

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
JONATHAN TROFFA and JOS. M. TROFFA LANDSCAPE
AND MASON SUPPLY, INC.,

Index No. 609510/2016
(Garguilo, J.)

Plaintiffs,

-against-

JOSEPH M. TROFFA, LAURA J. TROFFA,
JOS. M. TROFFA MATERIALS CORPORATION,
NIMT ENTERPRISES, LLC, L.J.T. DEVELOPMENT
ENTERPRISES, INC., and JOS. M. TROFFA LANDSCAPE
AND MASON SUPPLY, INC.,

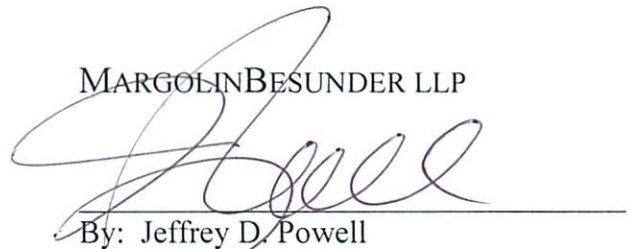
**NOTICE
OF APPEAL**

Defendants.
-----X

PLEASE TAKE NOTICE, that Plaintiffs Jonathan Troffa and Jos. M. Troffa Landscape and Mason Supply, Inc. hereby appeal to the Appellate Division of the Supreme Court, Second Judicial Department, from each and every part of the *Order* dated September 25, 2018 and entered September 26, 2018, of the New York Supreme Court, County of Suffolk (Garguilo, J.), which granted Defendants' motion to quash subpoenas and for a protective order.

Dated: Islandia, New York
October 22, 2018

MARGOLIN BESUNDER LLP



By: Jeffrey D. Powell
Attorneys for Plaintiffs
1050 Old Nichols Road, Suite 200
Islandia, New York 11749
(631) 234-8585

TO: All Counsel of Record (Via NYSECF)



NYSCEF - Suffolk County Supreme Court

Confirmation Notice

This is an automated response for Supreme Court cases. The NYSCEF site has received your electronically filed documents for the following case.

609510/2016

Jonathan Troffa et al - v. - Joseph M. Troffa et al

Assigned Judge: Jerry Garguilo

Documents Received on 10/22/2018 11:16 AM

Doc #	Document Type	Motion #
210	NOTICE OF APPEAL/INFORMATIONAL STATEMENT/COPY OF ORDER/PROOF OF SERVICE Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	

Filing User

Name:	Jeffrey D Powell		
Phone #:	631-234-8585	E-mail Address:	jpowell@margolinbesunder.com
Fax #:		Work Address:	1050 Old Nichols Road SUITE 200 ISLANDIA, NY 11749

E-mail Notifications

An e-mail notification regarding this filing has been sent to the following address(es) on 10/22/2018 11:16 AM:

HANSEN, KAREN INGRID - khansen@margolinbesunder.com

MAHLER, PETER - pmahler@farrellfritz.com

MCROBERTS, FRANKLIN C - fmcroberts@farrellfritz.com

Mahler, Peter A - pmahler@farrellfritz.com

POWELL, JEFFREY D - jpowell@margolinbesunder.com

NOTE: If submitting a working copy of this filing to the court, you must include as a notification page firmly affixed thereto a copy of this Confirmation Notice.

Judith A. Pascale, Suffolk County Clerk - <http://www.suffolkcountyny.gov/Departments/CountyClerk/EfilingNotice.aspx>

Phone: 631-852-2000 Fax: 631-852-3016 (fax) Website: <http://www.suffolkcountyny.gov/Departments/CountyClerk/EfilingNotice.aspx>

