

**Simon v Francinvest, S.A.**

2021 NY Slip Op 30432(U)

February 16, 2021

Supreme Court, New York County

Docket Number: 162867/2014

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT:** HON. ANDREW BORROK PART IAS MOTION 53EFM

*Justice*

-----X

SIMON, JEAN-PASCAL

Plaintiff,

- v -

FRANCINVEST, S.A.

Defendant.

-----X

INDEX NO. 162867/2014

MOTION DATE 01/13/2020

MOTION SEQ. NO. 018

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 018) 812, 813, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 837, 839, 840, 841, 842, 843, 844, 845, 862, 864

were read on this motion to/for STAY.

Upon the foregoing documents, French-American Surgery Center, Inc., French American Clinic, Inc. and Jean-Francois Simon's (collectively, the **Defendants**) motion for a stay is denied as moot. Jean-Pascal Simon's (**the Plaintiff**) cross-motion to strike the Defendants' Answer to the Third Amended Complaint (**the Third Amended Answer**) is denied.

**The Relevant Facts and Circumstances**

This action concerns a dispute over the sale of defendant French-American Surgery Center, Inc. (**FASC**) and certain assets owned by nominal defendant FrancInvest, S.A. (**FrancInvest**). The Plaintiff is the brother of defendant Jean-Francois Simon (**Francois**) and the sister of non-party Anne Valerie. Their father, Jean Jacques Simon (**Jacques**), formed FrancInvest to pass on his wealth to his children (NYSCEF Doc. No. 543, ¶ 51). The Plaintiff was allegedly the largest shareholder of FrancInvest at the time of its founding (*id.*, ¶ 54).

In 1982, Jacques formed the entity French-American Clinic Inc. (**FAC**) to open a surgery center in New York City and FAC leased the property located at 1049 Fifth Avenue for that purpose (*id.*, ¶ 67-68). At that time, FrancInvest owned 83% of FAC and Jacques owned the remaining 17% (*id.*, ¶ 69). Jacques later formed FASC in 1988 to operate the surgery center and FAC subsequently subleased the Premises to FASC (*id.*, ¶¶ 96-97, 124). The Plaintiff alleges that he made substantial professional and financial contributions in developing the surgery center before Jacques passed away in 2002 (*id.*, ¶¶ 99-125). Jacques' estate passed to his wife, Francine Simon (*id.*, ¶ 127).

In October 2002, Francois allegedly purchased Anne-Valerie's shares in FrancInvest and became the company's majority shareholder (*id.*, ¶ 152), which the Plaintiff alleges was part of a scheme by Francois to defraud the Plaintiff and sell FASC. In November 2007, Francois allegedly sold the FASC to Fifth Avenue Surgery Center, LLC and received \$2.3 million in proceeds that he kept for himself (the **Sale**) (*id.*, ¶¶ 11, 135).

The Plaintiff commenced this action on December 31, 2014. As relevant to the instant motion, the Defendants filed a motion to dismiss on May 24, 2017 (Seq. No. 005). On June 25, 2018, the court (Scarpulla J.) denied the Plaintiff's motion to strike the Defendants' answer for failure to comply with discovery demands (Seq. No. 011; NSYCEF Doc. No. 536). The Defendants were then directed to respond to the Plaintiff's deficiency letter by August 1, 2018 with supplemental production or objections pursuant to a So-Ordered Stipulation dated July 11, 2018 (NSYCEF Doc. No. 537).

In August 2018, while a decision on the Defendants' motion to dismiss (Seq. No. 005) was pending, the Defendants disclosed a certain Agreement and Plan of Merger dated October 8, 2014, by and between FASC and FAC pursuant to which the two corporations were merged to form an entity referred to as FASC-FAC (the **Merger**) (NYSCEF Doc. No. 816; NYSCEF Doc. No. 823, ¶¶ 28, 51).

