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

PRESENT: _____ PART 54

Index Number : 109651/2006

ADAMOWICZ, LAURENT

vs

FAUCHON, INC.[US]

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 4/30/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 10 2007
COUNTY CLERK'S OFFICE
NEW YORK

[illegible] IS DECIDED IN ACCORDANCE
[illegible] ACCOMPANYING MEMORANDUM [illegible]

IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/30/07

_____
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

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LAURENT ADAMOWICZ,

Plaintiff, Index No.: 109651/2006

- against -

FAUCHON, INC. (US), PIERRE BESNAINOU, FAUCHON HOLDING, SAS, FAUCHON, SAS, GROUPE FAUCHON, S.A., UNIVERSAL CAPITAL PARTNERS, S.A. AND WALDO, S.A.,

Defendants.

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RICHARD B. LOWE III, J:

This action arises out of an alleged breach of contract concerning the equity shares in various Fauchon companies. The complaint, dated July 3, 2006 (Complaint), sets forth causes of action for breach of contract as against defendants Universal Capital Partners, S.A. (UCP) and Pierre Besnainou (First Cause of Action), breach of fiduciary duty as against UCP and Besnainou (Second Cause of Action), and tortious interference with contract as against all defendants, excluding UCP (Third Cause of Action).

Defendants Fauchon Holding, SAS (Fauchon Holding), Fauchon SAS (Fauchon SAS), Groupe Fauchon, S.A. (Groupe Fauchon), Fauchon, Inc. (US) (Fauchon US), and Waldo S.A. (Waldo) (collectively Fauchon Group) move for an order, pursuant to CPLR 3211 (a) (5), (7) & (8) and CPLR 327, dismissing the Complaint with prejudice.[1]

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[1] On February 7, 2007, UCP and Besnainou filed a motion to dismiss to be decided under separate sequence. Oral argument is set for May 15, 2007.

Background

The Parties

Plaintiff, Laurent Adamowicz, is a citizen of France and a permanent resident of the State of Connecticut. Prior to moving to Connecticut, Adamowicz was a resident of New York (Complaint, ¶ 2). In 1998, Adamowicz acquired controlling interest in the Fauchon Group.

The Fauchon Group of companies is a collection of privately held related corporations (Complaint, ¶ 10). It is a French-origin manufacturer and retailer of gourmet products and catering services (id., ¶ 10). With the exception of Fauchon US, the Fauchon Group is located in France (id., ¶ 12).

Fauchon US is incorporated in Delaware with retail operations in Long Island City and Manhattan, New York (Complaint, ¶ 9). Fauchon US is an indirect and wholly owned subsidiary of defendants Waldo, Fauchon Holding, Groupe Fauchon and Fauchon SAS (id.). While Adamowicz was CEO, Fauchon US maintained its headquarters, as well as a warehouse, kitchen, baking facility, and three stores in New York (id., ¶ 15).

Besnainou is the owner of UCP (id., ¶ 4). UCP is an investment company located in Belgium with interests in Europe and the United States (id.).

Adamowicz's Relationship with the Defendants

As noted above, Adamowicz acquired a controlling interest in the Fauchon Group in 1998 (Complaint, ¶ 10). Adamowicz, along with a number of minority investors[2] (Minority Investors)

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[2] The Minority Investors include the following companies and individuals: Barclays Private Equity France, S.A.S.; Compagnie De Bois Sauvage; Michel Deroy; Michel Ducros; Chirstine Gaillard; Intermediate Capital Group, P.L.C.; Levira Holding; Matignon Investissement et Gestion S.A.S.; Matignon F.C.P.R.; Parvent, Guy Paquot, and Jean Francoise Toulouse (see Adamowicz v Barclays Private Equity France S.A.S., No. 05 Civ. 0961 (HB), 2006 WL 728394,

entered into a Groupe Fauchon Shareholders' Agreement, dated March 10, 1998 (Shareholders' Agreement) that gave Adamowicz voting and operational control as Chairman and CEO of the Fauchon Group through March 2005 (Complaint, ¶ 10). The Shareholders' Agreement, written in French and executed in Paris, provides that all disputes relating to the signing, interpretation and performance of the Shareholders' Agreement are subject to the jurisdiction of the Paris Commercial Court.

In 2003, the Fauchon Group experienced a liquidity crisis (Complaint, ¶ 18). In October 2003, the Paris Commercial Court appointed a receiver to assist the Fauchon Group in its negotiations with creditors while it created a recapitalization plan (id., ¶ 20).

