

<b>Simon v French-American Surgery Ctr., Inc.</b>
2017 NY Slip Op 30309(U)
February 16, 2017
Supreme Court, New York County
Docket Number: 162867/2014
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 39

-----X  
JEAN-PASCAL SIMON,

Plaintiff,

**DECISION/ORDER**

-against-

Index No. 162867/2014  
Motion Seq. No. 002 & 004

FRENCH-AMERICAN SURGERY CENTER, INC.,  
FRENCH AMERICAN CLINIC, INC., JJS GROUP, INC.,  
FIFTH AVENUE SURGERY CENTER LLC, GEORGE  
KESSLER, JEAN-FRANCOIS SIMON, FRANCIINVEST,  
S.A. (NOMINAL DEFENDANT)

Defendants.

-----X  
HON. SALIANN SCARPULLA, J.

In this action for money damages and equitable relief, defendants Francinvest, S.A. (“FI”), French-American Surgery Center, Inc. (“FASC”), French American Clinic, Inc. (“FAC”), JJS Group, Inc. (“JJS”), and Jean-Francois Simon (“Francois;” collectively, “defendants”<sup>1</sup>) move in motion sequence number 002, pursuant to CPLR § 327, to dismiss the complaint on the ground that New York State is an inconvenient forum for the resolution of this matter. Defendants also move for summary judgment, pursuant to CPLR § 3212, on the same ground that justice cannot be done in this matter in New York State without great inconvenience to the defendants FI and JJS.

Plaintiff Jean-Pascal Simon (“Pascal”) opposes defendants’ motions and cross-moves, pursuant to CPLR § 3025 (b), for leave to file a second amended complaint and, pursuant to CPLR § 1003, to add VCC, Inc. d/b/a Cicero Consulting Associates and Lynn Rosenberg as additional defendants.

<sup>1</sup> Defendant George Kessler (“Kessler”) is not a moving defendant, but submitted affidavits so that the court could consider his position.

In motion sequence number 004, defendants move, by order to show cause, for an order quashing and/or adjourning the notice of subpoena, dated February 25, 2016, and *subpoena duces tecum* issued by plaintiff's attorney on David Gronsbell & Co. CPAs, P.C., dated February 16, 2015, until such time as the court determines defendants' motions in sequence number 002.

Motion sequence numbers 002 and 004 are now consolidated for disposition in this decision.

## Background<sup>2</sup>

Pascal is a medical doctor who is a resident of the City and State of New York. He is also the brother of individual defendant Francois, a resident of Hallandale, Florida, and of nonparty Anne Valerie Simon ("Valerie"). They are the children of Francine and Jean Jacques Simon ("Jacques"). Francine resides in Paris, France.

Nominal defendant FI, a French société anonyme (the equivalent of a corporation), was established by Jacques to transfer wealth that he had received from his mother on to his children – Pascal, Francois and Valerie – who each received shares in FI. Francine is the president of FI. Valerie is subject to the equivalent of New York's guardianship in France.

FI has a partial ownership interest in a number of entities, including JJS and FAC. JJS is a corporation authorized to do business in New York and whose principal executive office is in Hallandale, Florida. JJS owns the condominium property located at 1049 Fifth Avenue, New York, NY, 10028, Professional Unit 3, Block 1497 Lot 1003 (the "Premises"), which is a primary focus of this dispute. FI owns an 80% interest in JJS, and Francine owns the remaining 20%. In FI's annual report, Francine is listed as president, and Francois as vice president of JJS. Francois is also the Chief Executive Officer.

FAC is currently a New York corporation, though it has been terminated and re-formed at various times since its incorporation in 1982. Francine is the president, and Francois is the vice-president/treasurer. Rosenberg is the secretary. FAC is the tenant of the Premises, and subleases the Premises to FASC and/or to Fifth Avenue Surgery Center, LLC (“LLC”)<sup>3</sup>. FASC, which conducted business under the name “Fifth Avenue Surgery Center,” was a corporation authorized to do business in New York, and whose principal executive office was in Hallandale, Florida. However, it became inactive immediately after the initial complaint in this action was filed. Although Francine was the president of FASC, Francois is listed as the Chief Executive Officer with the New York Secretary of State. LLC, a New York entity, is the putative successor to FASC, which operates a multi-specialty surgery center on the Premises, pursuant to an operating license that was issued by the Department of Health of the State of New York (“DOH”). Pascal alleges that LLC entered into an improper insider transaction to purchase FASC in June 2009, and is continuing FASC’s business under the same name.

