TRAUB LIEBERMAN

Mid-Westchester Executive Park | 7 Skyline Drive | Hawthorne, NY 10532

DIRECT (914) 586-7052 | MAIN (914) 347-2600 | FAX (914) 347-8898

Mario Castellitto | Partner | mcastellitto@tlsslaw.com

June 29, 2020

John P. Asiello, Esq.
Chief Clerk and
Legal Counsel to the Court
State of New York
Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: Matter: *Simon v. FrancInvest*
Index No.: 1628678/2014, New York County Supreme Court
10463, Appellate Division, First Department
Our File No.: 122.0275

Dear Mr. Asiello:

This firm represents defendant-respondent VCC Inc. d/b/a Cicero Consulting Associates ("CCA") in the above-referenced matter. By letter dated June 17, 2020, the Court notified all parties of its intent to examine the subject matter jurisdiction of this appeal, pursuant to Rules of the Court of Appeals (22 NYCRR) § 500.10 (a), regarding finality within the meaning of the Constitution and whether the order of the Appellate Division directly involved a substantial constitutional question. Please allow this letter to serve as the jurisdictional response on behalf of CCA as afforded by said letter.

SUMMARY OF MATTER

By way of background, defendant-respondent Fifth Avenue Surgery Center, LLC ("Fifth Ave.") retained CCA in 2009 to assist in the preparation of regulatory Certificate of Need application ("CON Application") for the transfer of asserts concerning the sale of a surgery center pursuant to article 28 of the Public Health Law. The surgery center was owned by defendant-respondent French-American Surgery Center, Inc. ("FASC"). CCA acted solely as an intermediary and facilitator in the preparation of the CON Application. It is not required to investigate or verify the information contained in the CON Application.

The CON Application was submitted to the New York State Department of Health ("DOH") for review and investigation. Thereafter, DOH recommended the application to the Public Health and Health Planning Counsel ("PHHPC") for approval. PHHPC issued a conditional

approval provided that certain conditions were met. By letter dated September 23, 2010, PHHPC certified and confirmed the satisfaction of those contingences, and that the CON Application had been fully approved "after inquiry and investigation" [R: 1263].[1]

Plaintiff commenced this action against several parties by filing a summons and complaint on December 21, 2014 [R: 1001-1020]. Thereafter, he filed and served a first amended complaint and was granted leave to file a second amended complaint [R: 1022-1048, 1088-1149].

In his second amended complaint, plaintiff alleged that article 28 of the Public Health Law proscribes a non-physician from having an ownership interest in these types of facilities, to wit—the surgery center at issue here. It is claimed that CCA must have aided-and-abetted fraud in preparing and filing the CON Application on Fifth Ave.'s behalf by materially misrepresenting the ownership interest of the surgery center because PHHPC and DOH would not have approved the sale.

Among others, FASC moved to dismiss the second amended complaint on the grounds that, among other things, plaintiff lacked standing to assert his claims for fraud and aiding-and-abetting fraud because he was not a shareholder of FASC [R: 34-50]. Fifth Ave. joined that motion and cross-moved for summary judgment to dismiss the complaint in its entirety [R: 407-567]. On September 29, 2017, CCA joined the foregoing motions with respect to the issue of standing and independently moved for summary judgment on the claim for aiding-and-abetting fraud [R:965-970]. In sum, CCA produced the approved CON Application that properly reflected the ownership interest as submitted to DOH, and as such there was no underlying fraud [R: 965-970]. CCA further contended that plaintiff's understanding of Public Health Law article 28 was mistaken [R: 965-970].

In opposition to the foregoing motions, plaintiff did not argue that any law or rule was unconstitutional, and never referenced or alluded to Municipal Home Rule Law § 10, NY City Charter § 555, or the purported NYC Hospital Code Art. IX, Part II, Sec. 11.02 [R: 141-162, 570-589, 635-363, 1268-1279]. By order entered October 13, 2018, the Supreme Court (Scarpulla, J.), New York County, found that plaintiff was not and had never been a shareholder in FASC, he was owed no duty of disclosure regarding the sale of the surgery center, and, as such, he could not allege an underlying fraud [R: 5-33]. Accordingly, Supreme Court granted CCA's motion for summary judgment dismissing it from the matter [R: 21 n 3].

On appeal before the First Department, plaintiff abandoned in its entirety his argument that article 28 of the Public Health Law proscribes a non-physician from having an ownership interest in the surgery center. Rather, for the first time, plaintiff raised arguments concerning Municipal Home Rule Law § 10 and the purported NYC Hospital Code 11.02 regarding whether it was proper

---

[1] All page references preceded by "R" are to the consecutively-paginated, two-volume set entitled "Record on Appeal"; all page references preceded by "SR" are to the consecutively-paginated, two-volume set entitled "Supplemental Record on Appeal."

for DOH to approve a CON Application in 1988 [Plaintiff-Appellant's Brief, at 21-27].[2] CCA countered that plaintiff did not preserve these arguments, and that the appropriate course would be to challenge the determination through exhaustion of administrative remedies [CCA's Respondent's Brief, at 3-4, 21].

By order dated December 3, 2019, the First Department affirmed that plaintiff lacked standing for his fraud claim for the sale of the surgery center and affirmed dismissal of CCA absent an underlying fraud claim (*see Simon v FrancInvest, S.A.*, 178 AD3d 436, 436-438 [1st Dept 2019]). The First Department did not address, allude to, or reference plaintiff's unpreserved so-called constitutional arguments, but found "plaintiff's remaining arguments . . . improperly before this Court" (*id.* at 438). By order dated February 25, 2020, the First Department summarily denied plaintiff's motion for reargument or, in the alternative, for leave to appeal to the Court of Appeals (*see Simon v FrancInvest, S.A.*, 2020 NY Slip Op 063486[U], 2020 WL 891197 [1st Dept 2020]).

THE APPEAL BEFORE THIS COURT

Plaintiff claims an appeal as of right pursuant to CPLR 5601 (b) (2) and NY Constitution, article VI, § 3 (b) (2). He ostensibly contends that "i) Municipal Home Rule Law Sec. 10; ii) NYC City Charter, Ch. 22, Sec. 555; and iii) NYC Hospital Code Art. IX, Part II, Sec. 11.02 ('Licensure-General Provisions' (amended October 2, 1967) and related sections" are unconstitutional (1) on their face; (2) as applied in certain cases; (3) as applied to deprive plaintiff of rights, remedies and defenses; and (4) as applied to the issue of standing in the lower court.

Neither the notice of appeal nor the preliminary appeal statement identify which provision of the New York State Constitution is violated, and CCA is left without a whit as to what exactly is claimed to be unconstitutional. Inasmuch as one can manufacture a constitutional argument, as previously stated, the proper recourse would be to challenge the administrative decision approving the CON Application, which plaintiff has not done, and which would still not support any of plaintiff's allegations against CCA.

The foregoing coupled with the following discussion, respectfully, should result in a determination that this Court lacks subject matter jurisdiction over the appeal.

CPLR 5601 (b) (2) and NY Constitution, Article VI, § 3 (b) (2)

A party has an appeal as of right to the Court of Appeals "from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the

---

[2] The original verified complaint does not allege any constitutional violation or reference Municipal Home Rule Law § 10, New York City Charter § 555, or the purported NYC Hospital Code Art IX, Part II, sec. 11.02 [R: 1001-1002]. Neither does the first amended complaint [R: 1022-1048] or the second amended complaint in which CCA is first named as a defendant [R: 1088-1149]. Although leave to file a proposed third amended complaint at this juncture was denied, it is informative that the proposed third amended complaint also lacked any of the foregoing allegations [R: 685-759].

constitution of the state or of the United States" (CPLR 5601 [b] [2]; *accord* NY Constitution, article VI, § 3 [b] [2]).

Inasmuch as plaintiff appeals from the order of Supreme Court, "[a] direct appeal does not lie where questions other than the constitutional validity of a statutory provision are involved" (*New York State Club Assn. v City of New York*, 67 NY2d 717, 717 [1986]; *accord Kemp v State of New York*, 97 NY2d 720, 720 [2002], *cert denied* 537 US 832 [2002]; *People ex rel. Yonamine v Artuz*, 91 NY2d 954, 954 [1998]). As discussed above, Supreme Court's order addressed issues that did not concern the constitutional validity of a statutory provision. This is patent by the fact that plaintiff did not raise those issues. Thus, this appeal should be dismissed as there is no direct appeal as of right from the order of Supreme Court. Additionally, this appeal should be dismissed inasmuch as it seeks review of the Appellate Division's order, as that is not the court of record of original instance within the meaning of the statute or Constitution.

To the extent that plaintiff's appeal can be construed pursuant CPLR 5601 (b) (1), the Court should dismiss the appeal for the reasons addressed below.

Plaintiff's Unpreserved Legal Theories and Arguments

Initially, it is well-established that new legal theories or arguments not raised before the lower court or in the complaint are unpreserved for review by the Court of Appeals (*see Mohassel v Fenwick*, 5 NY3d 44, 53 [2005]; *Elezaj v Carlin Constr. Co.*, 89 NY2d 992, 994-995 [1997]; *Snyder v Wetzler*, 84 NY2d 941, 942 [1994]). "Unlike the Appellate Division, [the Court of Appeals] lack[s] jurisdiction to review unpreserved issues in the interest of justice" (*Bingham v New York City Tr. Auth.*, 99 NY2d 355, 359 [2003]).

As previously discussed, plaintiff did not allege or raise any of the foregoing "constitutional" challenges in any iteration of the complaints at issue here. Neither did plaintiff raise any of these challenges in opposition to the motions before Supreme Court. The abject failure to plead any of the foregoing alleged constitutional issues, or to argue them before the lower court, renders such unpreserved and, respectfully, outside of this Court's jurisdiction (*see Mohassel v Fenwick*, 5 NY3d at 53 [concluding that a due process challenge to a statutory scheme was unpreserved for review because it was not raised before Supreme Court, and that a review of an apportionment decision should have been challenged before in an administrative proceeding when the error could have been corrected]; *Snyder v Wetzler*, 84 NY2d at 942 ["To the extent plaintiff contends that the State tax statutes at issue violate either the Supremacy Clause or New York law, his arguments are unpreserved and cannot be considered on this appeal. Plaintiff's complaint asserted only violations of the Commerce Clause and 'the laws of the United States enacted pursuant thereto.'"]).

The Appellate Division's Order Did Not Directly Involve Any Substantial Constitutional Question

It is settled-law that where the Appellate Division renders its decision on an independent, nonconstitutional ground, there is no appeal as of right within the meaning of CPLR 5601 (b) (1)

(*see Matter of Gonnard v Guido*, 22 NY3d 948, 948 [2013]; *Matter of Shannon B.*, 70 NY2d 458, 462 [1987]; *Matter of Levy*, 255 NY 223, 226 [1931]).

The First Department did not address the unpreserved so-called constitutional questions in its order. Rather, it concluded that "plaintiff's remaining arguments . . . [are] improperly before this Court" (*Simon v FrancInvest, S.A.*, 178 AD3d at 438). The First Department affirmed that part of the lower court's order granting CCA summary judgment dismissing all claims without even a cursory reference to plaintiff's unpreserved arguments.

Accordingly, this appeal should be dismissed given that the Appellate Division decided this matter on independent, nonconstitutional grounds (*see Matter of Shannon B.*, 70 NY2d at 462 ["The Appellate Division did not explicitly address the constitutional argument upon which appellant hinges her appeal as of right to this court . . . The record reveals that this argument was first raised on the appeal to the Appellate Division. The issue is therefore not preserved for our review and the appeal as of right must be dismissed on the ground that no substantial constitutional question is directly involved."]; *see generally Dama v Village of Tuckahoe*, 72 NY2d 832, 832 [1988]).

