

<b>Selinger v Carsel Realty Corp.</b>
2015 NY Slip Op 30470(U)
March 23, 2015
Sup Ct, Queens County
Docket Number: 8324/2014
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

- - - - - x

SEAN SELINGER, Index No.: 8324/2014

Plaintiff, Motion Date: 11/13/14

- against - Motion No.: **140 and 141**

CARSEL REALTY CORPORATION, HARRY Motion Seq.: **1 and 2**  
SELINGER, individually and as Executor

and Trustee of the Estate of B.  
Caroline Selinger, JOHN S. SELINGER,  
ZECCOLA & SELINGER, LLC, ALBERT  
PACIONE and PROFESSIONAL SERVICES  
CENTER FOR THE HANDICAPPED,

Defendants.

- - - - - x

The following papers numbered 1 to 45 were read on this motion by plaintiff, Sean Selinger, for a preliminary injunction, pursuant to CPLR 6301, directing defendant Professional Service Centers for the Handicapped, to pay the monthly rent of \$6,000.00 for premises located at 16-33 Madison Street, Ridgewood, Queens County, New York, 11385, directly to the plaintiff rather than to defendants Carsel Realty Corporation, Harry Selinger and John Selinger; and the cross motion of Carsel Realty Corporation for an order pursuant to CPLR 3211(a)(8) dismissing the complaint in its entirety against Carsel Realty Corporation for failure to obtain personal service; and the cross-motion of John Selinger and Zeccola & Selinger LLC, for an order dismissing the first and third causes of action in the complaint as asserted against said defendants pursuant to CPLR 3211(a)(1), (2), (5), (7) and (8), for failure to state a cause of action and for failure to obtain personal jurisdiction; and the separate motion of defendant, Albert Pacione, Esq. for an order changing venue to Orange County, or dismissing the complaint against said defendant pursuant to CPLR 3211(a)(8), (1), (5), and (7) for failure to obtain personal jurisdiction over said defendant, failure to state a cause of action and as untimely pursuant to the three year statute of limitations for legal malpractice:

Papers Numbered

Plaintiff's Order to Show Cause-Affidavits-Exhibits.....	1 - 5
Carsel Notice of Cross-Motion-Affirmation-Memo of Law....	6 - 12
Selinger Notice of Cross-Motion-Affirmation-Memo of Law.	13 - 20
Pacione Notice of Motion-Affirmation-Memo of Law.....	21 - 28
Plaintiff's Affirmation in Opposition-Affidavits.....	29 - 34
Reply affirmations(3).....	35 - 45

This is an action commenced by Sean Selinger by Order to Show Cause dated September 2, 2014. Pursuant to the direction of the Court, the Order to Show Cause together with the summons and complaint and the supplemental Summons and First Amended Complaint were directed to be served upon all named defendants by personal service on or before September 9, 2014.

The plaintiff, Sean Selinger, age 43, a resident of Anondale, Pennsylvania, submits an affidavit and a copy of the pleadings in support of the Order to Show Cause stating that defendant, Harry Selinger, who is 90 years of age, is his father and resides in Wellington, Florida. His mother, Caroline Selinger died in 1980 in Nassau County at the age of 38. Prior to her death, his mother and father purchased rental property in Ridgewood, Queens County. The property was owned in the name of Carsel Realty Corporation (Carsel). At the time of her death, his mother was the sole shareholder of Carsel. According to her will, dated September 7, 1979, which was probated in Nassau County Surrogate's Court on April 23, 1981, she directed the co-executors and trustees, to wit, her husband and sister-in-law, Faith Dubbs, to put the property in a trust, to collect the rent from the property, and pay the net income to her husband Harry Selinger for his lifetime. The trust was to last until the death of her husband at which time the property was to be passed to her two children, Sean and John Selinger, equally.