Pascal was previously vice president and director of both FASC and FAC. He was also medical director until 1995. Starting in about 1991, Pascal allegedly loaned money to FASC and FAC, totaling between \$76,000 and \$130,000 (the “Loan”). Several checks were made payable to FASC and FAC, and Francois endorsed the checks for deposit. Pascal states that he received reimbursements for the Loan from time to time, but he has not been paid back in full. Through counsel, Pascal made written demand for repayment in November 2014. Although Pascal provided FASC with proof of the Loan, Francois, on behalf of FASC, stated that it would not repay the Loan.

Jacques was the sole shareholder and president of FAC, and he was also the majority shareholder and president of FASC until his death in 2002. Because the estate was subject to

<sup>3</sup> Defendant LLC is not a moving defendant, but submitted an affidavit in opposition to plaintiff’s cross-motion for leave to amend.

French law, Francine became the sole shareholder and president of FAC, and the majority shareholder and president of FASC. Francois was working in a non-medical capacity at FASC at the time of Jacques's death. He continued to remit payments to Francine and Valerie from FAC and FASC.

Pascal alleges that after Jacques's death but before Valerie was placed under guardianship in 2012, her shares in FI, allegedly worth more than \$5 million, were transferred to Francois for minimal consideration and without Pascal's knowledge or consent. Pascal states, upon information and belief, that Lynn May Rosenberg ("Rosenberg"), Stuart Kessler ("Stuart"), Francine, and Kessler, a New York attorney who represented FAC, received the remaining shares in FI. Pascal alleges that Rosenberg is Kessler's wife, which Kessler denies, and that Stuart is another Kessler relative. Proceedings dealing with the ownership of Valerie's shares in FI, as well as other issues, have commenced in France.

Pascal further alleges that Francois caused himself, Francine and Rosenberg to be installed as the three administrators of FI without authorization. He asserts that following her 80<sup>th</sup> birthday, Francine was ineligible to serve in such a capacity. Francine disputes this, and claims to still be an officer of the company. Pascal further asserts that Francois has dominated FI, caused unauthorized resolutions to be passed, and caused FI to take on unauthorized debt by specifically having JJS enter into mortgages and other unauthorized encumbrances on the Premises.

In September 2014, Pascal allegedly spoke to David Gronsbell ("Gronsbell"), the accountant for FAC, FASC and JJS, who informed Pascal that he had met with Kessler regarding the anticipated merger of FAC and FASC. Gronsbell told Pascal that JJS was to be the eventual sole surviving entity. After speaking with Gronsbell, Pascal undertook an investigation and requested DOH records, which show that LLC sought approval from the DOH to purchase FASC in June

2009. Pascal was allegedly never informed of this transaction. Pascal also maintains that several

records were required but never provided to the DOH, that misrepresentations were made to the DOH, and that required tax returns were also never filed in the United States or in France. The sale of FASC to LLC was consummated after June 30, 2009, for allegedly well below the actual market value and without notice to Pascal and without his consent.

After the sale, Francois terminated FAC as a New York corporation in January 2012, and re-formed it in the State of Florida. It functioned in the same manner as the New York entity. FAC was terminated again on June 5, 2013, and re-formed in New York sometime on or after October 20, 2014. Pascal alleges that FAC was operating for a period of time when it was not registered to do business in New York or in Florida. Pascal maintains that Francois, with Kessler's aid, orchestrated the transfers and re-formations in order to consolidate the rights to the Premises in JJS as part of Francois's attempt to transfer the Premises for his personal gain and to the detriment of Pascal, Francine, Valerie, and FI as an entity.

FASC was rendered inactive on December 31, 2014, immediately after the initial complaint in this action was filed. Francois has allegedly refused to provide Pascal with accurate corporate documents or to provide information concerning the entities. Pascal alleges that Francois caused one or more mortgages to be entered into concerning the Premises, and retained the proceeds for his personal use.