During November and December 2003, Adamowicz negotiated a joint venture agreement with UCP that encompassed an investment by UCP with Fauchon Group as well as the future sale of Adamowicz's stake in the companies to UCP (id., ¶ 22). This agreement was executed on December 18, 2003 (id., ¶ 25). On December 22, 2003, the Minority Investors rejected the joint venture agreement allegedly because it called for additional capital contribution (id., ¶ 26).

Adamowicz and Besnainou negotiated a subsequent agreement wherein UCP agreed to loan money to Adamowicz in order to fund new capital increases (Complaint, ¶ 28). The loan agreement was executed on January 5, 2004 in Paris (Protocol d'accord, dated January 5, 2004; see also Complaint, ¶ 32). However, according to Adamowicz, on January 9, 2004, Besnainou announced that UCP was no longer interested in investing in the Fauchon Group (Complaint, ¶ 36). Adamowicz alleges that the Minority Investors conspired with Besnainou so that UCP would renege on its obligations.

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at *1 [SD NY Mar. 22, 2006]).

That same day, the French receiver informed Adamowicz that he could choose to either sell his Fauchon Group shares to the Minority Investors or file for bankruptcy relief (Complaint, ¶ 37). According to Adamowicz, he opted to sell his shares at an artificially depressed price.

In March 2004, UCP announced that it would acquire a 10% interest in the Fauchon Group (id., ¶ 40).

Procedural History

In or around January 2004, after Adamowicz sold his Fauchon Group shares, Adamowicz initiated a proceeding in France requesting the appointment of a judicial expert to inquire into an alleged scheme by the Fauchon Group, UCP, Besnainou and the Minority Investors to gain control of the Fauchon Group (see 2004 Summons for Urgent Expert Examination Before the Commercial Court of Paris at the request of Laurent Adamowicz).

On October 4, 2004, the Paris Commercial Court denied and dismissed Adamowicz's request for the appointment of an expert holding that it "largely exceeded the fact-finding by a technician" and "based, at this stage only on suppositions" (Paris Commercial Court Provisional Order, dated October 4, 2004), and the Paris Court of Appeals affirmed (see Paris Court of Appeal Decision, dated June 8, 2005). According to defendants, the French court did not preclude Adamowicz from pursuing his substantive claims in France.

On January 27, 2005, Adamowicz commenced an action in the United States District Court for the Southern District of New York against the Fauchon Group, Besnainou, UCP as well as the Minority Investors (SDNY defendants) (see SDNY Complaint). There, Adamowicz alleged violations of the Securities and Exchange Act of 1934, as well as claims of breach of contract, breach of fiduciary duty, tortious interference with contract, and sought an accounting

(id.). SDNY defendants moved to dismiss the complaint based on: (1) forum non conveniens; (2) lack of subject matter jurisdiction; (3) failure to state a claim pursuant to Fed. R. Civ. Pro. 12(b)(6); and (4) lack of personal jurisdiction. On March 22, 2006, Judge Baer granted SDNY defendants' motion based on forum non conveniens grounds, holding that France was the appropriate forum for the dispute (see Adamowicz, No. 05 Civ. 0961 (HB), 2006 WL 728394, at *1). The SDNY Complaint was dismissed without prejudice (id. at * 4).

On July 12, 2006, Adamowicz filed the instant action asserting claims identical to those raised in the two previous lawsuits.

DISCUSSION

Personal Jurisdiction Over Fauchon Holding, Fauchon SAS, Groupe Fauchon and Waldo

Where, as here, defendants move to dismiss the complaint asserting that the court lacks personal jurisdiction over them, the plaintiff bears the burden of proof (Chen v Shi, 19 AD3d 407 [2d Dept 2005], citing Brandt v Toraby, 273 AD2d 429, 430 [2d Dept 2000], Roldan v Dexter Folder Co., 178 AD2d 589, 590 [2d Dept 1991], Spectra Products v Indian Riv. Citrus Specialties, Inc., 144 AD2d 832, 833 [3rd Dept 1988]). However, "the plaintiff[] need only demonstrate that facts 'may exist' to exercise personal jurisdiction over the defendant[s]" (Chen, 19 AD3d at 408, citing Cordero v City of New York, 236 AD2d 577, 578 [2d Dept 1997]; see also Amigo Foods Corp. v Marine Midland Bank-NY, 39 NY2d 391, 395 [1976]; Peterson v Spartan Indus., Inc., 33 NY2d 463, 467 [1974]). Moreover, the evidence presented by the parties must be viewed in the light most favorable to the plaintiff (Exclaim Assocs. Ltd. v Nygate, 10 Misc3d 1063 (A), 2005 NY Slip Op 52106 U [Sup Ct, NY County 2005], citing Brandt, 273 AD2d at 430).