NYSCEF Resource Center - EFile@nycourts.gov

Phone: (646) 386-3033 Fax: (212) 401-9146 Website: www.nycourts.gov/efile

Supreme Court of the State of New York

Appellate Division: Second Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		For Court of Original Instance
JONATHAN TROFFA and JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC., <div style="text-align: right;">Plaintiffs,</div> <div style="text-align: center;">- against -</div> JOSEPH M. TROFFA, LAURA J. TROFFA, JOS. M. TROFFA MATERIALS CORPORATION, NIMT ENTERPRISES, LLC, L.J.T. DEVELOPMENT ENTERPRISES, INC., and JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC., <div style="text-align: right;">Defendants.</div>		<div style="border: 1px solid black; height: 40px; margin-bottom: 10px;"></div> Date Notice of Appeal Filed
		For Appellate Division
		<div style="border: 1px solid black; height: 40px;"></div>

Case Type	Filing Type
<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings
<input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review
<input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278	

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

<input type="checkbox"/> Administrative Review	<input checked="" type="checkbox"/> Business Relationships	<input checked="" type="checkbox"/> Commercial	<input type="checkbox"/> Contracts
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law	<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous	<input type="checkbox"/> Prisoner Discipline & Parole
<input checked="" type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation	<input type="checkbox"/> Torts

Appeal

Paper Appealed From (Check one only):

If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

- | | | | |
|--|---|---|---|
| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input checked="" type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgement | <input type="checkbox"/> Finding | <input type="checkbox"/> Order & Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

Court: Supreme Court

County: Suffolk

Dated: 09/25/2018

Entered: 9/26/18

Judge (name in full): Hon. Jerry Garguilo

Index No.: 609510/2016

Stage: ☒ Interlocutory ☐ Final ☐ Post-FinalTrial: ☐ Yes ☒ No If Yes: ☐ Jury ☐ Non-Jury**Prior Unperfected Appeal and Related Case Information**

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ☒ No
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original ProceedingCommenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court

County: Choose County

Judge (name in full):

Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court

County: Choose County

Judge (name in full):

Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Appeal is from Short Form Order of the Hon. Jerry Garguilo dated September 25, 2018 and entered September 26, 2018 which granted Defendants' motion to quash subpoenas and for a protective order.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Whether the Court erred in applying the three-year statute of limitation to a shareholder's derivative action

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Jonathan Troffa	Plaintiff	Appellant
2	Jos. M. Troffa landscape and Mason Supply, Inc.	Plaintiff	Appellant
3	Joseph M. Troffa	Defendant	Respondent
4	Laura J. Troffa	Defendant	Respondent
5	Jos. M. Troffa Materials Corporation	Defendant	Respondent
6	NIMT Enterprises, LLC	Defendant	Respondent
7	L.J.T. Development Enterprises, Inc.	Defendant	Respondent
8	Jos. M. Troffa Landscape and Mason Supply, Inc.	Defendant	Respondent
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			

Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Jeffrey D. Powell / MargolinBesunder LLP

Address: 1050 Old Nichols Road, Suite 200

City: Islandia

State: New York

Zip: 11749

Telephone No: 631-234-8585

E-mail Address: jpowell@margolinbesunder.com

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 1, 2

Attorney/Firm Name: Peter A. Mahler ; Franklin C. McRoberts / Farrell Fritz, P.C.

Address: 622 Third Avenue, Suite 37200

City: New York

State: New York

Zip: 10017

Telephone No: 212-6871230

E-mail Address: pmahler@farrellfritz.com ; fmcroberts@farrellfritz.com

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 3, 4, 5, 6, 7, 8

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

E-FILE

SHORT FORM ORDER

16
INDEX NO. 18/609510SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE_____
JONATHAN TROFFA and JOS. M. TROFFA
LANDSCAPE AND MASON SUPPLY, INC.,

Plaintiffs.

