

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

2023 NY Slip Op 32422(U)

July 18, 2023

Supreme Court, New York County

Docket Number: Index No. 162867/2014

Judge: Melissa A. Crane

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

PRESENT: HON. MELISSA A. CRANE PART 60M

*Justice*  
-----X

JEAN-PASCAL SIMON,  
  
Plaintiff,  
  
- v -  
  
FRANCINVEST, S.A. (NOMINAL DEFENDANT), JJS  
GROUP, INC., FRENCH-AMERICAN SURGERY CENTER,  
INC., FRENCH AMERICAN CLINIC, INC., JEAN-FRANCOIS  
SIMON, CHARLES RAAB, GEORGE KESSLER,  
  
Defendant.  
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INDEX NO. 162867/2014  
  
**DECISION AFTER  
INQUEST**

The court presumes familiarity with the facts underlying this 2014 case but provides the following background as relevant to this unopposed inquest on papers.

On September 4, 2018, the court dismissed certain claims asserted against French-American Surgery Center, Inc. (“FASC”) and granted plaintiff leave to file and serve a Third Amended Complaint (the “TAC”) (Doc 540 [9/4/18 Order]). On September 24, 2018, Charles Raab (“Raab”) was served with the TAC (Doc 544). The TAC listed Raab as an individual defendant with regard to two derivative claims: (a) the eighth cause of action for corporate waste, which alleged that Raab violated his duties as JJS Group Inc.’s (“JJS”) officer and director in the referenced transactions, resulting in a waste of corporate assets and damage to JJS; and (b) the tenth cause of action for breach of fiduciary duty, which alleged that Raab, as an officer of JJS, owed JJS a fiduciary duty to perform services in a careful and prudent manner, and that he breached that duty by committing improper acts.

**OTHER ORDER – NON-MOTION**

After his counsel withdrew, Raab failed to appear for numerous court appearances. Plaintiff then moved for an order striking Raab's answer and granting a default judgment against Raab (Doc 1587 [Notice of Motion, MS 41]).

On March 20, 2023, the court granted plaintiff's motion, struck Raab's answer, and awarded plaintiff a default judgment against Raab as to liability only on the eighth and tenth causes of action in the TAC. It was not until the default that Raab finally appeared and moved to vacate. However, Raab failed to demonstrate either a reasonable excuse or a meritorious defense. The court scheduled an inquest to determine damages (Doc 1605 [3/20/23 Decision]).

This decision ascertains plaintiff's damages on the derivative eighth and tenth causes of action following the unopposed inquest on papers.

#### **Discussion**

Plaintiff argues that it is entitled to a \$29,289,751.20 judgment, in favor of JJS, FAC and FrancInvest, and as against defendant Raab, on the eighth and tenth causes of action, comprised of: (a) \$15,777,447.40 in damages caused by the below-market lease (10 year term, plus renewal term); (b) \$6,255,702.99 in unauthorized transfers; (c) \$5,786,940.50 in damages from borrowing, debt servicing, and mortgage principal payments; and (d) \$1,469,630.34 for damages to the FrancInvest and JJS shareholders as a result of a check payable to a "non-existent entity" called the "First American Surgery Center" (Doc 1639 [Plaintiff's Inquest Submission], ¶¶ 21, 27, 31-33).

As relevant to this inquest for damages, plaintiff was awarded a default judgment against Raab for only the eighth and tenth causes of action. The eighth cause of action is a "double derivative claim for corporate waste" relating to the Premises that JJS owned, and plaintiff pleads that claim against Raab "as [an] officer[] of JJS" (Doc 771 [TAC – eighth cause of action]). The

tenth cause of action is also a “double derivative claim,” this time for breach of fiduciary duty, and also concerns only the Premises that JJS owned. Plaintiff asserted, in support of the tenth cause of action, that Raab owed JJS a fiduciary duty “as [an] officer[] of JJS” (*id.* [tenth cause of action]). As discussed below, in light of the pleadings against Raab and the fact that plaintiff’s submissions establish that Raab ceased to be an officer of JJS in 2011, the court declines to award plaintiff the full amount that plaintiff seeks on this inquest application.