Adamowicz argues that personal jurisdiction over collectively, the Fauchon Holding, Fauchon SAS, Groupe Fauchon and Waldo (foreign Fauchon defendants), is warranted pursuant to CPLR 301 and CPLR 302 based on the presence and activities of its subsidiary, Fauchon US in New York. The Fauchon Group submits that Adamowicz has not established sufficient facts to warrant jurisdiction since he has not established: (1) any wrongdoing by any of the Fauchon Group; (2) that the New York subsidiary was acting as an agent or mere department of the foreign Fauchon defendants; or (3) that the foreign Fauchon defendants conduct any business in New York.

A foreign corporation is subject to the jurisdiction of New York courts if it is engaged in such continuous and systematic course of 'doing business' here as to warrant a finding of its presence in this jurisdiction (Landoil Resources Corp. v Alexander & Alexander Servs., Inc., 77 NY2d 28, 33 [1990] (citations omitted); see also Frummer v Hilton Hotels Intl., Inc., 19 NY2d 533 [1967], quoting Simonson v International Bank, 14 NY2d 281, 285 [1964]; see also Bryant v Finnish Natl. Airline, 15 NY2d 426 [1965] [other citations omitted]). "Whether a corporation may be deemed to be present by virtue of its doing business in the jurisdiction depends on the application" of a number of factors, (Landoil, 77 NY2d at 33, citing Bryant, 15 NY 2d at 432), including: (1) the existence of an office in New York; (2) the solicitation of business in the state; (3) the presence of bank accounts and other property in the state; and (4) the presence of employees of the foreign defendant in the state (Frummer, 19 NY2d at 537).

Jurisdiction over a foreign corporation may be warranted based on the activities of a subsidiary present in New York (see Frummer, 19 NY2d 533; Bryant, 15 NY2d 426; Taca Intl. Airlines, S.A. v Rolls-Royce of England, Ltd., 15 NY2d 97 [1965]). There is no dispute that

Fauchon US is a domestic corporation with offices in Manhattan. However, in order to have personal jurisdiction over the foreign Fauchon defendants, Adamowicz must show that the subsidiary "does all the business which the parent corporation could do were it in New York by its own officials", i.e., that the subsidiary is acting as an agent or mere department of the parent corporation (see Frummer, 19 NY2d at 537; Delagi v Volkswagenwerk A.G. of Wolfsburg, Germany, 29 NY2d 426 [1972]; Taca Intl.,15 NY2d at 102). Factors to consider are: (1) common ownership; (2) financial dependency of the subsidiary on the parent corporation; (3) the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and (4) the degree of control over the marketing and operation policies of the subsidiary exercised by the parent (Goldsmith v Sotheby's, Inc., 9 Misc3d 1120 (A), 2005 NY Slip Op 51702 U [Sup Ct, NY County 2005], citing Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp., 751 F2d 117 [2d Cir 1984]; see also Kossoff v Samsung Co., Ltd., 123 Misc2d 177 [Sup Ct, NY County 1984] [the parent retained complete control over its New York subsidiary where the New York corporation was listed as a branch of the parent, there was a substantial interchange of personnel between the parent and its subsidiaries, the earnings of the subsidiary were consolidated in the financial statement of the parent, and management decisions were dictated by the parent]).

Adamowicz provides no support for his assertion that Fauchon US is a mere department or agent of the foreign Fauchon defendants, save for the self-serving statement that Fauchon US is a mere alter ego of the Fauchon Group (Complaint, ¶ 36). As such, Adamowicz has not met his burden under CPLR 301.

The court now turns to whether personal jurisdiction may be exercised over the foreign

Fauchon defendants pursuant to CPLR 302.

CPLR 302 (a) (1) extends jurisdiction of the New York state courts to a nonresident who purposely availed himself of the privilege of conducting activities within New York and thereby invoked the benefits and protections under its laws (see Corporate Campaign, Inc. v Local 7837, United Paperworkers Intl. Union, 265 AD2d 274 [1st Dept 1999]). One business transaction in New York may be enough to invoke jurisdiction, even though the out-of-state defendant never entered New York, as long as its activities in the state were purposeful and there is substantial relationship between the transaction and the claim asserted (see Johnson v Ward, 4 NY3d 516, 519 [2005] [under CPLR 302 (a) (1), a "substantial relationship" must be established between a defendant's transactions in New York and a plaintiff's cause of action]; Kreutter v McFadden Oil Corp., 71 NY2d 460, 467 [1988]).

In other words, there must be "the existence of some articulable nexus between the business transacted and the cause of action sued upon" (Opticare Acquisition Corp. v Castillo, 25 AD3d 238 [2d Dept 2005], citing McGowan v Smith, 52 NY2d 268 [1981]; see also Markel Ins. Co. v GFM Constr., Inc., 35 AD3d 151 [1st Dept 2006]).

