

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

Index No. 162867/2014

JEAN-PASCAL SIMON,

Plaintiff
against

ANSWER TO THIRD AMENDED
COMPLAINT, AFFIRMATIVE
DEFENSES, AND COUNTERCLAIM OF
DEFENDANT GEORGE KESSLER

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

Defendant, GEORGE KESSLER (“Kessler”) by his attorney, WILLIAM W. SIEGEL, ESQ. as and for his Answer to the THIRD Amended Complaint, affirmative defenses and counterclaims, states as follows, upon information and belief:

ANSWER TO THIRD AMENDED COMPLAINT

1- Defendant, GEORGE KESSLER denies the allegations contained in paragraphs 2,3, 4, 5, 6 7,8,9,10,11,12,14,15,16, 21, 22, 23,24,26,29,31,32, 34,35,39, 40,65, 67,68, 70, 85,86,87,93,99,100, 101, 102,103,114,115, 118, 119, 126, 128, 129, 130,136, 138, 140,141, 142 143, 146, 147, 148, 153,154,155, 158, 159., 163, 164, 184, 187, 190. 191, 194, 201, 205, 206, 207, 208, 209, 210, 211, 212,213, 218, 222, 223, 227,229,, 244, 245, 246, 247, 248, 259, 261, 263, 264, 266, 268, 269, 271, 272, 274, 275, 278, 281, 282, 283, 285, 286, 295 298, 300, 301 302, 308, 309, 311, 312, 313, 314, 315, 316,317, 318,,m 319, 320, 321, 323, 325, 326, 327, 328, 329, 330, 332, 333, 334, 336, 337, 338, 339, 340, 341, 344, 349,, 350, 351 , 352 ,354, 355, 356, 357, 359, 360, 361, 362 , 363, 364, 365, 366, 367, 368, 370, 371, 372, 373, 375, 376, 378, 379.381,382, 383, 385, 386,387, 388, 390, 391, 392, 393, 395, 396, 397, 398, 400, 401, 402, 404,405, 406, 407, 409, 410

411, 414, 415, 416, 418, 419, 420, 421, 422, 423, 425, 426. of the Third amended complaint.

2- Defendant KESSLER denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs, 1, 13, 17, 19, 20, 25, 27, 28, 30, 33, 36, 37, 38, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64,, 66, 69, 78, 79, 80, 81, 83, 84, 88, 89, 90, 91, 92, 98, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 116, 117, 120, 122,, 123, 124, 127, 131, 132, 133, 134, 135, 137, 144, 145, 149, 150, 151, 152, 156, 157, 160, 161, 162, 165, 166, 167, 168, 169, 170, 171, 172 173, 174, 175, 176, 177, 178, 179,180, 181, 182, 183, 185, 186, 195, 196, 197, 198, 199, 200, 202, 203, 204, 214, 215, 216, 217. 219, 220, 224, 225, 226, 228, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 249, 250, 251, 252, 253, 254, 255, 256, 257, 260, 262, 267, 270, 273, 276, 277, 279., 280, 284, 287, 288, 289, 290, 291, 292, 293, 294, 296, 303, 304, 305, 322, 345, 346, 348, 384, 403, and 413, of the third amended complaint.

3- Defendant KESSLER admits the allegations contained in paragraphs 18, 71, 72, 73, 74, 75, 76, 77,, 94, 95, 96, 97, 121, 125, 188, 189, 193, 221, 258, 265, 297, 306, 307, and 377, of the Third Amended Complaint.

4- In paragraphs 310, 324, 331, 335, 343, 347, 353, 358, 369, 374, 380, 389, 394, 399, 408, 412, 417, and 424, plaintiff repeats and re-alleges certain allegations. for his Answer to these allegations, defendant KESSLER respectfully refers the Court to his answers above.

AFFIRMATIVE DEFENSES

INTRODUCTION

5- Defendant KESSLER is an attorney admitted to practice in the Courts of the State of New York.

6- The matters KESSLER handled for plaintiff were the usual form of matters that attorneys handle on behalf of clients. KESSLER has not represented the Plaintiff for over twenty five (25) years, and Plaintiff has never complained of or sought counsel from KESSLER since that time.

7- If KESSLER gleaned any knowledge of a fiduciary or confidential nature, as respects Plaintiff, some twenty five (25) or more years have elapsed, and any such information has long ago faded from memory, and in any event, was never used or transmitted against the Plaintiff, nor has any present relevance or bearings as to have prejudiced or caused damage to the Plaintiff.

8- Nevertheless, KESSLER, respecting the attorney-client relationship has to this date never discussed the particulars of his representation of plaintiff with third parties.

9- The one communication plaintiff had with KESSLER from or after 1995 to present concerned plaintiff's father, Dr. Jean Jacques Simon, when plaintiff called KESSLER to ascertain if a Will existed after his father passed away in 2002. That conversation lasted about twenty seconds.

10- Prior to representing the plaintiff, Kessler represented some of the other co-defendants. As to any of the co-defendants, the representations were proper and consisted only of the usual and normal services any lawyer provides to clients.

11- Defendant Kessler fully, ethically and satisfactorily performed any and all agreements or acts required of him, contractual, fiduciary or other, and no further duty or obligation is due to the plaintiff.

12- As to nominal defendant Francinvest, upon information and belief, a Societe Anonymous in France required a minimum of seven (7) shareholders. Francine Simon, the President of Francinvest and mother of the plaintiff, informed Kessler that some of the Francinvest shareholders were retiring and inquired if Kessler and defendant Rosenberg would agree to be a shareholder. As an accommodation to her, Kessler and Rosenberg consented and were registered on the books and records of Francinvest as the owner of one share each which represented an insignificant value of seventy two (72) Euros. The transfers to Kessler and Rosenberg were conditioned on the understanding that when Francine Simon wanted a return of the shares, all she had to do was to request a transfer back of the one share each. Subsequently upon her request, the owned one share by Kessler and Rosenberg were transferred back to Francine. Neither Kessler nor Rosenberg have any present ownership of any share of Francinvest. Kessler and Rosenberg never acquired any moneys, distributions, dividends or financial benefits from Francinvest. Their involvement was to simply do Francine a favor; no more, no less.

13- Plaintiff makes unspecified claims as to acts KESSLER has done or is about to do without any particulars as to time and date of such acts and the manner of such supposed fraud involved.

14- These unknown acts, whatever they may be, are denied and barred by the Statute of Limitations, or if they have yet to be committed, are speculative in nature and without merit.

15- The Plaintiff's allegations against Defendants boils down to, a what could have been or should have been presentation, as plaintiff and never was a shareholder of FASC. His alleged assumptions that he thought he would become a shareholder are legally lacking,

and insufficient, and contrary to the facts at hand. There exists no viable cause of action against any of the many defendants on such meritless grounds. None of the defendants herein are accused of making any claims or representations to the plaintiff regarding his status as an alleged shareholder of FASC. If Plaintiff relied on representations made by his father, Dr. Jean Jacques Simon, the appropriate venue to have claimed that “breach of assumption” would have been against the Estate of Dr. Jean Jacques Simon and not the innocent parties sued in this action.

16- On point however, Dr. Jean Jacques Simon was knowledgeable and clever (and a gentleman), and if he had wished to have made the plaintiff a shareholder of FASC, he would have appropriately provided for it. Also, not only was plaintiff not a shareholder of FASC, but he was also not a shareholder of French Medical Services, which was the predecessor entity to FASC, seeking a license from the Department of Health to operate an ambulatory surgical center. The four (4) shareholders in both entities consisted of Dr. Charles Kelman, Dr. Stanley Schoenbach, Dr. Jean Jacques Simon and Dr. Albert Waitman..

17- Given the fact that Plaintiff lacks any standing derivatively or otherwise against FASC, Plaintiff's actions against FASC, should be summarily dismissed with costs. Further, Plaintiff himself acknowledges that a corporation such as Francinvest could not be a shareholder of a corporation engaged in the practice of performing medical services. As such, no derivative rights against FASC emanating from or through Francinvest could conceivably or legally exist.

18- The causes of action against Kessler lack any merit. Kessler was not involved in the day to day operations and transactions of any defendant corporation and never controlled or ever had privy or knowledge to any distribution of funds ever made by any of the defendants. His duties and services were solely limited to his services as an attorney.