Plaintiff contends that the property is presently valued at 1.2 million dollars and is rented to defendant Professional Service Center for the Handicapped (PSCH) for an annual rental of approximately \$70,000.00. Plaintiff states that in 2008, defendant, Albert Pacione, Esq. an estates and trusts attorney who shared office space with plaintiff's brother, John, also an attorney, was retained by the plaintiff's father, Harry, to gift one-third of the shares of stock in Carsel Realty to each of his two sons. Harry would retain his interest in one-third also. Mr. Pacione took steps to have the shares of stock which were held 100 per cent in the Carsel Realty Trust divided equally to Harry and his two sons John, and Sean, equally. At the time he retained

Mr. Pacione, in June 2008, Harry believed, despite a will having been filed in Nassau Surrogate's Court, that there was no will and that his wife died intestate. Mr. Pacione had Harry execute an affidavit stating that his wife died intestate and that no probate or administration proceedings were ever commenced for her estate. The affidavit states that under the laws of intestacy her estate passed in equal thirds to himself and his two sons.

Sean Selinger now claims that although he is the record owner of 1/3 of the shares of stock of Carsel Realty and has been record owner since 2008, he has never received his fair share of the rental income from the property despite demanding same from his father and his brother John. He also asserts that since 2008 he has been imputed with taxable earnings from the property of over \$100,000 but he has not received more than \$20,000 in distributions.

The plaintiff alleges that his brother, an attorney with the firm of Zeccola & Selinger in Goshen, New York, committed fraud in that he concealed the fact that Sean was a one-third shareholder and he alleges that John laundered the checks made out to him (Sean) and sent the checks to his father and himself. Plaintiff states that his brother embezzled his share of the Carsel income and forged Sean's signature on checks made out to him. He also states that his brother used the pretext of an IRS restraining order to completely withhold funds. He states that attorney Albert Pacione and his father were part of the fraud and embezzlement. He states that he did not discover the scam until February 13, 2014. He states that his share of \$1940 in disbursements is being withheld from him and yet John and Harry continue to impute a tax liability to him which equals an additional tax burden of \$780.00 per month.

In order to rectify the alleged fraud being perpetuated by his brother and father, Sean is now requesting that this Court order, pending the trial in this matter, that the full amount of the monthly rental income from the Ridgewood property be made payable to him.

Along with the order to show cause the plaintiff commenced an action by summons and complaint and supplemental summons and amended complaint. The action was commenced by the filing of the pleadings on May 29, 2014. The complaint asserts three cause of action, the first against Harry Selinger, Carsel Realty, John Selinger, and Albert Pacione for fraud and breach of trust. Plaintiff asserts, under this cause of action, that the deed to the premises in Queens was never properly distributed to the Estate of Caroline Selinger pursuant to the terms of her last

will and testament. Instead, it is alleged, the defendants participated in a fraudulent scheme by wrongfully transferring Carsel stock to the plaintiff, his brother, and his father in violation of his mother's last will and testament. Plaintiff asserts that the defendants acted together to deprive him of his rightful share of the estate of his late mother and his share of the profits from his one-third ownership of the corporation.

The second cause of action asserts legal malpractice against Albert Pacione. It is alleged that Pacione was retained as the attorney for Carsel Realty and continues to act as the attorney for Carsel. Plaintiff alleges that Pacione committed malpractice in that he knowingly failed to properly distribute the assets of his mother estate in compliance with the terms of her will.

The third cause of action is against John Selinger and Zeccola and Selinger, for breach of contract and involves separate allegations. The complaint alleges that in January 2003, John Selinger and his law firm retained Sean as an advertising agent for the promotion of John's law practice for a monthly fee plus bonuses. Plaintiff claims that the law firm stopped paying the plaintiff his monthly fee and bonuses in June 2008 despite demand having been made for further payment.

Carsel Realty Corporation, appearing by Condon & Associates, PLLC opposes Sean's motion for an injunction and cross-moves for an order pursuant to CPLR 321(a)(8) dismissing the complaint against Carsel Realty. In support of the cross-motion, John Selinger, the President of Carsel Realty states that neither he, his law firm, Zeccola & Selinger LLC, nor Carsel Realty were served personally with the summons and complaint in accordance with the direction of the Court.