Pascal contends that through these series of alleged events, Francois has, or is attempting to, improperly gain control of the various entities, with Kessler's assistance, so that he can transfer the Premises for his and Kessler's benefit, and to the detriment of Pascal and FI. Pascal further maintains that Francois has exerted undue influence over their mother and sister, and caused transfers to be made without notice to, or consent from, Pascal or Francine. He asserts that the sale of FASC was in Francois's financial interest, but detrimental to the interests of FASC and Pascal

because the sale was for below market value and was an inside transaction.

Based on the foregoing allegations, Pascal asserts eight causes of action in the amended complaint, including: (1) recovery for the Loan against FAC and FASC, (2) unjust enrichment and/or quantum meruit against FAC, FASC and the individual defendants, (3) derivative claim for waste of corporate assets pursuant to BCL §§ 626, 720 against FI and the individual defendants, (4) derivative claim for breach of fiduciary duty pursuant to BCL §§ 626, 720 against FI and the individual defendants, (5) derivative and direct claim for fraud pursuant to BCL §§ 626, 720 against Francois, Kessler and LLC, (6) derivative and direct claim for access to corporate records pursuant to BCL §§ 624, 626, 720 against FAC, FASC and JJS; (7) derivative and direct claim for an injunction pursuant to BCL §§ 626, 720 against all defendants; and (8) rescission of the FASC sale to LCC against FASC, LLC and the individual defendants.

**Discussion**

**I. Motion Sequence 002**

**Forum Non Conveniens**

Defendants move to dismiss the amended complaint on the ground of *forum non conveniens*. They contend that Francine’s testimony is essential to the case because she is the president of FI, which owns an 80% interest in JJS. She is 85 years old, lives in Paris and finds it difficult to travel. She is also the mother of both Francois and Pascal, who were both born and raised in Paris. Further, they contend that French courts should decide any internal governance and financial matters of FI, a French corporation.

Plaintiff opposes, arguing that this action does not involve the internal workings of FI, and that there is no reason to adjudicate the matter in France when the Premises, JJS, FAC, FASC and LLC are all located in New York or in this country. Pascal further alleges that Francine has traveled to the States regularly for more than 30 years and continues to visit frequently, so it would

be no greater hardship for her to travel to New York now than before. Pascal points out that she is

the only one who resides in Paris, and that all the other individual defendants have residences in New York or are otherwise connected with this state. The companies that are involved in the dispute are either New York domestic corporations or regularly conduct business in New York, and the situs of most of the alleged conduct and unlawful transactions occurred in New York or this country. Thus, Pascal concludes that the action should remain in New York.

To dismiss an action on the ground of *forum non conveniens*, the defendants bear a heavy burden of establishing that New York is not a convenient forum for the action, and that there is no substantial nexus between New York and the action. *Elmaliach v Bank of China Ltd.*, 110 A.D.3d 192, 208 (1st Dep't 2013). The court considers such factors as the situs of the underlying action, the residence of the parties, the potential hardship to the parties, the location of the witnesses, whether foreign law applies, the existence of an adequate alternative forum, and the burden on New York courts. *See Islamic Republic of Iran v Pahlavi*, 62 N.Y.2d 474, 479 (1984); *Tiger Sourcing (HK) Ltd. v GMAC Commercial Fin. Corp.-Can.*, 66 A.D.3d 1002, 1003 (2d Dep't 2009); *Phat Tan Nguyen v Banque Indosuez*, 19 A.D.3d 292, 294 (1st Dep't 2005). To disturb the plaintiff's choice of forum, the balance must be strongly in favor of the defendant. *Waterways Ltd. v Barclays Bank PLC*, 174 A.D.2d 324, 327 (1st Dep't 1991).

Defendants make two arguments for dismissal based on *forum non conveniens*. First, defendants contend that this action involves the inner workings of a French company, and therefore a French court should adjudicate the matter. Most specifically, Kessler, a non-moving defendant, argues in a sworn affidavit that, because Pascal is not a shareholder in any of the named defendant entities except for FI, French law applies to determine any rights and his standing to initiate a derivative action. Second, defendants argue that Francine is a main witness and cannot travel to attend court sessions in New York.

The only claims involving the French entity are both derivative claims - for waste of corporate assets and for breach of fiduciary duty. Otherwise, the remaining claims involve defendants located in New York and/or Florida. Although it is not at all clear to me at this point that French law applies in this action, “the courts of New York are frequently called upon to apply the law of foreign jurisdictions and, should the necessity arise, will be fully capable of applying [French] law.” *Anagnostou*, 204 A.D.2d at 62. To the extent a related proceeding against FI has already commenced in France, that proceeding is sufficiently distinct, largely involving the transfer of Valerie’s shares and other FI issues, and excluding the other named defendants for certain claims raised in this action.