Here, Adamowicz is asserting a claim of tortious interference with a contract against the Fauchon Group with respect to the joint venture and subsequent Loan Agreement with UCP [UCP Agreements]. Adamowicz alleges that in December 2003, while in negotiations with UCP, owners of Groupe Fauchon and Fauchon Holding were sent to the United States to audit Fauchon US's operations (Complaint, ¶ 24). Adamowicz's attempt to link the presence of these individuals to the subsequent failure of the alleged UCP Agreements is speculative at best. Further, there are no allegations that any representatives of Fauchon SAS or Waldo transacted

any business in New York or sent any representatives to New York at that time. Taking these allegations in the light most favorable to Adamowicz, the court finds that there is no substantial relationship between the business transaction and the cause of action sued upon as against Groupe Fauchon and Fauchon Holding (see Seevers v Tang, 268 AD2d 249 [1st Dept 2000]).

The court holds that Adamowicz fails to allege facts sufficient to warrant jurisdiction under CPLR 302 (a) (2), as there are no allegations which show the foreign Fauchon defendants committed a tortious act within the state. Specifically, Adamowicz alleges no more than that representatives of two of the foreign Fauchon defendants were present in New York (Complaint, ¶ 24). "While [Adamowicz] purports to allege that these defendants conspired ... through agents in New York, [Adamowicz's] allegations of conspiracy and agency are wholly inadequate to set forth the requisite jurisdictional predicate" (see Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG, 23 AD3d 269, 270 [1st Dept 2005]; see also Seevers, 268 AD2d 249 [dismissal required where "there is no factual basis to find as a basis for New York long arm jurisdiction, ... that [the defendant] committed tortuous conduct in New York"]). As such, the court finds that it lacks personal jurisdiction over the foreign Fauchon defendants pursuant to CPLR 302 (a) (2).

Accordingly, the motion to dismiss for lack of personal jurisdiction is granted as to Groupe Fauchon, Fauchon Holding, Fauchon SAS and Waldo.

Forum Non Conveniens

State courts in New York consider and balance the following factors to determine whether dismissal based on forum non conveniens is warranted: (1) the potential hardship to the defendant; (2) the location of documents; (3) the location of a majority of the witnesses; (4) and the burden on New York courts (see Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479

[1984]; see also Phat Tan Nguyen v Banque Indosuez, 19 AD3d 292 [1st Dept 2005] [internal citations omitted]). The burden to show that New York is an inconvenient forum lies with the defendant (see Pahlavi, 62 NY2d at 479).

The court is inclined to follow Judge Baer's rationale in dismissing the SDNY Complaint based on forum non conveniens. While Fauchon US is present in New York, the remaining individual and corporate defendants, as well as relevant witnesses and documents, are located in either France, Belgium or other European countries (see Finance & Trading Ltd. v Rhodia S.A., 28 AD3d 346 [1st Dept 2006] [granting motion to dismiss based on forum non conveniens finding that the majority of the relevant documents and witnesses were French]; see also Wyser-Pratte, 23 AD3d at 270 ["the fact that five of the nine defendants are German residents is entitled to and properly accorded substantial weight"]; Phat Tan Nguyen, 19 AD3d 292 [granting defendant's motion to dismiss on forum non conveniens grounds holding finding that the majority of witnesses, relevant documents were located in either France or Vietnam and court would be required to interpret either French or Vietnamese law]).

Moreover, as Fauchon Group suggests, this court would be required to apply French law since the Shareholders' Agreement was written in French, executed in Paris, and provides that disputes relating to its interpretation and enforcement must be brought in the Paris Commercial Court. Additionally, the Loan Agreement, also written in French, was executed in Paris. The courts of France are in much better position to interpret its own law (see Phat Tan Nguyen, 19 AD3d at 295).

The court finds that Fauchon Group has satisfied their burden in demonstrating that New York is not a convenient forum in which to litigate this action.

Accordingly, the motion to dismiss the action as against the moving defendants on the grounds of forum non conveniens is granted.

CONCLUSION

It is ORDERED that the motion by defendants Fauchon Holding, SAS, Fauchon SAS, Groupe Fauchon, S.A., and Waldo S.A. motion to dismiss for lack of personal jurisdiction is granted; and it is further

ORDERED that the motion by defendants Fauchon Holding, SAS, Fauchon SAS, Groupe Fauchon, S.A., Fauchon, Inc. (US) and Waldo S.A. motion to dismiss on the ground of forum non conveniens is granted on the condition that moving defendants waive any statute of limitations defenses and makes itself amenable to service of process if Laurent Adamowicz brings this action in France; and it is further;

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATE: April 30, 2007

ENTER:

J.S.C.