The affidavits of service which were filed with the court in the Central Motion Part on October 9, 2014, states that John Selinger was served with the summons and complaint by serving a person of suitable age and discretion to wit "Stella Cabarcas/Legal Assist" on September 8, 2014, at his place of business at 45 Webster Avenue, Goshen, New York. The affidavit of service for Carsal Realty states that the motion, summons and complaint were served by service upon Stella Cabarcas/Legal Asst and managing agent of the corporation, authorized to accept service for the corporation. The affidavit of service for Zeccola & Selinger, LLC, states that order to show cause and summons and complaint were served by leaving same with Stella Cabarcas, managing agent of the corporation. John Selinger states that Stella Cabarcas is a receptionist at the building located at 45 Webster Avenue, New York. He states that she is not an

employee, agent, or representative of Carsel Realty and is not authorized to accept service for Carsel Realty.

In addition counsel for Carsal states that service of the summons and complaint were not made in accordance with CPLR 306-b which requires service of the summons and complaint to be made within 120 days after the commencement of the action. Counsel states that the action was commenced on May 29, 2014 that Carsel was not properly served within 120 days thereof.

John Selinger opposes the order to show cause seeking an injunction stating that in 2008 he and his father and brother agreed that the income from Carsel would go to the father and the he and his brother would receive \$1500 each per month and gift \$1000 to the father and the remaining \$500 would be used to pay taxes on the property. John Selinger states that he issued checks under that arrangement, agreed upon by his brother, for 4½ years until November 2012. At that time he stopped making payments to Sean due to a large tax levy on the property.

Counsel for Carsel Realty states that the shares were distributed in 2008 because Harry mistakenly believed his wife died intestate and assumed he was the sole owner after her death. He states that because of the mistake Harry caused Carsel to transfer ownership to his sons and himself in 2008. Counsel claims that the plaintiff states he stopped receiving distribution in 2012 but waited until 2014 to bring the action showing that there has been no irreparable harm from the failure to get an immediate payout of the funds. Further, counsel claims that an injunction is not warranted as any loss to the plaintiff may be compensated by monetary damages. In addition, he states there is no likelihood of success on the merits as the decision to stop Sean's distributions was based upon a tax levy and the decision was made in good faith.

John Selinger and the law firm of Zeccola & Selinger submit a separate cross-motion for an order dismissing the complaint for failure to make proper service of the summons and complaint and in addition, move to dismiss the first cause of action based upon fraud and the third cause of action for breach of contract for failure to state a cause of action. John Selinger submits an affidavit in support of the motion stating that he believed that from the date of his mother's death his father succeeded to ownership of all of the issued and outstanding stock. However, he states that in 2007 his father approached him stating that he wanted to convey a one-third interest in the company to John and his brother but wanted to retain the income associated with the interest for his lifetime. At that point John referred Harry to

attorney Albert Pacione. As stated above, Pacione arranged to have 50 shares of capital stock in Carsel transferred to John, his brother Sean, and his father. John states that he did not know his mother had a will until he saw the copy attached to the plaintiff's motion.

As to the third cause of action with regard to money owed to Sean for advertising and marketing services, John submits copies of bills and payment checks showing that his contract was with Testing Technologies the company his brother was affiliated with and not with Sean personally. Moreover, he states that the cause of action for breach of contract with respect to advertising services which were performed in 2002 and 2003 is barred by the six year statute of limitations for contracts although he was making payments through 2008.

Albert Pacione moves separately for an order dismissing the complaint against him on the ground that the Court lacks personal jurisdiction over him. He states that although Stella Cabarcas was served as a person of suitable age and discretion at his office address, she is not his legal assistant or employee and not authorized to accept service on his behalf. He also moves to dismiss the cause of action for legal malpractice on the ground that the three year statute of limitations for work he performed in 2008 expired prior to this action being commenced in 2014. He also seeks to have the venue of the action changed to Orange County, the place of residence of the parties, rather than Queens County, as there is no nexus with Queens County. He also seeks to dismiss the first cause of action against him for fraud for failure to state a cause of action. In his affidavit in support of the motion, Mr. Pacione states that he never represented Sean in any underlying transactions. He was retained by Harry Selinger in 2008 to gift shares of Carsel to his two sons. He states that he rendered services to Harry in 2008 and was paid in 2008 and did not perform any legal services for the family after that time. He also states that he never collected rents from tenants at the subject premises as alleged in the complaint.

Ms. Cabarcas also submits an affidavit stating that she is not now and never has been an employee, agent, or representative of Albert Pacione and she is not authorized to accept service on his behalf.

