

Serota v Scimone

2014 NY Slip Op 30924(U)

April 8, 2014

Supreme Court, New York County

Docket Number: 651117/2012

Judge: Charles E. Ramos

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

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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 STREAM 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

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

Motion sequence numbers 014, 015 and 018 are herein
consolidated for disposition.

In motion sequence numbers 014 and 015, defendant Michael
Cassidy moves for leave to reargue this Court's order which
granted plaintiffs leave to serve a Second Amended Complaint as
against him, and upon reargument, to deny the motion.

In motion sequence number 018, defendant Joseph Scimone,
individually and as executor of Serota's estate, moves to dismiss
the second through fifth and seventh causes of action of the SAC
pursuant to CPLR 3211 (a) (1), and (7).

Background¹

¹ The facts set forth herein are assumed to be true for the
purposes of disposition.

For a full recitation of the factual background in this action, see this Court's decisions dated January 10 and July 19, 2013 (NYSCEF Doc. 151, 224).

Nathan Serota (Serota) is a real estate developer who built more than fifty residential, shopping and commercial properties in the greater New York metropolitan area. Many of the properties that he developed are owned by the plaintiff limited liability companies (LLCs), of which Serota was a managing member until his death in May 2010 at the age of 90.

This action arises out of an agreement (Agreement) executed between Serota, as managing member of twenty-nine LLCs and defendant Scimone just one month prior to Serota's death. The Agreement purports to grant to Scimone the right to manage, operate and lease the residential and commercial real estate owned by the LLCs via a management entity in which Scimone is an owner or officer of. The Agreement provides that it is to take effect 180-days from the date of Serota's death, and that Scimone would be paid a management fee of six percent of gross rents for his services, for a term of 5 years. Scimone formed Lighthouse approximately four months following Serota's death, and assigned the Agreement to Lighthouse. As managing member of Lighthouse, Scimone retained principal ownership and management of the properties.

Michael Cassidy was Serota's attorney and attorney for the

LLCs. Cassidy owns a five percent interest in Lighthouse.

In his will, Serota bequeathed his membership interests in all twenty-nine LLCs to his sons, plaintiffs Charles and Geoffrey and his wife. Subsequent to his death, Charles and Geoffrey, as the plaintiff LLCs' sole surviving members and beneficiaries, became managing members of the LLCs.

Plaintiffs allege that, in the years before his death, Serota was mentally and physically incapacitated. The defendants allegedly colluded and conspired to obtain Serota's signature on the Agreement in order to take control of Serota's real estate empire. The Agreement is purportedly replete with commercially unreasonable provisions which effectively deprive the plaintiff LLCs of their ownership rights, including the ability to control their revenue, expenses and profits, and to sell the properties at their market value.

Plaintiff commenced this action in April 2012, seeking a declaratory judgment that the Agreement was invalid because it was signed by Serota when he lacked the mental capacity to comprehend it. Defendants moved to dismiss the complaint, and later withdrew it when plaintiffs served an amended complaint.

Defendants thereafter moved to dismiss the amended complaint, and plaintiffs moved for leave to file a second amended complaint. The Court granted the motion to dismiss in its entirety as against Cassidy, and granted the motion, in part,

as against Scimone to the extent of dismissing the claim for aiding and abetting Cassidy's breach of fiduciary duty. The Court also granted plaintiffs' motion for leave to serve a second amended complaint (SAC).

In the SAC, plaintiffs allege that, if Serota was competent to execute the Agreement as defendants have maintained, the Agreement should be declared invalid because Serota's execution of that agreement as managing member of the LLCs was a breach of fiduciary duty that he owed to plaintiffs as members. Plaintiffs also assert two new causes of action against Scimone and Cassidy, for knowing participation in Serota's breach of trust.

Discussion

In the second and seventh causes of action, plaintiffs allege that Serota held a position of trust and as a fiduciary with regard to the plaintiff LLCs and their members. Entering into the Agreement purportedly constituted a breach of Serota's duties of trust and fiduciary duties to the plaintiff LLCs and their members because its terms were commercial unreasonable. Further, plaintiffs allege that Serota burdened the LLCs with an agreement which deprives them of their ownership rights and ability to derive any significant value from such ownership by a sale of the plaintiff LLCs' properties or their operation, and seek a declaration that the Agreement is void.