**I. Below Market Lease Damages**

Plaintiff argues it is entitled to the damages, totaling \$15,777,447.40, caused by the below-market lease of the commercial condominium located at 1049 Fifth Avenue, New York, NY, 10028 (“the Premises”) (*id.*, ¶ 21).

The Premises is JJS’s sole asset. According to plaintiff, the \$15,777,447.40 figure is comprised of the damages for the initial 10-year term, totaling \$12,064,956.20 and the damages for the renewal term, totaling \$3,712,491.16. Plaintiff also seeks interest for each lease year. Plaintiff bases these calculations on the difference between the rent that FAAA paid and the rent that JJS should have received under the 2007 Lease if it were an arms-length transaction, from the effective date of the second closing, December 17, 2010, to the date of Judgment (*id.*, ¶ 6).

**a. 10-Year Lease Term**

Plaintiff’s submissions provide that Raab served as JJS’s, FASC’s, and FAC’s director and officer since shortly after Jean-Jacques Simon’s death on August 2, 2002, at which point defendant Jean-Francois Simon installed Raab as Treasurer of JJS, FASC, and FAC (*id.*, ¶ 3). Its submissions include a fair market rent study, for the 7,751 sq. ft. of total office space on the Premises’ ground floor, which Plaintiff’s counsel sought for the purpose of determining an opinion of the Premises’ market rent as of November 5, 2007, the lease term’s commencement date (*id.*, ¶ 6; Doc 1640 [Fair

Market Rent Survey)). The study demonstrates that the Premises' square footage is 7,751 sq. ft., and that the arm's-length rental rate should have been \$178 per sq. ft. (Plaintiff's Inquest Submission, ¶ 7; Fair Market Rent Survey, p. 3). Plaintiff demonstrates that JJS sustained the following damages for each of the 10 lease years as follows:

Year 1: Plaintiff explains that the arm's length rent should have been \$1,379,700 for year 1, and that the rent should have increased by 3.5% each year afterwards (Plaintiff's Inquest Submission, ¶ 7; *see also* Fair Market Rent Survey, p. 5). The submissions explain that FAAA leased the Premises for only \$20,833.33 per month (that is, \$250,000 per year) in year 1. Thus, JJS's damages for that first year (December 17, 2010 to December 17, 2011) totaled \$1,129,700, plus 9% interest from December 17, 2010 (*id.*, ¶ 8).

Year 2: Plaintiff demonstrates that year 2's rent should have totaled \$1,427,989.50 following the 3.5% increase. FAAA leased the Premises in year 2 for just \$365,000. Plaintiff calculates that, after applying FAAA's \$365,000 payment, year 2's damages totaled \$1,062,989.50, plus 9% interest from December 17, 2011 (*id.*, ¶ 9).

Year 3: Plaintiff demonstrates that the rent should have been \$1,477,969.13 after the 3.5% increase. It further demonstrates that, after applying the \$377,775 payment from FAAA for year 3, JJS's damages in year 3 totaled \$1,100,194.13, plus 9% interest from December 17, 2012 (*id.*, ¶ 10).

Year 4: Plaintiff asserts that the rent should have totaled \$1,528,698.05 following the 3.5% increase. The court notes that this number appears incorrect, as a 3.5% increase on the year 3 rent of \$1,477,969.13 would total \$1,529,698.05. The court uses this figure for year 4 and corrects the figures for following years due to this error. Plaintiff further explains that, after accounting for

FAAA's \$391,000 payment, year 4's damages totaled \$1,138,698.05, plus 9% interest from December 17, 2013 (*id.*, ¶ 11).

Year 5: Plaintiff's submissions demonstrate that year 5's rent should have totaled \$1,583,237.48 after the 3.5% increase. After applying FAAA's \$404,682 payment, year 5's damages totaled \$1,178,555.48, plus 9% interest from December 17, 2014 (*id.*, ¶ 12).

Year 6: Plaintiff's submissions provide that the rent should have been \$1,638,650.79 after applying the 3.5% increase. The submissions also provide that after deducting FAAA's \$433,505.64 payment, year 6's damages totaled \$1,205,145.15 plus 9% interest from December 17, 2015 (*id.*, ¶ 13).

Year 7: Plaintiff's submissions demonstrate that the rent should have totaled \$1,696,003.57 after the 3.5% increase. It further explains that, after applying FAAA's \$448,630.20 payment, year 7's damages equated to \$1,247,373.37, plus 9% interest from December 17, 2016 (*id.*, ¶ 14).

Year 8: The submissions also demonstrate that year 8's rent should have been \$1,755,363.70 after the 3.5% increase, provides that FAAA paid \$464,381.88, and that after applying that payment, year 8's damages totaled \$1,290,981.82, plus 9% interest from December 17, 2017 (*id.*, ¶ 15).

Year 9: Plaintiff's submissions provide that the rent for year 9 should have been \$1,816,801.43 after a 3.5% increase. Plaintiff also establishes that after applying the FAAA's \$480,635.28 payment, year 9's damages totaled \$1,336,166.15, plus 9% interest from December 17, 2018 (*id.*, ¶ 16).

Year 10: For year 10, plaintiff's submissions demonstrate that, after the 3.5% increase, the rent should have been \$1,880,389.48. It further demonstrates that after the \$497,457.48 payment

from FAAA, year 10's damages totaled \$1,382,932, plus 9% interest from December 17, 2019 (*id.*, ¶ 17).

Thus, plaintiff's submissions establish *prima facie* entitlement to \$12,072,735.64 for the 10-year lease term, plus interest as set forth above.

**b. The Renewal Term Years**

Plaintiff's submissions also provide that FAAA entered a three-year renewal term to lease the premises at the 10-year lease term's end<sup>1</sup> (*id.*, ¶ 18). Plaintiff argues that FAAA paid \$514,868.52 during the first renewal year and the damages for that renewal year total no less than \$1,430,062.29, plus 9% interest from December 17, 2020 (*id.*). Plaintiff also contends that the arm's length rent increased by 3.5% in Renewal Term year 2, and should have totaled \$2,013,003.39 (*id.*, ¶ 19).

Plaintiff argues that after applying FAAA's \$514,868.52 payment, the damages for Renewal Term year 2 total \$1,498,134.87, plus 9% interest from December 17, 2021 (*id.*). Plaintiff also argues that the arm's length rent increased by 3.5%, in Renewal Term year 3, and should have totaled \$2,083,458.51, and that after applying the \$514,868.52 payment from FAAA that year, the damages for Renewal Term for the six months of year 3 total \$784,294.99, plus 9% interest from December 17, 2022 (*id.*, ¶ 20).

The court rejects plaintiff's arguments. As of December 17, 2010, Raab was no longer an officer of FASC, JJS, and FAC (*see* Doc 1128 [12/17/10 Email]). Additionally, and in any event, plaintiff has failed to obtain a separate report for these additional renewal years, and the existing report it has submitted on this inquest application does not address or otherwise contemplate these renewal years at all (*see* Doc 1640 [Fair Market Rent Survey]).

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<sup>1</sup> Plaintiff concedes that the renewal term rent should have been a different amount but applies an increase of 3.5% to calculate these damages for the May 4, 2023 deadline (Doc 1639 [Plaintiff's Inquest Submission] ¶ 18).

Thus, plaintiff has failed to make a *prima facie* case with regard to these renewal term damages, and as such, the court declines to award damages for the renewal term years.

## II. Mortgage Principal and Debt Servicing

Plaintiff contends it is entitled to \$5,786,940.50 in damages from JJS' unnecessary borrowing, comprised of \$2,400,000 for the 2005 refinance with Park Avenue Bank and \$3,386,940.50 for debt service payments made (*id.*, ¶ 31).

The submissions provide that Raab became FASC's Administrative Manager in 2000, and that defendants engaged in several refinancing transactions afterwards that caused JJS to take on additional debt, for no legitimate business purpose, by refinancing the Premises during the time Raab was a director or officer (*id.*, ¶ 28). This included the: (i) \$1,000,000 refinance with HSBC, dated December 30, 2002, with new debt of \$123,330.14; (ii) \$300,000.00 conversion, FASC credit default, to second mortgage, dated October 25, 2004; (iii) \$2,400,000 refinance with Park Avenue Bank, dated February 25, 2005, with new debt of \$1,555,745.32.

Plaintiff also seeks damages for the following transactions that occurred after Raab was no longer an officer of JJS: (iv) \$3,300,000 refinance with Berkshire Bank, dated August 3, 2011; with new debt of \$1,141,729.93; and (v) \$4,500,000 refinance with Morgan Stanley Bank, dated December 30, 2020, with new debt of \$1,992,526.28 (*id.*).

Plaintiff's submissions further provide that Raab, as JJS' treasurer starting in 2002, caused the refinancing of the \$1,000,000 mortgage, and the resulting cash-out of \$123,000, with HSBC on December 31, 2002 (*id.*, ¶ 29; Doc 121 [2002 Refinance]). They also provide that he was responsible for causing the \$300,000 conversion of the FASC credit default as FASC's Administrative Manager (Doc 1642 [HSBC Letter Re: FASC Credit Line Converted to JJS Second Mortgage]), as well as the 2005 refinance of \$2,400,000 with Park Avenue Bank, where he

authorized the associated loan and signed the incumbency certificate (*id.*; Doc 1643 [JJS Incumbency Certificate]).

Plaintiff also contends that JSS paid \$3,386,940.50 in debt service on several loans and refinancing transactions during the time Raab was an officer or director (Doc 1639 [Plaintiff's Inquest Submission] ¶¶ 30-31). This includes the: \$135,000 paid on the \$1,000,000 mortgage with HSBC, from December 30, 2002 to February 25, 2005; \$25,000 paid on the \$300,000 second mortgage, from October 25, 2004 to February 25, 2005; \$1,131,000 paid on the \$2,400,000 mortgage with Park Avenue Bank, from February 25, 2005 to August 3, 2011; \$1,476,065.50 paid on the \$3,300,000 mortgage with Berkshire Bank, from August 3, 2011 to December 30, 2020; and \$619,875 paid on the \$4,500,000 mortgage with Morgan Stanley Bank, from January 1, 2021 to May 31, 2023, for a total of \$3,386,940.50 made in debt service payments (*id.*, ¶¶ 30-31).

However, the evidence establishes that, as of December 17, 2010 (*see* 12/17/2010 email from defendant Jean-Francois Simon), Raab was no longer an officer of FASC, JJS, and FAC. Therefore, plaintiff has not made a *prima facie* case for damages for the 2011 and 2020 transactions because he did not have authority to conduct business on those entities' bank accounts with regard to the 2011 Berkshire Bank and 2020 Morgan Stanley Bank transactions (Doc 1128 [12/17/10 Email]). Thus, the court declines to award any sums paid as debt service for the \$1,476,065.50 paid on the mortgage with Berkshire Bank and the \$619,875 paid on the mortgage with Morgan Stanley Bank, as Raab was not an officer of FASC, JJS, or FAC at those times.

As such, the court awards plaintiff \$3,691,000 (debt service [\$1,291,000] + refinance transactions [\$2,400,000]) for the 2002, 2004, and 2005 transactions (the 2002 HSBC refinance, the 2004 FASC credit default, to second mortgage, and the 2005 refinance with Park Avenue Bank).

### III. Unauthorized Checks, Transfers and the First American Surgery Center Check

Plaintiff also argues that it is entitled to \$6,255,702.99, comprised of damages from the unauthorized transfers totaling \$3,000,000, plus interest, and damages arising out of allegedly improper checks totaling \$3,255,702.99 (*id.*, ¶¶ 24, 26).

The court declines to award that amount. Plaintiff was awarded a default judgment against Raab on the eighth and tenth causes of action. Parties that have defaulted “are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]).

