 AD3d 106, 116 [1st Dept 2010] ["A motion for reargument is addressed to the court's discretion and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law"]; see also *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]).

A renewal motion "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination . . . [and a] reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2] and [3]). "Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application" (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987], appeal dismissed sub nom *Matter of Beiny*, 71 NY2d 994 [1988] [internal citation omitted]); *CPA Mut. Ins. Co. of Am. Risk Retention Group v Weiss & Co.*, 80 AD3d 431, 432 [1st Dept 2011]).

It is well settled that there is a strong public policy in New York which favors resolution of actions on their merits rather than on default (see *Picinic v Seatrains Lines, Inc.*, 117 AD2d 504, 508 [1st Dept 1986]; *Berurdo v Guillet*, 86 AD3d 459 [1st Dept 2011]; *Chi v Kelly Group, P.C.*,

63 AD3d 632 [1st Dept 2009]; *Yu v Vantage Mgmt Services, LLC*, 85 AD3d 564 [1st Dept 2011]; *Bobet v Rockefeller Center, North, Inc.*, 78 AD3d 475 [1st Dept 2010]). As such, there is a liberal policy towards "opening default judgments in furtherance of justice so that parties may have their day in court" (*Picinic*, 117 AD2d at 508). Additionally, in accordance with CPLR 3012(d), "the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court (*BAC Home Loans Servicing, LP v Reardon*, 132 AD3d 790 [2d Dept 2015]).

The Court finds that plaintiff does not meet the standard for leave to renew or reargue the 2015 Order. However, in taking into account the entire record and in the interest of justice, as well as the strong public policy favoring the resolution of cases on their merits, the Court finds that the plaintiff shall be granted an opportunity to submit a reply to the defendant's counterclaim (see *Bobet*, 78 AD3d at 475). Accordingly, the default judgment previously granted to defendant on its counterclaim in the 2015 Order must be vacated. The Court finds that plaintiff has demonstrated a reasonable excuse for failing to submit a formal and timely reply to the counterclaim, to wit, counsel's error, as plaintiff mistakenly believed that the stipulation of February 4, 2015 fully resolved the counterclaim (see *Oberon Sec. LLC v Parmar*, 135 AD3d 446 [1st Dept 2016]). Plaintiff's failure to respond to the counterclaim with a reply was entirely inadvertent, and does not evidence any willful or contumacious conduct on plaintiff's behalf. Also significant here is that defendant fails to demonstrate any prejudice from the late filing of the reply inasmuch as plaintiff has previously stated its position on the counterclaim, to wit that it is "baseless" and "without merit" in the affidavit in support of its summary judgment motion submitted by Keilty. Thus, defendant was clearly on notice of plaintiff's defense, which is consistent with the reply it seeks to file now in which it denies

publicly disclosing information imparted to it by defendant in confidence. Additionally, the plaintiff's claim for unpaid legal fees is going forward and discovery has been stayed. The Court sees no reason why the parties cannot simultaneously engage in discovery on defendant's counterclaim and the issue of whether plaintiff publicly disclosed of confidential information, and if so, whether defendant incurred damages.

CONCLUSION

For these reasons it is hereby,

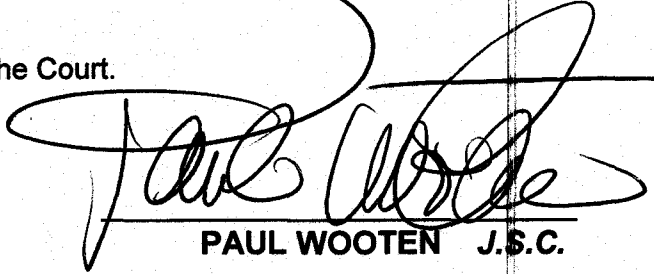
ORDERED that plaintiff's motion is granted to the extent that plaintiff shall serve a reply, in the form as annexed to its papers in exhibit 2, upon the defendant within 7 days of the date of this Order; and it is further,

ORDERED that this Court's Decision and Order dated November 12, 2015 and entered on November 13, 2015 is hereby amended to the extent that the portion of the motion granting defendant a default judgment on its counterclaim against the plaintiff is vacated, but otherwise remains the same; and it is further,

ORDERED that counsel for the plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendant, the County Clerk, and the Clerk of Part 7 who is directed to schedule a Status Conference forthwith.

This constitutes the Decision and Order of the Court.

Dated: 12/20/16

  
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE