

Simon v Francinvest, S.A.

2020 NY Slip Op 30923(U)

April 13, 2020

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 IAS MOTION 39EFM

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<p>JEAN-PASCAL SIMON,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>FRANCINVEST, S.A. (NOMINAL DEFENDANT), JJS GROUP, INC., FRENCH-AMERICAN SURGERY CENTER, INC., FRENCH AMERICAN CLINIC, INC., JEAN-FRANCOIS SIMON, CHARLES RAAB,</p> <p style="text-align: center;">Defendant.</p>	<p>INDEX NO. <u>162867/2014</u></p> <p>MOTION DATE _____</p> <p>MOTION SEQ. NO. <u>016, 017</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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SALIANN SCARPULLA, J.:

In this action for money damages and equitable relief, defendants French-American Surgery Center, Inc. ("FASC"), French American Clinic, Inc. ("FAC"), and Jean-Francois Simon ("Francois") (collectively "defendants") move to reargue this Court's decision and order dated November 14, 2019 insofar as it denied dismissal of the derivative and double derivative causes of action and denied dismissal of the fourth and fifth causes of action (motion sequence 016). Plaintiff Jean-Pascal Simon ("Simon") cross moves to reargue and/or renew the same order insofar as it denied his motion for summary judgment on his fourth and fifth causes of action. Simon also separately moves to reargue and/or renew the same order insofar as it dismissed the double derivative cause of action for aiding and abetting fraud asserted against George Kessler and insofar as it dismissed all causes of action asserted against Lynn Rosenberg and George Kessler (motion sequence 017).

Defendants' Motion

In support of their motion, defendants argue that leave to reargue should be granted on the grounds that (1) the Court failed to dismiss the fourth and fifth causes of action as time barred because it inadvertently misapprehended the final closing date of the sale of the FASC surgery center; and (2) the Court failed to dismiss the derivative and double derivative causes of action because it inadvertently overlooked French law which states that shareholder derivative lawsuits are not permitted.

In support of their argument, they maintain that it is undisputed that the final closing date for the surgery center sale was December 17, 2010, as stated in Simon's affidavit dated May 30, 2019, and refer to a check for \$1,469,630.34 dated December 14, 2010, which was allegedly delivered at the final closing. As such, the fourth and fifth causes of action, which are based on the allegation that FASC and FAC breached their fiduciary duties to Simon by selling the surgery center without Simon's knowledge or consent, are time barred by the three year statute of limitations.

Defendants also argue that the derivative and double derivative causes of action should have been dismissed because they are not permitted under French law. In support of this argument, they attach an affidavit from a "French expert in the field" as well as a recent decision from the Court of Cession in France, which both purportedly state that shareholder derivative lawsuits are not allowed under French law. They also maintain that because derivative claims are barred by French law, the ninth cause of action, which was reinstated by the Appellate Division, First Department, should be dismissed as well.

In opposition, Simon argues that FASC, FAC and Francois do not have standing to make this motion because this motion concerns the court's jurisdiction over derivative and double derivative claims and these defendants waived their personal jurisdiction defenses by failing to raise them in their answer. He also argues that derivative and double derivative claims are permissible according to French law.

Finally, he maintains that the fourth and fifth causes of action are not time barred because the six year statute of limitations applies to these causes of action.

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (*Schneider v. Solowey*, 141 A.D.2d 813.)

Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971) or to present arguments different from those originally asserted (*Foley v. Roche*, 68 A.D.2d 558). A motion to renew under CPLR 2221, on the other hand, is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention. (*Beiny v. Wynyard*, 132 A.D.2d 190, *lv dismissed* 71 N.Y.2d 994.) *William P. Pahl Equip. Corp. v. Kassiss*, 182 A.D.2d 22, 27 (1st Dept. 1992).

Defendants have not shown that I overlooked or misapprehended the facts or the law or arrived at my prior decision based on mistake.

I clearly stated in my November 14, 2019 decision and order that the fourth and fifth causes of action in the third amended complaint were the same as those causes of action alleged in the second amended complaint and "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." Furthermore,

determining whether those causes of actions are barred by the statute of limitations would not be appropriate because there are differing factual accounts of when these causes of actions may have accrued.

With regard to defendants' argument that the ninth cause of action should be dismissed, the Appellate Division, First Department, in its December 3, 2019 decision determined that the ninth cause of action should be reinstated. It is inappropriate to request dismissal of a cause of action here that the Appellate Division reinstated.

Finally, with regard to the derivative and double derivative causes of action that defendants argue should have been dismissed, defendants submit an affidavit from a "French expert in the field" who references several cases allegedly speaking to this issue. Defendants offer no reason or explanation as to why they did not produce this evidence at the time of the original motion. While one of the cases that the expert references is from the time period after the motion was made, he references older cases as well, which were presumably available at the time of the original motion. Defendants are looking for a second bite at the apple, which is inappropriate. The appropriate means for redress would be to appeal my November 14, 2019 decision and order if they so choose. In accordance with the foregoing, defendants' motion is denied.

Plaintiff's Cross-Motion

Simon cross moves for leave to reargue and/or renew, arguing that his motion for summary judgment on his fourth and fifth causes of action should have been granted.

In my original decision and order dated September 4, 2018, which resolved motions addressing the second amended complaint, I sustained the fourth and fifth causes

of action as direct claims asserted by Simon against FASC and FAC. I did not grant dismissal of them as asserted against FAC and FASC, or summary judgment in favor of them. In my November 14, 2019 decision and order, which resolved motions addressing the third amended complaint, I declined to dismiss these causes of action, or grant summary judgment on these causes of action, because they were pled in the third amended complaint identically to how they were pled in the second amended complaint. There are many issues of fact surrounding these claims, including, as discussed above, the date they may have accrued, and thus, summary judgment would not be appropriate at this time. Simon has failed to meet his burden of showing entitlement to reargument and/or renewal here. Any arguments advanced or evidence produced are not new and have been carefully considered by the court on the original motion without mistake.

In his papers and at oral argument, it appears that Simon is also arguing that he should be permitted to assert derivative claims. Specifically, at oral argument he stated that he has standing on behalf of FASC, which owned FrancInvest, but was unable to prove it until now, when he recently became aware of a document evidencing the merger between FASC and FAC. He argued that defendants willfully withheld that information. In his cross motion, he states that “that willful default, along with defendants Francois’s belated document production, intentionally altered the outcome in that September 4, 2018 decision and also resulted in documents relevant to the appeal not appearing in the appeal record, which interfered with my being able to raise those arguments in my appeal.” This cross-motion, which is merely addressed to reargument and/or renewal of the November 14, 2019 order, is not the appropriate forum to advance those arguments.

Notably, plaintiff has properly followed my instructions and filed a revised third amended verified complaint so that the complaint is consistent with my recent decisions and the Appellate Division's December 3, 2019 decision. On multiple occasions I have directed defendants' counsel, who has been holding himself out as counsel for the nominal defendants as well, to submit an answer on behalf of the nominal defendants. He has failed to follow this directive. Instead, in the answer filed in response to Simon's revised third amended verified complaint, he added a paragraph addressing any allegations relating to the nominal defendants. Specifically, in that answer, he added paragraph 45 which states, "to the extent that any of the claims herein are alleged to be plead as against the nominal defendants FrancInvest and JJS, the foregoing responses in paragraph "1" through "44" contained in this Answer are restated and reincorporated as if more fully set forth at length therein." He then signed and verified the complaint as counsel on behalf of defendants FASC, FAC and Francois. This does not constitute an appropriate answer submitted on behalf of FrancInvest and JJS. Defendants is directed to file an appropriate answer on behalf of the nominal defendants FrancInvest and JJS within twenty days of the date of entry of this order and will be precluded from making any further motions in this action until such answer is properly filed.

Plaintiff's Motion

Simon moves for leave to reargue and renew the November 14, 2019 decision and order insofar as it dismissed the double derivative cause of action for aiding and abetting fraud against George Kessler and insofar as it dismissed all causes of action asserted against Lynn Rosenberg and George Kessler (motion sequence 017).

In support of the motion to renew, Simon maintains that subsequent to my November 14, 2019 decision, the Appellate Division reinstated the ninth double-derivative cause of action for fraud on behalf of nominal defendant JJS Group, Inc. (“JJS”) as against Francois that I had dismissed in my September 4, 2018 decision and order. Because that cause of action has now been reinstated, the eleventh cause of action for aiding and abetting that fraud asserted against George Kessler, which I had dismissed because there was no underlying cause of action for fraud, should be reinstated.