The TAC does not address or reference allegations that Raab engaged in corporate waste or breached a fiduciary duty to JJS by signing unauthorized checks or making unauthorized wire transfers. Instead, the TAC’s eighth and tenth causes of action concern only JJS’s losses in connection with the commercial Premises in Manhattan. While, in theory, Raab may have breached a fiduciary duty to FASC, or another entity other than JJS, in writing these checks or making these wire transfers, plaintiff did not assert a cause of action against Raab as a fiduciary of FASC in the TAC. Because these proposed damages are unrelated to the Premises, or Raab’s corporate waste and breaches of fiduciary duties owed to JJS, plaintiff has not established *prima facie* entitlement to these damages under the eighth and tenth causes of action (*see e.g. Paulson v Kotsilimbas*, 124 AD2d 513, 514 [1st Dept 1986] [“Even in the case of a default upon inquest and assessment, plaintiff is required to prove the actual damages sustained.”]).

Further, Plaintiff has also not established its entitlement to \$1,469,630.34, representing consideration that FAAA paid, by check, to a nonexistent entity known as “First American Surgery

Center” (*id.*, ¶¶ 32-33). For the same reasons as above, the court declines to award damages related to the First American Surgery Center Check. The allegations set forth in the eighth and tenth causes of action are directed at JJS’ losses as the Premises’ owner, not to breaches of fiduciary duties owed to FASC, for example. Further, the record on this unopposed inquest does not demonstrate, *prima facie*, that the check originated from a JJS bank account.

#### IV. Conclusion

As discussed above, plaintiff has established its entitlement to \$12,072,735.64, representing the damages it incurred in connection with the Premises’ below-market 10-year lease term, plus interest.

Additionally, plaintiff has also demonstrated entitlement to \$3,691,000, representing the damages traceable and related to the mortgage principal and debt servicing payments relating to the 2002, 2004, and 2005 transactions.

As discussed above, the court declines awarding any damages related to the 2011 and 2020 transactions, or for the Unauthorized Checks, Wire Transfers, and the First American Surgery Center Check.

As such, the court awards plaintiff a total of \$15,763,735.64, with prejudgment interest as set forth below.

The court has considered the parties’ remaining arguments and finds them unavailing.

Accordingly, it is

**ORDERED** that the Clerk is directed to enter judgment in favor of Plaintiff Jean-Pascal Simon and against individual defendant Charles Raab, the sum of \$15,763,735.64, comprised of the following figures, plus interest as set forth below:

(a) \$1,129,700, plus statutory interest at the rate of nine percent (9%) per annum from December 17, 2010; and

(b) \$1,062,989.50, plus statutory interest at the rate of nine percent (9%) per annum from December 17, 2011; and

(c) \$1,100,194.13, plus statutory interest at the rate of nine percent (9%) per annum from December 17, 2012; and

(d) \$1,138,698.05, plus statutory interest at the rate of nine percent (9%) per annum from December 17, 2013; and

(e) \$1,178,555.48, plus statutory interest at the rate of nine percent (9%) per annum from December 17, 2014; and

(f) \$1,205,145.15, plus statutory interest at the rate of nine percent (9%) per annum from December 17, 2015; and

(g) \$1,247,373.37, plus statutory interest at the rate of nine percent (9%) per annum from December 17, 2016; and

(h) \$1,290,981.82, plus statutory interest at the rate of nine percent (9%) per annum from December 17, 2017; and

(i) \$1,336,166.15, plus statutory interest at the rate of nine percent (9%) per annum from December 17, 2018; and

(j) \$1,382,932, plus statutory interest at the rate of nine percent (9%) per annum from December 17, 2019; and

(k) \$3,691,000, plus statutory interest at the rate of nine percent (9%) per annum from December 20, 2002; and it is further

**ORDERED** that the foregoing constitutes the Judgment of the Court against defendant Charles Raab for the Eighth and Tenth Causes of Action alleged in the Third Amended Verified Complaint, and that all other claims and causes of action in this action are severed and shall continue; and it is further

**ORDERED** that the Clerk is directed to enter judgment, in favor of plaintiff, and as against defendant Charles Raab, in accordance with this decision and order; together with costs and disbursements, as taxed by the Clerk upon submission of an appropriate bill of costs and it is further

**ORDERED** that there shall be no further motion practice without a pre-motion conference with the court (Part Rule 10 [a]).

7/18/2023  
DATE

  
MELISSA A. CRANE, J.S.C.

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