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| Simon v French-American Surgery Ctr., Inc. |
| 2018 NY Slip Op 32184(U) |
| September 4, 2018 |
| 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: COMMERCIAL DIVISION PART 39

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JEAN-PASCAL SIMON,

Plaintiff,

INDEX NO. 162867/2014

MOTION SEQ. NO. 005

- v -

DECISION AND ORDER

FRENCH-AMERICAN SURGERY CENTER, INC., FRENCH AMERICAN CLINIC, INC., JJS GROUP, INC., FIFTH AVENUE SURGERY CENTER LLC, GEORGE KESSLER, JEAN-FRANCOIS SIMON, FRANCINVEST, S.A. (NOMINAL DEFENDANT), VCC, INC. D/B/A CICERO CONSULTING ASSOCIATES, LYNN ROSENBERG,

Defendant.
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The following e-filed documents, listed by NYSCEF document number 205, 206, 207, 208, 209, 210, 211, 212, 213, 217, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 350, 376, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 470

were read on this application to/for DISMISSAL

HON. SALIANN SCARPULLA:

Motion Sequence Nos. 005, 008, and 009 are consolidated for disposition.

This action for monetary damages and equitable relief arises out of a dispute concerning the sale of defendant French-American Surgery Center, Inc. ("FASC") and certain assets owned by nominal defendant FrancInvest, S.A. ("FrancInvest").

In Motion Sequence No. 005, defendants FASC, French American Clinic, Inc. ("FAC"), JJS Group, Inc. ("JJS"), and Jean-Francois Simon ("Francois") move, pursuant

to CPLR 3211 (a) (7) and 3016 (b) and Business Corporation Law § 620 (a), for dismissal of the second amended verified complaint (“complaint”). Defendant Fifth Avenue Surgery Center, LLC (“Fifth LLC”) joins the motion and cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Surgicore 5th Avenue LLC (“Surgicore”) submits an affidavit and memorandum of law in support of Fifth LLC’s cross-motion. Surgicore, which purchased 60% of the existing stock in Fifth LLC in November 2016, had been granted leave to intervene in this action in a prior decision and order.

In Motion Sequence No. 008, plaintiff moves, pursuant to CPLR 3025 (b) and CPLR 1003, for leave to serve and file a third amended verified complaint adding Fifth LLC’s managing partner, Charles Raab (“Raab”), as a party defendant, and to assert additional claims against defendants Francois, George Kessler (“Kessler”) and Lynn Rosenberg (“Rosenberg”).

In Motion Sequence No. 009, defendant VCC, Inc. d/b/a Cicero Consulting Associates (“CCA”) joins the motion filed by FASC, FAC, JJS and Francois, and moves separately, pursuant to CPLR 3212, for summary judgment.

The motions are consolidated for decision and disposition herein.

Background

According to the complaint, plaintiff is a physician licensed by the state of New York and is a resident in this state. His brother, Francois, along with their sister, non-party Anne-Valerie, are children of the non-parties Jean Jacques (“Jacques”) and Francine Simon (“Francine”).

Jacques established nominal defendant FrancInvest, a French corporation, as a vehicle to pass on his wealth to plaintiff, Francois, and Anne-Valerie. Each of Jacques' children received nearly equal shares of almost all the authorized shares in FrancInvest at the time of the company's formation. FrancInvest's current administrators are Francine, Francois, and Rosenberg.¹

FrancInvest owns partial interests in several entities related to this dispute, including FAC, a corporation Jacques formed in New York in 1982. At the time, FrancInvest owned 83% of FAC, and Jacques owned the remaining 17%. Plaintiff alleges that Jacques formed FAC to open a surgery center in New York City, and that FAC leased the property located at 1049 Fifth Avenue ("Premises") to fulfill that business plan in 1982. Plaintiff further alleges that Jacques later formed FASC, a separate corporation, in 1988 as the entity that would operate the surgery center, and that FAC subsequently subleased the Premises to FASC.

FASC opened the surgery center in 1988 after the New York State Department of Health ("DOH") approved FASC for an operating license. Jacques retained Kessler and CCA, a consulting firm, to assist FASC in completing the application for that operating license. Plaintiff assumed he was a shareholder of FASC because he was a licensed physician and, according to plaintiff, FASC would not have otherwise obtained a license

¹ Plaintiff alleges that Rosenberg is the wife of George Kessler ("Kessler"). According to Plaintiff, Kessler is an attorney who represented Jacques and various entities relevant to this dispute.

to operate the surgery center without him. However, plaintiff does not and has never owned an interest in FASC, and Jacques was a 90% majority shareholder of the company.

FrancInvest additionally owns a partial interest in JJS. Jacques formed JJS in 1995 to purchase the Premises for \$1.8 million. At the time, FrancInvest owned 80% of JJS, and Jacques owned the remaining 20%. However, when Jacques died in 2002, his estate passed to Francine by operation of French law, and Francine now owns Jacques' interest in JJS as well as his ownership interests in FAC and FASC. FAC continued to lease the Premises after JJS acquired it, and FASC continued to sublease it from FAC. In 2003, according to plaintiff, JJS directly leased the Premises to FASC, thereby eliminating any rental income FAC received as a sublessor.

Prior to Jacques's death in 2002, plaintiff alleges that he personally made professional and financial contributions into developing the surgery center. Plaintiff alleges that his contributions to FAC and FASC totaled \$1,239,000.00. Specifically, plaintiff alleges that he loaned FAC and FASC a total of \$169,000.00 (the "Loan"). Although plaintiff periodically received reimbursements, plaintiff alleges that the Loan has not been repaid in full. Plaintiff further alleges that in 1991 and 1993, on behalf of FASC, he executed two medical equipment leases with non-party Copelco Leasing Corporation for \$151,029.60 and \$69,781.18 ("Copelco Leases"). He personally guaranteed and paid the Copelco Leases but has never been repaid. Plaintiff also alleges that he waived collecting his annual \$75,000.00 salary as FASC's Medical Director. Plaintiff alleges that both Jacques and Francine promised that he would be repaid for these contributions.

After Jacques died, plaintiff alleges that Francois gained improper control over FrancInvest by exerting undue influence over Francine and Anne-Valerie. Plaintiff alleges that in October 2002, Francois purchased Anne-Valerie's shares in FrancInvest for substantially less than what the shares are worth, thereby establishing Francois as FrancInvest's majority shareholder. Moreover, plaintiff alleges that Francois wrongfully transferred four shares in FrancInvest to Kessler, Rosenberg and non-parties Stuart Kessler and Pamela Karman. In gaining control over FrancInvest, plaintiff alleges that Francois secretly sold FASC in November 2007 as part of his scheme to defraud plaintiff.

Plaintiff allegedly learned about the sale of FASC in September 2014 after speaking with David Gronsbell ("Gronsbell"), the accountant for FAC, FASC, and JJS. Gronsbell informed plaintiff about the anticipated merger of FAC and FASC, explaining that JJS would be the eventual sole surviving entity. Plaintiff alleges that his conversation with Gronsbell raised concerns and, through an independent investigation, he learned that FASC sold the surgery center to Fifth Avenue ASC, Corp. pursuant to an Asset Purchase Agreement in November 2007 for \$2,300,000.00. Pursuant to an Assignment and Assumption Agreement, Fifth Avenue ASC, Corp. assigned its rights in the surgery center to Fifth LLC in April 2009.

Fifth LLC is a New York corporation formed in July 2008, and Raab is its Managing Partner. Raab previously worked for FASC as its CEO, and plaintiff alleges that the sale of the FASC to Fifth LLC was an insider transaction for below market value. Plaintiff claims that the sale was not approved by FASC's board of directors, of which he believed he was a member. Plaintiff also maintains that the sale of the surgery center is void under

New York law because it is unlawful for Raab, who is not a licensed physician, to own and operate a surgery center. Although DOH approved the sale of the surgery center, plaintiff insists that the approval is based on material misrepresentations and omissions. CCA and Kessler allegedly misrepresented FASC's ownership interests when assisting FASC in the sale and transfer of the surgery center's operating license to Fifth LLC.

To further perpetuate his scheme, Francois allegedly induced Francine to execute a durable New York power of attorney in June 2011. Plaintiff alleges that this enabled Francois to control FrancInvest, FAC, FASC and JJS and effectuate numerous unauthorized transfers and other transactions. It is alleged that Kessler prepared the power of attorney document.

Plaintiff complains that JJS and Fifth LLC entered into a sweetheart triple-net lease agreement for \$394,000.00 in annual rent, which is far below fair market rental value for the Premises. Moreover, Francois, through JJS, allegedly encumbered the Premises with three mortgages to enrich himself by (1) refinancing the mortgage on the Premises on December 31, 2002 for \$123,330.14; (2) refinancing again on February 25, 2005 for \$2,400,000.00; and then (3) finally refinancing on August 3, 2011 for \$3,300,000.00. He purportedly used the mortgage proceeds to pay off his home mortgage and to purchase property in Florida, which Kessler had previously owned. Plaintiff further alleges that the rental income JJS receives from the Premises is assigned to the mortgagor of the last refinanced loan. According to plaintiff, Francois has caused JJS to pay him an annual salary of \$100,000 without first obtaining the consent of FrancInvest's shareholders.

