

**Urquhart v AVRA Surgical Robotics, Inc.**

2018 NY Slip Op 32073(U)

August 17, 2018

Supreme Court, New York County

Docket Number: 158148/2014

Judge: Gerald Lebovits

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

**PRESENT:** HON. GERALD LEBOVITS PART IAS MOTION 7EFM

*Justice*

-----X INDEX NO. 158148/2014

QUINN EMANUEL URQUHART & SULLIVAN, LLP

MOTION SEQ. NO. 005

Plaintiff,

- v -

AVRA SURGICAL ROBOTICS, INC.,

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is

Plaintiff, Quinn Emanuel Urquhart & Sullivan, LLP (Quinn Emanuel), moves under CPLR 3212 for (1) summary judgment on its claims for breach of contract, unjust enrichment, and account stated against defendant AVRA Surgical Robotics, Inc. (AVRA); and (2) summary judgment on AVRA's counterclaim against plaintiff for plaintiff's allegedly breaching its fiduciary duty toward defendant.

**I. Background**

Plaintiff commenced this action against defendant AVRA, plaintiff's former client, for alleged nonpayment of legal fees.

On August 19, 2014, plaintiff filed a complaint against defendant to recover approximately €175,000 in legal fees for providing legal representation concerning disputes among AVRA, its subsidiary, MIS Robotics GmbH ("MIS"), and a RG Mechatronics GmbH (RGM). On September 18, 2014, defendant filed an answer that includes a set-off and counterclaim for breach of fiduciary duty for plaintiff's supposedly disclosing confidential information.

On November 4, 2014, plaintiff moved for a default judgment, and defendant cross-moved for a default judgment on its counterclaim. On February 4, 2015, Judge Paul Wooten denied both motions and so-ordered a stipulation between the parties providing a schedule to file an amended complaint and an answer.

On February 17, 2015, plaintiff filed its amended complaint, and defendant answered, again setting forth a counterclaim on the ground 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 a default judgment on its counterclaim.

On November 12, 2015, Judge Wooten denied plaintiff’s motion and granted defendant’s cross-motion for a default judgment. Judge Wooten denied the summary-judgment motion under CPLR 3212 (b). The court ordered that at the conclusion of this action, an inquest shall be held on defendant’s counterclaim for breach of fiduciary duty. Judge Wooten determined that plaintiff failed to reply to the counterclaim contained in defendant’s answer to the amended complaint, a default judgment is appropriate.

On December 22, 2016, plaintiff moved to renew and reargue. Judge Wooten vacated the default judgment and granted plaintiff leave to reply to the counterclaim.

Plaintiff now moves for summary judgment, alleging that (1) defendant owes plaintiff approximately €175,000 in legal fees for professional services rendered; (2) plaintiff gave defendant detailed invoices on a monthly basis in light of the retainer agreement between the parties; (3) to date, defendant has not made any payment on any monthly invoice, although emails show that defendant assured plaintiff that full payment was forthcoming; and (4) plaintiff did not disclose defendant’s confidential information.

**II. Plaintiff’s Motion for Summary Judgment for an Account Stated**

Plaintiff’s motion for summary judgment for account stated is granted.

To plead a cause of action sufficiently, “[i]t is enough . . . that a pleader state the facts making out a cause of action, and it matters not whether he gives a name to the cause of action at all or even gives it a wrong name.” (*Van Gaasbeck v Wehatuck Cent. Sch. Dist. No. 1*, 21 NY2d 239, 245 [1967].) Defendant argues that plaintiff attempts to re-label its quantum meruit claim in the amended complaint to a claim for an account stated. But it does not matter whether plaintiff pleaded its third cause of action as services rendered/quantum meruit or account stated as long as plaintiff sufficiently established in the amended complaint all the underlying grounds of an account stated-claim.

In plaintiff’s amended complaint, plaintiff pleaded the facts to state a cause of action for account stated through monthly invoices as follows:

“Quinn Emanuel invoiced AVRA for services rendered on five occasions in 2013: on May 17th, for the sum of 57,259.46 EURO; on June 21st, for the sum of 54,955.35 EURO; on July 10th for the sum of 38,949.22 EURO; On August 16th for the sum of 20,203.41 EURO; and on October 15th for the sum of 2,887.99 EURO.” (NYSCEF #17 ¶ 4).

Detailed monthly invoices, which were regularly and timely forwarded to and received by defendant, establishes that plaintiff complied with regular billing requirements of its retainer agreement, and thus established an account stated. (*See Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539, 539 [1st Dept 2009].) An account-stated claim is established when a defendant does not object to the bills. (*Id.*)

Further, defendant expressly assented to the full account balance via email correspondence in which defendant repeatedly promised to pay plaintiff. (July 25, 2014, email of Stameil to Quinn Emanuel: “[A]s I explained to your partners in LA, you worked hard and your bills will be paid.” (NYSCEF # 75; Sept 16, 2013, email from J. Stameil to M. Grosch, stating “that you will be paid in full as soon as possible.”NYSCEF # 72.)

Therefore, plaintiff is entitled to summary judgment on its account-stated claim. Pursuant to the undisputed five monthly invoices submitted by plaintiff (NYSCEF # 65-69), plaintiff is awarded summary judgment against defendant for €174,255.43, payable in U.S. funds.

The court need not decide whether plaintiff is entitled to summary judgment on its breach of contract and unjust enrichment claims. That aspect of plaintiff’s motion is denied as academic.

Defendant does not demonstrate any material issues of fact for trial.

### **III. Plaintiff’s Summary Judgment to Dismiss AVRA’s Counterclaim for Breach of a Fiduciary Duty**

Plaintiff’s motion for summary judgment to dismiss defendant’s counterclaim for breach of a fiduciary duty is granted.

#### **A. Whether Summary Judgment to Dismiss AVRA’s Counterclaim Is Premature**

Defendant alleges that summary judgment on defendant’s counterclaim is premature because defendant is appealing Judge Wooten’s 2016 order in which he vacated a default judgment on defendant’s counterclaim and granted plaintiff leave to reply to the counterclaim.

Judge Wooten found that defendant had failed to demonstrate any prejudice from the late filing of the reply, because plaintiff had previously stated its position on the counterclaim in the affidavit in support of its default judgment motion. Defendant cites *Calderone v Levites Realty Mgmt. Corp.* (246 AD2d 458, 458 [1st Dept 1998]) to demonstrate that its premature to determine a summary judgment motion before the determination of a pending appeal. But in *Calderone*, the pending appeal concerned a motion to quash a subpoena. (*Id.*) While the appeal was pending, the lower court granted partial summary judgment to plaintiffs (*Id.*) The *Calderone* Court determined that the grant of summary judgment was premature given the pending appeal. (*Id.*) Here, the facts concerning defendant’s appeal do not concern a disclosure issue that would impact the court’s decision on the summary-judgment motion.

Accordingly, the summary-judgment motion to dismiss defendant AVRA's counterclaim is not premature.

**B. Defendant AVRA's counterclaim**

Plaintiff's motion for summary judgment on defendant AVRA's counterclaim is granted and AVRA's counterclaim for breach of a fiduciary duty is dismissed.

To recover on a breach-of-fiduciary-duty claim, a party must "prove both the breach of a duty owed to it and damages sustained as a result." (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 10 [1st Dept 2008].) Thus, a client must establish actual and ascertainable damages that would not have occurred but for the attorney's conduct. (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 272 [1st Dept 2004].) In *Priest v Hennessy*, the Court of Appeals illuminated that "the fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case." (51 NY2d 62, 69 [1980].)

Defendant alleges that plaintiff disclosed in the original complaint confidential information and thus breached its fiduciary duty to defendant; defendant also alleges that plaintiff failed to reply to defendant's counterclaim for breach of duty of care and loyalty, including the duty to maintain the confidentiality of defendant's business information. Defendant alleges that plaintiff was aware of defendant's undergoing fundraising negotiation to pull through financial difficulties. According to defendant, plaintiff's gratuitous statements in the original complaint, unrelated to claiming unpaid fees, improperly injecting unrelated adverse information that result in defendant's fundraising efforts to be suspended.

First, defendant fails to establish actual and ascertainable damages they sustained on its breach-of-fiduciary-duty claim. No documentary evidence is produced in support of defendant's vague and conclusory allegation about the substantial damage. The bare assertion that defendant's fundraising efforts have been suspended because of plaintiff's negative statement in the original complaint is insufficient to prove that there is a direct causality between the critical statement and failure in fund raising.

Second, plaintiff's allegation in the complaint that defendant did not pay legal fees is not confidential communication under attorney-client privilege. (*See Priest*, 51 NY2d at 69.) Plaintiff's allegation about defendant, and the documents attached to the amended complaint about the fee arrangements is not enough for defendant to state a breach-of-fiduciary-duty claim.

Therefore, plaintiff's summary-judgment motion to dismiss AVRA's counterclaim for breach of a fiduciary duty is granted.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted: Plaintiff is awarded summary judgment on its account-stated cause of action, and plaintiff is granted a summary judgment on defendant AVRA's counterclaim and the counterclaim is dismissed; and it is further

ORDERED that plaintiff is granted a judgment for €174,255.43, payable in U.S. funds, with costs and disbursements; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on defendant and on the County Clerk's Office, which is directed to enter judgment accordingly.

8/17/2018  
DATE



GERALD LEBOVITS, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE