To be Argued by:
JEFFREY D. POWELL
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

Docket No.: 2018-12622

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

Plaintiffs-Appellants,

– 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-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiff-Appellant Jonathan Troffa ("Jonathan"), suing derivatively on behalf of Jos. M. Troffa Landscape & Mason Supplies, Inc. (the "Corporation"), respectfully appeals the Short Form Order of the Honorable Jerry Garguilo dated September 25, 2018 (the "Order"). In this derivative action, Jonathan alleges that Defendant-Respondent Joseph Troffa ("Joseph"), a 50% shareholder, director and officer of the Corporation, breached his fiduciary duty and duty of loyalty to the Corporation and to Jonathan who was the holder of the remaining 50% of the stock of the Corporation by, *inter alia*, engaging in self-dealing, misappropriating a corporate opportunity, and wasting the Corporation's assets.

The Order granted Defendants-Respondents' motion to quash three subpoenas and issued a protective order relieving the subpoena-recipients of any obligation to comply with the subpoenas. The Order was based on the erroneous application of a three-year statute of limitations to the shareholder's derivative claims, where CPLR § 213(7) explicitly provides for a six-year statute of limitations for derivative claims against a corporation's director or officer.

The Court granted the motion based on the faulty reasoning that the claims underlying the derivative action were barred by the three-year statute applicable to claims for injury to property, and that the information sought by the subpoenas related to claims that had accrued more than three years before the action

commenced. The Order incorrectly applied a three-year statute of limitations to Jonathan's shareholder derivative claims, where it should have applied the six-year statute set forth in CPLR § 213(7), and Defendants' motion should have been denied. The Order must be reversed.

BACKGROUND

At all relevant times, Jonathan and Joseph each owned fifty percent of the common stock of the Corporation. A-101 at ¶ 2. Joseph was the president of the Corporation and claimed to be the sole director. Amended Complaint, A-18-19 at ¶¶ 20-24.[1] In or around 1999, the Corporation entered into a lease/purchase agreement for a 1.78-acre parcel located at 70A Comseqogue Road (a/k/a Parsonage Road), Seatauket, New York (referred to herein as the "Compost Yard") for an agreed upon purchase price of $390,000. Amended Complaint, A-21 at ¶ 39. The original agreement was confirmed in 2004 by a letter on the Corporation's letterhead signed by Defendant-Respondent Joseph Troffa as president of the Corporation, which calculated monthly payments to be $ 2,254. A-108. For over a decade, the Corporation conducted business on this parcel and paid down the purchase price. These payments were reflected in a printout from the Corporation's accounting records. A-109-111.

[1] Citations to the Appendix will be cited as A-[ ].

On March 12, 2013, Joseph diverted the purchase of the Compost Yard to himself, and paid just $39,628 out of the $390,000 purchase price for the property. A-106-107; A-36-37. As evidenced by what the Closing Statement for the transaction, the $355,372 prepayment came from funds of the Corporation. A- 106-107. Instead of purchasing the Compost Yard in the name of the Corporation as he was duty-bound to do, Joseph usurped title to the Compost Yard for himself, in his own name as shown above. Jonathan derivatively on behalf of the Corporation asserts that this transaction renders Joseph liable for breach of fiduciary duty, wasting assets, misappropriation, diversion and self-dealing. He also makes other derivative claims in the Amended Complaint for which the limitation period should be six-years.

In July, 2018, Jonathan served subpoenas on Offices of Michael R. Strauss, Esq., Cohen, Warren, Meyer & Gitter, P.C., and Cullen & Danowski, LLP (collectively referred to as the "Subpoenas"), A-50-61, in order to obtain authenticated documentation of Joseph's misconduct relative to the Compost Yard transactions and other financial disclosure relative to the derivative claims.

THE ORDER

Joseph moved to quash the Subpoenas on the ground that the Court previously ruled that the claims brought by Jonathan directly against Joseph relating to the Compost Yard were barred by a three-year statute of limitations and

were, therefore, barred by "Law of the Case" principles.[2] The Court did not allude to this argument in its decision, but held:

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

A-5(internal citation omitted). In other words, because the Court determined that the derivative claim sought money damages, it was subject to a three-year statute. As the Court relied solely on the mistaken application of the wrong limitation period, there is only one issue on appeal, the proper statute of limitations.

ISSUE ON APPEAL

Did the Supreme Court err when it applied a three-year statute of limitations to an action alleging breach of fiduciary duty brought derivatively against an officer and director of a corporation?

The answer is in the affirmative.

[2] Defendants also argued that the Derivative Claims, the Fourth Cause of Action had been dismissed. However, the January 11, 2017 Order explicitly denied Defendants' motion to dismiss that Cause of Action. A-42.

ARGUMENT

Pont 1. Jonathan's claims must be brought derivatively.

