

**E-FILE**

SHORT FORM ORDER

INDEX NO. 16/609510

**SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY****PRESENT:****HON. JERRY GARGUILO  
SUPREME COURT JUSTICE**

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**JONATHAN TROFFA and JOS. M. TROFFA  
LANDSCAPING 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 LANSCAPE AND MASON  
SUPPLY, INC.,**Defendants.

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**ORIG. RETURN DATE: 10/19/22  
FINAL SUBMITTED DATE: 1/11/23  
MOTION SEQ# 012-MG, CASEDISP****PLAINTIFFS' ATTORNEY:  
MARGOLIN BESUNDER LLP  
3750 EXPRESS DRIVE SOUTH, STE 200  
ISLANDIA, NY 11749****DEFENDANTS' ATTORNEY:  
FARRELL FRITZ, P.C.  
622 THIRD AVENUE, STE 37200  
NEW YORK, NY 10017**

The Court has considered the following in consideration of its determination:

1. Notice of Motion and exhibits (Doc. 270 – 286)
2. Memorandum of Law in Support, Statement of Facts (Doc. 287, 288)
3. Notice of Cross Motion and exhibits (Doc. 291 – 307)
4. Affirmation in Opposition and exhibits (Doc. 308 – 324)
5. Memorandum of Law in Opposition to Motion and In Support of Cross Motion, Statement of Facts (Doc. 325, 326)
6. Memorandum of Law in Opposition to Cross Motion, Affidavit in

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Opposition to Cross Motion, and Further Support of Motion, and exhibits (Doc. 329 – 334)

7. Memorandum of Law in Reply in Further Support of Cross Motion, Affidavit in Reply (Doc. 335, 336)

It is,

**ORDERED** that the Defendants' motion (Mot. Seq. 012) for summary judgment is granted solely to the extent that the fourth cause of action is dismissed, and the remainder of the relief requested is denied as academic; and it is further

**ORDERED** that the complaint is dismissed in its entirety; and it is further **ORDERED** that the Defendants are directed to serve and e-file this Order with Notice of Entry within thirty days of this Order.

In this action, the parties shared ownership of a corporation which provides landscaping services and also sells landscaping supplies. Over time, the parties have become contentious and during this action, sought a judicial dissolution which was granted by Order dated July 21, 2017 (Garguilo, J.). The Plaintiff seeks damages in the fourth cause of action as against the Defendants for the alleged purchase of the Compost Yard by Joseph in his name alone, on the ground that Joseph usurped a corporate opportunity when he closed on the property in 2013.

The recent Appellate Division, Second Department, Order, dated March 3, 2021 held that the six-year statute of limitations provided in CPLR 213 (7) governs the derivative cause of action and reversed this Court's determination that Jonathan was not entitled to discovery from certain non-parties. Moreover, this Court, in its prior determination, dated August 2, 2022, found that the Defendants had neglected to seek summary judgment in the Notice of Motion to dismiss the complaint as against Jos. M. Troffa Materials Corp. and to limit damages for rental payments to NIMT to six years and denied that relief, however, the Court granted leave to renew.

The Defendants now seek summary judgment on the basis that the fourth cause of action is barred by the six-year statute of limitations. In addition to submitting their motion papers, the parties appeared for oral argument on January 12, 2023.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of

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any material issues of fact (*Winegrad v N. Y. Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*Stewart Title Ins. Co. v Equitable Land Servs.*, 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

A defendant moving for dismissal on statute of limitations grounds bears the initial burden of establishing that the time in which to commence the action has expired (see *Williams-Guillaume v Bank of Am., N.A.*, 130 AD3d 1016, 1016-1017, 14 NYS3d 466 [2015]; *Baptiste v Harding-Marin*, 88 AD3d 752, 753, 930 NYS2d 670 [2011]). The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (see *Williams-Guillaume v Bank of Am., N.A.*, 130 AD3d at 1016-1017). As stated above, CPLR 213 (7) provides for a six-year statute of limitations for derivative causes of action.

