

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO

1437 Bannock Street
Denver, Colorado 80202

HARVEY SENDER, as Receiver for GARY DRAGUL;
GDA REAL ESTATE SERVICES, LLC; and GDA
REAL ESTATE MANAGEMENT, LLC,

Plaintiffs,

v.

GARY J. DRAGUL, an individual; BENJAMIN KAHN,
an individual; THE CONUNDRUM GROUP, LLP, a
Colorado Limited Liability Company; SUSAN
MARKUSCH, an individual; ALAN C. FOX, an
individual; ACF PROPERTY MANAGEMENT, INC., a
California Corporation, MARLIN S. HERSHEY, an
individual; and PERFORMANCE HOLDINGS, INC., a
Florida Corporation; JOHN AND JANE DOES 1 – 10;
and XYZ CORPORATIONS 1-10,

Defendants.

Attorneys for Defendants: Benjamin Kahn and
The Conundrum Group, LLP

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Case No.: **2020 CV 30255**

Division: **414**

**THE CONUNDRUM GROUP, LLP'S RESPONSE TO PLAINTIFF'S MOTION TO
DISMISS**

Defendant and Counterclaimant, The Conundrum Group, LLP (the “Law Firm”), by and through its undersigned counsel, Gordon & Rees LLP, responds in opposition to the Receiver’s Motion to Dismiss as follows:

INTRODUCTION

The Law Firm represented GDA Real Estate Services and its affiliated entities (“GDA RES”) pursuant to a September 1, 2012 fee agreement. The Law Firm represented GDA RES on litigation defense and risk management matters up to the appointment of the Receiver, and invoiced GDA RES for its legal services. Following the appointment of the Receiver, the Law Firm continued to provide legal services at the Receiver’s request, and invoiced GDA RES through the Receiver for its legal services. The Law Firm has not been paid for in excess of \$735,000 in fees for legal services provided, approximately half of which was incurred in the months leading up to appointment of the Receiver and half of which was incurred after the Receiver was appointed.

The Receiver filed the instant case, alleging on behalf of creditors of the Receivership Estate that the legal fees the Law Firm received since September 2012 were fraudulent and not related to legitimate legal services. Through its Counterclaims, the Law Firm contends the fees it has been paid and the outstanding, unpaid fees were for legal services the Law Firm provided to GDA RES prior to and after appointment of the Receiver. The Law Firm further asserts the amounts sought from the counterclaims operate as a setoff to reduce any potential future judgment.

ARGUMENT

- I. The Receivership Order does not prohibit a Creditor from Seeking a Setoff Against Alleged Damages for Claims Affirmatively Brought by the Receiver.**

In his Motion, the Receiver asserts this Court has jurisdiction over his affirmative claims against the Law Firm, yet lacks jurisdiction over the Law Firm's Counterclaims, which would operate as a setoff against any judgment against the Law Firm. However, nothing in the Receivership Order prohibits a Creditor from seeking a setoff against affirmative claims brought by the Receiver in a court other than the Receivership court. *See Exhibit 2, Receivership Order.* As such, this Court does not lack jurisdiction over the Law Firm's Counterclaims.

Colorado courts recognize that a defendant is entitled to prove its counterclaims, not for purposes of affirmative recovery, but as an affirmative defense of setoff. *Awanderlust Travel, Inc. v. Kochevar*, 21 P.3d 876, 878 (Colo. App. 2001); *see also First National Bank v. Lewis*, 57 Colo. 124, 139 P. 1102 (1914). The Colorado Court of Appeals has recognized that "fairness is achieved by allowing the defensive use of a counterclaim or setoff against ... a claim[.]" which "achieves the general equitable purpose from which counterclaims and setoffs evolved." *Duell v. United Bank, N.A.*, 892 P.2d 336, 343 (Colo. App. 1994) (J. Tursi, concurring). Further, "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation."

