

Simon v Francinvest, S.A.

2019 NY Slip Op 33385(U)

November 14, 2019

Supreme Court, New York County

Docket Number: 162867/2014

Judge: Saliann Scarpulla

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

-----X
JEAN-PASCAL SIMON,

Plaintiff,

- v -

FRANCINVEST, S.A. (NOMINAL DEFENDANT), JJS
GROUP, INC., 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, CHARLES RAAB,

Defendants.
-----X

INDEX NO. 162867/2014

MOTION DATE _____

MOTION SEQ. NO. 012, 013

**DECISION + ORDER ON
MOTION**

SALIANN SCARPULLA, J.:

In this action for money damages and equitable relief, defendants George Kessler (“Kessler”) and Lynn Rosenberg (“Rosenberg”) move to dismiss the third amended complaint insofar as asserted against them (motion sequence no. 012). Defendants French-American Surgery Center, Inc. (“FASC”), French American Clinic, Inc. (“FAC”), and Jean-Francois Simon (“Francois”) move to dismiss the third amended complaint, and plaintiff Jean-Pascal Simon (“Pascal”) cross-moves for summary judgment on his 4th and 5th causes of action for unjust enrichment/quantum meruit and constructive trust (motion sequence no. 013).^{1 2}

¹ FASC, FAC and Francois also filed a cross motion for summary judgment dated June 3, 2019 but withdrew it on June 21, 2019.

² For the detailed factual background of this case, see my decisions dated 2/16/17 and 9/4/18.

Discussion

Kessler and Rosenberg's Motion to Dismiss (motion seq. no. 12)

In his third amended complaint, which is seventy-five pages long and contains eighteen causes of action (many of which have been previously dismissed) Pascal asserted the 11th double derivative cause of action for aiding and abetting fraud against Kessler, and the 14th derivative cause of action for aiding and abetting fraud against Kessler. Against Rosenberg, he asserted the 8th double derivative cause of action for corporate waste, 10th double derivative cause of action for breach of fiduciary duty, 12th derivative cause of action for corporate waste, and the 15th derivative cause of action for breach of fiduciary duty. As against both Kessler and Rosenberg, Pascal asserted the 18th double derivative cause of action for unjust enrichment on behalf of JJS Group, Inc. ("JJS").

Kessler and Rosenberg move to dismiss the third amended complaint insofar as asserted against them. In support of the motion, Kessler submits an affidavit contending that Pascal has no standing to assert a double derivative cause of action against him, and that Pascal's allegations are undermined by his unclean hands.

Rosenberg also submits an affidavit in which she provides that she has worked as a secretary for FASC, FAC and JJS but has never served on their Board of Directors. She was never involved in policy making decisions of any of the defendant corporations and was not a party to any of the transactions referenced by Pascal in the complaint. She

avers that she was asked by Francine Simon to replace Francine's husband, upon his death, as a member of Francinvest Societe Anonyme ("FI") because French law required the company to have seven members. According to Rosenberg, Francine transferred one FI share to Rosenberg, which had a nominal value, and Rosenberg then transferred the share back to Francine.

In opposition, Pascal first argues that Kessler aided and abetted fraud by, *inter alia* preparing certain documents for Francois that misrepresented the breakdown of shares owned in FI, and by preparing a power of attorney and assisting Francois in inducing Francine to execute said power of attorney in order to enable Francois to control FI, FAC, FASC and JJS. Kessler allegedly committed these acts in order to assist Francois in his scheme to gain control of FI and ultimately sell FASC to defraud Pascal, and to deprive Pascal of his rights in JJS. Pascal next argues that Kessler allegedly received legal fees even though he was "in retirement" and received money as "escrow agent" even though the corporations already had an appointed escrow agent.

Pascal further argues that contrary to her contention, Rosenberg was not merely a secretary, rather she was an officer and director of FAC, JJS, FASC and FI and breached her fiduciary duty owed in that capacity. Further, she allowed corporate waste by permitting a valuable apartment in Paris owned by FI to be sold for much less than its appraised value, proceeds of which then disappeared from the FI corporate account. She also allegedly received officer fees and director fees for doing nothing, and aided and abetted Francois in diverting money from JJS.

With regard to the 8th and 10th double derivative causes of action for corporate waste and breach of fiduciary duty, 12th and 15th derivative causes of action for corporate waste and breach of fiduciary duty, and 18th double derivative cause of action for unjust enrichment insofar as asserted against Rosenberg, Pascal has not set forth sufficiently specific allegations of any wrongdoing on Rosenberg's part. While there is conflicting evidence presented as to Rosenberg's exact role within the subject corporations, Pascal fails to set forth any factual basis for which these derivative and double derivative claims can be stated against Rosenberg.