Applying these principles, the Defendants have demonstrated their entitlement to judgment as a matter of law. In support, the Defendants contend that the six-year statute of limitations has run on the fourth cause of action inasmuch as the corporate opportunity that was seized by Joseph accrued on December 7, 2006, the date that he signed the contract of sale for the Compost Yard. Thus, the statute of limitations expired on December 7, 2012. The Plaintiff commenced the action on June 27, 2016, four years after the expiration of the statute of limitations. Consequently, the Defendants satisfied their initial burden of establishing that the action had been commenced beyond six years after the accrual of the fourth cause of action and, thus, is subject to dismissal as time barred. Defendants submit a copy of the closing statement which reveals that the down payment, made on November 21, 2006, in the amount of \$10,000, was held in escrow to be applied to the purchase price at closing on March 12, 2013.

The Defendants cite *Continental Indus. Group, Inc. v Usuntas*, (2020 NY Misc. LEXIS 10940, 2020 NY Slip Op 34344(U) [NY Sup Ct, Dec. 31, 2020]), which held that the accrual of a cause of action for diversion of a corporate opportunity is on the date when the corporate opportunity was first diverted. The Defendants also cite *Rosenblum v Rosenblum* (2022 Misc LEXIS 312, 2022 NY Slip Op 30237(U) [NY Sup Ct, January 4, 2022]), which held that because the contract of sale was entered into prior to the execution of the settlement agreement and because the signing of the contract constituted the

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usurpation of the corporate opportunity, the defendants released the claims relating to the transaction.

In addition, the Defendants rely upon *In re Fischer*, 259 BR 23, 31, 2001 Bankr LEXIS 203, 56 Fed R Evid Cert 1033 [Bankr EDNY, March 2, 2001]), which held, *inter alia*, that Fischer diverted a corporate opportunity when he entered into the contract to buy the Hotel Property, not when the closing occurred. Moreover, the Defendants cite *Skorr v Skorr Steel Co.* (8 Misc3d 1021(A), 803 NYS2d 21 [NY Sup Ct, July 25, 2005], *affd*, 29 AD3d 594, 595, 814 NYS2d 250 [2d Dept 2006]), wherein the Court determined that the claim accrued at the time of the loan, not the date of the closing of the real estate transaction for which the loan was used, and the petitioner could not attack the loan since the transaction took place more than six years prior to the commencement of the action.

In opposition, the Plaintiff has failed to meet his burden of raising a triable issue of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether he actually commenced the action within the applicable limitations period (see *HSBC Bank USA, N.A. v Grella*, 176 AD3d 924, 925, 111 NYS3d 310 [2d Dept 2019]). The Plaintiff provides no legal authority to support his contention that the fourth cause of action accrued in 2013 at the closing. The Plaintiff did not raise a triable issue of fact as to the applicability of the doctrine of equitable estoppel, as he failed to present evidence of an affirmative act of misconduct or misrepresentation by the Defendants that occurred within the limitations period and prevented the Plaintiff from timely commencing this action (see *Board of Mgrs. Of the 23-23 Condominium v 210th Place Realty, LLC*, 185 AD3d 890, 891, 128 NYS3d 255 [2d Dept 2020]).

The attorney's affirmation observes discrepancies between the contract of sale which was found in the closing attorney's file and the copy which was submitted by the Defendants. In addition, the claim that the contract must have been cancelled in 2006 when a closing had not occurred is mere speculation, inasmuch as the down payment remained in escrow. "Mere speculation that some improbable remote circumstances may exist should not defeat summary judgment" (see *Hewett v Marine Midland Bank, N.A.*, 86 AD2d 263, 268, 449 NYS2d 745 [2d Dept 1982], *Trails West v Wolff*, 32 NY2d 207, 221, 344 NYS2d 863 [1973]). In any event, an attorney's affirmation is not probative on a motion to dismiss inasmuch as the attorney has no personal knowledge of the facts (*Zuckerman v New York, supra*).

Under these circumstances, inasmuch as the fourth cause of action is barred by the statute of limitations, the remaining arguments are denied as academic. Accordingly, the


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Defendant's motion for summary judgment dismissing the fourth cause of action is granted and the action is dismissed.

The foregoing constitutes the decision and **ORDER** of this Court.

Submit Judgment

Dated: Feb. 17, 2023

  
HON. JERRY GARGUILO, JSC