19- As to the merger between FACI and FASC, the said defendants relied upon the guidance of their financial adviser to enter into a merger as a way to eliminate debt. The shareholders approved the merger as per their shareholder resolutions. Contrary to prejudicing the plaintiff, the merger benefited the respective corporations and their shareholders. Kessler's participation throughout was solely as a lawyer in drafting certain merger papers. Moreover, there is no logical connection as alleged by plaintiff, that by virtue of a subsequent, contemplated merger of FACI with JJS, that it would then lead to a sale of JJS's real estate property. There is no basis or connection that a merger was a necessary step prior to a sale of JJS's real estate. For the record however, Kessler was never involved in discussions to sell JJS property at any time prior to the commencement of plaintiff's suit.

20- The notion that a lawyer should be liable and sued for *aiding (emphasis added)* a client in its legal endeavors is so ludicrous, it hardly warrants a response. Be that as it may, Kessler used his best efforts to represent his clients throughout his career as an Attorney at Law and should not be liable to Plaintiff for legally aiding and representing a client. Commerce would come to a screeching halt without the involvement of legal agreements and lawyers aiding clients.

21- As to Kessler's participation or rather lack of participation in the sale and lease agreement entered into among FASC, JJS and FAAA, the law firm representing the defendants FASC and JJS in the transactions was Nixon Peabody, LLP. Kessler was not initially involved whatsoever on behalf of FASC and JJS or had privity to the contemplated transactions. Kessler was approached and requested by Francois Simon after the drafting to review the agreements and possibly appear at the eventual closings, as the lawyers representing FAAA were situated in Florida. Kessler attempted to beg off as he was in the throes of retirement at that time (approximately 2006), but Francois pleaded and Kessler relented and eventually agreed to being retained.

22- At the instance of the first Closing between FASC and FAAA on April 7, 2009, Francine Simon appeared at the closing in Florida.

23 (a)- Also, for the record, Kessler never represented FI, is not admitted to practice in France, does not speak or understand the French language, nor is presently a member or a shareholder of Francinvest.

(b) Lacks knowledge as to the legal capacity of FI as an entity or its shareholders to claim and maintain derivative rights or double derivative rights under French Law.

(c) Lacks knowledge that Plaintiff is a member or shareholder in FI, from the commencement of this action or to this present time.

(d) Lacks knowledge that Plaintiff is a resident of New York City.

24- Further, as regards Power of Attorneys, Francois received POA Appointments dating back to 1995 from Dr. Jean Jacques Simon, as a necessary component to attend to the affairs of the businesses in the United States. The policy of providing Power of Attorneys continued thereafter when Francine became President of the businesses. To Kessler's knowledge, Plaintiff was never entrusted by either of his parents to ever receive such appointments.

25- It should also be noted that Plaintiff, after sending a letter of resignation on March 16, 1993 did not participate any further in any of the shareholders meetings or business affairs of the defendant corporations; thus, his authority was a moot point. Plaintiff's prior

participation in the business was not a positive factor; rather, it was a negative factor. Plaintiff almost caused financial ruin to the Simons' family fortunes when suddenly and unexpectedly, he left New York to intern in Boston. Francois was called upon to leave France to manage the businesses. When Plaintiff resigned from the businesses, they were floundering financially. Francois almost single handedly turned them profitable

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

26- Notice:

Plaintiff failed to provide Notice to Defendant in advance of instituting suit.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

27- Reliance.

The Plaintiff did not reasonably rely upon any acts, misrepresentation or non disclosures of material facts made by Kessler and is therefore barred from seeking relief.

AS AND FOR A THIRD AFFIRAMTIVE DEFENSE

28 - Unclean Hands and Laches.

The Plaintiff, as an officer and managing director of FACI, breached a fiduciary duty and comes into this suit with unclean hands and seeking equitable relief. The Plaintiff personally committed wrongful acts in failing to pay rent during the period he occupied space in the most sought out site within FACI premises, failing to obtain authorization to rent such space to himself or to place his examination and other medical equipment within that space, failing to enter into a commercial lease agreement with FACI, failing to provide a security deposit and then eventually without notice, vacating the space without paying rent during the unoccupied period which followed plaintiff's departure, failing in advance to previously rent out the particular office space involved so he could reserve it for his own personal use, and then when ultimately paying two (2) monthly rent checks for July, 1991 and August 1991, did not cover and pay for all the periods plaintiff was in possession, and of those payments which were made, such amounts were substantially below their fair market value, and engaging in such other unauthorized acts emblematic of dirty hands. By virtue of plaintiff's conduct which constitutes a tortious act, waiver and unclean hands and laches, plaintiff is estopped to assert any right of equitable relief. Further, plaintiff is barred by reason of acts, omissions, representations and courses of conduct under the Doctrine of Equitable Estoppel. Other acts of unclean hands committed by plaintiff additionally exist.

29- Material Misrepresentation

Plaintiff demanded damages from Kessler in his original and first amended verified complaints amount to be no less than seventy six thousand dollars (\$76,000.00) with interest, which amount conspicuously refers back to the time barred, alleged loans

plaintiff made to FASC and FACI more than fifteen (15) years ago. Plaintiff has failed to plead or establish the connection of these time barred, alleged loans between plaintiff and Kessler, or how Kessler in some manner received or profited from these loans made to FASC and FACI, which were corporations, that plaintiff himself was then managing at the time of the alleged loans, and to corporations in which Kessler had no proprietary interests. Kessler never profited or even knew of the alleged loans nor had dealings in connection with the loans whatsoever. Such allegations on the part of the plaintiff are frivolous, malevolent and without merit or logic.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

30- Speculative allegations:

The allegations against Kessler are without any specificity or particulars and consist of merely wild and unsupported accusations.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

31- Equitable Doctrine of Waiver.

The claims alleged are barred in whole or in part by the Equitable Doctrine of Waiver.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

32- Mitigation of damages:

The claims alleged are barred or diminished by plaintiff's failure to mitigate any alleged damages.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

33- Alternate Remedies:

Plaintiff has failed to pursue any and all alternative and appropriate remedies.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

34- Ratification:

Plaintiff by his actions has ratified the acts of defendant Kessler.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

38- Statute of Limitations:

Plaintiff's causes of action are barred by the Statute of Limitations.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

39- Lack of Standing

Plaintiff lacks standing as a party to institute suit against the defendant.

AS AND FOR AN TENTH AFFIRMATIVE DEFENSE

40- Incorporation by Reference:

Defendant Kessler incorporates by reference any and all other affirmative defenses which he may eventually assert in the proceedings, including but not limited to immunity status of a lawyer.

AS AND FOR A FIRST COUNTERCLAIM

Plaintiff repeats and re-alleges all of the allegations in paragraphs 1 through 40 as if more fully set forth herein.

41- Defendant Kessler is an innocent party to any and all of the transactions described by the plaintiff, and plaintiff's suit against Kessler is without merit or substance and instituted solely to annoy and harass Kessler and cause extreme, mental anguish and distress. Plaintiff's acts patently constitute both a willful and civil wrong of malicious prosecution.

AS AND FOR A SECOND COUNTERCLAIM

42- Defendant KESSLER repeats and re-alleges paragraphs 1 through 41 as if more fully set forth herein.

43- Defendant Kessler respectfully requests that this Court impress a constructive trust on all of plaintiff's assets due to false abuse of process and malicious prosecution of claims herein, pursuant to 2NYCRR 130-1.1. A constructive trust is necessary because it will cost considerable sums for defendant Kessler to defend against the instant false Complaint, and plaintiff can otherwise transfer his assets to his wife or other third parties upon adverse findings and claims against him.

AS AND FOR A THIRD COUNTERCLAIM

44- Defendant KESSLER repeats and re-alleges paragraphs 1 through 43 as if more fully set forth herein.

45- Plaintiff published one or more oral and written false statements which were intended to impeach and impugn KESSLER'S honesty, integrity, virtue and/or reputation.

46- Said defamatory statements are among others, set forth in the pleadings herein by plaintiff, and among other false charges, cites KESSLER committed fraud and breached a fiduciary duty.

47- KESSLER is not a public figure.

48- The statements made by plaintiff slurs and soils and defames the character of KESSLER.

AS AND FOR A FOURTH COUNTERCLAIM

49- Defendant KESSLER repeats and re-alleges paragraphs 1 through 48 as if more fully set forth herein.

50- Plaintiff intentionally and deliberately inflicted emotional distress to KESSLER by defaming him to many people including his relatives, clients, colleagues, friends and counsel.

51- As a result of plaintiff's extreme and outrageous conduct, KESSLER has suffered and will continue to suffer mental pain and anguish, embarrassment, and humiliation.

52- Due to the aforesaid false claims, KESSLER has been damaged in an amount in excess of the jurisdiction limits of all lower Courts which might otherwise exercise jurisdiction in this matter.