Counsel also submits that Orange County is the only proper county as Pacione resides in Orange County and the plaintiff resides outside the state of New York. Venue was placed in Queens by the plaintiff based on the location of the property. However, Mr. Pacione argues that pursuant to CPLR 507 the situs of the

property may only be the basis for venue when the judgment would affect title to or the possession use or enjoyment of the real property. Counsel argues that this action only concerns the proper distribution of the rent proceeds and the complaint does not seek to change title to or the possession of the property.

In opposition, the plaintiff submits an affirmation stating that in 2008 when his father was 86 years old, his brother John convinced his father to transfer shares of Carsel to him and his brother. John told him that Mr. Pacione would be acting as both of their attorneys. He states that it was John who hired Mr. Pacione, a co-tenant of his brothers. He states that he believes from his personal observation that Ms. Cabarcas is an employee of for Pacione able to accept service, he states that Pacione defrauded him into signing the stock transfer. He also states that he believes that Pacione was involved in a fraud as he should have known that his mother left a will and that a diligent search of the Nassau Surrogates Court records would have easily ascertained the existence of the will.

Plaintiff also states that venue should not be changed to Orange county as Carsel was incorporated in Queens County. He also states that he will not be able to get a fair trial in Orange County where his brother knows all of the attorneys and judges. He states that he has pled an sufficient cause of action for fraud based on the fact that the elaborate "gift arrangement" to embezzle funds from him was approved by John and Albert pacione and his father and that based upon the fraud he continues to suffer repeated financial injury he also states that he performed advertising services under his individual name.

Upon review and consideration of the plaintiff's motion the defendants respective motions and cross-motions in opposition and the respective replies thereto, this court finds as follows'

To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction" (Stockley v Gorelik, 24 AD3d 535 {2d Dept. 2005}); (see Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd., 53 AD3d 612 [2d Dept. 2008]; Montauk-Star Is. Realty Group v Deep Sea Yacht & Racquet Club, 111 AD2d 909 [2d Dept. 1985]). "A court evaluating a motion for a preliminary injunction must be mindful that the purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties (Masjid Usman, Inc. v Beech 140, LLC, 68 AD3d 942 [2d Dept. 2009]; also see Matter of

Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs., 65 AD3d 1051 [2d Dept. 2009]; Coinmach Corp. v Alley Pond Owners Corp., 25 AD3d 642 [2d Dept. 2006]). Further, "a party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts" (Omakaze Sushi Rest., Inc. v Ngan Kam Lee, 57 AD3d 497, 497[2d Dept. 2008]; also see Peterson v Corbin, 275 AD2d 35 [2d Dept. 2000]).

Here, this court finds that the plaintiff has failed to show a likelihood of ultimate success on the merits by clear and convincing evidence (see Gluck v Hoary, 55 AD3d at 668 [2d Dept. 2008]; Apa Sec., Inc. v Apa, 37 AD3d 502 [2d Dept. 2002]). The affidavits and copies of documents submitted by the parties presents questions of fact as to whether a fraud was knowingly perpetrated on the plaintiff to embezzle funds which were due to him. Pursuant to the terms of will submitted by the plaintiff his father was entitled to the full income from the real estate for his life after which time the brothers would inherit the corporation equally. There are also question of fact as to whether the plaintiff was provided with enough income from the company after 2008 in order to pay for his tax liability on the property.

Moreover, the plaintiff also has not shown irreparable injury absent the granting of a restraining order (see Di Fabio v Omnipoint Communications, Inc., 66 AD3d 635 [2d Dept. 2009]). A preliminary injunction is not warranted when there is an adequate remedy at law (see Famo, Inc. v Green 521 Fifth Ave. LLC, 51 AD3d 578 [1<sup>st</sup> Dept. 2008]; Credit Index v RiskWise Intl., 282 AD2d 246 [1<sup>st</sup> Dept. 2001]). Here, the injunction requiring the tenant to immediately pay the full rental income to the plaintiff is not appropriate as the plaintiff seeks to recover monetary damages due to fraud and breach of trust (see Credit Agricole Indosuez v Rossiyskiy Kredit Bank, 94 NY2d 541 [2000]; Mar v. Liquid Mgt. Partners, LLC, 62 AD3d 762 [2d Dept. 2009]; Hall v Cucco, 5 AD3d 631 [2d Dept. 2004]). As the plaintiff is seeking his rightful share of the proceeds of the rental income earned by the Realty Corporation he can be clearly be compensated, should he succeed on the merits, by monetary damages.

