

**Serota v Scimone**

2013 NY Slip Op 30301(U)

January 10, 2013

Sup Ct, New York

Docket Number: 651117/2012

Judge: Charles E. Ramos

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

PRESENT: CHARLES E. RAMOS  
*Justice*

PART 53

C. Serota, et al

INDEX NO.

651117/12

MOTION DATE

- v -

MOTION SEQ. NO.

06

J. Simone

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

*to be read in accordance with accompanying memorandum decision and order.*

Dated: 1/10/13

HON. CHARLES E. RAMOS

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X  
CHARLES R. SEROTA AND GEOFFREY S. SEROTA,  
SONS EASTPORT LLC, SONS RIVERHEAD II LLC,  
409-423 WFP SHIRLEY LLC, 349-351 WFP  
SHIRLEY LLC, SEROTA WADING RIVER LLC, SONS  
EAST MEADOW LLC, 3644 LONG BEACH ROAD LLC,  
AND SEROTA VALLEY STREEM LLC,

Plaintiffs,

Index No. 651117/2012

-against-

JOSEPH SCIMONE individually, JOSEPH  
SCIMONE in his capacity as Executor of the  
ESTATE OF NATHAN L. SEROTA, MICHAEL CASSIDY,  
VIVIAN SEROTA AND LIGHTHOUSE REALTY PARTNERS,  
LLC,

Defendants.

-----X

**Charles E. Ramos, J.S.C.:**

In motion sequence 006, defendant Michael Cassidy moves to dismiss the claim for breach of fiduciary duty asserted against him in the amended complaint (complaint) pursuant to CPLR 3211 (a) (7) and 3211 (a) (10).<sup>1</sup>

In motion sequence 008, defendant Joseph Scimone moves to dismiss the claims asserted against him in the complaint pursuant to CPLR 3211 (a) (1), (3), (7), and (10).

Motion sequence 06 and 08 are consolidated for disposition.

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<sup>1</sup> Previously, this Court granted Cassidy's motion to dismiss, in part, with respect to the fifth cause of action for violation of New York Judiciary Law § 487, and reserved disposition with respect to the claim for breach of fiduciary duty.

## Background<sup>2</sup>

This action arises out of an attempt to declare null and void a property management agreement (Agreement) entered into by deceased patriarch, Nathan Serota (Serota), with defendant Joseph Scimone. The Agreement authorizes Scimone to manage Serota's real estate empire, and was purportedly obtained by the unlawful collusion of defendants Scimone, Michael Cassidy, counsel for Nathan Serota Properties which owned the properties and related LLCs, and Serota's second wife, Vivian Serota, at a time when Serota was in failing physical and mental health.<sup>3</sup> Serota executed the Agreement just three weeks before his death, at age 90, despite allegedly refusing to sign it for seven years prior.

Plaintiffs in this action are Charles and Geoffrey Serota, Serota's sons and managing members of the LLCs which own the properties (Plaintiffs).

In his will (Will), Serota bequeathed his membership interests in the LLCs to his two sons, Charles and Geoffrey, and to his wife, Vivian, and named Scimone as his executor. The Will provided that many of Serota's properties were to be managed by Scimone or a company owned or controlled by him.

According to Plaintiffs, the Agreement goes far beyond what

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<sup>2</sup> The facts set forth herein are taken from the Complaint and the affirmation of John W. Moscow, Esq.

<sup>3</sup> This Court previously granted Vivian Serota's motion to dismiss in its entirety (October 12, 2012 Decision).

is directed in the Will and what Serota would have agreed to, had he been of right mind when he executed it. For instance, the Agreement permits Scimone to self-deal and to compete in the same or similar business. The Agreement also provides for a six percent fee to be collected by Scimone "for as long as he lives," which is approximately \$3 million annually. The Plaintiffs also allege that the Agreement unreasonably restricts their ability to manage and operate the own properties, while granting Scimone unfettered discretion and control.

Plaintiffs also claim that the Agreement is suspicious on its face.

Following Serota's death, Scimone assigned the Agreement to Lighthouse Realty Partners, LLC (lighthouse), an entity in which both defendants Scimone and Cassidy have an ownership interest.

In May 2012, Plaintiffs served the Complaint, asserting five causes of action. As against Scimone, Plaintiffs seek a declaration that the Agreement is null and void, and for unjust enrichment and aiding and abetting Cassidy's breach of fiduciary duty. As against Cassidy, Plaintiffs assert a claim for breach of fiduciary duty.

#### Discussion

Scimone moves to dismiss the claims asserted against him on the grounds that Charles and Geoffrey lack standing to sue to challenge the Agreement insofar as they are not parties to the

Agreement, nor do they own any of the properties which are subject to the Agreement. In addition, Scimone argues that dismissal is appropriate for failure to name necessary parties, the LLCs which own many of the properties to be managed under the Agreement. The Agreement also contains a broad arbitration clause that provides that any disputes thereunder must be arbitrated within two years. Finally, Scimone asserts that no justiciable controversy exists because the Will contains a so-called fail safe provision which directs Scimone, as executor of Serota's estate, to enter into a management agreement with himself. Thus, Scimone argues that even if the Agreement were declared null and void, he is permitted to execute a substantially identical one in its place.

On a motion to dismiss aimed at the sufficiency of the pleadings, "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intl.*, 80 AD3d 448 [1<sup>st</sup> Dept 2011]).

As a threshold matter, Geoffrey and Charles have standing to bring this action to challenge the enforceability of the Agreement as beneficiaries of Serota's estate and the related trusts created by Serota's Will (see generally *In re Lawrence's*

*Estate*, 271 AD 897 [2d Dept 1946], appeal dismissed 297 NY 596 [1947]; see also *Tzolis v Wolf*, 10 NY3d 100, 104 [2008]).