Scimone knew that Serota held a position of trust vis-a-vis

plaintiffs, and was a party to the Agreement and thus, knew or should have known that the terms of the Agreement were so commercially unreasonable that, by entering into the Agreement, Serota was breaching his duty of trust to plaintiffs.

In the third and fourth causes of action, plaintiffs maintain that Serota lacked authority to execute the Agreement and to bind the LLCs, and constitutes a breach of the implied covenant of good faith and fair dealing.

In the fifth cause of action, plaintiffs allege that the powers granted to Scimone in the Agreement constitute a testamentary disposition, and that because the Agreement was not executed with all the formalities required by a will, the agreement is voidable.

Defendant Scimone moves to dismiss these causes of action because plaintiffs have failed to allege any acts constituting a breach of trust, the plaintiff LLCs' operating agreements provide that Serota had ample authority to enter into the Agreement, and the powers granted to Scimone in the Agreement do not constitute a testamentary disposition.

I. Knowing Participation in a Breach of Trust

"A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator" (*Kaufman v Cohen*, 307 AD2d 113, 124 [1st Dept 2003]). "Substantial assistance occurs when a defendant

affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur. However, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff" (*Id.*).

Plaintiffs' claims for knowing participation in a breach of trust fail to state a cause of action. In the first instance, plaintiffs fail to allege a primary breach of duty, which according to the SAC is entering into the Agreement.

Ten of the operating agreements of the LLCs are identical, and state that management shall be vested in the managing member [Serota], who is granted,

"full, exclusive and complete discretion, power and authority, on behalf of the Company to ... enter in any agreement, instrument or other writing, ... and take any other lawful action that the Managing Member consider[s] necessary, convenient or advisable in connection with any business of the Company" (Exhibit D, annexed to the Riordan Aff., §§ 4.1-4.2).

Section 4.6 states,

"If at any time there is only one person serving as a Managing Member, such managing Member shall be entitled to exercise all powers of the managing Members set forth in this Section, and all references in this Section and otherwise in this Operating Agreement to 'Managing Members' shall be deemed to refer to such single Managing Member."

The contractual language of the operating agreements refute the contention that Serota's execution of the Agreement constituted a breach of trust. The operating agreements provide broad authority to Serota to exercise his authority as managing

member to delegate management of the properties that the LLCs own to Scimone.

Alternatively, Scimone asserts that the causes of action premised upon knowing participation in a breach of trust must fail because plaintiffs have not alleged sufficient facts to overcome the protection that the business judgment rule affords Serota, as managing member. The Court agrees.

It is well-settled that the law of the state of incorporation applies to claims involving corporate governance (*Hart v General Motors Corp.*, 129 AD2d 179, 183-184 [1st Dept], *app denied* 70 NY2d 608 [1987]). Of the ten plaintiff LLCs, seven were incorporated in Delaware, and three were incorporated in New York. Thus, Delaware and New York law govern plaintiffs' claims for knowing participation of breach of trust.

Under Delaware and New York law, managing members of LLCs owe non-managing members a fiduciary duty (*Aronson v Lewis*, 473 A2d 805, 807, 814, 819 [Del 1984], overruled on other grounds by *Brehm v Eisner*, 746 A2d 244, 253 [Del 2000]; *Pokoik v Pokoik*, __AD3d__, 2014 WL 862100 [1st Dept 2014]; *Lorne v 50 Madison Avenue LLC*, 65 AD3d 879 [1st Dept 2009], *lv dismissed* 15 NY3d 732 [2010]).

There is a rebuttal presumption that "the directors of a corporation act on an informed basis [in making a business decision], in good faith and in the honest belief that the action

taken was in the best interest of the company" (*Aronson*, 473 A2d 805; *In re Comverse Tech., Inc.*, 56 AD3d 49 [1st Dept 2008]). In order to rebut the presumption, plaintiff must plead particularized facts sufficient to raise a reason to doubt that the action was taken honestly and in good faith or a reason to doubt that the [board] was adequately informed in making the decision (*Id.*; *In re Walt Disney Co.*, 825 A2d 275, 286 [Del Ch Ct 2003]). "If, under the facts pled in the complaint, any reasonable person might conclude that the deal made sense, then the judicial inquiry ends" (*Harbor Finance Partners v Huizenga*, 751 A2d 879, 892-93 [Del Ch 1999]).