In holding that the fraud claim should be reinstated, the Appellate Division found that the complaint sufficiently pled with particularity that Francois, as vice president of JJS, concealed material facts from JJS shareholders, such as refinancing the mortgage and keeping the cash-outs for himself and receiving kickbacks from negotiating a below market rate lease for the property. Simon now argues that because Kessler, as attorney for JJS and Francois, prepared all of the documents for that mortgage, and prepared the JJS lease and first amendment to the administrative services agreement, which was the source of the kickbacks, he could be found liable double derivatively for aiding and abetting fraud.

Kessler’s counsel argues that Kessler did not prepare the mortgage documents or attend the closing. He merely reviewed the documents and was not a party to the distribution of the mortgage proceeds. He also did not prepare the JJS lease or negotiate its terms. Rather, the law firm of Nixon Peabody prepared and negotiated the lease. Finally, the administration services agreement had no connection to Kessler.

Many of Simon's allegations about the nature and extent of Kessler's involvement with Francois' alleged fraud are conclusory. Notably, however, Kessler himself has failed to submit any evidence in opposition to this motion. Rather, his attorney submits an affirmation, which lacks personal knowledge of the allegations made herein. Nevertheless, Simon fails to demonstrate how Kessler, an attorney, can be subject to a double derivative claim on behalf of a corporation in which he had no role. This motion to renew is denied.

In support of the motion to reargue, Simon argues that there were facts overlooked in reaching the original decision proving that Rosenberg was an officer/director of Francinvest and JJS. Specifically, there are publications and annual reports from Francinvest listing her as officer and director, the Florida Department of State website lists her as officer and director, JJS ledgers referencing "directors fees" being paid to Rosenberg, and JJS board meeting minutes which were "acknowledged" by Rosenberg.

Simon further argues that there were sufficient allegations to support the 18th cause of action for unjust enrichment asserted against Kessler and Rosenberg.

In opposition, Rosenberg and Kessler argue that Simon is merely rehashing the same arguments made on the original motion and therefore, his motion should be denied. In any event, there is no proof that Rosenberg was a director/officer of the New York corporation JJS. Further, she had no involvement in any of the activities or duties that she is being accused of. She served in a limited capacity, on and off, as a secretary for the New York corporations.

With regard to Rosenberg, as I stated in my November 14, 2019 decision and order, “while there is conflicting evidence presented as to Rosenberg’s exact role within the subject corporations, [Simon] fails to set forth any factual basis for which these derivative and double derivative claims can be stated against Rosenberg.” Simon has not shown that I overlooked or misapprehended the facts or the law or arrived at my prior decision based on mistake with regard to any claims asserted against Rosenberg. Similarly, Simon has not shown that I overlooked or misapprehended the facts or the law or arrived at my prior decision based on mistake with regard to the 18th cause of action for unjust enrichment insofar as asserted against Rosenberg and Kessler. The complaint does not contain sufficient allegations that Kessler or Rosenberg were unjustly enriched at the expense of JJS.

Finally, the amount and tenor of the motion practice in this six-year old action is unfortunate. The parties are reminded that they should work to prosecute and defend the action to conclusion, not to continue massaging the pleadings and attack each other.

In accordance with the foregoing, it is hereby

ORDERED that defendants French-American Surgery Center, Inc., French American Clinic, Inc. and Jean-Francois Simon’s motion to reargue this Court’s Decision and Order dated November 14, 2019 insofar as it denied dismissal of the derivative and double derivative causes of action and denied dismissal of the fourth and fifth causes of action is denied (motion sequence 016); and it is further

ORDERED that plaintiff Jean-Pascal Simon’s cross motion to reargue and/or renew this Court’s Decision and Order dated November 14, 2019 insofar as it denied his

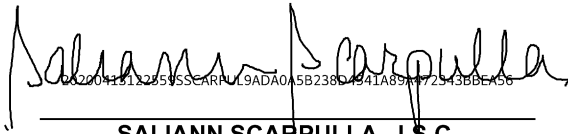
motion for summary judgment on his fourth and fifth causes of action is denied (motion sequence 016); and it is further

ORDERED that plaintiff Jean-Pascal Simon’s motion to reargue and/or renew this Court’s Decision and Order dated November 14, 2019 insofar as it dismissed the double derivative cause of action for aiding and abetting fraud and insofar as it dismissed all causes of action asserted against Lynn Rosenberg and George Kessler is denied (motion sequence 017); and it is further

ORDERED that nominal defendants FrancInvest, S.A. and JJS Group, Inc. are directed to file an answer to the revised third amended verified complaint within twenty days of the date of entry of this order.

This constitutes the decision and order of the court.

4/ 13 /2020
DATE


SALIANN SCARPULLA, J.S.C.

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