-against-JOSEPH M. TROFFA, LAURA J. TROFFA, JOS. M.
TROFFA MATERIALS CORPORATION, NIMT
ENTERPRISES, LLC, L.J.T. DEVELOPMENT
ENTERPRISES, INC., and JOS. M. TROFFA
LANDSCAPE AND MASON SUPPLY, INC.,Defendants.
_____ORIG. RETURN DATE: 9/12/18
SUBMISSION DATE: 9/12/18
MOTION SEQ#007
MOTION: 007 - MG**ATTORNEY FOR PLAINTIFFS**
MARGOLIN BESUNDER LLP
1050 Old Nichols Road, Ste 200
Islandia, NY 11749**ATTORNEY FOR DEFENDANTS**
FARRELL FRITZ, PC
622 Third Avenue, Ste 37200
New York, NY 10017

Upon the following e-filed papers numbered 149 to 207 read on this motion to quash subpoena and for protective order; Notice of Motion/ Order to Show Cause and supporting papers 149 - 162, 180 - 186; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 187 - 200, 201 - 204; Replying Affidavits and supporting papers 205 - 207; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (007) by Defendants to quash the subpoenas duces tecum served by Plaintiff Jonathan Troffa upon the offices of Michael R. Strauss, Esq., Cohen, Warren, Meyer & Gitter, P.C. and Cullen and Danowski, LLP dated July 11 and 17, 2018; for a protective order relieving the Strauss Firm, Cohen Firm, and Cullen Firm of any obligation to comply with the subpoenas is granted; and it is further

ORDERED that counsel are directed to appear for a status conference on December 3, 2018 at 9:30 a.m. in

Troffa v Troffa
Index No. 16/609510
Page 2

Commercial Part 48.

In this action, Plaintiff Jonathan Troffa has served non-party subpoenas upon the offices of Michael R. Strauss, Esq., Cohen, Warren, Meyer & Gitter, P.C. and Cullen and Danowski, LLP, dated July 11 and 17, 2018. Defendants now move to quash and seek a protective order relieving these law firms of any obligation to comply with the subpoenas.

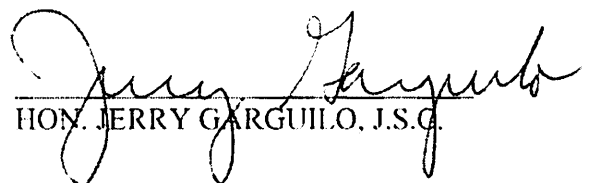
In support of the motion, Defendants contend that law of the case precludes this discovery inasmuch as the court determined that the second cause of action was time-barred. That cause of action alleged that Defendant Joseph Troffa breached his fiduciary duty to the corporation by purchasing the compost yard. Defendants further claim that Plaintiff is attempting to re-litigate the statute of limitations for the compost yard sale. Defendants also argue that the six-year statute of limitations for shareholder derivative claims under CPLR 213 (7) does not apply to the dismissed compost yard purchase. Plaintiff is attempting to recast the compost yard transaction as a derivative, equitable cause of action to revive the claim after dismissal.

In opposition, Plaintiffs' counsel affirms that the subpoenas served on Defendants' accountants, the Cullen Firm, seeks the financial accounting for the compost yard transaction, along with financial data that relate to Defendants' self-dealing and breach of fiduciary duty. In addition, Plaintiffs contend that Defendants have made no showing that the documents sought in the subpoenas are not relevant and material.

The N.Y. Civil Practice Law and Rules does not specify a limitations period for breach of fiduciary duty, unjust enrichment, or tortious interference with fiduciary relationship claims, but the New York courts have held that such claims are governed by either a three-year statute of limitations when monetary relief is sought or a six-year statute of limitations when equitable relief is sought (See *Carlingford Center Point Assoc. v MR Realty Assoc.*, 4 AD3d 179, 179-80, 772 NYS 2d 273 [1st Dept 2004] [three-year statute of limitations applied to a breach of fiduciary duty claim seeking monetary damages]). Inasmuch as the second cause of action seeks monetary damages for Defendant Joseph Troffa's alleged breach of fiduciary duty upon his purchase of the compost yard it is time-barred. Therefore, Plaintiff is not entitled to discovery related to the purchase of the compost yard.

Accordingly, Defendants' motion to quash the subpoena and for a protective order is **GRANTED**.

DATED: September 25, 2018


HON. JERRY GARGUILO, J.S.C.