Plaintiffs fail to cast a reasonable doubt that Serota's execution of the Agreement and the delegation of authority to Scimone to manage the LLCs' properties, viewed substantively, was not the result of valid exercise of business judgment. Plaintiffs do not allege that Serota acted with divided loyalty when he executed the Agreement, that he was motivated by bad faith such as to deliberately single out plaintiffs for harmful treatment, or that the transaction was tainted by fraud (*compare Pokiok*, 2014 WL 862100; *Barbour v Knecht*, 296 AD2d 218 [1st Dept 2002]). Rather, plaintiffs merely allege that the Agreement contains commercially unreasonable terms. However, even assuming *arguendo* that the Agreement is commercially unreasonable does not constitute an actionable breach of trust or fiduciary duty.

Therefore, the second and seventh causes of action fail to state a cause of action.

II. Lack of Authority

Plaintiffs' third and fourth causes of action seek a declaration that the Agreement is voidable because Serota lacked the authority to execute the Agreement, and did not have the power to delegate the powers and duties of the plaintiff LLCs after his death.

Nonetheless, as discussed above, the LLCs' operating agreements granted broad authority to Serota, as sole managing member, "full, exclusive and complete discretion, power and authority, on behalf of the Company to ... enter into any agreement ... that the Managing Members consider necessary ... in connection with any business of the Company" (Exhibit D, annexed to the Riordan Aff., §§ 4.1, 4.2, 4.6; see also Limited Liability Company Law § 412 [a]; Delaware Code § 18-402).

Plaintiffs also assert that, by entering into the Agreement, Serota, if mentally competent, deprived Charles and Geoffrey of the very essence of their bargain in establishing the operating agreements for the plaintiff LLCs, which includes their rights as surviving members to take over as managing members after Serota's death. However, the LLCs operating agreements grant Serota authority to enter into such an agreement. The implied covenant of good faith and faith dealing cannot be used to rewrite the

operating agreements (see *Cohen PDC, LLC v Cheslock-Bakker Opportunity Fund, LP*, 94 AD3d 539 [1st Dept 2012]). In any event, plaintiffs do not allege that Serota breached any contractual provision, acted in bad faith, or effectuated any transaction that was not in the ordinary course of business by delegating management and leasing authority of the properties to Scimone (see *Duration Mun. Fund, L.P. v J.P Morgan Sec. Inc.*, 77 AD3d 474 [1st Dept 2010]; compare *TIC Holdings, LLC v HR Software Acquisitions Group, Inc.*, 301 AD2d 414 [1st 2003]).

Insofar as the operating agreements completely refute the contention that Serota lacked authority to enter into the Agreement, the third and fourth causes of action are dismissed, pursuant CPLR 3211 (a) (1).

III. Testamentary Disposition

Plaintiffs allege in their fifth cause of action that the Agreement and its disposition of rights attendant to the plaintiff LLCs' ownership interests, constitutes a testamentary disposition and is voidable.

A disposition within the meaning of the EPTL is any transfer of property either during a person's lifetime or by will (EPTL § 1-2.4). The managerial authority that Serota delegated to Scimone in the Agreement does not constitute a transfer of property within the meaning of the EPTL, and thus, plaintiffs fail to allege a testamentary disposition. The fifth cause of

action is dismissed.

The Court has carefully considered plaintiffs' remaining arguments and finds them meritless.

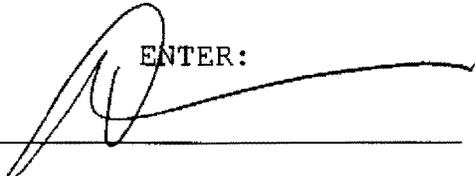
Accordingly, it is

ORDERED that motion sequence numbers 014 and 015 for leave to reargue is granted, and upon reargument, the Court adheres to its prior decision; and it is further

ORDERED that motion sequence number 018 to dismiss portions of the complaint is granted in its entirety, and the second through fifth and seventh causes of action are hereby severed and dismissed; and it is further

ORDERED that the remaining defendants shall serve an answer to the second amended complaint within 20 days of service of a copy of this order with notice of entry.

DATED: April 8, 2014

ENTER:


J.S.C.

HON. CHARLES E. RAMOS