Where there are only two stockholders, each with a 50% share, an action cannot be maintained in the name of the corporation by one stockholder against another and the proper remedy is a stockholder's derivative action. *See Exec. Leasing Co., Inc. v. Leder*, 191 A.D.2d 199, 200 (1st Dept. 1993); *L.W. Kent and Co., Inc. v. Wolf*, 143 A.D.2d 813 (2d Dept. 1988). Therefore, the proper action by Jonathan is a stockholder's derivative claim. The Amended Complaint incorporated all of its allegations into the derivative action, the Fourth Cause of Action. A-29.

Point 2. Applicable law clearly confirms that Joseph's usurpation of the Compost Yard was a breach of his fiduciary duty.

The law has been clear for over a hundred years that a director may not purchase for himself property under lease to his corporation. *Robinson v. Jewett*, 116 N.Y. 40, 51-53 (1889). Nor may he purchase property which the corporation needs or has resolved to acquire. *Blake v. Buffalo Creek R.R.*, 56 N.Y. 485 (1874), or which it is contemplating acquiring. *New York Trust Co. v. American Realty Co.*, 244 N.Y. 209, 219 (1926). A corporate fiduciary may not take advantage of an offer made to the corporation. *Kelly v. 74 & 76 West Tremont Ave. Corp.*, 4 Misc. 2d 533 (Sup. Ct. Bronx County 1956), *modified on other grounds sub nom.*, 3 A.D.2d 321 (lst Dept. 1957), *Procario v. 74 & 76 West Tremont Ave. Corp.*, 3

A.D.2d 821 (1st Dept.), *aff'd*, 3 N.Y.2d 973 (1957). Nor can she make use of knowledge which came to her as a director. *See In re McCrory Stores Corp*., 12 F. Supp. 267 (S.D.N.Y. 1935). In *Ault v. Soutter*, 167 A.D.2d 38 (1st Dept. 1991) the First Department held that "if there is a corporate opportunity that would be financially advantageous to the corporation, a [fiduciary] cannot take the opportunity for himself." *Id.* at 43. The extent and nature of Joseph's fiduciary duties to the Corporation are so well established that a more detailed discussion here would be superfluous.

The Corporation has been aggrieved by the malfeasance and disloyalty of its sole director, officer and 50% shareholder. Accordingly, Jonathan brings the Compost Yard claim and other claims derivatively against Joseph. *See* A-29.

Point 3. CPLR § 213(7) establishes a six-year statute of limitations for derivative claims.

The diversion of the corporate opportunity occurred on May 12, 2013, when the closing on the sale of the Compost Yard to Joseph occurred. A106-107 (Closing Statement) and A-36-37 (Deed). The action was commenced on June 27, 2016, less than six-years after the transaction. A-73.

The Supreme Court reasoned that because the derivative claims sought

money damages, a three-year statute applied.[3] That opinion is diametrically opposed to applicable law.

New York Civil Practice Law and Rules provides: "The following actions must be commenced within six years….

> an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith."

CPLR § 213(7).

Regardless of whether the claims are equitable or seek money damages only, it is black-letter law that a shareholder derivative action is governed by the six-year statute of limitations provided in CPLR § 213(7). *See Grika v. McGraw*, 55 Misc. 3d 1207(A) (Sup. Ct. N.Y. County 2016), *aff'd sub nom. L.A. Grika on behalf of McGraw*, 161 A.D.3d 450 (1st Dept. 2018)(rejecting three-year statute of limitation

[3] Parenthetically, one of the remedies sought by Plaintiff was an accounting. "An accounting is an 'equitable remedy ... designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession.'" *Rye Police Ass'n v. Chittenden*, 43 Misc. 3d 471, 475 (Sup. Ct. Westchester County 2014). The pilfering by Joseph of $355,372 of corporate funds must be accounted for, and is an equitable remedy. Even by the Supreme Court's own reasoning, the accounting claims relating to the misappropriation of the Compost Yard should have been governed by a six-year statute of limitations. Moreover, the six-year statute of limitations has been applied to a derivative breach of fiduciary duty claim on the ground that the derivative action itself is "equitable in nature" and equitable claims are subject to a six-year statute. *See Otto v. Otto*, 110 A.D.3d 620, 621 (1st Dept. 2013)(citing *Horizon Asset Mgt., LLC v. Duffy*, 106 A.D.3d 594, 595, (1st Dept. 2013)).