In 2015, FrancInvest, under Francois' direction, sold Francine's Paris apartment. FrancInvest deposited \$1,666,846.00 that it had received from the sale into its account at HSBC. Francois allegedly transferred the funds to his personal account shortly thereafter. In addition to these complained of transactions related to Francois' conduct, plaintiff maintains that Francois, with Kessler's aid, ultimately plans to deprive him of the rights to the Premises in JJS for his personal gain and to the detriment of plaintiff and FrancInvest.

Plaintiff commenced this action on December 31, 2014. The operative complaint asserts 17 causes of action: (1) a direct claim against FAC and FASC for recovery on the Loan; (2) a direct claim against FAC and FASC for unjust enrichment/quantum meruit related to the Loan; (3) a direct claim against FAC, FASC, Francois and Fifth LLC for rescission of the sale agreement of the surgery center; (4) a direct claim for unjust enrichment and/or quantum meruit against FAC, FASC, and Francois related to the sale of the surgery center; (5) a direct claim against FAC, FASC, Francois and Fifth LLC for the impressment of a constructive trust on the proceeds of the sale of the surgery center; (6) a direct claim against Francois for fraud related to the sale of the surgery center; (7) a direct claim against Fifth LLC and CCA for aiding and abetting fraud related to the sale of the surgery center; (8) a double derivative claim on behalf of JJS against Francois and Rosenberg for corporate waste; (9) a double derivative claim on behalf of JJS against Francois for fraud; (10) a double derivative claim on behalf of JJS against Francois and Rosenberg for breach of fiduciary duty; (11) a double derivative claim on behalf of JJS against Kessler for aiding and abetting fraud; (12) a derivative claim on behalf of FrancInvest against Francois and Rosenberg for corporate waste; (13) a derivative claim

on behalf of FrancInvest against Francois for fraud; (14) a derivative claim on behalf of FrancInvest against Kessler for aiding and abetting fraud; (15) a derivative claim on behalf of FrancInvest against Francois and Rosenberg for breach of fiduciary duty; (16) an accounting against FAC, FASC, JJS, and Francois; and (17) injunctive relief against all defendants.

FAC, FASC, JJS, Francois, Fifth LLC and CCA move for dismissal or summary judgment on the complaint. Kessler has not moved for dismissal of the eleventh, fourteenth and seventeenth causes of action asserted against him. Rosenberg has not moved for dismissal of the eighth, tenth, twelfth, fifteenth and seventeenth causes of action asserted against her.

Discussion

FAC, FASC, JJS, and Francois' Motion to Dismiss

On a motion to dismiss directed at the sufficiency of the complaint, I must “accept the facts as alleged in the complaint as true, accord [the plaintiff] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory[.]” *Leon v Martinez*, 84 N.Y.2d 83, 87-88 (1994). However, I am “not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts.” *Robinson v Robinson*, 303 A.D.2d 234, 235 (1st Dep’t 2003).

A. The First Cause of Action for Breach of Contract against FASC and FAC

Plaintiff alleges that he loaned FASC and FAC at least \$169,000.00 in or about 1991, and that several checks evidence the Loan to FASC and FAC. Plaintiff alleges that,

despite FASC's and FAC's promise to repay the Loan, FASC and FAC has not repaid the Loan after plaintiff made several demands. The first cause of action seeks repayment in the amount of at least \$389,000.00.

Even affording the complaint every favorable inference, the complaint fails to plead any of the material terms of an alleged agreement, such as the agreed-upon amount for the Loan, the date by which the Loan was to be repaid, and if the Loan included interest. *See Canzona v Atanasio*, 118 A.D.3d 837, 839 (2d Dep't 2014). Plaintiff fails to remedy this deficiency in his affidavit. Accordingly, I dismiss the first cause of action for breach of contract against FAC and FASC for failure to state a claim.

B. The Second Cause of Action for Unjust Enrichment/Quantum Meruit against FAC and FASC

In the alternative, plaintiff seeks recovery on the Loan based on unjust enrichment/quantum meruit in the amount of \$389,000.00 against FAC and FASC. FAC and FASC contend that the unjust enrichment/quantum meruit claim is untimely because the Loan was made 23 years before plaintiff initiated this action, and a six-year statute of limitation applies.

CPLR 203 (a) provides that “[t]he time within which an action must be commenced . . . shall be computed from the time the cause of action accrued to the time the claim is interposed.” Because the second cause of action arises out of the same facts as the breach of contract claim, it is subject to a six-year statute of limitations. *See* CPLR 213 (1); *see also Demian v Calmenson*, 156 A.D.3d 422, 423 (1st Dep't 2017). “A cause of action for

unjust enrichment accrues ‘upon the occurrence of the wrongful act giving rise to a duty of restitution.’” *Elliott v Qwest Communications Corp.*, 25 A.D.3d 897, 898 (3d Dep’t 2006).