The Law Firm's Counterclaims are the basis for a setoff against the judgment sought by the Receiver. The Law Firm does not seek an affirmative judgment from the Receiver for the amounts claimed in the Counterclaims. The Receivership Order is silent on the issue of setoffs, and the Receivership Court does not hold exclusive jurisdiction for a Creditor's setoff counterclaim or affirmative defense, which was filed in response to the Receiver's affirmative claims. If the Court has jurisdiction over the Receiver's claims against the Law Firm, it similarly has jurisdiction over the Law Firm's equitable right to seek setoff against the Receiver's alleged damages.

II. The Law Firm's Counterclaims are Compulsory.

Colorado Rule of Civil Procedure 13(a) requires a defendant plead counterclaims when the claim “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim; and does not require adding another party over whom the court cannot acquire jurisdiction.” The Law Firm contends it was paid legal fees for legal services provided. The Receiver contends the Law Firm either provided no legitimate legal services, or was negligent in its provision of legal work. Regardless of whether the claim was made in the Receiver’s Complaint or in the Law Firm’s Counterclaims, the central issue is the same – whether the Law Firm provided non-negligent, legitimate legal services for which it received compensation. The claims in the Complaint and the claims in the Counterclaim arise out of the same occurrence, *i.e.*, the Law Firm’s legal services and payment related to such legal services. As a result, the Law Firm’s Counterclaims are compulsory pursuant to C.R.C.P. 13(a).

The Law Firm’s Counterclaims are also compulsory in order to preserve its right to setoff. A setoff arising from the same subject matter or occurrence as the Receiver’s claims is a compulsory counterclaim which must be affirmatively plead. *Grynberg v. Rocky Mountain Natural Gas*, 809 P.2d 1091 (Colo. App. 1991); *Corbin Douglass, Inc. v. Kelley*, 472 P.2d 764 (Colo. App. 1970). As discussed above, the Law Firm asserts its Counterclaims to preserve the affirmative defense of setoff. Pursuant to *Grynberg* and *Corbin Douglass*, the Law Firm’s Counterclaims are compulsory.

The Receiver claims the Law Firm’s Counterclaims fall within the exception to C.R.C.P. 13(a) because they are the subject of another pending action. C.R.C.P. 13(a)(1). Not so. While the Law Firm previously submitted an application for payment to the Receiver, the Law Firm has

never filed claims against the Receiver in another pending action. The Receiver has not established the requirements of an exception to the compulsory nature of the Counterclaims. *See* C.R.C.P. 13(a)(1).

III. The Law Firm's Accounting Claim Seeks Relief Not Available Through Discovery.

An accounting is appropriate where the record reveals that a party's books are inadequately kept, or are in such disarray that it is necessary to examine them in detail. *Andrikopoulous v. Broadmoor Mgmt. Co., Inc.*, 670 P.2d 435, 440 (Colo. App. 1983). Additionally, an accounting may be appropriate when the records provided do not reflect all income and expenses, or are intermingled in a manner that only a detailed accounting can provide the necessary information. *Id.* As the Counterclaims allege, the exhibits to the Receiver's Complaint are incomplete, inadequately prepared, and suggestive of co-mingling. Counterclaims, ¶¶ 396-411.

According to the Receiver's Complaint, GDA RES' and the Receivership Estate's payments to the Law Firm are at issue in this case. The Law Firm's right to conduct discovery alone is not a full, complete and adequate remedy. An equitable accounting of the Receivership Estate's accounts is appropriate, and the Counterclaims allege sufficient factual allegations to support such a claim. C.R.C.P. 12(b)(5).

WHEREFORE, for the foregoing arguments and authorities, the Law Firm requests this Court deny the Receiver's Motion to Dismiss Counterclaims.

Dated this 15th day of June, 2020.

GORDON & REES LLP

Pursuant to C.R.C.P. 121 § 1-26(7), a printed copy of this document with original signatures shall be maintained by the undersigned and will be made available for inspection by other parties or the court, upon request.

/s/ John M. Palmeri

John M. Palmeri, #14252

Margaret L. Boehmer, #45169

ATTORNEYS FOR DEFENDANTS

BENJAMIN KAHN and

THE CONUNDRUM GROUP, LLP

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the above and foregoing was filed and served via the CO-Courts electronic filing system this 15th day of June, 2020, which will serve the following.

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