Defendants have also failed to demonstrate that this action involves the inner workings of a French company, implicating the internal affairs doctrine. “That doctrine ‘recognizes that only one State [i.e., the state of incorporation] should have the authority to regulate a corporation’s internal affairs – matters peculiar to the relationship among or between the corporation and its current officers, directors, and shareholders [,]’” for example, suits to compel a foreign corporation to redeem its stock or to declare a dividend. *Culligan Soft Water Co. v Clayton Dubilier & Rice LLC*, 118 A.D.3d 422 (1<sup>st</sup> Dep’t 2014); see also *Ackert v Ausman*, 29 Misc. 2d 974, 976-77 (Sup. Ct. 1961) and cases cited therein.

To the extent this action raises issues regarding FI’s alleged internal conduct, these issues relate to the Premises, a New York property, vis-à-vis defendant New York entities. These considerations compel that Pascal’s claims be adjudicated in New York. See *Broida v Bancroft*, 103 A.D.2d 88, 92 (2d Dep’t 1984) (stating that “New York has a special responsibility to protect its citizens from questionable corporate acts when a corporation, though having a foreign charter, has substantial contacts with this State”); see also *Hart v Gen. Motors Corp.*, 129 A.D.2d 179, 186

(1st Dep't 1987) (stating that "the 'internal affairs' rule is, by current legal standards, only one aspect under the general principles of *forum non conveniens*.").

Defendants also argue that I should dismiss this action on *forum non conveniens* grounds because Francine, due to her age and health, will have difficulty in traveling. However, when balanced against the fact that all the other parties and witnesses are in this country and most of the corporate records are located in New York or may be produced here, Francine's potential inability to travel does not tip the balance in favor of dismissal of the action. If the need arises, the parties may depose Francine by electronic means or may travel to Paris to preserve Francine's testimony. In sum, I find that defendants have failed to meet their heavy burden of demonstrating that the forum chosen by plaintiff is inappropriate to resolve this action.<sup>4</sup>

#### Plaintiff's Cross-Motion

Plaintiff cross-moves for leave to file a second amended complaint and to add VCC, Inc. d/b/a Cicero Consulting Associates ("VCC") and Rosenberg as additional defendants. Defendant LLC opposes the cross motion on the grounds that plaintiff's delay in requesting leave to amend is inexcusable and prejudicial, plaintiff has been aware of the facts and circumstances from the outset of the action, the proposed amended complaint does not raise any "additional or subsequent transactions or occurrences" as CPLR § 3025 (b) requires, it is unaccompanied by an affidavit of merit, and it clearly lacks merit. Defendants FI, FASC, FAC, JJS and Francois also oppose, arguing that the action should be dismissed on *forum non conveniens* grounds, and should not be expanded, because Pascal does not allege a single fact that was not known to him when he

<sup>4</sup> Defendants seek dismissal of the action under both CPLR 3212 and 327 on the grounds of *forum non conveniens*. For the reasons set forth above, I deny dismissal under both sections of the CPLR.

originally filed the complaint thirteen months prior to this application, and because Pascal does not submit an affidavit of merit with his cross-motion.

Leave to amend a complaint is freely granted “upon such terms as may be just,” requiring only that the plaintiff “set[] forth additional or subsequent transactions or occurrences” and that the motion be “accompanied by the proposed amended . . . pleading clearly showing the changes or additions to be made to the pleading.” CPLR § 3025 (b). When an amendment is sought long after the commencement of the action, *e.g.*, on the eve of trial, “the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom.” *American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co.*, 68 A.D.3d 792, 794 (2d Dep’t 2009) (internal quotation marks and citation omitted); *see also* Patrick M. Connors, 2012 Supplementary Practice Commentary (McKinney’s Cons Laws of NY, Book 7B, CPLR C3025:9A). Lateness is a barrier to granting a motion to amend only when combined with significant prejudice to the other side. *Edenwald Contr. Co. v City of New York*, 60 N.Y.2d 957, 959 (1983); *Norwood v City of New York*, 203 A.D.2d 147 (1<sup>st</sup> Dep’t 1994). “Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment[.]” *Valdes v Marbrose Realty, Inc.*, 289 A.D.2d 28, 29 (1st Dep’t 2001) (citations omitted).

