

**Finlayson v Death**

2008 NY Slip Op 30346(U)

January 22, 2008

Supreme Court, Nassau County

Docket Number: 0807-07/

Judge: Joseph P. Spinola

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**  
SUPREME COURT, STATE OF NEW YORK  
COUNTY OF NASSAU

-----  
**JAMES C. FINLAYSON and WILLIAM F. FINLAYSON,**  
**as Shareholders of HARBOR FUEL COMPANY, INC.,**  
**suing in the right of HARBOR FUEL COMPANY, INC.,**

**Trial/IAS Part 19**  
**Index No. 07-807**  
**Sequence No. 01**  
**Submit Date 11/19/07**

Plaintiffs

*against*

**DONALD C. DEATH and HARBOR FUEL COMPANY, INC.,**

Defendant

-----  
**The following papers read on this motion:**

- Notice of Motion/Order to Show Cause..... X**
- Cross-Motions.....**
- Answering Affidavits..... X**
- Replying Affidavits..... X**

This motion by defendant Donald C. Death for: an order pursuant to CPLR 3211(a)(3) and Business Corporation Law § 626(a), (c) dismissing the complaint for lack of standing; an order pursuant to CPLR 3211(a)(8) dismissing the complaint against defendant Donald C. Death for lack of personal jurisdiction; an order pursuant to CPLR 3211(a)(5) dismissing the first cause of action for conversion and the third cause of action for breach of fiduciary duty as barred by the Statute of Limitations; an order pursuant to CPLR 3211(a)(5) dismissing the second cause of action for conversion and fourth cause of action for breach of fiduciary duty as barred by the Statute of Limitations or dismissing so much of said causes of action as accrued prior to January 12, 2004; an order pursuant to CPLR 3211(a)(3) and Business Corporation Law § 624(b) dismissing the fifth cause of action for an accounting for lack of standing or dismissing so much of said cause of action as seeks an accounting prior to January 12, 2001 pursuant to CPLR 3211(a)(5), CPLR 213(7); and, should the complaint not be dismissed in its entirety, an order granting him 20 days from Notice of Entry of this court's decision to interpose an Answer is determined as provided herein.

[\* 2 ]

The court initially notes that in response to this motion, the plaintiffs have amended their complaint, as is their right pursuant to CPLR 3025(c). The defendant Death has nevertheless elected to pursue his motion to dismiss the Amended Complaint pursuant to CPLR 3211, as is also his right. Terrano v Fine, 17 AD3d 449 (2<sup>nd</sup> Dept. 2005) citing Livadiotakis v Tzitzkalakis, 302 AD2d 369, 370 (2<sup>nd</sup> Dept. 2003).

In this derivative action, the plaintiff shareholders of defendant Harbor Fuel Company seek to recover for conversion and breach of fiduciary duty. They also seek an accounting. More specifically, in their Amended Complaint, they allege that in their first and second causes of action that from November 1, 1996 up until the present time, the individual defendant Donald C. Death Jr. misappropriated, converted and wasted various corporate assets. They allege in their third and fourth causes of action that defendant Death breached his fiduciary duties as an officer, director and shareholder of Harbor Fuel from November 1, 1996 up until the present time by diverting corporate funds to himself. By way of their fifth cause of action, the plaintiffs seek an accounting of corporate assets from November 1, 1996 to the present.

Defendant Death seeks dismissal of the complaint on several grounds. He alleges a lack of personal jurisdiction; that plaintiffs lack standing; that all claims are barred in whole or in part by the Statute of Limitations; and, that plaintiffs have already procured an accounting.

#### I. Personal Jurisdiction

This action was commenced by the filing of a Summons with Notice on January 12, 2007. Defendant Death is a corporate officer of the Harbor Fuel Company. He was personally served at his home with the Summons with Notice on February 13, 2007. Nevertheless, he challenges jurisdiction over him personally as not having been obtained pursuant to CPLR §311 and Business Corporation Law §306. Those statutes apply to service of process on a corporation, not an individual.

The Affidavits of Service indicate that the Summons with Notice was served personally on Death at his residence, which he admits. They further provide that copies of the Summons with Notice were served. Thus, jurisdiction was obtained over him personally (CPLR 308[1]), as well as over the corporate defendant (CPLR 311[a][1]). See, Helfand v Cohen, 110 AD2d 751 (2<sup>nd</sup> Dept. 1998), citing Boyd v United States Mtg. & Trust Co., 187 NY 262 (1907); Portchester Elec. Co. v Ronbed Corp. 28 AD2d 1008 (2<sup>nd</sup> Dept. 1967).

#### II. Plaintiffs' Standing

As for plaintiffs' standing, while a demand on a corporate board is generally a

[ 3 ]

prerequisite to the maintenance of a shareholder derivative action (see Business Corporation Law § 626[c]), “[t]he rule is clear in this State that no demand is necessary if ‘the complaint alleges acts for which a majority of the directors may be liable and plaintiff reasonably concluded that the board would not be responsive to a demand.’ ” Miller v Schreyer, 200 AD2d 492 (1<sup>st</sup> Dept. 1994), quoting Barr v Wackman, 36 NY2d 371 (1975); see also, Marx v Akers, 88 NY2d 189, 200 (1996). The plaintiffs have adequately plead the futility of a demand in their Amended Complaint. There are four board members, i.e., the two plaintiffs and the defendant and his wife. Defendant Death’s self-interest in the claims advanced in this action supports plaintiffs’ claim that a demand on the board would have been futile.