Here, plaintiff alleges that the Loan was made in or about 1991 without alleging when repayment was due, and plaintiff commenced the instant action in December 2014. Therefore, the second cause of action for unjust enrichment accrued from when plaintiff first advanced the funds in 1991, making his claim time-barred when applying the six-year statute of limitations. *C.f. Maya NY, LLC v Hagler*, 106 A.D.3d 583, 585 (1st Dep’t 2013) (finding that, under the circumstances, where the plaintiff had alleged a repayment date, “[t]he alleged wrongful act occurred . . . when the monies should have been repaid to plaintiff and not when plaintiff first advanced the funds” for purposes of determining the accrual of unjust enrichment).

Plaintiff, in response, does not dispute that there is a six-year limitations period. However, plaintiff argues the statute of limitations did not start to accrue until later because CPLR 206 (a)(1) applies.

CPLR 206 (a) (1) states that “where a right grows out of the receipt or detention of money or property by a . . . person acting in a fiduciary capacity, the time within which the action must be commenced shall be computed from the time when the person having the right to make the demand discovered the facts upon which the right depends.” According to plaintiff, Francine owes plaintiff a fiduciary duty and because Francine promised to repay plaintiff for his investments if FASC was sold, his claim for repayment did not accrue until he demanded repayment after discovering that FASC had been sold in October/November 2014.

Contrary to plaintiff's position, I find that CPLR 206 (a)(1) does not apply. When plaintiff made the alleged Loans in 1991, his contributions were made at Jacques' request without any specified time of repayment. Even assuming Jacques owed plaintiff a fiduciary duty, there are no facts upon which the right to make the demand depends. "Instead, since the advances at issue were made without any specified time of repayment, they were payable on demand." *Seattle Pac. Indus., Inc. v Golden Val. Realty Assoc.*, 54 A.D.3d 930, 931 (2d Dep't 2008). Therefore, the discovery accrual rule embodied in CPLR 206 (a)(1) does not apply here to save plaintiff's claim, and the statute of limitations began to run from the date of the Loan.

Neither is Francine's alleged promise to pay back plaintiff if FASC was sold sufficient to invoke CPLR 206 (a)(1). Accepting the complaint's allegations as true, Francine only promised to pay back plaintiff for his investments after Jacques had passed away, *i.e.*, in 2002. At that time, plaintiff had already made the Loan without relying on Francine's promise and, in any event, the statute of limitations period had already long passed.²

Accordingly, the branch of the motion seeking dismissal of the second cause of action for unjust enrichment/quantum meruit against FAC and FASC is granted.

² For the same reason, I reject plaintiff's argument regarding equitable estoppel because plaintiff is unable to "establish that subsequent and specific actions by defendants somehow kept [him] from timely bringing suit" *Zumpano v Quinn*, 6 N.Y.3d 666, 674 (2006). Although plaintiff insists the sale of FASC was concealed from him, the sale is irrelevant because the limitations period had already passed.

C. The Third Cause of Action for Rescission against Francois, FASC, FAC, and Fifth LLC

Plaintiff asserts a direct claim for rescission of the sale agreement of the surgery center between FASC and Fifth LLC.

As an initial matter, plaintiff is neither a party to that sale agreement nor a shareholder in FASC and therefore, lacks standing to seek rescission. *See Kaung v Bd. of Managers of Biltmore Towers Condominium Ass'n*, 22 Misc. 3d 854, 873 (Sup. Ct. 2008), *affd*, 70 A.D.3d 1004 (2d Dep't 2010) (“[O]nly parties or third party beneficiaries to a contract have the capacity and standing to seek rescission of a contract.”). This claim is also premised upon the sale of the surgery center for less than fair market value, and any recovery would inure to the benefit of the corporation, FASC. *See Gordon v Credno*, 102 A.D.3d 584, 585 (1st Dep't 2013). Because plaintiff is not an owner or shareholder in FASC, he has no derivative right, let alone an individual one, to assert this claim on behalf of or against FASC. Notably, FrancInvest owned no shares in FASC at the time of the sale, and a rescission of the sale would not benefit FrancInvest's shareholders.

Rescission is also not available if a party against whom rescission is sought “has changed his [or her] position and cannot be returned to the status quo ante” *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 A.D.2d 64, 71 (1st Dep't 2002). In Fifth LLC's cross-motion for summary judgment, Fifth LLC has demonstrated that the equitable remedy of rescission would not be appropriate in this instance because the status quo may not be restored given the expenditures it has made since 2009. Moreover, the allegations

in the complaint make clear that plaintiff has an adequate remedy at law, *i.e.*, monetary damages.

Consequently, the third cause of action for rescission of the sale of the surgery center is dismissed in its entirety.