While defendants contend that plaintiff has unreasonably delayed seeking amendment, the delay was only slightly more than a year. Further, the motion was not made on the eve of trial, nor have defendants demonstrated that they will suffer substantial prejudice due to the delay. I note that the formal discovery process has not yet begun. Further, plaintiff has submitted an affidavit in

which he explains that he did not have access, at the time he filed the original complaint, to the facts upon which the proposed amended complaint is based.

Defendants next assert that the cross-motion should be denied because none of the new facts involve transactions or occurrences that took place after the commencement of the action. However, CPLR § 3025 (b) requires the movant to set forth “additional *or* subsequent transactions or occurrences.” Emphasis added.

Defendants finally argue that because plaintiff did not submit an affidavit of merit, this Court must deny Pascal’s cross-motion for leave to amend. CPLR § 3025 (b) does not require that the movant submit an affidavit of merit. *See also MBI Ins. Corp. v Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dep’t 2010) (holding that “[o]n a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations . . . but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit”) (citation omitted); *see also Delta Dallas Alpha Corp. v S. St. Seaport Ltd. Partnership*, 127 A.D.3d 419, 420 (1st Dep’t 2015). To the extent that plaintiff must demonstrate that the proposed amended complaint is not palpably insufficient and devoid of merit, plaintiff has done so by submitting his affidavits and exhibits supporting his allegations surrounding the claims.

CPLR § 3025 (b), however, does require that “the proposed amended . . . pleading clearly show[] the changes or additions to be made to the pleading[,]” and plaintiff submitted a red-line copy showing such changes and additions. Because none of defendants’ arguments support denial and because plaintiff complied with the requirements of CPLR § 3025 (b), this Court grants plaintiff’s cross-motion for leave to file an amended complaint.

That portion of plaintiff’s cross motion in which he seeks to add two party defendants, pursuant to CPLR § 1003, is also granted. There has been no showing of prejudice and any

defenses that those defendants have may be raised after they are added as parties.

Consequently, plaintiff's cross-motion to file the proposed amended complaint is granted, and the proposed second amended complaint, as attached to the cross-moving papers, is deemed served upon the defendants already named as of the date of this decision and order.

**II. Motion Sequence Number 004**

Defendants FI, FASC, FAC, JJS and Francois moved to quash and/or adjourn the notice of subpoena dated February 25, 2016, and *subpoena duces tecum*, issued by plaintiff's attorney, pending determination of their motion to dismiss. As defendants' motion is denied for the reasons set forth herein, motion sequence number 004 is now denied as moot.

In accordance with the foregoing, it is

ORDERED that the motion of defendants Francinvest, S.A., French American Surgery Center, Inc., French American Clinic, Inc., JJS Group, Inc. and Jean-Francois Simon to dismiss this action on the ground of *forum non conveniens*, or alternatively, for summary judgment on the ground that justice cannot be done in this matter in New York State without great inconvenience to defendants Francinvest, S.A. and JJS Group, Inc. (motion sequence number 002) is denied; and it is further

ORDERED that the cross-motion of plaintiff Jean-Pascal Simon for leave to file a second amended complaint and to add VCC, Inc. d/b/a Cicero Consulting Associates and Lynn Rosenberg as additional defendants pursuant to CPLR § 1003 is granted, and the second amended complaint in the form annexed to the moving papers shall be deemed served upon the previously named defendants as of the date of this order, and service on the two additional defendants shall be made in accordance with the CPLR; and it is further

ORDERED that defendants and the proposed additional defendants shall serve an answer to the second amended complaint or otherwise respond thereto pursuant to the time limits set forth in

the CPLR; and it is further

ORDERED that defendants' motion seeking to quash the notice of subpoena dated February 25, 2016 and *subpoena duces tecum* issued by plaintiff's attorney on David Gronsbell & Co. CPAs, P.C. dated February 16, 2016 (motion sequence number 004) is denied as moot; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 208, 60 Centre Street, on March 29, 2017, at 2:15 p.m.

This constitutes the decision and order of the Court.

DATE:

2/16/17

  
SCARPULLA, SALIANN, JSC