for breach of fiduciary duty claim seeking money damages in derivative action and applying CPLR 213(7)); *Levy v. Young Adult Inst., Inc.,* 103 F Supp. 3d 426, 435 (S.D.N.Y. 2015)(CPLR 213(7) applies to all corporate derivative actions, with no differentiation between legal and equitable claims); *Oxbow Calcining USA Inc. v. Am. Indus. Partners*, 96 A.D.3d 646, 651-52 (1st Dept. 2012)(holding that the six-year limitations period of CPLR 213(7) applies to derivative actions for breach of fiduciary duty against a present or former corporate director or officer)*; Skorr v. Skorr Steel Co., Inc.*, 29 A.D.3d 594, 595 (2d Dept. 2006)(affirming that six-year statute applies to shareholder derivative action); *Toscano v. Toscano*, 285 A.D.2d 590 (2d Dept. 2001)(holding that a shareholder derivative action alleging diversion of corporate assets, misappropriation of corporate assets and breach of fiduciary duty was subject to the six-year statute of limitations of CPLR § 213(7)); *Rye Police Ass'n v. Chittenden*, 43 Misc. 3d 471, 474 (Sup. Ct. Westchester County 2014)(conversion, generally subject to three-year statute under CPLR § 214, when asserted in a shareholders' derivative action, is subject to six-year statute pursuant to CPLR § 213(7)).

In fact, the Court of Appeals has explicitly held that a six-year statute of limitations applies to derivative claims for breach of fiduciary duty in a case closely analogous to the one presently before this Court. "In this case, we are asked whether a three- or six-year statute of limitations applies to causes of action

for negligence and breach of fiduciary duty by a school district against a former member of the school board." *Roslyn Union Free School Dist. v. Barkan*, 16 N.Y.3d 643, 645 (2011). The *Barkan Court* determined a school district is "both a municipal corporation and a public corporation," and therefore "it falls within the ambit of the term "corporation" in CPLR 213(7). *Id.* at 649. "We hold that the six-year limitations period in CPLR 213(7) is applicable and, therefore, this action was timely commenced." *Id.* at 649.

Moreover, the Court of Appeals continued:

> It has been suggested that CPLR 213(7) should not control here because that statute is restricted to equitable causes of action [shareholder's derivative actions being equitable] asserted by a corporation against its former officers or directors. This is not so. Equitable claims evoke nonmonetary relief, such as the issuance of an injunction, an accounting, or a remedy in the nature of specific performance or reformation of a contract *(see* Black's Law Dictionary 33 [9th ed.]). But CPLR 213(7) applies to all 'action[s],' with no differentiation between legal and equitable claims. In fact, equitable causes of action are usually subject to a six-year statute of limitations by application of the "catch-all" provision in CPLR 213(1) (*see* Siegel, N.Y. Prac. § 36 [4th ed.]), which suggests that there is no basis for limiting subdivision (7) to equitable claims.

Id. at 650–51. The *Barkan* Court went on to opine: "From its plain language, CPLR 213(7) provides a corporation…with six years to assert both equitable and nonequitable causes of action against a former director, officer or shareholder." *Id.* at 651.

The Supreme Court determined that the rationale for application of CPLR § 214 (three-year statute for injury to property) superseded the limitation period explicitly set forth in CPLR § 213(7). The Court of Appeals holds to the contrary: "If the specific language of CPLR 213(7) encompasses a particular claim, it supplants the general three-year rule of CPLR 214(4)." *Roslyn Union Free School Dist. v. Barkan*, 16 N.Y.3d 643, 648 (2011).

Finally, there can be no argument that the legislature intended any different interpretation of the law. The legislature clearly intended that CPLR §213(7) supersede all other limitations periods for shareholder derivative actions against directors and officers of a corporation asserting claims for breaches of fiduciary duty. "The legislative history of Section 213(7) and principles of statutory construction make clear that Section 213(7) supplants all other statutes of limitation potentially applicable to a suit on a corporation's claim against its director, officer or shareholder." *Whitney Holdings, Ltd. v. Givotovsky*, 988 F. Supp. 732, 742 (S.D.N.Y. 1997). Moreover, the federal court opined that: "Defendant's contention that the general provision for 'injury to property' found in Section 214(4) controls over this more specific period in Section 213(7) is frivolous." *Id.* at 742.

Subsequently, the Court of Appeals came to the same conclusion where it set forth a comprehensive analysis of legislative intent. *See Roslyn Union Free School Dist. v. Barkan*, 16 N.Y.3d at 650-53.

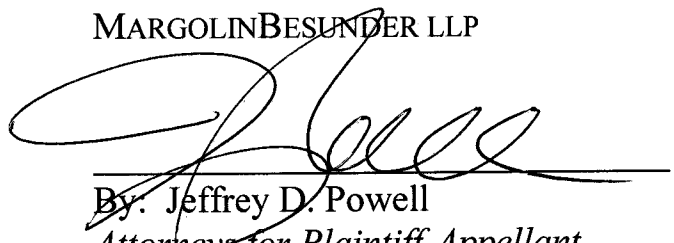
CONCLUSION

For the reasons aforesaid, the Order erred in applying a three-year statute of limitations to the instant shareholder's derivative action. Accordingly, the Order should be reversed and the motion to quash the Subpoenas and for protective order must be denied.

Dated: Islandia, New York
November 20, 2018

Respectfully submitted,

MARGOLINBESUNDER LLP



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