D. The Fourth (Unjust Enrichment/Quantum Meruit) and Fifth (Constructive Trust) Causes of Action against FAC, FASC and Francois

The fourth cause of action pleads a claim for unjust enrichment/quantum meruit related to the sale of the surgery center, and the fifth cause of action pleads a claim for the impressment of a constructive trust. FAC, FASC and Francois argue for dismissal because these causes of action are derivative in nature and identical to the derivative claims for corporate waste and mismanagement.

To state a claim for unjust enrichment, “[a] plaintiff must show ‘that (1) the other party was enriched, (2) at that party’s expense, and (3) that ‘it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered’” *Kramer v Greene*, 142 A.D.3d 438, 442 (1st Dep’t 2016). “To establish a claim for quantum meruit, the plaintiff must demonstrate: ‘(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the service’” *Id.* at 442.

I find that the fourth cause of action for unjust enrichment/quantum meruit and the fifth cause of action for a constructive trust are direct claims because plaintiff seeks to recover damages that he personally sustained. The complaint alleges that, in addition to his time and labor, plaintiff made significant financial contributions to the surgery center.

These financial contributions included plaintiff's payment of the Copelco Leases. He also allegedly declined collecting his annual salary as the surgery center's Medical Director, thereby allowing FASC to keep those funds. Plaintiff alleges that these contributions were made at Jacques' behest, and, based on an express promise from Jacques, plaintiff believed that he would be repaid for his investments. Francine allegedly made similar promises after Jacques' death. As such, plaintiff has pleaded direct claims that through the sale of the surgery center, FASC and FAC were enriched at his expense, for which he seeks the proceeds of that sale. The allegations against FAC and FASC are thus sufficient to withstand dismissal.

However, the complaint fails to plead causes of action for unjust enrichment/quantum meruit and for a constructive trust against Francois. The allegations show that Jacques asked plaintiff to contribute money and services to FAC and FASC and that plaintiff complied with his father's request. Although Francois may have ultimately benefited from plaintiff's contributions, this allegation is insufficient to sustain these individual claims against him. *See Crescimanni v Trovato*, 162 A.D.3d 849 (2d Dep't 2018) ("The relationship must be one that could have caused reliance or inducement").

I also grant summary judgment dismissal of the fifth cause of action for a constructive trust as asserted against Fifth LLC. The elements of a constructive trust claim are "a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment" *Abacus Fed. Sav. Bank v Lim*, 75 A.D.3d 472, 473-74 (1st Dep't 2010). Here, no confidential or fiduciary relationship between plaintiff and Fifth LLC ever existed to impose a constructive trust and, in any event, the substance of the alleged unjust

enrichment arises from the benefit FAC and FASC allegedly received long before Fifth LLC even existed.

Accordingly, the branch of the motion seeking to dismiss the fourth cause of action for unjust enrichment/quantum meruit and the fifth cause of action for the impressment of a constructive trust against FAC, FASC, and Francois is granted only as to Francois, and these claims are dismissed against him. Additionally, dismissal of the fifth cause of action against Fifth LLC is also granted.

E. The Sixth Cause of Action for Fraud against Francois

The sixth cause of action asserts a claim for fraud against Francois related to the sale of the surgery center, and Francois moves to dismiss this cause of action by arguing that the claim is derivative and that it fails to plead fraud with particularity, pursuant to CPLR 3016 (b).

Plaintiff alleges that had Francois disclosed the sale of FASC earlier, he would have intervened to stop the sale. “Although a cause of action for fraud may be predicated on acts of concealment, there must first be proven a duty to disclose material information[.]” *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 (1st Dep’t 2006). Because plaintiff owned no shares in FASC, Francois had no duty to disclose the sale to plaintiff. Moreover, the complained of fraud is derivative in nature because it purportedly caused damage to FASC. As with the third cause of action, plaintiff may not assert a derivative claim for damage FASC allegedly sustained, let alone a direct one, in the absence of an ownership interest in FASC.

Accordingly, the sixth cause of action for fraud is dismissed against Francois.³

F. The Eighth (Corporate Waste), Ninth (Fraud), and Tenth (Breach of Fiduciary Duty) Causes of Action against Francois

The complaint asserts three double derivative claims on behalf of JJS – corporate waste (eighth cause of action), fraud (ninth cause of action), and breach of fiduciary duty (tenth cause of action) – for damage related to the Premises.