As for the plaintiffs’ alleged failure to demand an Accounting, Death’s reliance on Business Corporation Law § 624(b), (d) and (3) is misplaced. Plaintiffs do not seek inspection of corporate books and records nor do they seek production of an annual balance sheet and profit and loss statement. Furthermore, the relief sought here is available under Business Corporation Law § 624(g) and no demand is required. See, O’Brien v O’Brien, 75 AD2d 641 (2<sup>nd</sup> Dept. 1980), app. disp. 51 NY2d 1006, rearg. den. 52 NY2d 1073 (1981).

### III. Statute of Limitations

Whether the Statute of Limitations is six years (CPLR 213[7]) or three years (CPLR 214[3]), as well as when the causes of action accrued must, be determined.

The six year Statute of Limitations set forth at CPLR 213(7) applies to:

“ 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.”

As this Court held in Skorr v Skorr Steel Co., Inc. (8 Misc3d 1021[A] [Supreme Court Nassau Co.], aff’d. 29 AD3d 594 [2<sup>nd</sup> Dept. 2006]), “[a] shareholder derivative action, regardless of the theory underlying the claim, is governed by the six year statute of limitations provided in CPLR 213(7). See also, Toscano v Toscano, 285 AD2d 590 (2<sup>nd</sup> Dept. 2001); Rupert v Tigue, 259 AD2d 946 (4<sup>th</sup> Dept. 1999). Thus, the first, second, third and fourth causes of action are subject to a six-year Statute of Limitations.

The Statute of Limitations for an accounting is also six years. CPLR 213(1); Matter of Behr, 191 AD2d 431 (2<sup>nd</sup> Dept. 1993). Therefore, the fifth cause of action is subject to a six year Statute of Limitations as well.

Moreover, for all of these causes of action, the Statute of Limitations “does not

begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has otherwise terminated.” Westchester Religious Institute v Kamerman, 262 AD2d 131, 131-132 (1<sup>st</sup> Dept. 1999), citing Matter of Barabash, 31 NY2d 76, 80 (1972), rearg den., 31 NY2d 963 (1972); Matter of Winnie, 232 AD2d 956, 957-958 (3<sup>rd</sup> Dept. 1996); 196 Owners Corp. v Hampton Management Co., 227 AD2d 296 (1<sup>st</sup> Dept. 1996); see also, Matter of Behar, supra. “[T]he statutory period is tolled between the alleged fiduciary misconduct and the date on which the fiduciary relationship is openly repudiated or otherwise ended. . . .” Golden Pacific Bancorp. v Federal Deposit Insurance Corporation, 273 F.3d 509, 518-519 (2d Cir. 2001); see also, In re Meyer, 303 AD2d 682 (2<sup>nd</sup> Dept. 2003); In re Estate of Mayo, 11 Misc3d 1072(A) (Surrogate’s Court Nassau Co. 2006). “When measured from the date of a repudiation, the trustee must establish that the repudiation was clear and made known to the beneficiaries.” Matter of Behr, supra, at p. 431; Matter of Barabash, supra. And, any doubts as to the applicability of the Statute of Limitations defense must be resolved in the plaintiffs’ favor and the case permitted to proceed. Matter of Behar, supra, at p. 431, citing Erbe v Lincoln Rochester Trust Co., 3 NY2d 321 (1957); In re Pettit’s Will, 38 Misc2d 818 (Surrogate’s Court Nassau Co. 1963).

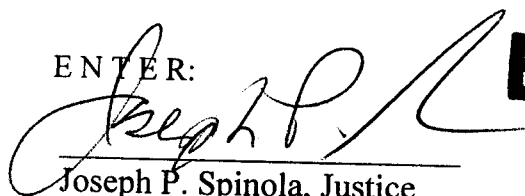
Here, Death allegedly did not repudiate his fiduciary duties until September 2, 2004, on which date he for the first time denied an obligation to repay monies he had admittedly taken from the corporation, claiming that it was owed him as and for salary. His repudiation was clearly the operative event as the plaintiffs would never have been aware of Death’s self-appropriation under the guise of salary: His compensation was never authorized by the corporate board and routine tax documents were never issued reflecting such an arrangement.

In view of the six year Statute of Limitations applicable to all causes of action; the accrual date of September 2, 2004; and, the date this action was commenced, defendant Death’s motion to dismiss pursuant to the Statute of Limitations is denied. However, an accounting of Harbor Fuel’s assets through May 31, 2003 has already been rendered. In fact, that accounting gave rise to the claims advanced here. Thus, plaintiffs’ demand for an accounting is limited to June 1, 2003 through the present.

Defendant Death is directed to answer the Amended Complaint within 20 days of service of a copy of this Order with Notice of Entry.

This constitutes the decision and order of the Court.

ENTER:



Joseph P. Spinola, Justice  
Supreme Court, Nassau County

**ENTERED**

FEB 01 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

Dated: January 22, 2008