AS AND FOR A FIFTH COUNTERCLAIM AND PUNITIVE DAMAGES DEMANDS


53- Plaintiff's action against Kessler is entirely without merit or substance and equates to a hate crime or hate suit perpetrated against a senior citizen. Plaintiff is deploying the Court System as an unwitting accomplice to cause pain and suffering to the innocent and elderly. Neither Kessler nor Rosenberg, both senior citizens, have committed any wrongdoings, should not have been parties brought into this litigation and are being sued and punished merely to gratify the vindictive and spiteful nature of the plaintiff. The award for damages against the plaintiff should be commensurate with the harm he is causing and should be sufficiently severe and costly to eliminate any further, unwarranted use of the Judiciary by plaintiff to punish and persecute innocent victims. plaintiff's considerable wealth should also factor into the punitive amount awarded.

WHEREFORE, Defendant KESSLER demands judgment dismissing the Third Amended Complaint in its entirety, judgment on each of the several Counterclaims in an amount to be determined at trial, but no less than \$15,000,000.00.

b) Awarding punitive damages and sanctions;

c) Awarding interest, costs disbursements and fees, and granting such other and further relief as the Court deems just and proper.

Dated: NEW YORK, NEW YORK
October 16 , 2017



WILLIAM W. SIEGEL

Attorney for Defendant, George Kessler
Office and Post Office Address
20 Vesey Street- Suite 1110
New York, New York 10007
(212) 267-1948
(917) 699-5753
(Fax) 212-587-8225

VERIFICATION

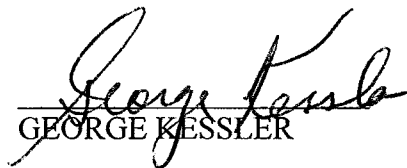
INDEX # 162867/2014

State of New York)
County of New York) ss.:


GEORGE KESSLER, being duly sworn, deposes and says:

I am one of The defendants herein. I have read the foregoing Answers to Third Amended Complaint and Counterclaim, and the same are true to my own knowledge, except as to those matters stated upon information and belief, and as to those matters, I believe them to be true.

DATED: October 16, 2018
New York, New York


GEORGE KESSLER

Sworn to before me this 16th day of
October, 2018


NOTARY PUBLIC
WILLIAM W. SIEGEL
Notary Public, State of New York
No. 02SI8990055
Qualified In New York County
Commission Expires Sept.30, 2019

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

JEAN-PASCAL SIMON,

Plaintiff

against

Index No. 162867/2014

SCARPULLA, J.

AFFIRMATION

FRANCINVEST S.A., and JJS GROPUP, 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

AFFIRMATION OF SERVICE

William W. Siegel, an attorney admitted to practice in the Court of the State of New York, affirms the following under penalties of perjury:

On October 16, 2018 I served the attached Verified Answer and Counterclaim to Plaintiff's Verified Third Amended Complaint upon Brian S. Cohen, Esq., c/o , LachtmanCohen, P.C., the attorneys for the Plaintiff herein via e-mail to bcohen@lcpclaw.com

Dated: October 16, 2018



WILLIAM W. SIEGEL

Attorney for Defendant George Kessler
20 Vesey Street – Suite 1110
New York, New York 10007
(Tel): (22) 267-1948
(Tel): (917)- 699-5753
e-mail: wsiegellaw@gmail.com

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

-----X

JEAN-PASCAL SIMON,

Plaintiff,

-against-

FRANCINVEST S.A. And JJS GROUP, INC.

Nominal Defendants,

-against-

FRENCH-AMERICAN SURGERY CENTER, INC.,
FRENCH AMERICAN CLINIC, INC., FIFTH AVE
SURGERY CENTER, LLC, GEORGER KESSLER
JEAN-FRANCOIS SIMON, VCC INC. d/b/a
CICERO CONSULTING ASSOCIATES, LYNN ROSENBERG
and CHARLES RAAB,

Defendants


-----X

-----X

VERIFIED ANSWER AND COUNTERCLAIM

-----X

*Pursuant to 22NYCRR 130-1.1-I the undersigned, an attorney admitted p practice
In the Courts of New York State, certifies that upon information and belief and upon
reasonable inquiry, that the contentions contained in the annexed document are not
frivolous.*



WILLIAM W. SIEGEL

Attorney for Defendant LYNN ROSENBERG
20 VESEY STREET – SUITE 1110
NEW YORK, N.Y. 10007
(212) 267-1948
(917) 699-5753