Pursuant to a decision and order dated September 4, 2018 (the **Prior Decision**; NYSCEF No. 539), the court (Scarpulla J.) granted the Defendants' motion to dismiss the Second Amended Complaint in part. In particular, the third cause of action for rescission of the Sale was dismissed because the Plaintiff "is neither a party to the [Sale] nor a shareholder in FASC and therefore lacks standing" and that "FrancInvest owned no shares in FASC at the time of the sale, and a rescission of the sale would not benefit FrancInvest's shareholders" (*id.* at 12). The court also dismissed the fifth cause of action for fraud against Francois "because the plaintiff owned no shares in FASC [and] Francoise had no duty to disclose the sale to plaintiff" (*id.* at 15).

When the Defendants moved to reargue the Prior Decision in December 2019, the Plaintiff responded with a cross-motion to reargue/renew the Prior Decision, in part, because the Defendants intentionally concealed the Merger to prevent the Plaintiff from asserting derivative claims on behalf of FASC (*see* Seq. No. 016; NYSCEF Doc. No. 816 at 1-3). On January 17, 2020, the Defendants filed the instant motion to stay the action because of the pending motions to reargue and the Plaintiff cross-moved to strike the Third Amended Answer.

Pursuant to a decision and order dated April 13, 2020 (the **Reargue Decision**; NYSCEF Doc. No. 852), the court (Scarpulla J.) denied the Defendants' motion to reargue and the Plaintiff's cross-motion to reargue/renew. The court addressed the Plaintiff's cross-motion as follows:

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.

(*id.* at 5).

## **Discussion**

### **A. Defendants Motion for a Stay**

The Defendants filed a motion to stay because of pending motions to reargue (*see* Seq. Nos. 016, 017). As the motions to reargue have now been resolved pursuant to the decision and order dated April 13, 2020 (NYSCEF Doc. No. 852), the Defendants' motion for a stay is denied as moot.

### **B. Plaintiff's Cross-Motion**

The Plaintiff argues that the Defendants' Third Amended Answer should be struck because the Defendants perpetrated a fraud on the court by concealing evidence of the Merger, which if

timely disclosed, would reveal the Plaintiff's interest in FASC and preclude the dismissal of certain double derivative claims in the Prior Decision. The argument fails.

A court has the inherent power to impose sanctions for a party's fraud on the court when it involves willful and deceitful conduct that undermines the integrity of the proceeding (*see CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014]). In order to demonstrate a fraud on the court, the non-offending party must establish by clear and convincing evidence that the offending "party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action" (*id.* at 320). Dismissal is not appropriate where the fraud is not central to substantive issues in the case (*id.* at 321-322).

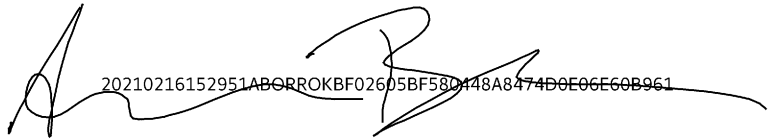
Here, the Plaintiff has not met its heavy burden in seeking to strike the Defendants' Third Amended Answer. The Defendants provided a supplemental production, including evidence of the Merger, in response to the court's So-Ordered Stipulation dated July 11, 2018 (NSYCEF Doc. No. 537). Inasmuch as evidence of the Merger was produced before the Prior Decision was issued, the Plaintiff had the opportunity to address the allegedly concealed Merger in its prior cross-motion to reargue/renew (*see* Seq. No. 016). The court did not find that the Merger was a basis for reargument or renewal (*see* NYSCEF Doc. No. 852). In other words, the court declined to address the issue of the Plaintiff's purported standing on the basis of the new evidence presented. In addition, there is no prejudice to the Plaintiff who had the opportunity to raise this issue in prior motion practice and its motion to strike is denied.

Accordingly, it is

ORDERED that the Defendants' motion to stay is denied as moot; and it is further

ORDERED that the Plaintiff's motion for sanctions is denied; and it is further

ORDERED that the parties shall attend a remote conference on March 2, 2021 at 11:30am.



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2/16/2021  
DATE

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ANDREW BORROK, J.S.C.

CHECK ONE:


CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED


NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: