

**Adamowicz v Fauchon, Inc. (US)**

2008 NY Slip Op 30113(U)

January 14, 2008

Supreme Court, New York County

Docket Number: 0109651/2006

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III  
*Justice*

PART 56

Index Number : 109651/2006

INDEX NO. \_\_\_\_\_

ADAMOWICZ, LAURENT

MOTION DATE 5/15/07

vs  
FAUCHON, INC.[US]

MOTION SEQ. NO. \_\_\_\_\_

Sequence Number : 002

MOTION CAL. NO. \_\_\_\_\_

DISMISS

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**

JAN 18 2008

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1/14/08

HON. RICHARD B. LOWE, III

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

-----X  
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.

-----X  
**RICHARD B. LOWE III, J:**

**FILED**  
JAN 18 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

This action arises out of an alleged breach of contract concerning the equity shares in various Fauchon companies.<sup>1</sup> In the complaint, dated July 3, 2006 (Complaint), plaintiff Laurent Adamowicz asserts claims of: (1) breach of contract against Universal Capital Partners, S.A. (UCP) with respect to a joint venture and subsequent loan agreement (UCP Agreements); (2) breach of fiduciary duty against UCP and Pierre Besnainou; and (3) tortious interference with the UCP Agreements by Besnainou.

Defendants UCP and Besnainou move for an order, pursuant to CPLR 306-b, 3211 (a) (8) and CPLR 327 (a), dismissing the Complaint on the grounds that: (1) service of the summons and Complaint was not timely served; (2) the court lacks personal jurisdiction over defendants; and (3) New York is not a proper forum under the doctrine of forum non conveniens.

Adamowicz cross-moves, pursuant to CPLR 306-b, for an order extending his time to

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<sup>1</sup> On April 30, 2007, the court dismissed the action against defendants Fauchon Holding, SAS (Fauchon Holding), Fauchon SAS (Fauchon SAS), Groupe Fauchon, S.A. (Groupe Fauchon) and Waldo S.A. (Waldo) based on lack of personal jurisdiction. The court also dismissed the action against the aforementioned defendants and against Fauchon, Inc. (US) (collectively the Fauchon Group) on the additional ground of forum non conveniens.

effect service upon defendants to and including January 27, 2007, nunc pro tunc.

For the foregoing reasons, defendants' motion is granted and plaintiff's cross motion is denied.

### **Background**

For a detailed discussion of the facts and procedural history of the case, the court refers to its April 30, 2007 decision.

### **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 a controlling interest in the Fauchon Group.

Besnainou, a citizen of France and resident of Belgium, is the president and chief executive officer of UCP. UCP is an investment company located in Belgium with interests in Europe and the United States. UCP's corporate headquarters and principal offices are located in Brussels. Neither UCP nor Besnainou has any offices in the United State or any officers, directors, employees or agents in the United States. They do not own or possess any real or personal property in the United States.

According to defendants, UCP and Besnainou do not manufacture, market, sell or distribute products or services of any kind in or into the United States. They do not receive revenues from any business activities in the United States. Further, neither defendant maintains any bank accounts or telephone numbers in the United States.

### **Adamowicz's Relationship with the Defendants**

As discussed in detail in the court's April 30, 2007 decision, in 1998, Adamowicz

acquired a controlling interest in the Fauchon Group and was appointed, via a shareholders' agreement, Chairman and CEO of the Fauchon Group through March 2005. The shareholders' agreement was entered into along with a number of minority investors (Minority Investors) and provides that all disputes relating to it are subject to the Paris Commercial Court.

In 2003, the Fauchon Group experienced a liquidity crisis. As a result, 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 (Complaint, ¶ 20).

During November and December 2003, Adamowicz negotiated a joint venture agreement with UCP that encompassed an investment by UCP with Fauchon Group, including UCP's purchase of Adamowicz's stake in the companies (*id.*, ¶ 22). The agreement was executed on December 18, 2003 (*id.*, ¶ 25). On December 22, 2003, the Minority Investors rejected the joint venture agreement allegedly because it required additional capital contribution (*id.*, ¶ 26).

Thereafter, Adamowicz and Besnainou negotiated another agreement wherein UCP agreed to loan money to Adamowicz in order to fund new capital increases (Loan Agreement) (see Complaint, ¶ 28). Besnainou admits that from December 24, 2003 through January 1, 2004 he vacationed in Florida and during that time he participated in one telephone call with Adamowicz. The Loan Agreement was executed by all parties on January 5, 2004 in Paris (Protocol d'accord, dated January 5, 2004; see also Complaint, ¶ 32). According to Adamowicz, on January 9, 2004, Besnainou announced that UCP was no longer interested in investing in the Fauchon Group (Complaint, ¶ 36).

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).

Adamowicz alleges that the Minority Investors conspired with Besnainou so that UCP would renege on its obligations.

#### Procedural History

In or around January 2004, Adamowicz initiated a proceeding in France seeking an 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 (Paris Commercial Court Provisional Order, dated October 4, 2004). The Paris Court of Appeals affirmed (*see* Paris Court of Appeal Decision, dated June 8, 2005).

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 and the Minority Investors (SDNY defendants) (*see* SDNY Complaint), alleging violations of the Securities and Exchange Act of 1934, as well as claims of breach of contract, breach of fiduciary duty, and tortious interference with contract (*id.*). SDNY defendants moved to dismiss the complaint based on, among other grounds, forum non conveniens and lack of personal jurisdiction. On March 22, 2006, Judge Harold Baer granted SDNY defendants' motion 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. UCP was served with the Complaint in this action in Brussels on or about January 9, 2007. Besnainou was served in Brussels on or about January 22, 2007.

As noted above, on April 30, 2007, the court dismissed the action as against the Fauchon Group based on lack of personal jurisdiction and forum non conveniens. On June 5, 2007, Adamowicz filed a notice of appeal.

#### Discussion

Defendants argue that the Complaint should be dismissed, pursuant to CPLR 306-b, on the ground that plaintiff failed to serve the Complaint within 120 days after filing. Specifically, CPLR 306-b provides that the court, upon motion shall dismiss an action as against a defendant, without prejudice, if the defendant is not served with the complaint within 120 days after filing, unless “good cause” is shown or “in the interests of justice”, the time to serve should be extended (see CPLR 306-b).

Plaintiff cross-moves for an order extending his time to serve, nunc pro tunc, asserting that both the good cause and interests of justice standards have been met.

“Good cause” and “in the interest of justice” are two independent grounds on which the court, in its discretion, may grant an extension of time to serve (Leader v Maroney, Ponzini & Spencer, 97 NY2d 95 [2001]; Lippett v Education Alliance, 14 AD3d 430 [1<sup>st</sup> Dept 2005]). A prerequisite to establishing “good cause” is a showing of a reasonable diligence in making

service (Spath v Zack, 36 AD3d 410 [1st Dept 2007]; Charles v Suvannavejh, 16 Misc 3d 1123(A), 2007 NY Slip Op 51550 (U) [Sup Ct, Bronx County Apr 30, 2007]). “[T]he interest of justice is a broader standard, which does not require a showing of good cause, and permits the court to consider many factors” (Spath, 36 AD3d at 413, citing Mead v Singleman, 24 AD3d 1142 [3<sup>rd</sup> Dept 2005]), including, but not limited to “expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of plaintiff’s request for the extension of time, and prejudice to the defendant” (Lippett, 14 AD3d at 431, quoting Leader, 97 NY2d at 105-106).

The Complaint was filed in the New York County Clerk’s office on July 12, 2006. As such, the Complaint was due to be served by November 9, 2006. UCP and Besnainou were not served until January 9 2007 (181 days after filing) and January 22, 2007 (194 days after filing), respectively. Defendants contend that neither party attempted to avoid service and both were easily accessible. Adamowicz claims that he timely filed all necessary documents with a central authority in New York pursuant to the Hague Convention, for service upon defendants (see July 18, 2006 Affidavits of Service of the New York City County Clerk’s Office). On August 21 and August 22, 2006, the Ministry of Justice in Brussels responded, in French, explaining that service was not executed on the respective parties, because the Hague Convention requires that such papers to be served be translated into French (see August 21 and August 22, 2006 letters from the Service Public Federal Justice). Over three months later, on December 7, 2006, Adamowicz sent the Complaint to Pardo Boulager & Associates in Paris, for a second delivery upon Defendants (see December 7, 2006 letter from Adamowicz’s counsel to Pardo Boulanger & Associates).

“All that an attorney can do regarding service pursuant to the Hague Convention is follow

the proper procedures to cast his client on the tender mercies of a foreign sovereign which may or may not have much interest in effecting the involvement of its citizens in litigation in the United States” (Kulpa v Jackson, 3 Misc 3d 227 [Sup Ct, Oneida County 2004]). Here, while Adamowicz attempted to timely serve the Complaint within the 120-day deadline by filing the papers for service with the New York County Court Clerk, he failed to follow proper procedures in that the papers were not translated in French as required by the Hague Convention.