Moreover, as executor and trustee of Serota's Will and estate, Scimone is unlikely to bring suit against himself. Indeed, Scimone separately argues in support of his motion to dismiss that the Agreement is "binding on Charles and Geoffrey as beneficiaries under the Will ... and is binding on [them] pursuant to the command of the Will, and binding on the LLC Plaintiffs because they are parties" (Scimone's Memo. of Law, 11). In addition to being direct beneficiaries of the Will, Geoffrey and Charles are managing members of the various LLCs on whose behalf Scimone was engaged to perform management and administrative duties in the Agreement.

Plaintiffs' claims are not time-barred by the arbitration clause contained in the Agreement. The Agreement, which Plaintiffs seek to have set aside as null and void because it was allegedly procured by collusion, was executed on April 8, 2010. This action was commenced on April 5, 2012, and thus, is within the two year limitations period referred to in the arbitration clause.

Moreover, defendants have not served a demand to arbitrate or sought to compel arbitration, and have voluntarily participated in ongoing mediation, through the Commercial Division's ADR program. Defendants' affirmative use of the

judicial process and active participation in the litigation undermines their contention that arbitration is mandated.

Finally, the Court rejects the assertion that plaintiffs fail to present a justiciable controversy due to the so-called fail safe provision contained in the Will. Plaintiffs seek a declaration as to the enforceability of the Agreement, which they challenge as invalid on its face and commercially unreasonable. Such allegations present a justiciable controversy as to the respective legal rights of the parties and is sufficient to invoke the Supreme Court's power to render a declaratory judgment (CPLR 3001).

A. Breach of Fiduciary Duty

As against Cassidy, plaintiffs allege he breached his fiduciary duty to the plaintiff LLCs that he represented by colluding with Scimone in imposed on Plaintiffs a commercially unreasonable management agreement (the Agreement, which he personally benefits from insofar as he has a financial interest in Lighthouse, the entity to whom the Agreement was assigned.

Cassidy moves to dismiss the cause of action for breach of fiduciary duty on the ground that plaintiffs fail to allege the element of damages. This Court agrees.

The proponent of a claim for breach of fiduciary duty must, at a minimum, "establish that the offending parties' actions were a 'substantial factor' in causing an identifiable loss" (*Gibbs v*

*Breed, Abbott & Morgan*, 271 AD2d 180, 188-89 [1<sup>st</sup> Dept 2000]).

There must be some "reasonable connection between the act or omission of the defendant and the damage to which the plaintiff has suffered (*Laub v Faessel*, 297 AD2d 28, 31 [2nd Dept 2002]).

Cassidy persuasively argues that the alleged undue influence he asserted in securing Serota's signature to the Agreement was not necessary insofar as execution of the commercial unreasonable Agreement could have taken place without Cassidy's participation. The Will required that Scimone execute a management agreement, and Scimone has the unilateral authority to execute such an agreement on behalf of Serota by virtue of having Power of Attorney. Consequently, Scimone could have executed the Agreement himself on Serota's behalf in both Serota's individual capacity and in Serota's capacity as the managing member of the LLCs. For these reasons, Plaintiffs have failed to plead requisite element of damages.

#### B. Unjust Enrichment

Scimone moves to dismiss the claim for unjust enrichment on the grounds that a valid, enforceable agreement exists between the parties, and because plaintiffs fail to allege that they suffered actual harm.

To the extent that plaintiffs allege that the Agreement is not enforceable because Serota lacked the capacity to execute it, the claim is not barred by the well-settled principal that quasi

contractual claims are barred by the existence of a valid contract covering the subject matter of the dispute (*Sound Beyond Elec. Corp. v City of New York*, 100 AD3d 412, 413 [1<sup>st</sup> Dept 2012]).

Otherwise, Plaintiffs have adequately pled a claim for unjust enrichment. The elements required for unjust enrichment are that the other party was enriched at the plaintiff's expense, and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182-83 [2011]).

Plaintiffs are the direct beneficiaries of the Will and managing members of the various LLCs on whose behalf Scimone was engaged to perform services under the Agreement. Scimone allegedly deceived Serota into executing the Agreement which goes far beyond, and bestows greater financial benefits to Scimone than anything provided for in the Will, at the plaintiffs' expense. Such allegations adequately plead a claim for unjust enrichment to survive the pleading stage.

#### C. Aiding and Abetting Breach of Fiduciary Duty

Plaintiffs' claim for aiding and abetting breach of fiduciary duty, premised upon allegations that Scimone knowingly participated in Cassidy's breach of fiduciary duty, must be dismissed. A claim for aiding and abetting necessarily requires the assertion of a primary breach of duty (*see generally Kaufman*

*v Cohen*, 307 AD2d 113, 125 [1<sup>st</sup> Dept 2003]). The Court's dismissal of the claim for breach of fiduciary duty as against Cassidy necessarily vitiates the claim for aiding and abetting (*Id.*).

Accordingly, it is

ORDERED that the motion (06) of defendant Michael Cassidy to dismiss the amended complaint herein is granted and the amended complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the motion (08) to dismiss by defendant Joseph Scimone is granted, in part, and denied, in part, and the fourth cause of action of the amended complaint is dismissed; and it is

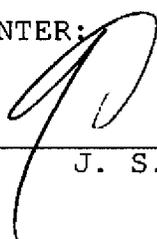
further

ORDERED that defendant Joseph Scimone is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 53 on February 19, 2013 at 10AM.

Dated: January 10, 2013

ENTER:



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J. S. C.

HON. CHARLES E. RAMOS