Further, inasmuch as I previously dismissed the 9th and 13th causes of action alleging fraud against Francois on the ground that Pascal failed adequately plead fraud with particularity, the 11th double derivative and 14th derivative causes of action asserted against Kessler for aiding and abetting Francois' fraud is also dismissed. *See generally Weinberg v. Sultan*, 142 A.D.3d 767 (1st Dept. 2016).³

Finally, with regard to the 18th double derivative cause of action for unjust enrichment insofar as asserted against Kessler, Pascal essentially alleges that Kessler, who maintained that he was retired, took money from JJS, claiming it was for legal work or that he was receiving payment as an "escrow agent." 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

³³ In a decision dated December 4, 2018, I dismissed or partially dismissed the first, second, third, fourth, fifth, sixth, ninth, thirteenth, sixteenth and seventeenth causes of action asserted in the second amended complaint.

party] to retain what is sought to be recovered’.” *Kramer v. Greene*, 142 A.D.3d 438, 442 (1st Dept. 2016). Pascal fails to adequately allege in the complaint that Kessler, a lawyer who had been employed by the defendants and who had no other relationship to the corporation upon whose behalf plaintiff is asserting this claim double derivatively, was unjustly enriched at the expense of JJS.

For the reasons set forth above, all causes of action asserted against Kessler and Rosenberg are dismissed.

FASC, FAC and Francois’ Motion to Dismiss and Pascal’s Cross-Motion for Summary Judgment (motion seq. no. 013)

FASC, FAC and Francois move to dismiss the 4th, 5th and 18th causes of action in the third amended complaint. They first argue that the 4th cause of action for unjust enrichment/quantum meruit and the 5th cause of action for a constructive trust, which were both related to FASC and FAC’s alleged breach of fiduciary duty owed to Pascal during the sale of FASC in 2007, must be dismissed as time barred. They next argue that the 18th cause of action must be dismissed because all French derivative law suits must be pled against the parent company’s CEO and/or all of its directors, which was not done here, and, in any event, French law does not allow for double derivative causes of action.

Pascal then cross moves for summary judgment on his 4th and 5th causes of action for unjust enrichment/quantum meruit and a constructive trust. In support of his cross motion, and in opposition to FASC, FAC and Francois’ motion, he first argues that his claims are not time barred because FASC’s 2010 tax return states that the date of sale was

12/17/10 and Francois admitted in his answer to the third amended complaint, that the final sale closed in July 2011. Pascal then found out about the sale in October 2014.

The 4th and 5th causes of action asserted against FAC and FASC in the third amended complaint are identical to those alleged in the previous complaint. Inasmuch as I already held that, with regard to those two causes of action, “the allegations against FAC and FASC are [] sufficient to withstand dismissal” in my decision dated September 4, 2018, those causes of action will not be dismissed.

The 18th double derivative cause of action in the third amended complaint alleged unjust enrichment against Francois. Francois argues, as he did in his prior motion seeking dismissal of other double derivative causes of action asserted against him, that there is no precedent under French law for such claims against a French corporation. The translated French case law now submitted by Francois in support of his argument is insufficient to conclusively prove that double derivative claims are not permissible against a French corporation.

Further, I find that Pascal set forth a sufficient factual basis to assert this cause of action against Francois. Specifically, Pascal maintained, *inter alia*, that Francois was unjustly enriched by refinancing the JJS condominium and using the cash out obtained therefrom for his personal benefit, and by causing JJS to repay him for fake loans and to pay for his personal purchases and activities.

Finally, at this stage in the litigation, and where there are so many factual issues in dispute, summary judgment would be inappropriate. As such Pascal's cross-motion for summary judgment is denied.⁴

In accordance with the foregoing, it is hereby

ORDERED that defendants George Kessler's and Lynn Rosenberg's motion to dismiss the third amended complaint insofar as asserted against them is granted and the complaint insofar as asserted against them is severed and dismissed (motion sequence no. 012) and the Clerk of the Court is directed to enter judgment dismissing the third amended complaint as to defendants George Kessler and Lynn Rosenberg; and it is further

ORDERED that defendants French-American Surgery Center, Inc.'s, French American Clinic, Inc.'s, and Jean-Francois Simon's motion to dismiss the third amended complaint is denied (motion sequence no. 013); and it is further

⁴ Most of the allegations in the seventy-five page third amended complaint and the arguments set forth in Pascal's motion papers are disorganized and chaotic. The parties to this litigation, as well as the Court, would benefit from Pascal narrowing down and clarifying the actual timely and relevant facts that he will be focusing on to support his remaining causes of action.

ORDERED that plaintiff Jean-Pascal Simon's cross-motion for summary judgment on his causes of action for unjust enrichment/quantum meruit and constructive trust is denied (motion sequence no. 013).

This constitutes the decision and order of the court.

11/14/2019
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE	<input type="checkbox"/>	