Plaintiff Relies on a Regulation that Never Existed or Was Abolished Decades Before Any Relevant Time Period

Finally, CCA raises concerns regarding the applicability of the purported regulation identified as "NYC Hospital Code Art. IX, Part II, § 11.02." Notwithstanding this office's best efforts, we have not been able to independently verify that this regulation, as represented by plaintiff, ever existed at the applicable times. Our research into the issue indicates that the regulation stems from former New York City Board of Hospitals or New York City Department of Hospitals that existed prior to 1969. Indeed, it is referenced explicitly or implicitly in court decisions from the 1960s as it relates to those now defunct regulatory agencies (*see e.g. Ferrante v City of New York*, 17 NY2d 616, 616 [1966]; *Matter of Charles B. Towns Hosp v Trussell*, 21 AD2d 762, 762 [1st Dept 1964]; *Bloom v Associated Hosp. Serv. of New York*, 45 Misc 2d 208, 211-212 [Sup Ct, Kings County 1965], *affd* 25 AD2d 818 [2d Dept 1966]).

For sure, "NYC Hospital Code" is not referenced in any court case, regulation, ordinance, or statute after 1969. This tracks given that, in 1969, the State of New York created the New York City Health and Hospitals Corporation ("HHC") to replace the former Department of Hospitals, and HHC commenced operations on July 1, 1970 (*see generally* L. 1969, c. 1016, §1 *et seq.*; McKinney's Unconsolidated Laws of NY §§ 7381 to 7406; *Matter of New York City Health & Hosps. Corp. v City of New York*, 43 AD2d 513, 513 [1st Dept 1973], *lvs dismissed* 66 NY2d 520, 935 [1974]).

While several other changes have occurred regarding administrative agencies at the State and City level in that period, all indicate that the relied upon provision of plaintiff, raised for the first time on appeal, was not in place at any relevant time to this matter. It should also be noted that the foregoing has not been briefed in any capacity, which further illuminates the irrelevancy of the issue to the Appellate Division's determination.

CONCLUSION

CCA respectfully requests that this Court declines to sustain subject matter jurisdiction over this appeal and to dismiss it accordingly.

Very truly yours,

TRAUB LIEBERMAN STRAUS & SHREWSBERRY LLP

Mario Castellitto

ATTORNEY AFFIRMATION OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Vito John Marzano, an attorney admitted to practice law before the Courts of the State of New York, affirms as follows:

1. I am not a party to the action and am over 18 years of age.

2. I am an associate with the firm Traub Lieberman Straus & Shrewsberry LLP, 7 Skyline Drive, Hawthorne, New York 10532, which is counsel of record to Defendant-Respondent VCC, Inc. d/b/a Cicero Consulting Associates in this matter.

1. On June 29, 2020, I served the within Jurisdictional Response of Defendant-Respondent VCC Inc., d/b/a/ Cicero Consulting Associates, via overnight delivery, by depositing the same in a properly addressed wrapper, in an official depository under the exclusive care of custody of Federal Express, within the State of New York, addressed to each of the following persons as the last known address set forth after each name:

Jean-Pascal Simon, M.D.
Pro Se Plaintiff-Appellant
43 West 43rd Street, Suite 199
New York, New York 10036
Tracking No.: 770823651006

Nancy Volin, Esq.
Attorney for Plaintiff-Appellant
On the Derivative Claims
43 West 43rd Street, Suite 199
New York, New York 10036
Tracking No.: 770823688654

Mark D. Lebow, Esq.
LEBOW & SOKOLOW, LLP
Attorneys for Defendants-Respondents
French American Surgery Center, Inc.
French-American Clinic, Inc., JJS Group, Inc.
and Jean-Francois Simon
770 Lexington Avenue, 6th Floor
New York, New York 10065
Tracking No.: 770823725700

Donald A. Pitofsky, Esq.
SCHWARTZMAN GARELIK WALKER & TROY, P.C.
Attorneys for Defendants-Respondents
Fifth Avenue Surgery Center, LLC
and Charles Raab
355 Lexington Avenue, 8th Floor
New York, New York 10017
Tracking No.: 770823754008

Vito John Marzano