Francois argues for dismissal of plaintiff's double derivative claims because there is no precedent under French law for such claims against a French corporation. Francois, though, failed to present any caselaw or statute to support this contention. *See Conergics Corp. v Dearborn Mid-West Conveyor Co.*, 144 A.D.3d 516, 530 (1st Dep't 2016) (finding that the affirmation of a Mexican attorney proffered by defendants "too vague or conclusory . . . to enable us to take judicial notice of Mexican law under CPLR 4511 (b)"). Similarly, Francois failed to establish that a conflict exists between the laws of France and New York on this matter. *See Portanova v Trump Taj Mahal Assoc.*, 270 A.D.2d 757, 759-760 (3d Dep't 2000) (stating that the court need not engage in a choice of law analysis where plaintiff failed to meet its burden of demonstrating a conflict of laws between New York and New Jersey). Therefore, Francois' conclusory position for dismissal of these claims is insufficient.

³ Although subject to a separate motion and cross-motion for summary judgment, I also dismiss plaintiff's seventh cause of action for aiding and abetting fraud against Fifth LLC and CCA here because plaintiff failed adequately to allege the existence of an underlying fraud. *See Little Rest Twelve, Inc. v Zajic*, 137 A.D.3d 540, 541 (1st Dep't 2016).

Under New York law, double derivative actions may be brought by a minority shareholder of a parent company for harm to a subsidiary of the parent. *See Pokoik v 575 Realties, Inc.*, 143 A.D.3d 487, 489 (1st Dep't 2016) (“[W]here the parent controls the subsidiary, a shareholder may bring a ‘double’ derivative action ‘not only for wrongs inflicted directly on the corporation in which he holds stock, but for wrongs done to that corporation's subsidiaries which make indirect, but nonetheless real, impact upon the parent corporation and its stockholders.’”) (citation omitted); *see also Pessin v Chris-Craft Indus.*, 181 A.D.2d 66 (1st Dep't 1992). The action may be maintained “[w]here a stockholder controls a subsidiary [such that] . . . there is no independence between the parent stockholder and the subsidiary, [and] it cannot be expected that the controlling stockholder will authorize a suit on behalf of the subsidiary against itself for harm to the subsidiary.” *Pessin*, 181 A.D.2d at 72.

Here, plaintiff alleges that he is a minority shareholder of FrancInvest, and that FrancInvest controlled JSS as the subsidiary corporation that owns the claims. Therefore, plaintiff's double derivative claims are appropriate. Francois, nevertheless, argues that I should dismiss the double derivative claims because plaintiff failed to plead that a demand upon FrancInvest's administrators would have been futile.

Business Corporation Law § 626 governs shareholder derivative actions, and the statute sets forth specific procedures that must be followed. Business Corporation Law § 626 (c) provides that the complaint in any shareholder derivative action “shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort.” In the complaint, plaintiff states that he

did not make a pre-suit demand upon FrancInvest. New York courts excuse a pre-suit demand as futile “if a complaint alleges with particularity that [] a majority of the directors are interested in the transaction” in addition other alternative bases. *Marx v Akers*, 88 N.Y.2d 189, 198 (1996).

I find that plaintiff has pleaded facts sufficient to infer that a pre-suit demand upon FrancInvest’s administrators would have been futile based on self-interest. *See Soho Snacks Inc. v Frangioudakis*, 129 A.D.3d 636, 637 (1st Dep’t 2015). “[A] director may be interested under either of two scenarios: self-interest in the transaction or loss of independence due to the control of an interested director” *Matter of Comverse Tech., Inc. Derivative Litig.*, 56 A.D.3d 49, 54 (1st Dep’t 2008). Here, FrancInvest’s three administrators are Francine, Francois and Rosenberg. Plaintiff alleges that Francois is FrancInvest’s majority shareholder and that, although Francine is another administrator, she executed a durable power of attorney permitting Francois to act on her behalf. The third administrator, Rosenberg, is Francois’ personal appointee. It is alleged that Francois transferred one share in FrancInvest to Rosenberg for no consideration. The facts, as alleged, are sufficient to infer that Francois exerted significant control over FrancInvest and its two other administrators to excuse the pre-suit demand for the double derivative claims because it cannot be expected that Francois would authorize suit against himself for the alleged harm his conduct caused JJS.

Lastly, although Francois does not attack the sufficiency of the claims for corporate waste or breach of fiduciary duty, he contends that the ninth cause of action for fraud was not pleaded with particularity pursuant to CPLR 3016 (b). I agree.

The complaint alleges that Francois failed to disclose to FrancInvest's shareholders that (1) JJS effectively cut off FAC's sole source of income when it negotiated a direct lease with FASC, the former sublessee of the Premises; (2) JJS entered into a lease with FASC for less than fair market value; (3) by virtue of the lease assignment to Fifth LLC, JJS became a secured creditor of Fifth LLC; (4) JJS refinanced three mortgages on the Premises; and (6) Francois misappropriated mortgage proceeds that belonged to JJS. Each of these allegations, however, relate to Francois' alleged mismanagement, misappropriation, and/or waste of corporate assets, which is appropriately the subject of the eighth and tenth causes of action. The allegations are insufficient to additionally plead fraud as a double derivative claim because it does not state with particularity why Francois had a duty on behalf of JJS to disclose his business judgment or conduct to FrancInvest's shareholders. Therefore, I dismiss the tenth cause of action for failure to plead fraud with particularity.