Adamowicz also failed to “monitor compliance with the Convention and to request, where required, extensions of the time to effectuate service” (*id.*). When the notices were sent to Adamowicz’s counsel advising of the improper filing, no motion to extend was ever filed. Even after Adamowicz made a second attempt to serve defendants in December of 2006, which was one month after the 120-day deadline, Adamowicz neglected to move for an extension of time. Instead, Adamowicz filed the cross motion for an extension of time after the issue was first raised by defendants. The court finds in the interests of justice, plaintiff’s delay in effecting service and failure to promptly request an extension of time warrants dismissal under CPLR 306-b (see Crawford v Liz Claiborne, Inc., — AD3d —, 844 NYS2d 273 [1<sup>st</sup> Dept Nov 1, 2007]; Leader v Maroney, Ponzini & Spencer, 276 AD2d 194 [2d Dept 2000], *affd* 97 NY2d 95 [2001]; Amsterdam Nursing Home Corp. v Lang, 16 Misc3d 1138(A), [Sup Ct, New York County 2007]).

Accordingly, Adamowicz’s cross motion for an extension of time to serve the Complaint, is denied and the Complaint is dismissed.

Even if service was considered timely, defendants are entitled to dismissal based on lack of personal jurisdiction pursuant to CPLR 302 (a). Adamowicz argues that personal jurisdiction

over defendants is warranted pursuant to CPLR 302 (a) (1) - (3).

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 [1<sup>st</sup> Dept 1999]). Adamowicz fails to provide any specifics concerning defendants' connection to New York. Adamowicz's assertion that defendants negotiated the terms of the Loan Agreement "while in the United States" and that the contract was agreed to while both parties were in the United States is unsupported and refuted by the evidence. While Besnainou admits to vacationing in Florida during the negotiation period and engaging in one telephone call with Adamowicz during that week, it is undisputed that the Loan Agreement was executed in Paris. Adamowicz makes no reference to New York in connection with the alleged contract negotiations save for the fact that he is a New York resident. His argument is thus tenuous.

CPLR 302(a)(2) confers jurisdiction over a non-domiciliary who commits a tortious act without the state which causes injury to person or property within the state. Adamowicz's vague allegation that Besnainou conspired with Minority Investors so that UCP could renege on its obligations without more is insufficient to set forth the requisite jurisdictional predicate under CPLR 302 (a) (2) (see Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG, 23 AD3d 269, 270 [1<sup>st</sup> Dept 2005]). Therefore, this argument fails as well.

Based on the record, there is no evidence that UCP derives any revenue from New York or that UCP regularly conducts or solicits business or engages in any other persistent course of conduct in New York as required under CPLR 302 (a) (3) (i).

Furthermore, Adamowicz's "attempt to establish jurisdiction pursuant to CPLR 302 (a) (3) (ii) lacks merit, as New York courts generally hold that the situs of the injury for a tort is where the events giving rise to the injury occurred, and is not based upon the fact that a party who happens to incur an indirect financial loss is domiciled in New York" (Flamel Techs. v Soula, 16 Misc3d 1129 (A) [Sup Ct, New York County Aug 27, 2007] [internal citations omitted]; O'Brien v Hackensack Univ. Med. Ctr., 305 AD2d 199, 201-202 [1<sup>st</sup> Dept 2003]).

As such, Adamowicz has not established personal jurisdiction pursuant to CPLR 302 (a) (3).

Likewise, defendants are entitled to dismissal based on forum non conveniens. For the reasons stated in this court's April 30, 2007 decision, the court is inclined to follow Judge Baer's rationale in dismissing the Complaint based on forum non conveniens, as France is the most convenient forum in which to litigate the dispute.

With the exception of Adamowicz, all of the other witnesses in this case are located in France or countries bordering France - as are many of the relevant documents (see Finance & Trading Ltd. v Rhodia S.A., 28 AD3d 346 [1<sup>st</sup> 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; Phat Tan Nguyen v Banque Indosuez, 19 AD3d 292 [1<sup>st</sup> Dept 2005]). Moreover, the UCP Agreements were executed in Paris, are written in French, and, according to the forum selection clause, courts of Paris are designated to hear any disputes arising from, or relating to, them. According to defendants, the Loan Agreement denominates the proposed loan in Euros and calculates interest in accordance with French law. The courts of France are better suited to interpret French law (see Phat Tan Nguyen, 19 AD3d

292).

Defendants have 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 defendants is granted in its entirety.

CONCLUSION

It is,

ORDERED that the motion to dismiss by defendants Universal Capital Partners, S.A. and Pierre Besnainou is granted in its entirety and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the cross motion by plaintiff Laurent Adamowicz is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: January 14, 2008.

ENTER:

*[Handwritten Signature]*  
RICHARD D. LONE, III  
J.S.C.

**FILED**  
JAN 18 2008  
NEW YORK  
COUNTY CLERK'S OFFICE