Furthermore, a balancing of the equities does not favor the granting of preliminary relief. The plaintiff has not shown that any injury he is likely to sustain will be more burdensome to him than the harm likely to be caused to his brother and his father by preventing them from having their rightful share of the earnings of the corporation (see Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC, 42 AD3d 420 [2d Dept. 2007]; Credit

Index, L.L.C. v. RiskWise Int'l, L.L.C., 282 AD2d 246 [1<sup>st</sup> Dept. 2001]).

In addition, "absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (SHS Baisley, LLC v Res Land, Inc., 18 AD3d 727 [2d Dept. 2005]; see Village of Westhampton Beach v Cayea, 38 AD3d 760 [2d Dept. 2007]; St. Paul Fire & Mar. Ins. Co. v York Claims Serv., 308 AD2d 347 [1<sup>st</sup> Dept. 2003]). The plaintiffs' request for the rental income from the corporation is a branch of the ultimate relief to which he would be entitled in a final judgment (see Board of Mgrs. of Wharfside Condominium v Nehrich, 73 A.D.3d 822 [2d Dept. 2010]; SHS Baisley, LLC v Res Land, Inc., 18 AD3d 727 [2d Dept. 2005]; St. Paul Fire & Mar. Ins. Co. v York Claims Serv., supra).

Lastly, the circumstances presented in this case are not of such an extraordinary nature as to warrant mandatory injunctive relief pending the resolution of the litigation (see Village of Westhampton Beach v Cayea, 38 AD3d at 762 [2d Dept. 2007]; SHS Baisley, LLC v Res Land, Inc., 18 AD3d at 728 [2d Dept. 2005]).

Accordingly, the plaintiff's application for preliminary relief pending the trial in this action is denied.

With respect to the motions and cross-motions of defendants, Carsel Realty Corporation, John S. Selinger, Zeccola & Selinger, LLC, and Albert Pacione, to dismiss the action for failure to make proper service pursuant to CPLR 308 and 306-b, this Court finds as follows:

A process server's affidavit stating proper service in accordance with CPLR 308, constitutes prima facie evidence of proper service (see Bank, Natl. Assn. v Arias, 85 AD3d 1014 [2d Dept. 2011]; Scarano v Scarano, 63 AD3d 716 [2d Dept. 2009]). However, a defendant's sworn denial of receipt of service, containing specific facts to rebut the statements in the process server's affidavit, "generally rebuts the presumption of proper service established by a process server's affidavit and necessitates an evidentiary hearing" (City of New York v Miller, 72 AD3d 726 [2d Dept. 2010]; also see Associates First Capital Corp. v Wiggins, 75 AD3d 614 [2d Dept. 2010]; Washington Mut. Bank v Holt, 71 AD3d 670 [2d Dept. 2010]).

Here, the defendants have presented evidence which contains sufficient facts regarding appropriate service and the capacity of Stella Cabarcas to accept service to warrant a traverse hearing to determine whether the individual and corporate

defendants were each properly served with the summons and complaint in accordance with the instructions of this court and the Rules set forth in the CPLR and BCL (see U.S. Bank, Natl. Assn. v Arias, 85 AD3d 1014 [2d Dept. 2011]).

Accordingly, the parties are directed to appear for a traverse hearing to be held in Room 304 of the Queens County Supreme Court, located at 25-10 Court Square, Long Island City, New York 11101, at **10:00 a.m** on **April 21, 2015**. The parties are directed to have all witnesses present at the time ready to proceed to the hearing.

With respect to the respective motions and cross-motions to change venue, and dismiss the plaintiff's complaint on several grounds including statute of limitations and failure to state a cause of action, those motions shall be held in abeyance pending the determination of this court following the traverse hearing. However, prior to the traverse hearing, this matter shall be conferenced with the court with a view towards settlement. All counsel and parties shall appear at **10:00 a.m** on **April 21, 2015** for conference prior to the traverse hearing.

Dated: March 23, 2015  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**