Accordingly, the branch of the motion seeking dismissal of the eighth, ninth, and tenth causes of action against Francois is granted only as to the ninth cause of action.

G. The Twelfth (Corporate Waste), Thirteenth (Fraud), and Fifteenth (Breach of Fiduciary Duty) Causes of Action against Francois

The complaint asserts three derivative claims on behalf of FrancInvest against Francois – corporate waste (twelfth cause of action), fraud (thirteenth cause of action), and breach of fiduciary duty (fifteenth cause of action) – for damages related to the Premises.

Francois argues that these claims suffer from the same infirmity as the double derivative claims and should be dismissed. As with the double derivative claims, the

derivative claims regarding waste and breach of fiduciary duty are sufficient to withstand dismissal, but the derivative claim regarding fraud fails.

Accordingly, the branch of the motion seeking dismissal of the twelfth, thirteenth and fifteenth causes of action against Francois is granted only as to the thirteenth cause of action.

H. The Sixteenth Cause of Action for an Accounting against FAC, FASC, JJS and Francois

The sixteenth cause of action seeks an accounting of FAC, FASC and JJS.

FAC, FASC, JJS and Francois argue that the claim should be dismissed because the complaint fails to allege that a demand for an accounting had been made. In opposition, plaintiff argues that no demand is necessary.

Contrary to plaintiff's position, he must demonstrate that a demand for an accounting was made and refused. *See Unitel Telecard Distrib. Corp. v Nunez*, 90 A.D.3d 568, 569 (1st Dep't 2011). Here, the complaint fails to plead that a demand for an accounting had been made and rejected. Consequently, the branch of the motion seeking dismissal of the sixteenth cause of action for an accounting against FAC, FASC, JJS and Francois is granted, and the sixteenth cause of action is dismissed against these defendants.

I. The Seventeenth Cause of Action for Injunctive Relief

The seventeenth cause of action seeks a permanent injunction restoring FAC and FASC to active status as New York corporations, enjoining Fifth LLC from occupying the premises in order to restore FASC as the tenant at the Premises, and enjoining defendants from selling the Premises.

“To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a violation of a right presently occurring, or threatened and imminent, that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor” *Matter of Long Is. Power Auth. Hurricane Sandy Litig.*, 134 A.D.3d 1119, 1120 (2d Dep’t 2015).

The complaint fails to plead any facts showing that FAC, FASC, JJS or Francois are presently causing or threatening to cause harm to plaintiff. The actions complained of occurred well before 2014, when plaintiff commenced the action. Moreover, plaintiff has not alleged that monetary damages would be inadequate in the absence of an injunction. *See Mini Mint Inc. v Citigroup, Inc.*, 83 A.D.3d 596, 597 (1st Dep’t 2011).

Accordingly, the branch of the motion seeking dismissal of the seventeenth cause of action for an injunction against FAC, FASC, JJS and Francois is granted, and the seventeenth cause of action is dismissed against these defendants. Given the dismissal of the substantive causes of action against Fifth LLC, this cause of action is also dismissed against Fifth LLC.

I also dismiss the seventeenth cause of action for a permanent injunction against CCA. Not only have I dismissed plaintiff’s substantive claim against CCA, but it is also undisputed that CCA does not own the Premises nor does it operate the surgery center.

J. Plaintiff’s Request for Leave to Replead

I deny plaintiff’s request for leave to replead those causes of action that are deficient. The allegations in plaintiff’s affidavit in opposition fail to cure the deficiencies in the causes of action that have been dismissed, and plaintiff failed to submit any arguments

indicating that it would be able to state viable causes of action upon repleading of those dismissed actions. *See Genger v Genger*, 135 A.D.3d 454, 455 (1st Dep't 2016).

Plaintiff's Motion to File a Third Amended Complaint

In a separate motion, plaintiff moves for leave to file a third amended verified complaint to: (1) amend the seventh cause of action to assert a direct claim against Raab as a party defendant for aiding and abetting fraud as it relates to the sale of the surgery center; (2) amend the eighth cause of action for corporate waste and the tenth cause of action for breach of fiduciary to add Raab as a party defendant based on his position as JJS's Treasurer; (3) add an eighteenth cause claim for unjust enrichment/quantum meruit against Francois, Kessler and Rosenberg based on their allegedly improper retention of JJS's funds; and (4) amend the caption to reflect JJS's status as a nominal, rather than a direct, defendant. The motion is supported by a proposed amended verified complaint. The proposed amended complaint also includes additional allegations involving Francois and CCA related to FASC and JJS, which plaintiff did not mention in his moving papers.

It is well settled that a motion for leave to amend the pleadings should be freely granted unless there is prejudice or surprise from the delay or if the amendment is palpably insufficient or patently devoid of merit. *See JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 A.D.3d 643, 644 (1st Dep't 2013).

Given the dismissal of all causes of action sounding in fraud, plaintiff's proposed seventh cause of action for aiding and abetting fraud against Raab is patently devoid of merit absent an underlying fraud. Accordingly, the branch of the motion seeking leave to amend the seventh cause of action to add Raab as a direct party defendant is denied.

As to the proposed corporate waste and breach of fiduciary duty claims, Raab opposes based on plaintiff's delay, particularly because of his current health condition. While I am sympathetic to Raab's medical condition, "mere lateness is not a barrier to the amendment" *Edenwald Contr. Co. v City of New York*, 60 N.Y.2d 957, 959 (1983). The proposed claims arise out of Raab's position as an officer in JJS, which plaintiff learned during discovery. Raab fails to establish that he has suffered significant prejudice from the delay. Thus, this branch of the plaintiff's motion for leave to amend the eighth and tenth causes of action to add Raab as a direct party defendant is granted.

As to the proposed eighteenth cause of action for unjust enrichment/quantum meruit, plaintiff alleges that JJS made payments to Kessler and Rosenberg in exchange for little or no work. Because JJS bestowed a benefit upon them, plaintiff has demonstrated the potential merit of the proposed claim against them and therefore, this branch of plaintiff's motion is also granted.

In accordance with the foregoing, it is

ORDERED that the motion of defendants French-American Surgery Center, Inc., French American Clinic Inc., JJS Group, Inc. and Jean-Francois Simon to dismiss the complaint herein is granted in its entirety as to the first, second, third, sixth, ninth, thirteenth, sixteenth, and seventeenth causes of action, and those causes of action are dismissed in their entirety; and it is further

ORDERED that, as to the fourth cause of action for unjust enrichment/quantum meruit, the motion to dismiss is granted in part as to Francois, and the motion is denied as to FASC and FAC; and it is further

ORDERED that, as to the fifth cause of action for a constructive trust, the motion to dismiss is granted in part as to Francois, and the motion is denied as to FASC and FAC; and it is further

ORDERED that the cross motion of defendant Fifth Avenue Surgery Center LLC for summary judgment dismissing the complaint against it is granted and the complaint is dismissed against defendant Fifth Avenue Surgery Center LLC; and it is further

ORDERED that the motion of defendant VCC, Inc. d/b/a Cicero Consulting Associates for summary judgment dismissing the complaint against it is granted, and the complaint is dismissed against defendant VCC, Inc. d/b/a Cicero Consulting Associates; and it is further

ORDERED that plaintiff's motion for leave to file a third amended verified complaint is granted, in part, as follows: leave is granted to amend the eighth and tenth causes of action to add Charles Raab as a direct party defendant, to add a proposed eighteenth cause of action against defendants Jean-Francois Simon, George Kessler and Lynn Rosenberg, and to amend the caption by removing defendant JJS Group, Inc. as a direct defendant and adding JJS Group, Inc. as a nominal defendant, but leave is denied with respect to the seventh cause of action; and it is further

ORDERED that plaintiff is directed to serve a third amended verified complaint that complies with this decision and order within twenty (20) days of this decision and order; and it is further

ORDERED that defendants French-American Surgery Center, Inc., French American Clinic, Inc., George Kessler, Jean-Francois Simon, and Lynn Rosenberg shall

each serve an answer to the third amended verified complaint or otherwise respond thereto pursuant to the time limits set forth in the CPLR; and it is further

ORDERED that the action shall bear the following caption:

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

-----X

JEAN-PASCAL SIMON,

Index No. 162867/2014

Plaintiff,

- against -

FRANCINVEST, S.A. and JJS GROUP, INC.,

Nominal Defendants,

- and -

FRENCH-AMERICAN SURGERY CENTER, INC.,
FRENCH AMERICAN CLINIC, INC., FIFTH
AVENUE SURGERY CENTER, LLC, GEORGE
KESSLER, JEAN-FRANCOIS SIMON, VCC, INC.
D/B/A CICERO CONSULTING ASSOCIATES, LYNN
ROSENBERG, and CHARLES RAAB,

Defendants.
-----X

and it is further

ORDERED that counsel for the moving party shall serve a copy of this order on the Clerk of the Trial Support Office and, upon such service, the Clerk is directed to amend the caption of this action accordingly.

This constitutes the decision and order of the Court.

9/4/18
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

DO NOT POST

FIDUCIARY APPOINTMENT

REFERENCE